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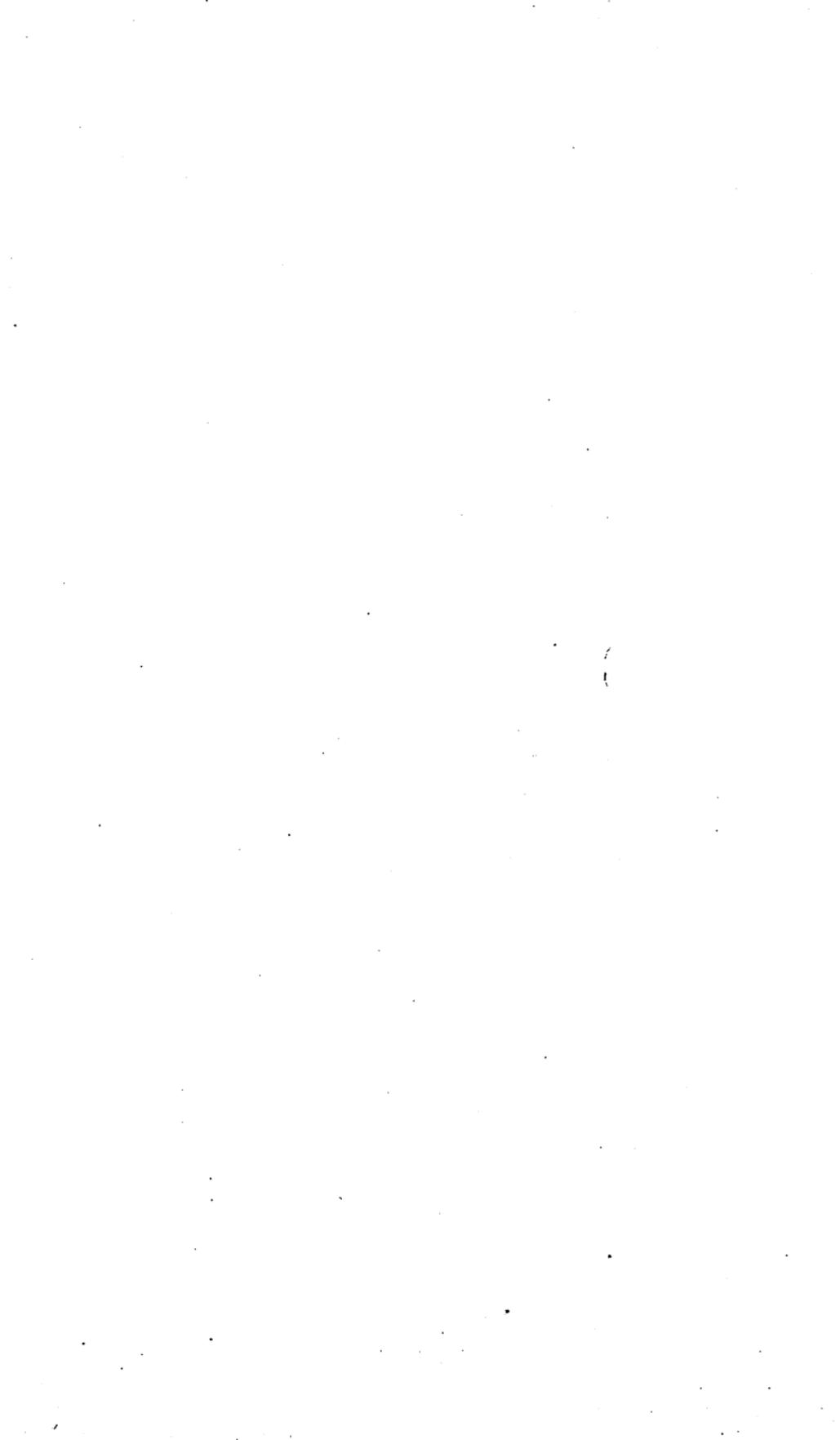
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BRITISH AND AMERICAN JOINT COMMISSION

FOR THE SETTLEMENT OF THE CLAIMS

OF THE

HUDSON'S BAY & PUGET'S SOUND AGRICULTURAL COMPANIES.

MEMORIAL AND ARGUMENT

ON THE PART OF THE

Puget's Sound Agricultural Company.

Montreal :

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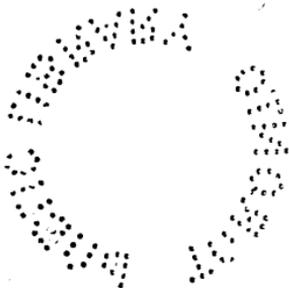
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BRITISH AND AMERICAN JOINT COMMISSION ON
THE HUDSON'S BAY AND PUGET SOUND AGRI-
CULTURAL COMPANIES' CLAIMS.

In the matter of the claim of the PUGET SOUND AGRICULTURAL
COMPANY.

MEMORIAL.

TO THE HONORABLE THE COMMISSIONERS :

The PUGET SOUND AGRICULTURAL COMPANY submit the following Memorial and statement of their claims upon the United States; and for facts and considerations in support of such claims, respectfully declare :—

That in the year 1846, and for many years previous thereto, the Puget Sound Agricultural Company were, and since have been, engaged in the business of agriculture and farming, and of breeding and raising live stock; and for the purposes and in the course of carrying on their said business, they acquired and became possessed as owners thereof, before the said time, of certain farms and extensive tracts of land in the Territory lying on the North West coast of America, to the South of the 49th parallel of North latitude and North of the Columbia River.

That upon portions of their said lands there were erected and made by them, buildings, enclosures and other improvements of great cost and value; and the Company also owned and possessed, and pastured and fed upon the said lands, their said live stock, consisting of large and valuable herds of cattle and horses, and flocks of sheep; from the sale and disposal of which, and of the other productions of their said farms and land, they received great annual returns and profit.

That by Article IV. of the Treaty concluded between the United States of America and Great Britain, under date of the 15th day of June, 1846, it was provided, that the farms, lands, and other property of every description belonging to the Puget Sound Agricultural Company, on the North side of the Columbia River, should be confirmed to the said Company; but that in case the situation of those farms and lands should be considered by the United States to be of public and political importance, and the United States' Government should signify a desire to obtain possession of the whole or of any part thereof, the property so required should be transferred to the said Government, at a proper valuation, to be agreed upon between the parties.

That the Government of the United States has not, at any time, signified to the Company a desire that any of the said property should be transferred to the said Government, at a valuation as provided by the Treaty, nor has any transfer thereof been made; but the Company have, ever since, continued to be the rightful owners of the said lands, farms and other property, and entitled to the free and undisturbed possession and enjoyment thereof.

That by a Convention concluded between the two Governments on the 1st day of July, 1863, it was agreed, that all questions between the United States' authorities, on the one hand, and the Puget Sound Agricultural Company on the other, with respect to the rights and claims of the latter, should be settled by the transfer of such rights and claims to the Government of the United States for an adequate money consideration.

And the claimants aver, that the rights and claims of the Puget Sound Agricultural Company, referred to and intended in and by the said Convention, are their rights and claims in and upon the said lands, farms and other property of every description, which they so held and possessed within the said territory, and which, by reason of the said Treaty of the 15th June, 1846, and according to the terms of the Fourth Article thereof, the United States became and were bound to confirm. And of the said farms and other property, they now submit to the Honorable the Commissioners a detailed statement and valuation as follows:—

First.—The tract of land at Nisqually, extending along the shores of Puget Sound, from the Nisqually River, on the one side, to the

Pu-yal-lup River, on the other, and back to the coast range of mountains, containing not less than two hundred and sixty-one square miles, or one hundred and sixty-seven thousand and forty acres ; of which said tract of land a portion is improved and under cultivation for farming and agriculture, and the remaining portion thereof was occupied and used by the Company for the grazing and pasturage of their cattle, horses and sheep, and for cutting wood and timber thereon, and for other purposes connected with their business ; the whole being of the value of one hundred and sixty thousand pounds sterling (£160,000) : the fort bastions, houses, stores, barns, shops, and outbuildings, with the fencing and enclosures at the main post and establishment, and the houses, barns, outbuildings, fencing and enclosures at the other points on the said land, of the cost and value of four thousand pounds sterling (£4,000) ; these two sums making together the entire sum of one hundred and sixty-four thousand pounds sterling. (£164,000)
 equal to seven hundred and ninety-eight thousand one hundred and thirty-three dollars and thirty-three cents. (\$798,133.33.)

Secondly.—The land and farm at the Cowlitz River, known as the Cowlitz Farm, consisting of three thousand five hundred and seventy-two acres, more or less ; of which upwards of fifteen hundred acres are improved and under cultivation for farming and agricultural purposes, and the remaining portion is used for cattle and sheep ranges, and pasturage, and for other purposes connected with the business of the said Company ; the said last mentioned land being of the value of twenty thousand pounds sterling (£20,000) ; the establishment and buildings of the Cowlitz farm, consisting of dwelling houses, saw mills, stores, granaries, barns, stables, sheds, and piggeries, and of a great extent of fencing and enclosures, of the value of six thousand pounds sterling (£6,000) : the said two last mentioned sums, making together the entire sum of twenty-six thousand pounds sterling. (£26,000)
 equal to one hundred and twenty-six thousand five hundred and thirty-three dollars and thirty-three cents. (\$126,533.33.)

Thirdly.—The Company also owned and possessed live stock, consisting of three thousand one hundred head of neat cattle, three hundred and fifty horses, and five thousand three hundred sheep, of the value of twenty-five thousand pounds sterling (£25,000) ; which

were pastured and fed on their said lands, before and at the time of the conclusion of the Treaty of the 15th June, 1846, and afterwards, until the time of the commission of the acts and injuries hereinafter mentioned, by which the greater part of the said live stock was either killed, or driven away, and entirely lost to the Company, within a few years after the time of the said Treaty.

And the claimants aver, that although at the time of the conclusion of the Treaty of the 15th June, 1846, and for a long time before, they held and possessed the said lands, farms, and other property as owners thereof, and the United States, by the terms and according to the Conventions contained in the said Treaty, undertook and were bound to confirm them in the same ; yet the United States failed to execute or grant to the said Company any formal title of confirmation of their said lands, farms and other property ; and by reason thereof, and of the acts and proceedings of officers of the United States, and of American citizens, and of others assuming to act under the authority of the laws, or of the Government of the United States, the Company were deprived of the use and enjoyment of a large portion of their lands, farms, and other property, and of the rents, fruits, and profits thereof ; their pasturage was destroyed or taken from them ; their live stock killed or driven off, and wholly lost to them ; and their entire business broken up or rendered unprofitable.

And the claimants have in consequence, suffered loss to the amount of fifty thousand pounds sterling. (£50,000)
equal to two hundred and forty-three thousand three hundred and thirty-three dollars and thirty-four cents. (\$243,333.34.)

It may be added, as indicative of the value of their property, and in some degree, of the nature and extent of the injuries to which the Company were exposed, that while they were thus suffering from aggressions, and were disturbed in their possession, as above stated, a portion of their lands was assessed, for the purpose of taxation, at a value of \$817,000* ; and they were compelled to pay taxes thereupon, from year to year, and have actually paid, for such taxes, the sum of \$14,596.

* This is erroneously stated. It should have been—at a rate which gave an entire value, &c. The actual assessment was \$500,000 for 104,320 acres.

In conclusion, the claimants submit to the Honorable the Commissioners, that they are entitled to claim and receive the fair value of their said farms and extensive tracts of land, and a just compensation for the capital expended in the acquisition and improvement of their said property, and in the buildings, forts, mills, trading establishments, and enclosures thereon; and further, compensation for the loss of their live stock, and for other loss suffered by them in consequence of the acts and proceedings hereinbefore complained of. And they ask, that upon the facts and circumstances, and for the reasons and considerations hereinbefore set forth, the Honorable the Commissioners will, after due examination, maintain their claim as just and reasonable; and will decide that the United States ought to pay to the said Company, in satisfaction and discharge of their said rights and claims, and as a proper valuation, and adequate money consideration for the transfer and relinquishment of them, the several sums hereinbefore specified, and now following, that is to say :—

For the farms and land, with the buildings, forts, trading establishments and improvements thereon one hundred and ninety thousand pounds sterling (£190,000); for the loss of the live stock, and other loss suffered by them, by reason of the acts and proceedings hereinbefore complained of, fifty thousand pounds sterling (£50,000); making together the entire sum of two hundred and forty thousand pounds sterling money of Great Britain. . . . (£240,000) equal to the sum of one million one hundred and sixty-eight thousand dollars. . . . (\$1,168,000.00.) to be paid in gold at the time and in the manner provided by the Treaty of 1st July, 1863.

And the claimants declare, that for the said sum of money, or for such other sum as the Honorable the Commissioners may justly award, they are ready and willing to transfer to the United States all their rights and claims according to the terms of the said two Treaties.

(Signed)

CHS. D. DAY,

Counsel for the P. S. A. Co.

DATED, 10th April, 1865.

BRITISH AND AMERICAN JOINT COMMISSION ON
THE HUDSON'S BAY AND PUGET SOUND AGRICULTURAL COMPANIES' CLAIMS.

In the matter of the claim of the PUGET SOUND AGRICULTURAL COMPANY.

ARGUMENT.*

TO THE HONORABLE THE COMMISSIONERS :—

The Memorial of the Puget Sound Agricultural Company shows as their claim, under the treaty of 1846, that at the date of that treaty, the Company held and possessed certain lands in the present territory of Washington; one tract on Puget Sound, between the Nisqually and Puyallup rivers, containing about two hundred and sixty square miles, or about one hundred and sixty-seven thousand and forty acres; another at the Cowlitz river, called the Cowlitz farms, of three thousand five hundred and seventy-two acres of land.

That on those two tracts were various buildings and farming enclosures.

That they owned at that time three thousand head of cattle, three hundred and fifty horses, and five thousand three hundred sheep, that were pastured and fed on these lands.

They further show that although the United States, by the terms of the treaty of 1846, were bound to confirm to the Company the lands and farms and other property held and possessed by them at the date of that convention, yet this was not done; and in consequence of this failure on the part of the government of the United States to fulfil its agreement, and of the acts and proceedings of

* This argument is chiefly the work of the Honorable Edward Lander.

its officers and citizens assuming to act under the authority of its laws, the Company are deprived of the use and enjoyment of a large portion of their lands, farms, and other property ; that there was a loss of rents and profits ; that their pasturage was destroyed ; their live stock killed, or driven off and lost ; and their business broken up and rendered unprofitable.

For these claims, thus stated in brief, the Company ask, for the farms and land, and for the buildings and improvements on them, one hundred and ninety thousand pounds sterling. For the loss of their live stock and other losses suffered from the failure of the government of the United States to perform its contract, and from the acts of its officers and citizens, they ask a further sum of fifty thousand pounds sterling, making the sum total of their money claim against the United States, two hundred and forty thousand pounds sterling, equal to \$1,168,000.

To prove the right of the Company to the payment of this amount, as an adequate money consideration under the provisions of the treaty with Great Britain of the first day of July, 1863, evidence has been offered by the Claimants ; and the United States, on their side, have produced testimony for the purpose of showing that the Company are not entitled to receive that amount of money, or any amount whatever, for the claims set up by them in their Memorial.

To show how far these claims of the Puget Sound Agricultural Company are sustained by the testimony before the Commission, and what their rights are under the treaty of 1846, and the treaty of July, 1863, is the object of the present argument. To do this properly, and to bring before the minds of the Commissioners the great importance and value of these claims, especially of the claim to the tract of land lying between the Nisqually and Puyallup rivers, which is called in the testimony in this case, the Nisqually Plains, it may be well to advert to the section of the country in which these plains are situated, and to present in a concise form from the testimony, a description of its general features, bearing as they do, strongly on the question of the importance and value of these lands to the Company which held and possessed them, and of their public and political importance to the Government of the United States, that now seeks their transfer for an adequate money consideration, to be determined upon by the Commission.

Northern Oregon in which these plains are situated, presents peculiar and marked features. Divided into two parts, by the Cascade range of mountains, its Eastern portion is an almost treeless plateau, while its western is covered by immense forests of fir, that stretch in a continuous line from the Columbia river, to the present boundary between British Columbia and the United States, and crossing the 49th parallel on the continent, hold possession of its western slope far to the north of it.

Parallel with the Cascade range, and farther to the west, is the Olympic range of mountains, that extends south from the Straits of Fuca nearly to the River Chehalis, which flows westwardly into the Pacific Ocean.

In the valley between these two ranges of mountains are the waters of Admiralty Inlet and Puget Sound that penetrate into the continent southwardly for more than 100 miles, having a width on the Inlet of 5 or 6 miles, and averaging in width on the Sound from 1 to 3, with bold shore lines, and deep water to the very shore.

Far up the sides of these mountain ranges, and lining the high shores of the sound and Inlet, to the water's edge, are found dense forests of fir—in the words of a witness for the United States, an impenetrable forest,—made so, not only by the thick growth of chaparel, but likewise by the immense amount of fallen timber. (Chapman, p. 83.)

The valley between the two ranges of mountains does not cease with the Olympic range, but appears to be continued to the Columbia river by the high hills, a prolongation of the Olympic range south of the Chehalis river. Through this valley flows the main Cowlitz river for some 30 miles, due south to its junction with the Columbia.

From the southern portion of the Sound, to near the point where the Cowlitz river is navigable for boats, as if to provide for the settlement of a region otherwise almost impervious to man, are found a series of openings of various sizes in the line of fir forest, that form, with belts of timber between, a continuous line of prairies from the Sound to the point of boat navigation, upon the Cowlitz, a distance of some fifty miles.

These prairies, a distinguishing feature of the country, vary in

size and quality of soil. Some of these, near the head of navigation of the Cowlitz, thence going north to the waters of the Sound for half the distance, though small in size, containing only from 14,000 to 17,000 acres in all, are of a rich soil, free from gravel, fertile and capable of long continued cultivation.

The prairies north of this tract and approaching the waters of the Sound, and those that skirt the southern points of its Eastern waters to the south bank of the Nisqually river, change their general character.

The rich soil, free from gravel, disappears, and in its place generally is found, a soil of a gravelly loam, interspersed with portions that show a sandy loam, more suitable for cultivation. Nearing the Sound, the small plains are at an elevation of about 200 feet above its level, and so continue to the belt of timber on the Nisqually. Across the Nisqually, the belt of timber concealing it gives way to an opening larger than any other. Here, stretching from the belt of timber on the north bank of that river to the wide belt on the south side of the Puyallup, and from the forest bordering on the shores of Puget Sound to that which extends to the Cascade range, are the great plains of North-western Oregon, called from the river they border upon on the South, the Nisqually.

The general nature of the Nisqually plains does not differ from those smaller ones near the head of the Sound. They may be described as forming part of a plateau, elevated from two to three hundred feet above tide water, rising in low benches as it recedes from the Sound (Gibbs, p. 313). The surface of this portion of the plateau is diversified with lakes of various size and watered by several streams affording a continuous and abundant supply of water. (Miller, p. 88, Int. 52.)

The soil of the larger portion of these plains is not rich or fertile enough for *continuous* cultivation without the aid of foreign substances, though sufficiently fertile for several years' crops; and is in some parts of a gravelly character mixed with a vegetable loam, changing in others into a sandy loam of the same character. This portion of the tract produces a short sweet natural grass, affording valuable and nutritious pasturage for stock. In the alluvial bottoms of the streams, the swales or depressions in the

plateau itself, on the lower grounds surrounding the lakes, and in the morasses, and swamps when drained, which are scattered over the wide plain and taken together constitute one fourth of the whole area, the soil is very rich and fertile, of great depth and largely productive.

Fir trees in groups and singly break the monotony of the plain, in some places separating portions of the prairie from the main body, by narrow belts of timber.

Here and there the firs give way entirely to oak trees of different sizes and quality, which latter tree is only found in abundance north of the Columbia River on this plateau, averaging here from two to three trees to the acre. The high bold shores, which are a distinguishing feature of the Country bordering on Puget Sound, on the water front of this part of the plateau (occupied by the plains) rise to the height of about 200 feet with a narrow beach at the base of the wooded hills. On one part of the water front, south of the mouth of one of the streams watering the plateau called "Steilacoom Creek," the rise in the plateau is more gradual; there it ascends in a gentler slope, breaking the uniformity of the high and hilly shores, while in front the Sound spreads out wide and unbroken by islands, the anchorage extending along two miles of shore, affording a spacious and convenient harbour. (Bolton, p. 89; Chapman, p. 151; Huggins, p. 95.)

In 1833 the Hudson's Bay Company, which had before that time occupied it, but not in a permanent way, took possession of Nisqually, erected buildings and placed upon the plains live stock, and proceeded to make use of them for agricultural and pasturage purposes. (Sir James Douglas, p. 80.)

In the year 1838 the same Company marked out and measured on the prairie, near the head of canoe or boat navigation on the Cowlitz River, a tract of land of some 5372 acres, began at once to open a farm, with many laborers, and in two years had fenced in nearly all the open prairie. (Plomondeau, pp. 11 and 12; Wilkes, p. 228.)

The Hudson's Bay Company thus took possession of the prairies at both ends of that line of prairies between the navigable waters of the Columbia River and those of Puget Sound. At one extremity they had the Cowlitz and Columbia Rivers to transport the products

of the rich and fertile prairie, and at the other the waters of Puget Sound that enabled them to transport supplies from the water front of the Nisqually plains to any part of the world. And connecting the two prairies and their landings, one on the river, the other on the Sound, by a road running through the intersecting prairies, they in two years, completed the occupation and possession of the Nisqually plains and the Cowlitz farms, until then unoccupied and in a state of nature. That Company thus prepared for the time when, in the language of a witness for the United States, the now Rear Admiral Wilkes, "the Country becoming the abode of a civilized community, the farms and other lands possessed by the Company, must become very valuable, as the posts occupy the points most favorably situated for trade, and the agricultural establishments have been placed in the best position for farming operations." (Wilkes, p. 245.)

In 1841 the present Sir James Douglas, then an officer of the Hudson's Bay Company, caused to be made under his direction a sketch of the lands marked out and held by the Hudson's Bay Company; and those lands, with all the improvements, live stock and farming implements, were by the Hudson's Bay Company transferred to an association called the Puget Sound Agricultural Company. This latter company was an association of distinct and separate interests, with a board of management, comprised in part of shareholders in the Hudson's Bay Company, in connection with others, and formed for the purpose of farming in this then remote Territory; an association that hoped by cultivating some portions of these lands, and pasturing others, in a few years to supply the wants of the Hudson's Bay Company, and afterwards to export their produce to other and more distant markets. (Sir James Douglas, p. 80.)

At the same time the Hudson's Bay Company transferred to the Puget Sound Agricultural Company their Cowlitz farms with all the improvements, live stock and farming implements thereon.

Thus the Puget Sound Agricultural Company in 1841 succeeded to all the advantages secured by the Hudson's Bay Company; and in 1846, when by the Treaty of Washington, the joint occupation of the country west of the Rocky or Stony Mountains, which by Convention between Great Britain and the United States had so long

continued, ceased, it was agreed by the 4th article of that Treaty, That the farms, lands and other property of every description of the Puget Sound Agricultural Company, on the north side of the Columbia River, should be confirmed to them; and it was further agreed, that "In case, however, the situation of these farms and lands should be considered by the United States to be of public and political importance, and the United States Government should signify a desire to obtain possession of the whole, or of any part thereof, the property so required shall be transferred to the said Government at a proper valuation to be agreed upon between the parties."

That Treaty found the Puget Sound Agricultural Company in full possession, use and occupation of the Cowlitz farms, and the Nisqually plains, with all the improvements, live stock and farming implements.

The rights and powers of the Hudson's Bay Company, from whom the Puget Sound Agricultural Company acquired their farms and lands, have been fully presented and argued in the case of that Company, and have reference to this case, so far as they show the history of Oregon before the Treaty of 1846, and the relations of the two Companies whose rights were guaranteed by that Treaty.

It may be well here to renew the statement made in the argument of the Hudson's Bay Company, that the Treaty was a compromise upon unrecognized claims. That it contains no admission of pre-existing rights to territory, but a denial by both contesting parties of any rights in either, and must be construed on the same principle by which a treaty of cession is construed, which declares and holds that titles granted and rights acquired under the ceding Government are good.

There is another proposition bearing upon the construction of a treaty, which is declared to be the highest law in the land, and that is, that like the statute law, it is to be construed in the light of facts existing at the time, and of the evils it was intended to remedy. (Dred Scott case, 1 Howard.)

In the case of a treaty, that which it was intended to remedy must be presumed to be in the view and within the knowledge of the high contracting parties. To presume otherwise, and to assert

that the state of facts, in reference to which the Treaty was made, was unknown to either at the time, would be too derogatory to them, to be admitted for a moment. What then in the light of history and the testimony in this case, was the condition of affairs in Oregon, before and at the time of this Treaty, with reference to the Puget Sound Agricultural Company, which must have been known to the United States? It was briefly this, that, before the Treaty of 1819, the North West Company, afterwards amalgamated into the Hudson's Bay Company, took possession of lands and erected posts in Oregon; there that Treaty found them, and recognized their occupation. Afterwards their posts were extended under that Treaty, and the Hudson's Bay Company succeeding to the North West Company, occupied the Nisqually plains in 1833 and the Cowlitz prairie in 1838, and in 1841, transferred both these tracts of land to the Puget Sound Agricultural Company, who occupied them at the date of the Treaty of 1846.

When therefore the Treaty declared that the farms, lands and other property of the Puget Sound Agricultural Company should be confirmed to them, they being in possession of no other lands than those acquired from the Hudson's Bay Company, the declaration in the Treaty, that the farms and lands did belong to the Puget Sound Agricultural Company, could refer only to those thus acquired, and take effect on those alone, and it must be construed also to carry with it the admission that those acquisitions were lawfully made, and also the right of that association or company to acquire and hold lands, and of the Hudson's Bay Company to transfer them.

These farms and lands thus lawfully acquired and held with the other property, the United States declared should be confirmed to the Puget Sound Agricultural Company, and by the second clause of the same article declared the right of the United States to purchase what it might deem of public and political importance in the situation, of these farms and lands, and bound the Company by that clause to recognize its paramount right as the only purchaser. This right to purchase also carries with it the power of the Company to sell under that name, as the United States as a purchaser cannot claim the right alone to purchase from a party under a particular designated name without recognizing in such party the right to sell under that name.

It may then be stated as a fair proposition to be deduced from the Treaty :

1st. That the United States by the Treaty has recognized the Puget Sound Agricultural Company as an association capable of acquiring lands, farms, and other property, and as having so acquired the same before the Treaty, and as being at the date thereof, in lawful possession, as owner, of certain lands and farms known to the United States, and of other property.

2nd. That the Company as such, and under its name, is declared to have the right to dispose of those lands and farms, and the other property belonging to it.

3rd. That the United States shall have the right to purchase those lands and farms from the Company whenever it may determine so to do.

4th. That the United States shall, by legislation, confirm those lands and farms to the Company.

From the third proposition there must follow another, that—

5th. The Company are compelled to hold their lands until the United States shall purchase them or decline so to do.

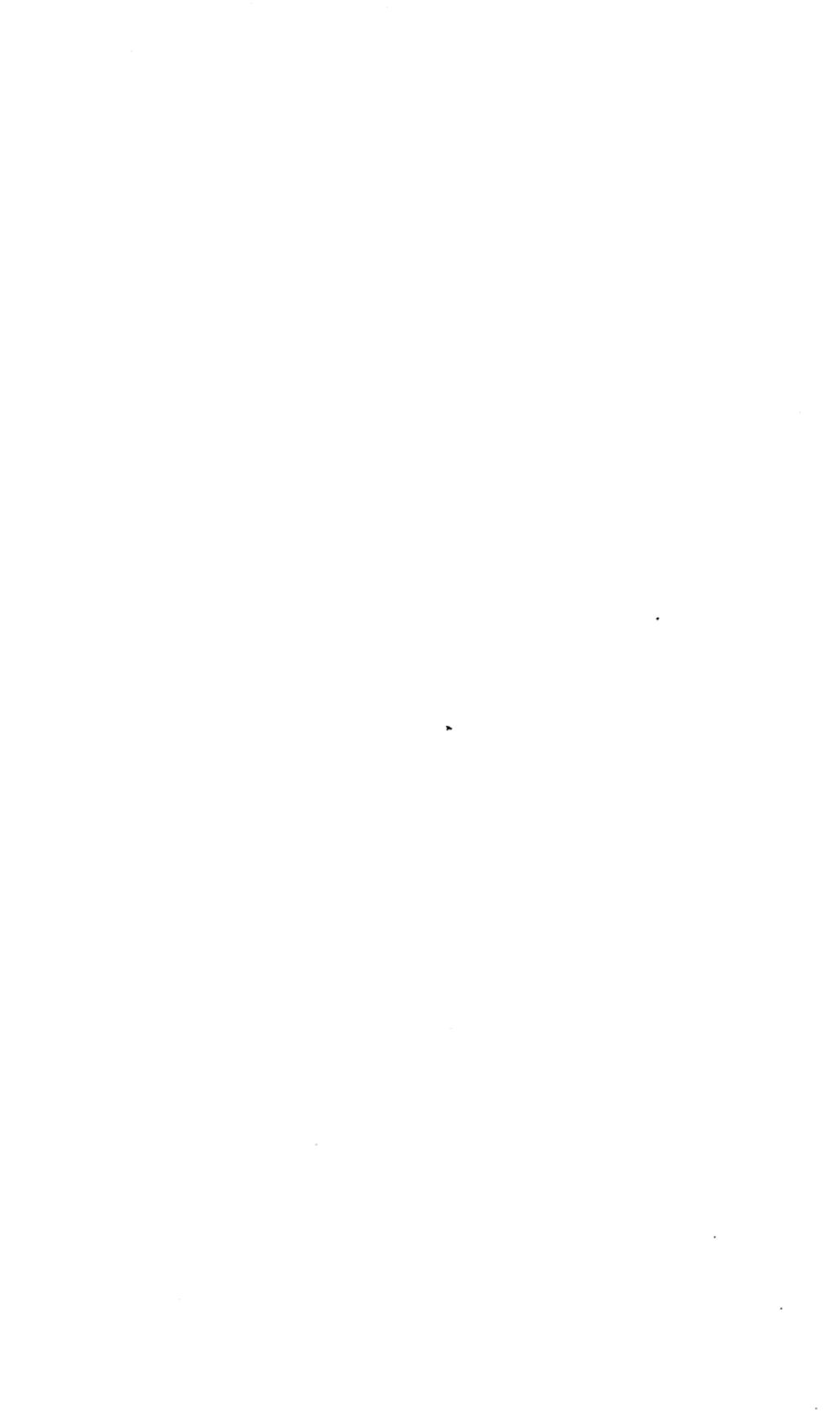
These propositions seem to contain the rights declared to belong to, and the obligations taken upon itself by the sovereign of a country acquiring territory. They also contain the rights of the Company subject, and they are those to which it is entitled by the law of nations, of equity, and of good faith, and by the special guarantee of the Treaty; its obligations are imposed upon it by that law, and are not taken upon itself of its own free choice, and these obligations are imperative, and dependent upon the action of the new sovereign. Hence, in view of the imperative obligations on the part of the Company, it would seem, that in addition to the protection which, by international law, the new sovereign is bound to give to property in the newly acquired country, there is also the natural obligation which should arise from the assumed relation of purchaser at option who would not be allowed in equity and good faith, to injure or cause to be depreciated, the property he had agreed to purchase, and then to take advantage of the depreciation following his own acts, to cause a lower price to be accepted as the value of the property.

More especially would this be the case where the purchaser is the sovereign, who can protect, and the vendor is a subject, who is bound to await his pleasure, and cannot sell to any one else until that pleasure is known. Should the sovereign in this case fail to protect the property he has agreed to purchase, equity and good faith require that when the compensation is to be paid, the price should be what the lands sought for would have been worth at the time the purchase is made, had adequate protection been given by the government that acquires the territory and becomes the purchaser.

But the case as to the value of the lands and farms of the Puget Sound Agricultural Company, is stronger than this; it is not only a case where by the principles of international law, the property was to be protected, and in which, in equity and good faith, the purchaser who had the power to protect, should do so, and not injure or cause to be depreciated the property he alone could purchase, but it is a case of a government reserving the right to purchase certain lands in territory acquired by it, which it declares to be of public and political importance, and specially agreeing that it will give to that property the legislative protection of a confirmation of its title from itself, whose duty it is to protect. Failing to give that legislative confirmation, failing to exercise the right to purchase, failing to decline to purchase or to suffer the subject owner, under its protection, to sell to others; and leaving the property it was bound to protect, and to confirm, for seventeen years, subject to the inroads of settlers claiming to hold land under its land laws, sustained by the acts and words of its public officers, affording no remedy in its courts of justice, the result was the loss to the Company of the possession of the great body of its lands, the destruction of a large portion of its live stock, and the loss of a great part of its annual profits.

And on this state of facts, which will be shewn by the evidence, the Claimants contend:

1st. That in estimating the compensation to which they are entitled for their lands and farms, they should be paid for them at the price they would be worth at the time of the Treaty of 1863, had legislative confirmation been granted and their property been protected.



2nd. That for the disturbance of their possession of the lands and farms guaranteed to them by the Treaty, the destruction of the greater portion of their live stock, and the loss of almost all of their annual rents and profits from their lands and farms, the United States is liable and should pay an adequate compensation.

In examining the evidence which in this case shows what the lands and farms were, and what their value ought to be, and in that other body of evidence showing the great losses suffered, and injuries done to the property of the Company, it is proper here, as in the case of the Hudson's Bay Company, to advert to the superior means of knowledge from residence, and in some instances from peculiar official position, of the witnesses for the Company over those generally produced by the United States. This gives to the evidence for the claimants a more sustained, clear, and succinct character than can be claimed for the evidence for the defense given by witnesses much greater in number, whose means of knowledge are not, in most instances, such as residents would have, and when these witnesses occupy official positions, those positions were not such as would especially qualify them to judge either of the character of the soil or the value of the land. They would be also, naturally influenced by feelings in favor of the country to which they belong. It is proper here to advert to another fact connected with this case, also mentioned in the argument of the Hudson's Bay Company's case, but which bears harder upon the claimants in this case than in the other, and that is the strong feeling which is apparent against the rights of the Puget Sound Agricultural Company.

Seated, as this Company is, near Olympia, the Capital of the Territory, and the centre of political influence and popular feeling, it had the legislature of the territory inquiring into the conduct of the United States officials in reference to it, and the high functionaries of the Government, sharing with the witness, George Gibbs, (p. 343) the opinion "that the Company was simply an association of *squatters* upon the public lands of the United States, whose right to certain farms within the area of their claim under the Treaty, was even doubtful," and freely expressing these views. Its lands were covered by claimants under the land laws of the United States, whose claims were duly recorded by the officers of its land department; the Nisqually plains, constituting nearly all the

settled portions. of Pierce County, being usurped by settlers and officials whose interests were adverse to any right and claim of the Company. What could be the result of all this but such a state of public opinion as would render the obtaining of any witnesses almost impossible, and would tend to color their testimony with the popular feeling that surrounded them?

No more striking proof of the existence and strength of this feeling and prejudice can be found than in the evidence of the editor of a newspaper published at Olympia, (Hewitt) a witness on the part of the United States, who proves on cross-examination (p.94) that numerous newspaper articles, with reference to the Company, had been published and read by him. By his testimony, it appears that one of the Agents of the Company, after this editor had, through his paper, called the attention of the public to what he termed the "gigantic swindle" of the two Companies, requested him during the taking of testimony which was then to commence, to be silent and not publish articles inflaming the public mind. He received a compensation simply to be silent, but could not even then restrain himself, and returning the amount received, began at once, while the testimony was being taken in that part of the country, the publication of a series of inflammatory articles, prepared, as is believed, by an official of high rank, since then the acting chief executive officer of the Territorial Government. The file of newspapers containing these articles, is among the documents in the case submitted to the Commissioners. To the existence of this prejudice, the testimony of E. E. Fitzhugh, a former associate Justice of the Supreme Court, on page 143, Int. 9, is full, and explicit, showing that even the Courts of Justice were closed to the Company. He says: "I was well acquainted with the feeling of the whole community with regard to the possessions of the Puget Sound Agricultural Company. It was almost uniformly bitter and adverse to their possession or occupation of any land whatever, from the belief that they had no right to possess or occupy any lands. This belief was supposed to have had its origin from the remarks and expressions of opinion of the early government officials in the Territory, to the general effect that the Treaty of 1846 gave the Companies no right to any lands. With regard to the administration of justice, in my



“ opinion it would have been useless for the Puget Sound Agricultural Company to have attempted to obtain any verdict in their favor at the hands of a jury. The Courts were open to them, but practically would have been of no use in any attempt to get rid of settlers on the land claimed by the Company. The almost universal opinion among the settlers that the lands taken possession of belonged to them (the settlers), would have made it impossible for any alleged rights of the Company to be maintained, and no counsel would have advised the prosecution of a suit with any hope of success.”

That witnesses could be found in the face of such a state of feeling, which forced an editor, to his pecuniary loss, and against the call of fair dealing and common justice, to publish attacks on the rights of one party to a controversy, and induced the highest functionary of the Government so far to violate the dictates of even-handed right as to lend himself to the business of inflaming the public mind already too much excited, is a strong proof of the justice of the claim of the Company, and adds weight to the testimony of the residents brought forward to testify under such circumstances.

We will now proceed to show what evidence has been offered in reference to the claim of the Company to the country near Puget Sound, as this is the first point of magnitude and importance ; what it was that they held and owned there in June, 1846, the date of the Treaty, from which time the obligations of the United States commenced.

NISQUALLY.

EVIDENCE OF POSSESSION.

DOUGLAS.—The first testimony on this part of the case is that of Sir James Douglas, who declares on page 80 of the published testimony on the part of the Claimants, Int. 3, and answer thereto, that “ Nisqually was occupied by the Hudson’s Bay Company in a permanent manner in the year 1833,” who states on the same page, that “ in the year 1841, he, as chief factor, caused to be made a map of the lands marked out and held by the Hudson’s Bay Company in 1841, and transferred to the Puget Sound Agricultural Company. This map is in evidence in this case (marked C), and on examination will be found to correspond almost exactly in its main details with another map, also in evidence (marked B),

the product of a survey, partially made in 1851-2, by one John B. Chapman, a witness for the defence, and completed by Huggins, a clerk of the Company, as stated in his testimony, page 94, after the settlers had contrived to prevent it for the time, by a posse of armed men threatening to break the instruments of the surveyor. (Chapman 147, Huggins p. 94.)

The first of these maps exhibits the Nisqually river on the south, and on the north includes the larger prairies north of Steilacoom Creek. The direction of that creek is not exactly laid down, and the prairies to the north of it are smaller than in the other map.

The same length is not given to the claim as in the more accurate survey. The stony woods between the plains and the Puyallup River, however, are put down, although that line of woods in this sketch is, as appears by the other map, brought too far to the south, while the woods on the east of the plains, extending to the mountains, are plainly shown.

On this first map, too, are the lakes and streams shewn in the other, and the cattle, sheep and dairy stations scattered over the plains.

The road from the Cowlitz and Chute Plains to the post at Nisqually, the one from Nisqually across the mountains to Walla Walla, and the smaller roads to the dairy, cattle and sheep folds, and towards Steilacoom Creek, the fords marked out across the Nisqually, are all found on the first map, as well as on the second, and prove the complete occupation of the tract, and its connection with other posts and farms at that early date, when the first map was made. The evidence of Sir James Douglas, and these maps, made out at different times, and their correspondence in general details, all combined, show that the same tract occupied by the Hudson's Bay Company, on the Sound, was transferred, with all there was upon it, to the Puget Sound Agricultural Company; and the evidence of the maps, with other testimony, shows its occupation by that Company at the date of the Treaty in June 1846, and before that time.

To this occupation and possession of the whole tract in 1846, as set out in the memorial, there are several witnesses; two of these, Messrs. T. Simmons and Gabriel Jones, whose position and means of knowledge appear, knew the land occupied by the Company in 1845, 1846, and 1847. The one, Simmons, knows (p. 36)

the lands as those shown by the map; the other, whose defective sight does not allow him to see the boundaries as entered upon the map, speaks (p. 54) of a large tract of land between the Puyallup and Nisqually rivers, occupied for farming and grazing purposes.

John McLeod and John Montgomery, old employees of the Company, speak, McLeod on page 65, and Montgomery on page 58, of the occupation of the tract, shown on the map, in the year 1845-6; and to these should be added the testimony of William F. Tolmie (p. 105), who managed the business of this Company from 1843 until 1859; who resided at Nisqually as early as 1838, and who on page 108, in answer to Int. 10, says:

“ I am acquainted with the lands represented on this map; they were occupied fully and solely by the Puget Sound Company at the date of the boundary treaty of 1846, with their flocks and herds.”

This occupation of the lands at Nisqually, evidenced by the map before referred to, marked (B), and shown by the legend and by proof to have been made in 1852, and filed in the office of the then Surveyor General of Washington Territory, James Tilton, in 1855, by the Company, was further proved by their flocks and herds on the lands, by their cattle and sheep stations, roads and enclosed fields, by pasturage and by cultivation, and in every way that ownership and occupation can be shown. There is only one witness, on behalf of the United States, introduced to contradict this continuous occupation, (Admiral Wilkes) who, from April to July, 1841, was engaged in the survey of the waters of Puget Sound and Admiralty Inlet. The vessels under his command lay for those three months at anchor opposite the landing of the Company, which is about half a mile from their post. Here on the beach, near his anchorage, he cut down the timber and erected buildings for the use of himself and officers in their work then to be carried on.

The valueless character of the testimony of this witness, has been exposed in the observations upon his deposition in the Hudson's Bay Company claim, and those observations apply equally in this case. The remarks made there, are called to the attention of the Commissioners here, and the difference between the eulogistic

language of his report and his testimony, must again be referred to in this connection.

The task of reconciling this discrepancy is attempted by the witness himself in his answers on cross-examination ; how far he has succeeded, must be left to the judgment of the Commission. It is sufficient to set out here the witness's own language to show that in 1841, there was an establishment on the Nisqually plains which would enable the Company to carry out their intentions, as expressed in the Admiral's own words, as follows, on page 237 :

“ It is also their intention, when they shall have succeeded
 “ in breeding a sufficient stock of cattle and sheep, to export
 “ hides, horns, tallow and wool to England in the return ships. In
 “ this way it may readily be perceived that they will be enabled to
 “ drive a profitable trade, particularly when it is considered how
 “ little care the cattle require in this Territory, in consequence of
 “ the grass and natural hay which the soil affords at seasons.”

He speaks of the post in the following extracts from page 235, Int. 6. :

“ Near by were to be seen fine fields of grain, large barns
 “ and sheep-folds, agricultural implements, and workmen with
 “ cattle engaged in the various employments of husbandry.”

And on page 244, Int. 10 :

“ On this farm there were about two hundred acres of land
 “ under cultivation, which I was informed would yield (15) fifteen
 “ bushels of wheat to the acre.”

Of the landing and the road, he speaks on page 244.

“ *Int.*—Was there not, at the time of your arrival at Nisqually,
 “ a well-constructed road, of easy ascent, going up the hill-side at
 “ the landing?”

Ans.—“ There was. I never used it : but I made a better one
 “ to my own encampment.”

Of the number of cattle, there is one statement taken from his report, which can be cited in reference merely to a dairy farm, and is as follows, on page 236, Int. 9 :

“ In connection with the Company's establishment at Nisqually
 “ they have a large dairy, several hundred head of cattle, and
 “ among them seventy (70) milch cows. They have also large
 “ crops of wheat, peas, and oats.”

These descriptions taken from his report, in a few words, give what, from notes and personal observation, he thought it his duty as an *officer*, to report to his government, as to the occupation of a portion of a disputed Territory by the subjects of another government that had possession, and were, when made, no doubt, in his opinion, accurate, just, and true.

What he thought of his own report, twenty-six years afterwards, is found in his answers to the cross-Interrogatories: one of these answers will be cited hereafter.

This testimony cannot be passed without giving, as an illustration of its character, the statement of the number of cattle. In the official report they are given at one dairy, as "several hundred head of cattle, and 70 milch cows."

In the examination-in-chief occur the following passages on page 23:

"*Int.* 24.—About what number of cattle were there at Nisqually in 1841?

"*Ans.*—I should say there were less than fifty.

"*Int.* 22.—What was the value of these cattle per head, and what particular opportunities did you have during this expedition for judging of the value of cattle in this section?

"*Ans.*—The cattle were few in number, as is shewn in the fact of their declining to sell any that belonged to the Company. Dr. McLaughlin presented the crew with two on the 4th of July.

It will be observed that the reason is given in the answer to *Int.* 22, for his knowledge of the fact, that the cattle were few in number.

On the cross-examination an opportunity is given to explain his statements. This is given in full as follows:

"*Int.* 9.—In speaking of the Company's establishment at Nisqually, did you make use in your report of this language, and how much of it is of your personal knowledge: "In connection with the Company's establishment at Nisqually, they have a large dairy, several hundred head of cattle, and among them seventy milch cows. They have also large crops of wheat, peas, and oats?"

"*Ans.*—I made use of this language; that is derived from Mr. Anderson, the superintendent.

“ *Int. 10.*—Did you not see a dairy at or near the Company's establishment ?

“ *Ans.*—No, sir.

“ *Int. 11.*—You have stated in your examination-in-chief that the cattle were few in number, and less than fifty. In making this answer, do you wish to be understood as saying that there were not more than fifty cattle belonging to the Company at Nisqually, or that you yourself only saw fifty, ?

“ *Ans.*—I wish to be understood as saying that I only saw fifty, and of my own knowledge. In the part of the report referred to in Interrogatory 9, I gave the number derived from others, good authority, as I believe, but I deemed it somewhat exaggerated, for I saw no force large enough to take care of and milk so many cows.”

On these two explanations, we would leave this witness, who officially gives enclosed fields, crops of grain, dairies, cattle and milch cows, sheep-folds and cattle pens, Fort and pickets, landing and road, all the various signs of occupation and ownership ; were it not for the statement that in spite of all this he heard no claim for land set up by the officers of the Company. Why he did not is easily explained, and appears from the testimony. He came to the Post in command of an armed squadron of a government that had opposing claims to the very country that, as officers of the Puget Sound Agricultural Company, they had settled upon. He cut down trees, and erected buildings on the land “ within hail of his ship,” made a road, brought ashore his armed guard, sent his officers on exploring expeditions, and, as he says, made a map of the interior, extending back nearly three hundred miles from the coast. What his secret instructions were could not be known. They made no objections to his landing, to the building of houses, to his making roads, to his placing forces on shore. On the contrary, they presented him with two bullocks “ as a peace offering,” page 246, *Int. 7* and *8*. With their knowledge of the territory, they aided him in his survey.

Any objections on their part to his proceedings, would have been useless. At first they thought the expedition an hostile one, (*Wilkes*, p. 243, *Int. 4*) and throughout the visit, both parties, while vying with each other in attentions, carefully avoided the

subject of claims of title ; he asked no questions as to it, they of course set up no claim ; for what had Admiral Wilkes to do with the matter, or in what possible way could the Company have derived benefit from raising any question with him on that subject ? There would have been no meaning or common sense in such a proceeding.

The armed neutrality of one side, was met with studied politeness on the other ; disagreeable questions were avoided by mutual forbearance during the visit, and the expedition left Nisqually, the commander recording in his report a pleasing picture of a flourishing settlement, coupled with the prophecy before cited, of the great future value of the post selected by his attentive hosts, (p. 245, Int. 11).

But even the Report of Admiral Wilkes is not full enough, to cover the whole truth as to the occupation of the country around Fort Nisqually by the Puget Sound Agricultural Company. Their occupation, besides that of enclosed fields, buildings, scattered sheep-folds and cattle pens, was, as before stated, of pasturage also ; the only occupation that the then condition of the country required. To fence pasturage against other flocks and herds, when theirs alone were to feed upon the lands, was useless.

The effect of this pasturage occupation has been fully presented in the case of the Hudson's Bay Company, and need not be repeated here ; but it may be added that for a Company whose business was to rear flocks and herds, it affords the best evidence of possession.

The admiral speaks of several hundred head of cattle at one dairy in his report, and he has personally seen fifty, and although he speaks of sheepfolds, he has not stated the number of the sheep. That both the cattle and sheep must have been numerous in 1841, is plain from the number that were found there in 1845, for there is no evidence of any being brought there after that year.

Simmons, John Montgomery, McLeod and Tolmie, all speak of the number of cattle and sheep. Simmons on page 36, Int. 5, says : " They were numerous everywhere on the plains, he thinks there were about 3000, cattle, something near 8000, sheep, from 150 " to 200 horses."

Jones (page 42) agrees with him, Montgomery gives the same numbers on page 58, McLeod (page 65), who with John Edgar,

herded the sheep, makes them over 8000, the cattle about 3000, the horses nearly three hundred.

Dr. Tolmie, agent at the time, corroborates these witnesses (page 107), as to the number of horses, cattle and sheep.

Then from 1841 to 1846, the date of the Treaty, the cattle, sheep and horses of the Company, in great and increasing numbers, occupied these plains until 1846. They were stocked nearly to their full capacity, with about 3000 cattle, something like 8000 sheep, and about 300 horses, that pastured over the whole surface, McLeod and John Edgar were in charge of the Company's sheep, and as McLeod says on page 65, he pastured them over all the prairies except a small one near Bolton's.

He says in answer to Int. 2.—“How many sheep had the Puget Sound Agricultural Company in the year 1845 at Nisqually?”

“For the first two years, John Edgar and myself had charge of the Company's sheep, they had over eight thousand of them. In those years all the prairie land between the Puyallup and Nisqually rivers, except a small prairie called Bolton's, was pastured by the Company's sheep.”

Montgomery herded cattle and horses, and with other herdsmen, took charge of them on these plains. There Simmons saw the stock in bands, with their herdsmen, 5 or 6 white, and 15 or 20 Indians, living in houses scattered over the plains. Sheep corrals and sheds were near the houses to which the Indian herdsman drove the sheep at night.

The cattle in small bands lying over the prairie appeared tame.

In summer time, when the grass was dry, the swales and marshes supplied the needed feed, and large numbers of cattle sought the beach, drinking salt water and feeding. His own language on page 36 in answer to Int. 5, is the best description of the full and complete occupation of the plains, and is here given.

“I am acquainted with the Company's claim at Nisqually. I first came there in the fall of 1845, and spent the night at Dr. Tolmie's, who was then in charge; he then told me that the claim included the country between the Nisqually and Puyallup Rivers, and from the Sound back so as to include all the prairie; was there often afterwards, and all over the plains in the fall of 1846; built ten cabins on the plains; know the country included within the

“ boundaries, as shewn by this map, well. All over this tract were
 “ bands of cattle and horses, and herds of sheep. They had five or
 “ six white herdsmen and fifteen or twenty Indians ; they lived in
 “ houses scattered over these plains. These white men had sheep
 “ ranches and corrals and sheds at their houses. The sheep were
 “ out on the plains in charge of Indians during the day, and were
 “ driven up at night. There were numerous sheep parks and cattle
 “ yards on the plains. The cattle were in small bands lying all over
 “ the prairie, and appeared tame ; in the summer time, a good many
 “ ranged in the woods and marshes, when the grass was dry on the
 “ plains ; and I have seen large numbers of cattle on the beach, be-
 “ tween Nisqually River and Steilacoom Creek, drinking salt water
 “ and feeding. The claim was well stocked ; the grass on the prairies
 “ was pretty short in summer. I was told how many head of cattle
 “ there were and other stock ; and judging from what I saw, I think
 “ there were about three thousand head of cattle, and I should think
 “ something like eight thousand sheep, and somewhere from one
 “ hundred and fifty to two hundred head of horses.

All the other witnesses corroborate Simmons and Dr. Tolmie, the agent, as to the manner in which this claim was occupied in 1846. Tolmie's more intimate and accurate knowledge supplements them all, and fills up the points left out. On page 107, in answer to Int. 7, he says :

“ At Nisqually, the Company had about eight thousand sheep in
 “ 1846, divided into flocks of about five hundred each, herded by
 “ white men, Indians and Sandwich Islanders, and regularly moved
 “ from one pasture to another, so as to prevent destruction of the
 “ grasses by over-feeding. They had also in the year 1846, very
 “ nearly three thousand head of horned cattle, which were herded by
 “ white men, with Indian assistance, and which cattle were then tame
 “ and easily driveable from place to place, and from two hundred and
 “ fifty to three hundred horses, also driveable and easily managed.
 “ At this time they had full and undisturbed possession of their claim.
 “ The Company had several small farms, in charge of their head
 “ shepherds and cattle herdsmen, at convenient points ; they had at
 “ the main station, known as Fort Nisqually, a farm of several hund-
 “ red acres enclosed, and on the clearing and draining of the swampy
 “ portion of which considerable outlay had been incurred prior to

“ 1846. The Company’s business was in 1846, in a flourishing con-
 “ dition, the early difficulties incident to its commencement having
 “ by that time been overcome. They had, by 1846, made at con-
 “ siderable expense, wagon roads through the different belts of
 “ timber existing on the claim, and two wagon roads to the sea beach,
 “ involving much grading, one at what is now known as Nisqually
 “ Landing, and the other at the mouth of Steilacoom Creek. They
 “ had cleared many of the swamps scattered over the claim, for
 “ the sake of the hay to be obtained from them. At Fort Nis-
 “ qually they had a dwelling house for the officer in charge, and
 “ several dwelling houses for the laborers, bastions for defence, and
 “ two large stores, one at the landing and the other at the fort—
 “ each a story and a half in height, and 60 x 40 feet in dimensions
 “ —barns and out-houses of various kinds ; also a large house, with
 “ convenient parks surrounding it, for shearing sheep, and a dam
 “ on the Segwalitchew Creek, for washing the sheep in. All the
 “ dwelling houses, stores, bastions, and the sheep shearing house
 “ were constructed of square timber—French Canadian fashion.
 “ At the out-stations already mentioned, the Company had dwelling
 “ houses for their overseers and other employees, and twenty to
 “ forty acres enclosed at each. Further on, on page 116 and 117
 in answer to Int. 23 of the cross-examination, he gives a more
 detailed description of the buildings used by the shepherds and
 Sandwich Islanders, and corroborates Simmons who says he built
 ten of them.

“ *Int. 23.*—What kind of buildings were those for the servants at
 “ Cowlitz and Nisqually, occupied by herders and others, which you
 “ facetiously denominated dwellings ?

“ *Ans.*—Several of the buildings used as dwelling-houses at Nis-
 “ qually, by the shepherds and others, were constructed of square
 “ timber, in Canadian fashion ; the chinks between the square logs
 “ were mudded and the walls were lined with thick bulrush mats.
 “ One at Nisqually, to the best of my recollection, was about 50 x 20
 “ feet, single story—partitioned into three rooms with a clay chim-
 “ ney in each ; behind was a lean-to, also constructed of square
 “ timber and partitioned, corresponding to the rooms in the dwell-
 “ ing-house. There were two other houses, similarly constructed,
 “ (each 20 x 15 feet). In the plains, there were several buildings
 “ of 20 x 30 feet, some of square and some of round logs, all made

“ comfortable with chimneys and mat linings. At Steilacoom there
 “ was a comfortable dwelling-house, a large barn, a granary and
 “ two or three smaller dwellings, which were leased to the United
 “ States troops in autumn of 1849, at a rent of fifty dollars a month,
 “ which is still paid.

“ *Int.* 24.—Were not a large number of shepherds’ dwellings
 “ built for the Company by Mr. M. T. Simmons, who has already
 “ been examined as a witness ?

“ *Ans.*—There were, and they were occupied by Sandwich
 “ Island and Indian herders.”

What fairer picture of farming and pasturage occupation of the Nisqually plains, the adjoining and connecting woods, and the water front could be drawn, than these witnesses portray. They describe its enclosed lands of several hundred acres, with crops of grain and vegetables; the main buildings, the separate farm houses with their small farms in charge of head shepherds; the cabins of the herders and shepherds, placed here and there over the plains for the better care and pasturage of the flocks and herds under their charge; the drained swamps, from which in the language of the agent (page 226), in answer to *Int.* 3, “ large quantities of hay were cut in the severe winters of 1846 and 1847; the water front, with its two landings, and roads cut and graded to these landings; and the cattle coming through the belt of timber to drink the salt water of the Sound. These were seen by Simmons in 1845 and 1846, and continued until 1852 and afterwards, when Bolton saw them drinking the salt water in bands, and on the prairie, tame and easily drivable, and during the heat of the summer, seeking the belts of timber, and the woods adjoining the prairie for food.

Thus from the very shore, through the belts of timber over the plains, and up to, and beyond the boundaries shown in the map of 1852, do the witnesses confirm and substantiate the free and complete occupation of these lands.

QUALITY OF LAND.

Passing from the enquiry as to the occupation and possession of the lands at Nisqually, the next question that may be considered has reference to the character of their soil, and is important for determining the value of the lands.

This has already been adverted to in the earlier part of this argument, and the soil of one portion of the plains has been described as being a vegetable loam, mixed with gravel, or perhaps to be better defined as a gravelly loam. In other portions of the tract the gravel gives way to a sand, and here the soil can be characterized as being a sandy loam. Something like three-fourths of these plains are of this description, while the remaining quarter is of rich soil, and of the highest fertility. The soil of portions of the adjoining woods on the belt near the Sound, is shown to be of a clay loam. (Hewitt, p. 70, Int. 14.)

It has been stated in substance, that the portion of the plains which has a soil of gravelly loam, is not suitable for continuous cultivation without manure, and that the sandy loam portion, while bearing longer cultivation, cannot be continuously cultivated without it; that both the sandy and gravelly loam portions, are good for pasturage, and covered with a short, sweet, natural grass, excellent for stock.

That this statement is borne out by the evidence will be seen on examining it. And first, it will be necessary to determine how much of this whole tract is fit for continuous cultivation and fertile. To describe this fairly, the means of knowledge of the witnesses ought to be considered.

Those who mention on the part of the claimants, the proportion of the different qualities of land, are Fitzhugh, Judge of the Superior Court, and a farmer;

Roberts, farmer on the Cowlitz farms of the Company;

Bills, an old resident on the claim;

Simmons, who knew it well in 1845-6, and was a farmer;

Tilton, the Surveyor-General of the Territory, and an official of the United-States;

Walker, Auditor of the Territory, and a farmer;

The past and present Sheriffs of Pierce County, Tucker and Judson, the last a farmer residing on the plains.

All of these persons, except perhaps Fitzhugh, took occasion particularly to notice these plains.

Beginning with Roberts, who, as Agent of the Company, knew them well, what does he say, on page 79, in answer to Int. 47;

“*Int. 47.*—Is not the soil of the Nisqually Plains very poor, sandy and gravelly, and at least four-fifths of them unfit for cultivation?”



“ *Ans.*—It is so, generally, but it is the four-fifths that give value to the one-fifth, and the one-fifth that gives value to the four-fifths ; its situation lying on the Sound, and being the last of the open prairie to the north, gives it additional value.”

Simmons, a farmer, who for two years was about the plains, employed by Tolmie, and who, born in Kentucky, ought to know good farming land, says on cross-examination on page 38, Int. 10, in reply to a question, as follows :—

“ Is not almost all the soil of the plains at Nisqually almost valueless for agricultural purposes ?

“ *Ans.*—I should say one-fifth of it is good farming land.”

Fitzhugh, who has not observed as carefully, but has travelled over most of them, says, on page 142, in answer to Int. 5 :—

“ I consider about one-fifth suitable for cultivation, good arable land.”

Lemuel Bills, an old resident on the claim, and a farmer, says, on page 57, in answer to Int. 6, cross-examination ; “ About one-fifth is good for cultivation, but for grazing purposes it is unsurpassed.”

The head of the land department in that territory, James Tilton, Surveyor-General, who has traversed the plains in various directions, eight or ten times, and thinks he has seen the whole of the open prairies, judges one half to be of poor quality. When under cross-examination, it is sought to shew by him the poor character of the soil on the tract. This appears on page 10, Int. 2, as follows :—

“ Is not the land embraced in the Company’s claim, as a general thing, of poor quality, gravelly, and of little value, except for pasturage ?

“ *Ans.*—I should judge one half of it to be of that character.”

R. M. Walker, Territorial Auditor for two years after the winter of 1853-4, and again from 1862 to 1863, who never resided on the Company’s claim, but who says, on page 140, Cross-Int. 4 ;

“ *Ans.*—I have never resided on the Company’s claims either at Nisqually or the Cowlitz farm.

“ In passing over the claims at both places, as I have frequently done, I have noticed the quality of the soil and its adaptation for grazing and agricultural purposes. My opportunities for judging

“ those things have been no better than others who have passed over “ it, as much as I have.”

This witness, whose opportunities were good, whose position required him to know the general capabilities of the country, says of the lands he is acquainted with, for six or eight miles to the eastward of the waters of Puget Sound, on page 138: “ There were many portions of these lands where the soil is quite rich and susceptible of being cultivated for cereals and vegetables.”

But while these witnesses establish the general features of pasturage and fertile arable lands, and show the actual proportion between them, there are two witnesses whose means of information place them far before all the others who are sworn for the claimants or for the defence; and these are the two Sheriffs of Pierce County, Egbert H. Tucker and Stephen Judson. The duties of these officers in a new County, as Sheriff and ex-officio collectors of delinquent taxes, by the laws of the Territory, compelled them to call once on all the residents of the County for delinquent taxes. (See Statute Wash. Ter. 1854, page 334, sec. 16.) Judson as Sheriff after 1862, became by law assessor ex-officio, (See laws 1861-62, Wash. Ter. page 6,) and as such assessor, was required to ascertain the names of all persons in such County liable to taxation, and all taxable property therein. (Statute Wash. Ter. 1854, page 332, sec. 6.) These duties made them, especially Judson, well acquainted with every foot of land in Pierce County, the improvements on which he assessed and estimated.

TUCKER—on page 30, in answer to Cross-Int. (6); “ Is not “ almost all the prairie land on the Company’s claim very poor in “ quality, gravelly and sandy?” denies that it is so, and says only a majority of it is inferior land for agricultural purposes, as follows. “ The majority of it is what we would term inferior land for agricultural purposes, but good for grazing purposes.” This statement of Tucker’s nearly agrees with that of the Surveyor General, who thinks one half might be of little value except for pasturage.

JUDSON—at the time he testified as above stated was, and for three years before had been, Sheriff and ex-officio Assessor of Pierce County; when the Nisqually plains, for about 15 years, had been exposed to the settlement of men looking for donation and preemption claims, who, it must be presumed, had with the keenness, com-

mon to American settlers, claimed and taken up all the good lands. He had visited as collector of taxes, the claims of all these settlers, in the discharge of his varied duties, during his three years as Sheriff, when nearly all the good land was probably known; and had also for three years made out the roll of taxable persons and property and the value of the latter; and he is himself a farmer, residing on his farms as well as a sheriff. With all these advantages, and the necessity for knowing all about the matter, he says, on page 21, in answer to the cross Interrogatory, "Is not the prairie land on the claim generally gravelly, with very poor soil:

"It is, large portions gravelly and some sandy; at least three-fourths of it is unfit for cultivation, and only useful for grazing purposes." What the remaining quarter is, that is fit for cultivation is shown in the next cross question and answer.

"*Int. 2.*—Is not the wheat and grass land you have spoken of choice situations near water, and no fair average of the whole claim?

"*Ans.*—The land I have spoken of is about an average of the cultivable portions of the claim."

This is the land spoken of by him on the same page 21 in the examination in chief as follows, which shows also his knowledge of the claim.

"*Int. 3.*—What would a clear title to the Puget Sound Company's claim, as represented by this map, be worth per acre to a person or Company at the present time owning the same?

"*Ans.*—Three dollars and a half per acre.

"*Int. 4.*—Have you a farm on this claim? If so, state how many bushels of wheat, when properly cultivated, you can grow on it to the acre, also, if you have any land seeded to the tame grasses; and if so, its yield per acre.

"*Ans.*—I have a farm on this claim, and can grow from 15 to 20 bushels of wheat per acre when properly cultivated. I have done so. I have no tame grasses on my farm, but my father has upon a farm adjoining mine, which yield from one and a half to two tons of timothy per acre. I know of about forty other farmers on that claim who raise timothy averaging a similar yield per acre.

"*Int. 5.*—State as near as you can the number of oak trees growing on the Puget Sound Company's claim when you first knew it.

“*Ans.*—I should say, taking the claim altogether, about three oak trees to the acre.”

Judson’s one-fourth fit for cultivation, is land that grows 15 to 20 bushels of wheat, and from a ton and a half, to two tons of Timothy per acre, and embraces all of this rich and fertile soil that careful enquiry had found up to 1865.

The arable land of Fitzhugh, the land fit for cultivation of Roberts, Simmon’s good farming land in 1845 and 1846, Bill’s land good for cultivation, is all of the same kind of land, and estimated by all those, at one-fifth of the whole. They, with no such means of accurate knowledge of the exact amount, corroborate Judson. So does Walker with his many portions quite rich. And Tucker, who shows that, in his opinion, much more than one-fourth, nearly one-half, was fit for cultivation, but how much of this was of high fertility, he does not say. So Tilton’s one-half of poor quality, and gravelly, does not define whether the other half is all of the richest soils, or whether he meant to include those of less fertility, like the sandy lands on the farm of Hewitt (page 71 Evidence for the United States), which another witness for the United States, W. W. Miller, describes on page 87, answer to cross-Int. 49, as follows :

“ Judge Hewitt’s prairie land is of a sandy nature, and for pasturage about of an equal value with Dominick prairie, in my opinion.

“ *Int.* 50.—Are the soils of those two localities, in your opinion, of like value for agricultural purposes ?

“ *Ans.*—I presume they are, though I do not deem either of them valuable for that purpose.”

Dominick prairie, a portion of Nisqually plains is thus referred to by this same witness, Miller.

“ *Int.* 43.—What is the extent of Dominick prairie, situate on the Company’s Claim, in Pierce county, and what is the description of its soil ?

“ *Ans.*—At a rough guess, I would say it consists of 1,000 acres and over ; the soil is of a sandy nature, and much better for pasturage than the average of the plains, in my opinion.

“ *Int.* 44.—Is it not also valuable for purposes of general agriculture, when properly cultivated ?

“ *Ans.*—As to that, I am not well informed.”

Tucker and Tilton, might easily, from the form of the cross-Int. they answered, mean to include what they thought was fit for pasturage alone, without explaining how much of the remainder was fertile and rich, how much of moderate fertility.

But there is one fact to those who know the frontier settler, which speaks more loudly than any other as to the fertility of parts of these plains. There are some 150 settlers on these plains; they raise wheat, oats, Timothy hay, and vegetables: what they would be doing with lands that needed manure for these purposes, it would be most difficult to understand. There must be soil somewhere on these plains, fertile and productive, or these men never would have settled upon them. We may then say upon this testimony, that one-fourth of this tract of land is of rich and fertile soil, and fit for continuous cultivation without the aid of fertilizers. Further on in the course of this argument it will be apparent that all of this whole tract of open prairie is as susceptible of cultivation as counties of high agricultural fame in the State of New-York, needing only labor and modern science, to prove the fact to be so.

Of the witnesses for the defence who mention the quantity of good land on these plains there are but two, W. P. Dougherty and T. M. Chambers, whose long residence and occupation, as farmers, qualify them at all to testify in this matter.

The non residents, C. C. Hewitt and S. P. Moses, transient travellers whose official position did not call upon them to examine, or who did not particularly examine the lands, Chapman the resident who did not farm, John H. Dement, J. B. McKibbin, B. H. Hill, A. V. Kautz, Military officers, stationed at Fort Steilacoom, Benjamin Alvord, Military visitor at the Fort, cannot be considered to be witnesses of much value, from their means of knowledge, or habits of observation. They are only valuable as confirming others, and of little reliance when contradicted by those whose knowledge is more precise and accurate, and whose means of knowledge and necessity and desire of acquiring information incident to their occupation, are all greater.

DOUGHERTY, is a farmer of standing, as his position of Probate Judge of the county indicates. He has been a resident since 1851 on the plains, and, as he says, has not a general acquaintance with

them; what that acquaintance was, the following questions and answers from page 101-2 will show.

“*Int.* 5.—Are you well acquainted with the Nisqually Plains, generally?”

“*Ans.*—I am not generally; I have passed from Nisqually bridge to Fort Steilacoom; I have passed from my house to Andrew Burge’s; I have been from Andrew Burge’s to Vanburen’s claim; I have been from my house, by the way of Gravelly Lake, to Fort Nisqually.

“*Int.* 6.—On what part of the plains is your residence?”

“*Ans.*—I live about three miles east of Fort Steilacoom, between that and the Puyallup river.

“*Int.* 7.—On what part of the plains does Andrew Burge reside?”

“*Ans.*—He lives at the place known as Muck, about ten or twelve miles from Steilacoom.”

On page 102, *Int.* 10 and 11 and answers, he gives the result of his observation as follows:

“*Int.* 10.—About what proportion, in your judgment, is at all suited to purposes of general agriculture?”

“*Ans.*—Some lands become exhausted in one year’s cultivation: two-thirds are fit for general agriculture.

“*Int.* 11.—Does this two-thirds include the land which you say is exhausted by one year’s cultivation?”

“*Ans.*—No sir.”

Here is a witness for the United States who, in passing from his farm, three miles east of Steilacoom to that place, and from Steilacoom to Nisqually bridge, has been over that portion of the plain which is poorest in appearance. That it is so is shown by another most intelligent witness for the United States, W. W. Miller, who says on page 77, in answer to *Int.* 18 as follows:

“*Int.* 18.—Would men passing along the road from the Nisqually river to Fort Nisqually, where Mr. Huggins resides, thence around by Lake Segwalitchew, down to Steilacoom, and then back to Mr. Huggins’, by the road leading from Steilacoom to Olympia, pass over, and be able to see an average quality of these plains?”

“*Ans.*—I think he would be able to see nearly, though not quite an average quality of the land. But from the fact of the land being more closely pastured on this portion of the claim, a stran-





“ger would be more unfavorably impressed than he would be with that portion lying to the eastward.”

The answer of Dougherty in spite of the apparent poorness of the land that he has seen, more than sustains the Surveyor General in his opinion that, one half only is unfit for cultivation; and he says, two thirds of what he saw are fit for general agriculture, undoubtedly meaning to include the lighter soils, as well as the richest portions of the tract, and corroborating sheriff Judson.

Passing from this old resident, it is proper here to mention the testimony of the only other practical farmer and resident who testifies for the United States, Thomas M. Chambers, who ought to know what he states about that country where, since 1849, he has been living or farming, and was for some time County Commissioner, previous to, and during 1859, as appears by his answer to Int. 9-12 and 13, on page 128.

He says, on page 128, concerning the soil of these plains generally:—“Some portions are sandy; the greater body gravelly; there is good soil in the swamps, but it costs a good deal of money to drain them to get the soil.

This witness declares the greater body of the plains to be gravel, some portions sandy. He confines the rich soil to the swamps alone, which he says must be drained. Seventy-one years old, as Mr. Chambers is, prejudiced as he is against the Company, with strong personal feelings against their agent, as is shown by his answer to Int. 4, on page 133; unwilling to answer questions that might involve himself in inconsistencies, as is shown on page 132, 133, in his answers to Ints. 2-3, he presents a concentrated type of the feeling and prejudice of most of the settlers on these lands of the two Companies. The testimony shows this old man to be one whose prejudices outlive his failing memory. Yet he describes the great features of the plains, and divides them into sandy, gravelly, and rich lands, and only fails to corroborate the witnesses for the Company in the proportion the different qualities of land bear to each other, and in confining the rich lands to the swamps alone. In this last statement he is simply, not to say wilfully, mistaken; the whole body of the testimony shows that the swales, the river and creek bottoms, and the lands bordering on the lakes, all are rich and fertile, and not the swamps alone; a mistake as to the

quantity of rich land, which his age and feeling scarcely excuse. With all the country north of the Columbia river in 1847 to choose from, this man Chambers decided in 1849 to settle on 640 acres of land on the Nisqually plains, and to spend \$15,000 upon that Donation claim (page 132, Int. 10). As County Commissioner, in 1857 and 1858, he valued every acre of the plains officially at \$3.50 per acre; in 1859 he again officially reduced its value to \$1.00 per acre; in 1860, as a private citizen on his oath, he puts the lands at 50 *cents* an acre in coin.

Further comment on the testimony of this witness, when he differs from others, is needless. But, in leaving him, it should be remarked, that he is the only witness for the United States, except Dougherty, who, from long *residence* on the plains and *occupation*, is qualified to form a reliable opinion of the lands in question. After his unreliability is so apparent, the whole case for the defence, so far as it is based on the testimony of practical farmers and residents, should go with this, its single witness;—for Dougherty, so far as he knows the country, is with the witnesses for the claimants as to the proportion fit for general agriculture.

There is another consideration connected with the fact of the great value of the testimony of resident farmers on the plains, proper to be mentioned here, and that is, that while the evidence of Chambers (whose prejudices must have been known) was relied upon as to the amount of rich land, the other resident farmers who were called as witnesses, A. J. Burge, a farmer on Muck Prairie since 1854, John Bradley, a farmer on Elk plain since 1849, R. S. Moore, a county commissioner, George M. Shazer, a farmer living one mile from the line—all of whom must have known the country well—were not called upon to speak as to the fertility of the lands they tilled, or the quantity of good land.

Instead of these, a long array of army officers and travellers were mustered to point out the character of a country whose soil they never looked upon as farmers, or on whose returns for their labor they had never counted on or valued.

Is it probable that, if the other farmers of the country would have sustained Chambers, they would not have been called as witnesses, or if Burge, Bradley, Moore, or Shazer would have sustained him, they would have been allowed to be silent on that point?

It is apparent that, in the testimony made use of to depreciate the general character of the soil of these plains, and to deny the existence of a fair proportion of rich soil, the defence has seen fit to rely on those who, from want of practical knowledge and opportunity for observation, could only speak of the little that they had seen, and who had not a full and accurate knowledge of any part of the country they professed to describe.

Foremost among the witnesses of the defence, of those who are not farmers and residents, is Wm. W. Miller, a broker and money lender residing at Olympia. He has a general knowledge of the plains, made up from passing on the roads leading across them; some portions he has personally seen. This witness corroborates the witnesses of the claimants as to the existence of rich lands, although, from want of personal knowledge, he does not say that so large a proportion of the whole tract is fertile, as those witnesses do.

This is shown in his answers in his examination-in-chief and cross-examination. On page 77, in answer to Int. 16: "Describe the soil of the prairie portion," he says: "It is almost entirely gravelly prairie, only fit for pasturage, though there are here and there small tracts large enough for gardens, or small fields of very rich lands."

In this answer he does not mention the river bottoms, the swales, the swamps, mentioned by the other witnesses, both for the defence and for the claimants, because he had not personally seen them, or did not at that moment recollect them. This is shown on his cross-examination on page 88, in his answer to Int. 51, where he, with great care, confines his statements to his *personal* knowledge, and recollects the swamp land when called to his mind.

Int.—"Do you not know that there are on the Nisqually Plains many valuable swamp lands, several of which have been drained, and now annually produce large crops of timothy hay?"

Ans.—"Of my personal knowledge, I do not know that such is the case, though I have heard of several of the swamps being drained, and fine crops being obtained therefrom. I have a personal knowledge of two swamp farms that produce good crops of hay and roots."

On the 87th page, his attention being called to it, he recollects seeing on several prairies in low moist basins, good soil in quantities.—

In answer to Int. 47, he says :

Ans. —“ I have at Muck and Tlitlow, and other points on the plains, seen very good crops growing in a rich black soil.” So, too, he recollects from his own observation, though, as he says, “ not well informed as to the general question,” (Int. 45, p. 87), “ One tract of land of the description mentioned in the question, “ consisting of some two or three hundred acres, known as the “ Gravelle claim, which produces good crops of wheat and other “ grain.”

This, with a little addition, is all that a man of intelligence and observation, as his testimony shows, will consent to say about the rich lands he has *personally* seen, on the Nisqually Plains, yet he has seen enough to prove their existence in larger quantities than his answers in the examination-in-chief would lead any one to suspect, and enough to show something besides “ small fields or small tracts of very rich lands,” and thus unwillingly to corroborate to a considerable extent, the witnesses for the claimants,—in so far as he really possesses any certain knowledge.

This testimony is cited here, the first of the non-residents, to show how little actual knowledge of any but the general features of the plains within their view, as seen from the roads or paths while passing, could be obtained by these non-residents, when this man of decided ability, interested in the country and acquainted with it, as he says, could see so little, and could or would recollect so little, until pressed by pointed questions, of the special features of the country, matters well known to its observing and honest resident farmers.

The next witness for the United States, S. P. Moses, like the last, has been in the employment of his government in a civil capacity, and is a non-resident. He has been to Fort Nisqually sometimes; on the plains several times. He “ regards part of it, fertile, and part of it sterile,” and gives to the lands of the claimants a greater proportion of fertile lands than their own witnesses had given, dividing it, by his answer, equally, between the fertile and the sterile.

The cross-examination, page 254, Ints. 3 & 5—shows that his

rides, in his several visits, were by the main road from Olympia to Fort Nisqually, to Chambers' farm seven miles north of it, and to Myer's, the same distance a little east of north, thus skirting the western edge of the plains on the travelled roads; yet, like others, he speaks of the whole plains, the quality of soil, the proportion of fertile and sterile land, while of the whole broad plain, extending far to the east, his eyes had only rested on the small portion of its western edge bordering the tract he rode upon.

The testimony of this travelling witness, who has seen so little, but who knows so much, does not stand alone. In other parts of this case, it will be apparent how confidently opinions are put forward, based on equally cursory observations as those of this gentleman.

The next class of witnesses, who speak for the defence as to the quantity of fertile lands, comprises the Military Officers and soldiers who have been stationed at Fort Steilacoom. It might be questioned whether their training as soldiers had qualified these gentlemen to be good judges of farms and lands, or whether their duties as such, discharged for a part of the time during a serious Indian war, allowed them much opportunity to form a judgment from careful observation. Whatever may be the opinion entertained on these points, they are brought as witnesses, and have testified generally as to the quality of the soil and the proportion of fertile lands.

They were residents upon the plains in one sense. They were stationed at Fort Steilacoom on the western side of the plains, at a place where farm buildings had been erected for some time. From this spot they rode in various directions over the plains, their rides generally extending to the post garden, a spot of great fertility, mentioned by nearly all with respect, to the Company's Fort at Nisqually, sometimes to the witness Gibbs', not far from the garden. Occasionally, one or two visited the lakes; and others, on the main roads, went to Olympia and towards the Columbia River. The surgeons, Drs. Buckley and Wirtz, rode over more of the country than the others, except perhaps General Kautz. All their observations were made on horse-back, and all their knowledge was thus acquired. Their testimony therefore cannot compare, in its means of knowledge, interest in the subject, or fitness for the enquiry, with

that of the farmers resident upon the plains, who, as before said, have every incentive to know thoroughly the subject they testify about. As it is, however, the first time there has been occasion to notice this class of witnesses, it is proper to examine their testimony a little in detail.

Take the first in rank, in that district, Gen. Alvord, a visitor to that country. His knowledge of the plains is derived from the fact, as he says, on page 266 in answer to Int. 4, that he "has travelled them a good deal on horse-back." It appears that he was a Paymaster in the army; that three times a year he went to Fort Steilacoom to pay the troops, going on the travelled road from Olympia to Fort Nisqually to that post, and sometimes by the military road; he has been by the path to the Puyallup, to the post garden, to Mr. Gibbs' claim, to the lakes and two or three miles beyond them. A glance at the map, marked "M," will show the roads he has travelled and the spots he has visited. He has ridden along the western edge of the plains on the main road and the Puyallup trail, across the south-eastern corner on the military road, and a few miles to the eastward in his visits to the lakes, and the two other places mentioned. The whole of the centre and the great western portion of the plains, he has never seen, and yet this witness undertakes to give, without any doubt or hesitation, as Moses has done, a clear and decided opinion as to the soil and proportion of fertile land. In answer to Int. 5, he says:—

"The soil is gravelly; in arable tracts it was very thin and poor, covered with sorrel some seasons of the year; four or five pretty lakes, surrounded with a few oaks; some patches on the stream with a little more fertility."

He includes all the lands in this sweeping opinion, finding no fertile soil at all, but patches a little better than the very poor and thin arable lands. He cannot even admit, that the post garden, which he visited with General Casey, is fertile, although that companion of his rides has given a strong opinion of its great fertility in his answer on page 241 to Int. 7. Further comment on this witness is unnecessary. The only excuse that can be made for him must be, that he had seen but little, even of the country that he rode over.

The next witness for the defence, D. B. McKibbin, Brevet

Brigadier General of Volunteers, is like Alvord in his view of the small amount of land fit for cultivation. The latter, who had only *visited* the country, had seen some patches on the streams with a little more fertility." This witness McKibbin, after his three years residence, page 159, Int. 10, says: "The stony ground, pine timber, and lakes, and what I should say was unproductive ground, that is, ground used once or twice, is eleven-twelfths. I call the ground unproductive because the Puget's Sound Company, after farming it for a year or two, move their farms to another place." Before this, on page 157, he had thus described the proportion of good land; "I suppose a great portion of it can be tilled, but not be productive. I think not one-twelfth part of it would be taken up by any man in a decent country, and that part only moderately good, except some few spots; a very small portion of that one-twelfth."

The witness is not only so well acquainted with the country, that he could have ridden to almost any part of it on the darkest night, but he was a surveyor also, and surveyed the roads and the country for that farmer and geologist, Mr. Geo. Gibbs. For this take his answer to interrogatory 6 on page 158.

It is a misfortune that one so well qualified to ride on the darkest night should, on the doctrine of compensation, not have been able to see during the day. In his cross-examination in page 161, he admits that the post garden was fertile, that part of Muck prairie was "moderately good," and that "the places where loam can wash down into them are pretty good land." Gen. Alvord did not see much from want of opportunity. Gen. McKibbin, by his own statement, had ample opportunity, but did not discover much that was true.

The next witness, Bennett H. Hill, was stationed in the country at an early day, and could not have become acquainted with it after there was any settlement, he therefore could hardly know what portion of it was fit for cultivation or not. He was stationed there from September, 1849, until the early part of 1852. His own personal knowledge is derived "from having ridden over many parts of the tract in question." See page 210, question 3. He says of the plains on the same page, "the soil is most generally sandy and gravelly; I considered very little of it fit for cultivation." This

witness states fairly enough on page 212, "I paid no attention to agricultural pursuits, except so far as is mentioned in answer to Question 9; and I was engaged in attending to my professional duties."

He gives his personal knowledge of the whole subject in his answer to Interrogation 2 on the same page, and fully confirms what was said about the manner in which knowledge of the plains was arrived at by the Military Officers. "The opinion formed and expressed in answer to Question No. 3 was derived from riding along the road leading to Fort Nisqually, along the road leading to the upper crossing of the Nisqually—I mean the road to the Cowlitz farms—along the road leading from Fort Steilacoom to the Puyallup river, to rides over the country in the neighborhood of the post of Steilacoom."

This answer better defines the roads they usually rode upon, and the country they knew, than any made by the other witnesses of this class.

John H. Dement, 1st Lieut, was stationed at the post the same time with Capt. Hill, he rode over the country in the same way; and on page 4 in answer to int. 6; "What proportion of this land, in your judgment, is suitable for agricultural purposes? says, "Not a great deal of it."

He can recollect some of the great features of the country, but confines the fertile soil to the "beds of the lakes and the margin of the streams."

The next witness is Surgeon Wirtz, whose testimony is remarkable in many respects. He says on page 186, in answer to Interrogatory 6, that he has a "general theoretical idea of what land is capable of cultivation," and gives his idea of the amount of such land on the plains.

As if to show how valuable his opinion was, and to prove how well he used his eyes in the rides he took over the trail, in answer to the very next question on the same page, as to his knowledge of cattle and sheep upon the plains, the existence of which in numbers is spoken of everywhere in the testimony, he says: "I lived there about two years, and I never saw, myself—and I used to ride about the country—I never saw any cattle, or sheep, or horses, whatever, on any of these plains; but I know there

“ must have been sheep on the plains, because Dr. Tolmie, chief factor and agent of the Puget’s Sound Agricultural Company, used to send me, when the sheep were cut, every spring, two or three gallons of what are called lambs-fries; and they must have had sheep, or they could not have had them; I imagined that there must have been a considerable number of sheep raised there, though I never saw any.”

A more extended examination of the evidence of this witness will only bring out more clearly, the fact as he himself states it in page 187 in answer to Int. 10;

“ I never took particular observation of it, and I simply now state what my impressions are, though I have never looked at the country with any special view of finding out any particular things either in regard to the productions of the country or timber.”

If he had done so, he could have probably recollected both the existence of sheep from the evidence of his own eyes, and of fertile land in large quantities also.

Surgeon Suckley, too, who appears to have noticed the country more carefully than the last witness, says on page 167 of the proportion of good land, “ as compared to the whole tract, the amount of good land was small.” Further on, page 168, he says: “ there were some strips, however, which were very good.” He testifies, as all the others do, to the general features of the country, and while leaving out morasses and lake borders, states in page 167, that “ there were lines and depressions in those plains frequently long but very narrow, much richer than the ground on the general level of the plateau.” He also states that “ there were swales, and in the vicinities of water courses the land was much better.” This witness has seen fertile lands on the plains, and on page 171, Int. 7, when asked if he did not know that there were large spaces of fertile land he declares that: “ Compared to the whole size of the tract, there were not; but often in a tract of six hundred and forty acres there would be a very handsome proportion of good land, but not in every six hundred and forty acres.” This lax statement corroborates the witnesses who are resident farmers and gives a fair proportion of good land to the whole tract.

August V. Kautz, Bvt. Brigadier General of Volunteers, who travelled the usual roads to the Puyallup and Olympia, who as

Quarter-Master rode about a good deal on duty, and on hunting and fishing excursions, declares page 222, Int. 3, his opinion that only one twentieth of the whole land was fit for cultivation. He finds that "All the grounds that were considered good for farming were in the swales and creek-bottoms and the edges of swamps;" thus agreeing in part with other witnesses as to where the good lands were to be found.

The last of these gentlemen stationed at Fort Steilacoom who speak of the portion of these plains capable of cultivation, is Bvt. Major General Casey, who like most of the others has a better personal knowledge of the country near the main roads, page 201, Int. 6. He has a more favorable opinion of the quantity of land fit for cultivation, and on page 196, at the close of his answer to Int. 10, he says: "If the country were thickly settled, a great part of it " would be cultivated; but our people would not consider more than " one-third of the whole tract fit for cultivation."

Here is a witness who contradicts his fellow soldiers, and does not corroborate McKibbin in his statement, that "the moderately good land was a " very small proportion of one twelfth," nor Kautz's "one twentieth," nor Wirtz's "very small indeed," nor Hill's, "very little fit for cultivation," nor Alvord's, "patches on the streams that show a little fertility." Suckley alone is a little nearer to him, when he says that the "amount of good land is small." Of all these conflicting statements, the last is undoubtedly the correct one? On looking at the testimony together, one speaking of good land on the streams, another in the swales, another in beds and sides of lakes, another in lines and depressions of prairie, others in different places, we get the great features of the country spoken of by all the witnesses, and its division into sandy and gravelly and fertile lands. To reconcile them with each other is not difficult, if it be observed, that McKibbin and Kautz have in their minds the rich prairies of Illinois, while Suckley thinks of New York, and Gen. Casey of New Hampshire. To reconcile this testimony, except that of Gen. Casey, with that of Sheriff Judson and others, it is necessary to repeat the statement before made, which the brief analysis of their testimony shows plainly, that in their excursions on the main roads, and in the neighborhood of the post, and in hunting and fish-



ing, they did not see or try to see, and had no interest in looking for the lands that the Sheriffs had to see to tax; and that farmers from their interest in the subject would notice. On the supposition that they only saw what was near the road or on the places they accidentally rode over, and that they as a general thing confined their rides to the neighborhood of the Fort, as several of them stated, their testimony not only does not contradict, but rather strengthens the evidence of those witnesses for the claimants, who like them divide the country into pasture and tillage lands; but who, as has been shown before, clearly place the amount of fertile lands suitable for continuous cultivation at one-third to one-fourth of the whole tract. To be classed with these military witnesses is Hugh A. Goldsborough, who, though not an officer, was a resident of Olympia, and connected with the military post at Steilacoom for a time; a positive and prejudiced witness, whose declarations are shewn by the cross-examination to be of little value. What has been said with reference to the work of careful observation and the necessity for it on the part of the officers, must be applied with equal force to this witness.

In this review of all the testimony, civil and military, offered for the defence, bearing on the relative proportions of fertile and other lands on those great plains, and applying to it even the familiar rule, that negative testimony of what was not seen cannot disprove the existence of that which is supported by positive proof, and it is a fair and inevitable conclusion from the testimony, that at least one-fourth of this tract is fertile, tillable land, and of good agricultural quality.

It will next be proper to consider of what the remaining three-fourths of this vast tract consist.

The swales, the river and creek bottoms, the lines and depressions in the prairies, the swamps and their edges, the borders of the present lakes and the beds of the old ones, and the low ground, all these comprise the lands that are fertile and rich, being included in the definition of good rich lands, that make up one quarter of the entire tract. It has been before observed that the larger portion of the plain has a soil of gravelly and sandy loam, some portions of

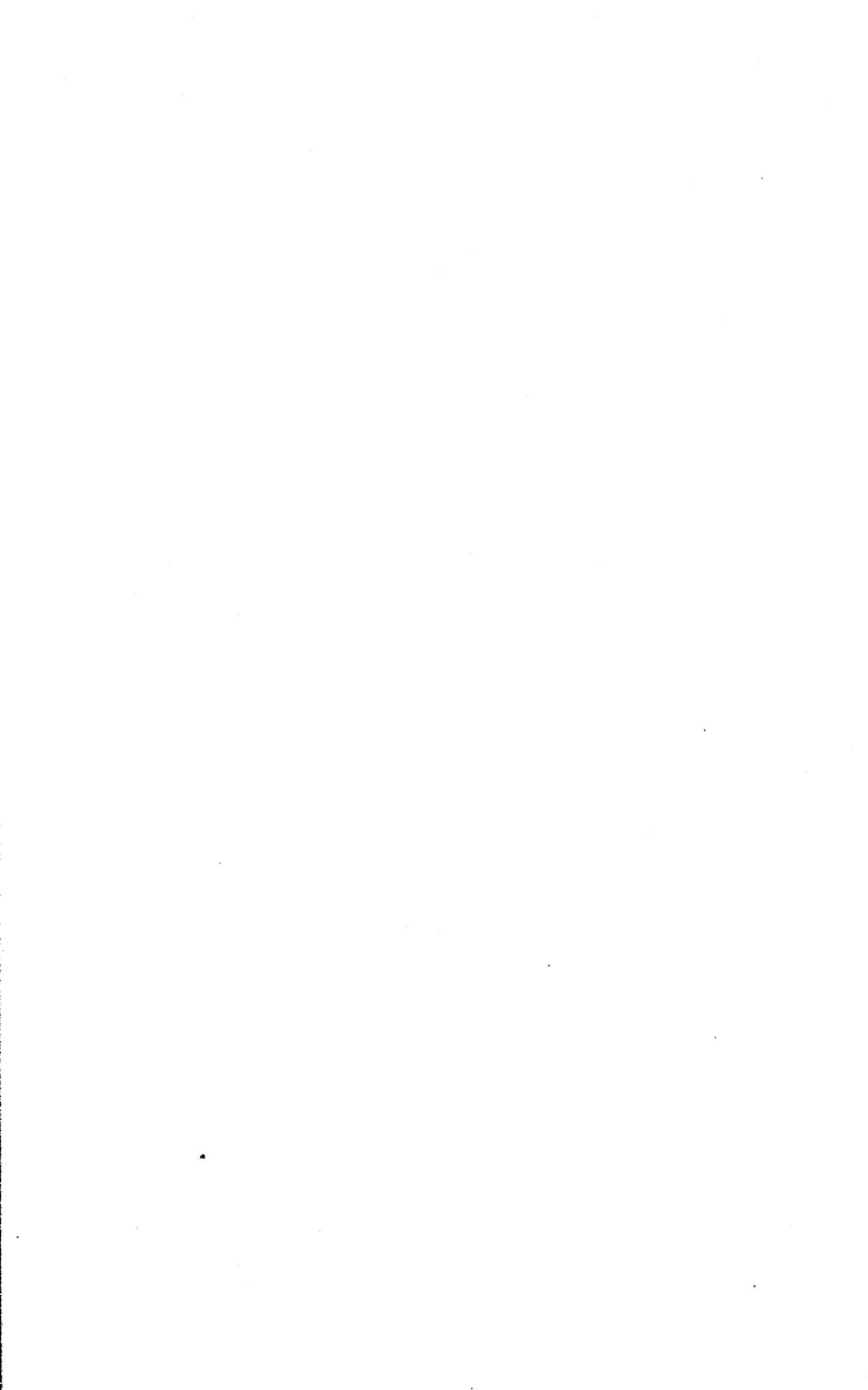
which are incapable of continuous cultivation without the aid of manures while others have more natural fertility, yet need their application in process of time.

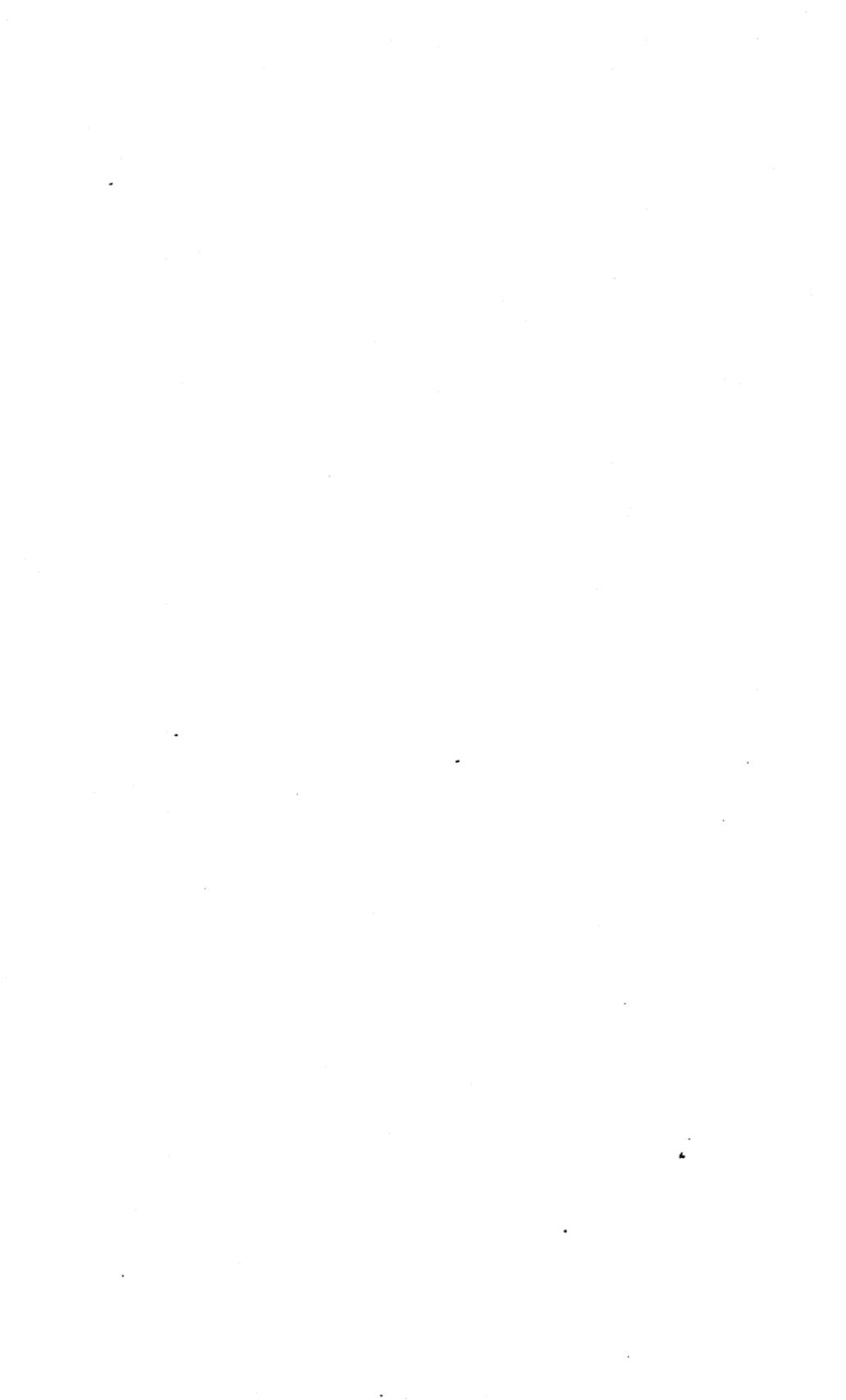
It is not contended here, that the larger portion of this high prairie is such that in a newly settled country, where the first comers seize upon the rich lands, it would at once be farmed and cultivated, nor that it is land that those used to the alluvials of the Mississippi Valley would call agricultural land. But it is believed that it is shown by the testimony, that the whole of it might be farmed and cultivated, and that it has value for agricultural as well as pasturage purposes. The better portions of this kind of prairie are now cultivated. The Gravelle claim, a witness for the defence says he knows. It consists of some two or three hundred acres, producing good crops of wheat and other grain. This is high open prairie, and no small tract of low ground.

McLeod, a witness for the claimants, also has his personal experience for fourteen or fifteen years to give as to the value of the prairie land. He says on page 66, Int. 6—"I have farmed from fifty to sixty acres of the prairie lands yearly for the last fourteen or fifteen years. It has averaged about twenty bushels of wheat and thirty bushels of oats to the acre."

These are special instances of cultivation. There is another and larger tract of sandy prairie already mentioned, which is good for cultivation. That is the Dominick Prairie of one thousand acres of a sandy nature, mentioned in Miller's cross-examination from page 8. He thinks it is good for pasturage, and on page 87 in answer to Ints. 48 and 49, when asked how it compares with the land of Chief Justice Hewitt, which he says he is acquainted with, he says: "Judge Hewitt's prairie land is of a sandy nature, and for pasturage about of an equal value with Dominick Prairie, in my opinion." When asked if "the soils of the two localities are of like value for agricultural purposes," he says—"I presume they are, though I do not deem either of them valuable for that purpose." And on page 79—"In Thurston county there are from twenty-two thousand to twenty-six thousand acres of open prairie land, nearly all of which is of the poorer gravelly kind known to this country."

Judge Hewitt, however, on page 72, in a series of questions and





answers, from Interrogatory 6 to Interrogatory 13, gives a different account of this prairie farm of his, that is like the Dominick Prairie, and of Thurston county prairie land, which is of the *poorer gravelly kind known to the country* (the term applied to the plains by the witness Miller) and intended to include all the prairies at the head of the Sound.

He says it produces grain, grass, pasture, fruit, and vegetables; twenty-five bushels of wheat, forty bushels of oats, and one ton and a half of timothy hay to the acre, also three hundred bushels of potatoes, and six hundred bushels of ruta-bagas. Cherries and plums thrive extraordinarily well.

This is the result on Thurston County Prairie of enclosing and properly cultivating land. That this land would wear out in a few years cultivation without manure, and if then left to itself exhausted, unfenced, and overpastured, it might be made to appear like a desert, instead of the fine garden the Chief Justice pictures, is probable. Miller thinks of it (p. 88), as witness after witness for the defence professes to think of the Nisqually plains—that it is not “valuable for cultivation,” but the Chief Justice knows better than that. He and McLeod find “the poor gravelly prairies” of value for crops. Gabriel Jones, on the same kind of Thurston County Prairie, five miles from Olympia, farms upon it and sells acres of it, “*similar* in quality to that of the Company’s claim, for five dollars an acre.” This answer he gives to Cross-interrogatory 4 on page 41, “as to the market value of good *farming* lands in Thurston County for the last three years.” Jones thinks, as does Hewitt, that his prairie can be farmed, and that he has sold land *similar* in quality to the Company’s. These witnesses are witnesses to their own experience; they have tried the so called sandy, gravelly prairie, and know it can be farmed. The Sheriff, Tucker, evidently thinks the body of the lands of the prairies, though not *good western* agricultural land, still capable of cultivation, when he says, on page 30, contradicting the words sought to be put in his mouth by “*Int. 6*;—Is not almost all the prairie “land on the Company’s claim very poor in quality, gravelly, and “sandy?” “*Ans.*—The majority of it is what we would term “inferior land for agricultural purposes, but good for grazing purposes.” This answer gets at the truth concerning that portion

of the plains called high prairie; it is capable of cultivation, but inferior, and not first class land.

J. W. Smith makes the same statement, when he says the soil of the prairie portion is gravelly, and not *well* suited for agricultural purposes." The witnesses who have been cited to show this prairie land capable of bearing good crops with proper care and attention, with an exception or two, are men who have cultivated this unpromising high prairie, and it is plain that they have found it agricultural land. In addition to those, there is a witness for the defence who gives the real state of the case, and proves that when careful cultivation shall take the place of wasteful improvidence, when the farmer has to confine his labors to a limited tract, and cannot crop his land until he nearly destroys its productiveness, and then move his fences to an untilled spot; that then this prairie will equal one of the best agricultural sections of the State of New York; for Surgeon Suckley says on page 172: "I am acquainted with Orange, Sullivan, Dutchess, and "Ulster "counties, in the State of New York, very well, besides being "acquainted somewhat with others. It is my belief and conviction, "that twelve miles square of Puget's Sound land claimed by the "Company is naturally of greater agricultural value than a tract of "land of the same size in Dutchess county, New York."

That the lands of Dutchess county, New York, are cultivated and tilled, and are valuable, needs no argument here. And on this deliberate comparison, made by an intelligent witness, relied upon by the defence to show the value of the Nisqually Prairies, the claimants may well rest their case and insist that the twelve miles square of Puget Sound land has an agricultural as well as a pastoral value.

That this high prairie is capable of cultivation is shewn everywhere in the testimony. It will be noticed that some of the witnesses relied upon by the defence, to reduce the value of this land, have but *little* personal knowledge of any portion of the plains, except that near the main roads and in the neighborhood of Forts Steilacoom and Nisqually.

As has been before said, near the former place was land worn out by cultivation, depastured to its utmost extent by the stocks of the garrison, kept near it at all times, but especially during the

Indian war. In the same condition was the high prairie around Fort Nisqually, and that near the road between the two posts. This worn out, overpastured section could not give to a daily observer an exalted opinion of the plains, nor would any one get a fair opinion of them who saw them from the main roads. This, even the witness for the defence, Miller, states on page 77, in reply to Interrogatory 17, when asked as to the difference of character in the different portions of the plains," and in answer to Int. 18, before referred to.

From these men riding on the main road and other travelled roads on the edge of the plains, stopping at the Forts, and from those residing at Fort Steilacoom, opinions are called out as to the agricultural capability of the whole tract; while, as before observed, when discussing the proportion of really rich land, the only resident farmers called as witnesses, who were asked as to the character of the soil, were Chambers and Dougherty.

A. A. Denny is one of the other class of witnesses, referred to above, (see his answer to cross in terrogatory 1 and 2); S. P. Moses, already mentioned, is another; Chief Justice Hewitt is another, (see his answer to cross interrogatory 14); E. J. Allen also, who usually travelled on the road leading from Fort Steilacoom to the crossing of the Puyallup, and on the road to Olympia. Several of the military residents, Dement, Alvord, Casey, and B. H. Hill, had their opportunities for observation limited, as stated before, to these roads, and the neighborhood of Fort Steilacoom. To these may be added Goldsborough; and all of them might easily, from the portion of the plains they saw, consider them rather poor lands, and yet they do not deny to them some agricultural value. Denny speaks of it as "rather poor quality of land;" Moses, who speaks of it "about Fort Nisqually," describes it as "inferior, gravelly, and well exhausted;" Allen considers "the prairie generally gravelly, very leachy, and continued cultivation decreased the crop raised, as the gravel worked to the surface."

The little value of the testimony of the military officers, who took no interest in, and paid no attention to farming, has been already shewn, and it would be useless here to cite their opinions.

Of the civilians called to this point, the first, George W. Lee is no farmer; in no portion of his varied career was he ever a farmer, nor

does he pretend to know anything about farming. He was a compositor in a printing office, in the town of Steilacoom, from 1854 to 1858 (page 293). From 1855 to the summer of 1857, there was an Indian war in the country back of Steilacoom, on these very plains, yet this journeyman printer, whose business was in the town, is brought up to testify to his acquaintance with the tract, and that "he would not waste his time in attempting to cultivate it (this prairie) for agricultural purposes." This witness testifies on a subject he plainly knows nothing of, and about a country that he cannot have examined.

The next civilian, who resides on the claim, though not a farmer, is John B. Chapman (p. 145) who took a claim on the shore with a view to building a town. Examining the question, he knew all about the legal rights of the Company, and knew that his town site was not included in the claim (p. 153). The fertility of the back country, which usually influences those who lay the foundations of future commercial emporiums, did not enter into Mr. Chapman's consideration. Lawyer, surveyor, and speculator in cities, as he swears he is, practical farmer as he clearly is not, on his own record as set out in his deposition, we leave this self sufficient and prejudiced old man without further observation. His testimony, though corrected by himself after careful inspection, is so rambling, feeble and disconnected, and so plainly animated with a dislike to the company whose rights he had decided against, and whose agent "would not agree on a case to try the title before the Supreme Court," (p. 164, int. 2.) that he ought not to be relied upon when he contradicts other witnesses, whether called upon by the same side or by the claimants.

A prominent witness for the respondents in this part of the case, is Mr. George Gibbs, not a practical farmer, but one of the clerks to this commission, who has also testified in the case of the Hudson's Bay Company. The animus of this witness, his conduct in connection with that claim, his peculiarities of memory, and his repeated corrections of his testimony, have been fully commented upon in the argument of that case, to which in order to avoid repetition reference is here made.

His testimony in this case is of the same character. His cross-examination on pages 340, 341 and 342, shews that his prejudices



are not less strong, and that his labors in defence of the United States against the claim of the Puget Sound Agricultural Company, have been no less marked than those he exhibited in the case of the other Company. He has put into his evidence in this case nearly all his varied experience, his knowledge as a geologist, his experience as a farmer, and his opinions as a lawyer.

As a geologist and would-be farmer, he took a claim on this very tract of land, and had the double mortification of finding his geological knowledge practically at fault, and that trespassing, or, to use his own words, *squatting* on another's land, had brought no recompense to repay him for the commission of that offence with which he was so ready to charge the Company, and hence perhaps an increase in the feeling of bitterness which he manifests.

The history of his experience on his claim may be thus given. At the time, he was living at, and connected with the Military Post, from which he did not care to roam far; he desired to select for his claim the nearest spot to it, and disregarding or rather denying the rights of the Company, made choice of a place about a mile from the Post Garden. Here, under the donation law, he took the claim early in the spring of 1854, and duly notified the register. In the spring of 1855, he changed the lines of his claim, and gave another notification to the register, under oath, from which his occupation dates. Whether he made this oath on the 16th of February or not, he cannot tell. In the summer of 1855 he surveyed the military road. In the fall of that year he was on the claim for a very brief period, then went to Vancouver, and at his return, the following December (p. 323) he found the family of Mr. Lane in the house. After this he never slept a night on his claim (p. 324). In his corrected answer to interrogatory 5 on page 313, he says he gave up his residence on the plains in 1856. On page 324, Interrogatory 15, his own statement is thus given, "When I mentioned having resided on the claim for three years from the spring of 1854, I was thinking the boundary survey first came in 1857. I should have stated two years."

Mr. Gibbs has since made the final proof by oath required by law of his residence upon and cultivation of this claim, for *four consecutive years* from some time in the spring of 1855 (the time he made his second statement of claim), to 1859: for this see his answer to *Int. 27*, page 326. *Int. 28*, page 327, with *Int. 16*, page 324.—

This final proof, by oath, was made to meet a provision of the Donation law, that a claimant of land under it, must live upon and cultivate the same for four consecutive years." (See Act of September 27th, 1850), and in a subsequent Act (17th July, 1854.) there is a provision "That no sale shall be deemed valid, unless the vendor shall have resided for four years upon the land." Under this section, after four years' consecutive residence and cultivation, the right to sell the occupant's claim is guaranteed. Mr. Gibbs has sold his claim. How far he has complied with the requirement of four years' consecutive residence, to which he has sworn, his testimony quoted above will show. For my part, I cannot discover any semblance of residence for more than two years at most, and no such consecutive residence at any time as would justify a man in making oath that he had complied with the requirement of the law.

How far he is an interested witness is apparent. How far a man of intelligence and education, a lawyer by profession, without the excuse of ignorance which other settlers could plead, has earned that title of *squatter*, which he so liberally bestowed upon the Puget Sound Agricultural Company, is also apparent. His experience on his farm forms the staple of his evidence. He professes to have tried and found that he could not succeed in making a profitable farm out of his claim. How much work he did himself, what attention he gave to his farm, how long he actually lived upon it, and what reasons actuated him in taking it, are detailed in his answers to Interrogatories 8, 9, 10, 11, 12, 13, 14 and 15, on page 322, Int. 15 on page 324, Int. 43, page 329. He says at first, in page 313, in answer to Int. 5, as to his acquaintance with the tract: "I am well acquainted with it; I first went there early in the spring of 1854, and lived there with intervals of absence *three years*,"—afterwards corrected by his answer to Int. 5, p. 324, to two years.

Mr. Gibbs during those two years was employed in the summers of 1854 and 1855 on the roads from Steilacoom to the Cascades, and from Steilacoom to Vancouver, which would give him the acquaintance with the country in the neighborhood of the Post common to the officers and others living there.

It would be an unprofitable consumption of time to follow Mr. Gibbs step by step, through his long deposition. It is, of course, as strong against the Company as he could make it. His general

assertions are sweeping and unqualified. The land, of course, is sterile, exhausted and worthless. It will produce nothing but sorrel. Yet he at once betrays himself when he is forced to explain and to particularize.

Take, for instance, his experience on the farm that others took care of for him (p. 315.) He got one crop of wheat from 25 to 30 bushels; the next year it did not pay for harvesting. He tried oats and rye; the heads of the rye did not fill; the oats he cut before they were ripe, on account of grasshoppers. Of potatoes and peas he got very fair crops, and timothy and clover grew pretty well.

Now many a farmer on the hills of New Hampshire or in Duchess County, who does not do his own work, nor stay at home in the summer to see it done, could tell a worse story than that, of wheat that did not pay, and rye that did not fill its heads, and of invading grasshoppers; and would be content with good crops of potatoes and peas, and fields of timothy and clover growing "pretty well."

He planted an orchard of some 200 apple and pear trees, but it did not come to anything; although Judge Hewitt's apple trees grew and flourished. Orchards neglected are apt to die out on the lands of the Atlantic, as well as on the Pacific side of the continent.

On cross-examination Mr. Gibbs admits that his statement, that after one or two crops gravel only is left, and is so thoroughly exhausted that it will produce nothing but sorrel, is a mistake. And his answers to the cross-interrogatories 89, 90, 91 (p. 327), expose the incorrectness of his statements in relation to the capability and condition of the land.

It is, indeed, not too much to say, that these statements are utterly unfounded and perverse. For he is made to confess that he had fourteen or fifteen neighbors who have taken claims of from half to an entire section; he admits they have built houses, put up fences and cultivated the land to a greater or less extent. Many of these must have taken their claims since 1854, for Gibbs says at that time he had the whole country to choose from, and they do not appear to have abandoned their lands. Here then, we have in one neighborhood *fourteen farms* with lands *capable* of cultivation; his own farm, too, bore its crops, and was not exhausted by one or two years cultivation.

Thus from the evidence of this witness so eager to sweep away with broad assertions the rights of the Company, who pronounces all its lands sterile, yet has a crop raised upon them ; who speaks of exhaustion in one or two years cultivation, and can only point to spots, how long wastefully cultivated he does not know ; from his evidence even, the fact is manifest that the body of the land is capable of cultivation ; whether more or less continuous, is dependent on the skill of the farmer and the judiciousness of the method followed.

To this part of the case also belong the travelling Oregon Commissioners, Applegate, Rinearson and Carson ; they too have been remarked upon in the argument of the other case and their testimony, and the weight to be given to it, considered. So far as the report is concerned it is utterly worthless.

Submitting their case to one tribunal in the full confidence of its merits, it cannot be expected that the Claimants should meet and answer here, the report of another tribunal made upon *ex parte* statements not under oath, by men whose chief qualification for their office was their notorious partizanship.

The personal knowledge of these men is derived from a drive over the main Olympia road, on a portion of the Western edge of the plains, from the crossing of the Nisqually to Fort Nisqually and the town of Steilacoom, and a return from Steilacoom by the garrison and the Olympia road. Their route is delineated fully on the map marked (M), by which it is apparent how very little of the whole tract they saw and examined. How that particular section of the plains would appear to an observer, Miller has stated in a quotation from his testimony already made. It was the very portion of the tract where, if upon any, the worn, over-cropped, and depastured land was to be found.

They say they examined a farm in the possession of the agent of the Company, (the farm at the Company's Fort). One of them says "our personal examinations were in the vicinity of the farm extending north no farther than the town of Steilacoom."

On this *personal* knowledge of one small portion of the tract, and a rapid drive on the road to Steilacoom, these three men made a joint statement as to the character of the soil of the whole tract, and deliberately swore to it. By the side of this report, the sweep-



ing testimony of General Alvord and other officers, of Simpson P. Moses, and other witnesses, who saw more of the plains than these men did, but still only a portion, and then described the whole; and even that of Mr. Gibbs himself, loses its apparent audacity, and seems to be founded on careful and extended observations.

They say (p. 18): "The surface has evidently been swept by a mighty flood, which has carried away soil and subsoil, if there were any." There is here a knowledge of the past set out in a flight of eloquence that geologist Gibbs did not venture upon; soil and subsoil alike have vanished, and this statement is sworn to as a fact; there is no grass; the report goes on to say; "The shingly plains may once have had a slight covering of grass." And Applegate on being asked in *Int.* 110 page 37: "Is not the soil of Nisqually Plains a black vegetable mold, mixed in very varying quantities with gravel in some parts, and sand in others, and from one to several feet deep?" answers.—"The lands in the vicinity of the Sound, properly termed plains, have upon them very little soil, not enough, except in basins or depressions, to support continued cultivation."

Carson and Rinearson are simple echoes of Applegate, and the cross-examination elicits nothing of importance on the character of the soil.

The depositions of these men rest upon so slender a basis of knowledge, and are so thoroughly dishonest, that they are left without further observation to the judgment of the Commissioners. The claimants protesting against the accordance of any consideration to them in deciding upon the case.

Referring to the whole body of this testimony as to the capability of the high prairies for cultivation, it may be said that no witness throughout his examination has denied their capability; but all those who have mentioned them—except perhaps George W. Lee, who knows nothing, and Chapman, who recollects but little—have admitted in some of their answers their capability of cultivation. Even those who had seen the worst part of the whole tract, the western edge and the neighborhood of the two posts, admit this.

Add to all this the further fact, that Thurston County on the same kind of poor gravelly prairie open to settlers, and free from the question of title, which rendered settlers on the Nisqually.

plains subject to the charge of being squatters, is one of the well settled counties of the territory. The open prairie land in its limits is owned by individuals, and pretty much fully stocked, (Miller p. 79, *Int.* 5).

The question, therefore, whether this high prairie is capable of being farmed, seems settled; and further, it appears that the gravelly and sandy portions alike can be cultivated with success; that the poorest lands will bear crops, and the question of how long they will continue so to do, depends on the method of cultivation.

Susceptible of cultivation as the great body of this high prairie is, its value however at the present time is greater in another form. Its nearness to a market and to a point where the produce of Oregon and Southern Washington must be carried by water, make this whole tract most valuable for pasturage. On these plains, from which as wanted, supplies can be taken, are pastured the stock that is to be transported by water to Victoria and British Columbia, and even to posts on the American side of the line. Here cattle are driven from other sections, from two to four hundred miles distant, and are kept on account of the superior advantages for pasturage, from one to twelve months, to restore their condition, (Hutchinson 131, *Int.* 6; *Int.* 5 and 7. Miller 82, *Int.* 17). The whole pasture lands are insufficient to supply this demand; much more could be used. (Hutchinson p. 131.) Of this stock, some 2,400 head of cattle, when suitable for market, and some 8,000 to 10,000 head of sheep, are yearly shipped to one port, Victoria. (Hutchinson, p. 131.) The amount that goes to British Columbia and other places is not known.

Such has been the profit of pasturage, that the attention of the settlers has not been called to the fact that the body of this land was something more than mere pasture land. As such, however, so great was its value, and so easy was it to be made profitable without labor, that little attempt has been made to cultivate it.

When the pasturage of one large animal was worth one dollar a month and twelve dollars a year, and that of each sheep in due proportion to that sum, it was not to be expected that agriculture would flourish except on the very richest lands. (Miller 83, *Int.* 24. Hutchinson 131, *Int.* 8. A. J. Burge 108, *Int.* 19.)

These plains can easily support from 5,000 to 6,000 head of cattle and horses, and from 8,000 to 10,000 sheep. In 1852 an inventory then made shewed the number of cattle to be 6,777, and of sheep 6,842. There was no inventory of cattle in 1853, the sheep on hand were 8,299. (Tolmie 110, *Int.* 14. 124, *Int.* 66.) In 1850, the estimate is 5,000 or 6,000 head of cattle, 275 head of horses, and between 9,000 and 10,000 head of sheep.

These are special statements and facts that show these lands valuable for pasturage, independent of the general statements of other witnesses.

The Surveyor General Tilton has reported to his government on this point in the Documentary Evidence for the United States, page 302, that "it (the Nisqually claim) is considered admirably adapted to the raising of cattle and sheep."

Sheriff Judson shows that the grass itself affords good pasturage in the following question and answer :

"*Int.* 3.—Do you find as good beef and mutton raised by feeding on the native grasses growing on the Company's claim as is usually raised in the country when fed upon the tame grasses?"

"*Ans.*—I do ; the native grasses are quite as good for rearing and fattening stock as the tame grasses."

Associate Justice Fitzhugh says, on page 142, of the plains : "The great body of the remainder is well adapted for grazing, being mostly covered with short, natural, sweet grasses, affording good pasturage for stock."

Walker, Territorial Auditor, says of the claim on page 135 : "The balance of the prairie land is very good for grazing purposes."

Sheriff Tucker, on page 30, pronounces the plains "good for grazing purposes."

Sheriff Judson on being asked on page 22 : "*Int.* 5.—Do you not consider this tract of land much more valuable for grazing purposes than any tract of land of like extent lying upon the eastern shore of Puget Sound ?

"*Ans.*—This is much the most valuable tract of land lying upon the eastern shore of Puget Sound for that purpose."

Lemuel Bills, an old resident on the claim, "a farmer and lumberer," as he calls himself on page 57, says, "for grazing pur-

poses it is unsurpassed by any claim of like extent in the State of Oregon or Territory of Washington."

Edward Huggins, an agent of the Company, for a long time conversant with the plains, and agricultural manager for the Company, says on page 95: "I consider the claim very valuable for stock raising purposes."

Tilton's report is made in December, 1859. Fitzhugh can speak of the county up to 1863, and Walker has a knowledge of the plains as late as the fall of 1863. All the other witnesses speak of the present time as well as of the past, their knowledge coming up to the time of the examination.

The witnesses called for the defence on this question of pasturage, are most of them those whose testimony has been commented upon before, and the value of it noticed.

The military officers, Generals Casey, Kautz and McKibbin, Surgeons Suckley and Wirtz, Messrs. Goldsborough and Gibbs, connected with the Fort, old Mr. Chapman and Mr. Denny, the former delegate from the Territory, all these witnesses speak in general terms, and except Mr. Denny, have no late acquaintance with the plains, having left there several years ago.

Mr. Chapman in answer to the question on page 162: "Was not this fine light grass you have spoken of good for pasturage?" says, "It was first rate. But qualifies the answer on page 156 in this form: "In a state of nature it is, but if used much it is destroyed."

Denny thinks "they afford a good and valuable pasturage for a short time, but are not durable."

As to their being worn out when these witnesses spoke of it, Chapman before 1853, and others since, that is disproved by the simple fact that they were good for pasturage in 1865, and were not then worn out. Thirteen years have passed since Chapman knew them, and yet in 1865, the pasturage was not worn out or destroyed, as he had prophesied it would be. This answers as to their being worn out.

As to the witnesses McKibbin, Suckley, Chapman, Goldsborough, Denny and Wirtz, they, in a greater or less degree, sustain the witnesses for the claimants. General Casey's want of general knowledge has been mentioned. Of General Kautz, it can only be said

that his opinion must have been formed from the worn out and depastured lands in the neighborhood of the two forts, and not from the general country. The facts are so strongly against him that this is the only excuse that can be offered for him.

There are two witnesses for the defence, on this subject of pasturage, that afford so clear an illustration of the value of different kinds of testimony, that they are quoted here together.

These two are Maximilian Mogk, an enlisted soldier stationed at Fort Steilacoom from 1855 to 1857, page 271, *Int. 3*, and A. J. Burge, a farmer and stock breeder. Mogk, a German by birth, came to the United States at 19 years of age. Before his enlistment in the army, he was employed "in a store where liquor was sold by the glass," and is now a bar-tender, (page 276, *Cross-Int. 4 and 5*). He carried a mail to Olympia in 1855, and had seen the country near the main road often. He describes the grass upon it (page 279) as "very clumpy, short and sour."

Of course sour grass does not afford valuable pasturage for cattle, and this soldier knows that fact, and has stated it to injure the value of the pasturage. He has testified either to that which he knows little or nothing about, or which he knows to be untrue. His own testimony would contradict him, for he says on page 273, "There were a great many cattle on the plains and in the woods." A short sour grass is not a vegetation likely to support a great many cattle.

After this testimony for the defence, it is well to look at the evidence of the other witness called on the same side, as to the pasturage.

A. J. Burge testifies not in general terms, but with the personal knowledge and the thorough acquaintance of one interested in the subject of which he speaks. That he is not prejudiced in favor of the Company, this extract from page 167, *Int. 11*, will show:

"How large a piece of ground have you enclosed on the Company's claim, and now used by you for grazing and other purposes?"

Ans.—I don't give the Company credit for having any claim; I have from 800 to 1,000 acres under fence, perhaps more.

Burge speaks of the pasturage afforded by the plains when enclosed, on page 108, in answer to Interrogatories 12, 13, 14 and 15.

This evidence establishes the fact that the natural grass was good and not sour, as it afforded beef of good quality. It shows that this grass afforded pasturage the whole year, and it further shews that one grown animal would be supported the *year round* on eight acres of enclosed land; and further, on the same page, *Int.* 19, that it is worth "one dollar per month, the year round, per head, to pasture grown cattle and horses within the enclosures upon Nisqually Plains."

This gives twelve dollars a year as a rental for eight acres of this prairie, or a rental of one dollar and a half per acre per year.

Miller's enclosure of 200 acres of Thurston County prairie, "somewhat set in sorrel," which "after the summer had partially gone, he rented for 200 dollars in coin, and the grass on which 80 head of cattle were expected to eat out in two months, was not so valuable in its rental as the Nisqually prairie." (*Miller 84, Int.* 32 and 33.)

On this question of pasturage, the farmers and stock raisers, the owners of land and the butchers, the men who have to deal in cattle and horses and pay for their pasturage, the men whose living depends on their knowledge, may be relied on. They have sustained throughout, the official reports of the former surveyor general, the territorial auditor, the associate justice of the Supreme Court, of the farmers, and of the Company's agent when he says, "I consider the claim very valuable for stock raising purposes;" and of Bills when he says, "It is unsurpassed for grazing purposes by any claim of like extent in Oregon or the territory of Washington." And they exhibit even more clearly than has been done before, the really little value to be given to the testimony of the military witnesses and those connected with the post at Steilacoom, and of many of the travelling witnesses when testifying on a matter in which they had so little interest and such slight special knowledge.

The woods around the plain are shown to be valuable in summer from the pea vine that grows luxuriantly among the trees, and the coarse grass found in them, thus affording a change of forage, and are also necessary to the stock as a shelter both in summer and winter. (*Miller, page 85; Williamson, 112, Int. 6.*)

There is a matter that has been brought prominently forward for the purpose of shewing this pasturage to be of little value,

or if not for that purpose, it is difficult to tell why it is put into the case.

It is said that sorrel is abundant on these plains. That it is found on the plains, is not denied, and it is equally true that it is abundant in parts of Oregon, and on all the other prairies near the sound in Washington territory. Miller found it in his enclosures in Thurston County, and Chief Justice Hewitt had "plenty of it," on his place. That it did not destroy the fertility of the soil is clear, for the same witness, on being asked on page 71, "Is there as much now," says "There is not as much. The reason is, the timothy grass has run a portion of it out; and a great portion of the balance has been killed by good cultivation."

That some of it does not to any extent injure the pasturage is equally clear, for Miller testifies on page 83 that he rented the pasture of about 200 acres for two hundred dollars in coin, this "was the *ordinary gravelly* prairie of the country, and was somewhat set in sorrel." Dr. Tolmie, whose statement is to be relied upon, says (p. 122, Int. 58): "At Nisqually sorrel has been on the increase since the Company were no longer able to prevent the eating out of the pasture. During the past summer I rode over a great part of the Nisqually Plains, and noticed that generally, but more especially within enclosures, the grass was better than it had been for years before 1859, and this I ascribe to the smaller number of stock now ranging in the Nisqually Plains."

In 1859 the grass was better than before. Sorrel was not so bad as it had been. If it has injured the pasturage to any extent the loss of value occasioned by it, if any, is not to be deducted from the price to be paid to the Company, as its increase was owing chiefly to the action of trespassers under the donation laws of the United States.

That the Company did not introduce it is shown by Dr. Tolmie's evidence on page 123, brought out on cross-examination.

For whatever purpose this testimony about sorrel has been brought into this case, it is clear that it should have no effect, or be considered as at all affecting the value of the lands in question.

This full examination of all the testimony bearing on the question of pasturage seems to leave no doubt that the native grasses by which these plains are covered afford a good nutritious pastur-

age, valuable for the fattening and raising of horses, cattle and sheep, during the whole year, and are as good as the cultivated grasses;—and that the woods afford a change of food and are valuable as a shelter in summer and winter. The severe winters with snows, that sometimes though seldom occur, must be held to make an exception to the statement, that the grass affords continuous pasturage during the whole year.

VALUE FOR CULTURE AND PASTURAGE.

After having thus gone over the testimony bearing on this tract in its proportions of rich and fertile lands, and lands capable of cultivation, and upon its pasturage value, the question follows, what price should be paid by the United States as a proper compensation for it. The first view to take of this question, is that of its value, in the opinion of those who lived upon the tract, and who best knew what it was worth, and of those who were officially called upon to know something of it; and here we find a concurrence of testimony that seems beyond controversy to establish for the tract more than the value set out in the memorial.

The acting Surveyor General of Washington Territory, Edward Giddings, the officer in charge of the surveys of the public lands, who from the official position he occupies must know more than any private citizen can of the general and comparative value of lands in that Territory, has given his opinion—a *quasi* official one—of their value, on page 55 in answer to *Int.* 3; “It is worth from four to five dollars an acre, for farming and grazing purposes, in my opinion.”

Isaac W. Smith, Deputy Surveyor, Register of the Land office at Olympia, and Agent for the Light House Department, is careful in his answer on page 135; he puts the value “of the prairie lands and bottoms at from four to five dollars per acre.” On page 136, he gives his reason for his estimate.

Edward C. Fitzhugh, former Associate Justice of the Supreme Court, and an owner of land which he farmed, on page 142, *Int.* 6, places the value of these lands at from four to five dollars per acre.

He says: “I would say that they were worth from four to five dollars per acre. If the lands belonged to me I would not have taken

less than that price. Taking the whole tract together, located as these prairies are with reference to water transportation to market at Victoria, with so large a body of prairie lying together in a country generally covered with a dense timber, they are very valuable for pasturage for cattle for the Victoria market and the British Columbia mines.

William H. Wood, clerk of the United States District Court, a resident of Pierce County, former member of the Legislature, Superintendent of Public Schools, is asked on page 51;

Int. 5.—"What would be the present value per acre of this claim, for grazing and agricultural purposes, to an individual having a good and sufficient title to the same?"

Ans.—"I think, take it as a whole, it would be worth five dollars an acre."

R. M. Walker, ex-Territorial Auditor, well acquainted with the settlements west of the mountains, puts the value on page 139, at five dollars per acre, averaging the whole tract.

E. H. Tucker, former Sheriff of Pierce County, says in answer to *Int. 5* on page 30: "To a person having a good title, the claim represented by this map, take it as a whole, with capital to properly stock and improve it, I think, is worth five dollars per acre."

John McLeod, former resident on the claim and donation claimant, whose experience and knowledge have been before remarked upon, on page 65, in reply to *Int. 4*, "What are these lands worth per acre for farming and grazing purposes?" says, "on an average from four to five dollars an acre."

John Montgomery, farmer and stock raiser, and donation claimant on the Nisqually plains, who has known the country since 1841, whose occupation makes him know the value of this land for stock purposes to him and others, when asked on page 59, *Int. 9*, "What is the Company's claim worth per acre, for farming and grazing purposes?" he says, "It is worth four or five dollars an acre for grazing stock."

Richard Fiander, farmer on the plains and donation claimant since 1853, has his experience to add to those of Montgomery and McLeod, and on page 63 says in reply to *Int. 11.*, "What are these lands worth per acre, for farming and grazing purposes?" "I should think four or five dollars an acre."

Peter Wilson, a farmer on a plain called "Muck," and also a donation claimant on those plains since 1850, on page 53, says, "the value of the land for farming and grazing purposes I should put at five dollars per acre."

Lemuel Bills, who has been mentioned before, a resident on the claim and a donation claimant, puts the value at five dollars per acre, on page 55, *Int. 3.*, "State the value of these lands per acre for grazing and agricultural purposes." "I would consider it worth five dollars an acre."

Mason F. Guess, an old resident of Steilacoom, on page 52 in answer to *Int. 5.*, "What is the average value per acre of this claim for farming and grazing purposes?" says, "I consider it worth five dollars per acre."

M. T. Simmons, whose acquaintance with the plains has also been shown, on page 37, in answer to *Int. 8.*, "What would be the present value per acre of that claim to a person or Company having good title thereto, taking it without its buildings, with the land as it now is?" says, "If it were my land, I wouldn't take less than from three to five dollars an acre for it."

M. T. Simmons' judgment is good, for his former partner, a witness for the United States, Hugh A. Goldsborough, now chief clerk of the Bureau of Construction and Repair in the Navy Department, on page 181, in answer to *Int. 30.*, "Is Michael T. Simmons a man of good repute, worthy of belief, of good judgment in matters of agriculture and milling, and one whose opinion on such matters would be of value?" says, "Simmons is a very clever man, natural judgment, strong sense, but violent prejudices. I would take his opinion on any ordinary subject in which his feelings did not come into operation."

If Michael T. Simmons' feelings have come into operation here *in favor* of this Company, he is the one great exception to his fellow countrymen.

Gabriel Jones, on being asked the market value of good farming lands, and whose knowledge of the tract has been stated before, puts it at five dollars per acre, and gives a special and substantial reason for it, based on an actual sale, he says in answer to *Int. 4*:

"What has been the market value of good farming lands in Washington Territory for the last three years?"

“ I do not know the market value of land ; the only sale I know of, being one I made myself, where I got five dollars per acre for land similar in quality to that of the Company’s claim. This land is about five miles from Olympia.” (Page 42, *Int.* 4.)

George B. Roberts, a former agent of the Company on the Cowlitz farm, like McLeod, Montgomery, Fiander and Wilson, is a naturalized American citizen and a donation claimant, a man well acquainted with the plains and not disposed to look upon them too favourably, says, on page 71, in answer to *Int.* 17 :

“ What is the present value per acre of this claim to an individual or Company having a clear title to the same ?”

“ In my judgment it would be worth from four to five dollars an acre for farming and grazing puposes.”

Mr. Roberts gives as one reason for his valuation, the position of the tract of land, when he says on page 77 : “ Its situation lying on the Sound, and being the last of the open prairie to the north, gives it additional value.”

Edward Huggins, agent in charge of the Company’s business at Nisqually, who has known this claim since 1850, and who, on page 95, considers it very valuable for reasons which he gives :

“ I do not know of any prairie land, to the north of the Company’s claim, of any extent, on Puget Sound or its vicinity. I consider the claim very valuable for stock raising purposes, also its proximity to the water of Puget Sound, the frontage of which, for nine or ten miles, the Company claims, along which extent easy and safe anchorage for vessels is to be found ; also on account of its numerous and never failing lakes and streams, also on account of the large quantity of valuable timber to be found upon the claim ; I consider it also valuable for arable purposes.”

On page 91 in answer to *Int.* 4 ;—

“ What is the present value per acre of these lands for farming and grazing purposes, to an individual or company, having a good and sufficient title to the same ?” says :

“ It would be worth from four to five dollars an acre, averaging the whole claim.”

William F. Tolmie, formerly in charge of the business at Fort Nisqually, who appears from his evidence to have fully examined the subject, and with a remarkable knowledge of facts and detail, has

testified on this case. Dr. Tolmie says on page 108, when asked in *Int. 12* :

“ What is the present value per acre of the Company’s claims at Cowlitz and Nisqually, for farming and grazing purposes ?”

“ Supposing both claims to belong to the same person or Company having a clear and undisputed title, and perfectly exempt from molestation in the transaction of business, I think the Cowlitz claim worth to-day, thirty dollars an acre, and the Nisqually claim five dollars an acre, for farming and grazing purposes.”

There are thus eight witnesses who put the value at five dollars, and eight others who put it at from four to five, and one who puts it at from three to five.

In this concurrence of testimony as to the valuation of these lands at five dollars per acre, those who speak of its being worth from four to five, must be considered as agreeing with and not contradicting those who put the value at five. There is an agreement of officers, resident farmers, and of those who best knew the capabilities of the land, that it most convincing.

The Surveyor-General speaks *quasi-officially*, and the United States ought not to repudiate its officer who has charge of matters relating to this very question, and who gives four to five dollars an acre, as its value.

The former Register has an interest in the question, and agrees with the other official.

The member of the highest Court of the United States in the Territory has added his opinion to that of these gentlemen, and given his reasons therefor. The clerk of the United States Court, too, agrees with the judge.

The Territorial officers, the Auditor of the Territory whose knowledge of the value of all territorial lands has been shown before, does not change its valuation ; the former sheriff of the county, whose position as *ex-officio* assessor and whose means of knowledge have been spoken of, places the value at five dollars per acre to a man having a good title.

Resident farmers and stock raisers speak to this value for farming and grazing purposes fully and explicitly.

Roberts Huggins, and Dr. Tolmie, with full and actual knowledge, speak of the good title and says it is worth five dollars per acre.

This question as to a good title lies at the bottom of all the testimony on the value of this claim. Those who may not think the title of the Company good, when asked as to its value to that Company, would say it is worth nothing. Others find in the fact that the Company claim the land, an excuse for placing a value upon it of mere possession for the time.

This explains the reasons for adding to the question in some instances, and to the answer in others the statement to "a person having a good title," and this too, is the reason the value shown by the sales of land on the tract is no criterion of real value, as the price paid is merely for a transfer of a right of possession with a doubt of ever having any title for years to come. For this reason the only actual sale that could be shewn of lands, not a forced one, where the title was complete, was in an adjoining county, of lands "similar in quality" with a good title from the United States, that of Gabriel Jones.

The personal and official knowledge of the Territorial officers mentioned before, the reasons given in the evidence for the opinion, the special fact of actual sale at the price mentioned, all make up a strong connected statement, which shews clearly a value of five dollars for farming and grazing purposes alone.

There are, however, witnesses for the claimants who do not place so great value on these lands, men whose opinion is entitled to respect.

Thus, ex-Surveyor-General Tilton, on being asked "what a clear title to these lands would be worth," says on page 10: "I should say it would be worth about three dollars per acre." So too, that witness of general information, the present sheriff Judson, says on page 21, in answer to *Int. 3*;

"What would a clear title to the Puget Sound Company's claim, as represented by this map, be worth per acre to a person or Company at the present time owning the same?"

Ans.—Three dollars and a half per acre."

H. G. Williamson, a shipwright, who has been engaged in milling, on page 48, *Int. 7*, puts the value of these lands for grazing and farming at "not over three dollars per acre."

Wm. R. Downey, a resident of Pierce county, who is a carpenter, and owns a farm, and, as he says, "has farmed some" since he resided in the county, to which he came in 1853, for five years

county commissioner of Pierce county, on being asked on page 44, *Int. 7*, "What would be the present value per acre of the Company's claim to an individual having a good and sufficient title thereto?" says—"For farming and grazing purposes I should judge it would be worth three dollars and a half per acre."

Robert Downey, a young man who has lived at Steilacoom and in the country back of it since 1863, says, on page 47, *Int. 7*, speaking of the claim and its value per acre, "I should put it at about three dollars and one-half per acre."

The testimony of the former Surveyor-General is entitled to great respect, as is that of Sheriff Judson and Mr. Downey, the county commissioner. Mr. Tilton, however, would not put his knowledge of the value in 1865 above that of his acting successor—his official knowledge was acquired some years before and it may be that his attention has not been called to it for several years. The reasons given for this valuation are found on page 9, and are as accessible now to this commission as to the witness, for he says on page 9, in answer to *Int. 7*—"My estimate is based chiefly upon the cost of clearing land, and the amount of interest that might be realized in farming and grazing the land on the claim."

The witness Smith says, on page 135, the cost of clearing fir trees from lands is from \$75 to \$100, and of harder woods from \$30 to \$50 per acre. And as to the amount of interest that might be realized, Huggins and Tolmie must know this much better than the Surveyor-General, and they think that "for the transaction of business," and for stock-raising purposes, it is worth five dollars per acre—that is, that it would pay an interest on a value of five dollars.

The elder Mr. Downey, who speaks of three dollars and fifty cents per acre as the value of this land, may not have that full information concerning it that would lead him to place as high a price upon it as those who knew its advantages better. His occupation and residence in town may have prevented him from knowing it as thoroughly as the others, who lived by farming and grazing alone. The younger Downey, undoubtedly, would be apt to think with his father.

The Sheriff's valuation is not so high as Dr. Tolmie's, or that of his predecessor's, or of those of the stock-raising farmers. He

knew the country, and his opinion of the value of those lands is worthy of great consideration. He, however, was no stock-raiser or cattle-dealer. His occupation as sheriff prevented that, and his opinion of value from want of full experience would naturally fall below those who lived solely by farming and stock-raising.

Of these witnesses for the Claimants who have given the lower valuation, it must be noted, that they are only *five* against *seventeen* who have given the higher; and that of these five there are only two, Tilton and Judson, whose means of knowledge can compare with theirs. It is therefore fair to conclude that the valuation of five dollars is the true one.

Of course, witnesses have been brought by the United States to cut down this valuation. As has been before said, the knowledge of the subject on which a witness speaks, first, gives his opinion value; but combined with knowledge must also be a freedom from prejudice, and no dread of the consequences of his testimony to himself. Further than this, his whole testimony must sustain his expressed opinion. Tried by these rules, the testimony of the defence on this point, as on others, will not be found entitled to much weight.

The mere knowledge necessary to speak on this point of value has, in the examination already given to the testimony, been shewn not to be possessed by many of the witnesses. What knowledge of this whole tract, or of its productions, or of its markets, at the present time could J. H. Dement have, whose amount of information has been fully commented upon, and who left the territory in 1853? After thirteen years of absence, with his want of former knowledge, he might well fail, as he does in his answer to Int. 7, on page 4, in giving any positive or decided estimate of its present value.

The testimony of General McKibbin has, in a former part of this argument, been examined. He values the land at twenty-five cents an acre, as much as would be expected from the character and spirit of his evidence already adverted to. Recalling these to notice, and coupling with them his want of knowledge, and accuracy of observation, he is left, without further remark, to the judgment of the Commissioners.

General Casey's knowledge of the plains, as has been shewn, is slight. His valuation of these lands per acre, and his reason for it, shew more plainly than any portion of his testimony how little he really knew of the subject from his personal observation. Thus, on page 197, in answer to Int. 13, he says—"If you estimate the value of land by what it will bring in market, I should say that the whole tract which they claim would not bring a dollar an acre, and I will give one reason: The Government had surveyed and sold land lying between these two rivers claimed by this Company, and the best lands so surveyed did not go off at the Government price, one dollar and a quarter an acre. This is what others have told me, and not what I know of my own knowledge."

It is known, from the Documentary Evidence in this case, that there have been no public surveys made by sub-divisions on any land claimed by the Company between the Puyallup and Nisqually Rivers. The whole statement therefore, objectionable as being founded on hearsay testimony, falls to the ground when even that hearsay is shown to be false in its main statement.

It has been shown before how little General Alvord knew of this tract of land which he undertook to describe. This want of knowledge, and the little time spent by him in his visits to the post at Steilacoom, and his total absence of examination or of thought upon the question of value, render it manifest that his estimation (on p. 264, Int. 6) is of no weight.

Goldsborough, too, has placed his value upon this land (p. 85). His valuation is from 1855 to 1857, (p. 178, Int. 9), at fifty cents an acre. An Indian war was going on during a part of this very time, on the plains, which would not add to their value. Moreover, a valuation of property made eight or nine years before, is of little importance in 1865. The fact, too, is shewn before, that of this whole tract, Goldsborough had seen but little and observed less, and that his opportunities of knowledge of the price of lands, or of their producing value, were almost nothing at all.

Maximilian Mogk, who has also been referred to before, agrees more nearly with General McKibbin, in his opinion of the value of these prairies. In the first part of his answer he declares he would not take it for a gift and pay taxes on it, but at the close values it "at fifty cents per acre," pronouncing it "pretty good pasture country,"—(page 273, Int. 8.)

What Mogk, an enlisted soldier, for a part of his life and a bar keeper for the rest of it, knew about land, and about this land in particular, has been already made apparent. What he knew about its value ought also to be plain.

The Rear Admiral, Chas. Wilkes, is on record as to the value of this land per acre. On page 230 he is asked in *Int.* 17—"What is the value of this prairie land?" and he replies: "I would have been sorry to have given $6\frac{1}{2}$ cents per acre." Twenty-seven years have passed since the Admiral acquired the knowledge that enabled him to make this answer, and yet he is thought to know the country well enough now to give an opinion of its present value. That he does not know anything about it now, is certain, for his prophesy made years ago, quoted in another part of this argument, has become the truth, and he has not found it out. The country has "become the abode of a civilized community, and the farms and lands have become very valuable, as the agricultural establishments are placed in the best position for farming operations;" all this has occurred as he said it would; yet he *declares* these lands and farms "thus become valuable" worth only $6\frac{1}{2}$ cents per acre.

The witnesses just noticed, are those included in the class who testify with but little knowledge of the subject. To these might be added Simpson P. Moses, whose testimony has been noticed, and his slight means of knowledge shewn. Moses has no knowledge of the country since 1856, his estimate of one dollar per acre has reference to that time, and besides it is not based on such knowledge as to make it of any value.

Judge Hewitt is another witness of little general knowledge of this tract of land; he "puts the agricultural prairie lands at about five dollars per acre, page 70, *Int.* 5. And on the same page, *Int.* 6, rates the prairie lands on the Nisqually plains, at "one-fourth as much." On the next page 71, *Int.* 1,—"He would sell the whole of his prairie land in a state of nature for five dollars per acre," including his own in lands capable of cultivation.

It is not necessary to repeat here what was apparent from Miller's and Jones' testimony, that all these high prairies around the head of the Sound are of the same general nature: Jones', that was sold for five dollars per acre, and Hewitt's, and the great body of the Nisqually plains included.

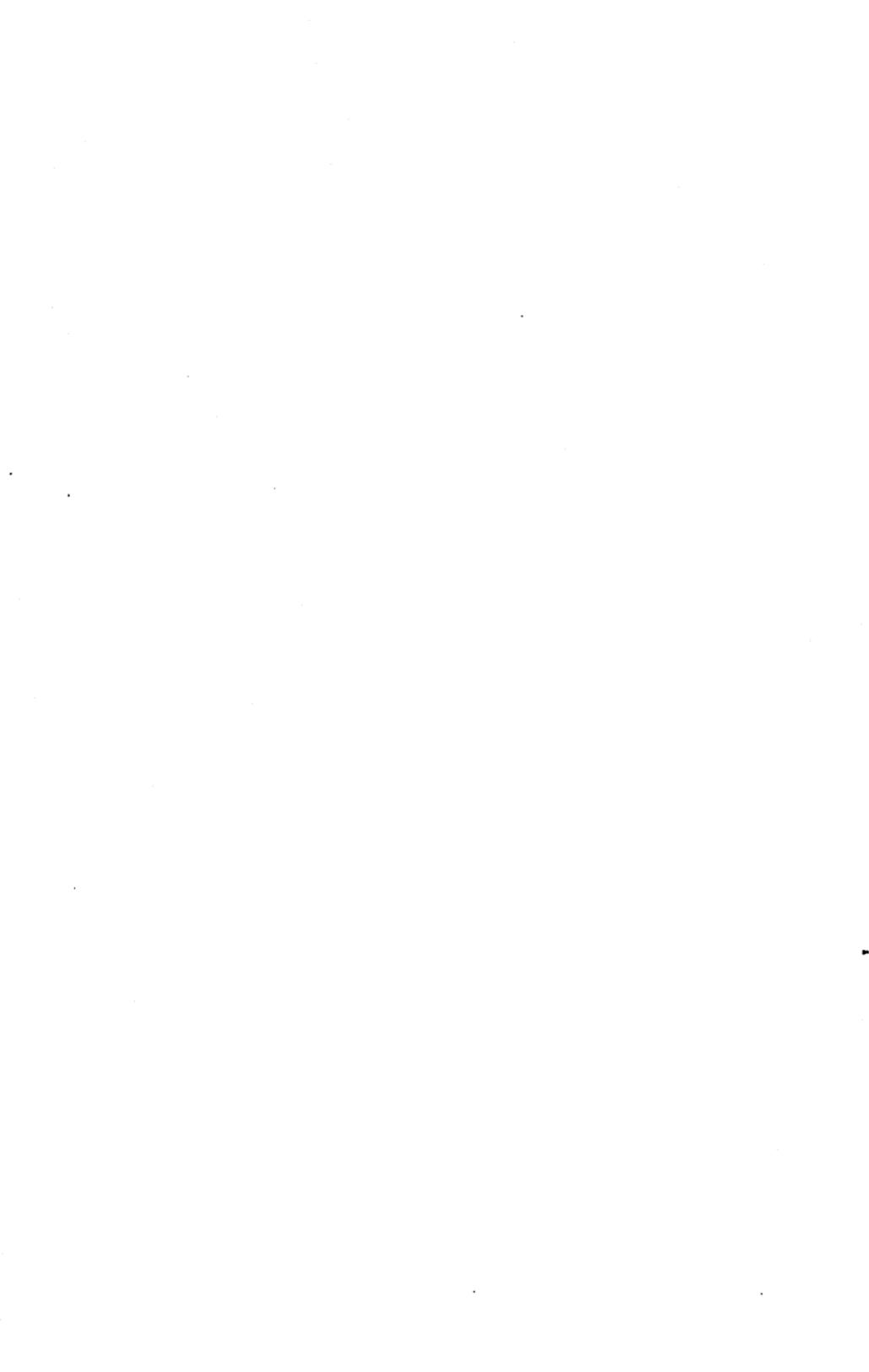
That most of this high prairie is capable of cultivation has been shewn, and if this is the fact, then Judge Hewitt agrees with the official action of the County Commissioners, and his value put upon the agricultural prairie lands is correct for the greater portion of the Nisqually plains.

With Moses and Judge Hewitt may be placed E. J. Allen, who left the country in 1855, and who has ridden over a portion of the plains near the military road to the Cascades, on which he was engaged in 1853 and 1854. He thinks with General McKibbin, "that twenty-five cents an acre would be a fair valuation for the prairie lands," and that "fifty cents per acre would be a fair valuation for the whole." Total ignorance of the subject, so far as the full amount and present value of Company's lands are concerned, is Mr. Allen's justification.

F. A. Clarke, now a County Commissioner, and R. S. More, a former County Commissioner of Pierce County; Wm. P. Dougherty and A. J. Burge, farmers resident on the Nisqually plains, and Daniel E. Lane, a farmer who has lived there, are men who have some means of knowledge; Burge, in particular, ought to be able to speak of the value of these lands from special means of information, yet he and all the rest combine in placing the price of the land at one dollar and twenty-five cents per acre; that Burge knows better than this, is proved most clearly by his simple statement before quoted from page 108,—"that it was worth one dollar a month the year round, per head, to pasture grown cattle and horses in the enclosures on the plain." The rental of land at the rate of pasturage is thus shewn to be \$1.50 per acre for the year: yet the fee simple, according to this witness, is worth less than the annual rental.

There may be an excuse found for Burge in his answer on page 106, to *Int.* 9; "Taking them together, at what price per acre, in gold coin, would you fix their value, without the improvements?" "I don't believe, on a twelve month's notice, they could be sold for Government price."

This is not a positive declaration of what he thought the lands were worth, but simply a statement that they could not be sold together for Government price. There are many reasons which Burge could find that would excuse this answer to himself. The



settlers might agree on that price and combine to give no more. It may be, that he saw fit to understand the question as meaning that the whole tract must be sold as one lot. The terms of the question would lead to that; "taking them together, at what price," etc. If he persuaded himself that this was so, he might find in it a justification to his conscience in answering as he did.

F. A. Clarke's statement, who has lived on the plains since 1863, is given on page 91, in answer to *Int.* 17; "What, in your opinion, is that land worth per acre, averaging it together?" "Not to exceed one dollar or one dollar and a quarter per acre."

Clarke, a farmer, resident on the rich and fertile lands of the Cowlitz, has dealt a little in lands in that section. He had a short time before been compelled to dispose of a piece of land at the Cowlitz, to a judgment creditor, whose debt of \$4,100 encumbered three and one half sections of other land also,—page 92, *Int.* 1,—at about five dollars or a fraction less per acre. Taking the usual proportion which the testimony shews to exist between Cowlitz prairies and those of Nisqually, which is about one to five in value, Mr. Clarke, smarting under his forced experience, might feel justified in declaring that if Cowlitz land was sold, although under the grinding pressure of judgment debts, at five dollars per acre, then Nisqually prairie ought to be worth only one-fourth as much, or one dollar and one-quarter. That Cowlitz prairie lands are worth twenty-five dollars an acre, a great deal more than Mr. Clarke had to sell them for, will be apparent hereafter.

Daniel E. Lane says, on page 134: "To estimate the value of the whole, I would not put it above Government price." Lane is a farmer, has farmed on this tract, a short time on the claim of Mr. Gibbs, and considers it "poor farming land," just as "Dr. Tolmie told me he considered it." As Mr. Lane evidently knows but little of the tract, and has based his opinion on Dr. Tolmie's, and his valuation of the land is on Dr. Tolmie's description of it, he should also have agreed with Dr. Tolmie's opinion of the value of this "poor farming land." This he does not do. Mr. Lane's whole testimony discloses, as what has been here said tends to shew, that his opinion has but little, if any, value.

R. S. More, twice a County Commissioner, and a farmer on the

plains, in his answer to *Int.* 12, on page 118: "At how much per acre, in gold coin, would you value these lands, taking them as a body together, and averaging the whole?" says: "About Government price, or \$1.25 in greenbacks. The value in coin would depend on the price of greenbacks." Now More was elected county commissioner in 1854, and by law his term of service was for three years.—*W. T. Stat.* 1855.—During his term of office as such, the county commissioners of Pierce County, *of whom he must then have been one*, approved an assessment of \$500,000 on 163 square miles of the Company's land. Both of these valuations were under oath. In which is he to be believed.

The testimony of Dougherty, Probate Judge, has been remarked upon in the course of this argument. His opinion is found on page 101, in answer to *Int.* 9. "Taking the whole tract together, at what price per acre would you fix the value of this land, so far as you are acquainted with it, without regard to improvements?" "Seventy-five cents an acre in coin."

This is the Government price spoken of by several of the witnesses as the usual difference between gold and currency in that section of the country where gold is the standard of value.

Of the testimony of these last named witnesses, farmers and county officers, there must be some common explanation which will throw light upon it. How Burge could put the fee simple of land so valuable for every year's rental at \$1.25 per acre, or how More, after approving its assessment at something like \$5.00 per acre, could also reduce it to Government price, and Dougherty, Lane and Clarke practically do the same, are strange facts, which ignorance of the subject—except in the case of Lane—or even the prejudice and ill-feeling which so plainly affects Chambers and others, does not sufficiently explain.

In noticing the questions and the answers, one common reason may be found: thus, Burge, More and Lane speak of "Government price," Clarke does the same, and Dougherty also, although not naming the value as Government price.

The term Government price seems to be used by these witnesses, as a sort of measure of value which ought to be applied to all Government lands that may be subject to entry and sale under the laws of the United States. In the belief of the great body of settlers

in the valley of Puget Sound and the Cowlitz, a belief, as Mr. Gibbs and others say, entertained by the officers of the Government and freely expressed, these lands were the lands of the United States and subject to its laws of purchase and sale. No wild or unsettled or unentered lands in any land district of the United States, be they ever so fertile, are sold by the Government for more than \$1.25 per acre, and that price is the criterion for all public lands belonging to the Government, the title to which may be acquired by purchase.

With this governing American idea possessing their minds, these men might well say that these lands which they think the United States own, are worth no more than any other lands subject to settlement and entry, to wit : \$1.25 per acre, for, in their opinion they can be obtained at that price when offered for sale, even if the agricultural prairies are worth, as Judge Hewitt swears, five dollars per acre.

A further suggestion must be made here in reference to the value placed upon these lands by *donation claimants*. It is, that their valuations, are made under the influence of those who have sought in various ways, through the press and in other forms, to corrupt the public mind on this whole subject. It has been urged upon them that whatever value was placed upon these lands by this Commission, they would have to pay as the price of their farms when put into market. (See Doc. Ev. of H. B. Co., p. 482-3.) The effect that such appeals were intended to produce is plain, and that they have had that effect is rendered too probable by the character of the evidence given.

Perhaps his belief that these prairies were United States lands, an opinion which he says he entertained in common with officers and citizens generally, led Mr. George Gibbs to say on page 316, in speaking of the value of these plains: "One-fifth of the amount I consider to be absolutely without value; for the remainder, taking the whole, I should be very sorry to give the minimum Government price." That it would be a sorrow to him to do so, his testimony, which has been fully noticed before, everywhere shows. It sounds very much like the expression of a disappointed theorist condemning all the ground alike, because he failed in his own selection.

While the Government price ought not to govern in estimating

the value of these lands, it is equally clear that no value based upon forced sales of land not upon this tract, ought to govern in determining the amount of compensation. As this has had some effect upon the testimony of Miller, a witness who has before been remarked upon, his opinion is noticed here, and it is thus given on page 75, "taking 160,000 acres of the tract between the two rivers (Puyallup and Nisqually,) "the prairie portion I would value at about \$1.25 per acre. That portion of the timber lying east of the Nisqually plains I consider has little or no market value. That portion of the timber immediately on Puget's Sound I am not sufficiently well acquainted with it to fix a value on it." He also says on page 75 in speaking of the lands of Lewis, Thurston, and Pierce Counties: "I have known some small tracts of very rich land, that were surrounded by grazing land of a poorer kind, to sell for from ten to twenty dollars per acre; but these were extreme cases. I have known other tracts of the best quality of prairie land, free from gravel, to sell for from a dollar and a-half to four dollars per acre, not including the improvements; gravelly prairie land is generally worth about Government entrance price, and sometimes a shade higher."

The substance of this is, that as gravelly prairie has been entered at Government price, but which can no longer be so entered in Thurston, Lewis, and Cowlitz, by his own statement,—page 79, *Int.* 8—therefore he thinks that the Nisqually plains, which are now unentered and are Government lands, are worth \$1.25 per acre. His estimate of the amount of gravelly prairie has been referred to in his answer to *Int.* 16, on page 77, where he says: "It is almost entirely gravelly prairie, only fit for pasturage, though there are here and there small tracts large enough for gardens, or small fields of very rich lands."

It is this estimate of the proportion of fertile lands on which his value of the Nisqually plains is based. He has considered the whole tract as one vast gravelly prairie, and has put it at the Government price for that reason. His own cross-examination and the body of the whole testimony as has been before explained, shows one-fourth of the plains to be of fertile land; and as he has well expressed it in his answer quoted above: "It (the tract) is composed of small tracts of very rich land surrounded by," what he calls,

“grazing land of an inferior quality.” The witness has known such tracts so surrounded to sell for ten or twenty dollars an acre. These “are exceptional cases.” Take his own special knowledge and estimate, that rich tracts surrounded by grazing lands have been sold for twenty dollars an acre, at the proportion, not of one-fourth, but one-eighth of the whole of this tract as very rich land, which would be 20,000 acres, at 20 dollars an acre, it gives \$400,000. The remaining 147,040 acres at one and one quarter dollars per acre, gives \$583,800 as the valuation of the tract on his own testimony. If we take, however, the proportions of fertile land to be one-fourth of the whole tract, as it has been shown to be, and the price to be what this witness for the defence says rich lands situated exactly as these are, have been sold for, we get over \$800,000 for the good lands alone.

All the testimony gives the description of rich land on the prairies as occurring at intervals surrounded by higher prairie lands.

That portion of Miller’s answer where he says, “I have known other tracts of the best quality of prairie land, free from gravel, to sell from one to five dollars an acre, not including the improvements,” is to be explained simply in this way ; in an experience of fifteen years in that country, loaning money on bond and mortgage—page 75, *Int.* 6—he may have known prairie lands fifty miles or less from the Sound at an early day, to be sold at these prices at *forced sales on judgments.*

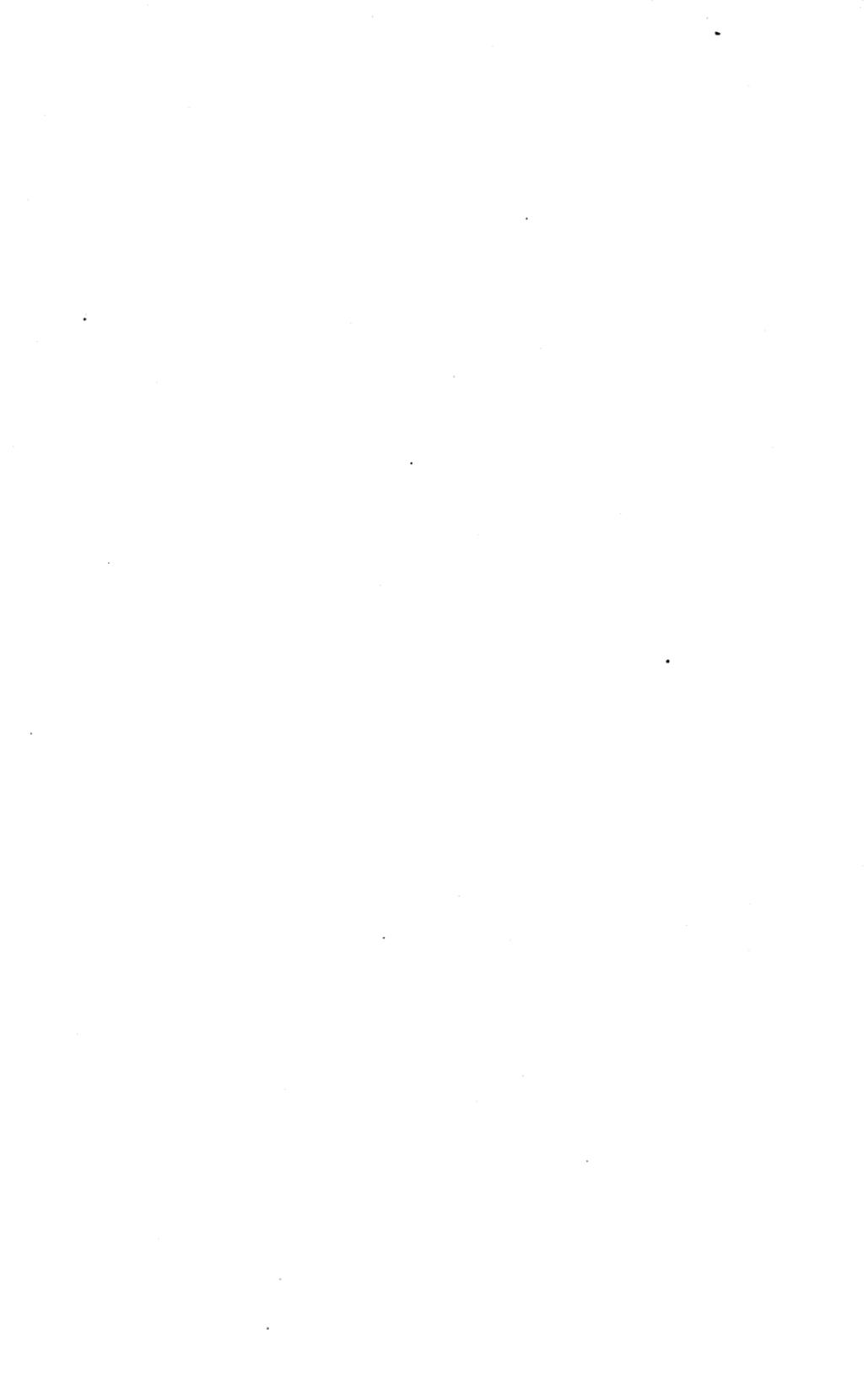
These low prices are the range at forced sales, and as such should be no criterion, as before remarked, of value in this case, nor should any sale of land indefinitely located and the distance of which from market is unknown, be adopted as any measure of value. The only true measure of value as indicated by sales of land, being of lands of similar quality, whose situation is known, so that a proper comparison could be made ; the sale itself being voluntary on the part of the vender.

All these varied opinions as to value have thus been collected together and presented. It is submitted, that the testimony of the Claimants is clear, connected and coherent, and founded on a correct view of the question submitted to the witnesses, and in accordance with the general evidence in the case and the special points bearing on the question of value ; that the witnesses for the United

States, in some instances, speak from little acquaintance with the subject, and from no special knowledge qualifying them to give a reliable opinion; in others, prejudice affects them, and self-interest controls them; that of those whose knowledge and habits of life have qualified them to speak with more weight on this subject, some have testified in such a manner that their evidence in one part of their testimony is wholly out of keeping with the facts stated in another, and that the official acts of others contradict their expressed opinion. A general reason common to most of them, in connection with special reasons in many instances, has been suggested to explain this testimony, its sufficiency is left to the judgment of this tribunal.

There is one fact, however, which settles the value of this claim beyond dispute or cavil, and that is, the action of the Board of County Commissioners of Pierce county in assessing 163 square miles, or 104,320 acres of this land in 1857 and 1858, at five hundred thousand dollars. This appears from a sworn copy of the assessor's book for the years 1857-58, on page 180 Doc. Evid. P. S. A Co.

It will be recollected that the records of the County Commissioners' Court were burnt in 1859 (T. M. Chambers, p. 128-*Int.* 13.) The assessor's book or roll, however, escaped destruction. This assessment roll or book, made up by the assessor, and called the assessment roll, is submitted to the board of County Commissioners at their annual session in May, and has to be by them approved. If necessary, it is corrected and then approved. (Acts of 1855 and of January 29th, 1864, W. T., sections 6 and 10; Doc. Evid. United States, page 324.) After this assessment roll has been examined, and, if necessary, corrected and approved by the County Commissioners, and not until then, it becomes the assessment roll, from which the proper duplicates are made (sections 11, 12 and 13, Acts 1855 and 1864, W. T.) The taxes actually levied and paid under this assessment and order of County Commissioners, amounted in 1857 to \$4,750.00, and the school-tax to \$249.00 additional on 40 sections of land; in 1858 to \$7,250.00; in 1859 it was again \$7,250.00, the whole of which was not paid, but only three hundred and one dollars on 40 sections (*Tolmie* 113, *Int.* 24.) This tax, at the valuation of \$500,000 is at the rate of \$1.45 per one hundred dollars.



This official valuation of the 163 square miles, or 104,320 acres of land at (\$500.000) five hundred thousand dollars, is at the exact rate of four dollars and seventy-nine and a quarter cents per acre, showing that the number of acres was so near one hundred thousand that the board estimated the tract at five dollars per acre, and finding that it came so near to half a million at that rate, they agreed upon that sum as the exact amount.

Five dollars, or four dollars and seventy-nine cents, is then the official assessed value of an acre of land on the Nisqually tract. The usual American practice of assessing property for taxation at one-half or two-thirds of its actual or saleable value, would make an acre of this land worth nine dollars and fifty-eight cents. At five dollars per acre, the 167,040 acres of which this tract consists, amount to \$835,200.00, or at four dollars and seventy-nine cents per acre, it amounts to \$810,121.00, both of these values being greater than that set out in the memorial; while, if it be estimated at four dollars and fifty cents per acre, or at a valuation of "between four and five dollars per acre," for farming and grazing purposes alone, it amounts to seven hundred and forty-one thousand six hundred and eighty dollars, (\$741,680.00) a little less than the sum mentioned in the memorial.

From this important and conclusive fact in proof of value, there is no escape. However numerous may be the array of persons, civil and military, brought forward by the respondents, and giving more or less wildly their statements or guesses upon the value of the lands—whatever, indeed, may be the opinions of witnesses on the one side or the other, here is a formal, official fixing of value, by men chosen for that purpose as best qualified for the duty, and acting under the sanction of the law and of public authority;—a value recognized and made the basis of taxation which was actually paid. This assessment proves conclusively two things—1st, the rights of the Company in the tract of land which it covers, viz., 104,320 acres, as belonging to it; and 2d, that the value of these 104,320 acres is not less than \$500,000.

The same rate for the remaining 62,680 acres would give for the whole tract an aggregate value of upwards of \$810,000, a sum exceeding the amount claimed for it. Is it possible to conceive stronger evidence of value? and is it possible, in the face of such

evidence, to hesitate in awarding to the claimants for this land, at least the amount at which it is estimated in the memorial?

On the weight of evidence the Company feel justified in claiming five dollars an acre for the Nisqually lands for farming and grazing purposes alone, and at that rate, the aggregate for the 167,000 acres would exceed the amount specified in the memorial.

OAK TIMBER AND WATER POWER.

In addition to the value of this tract of land for purposes of culture and pasturage, other elements must be considered in the final estimation of it; these are the oak timber which grows upon it, and the mill sites.

The great number of witnesses who speak with a certainty of knowledge, and particularity of detail, of the oak timber, precludes all reasonable doubt as to the correctness of their statements. The quantity of oak trees is proved to be an average of from two to five per acre, and the value certainly not less than five dollars each.

William B. Bolton is the witness for the claimants who speaks with the greatest particularity, and from the nature of his occupation, and his interest in the subject, is best qualified to give testimony upon it. He is a shipwright, who has a shipyard on the water front of the claim. He gives the number of oak trees to the acre, describes them, and gives their value in the following extract from page 86: "I think the whole claim would average three to the acre." * * "Their size will average from eight to twenty-four inches in diameter, and the trunks will average twenty-two feet to the branches. I would say there are three qualities of this oak. The first is as good as the white oak of the Eastern States; the second is very good for common use in shipbuilding; the third is a brashy timber, coarse grained, the trunks of little value, but the branches are valuable for bends and knees. They are worth, on an average, six dollars each." And adds to it his personal experience of their quality on page 87: "I have used a large quantity of this oak at my place below Steilacoom, for shipbuilding purposes. I had a ship yard there. I used it from 1850 until 1859. I examined a vessel two years ago, that was built by me out of this timber in 1850, and found her oak tim-

“bers as sound as the day I put them into the vessel. I shipped
 “to California in 1852, 1853, and 1854, about four or five hun-
 “dred oak trees, for which I got sixty cents per running foot,
 “landed on the beach at Steilacoom; about four hundred of the
 “trees I shipped came off three acres of ground.”

H. G. Williamson, also a shipwright and a miller, now building a vessel of 120 tons at Steilacoom, and who is the man referred to in the extract (Doc. Ev. of H. B. Co. p. 488) gives his knowledge “of the subject on page 48: *Int. 4.*—“How many oak trees are “there on the Company’s claim?” “In my judgment it would “average two trees to the acre.”

Int. 5.—“For what purpose are these oak trees principally “valuable?” “I think they are most valuable for shipbuilding “purposes.”

Int. 6.—“Place a value upon these oak trees.” “They are worth on an average five dollars each.”

B. Roberts on page 71 “thinks the oak trees fit for shipbuilding “purposes, growing on the claim, would average four or five to “the acre.”

Wilson, (page 53) says: “I am well acquainted with the Com- “pany’s claim. I have lived on it, on my farm, since 1853. I “should say there were from four to five oak trees per acre on the “land, and I would put their average value for shipbuilding pur- “poses at from five to six dollars per tree.

Wood puts the number at five to the acre at least (p. 51, *Int. 4*).

William R. Downey, the county commissioner, on page 44, says, “that he thinks when he first came to the country, the oak “trees would average five to the acre.”

Judson estimates them, on page 21, at three to the acre, while the younger Downey, on page 47, and Richard Fiander, on page 62, reduce the number to two to the acre. Fiander, on the same page, thinks the “oak trees worth from six to seven dollars each, (p. 65).

Add to the testimony of these witnesses, that of J. L. McDonald, a witness for the defence, who, from the length of his deposition, seems to be relied on to prove that these oak trees are of little value. His information does not appear to be full, either as to size, number, or quality of the trees to be found on this tract. He

has taken several rides in various directions on the plains. His route is fully set out in his answer to Int. 1, on page 124, and is delineated on map M. By this map it will be seen that he examined only a small part of the tract, and did not visit Mr. Bolton's prairie at all. He had no knowledge of the quantity, or even of the appearance of the oaks on the great body of the tract. He has, however, testified very fully, and with apparent technical knowledge; has told, on page 124, for what portions of an A. 1. ship this oak might be useful, and for what not; and on the same page he has said, in answer to Int. 7: "Knowing what you do of this oak timber, and of the other timbers of this country, what importance do you attach to the oak of the Nisqually plains for shipbuilding purposes;" "I attach little or no importance to them in the construction of large sailing ships or steamships; but in the construction of a fishing fleet of superior vessels, those oaks will furnish important materials in the construction and finish of fishing vessels of 100 tons or more."

The only difference apparent between Mr. McDonald and Bolton and Williamson, on this question, is in the size of the trees; but all agree as to the good quality and value of the oak for shipbuilding purposes. It may be said that as "large sailing and steam ships" are not likely, as yet, to be built on Puget Sound, the oak is suitable for the present vessels of that region.

The trunks of the oak trees McDonald saw, he says, average twelve feet in length. His opportunities being limited, he, perhaps, did not see the largest trees.

Dr. Suckley, another witness for the defence, says, (page 168: "In the vicinity of a farm there, called the Ross farm, on the map, there were many oaks like what we on the Atlantic call "scrub-oaks; but on the plains there were here and there scattered oaks of respectable size, near Fort Steilacoom there were about "a dozen, averaging about twenty inches in diameter, as near as I "can recollect. This oak timber was not abundant, and was but seldom used."

To the substantial agreement of these witnesses, one of them, a witness for the defence, all of them acquainted with oak timber, and knowing more or less of shipbuilding, there is the usual dissent by the witnesses for the defence, viz: McKibbin, Alvord, Mogk,

Gibbs, Lee, Allen, Goldsborough, and Moses. Of these it will be necessary to notice only the last two. With respect to the others, it is manifest from the most cursory reading of their depositions, that they are not of a character to affect the particular direct and positive evidence of the claimants, derived from careful personal observation and certain knowledge. A brief notice must be bestowed upon Goldsborough and Moses. Goldsborough would seem, from his own account, to have a special knowledge on this subject, and with that assumed personal knowledge, and the certain spirit of hostility to the claimants, apparent in his whole testimony, he does not hesitate to contradict all the witnesses who speak of these oaks as valuable. He says on page 175: "There is a small quantity of crooked and stumpy oak trees scattered here and there; but the result of my personal observation with a friend, who was engaged in the saw-mill business, was that these oak trees were not worth the trouble and expense of cutting down and transportation. I will also say that in making this observation in regard to the oak trees, I was myself engaged in the saw-mill business. I went there for the purpose of seeing if I could get oak timber on the plains."

His friend who made this personal observation with him, was M. T. Simmons, (page 181). It was Simmons' opinion that was taken as to the trees not being worth the expense of cutting down and transporting, and as his mill, for whose supply these trees were looked at, was 25 miles distant, and the witness says "hauling was expensive," that opinion in the then state of the country, was a good one. See page 181.

This comparison of their testimony contradicts Goldsborough positively as to the number of oak trees. He says "there is a small quantity." Simmons said about a year before this witness was examined (page 37): "I should think, taking all the plains together, they would average three or four to the acre, leaving out the swales, river bottoms, and fir timber land."

So much only of the testimony of Moses will be specially mentioned as tends to a direct contradiction of the witness Bolton. Moses' knowledge acquired as collector, and derived from visits to him, is apparently relied upon for that purpose. His visits were made to the house and shipyard of Mr. Bolton on the shore, in a

small clearing made in thick fir woods. Through these woods to the prairie back of the house, he never went, and can have no knowledge of the oak trees upon it. It is also sought to show by this witness, that Bolton did not ship the quantity of oak timber mentioned in his testimony. But as Bolton's shipments extended through 1854, and Moses' knowledge of manifests ceased in September, 1853, it is useless to follow this matter further, (page 251, *Int.* 22.) What Moses has to say himself of oak trees is confined to the road, "from the crossing of the Nisqually to as far north as he travelled," and as he took into account, in averaging the size of the oak trees, the oak brush or small trees he saw on the road—pages 254 and 255—his own personal opinion is of little value.

There were oak trees of 20 inches in diameter. Bolton says the extreme size is 22 inches. These trees, or others like them, the witnesses who talk of scrub oaks had never seen. Trees of this size capable of being used for shipbuilding purposes are valuable in any country on the borders of salt water.

Taking the testimony together, the existence of oak trees valuable for shipbuilding and other purposes is established. As already stated, the average number per acre is proved to be from two to five, and the price of each not less than five dollars. Taking the good sized trees to average even one to the acre, and the price to be only three dollars, one half of what Bolton says the trees are worth, and we have the sum of \$501,120 for oak trees in this tract. Placing the question on the testimony of the witnesses whose means of knowledge of the plains were the greatest, and counting the trees at not less than three per acre, at five dollars per tree, we have the sum of \$2,505,600 as the value of the oak trees alone, deduced from the evidence of those who best know the facts. The sum seems very large, but that the scattered oak trees of so large a tract of land, taken as needed for various purposes and sold as the demand occurred, would bring for the various purposes mentioned five dollars each, is a reasonable assertion.

There is another special element to be considered in valuing this claim. The water power on the two creeks—Segwalitchew and Steilacoom, is valuable, and must be included in making an accurate estimate of the full value of this tract. On the Steilacoom creek there are two flouring and two saw mills; on the Segwalit-

chew, what is called a merchant lumber mill in the language of the witness, by which is meant a mill used chiefly for cutting lumber for the export trade. A full and clear description of these streams and the mills upon them, and an estimate of the amount and value of their water power, is to be found in the testimony of Sheriff Tucker, on page 29, and is as follows :

“ There are several mill privileges. On Steilacoom creek there are two flour mills and two saw mills. The two flour mills and one saw mill are in operation, and one merchant lumber mill at the mouth of Segwalitchew creek. Steilacoom river, upon which the two flouring and lumber mills already described by me are situated, is about four miles long, and is an outlet of Wyatchew lake, and empties into Puget Sound. There is sufficient water in this stream, as now applied, to drive twelve times the amount of machinery now driven by it, that is the water can be used with sufficient fall twelve times over. Segwalitchew creek heads in Segwalitchew lake and empties into Puget Sound, and is about two miles in length. I would think from its head to its mouth, it had from 150 to 200 feet fall, possibly more. The water privilege on Segwalitchew creek, I should think, is now worth ten thousand dollars ; but by proper application of capital might be made worth several thousand dollars more. I would estimate the water privilege on Steilacoom river as worth twenty thousand dollars at the present time, and with proper application of capital might be made worth several thousand dollars more.”

The value of the mill sites or water power of these streams is thus estimated by this witness at thirty thousand dollars.

The buildings and enclosures on these plains are also to be estimated in arriving at a correct valuation of the property of the Company.

One of the travelling commissioners, Carson, is a carpenter and builder by occupation. From their testimony, it appears that they made out a list of all the buildings and enclosures, and fencing, and valued the whole on the 17th page of the volume of testimony for the defence, at \$9,500 for the buildings, and \$1,500 for the fencing, making an aggregate of \$11,000 for the whole.

What is this tract of land, with its varied qualities of soil, its oak trees, its water powers, its lakes, its front of eleven miles every-

where accessible to vessels, its market at its doors, in a section of country where the demand for agricultural produce is greater than the supply, worth to its owners—free from molestation—owners whose capital can now and could before have improved every foot of its wide area capable of cultivation? There are no lands to clear at a cost of from forty to seventy-five dollars an acre, nor vast prairies where the cost of hauling timber from a distance detracts largely from the value. The forests surround the main tract, and belts of timber and scattered trees diversify its surface. The yearly rental of its high prairies when enclosed is \$1.50 per acre, and every acre could be enclosed. The value of its fertile lands should be counted at five times as much. No prairies on the main land between it and the boundary, to take from it its value as a point of shipment; while between it and the Columbia river, before it is reached, nearly every acre of the small open tracts are owned and occupied. To say what it ought to be worth to its owner with these advantages, is the province of this commission, and is, on the evidence, easy of decision. To say what it would have been worth, had the government whose treaty obligations bound it to confirm the title, done so at an early day, and the Puget Sound Agricultural Company, free from molestation, had, as it is shown to have been capable of doing, gone on with its stock of cattle, horses and sheep under its own control, its rich farming lands its own, its lands of lesser fertility husbanded and improved, not worn out and wasted, its pasturage protected and watched, is more difficult; but there is enough in the testimony to enable the calculation to be made, and to show it to be largely in advance of any sum claimed by the Company.

LOSS OF CATTLE,—AND OF USE AND PROFITS OF LAND.

The obligations taken upon itself by the United States, to protect the property of the Puget Sound Agricultural Company, to confirm to it, its lands, farms and other property, have been fully set out in a former portion of this argument. The obligation imposed upon this Company to wait the pleasure of that government, until it should signify a desire to purchase its farms and lands, and its inability without the consent of the United States in some way shown, to sell to any other purchaser, have also been stated.

It has been further declared that the case presented to this Commission, on which the question of damages would arise, is the case of a government specially bound by a treaty to give its legislative confirmation to certain property, and holding the right to purchase it, wholly failing to confirm or to exercise that right, or so to act as to allow its subject owner, under its protection, to sell to others.

The consequence of thus leaving the property for seventeen years subject to the inroads of settlers claiming to hold the lands they settled upon under its land laws, sustained by its public officers, with its owners remediless in the courts of justice, was the loss to the Company of the possession of the great body of their lands and farms ; the destruction of a large portion of their live stock ; and the deprivation of a great part of their annual profits. They suffered also great injury to their entire business, and were compelled to pay a large amount of taxes on lands of the possession of which they had been deprived. And for all these forms and sources of injury, the United States is liable and should pay to the Company an adequate compensation.

That the United States did not confirm these farms and lands by any legislative act, that they did not for seventeen years, signify any desire to purchase them under that clause of the treaty, and that they did not so act through any of its departments of Government as to allow the Puget Sound Agricultural Company to sell its lands and farms to any other purchaser, is a part of the history of the case. That during the time between the first treaty of 1846, and the treaty of 1863, the tracts of land and farms of the Company at Fort Nisqually and the Cowlitz, were subject to the inroads of settlers who took possession of the larger portion of the tracts, claiming the right to hold the lands they had taken under the laws of the United States regulating the disposition of public lands in Oregon, the testimony makes apparent.

The acts and statements of the public officers of the United States in relation to these lands, and the amount of damage to the Company, resulting from the action of the Government, its officers and citizens, are also shown by the testimony.

The treaty of 1846 found this Company in the full possession of the lands claimed in the memorial, both at Nisqually and Cowlitz. The description of this possession and its extent and manner has

been already given. In 1846, the horned cattle at Nisqually were some 3,000 head, tame and easily driven, the sheep 8,000, and the horses 250 to 300, the enclosed lands were "about nine hundred acres in all." At the Cowlitz the cattle were 800, the sheep 1,000, the horses 120, and the enclosed lands amounted to 1600 acres. In 1863, there were none of the original stock of cattle either at the Cowlitz or Nisqually, the bands of horses were gone, the sheep had disappeared from the Cowlitz, and were much fewer in number at Nisqually, the enclosed fields and the pasture lands at the Cowlitz were no longer in the possession of the Company, except 160 acres held in a state of fear by Mr. Roberts. While on the Nisqually plains, of which in 1846, the Company had the exclusive occupation, over one hundred and fifty settlers had farms, large portions of the plains being fenced in by them. The Company's outlying farms were gone, the farm at the fort alone remaining in their possession, while of the great pasturage grounds, only a portion remained open to be pastured in common with the settlers claiming ownership.—Roberts page 69, 79; Miles, page 25; Tolmie, pages 109—111, 116; 128, *Int.* 7.

That all this occurred after the United States acquired the sovereignty of the country will not be disputed. The first settlers came upon the plains at the Nisqually in 1847. The best and clearest description of the manner in which they came, is found in the testimony of Dr. Tolmie on page 111, in answer to *Int.* 16., "How many squatters are there on the Company's claim at Nisqually; and when did they come there?" "About one hundred and fifty; they commenced coming early in 1847; there were generally about a dozen between 1847 and 1849. In 1849, when a military post was established at Steilacoom, on the Company's claim, the number increased considerably; and this increase continued until 1853, when a number of emigrants with their families settled thereon. The number has enlarged from that time till the present day." Showing that they came gradually and increased in number after the military post was established in 1849, and after the creation of the Territorial Government by Act of Congress, March 2nd, 1853.

At the Cowlitz, settlement upon the Company's land did not begin as soon. Enclosed in separate fields, as much of that plain was,



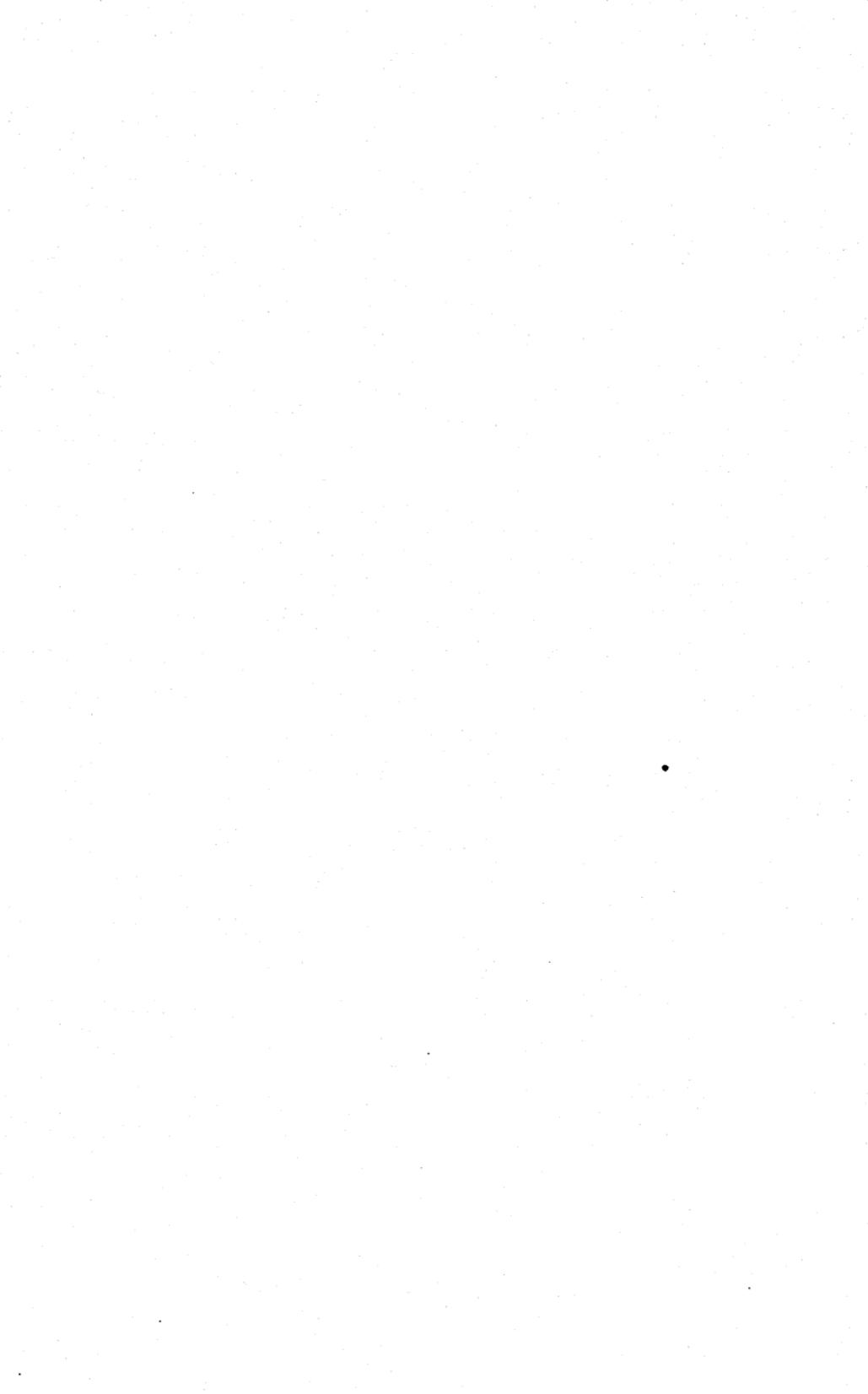
(see plan of fields, endorsed by agreement, as part of Mr. Robert's testimony), they seem here to have waited for some more than usual official encouragement; this appears to have been given some time in 1852 or 1853. In what manner they took possession, and under what circumstances, is set out in the following extract from Geo. B. Robert's testimony on page 69: "From 1846 till the early part of 1852, the Company was in the quiet and undisturbed possession of the whole tract as represented by this map. About this time there was a commotion among the people, caused by a report that the Company's claim was invalid, and Jackson Barton, Thomas H. Pierson, E. L. Finch, James Morgan, Lemuel Whittaker, James Galloway, and others, came and divided the farm among them, claiming to hold the lands respectively taken, under the United States donation law. If there was an unoccupied house, some of them took possession of it. They removed the fences, and placed them to suit themselves, except about one hundred and sixty acres, immediately surrounding the house and outbuildings where the agent resided, and rails sufficient to fence and subdivide this tract of one hundred acres. These settlers and their assigns have continued to hold these lands from then until now, with the exception of the 160 acres which has remained in the possession of the Company, or their lessee; some of these settlers cultivated no more than three acres, and some none at all, or comparatively so."

And also in the testimony of Henry Miles, on page 25, in answer to *Int. 7*: "There was quite a rush in 1853 and 1854 for settlement on the prairie, and there had been some settlers on it previously. Immediately after the receipt of a postscript accompanying a letter from Mr. Gardner, Surveyor General of Oregon, to a Mr. Flinn who had sent on his notifications of a claim on the Company's land, to that officer, the people, taking it as an opinion of the Surveyor-General in their favor, rapidly took up nearly all the prairie part of the Company's claim. Two settled very near the Company's house, on land that had been frequently tilled, and occupied as hog and sheep yards; two settled in the brush near the prairie, and the remainder on the edge of the prairie; all, except the two settlers in the brush, took more or less of the Company's rails; one man took something near a mile of the Company's fence."

The Company, through their agents at Nisqually, endeavoured to prevent this settlement, by giving notice to the parties making it, that they were trespassers upon the Company's land. This notice at first was verbal, but in 1848 or 49 they served them with written notices, and so far did they desire to be on peaceful terms with those claiming to be citizens of the country, and subjects of the new sovereign, that the agent of the Company paid a settler for his hut in 1847, and sometime afterwards bought the improvements of others desiring to leave. Tolmie page 119, *Ints.* 38 and 39. Shortly after the settlement described in 1853, as if finding the written notice to settlers insufficient to protect them, the agent of the Company on 14th day of January 1854, inserted in the *Washington Pioneer*, (a newspaper published at Olympia—the nearest point to the plains, where a newspaper was then published) a notice in which he recited, that “Whereas several persons have “recently settled on the lands of the Puget Sound Agricultural “Company situated in Pierce County, Washington Territory; and, “whereas, I am unable to serve personal notice of trespass upon “certain of such persons, on account of absence from their houses “on said lands, I take this method to notify all whom it may concern “of the boundaries of the tract of land claimed by said Company, to wit:” gave the boundaries of the claim, and declared, that “the Puget Sound Agricultural Company was by its agents in exclusive occupancy and use of the lands within the boundaries, and that he thereby gave notice that all persons settling within the said boundaries were trespassers. Doc. Evid. No. 2, List G. pages 178 and 179.

Among the settlers who thus received notice, was Lyon A Smith whom Dr. Tolmie verbally warned off in 1847, as John Bradley testifies on page 141, U. S. Evidence; and John B. Chapman, who took his Donation claim sometime about February 1851, and who, in his testimony, says he assisted in the survey of the Company's claim, he declares on page 151, U. S. Evid., in answer to *Int.* 7. that “they gave me notice to quit before I surveyed the Company's claim.”

H. L. Chapman too, testifies on this matter as follows on page 96. “The first claim I located was in Pierce county, on Nisqually claim, in January, 1853, where I resided about two



months. While there; I was served with a written notice by Mr. Huggins to abandon the claim." And he speaks of seeing the newspaper notice, on page 98 in answer to *Int.* 3.

Daniel E. Lane also, who settled on the Nisqually plains in the fall of 1853, had the written notice served upon him, in the manner he describes in answer to *Int.* 4. page 134, "There was a notice in this way, that I was trespassing on the Puget's Sound Company's land; it was to show me that I had no lawful right; that I was trespassing on their land."

The clerk of the Commission, Mr. Gibbs, during that *four* years' occupation of his claim; was verbally notified by the agent of the Company, Dr. Tolmie, that he too was a trespasser. The statements of these witnesses for the defence, settlers on the land, corroborate what has been said before as to the method and manner of giving notice to them and to others.

At the Cowlitz the same course as to notice was pursued (except so far as notice in the newspaper was concerned). Mr. Geo. Roberts, on page 69, in answer to *Int.* 8—"In 1852, when these persons came and divided the Cowlitz farm among each other, what effort, if any, did the Company make to prevent them from doing so?" says: "The Company warned and persuaded these persons against trespassing or encroaching on their land or enclosures."

The result of Mr. Roberts' warning is given in his answer to *Int.* 9—"What did these persons reply when thus warned by the Company?" *Ans.*—"They insisted there was no such Company, and threatened if the Company attempted to occupy any of the fields they had heretofore occupied, that were now claimed by the settlers, they would shoot the first man that ventured to do so, and they were so bold as to assert that they did so in open court before the District Judge."

These notices, verbal, written and printed, were ineffectual, and what effect an appeal to the Courts would have had is set out in the testimony of Edmund C. Fitzhugh, on page 141, where he says—"With regard to the administration of justice, in my opinion it would have been useless for the Puget Sound Agricultural Company to have attempted to obtain any verdict in their favor at the hands of a jury. The Courts were open to them, but

practically would have been of no use to them in any attempt to get rid of settlers on the land claimed by the Company."

The reason for the boldness with which their claims were taken, and for the tenacity with which they were held, is partially apparent in the testimony of Henry Miles, already quoted on page 25, where he says: "There was quite a rush in 1853 and 1854 for settlement on the prairie immediately after the receipt of a post-script accompanying a letter from Mr. Gardner, Surveyor-General of Oregon." In this case they were encouraged by the letter of the United States officer, but their general conduct was based on the belief entertained by those men and the great body of the other settlers on the public lands, that the whole of the open prairies were public lands, and that the Government and its officers were of the same opinion. The legislation, creating territorial Governments, and donating sections and half-sections of lands to settlers in Oregon after four years of occupation, excepting, it is true, in terms, from the operation of the last Act, "any rights to land holden or claimed under the provisions of a treaty or treaties existing between the United States and Great Britain," was well known to them. And the want of any legislation under the fourth article of the treaty of 1846, confirming the lands, farms, and other property of every description on the north side of the Columbia River belonging to the Puget Sound Agricultural Company, was also known.

The neglect of the Government of the United States to confirm any farms and lands, or any property to this Company, its failure to purchase or to do any act to segregate the farms and lands of the Company from the great body of the public lands in the wide territory of the Oregon, every acre of which was open, under the Donation Law, to be taken by its enterprising settlers, was apparent to all. All this was known to the settlers. This legislation, and the conduct of their Government, so well known to these men, created the opinion they held, and every successive year that passed only strengthened that opinion, showing as it did, that their own Government would do nothing by legislation to protect the Company, because, as it seemed to them, the Government had decided that there was nothing to confirm, protect, or purchase.

For a while, up to 1852 or 1853, they respected the enclosed lands, as shown by the testimony of Miles and Roberts, before

quoted, while freely settling on the unenclosed lands in the Nisqually Plains.

This postscript of a letter, before referred to, written by a United States official, the Surveyor-General of Oregon having charge of the public lands, which the people took as an opinion of the Surveyor-General in their favor, destroyed the respect for fences; claims were taken within the enclosures, under this Donation Law, "one man," in the language of the witness, "taking nearly a mile of the Company's fence."

The act of this Government official, or his opinion, swept down the fences of the Company, and is a striking but not a solitary instance of the manner in which the acts and the language of the Government officials, encouraged, sustained, and strengthened into moral certainty the belief that all, or nearly all, of the lands claimed by this Company were public lands, and subject to the Donation Law. In the early settlement of the country, when the settlers first took possession of the Company's lands, what was afterwards the territory of Washington was included in the territory of Oregon. In 1853 the territory of Washington was created, and the relation of the people of the new territory to the lands of the Company were brought more prominently to the notice of the Governor and the other officials of the territory. Among the first acts of this Governor (Stevens), seems to have been that of reporting upon the rights of both the Hudson's Bay and the Puget's Sound Agricultural Companies as guaranteed to them by the Treaty. Scarcely had he reached the territory, when (as if to recommend himself to the people, to the highest office in whose Government he had been appointed), on the 20th December, 1853, he addressed a letter to Peter Skeen Ogden, Esq., and also to William F. Tolmie, Esq., the then respective heads of the Hudson Bay Company's establishment at Vancouver, and of the Puget's Sound Agricultural Company's business at Nisqually, informing them that "he was instructed by the Secretary of State of the United States to call their attention to certain rights and privileges, granted to the Companies by the Treaty of 1846." In this letter, which embodies the views of his Government, he confirms and strengthens the opinions and prejudices entertained by the settlers, whose chief executive he was. These were :

First.—That it was doubtful whether the Puget's Sound Agricultural Company had any right to land whatever.

Second.—That if they had any right, it was confined to their lands enclosed for farming and pasturage.

To this letter Dr. Tolmie replied, and on the ninth of January, 1854, the Governor, in another letter, reiterates his former views, and declares on page 383, List C., No. 8, that "the Treaty does not confirm whatever you may have claimed, from the time the Treaty became known." Thus, speaking by the authority of the Government of the United States, he confirmed and strengthened the views of the community of which he was the executive head. Governor Stevens, however, did not positively declare the enclosed lands of the Company, subject to the Donation law; this was reserved for the Surveyor General of the Territory of Oregon, in whose land district the public lands of the Territory of Washington were then included and in whose office the notifications to settlers taking Donation claims were filed, to do, in response to a letter of a Mr. Flinn, inclosing to him his (Flinn's) notification of the taking of a Donation claim on the Company's land at the Cowlitz.

The Territory of Washington was erected into a separate surveying district, on the 17th July, 1854, and the pre-emption privilege was extended over all the public lands of the Territories of Washington and Oregon. A Register and Receiver for each of the said Territories, was created by the same act, and in addition to the usual duties of such officers, the duty of receiving notifications and final proof under the Donation law was transferred to them.

James E. Tilton, was appointed Surveyor General of Washington Territory, under this law. What the views of this officer were with reference to the rights of this Company, are found expressed in his letter of the 8th of December, 1859, to the Commissioner of the General land office, on page 300, Doc. Evid., U.S., List "B," No. 1. He had been, in pursuance of the direction of his Government, calling upon the agents of the Puget's Sound Agricultural Company for a verified copy of their charter, lists of shareholders, and other information respecting their lands, which had been done before by the Surveyor General of Oregon, and the Governor of Washington. His opinion is given on page 304, in the following extract from his letter: "Therefore, I arrive at the conclusion that



“ the Puget’s Sound Agricultural Company have shown no colour
 “ of title to the lands claimed, other than occupancy of an indefinite
 “ portion of them. Whether the Company are entitled to any com-
 “ pensation for the artificial value incident to the improvements
 “ thereon, I do not consider as within the purview of the instructions
 “ of your letter of the first October last, and consequently I have
 “ given no opinion on that subject. But with regard to the lands
 “ claimed as belonging to the Puget’s Sound Agricultural Company
 “ in Washington Territory, and known as the Nisqually claims and
 “ the Cowlitz farms, I decide that those *lands* are, and should be
 “ treated as *public* lands, and that the Puget’s-Sound Agricultural
 “ Company have no *legal title* thereto.” This opinion deliberately
 put on record in 1859, with no further information than he had
 at the time of his arrival in the Territory, is undoubtedly the opinion
 that he entertained from the first, though not until this time
 officially set forth, inasmuch as it was the opinion entertained by
 all the officers of the Government, civil as well as military, freely
 expressed, though not perhaps in as strong terms as the Surveyor
 General has thus officially stated it. Gibbs, 342 and 343, Ints.
 119, 120, 121, 122 and 123. E. C. Fitzhugh, Justice, page 143,
 Int. 9.

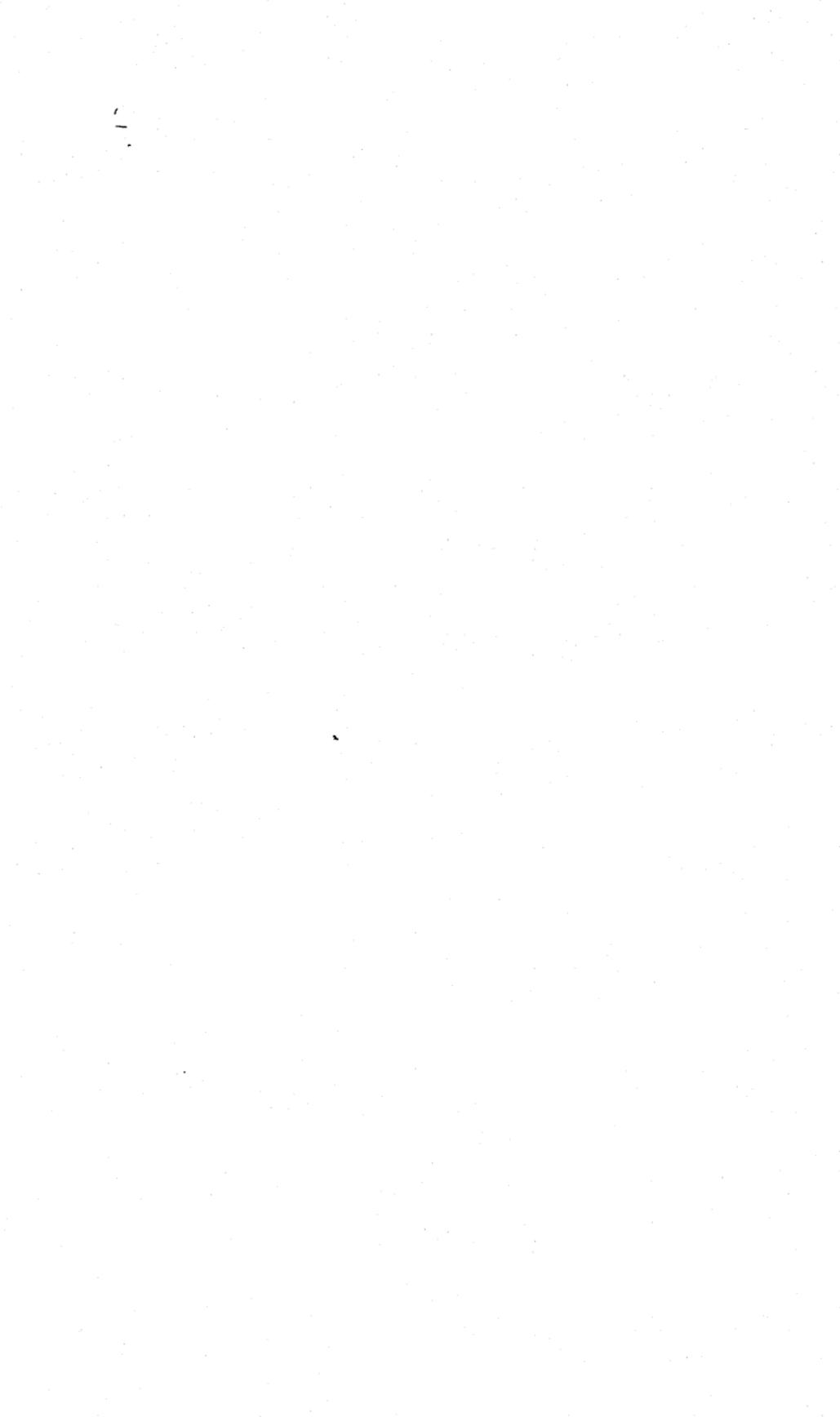
The opinion of the General land office, given through its Com-
 missioner, under whose control are the public lands of the United
 States, and who decides on the rights of parties claiming those
 lands under the laws of the United States, is found on page 275,
 Doc. Evid. U.S., A. 6. Speaking of the opinion of the Surveyor
 General, the Commissioner says: “ This unimpeached proceeding,
 in the opinion of this office, terminates the necessity for any further
 action, and leaves the Government of the United States, and the
parties (the settlers) holding in full possession of their legal
 rights.”

The Secretary of the Interior, while endorsing the opinion of the
 Commissioner of the General Land Office, thinks “ there might be
 some scattered portions of the tract that would answer the descrip-
 tion of farms and lands occupied by it, which in a spirit of fairness
 and liberality, might be determined by survey, confirmed and pa-
 tented,” although, as he expressly says, “ the Treaty created no
 right.” Doc. Evid., P. S. A. Co., List G, 181 and 182.

Entertaining this opinion, and with the *opinion* of the Surveyor-General, above quoted, before him, in the same letter he recommends that the Surveyor-General of Washington Territory, under the supervision of the Department, be authorized by special enactment to decide upon the validity of the claims of the Company. On the 7th of February, 1861, the Senate of the United States passed an act authorizing the Surveyor General, whose official opinion was on record, to decide upon the rights of the Puget's Sound Agricultural Company, in pursuance of the recommendation of the Secretary of the Interior.

The freely expressed opinions of all the officials of the Territory, civil and military; the letter of Governor Stevens, almost his first official act upon arriving in the Territory, freely circulated among the settlers; the letter of the Surveyor-General of Oregon in answer to Mr. Flinn, relied upon by the settlers on the Cowlitz as authority for entering the enclosures; the opinion of the Surveyor General of Washington, officially expressed in 1859, but undoubtedly known long before that time,—while they encouraged and justified the action of the settlers upon the lands of the Company, did not and would not have had so great an effect upon the public mind as the action of the officials to be next noticed, whose duty it was to receive the notifications and final proofs of donation claims in the Oregon country.

The Surveyor General of Oregon, under the Donation Act of 1850, was first authorized to receive these notifications and final proofs of the Donation claims. In his office, Lyon A. Smith, John Bradley, John B. Chapman, Thomas M. Chambers, and other early settlers spoken of by Col. Hill on page 213, Int. 4; and Simpson P. Moses, page 250, Int. 16, Donation Land claimants, must have filed a notification of their Donation claims; in this office too, Flinn filed his notification of a claim taken on the Company's land at the Cowlitz, and received the encouraging answer which induced other settlers to take claims within the Company's enclosure. Afterwards, when the offices of Register and Receiver were created by the Act above cited, and the duties respecting Donation claims hitherto performed by the Surveyor General, were transferred to these two offices, and the pre-emption laws under the same act were extended over the public lands in Washington Territory, the noti-



fications and final proofs of Donation claims were filed before these officers.

Here the notifications of the settlers who took Donation claims on the Company's lands, made out by Henry Miles, and of the one who took the pre-emption, were filed, as the following extract from Mr. Miles, on page 25, shows: "All of these settlers claimed under the donation law, except one who pre-empted his claim. Many of the notifications were made out by me, and I know of their being placed on file in the Register's Office in Olympia; most of them have now made their final proof in the office, with the exception of the official surveys."

All the notifications for Donation claims in Washington Territory were transferred by the Surveyor General to the new officers. It was in that office that Mr. Geo. Gibbs filed the two notifications of his Donation claim which he has spoken of in his testimony, one in the spring of 1854, and the other about the date of which there was an uncertainty—sometime in the spring of 1855. In this office, too, he made his final proof, as he says on page 324, in answer to interrogatory 16.

Most of the witnesses for the defence, who are farmers on the Company's lands, speak of their Donation claims, and of themselves as holding land under the donation laws of the United States. Geo. B. Roberts corroborates them as to the Cowlitz in his answer to interrogatory 6, on page 69, already quoted. Roberts himself having declared his intention to become a citizen of the United States, and perhaps afraid that "the threats to shoot the first man that ventured to occupy the fields the Company first occupied" might be carried into effect upon him, by such desperate neighbors, filed his declaratory statement of a pre-emption claim in the manner and for the reasons he describes in answer to interrogatory 30 on page 75.

Edward Huggins on page 91, *Int.* 7, speaks of these donation claimants.

Surveyor General Tilton, on page 302, *Doc. Evid. U. S.*, speaks of about two hundred American settlers having farms in a steady course of improvement on this Nisqually plain, and further adds that many old servants of the two Companies have long since become American citizens, and are now residing upon farms within

the alleged limits of the P. S. A. Company's claim at Nisqually, under the former Donation and the present pre-emption laws.

General Casey mentions these donation claims, and also expresses the opinion entertained by the military officers as to the rights of the Company to land, in his answer to *Int.* 18 on pages 198 and 199, which is here given: "Can you state any other matter or thing in your judgment affecting the claim of this Company against the United States?" "When I was stationed there the United States did not admit that the Company owned all the property there which it claimed to own. There was a claim owned by Judge Chambers with a mill on it near the fort. The town of Steilacoom was laid out within a mile of the fort, and within the territory claimed by the Company, and the citizens there bought and sold lots, and did not acknowledge the ownership of the Company. I suppose there were at most two hundred people in this town of Steilacoom while I was there. My impression is, that the people there claimed title through the United States by what were called 'donation claims.'"

He afterwards says: "I wish to add a little to my testimony of Saturday last. I wish now further to state that there were a number of claimants in addition to Judge Chambers and those mentioned as occupying lots in Steilacoom. In fact, the whole of the claim of the Company which was within my knowledge was dotted over with claimants who did not acknowledge the rights of the Company. I recollect the names of a number of them. Two or three persons named Bird, who occupied a mill and the grounds connected with it; two persons named Keach; a man named Patterson, another named Follett, and others named Smith and Dowling, and there were several others. These persons whom I have named, held under the *United States* either by *donation* or *otherwise*. The claim of the Company was the subject of discussion very frequently."

Reference is also made to the report of Isaac N. Ebey to Governor Steyens on 27th December, 1853, on page 230, Doc. Evid. U. S., and a long list of claimants under the donation laws of the United States given in that report.

Having thus seen in what manner, under what influence, and through what action and encouragement, claims under the land



laws of the United States were taken on these lands, the next enquiry is, as to the amount of damage resulting to the Company from this action of the settlers.

The condition of the Company's land at Nisqually, in 1846, has been already referred to, and mentioned again on the first part of the argument on this question of damages. Their pasturage and enclosed lands were but little interfered with in the early period of settlement. Their cattle increased in 1852, the number on inventory was 6,777, on the 31st October; three years after, in 1855, their number was by estimate reduced to about 500 head of cattle, seldom seen in daylight, and at night only in very small herds on the outskirts of the plains. Tolmie 110.

How this wholesale destruction of cattle occurred, is told by Mr. Huggins on page 91, in answer to Int. 6: "What became of these cattle?" "A small portion of them the Company made use of; much the larger portion, I have every reason to know, were destroyed by squatters or settlers upon the Company's claim at Nisqually and its vicinity."

"What do you mean by squatters or settlers on the Company's claim?" "I mean by squatters, persons who came and settled upon the Company's claim at Nisqually in defiance of the solemn protest of the agent in charge for the Puget Sound Company, and pretended to claim under the United States Donation and other laws."

Dr. Tolmie, on page 111, speaks of the manner in which these cattle were rendered wild, and afterwards destroyed; when asked "How did these people destroy the cattle; and what effect did the manner in which they destroyed them have upon those remaining?" he says: "The fences of the squatters were generally low, and they hounded them away with dogs, and shot at them. I now speak of early days, before the wholesale destruction commenced. These squatters destroyed the cattle by shooting them, which rendered them very wild—so that they were seldom to be seen on the prairie by day-light."

To show what these cattle were before the settlers disturbed them, and what they became after they were interfered with by the settlers, we quote here from those who knew these cattle best—the men who took care of them. One of these, John Montgomery,

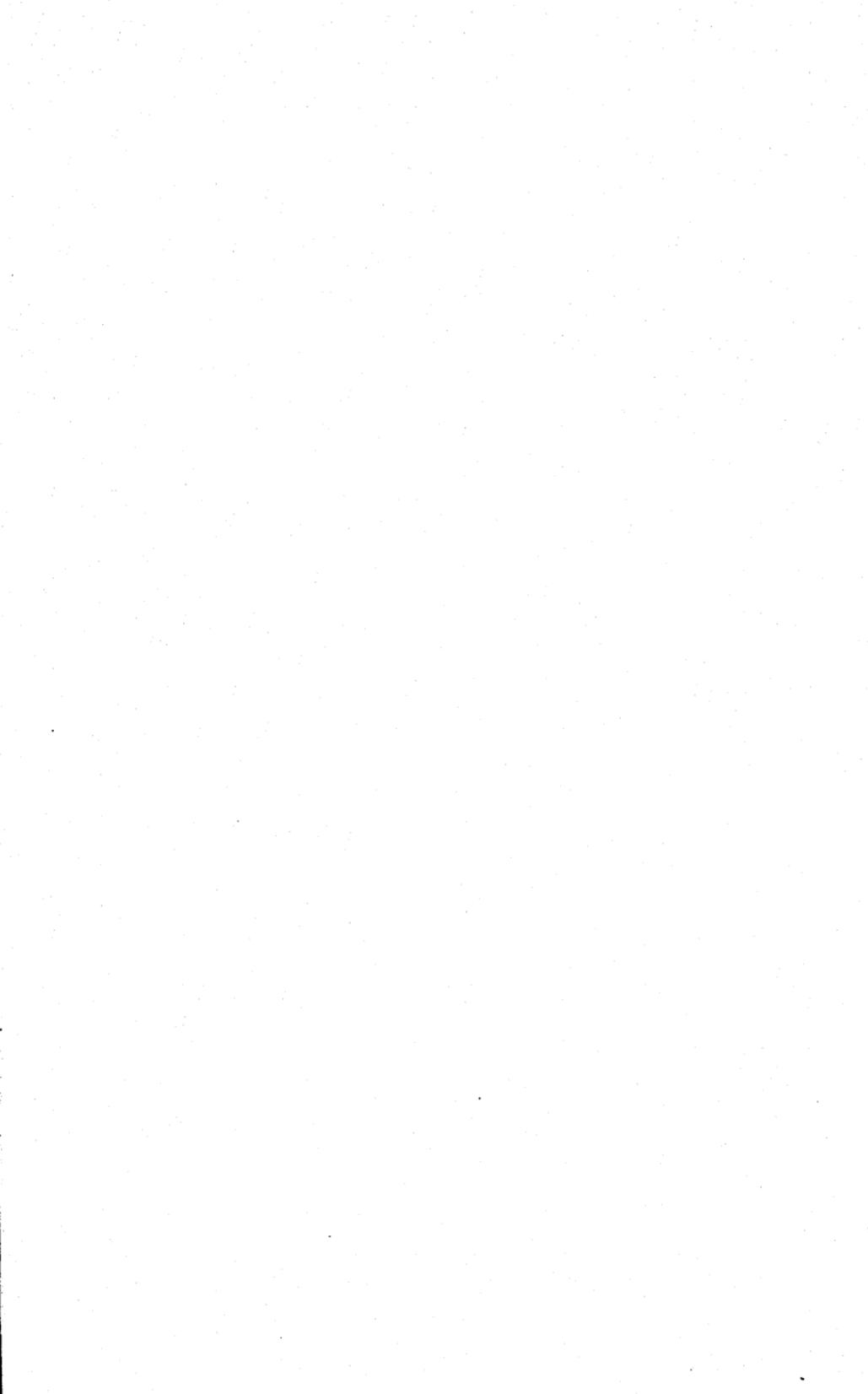
who herded the Company's cattle and horses from 1841 to 1853, thus describes them in answer to Int. 4, on page 58: "Were the Company's stock in those years, tame and driveable?" "We milked as many of the cows as we needed; they were all driveable into a corral for marking and branding; sometimes we had difficulty in doing so, but it is difficult to drive milk cows from their range."

What their condition was in later years, he also describes on page 50, in answer to Int. 6: "What was the condition of these cattle in later years?" "The cattle were easily driven and corralled until the settlers commenced shooting them down; they then became wild. Not long after the settlers upon the claim commenced shooting them down, they became quite wild, and were rarely seen in the day time on the prairie. The settlers hunted these cattle at times with dogs, and invariably frightened and kept them away from the vicinity of their claim."

John McLeod, also another herder, not of the cattle, but of the sheep of the Company, on page 66, relates his experience of the change made in cattle by the settlers on the Company's claim, in answer to Int. 7: He says: "When I first knew them, the cattle were tame, and so continued until about the year 1850; about this time settlers in considerable numbers came and squatted upon the Company's claim, and commenced to shoot and dog the Company's cattle, and from that time the cattle decreased in numbers very fast, and became wild until 1853 and 1854, when they were not seen in the prairie in the day time as often as formerly. In 1855 the Company had but few cattle remaining, and they were very wild and seldom seen on the prairie except at night."

Several witnesses have been called by the defence to show that these cattle were wild and dangerous.

The extracts from the testimony of the herders, above quoted and of Dr. Tolmie, show how these cattle became wild, and who rendered them so. That the settlers made them wild by shooting at them, is further shown by the testimony of Robert Downey on page 46; Richard Fiander on page 62, corroborates the other herders. He says, in answer to Int. 2, that "the cattle were tame and driveable on horseback when I first came to the country;" this was in 1851. He speaks of the change that took place in them, in answer to Int. 3; "State whether they continued as tame



and driveable as when you first knew them ; and if not, what made them less so ;” “ They did not ; when they first began to get worse, it was on account of the settlers shooting and dogging them from their places ; they were shot at and dogged until they were rarely seen upon the prairies, except at night time.”

As Richard Fiander seems to know, by name, many of those who had killed the Company's cattle, and also sets out a new method of depriving the Company of them by taking possession of the calves and yearlings, his answer to *Int. 4*, on the same page, is here given at length ; “ *Int. 4*.—What settlers did you ever see shoot the Company's cattle ; and how many did each shoot ? “ *Ans.*—I have seen Joseph Legard shoot seven head ; I have seen Charles Wren kill, I should think, upwards of one hundred head ; I have seen A. J. Burge kill two ; I have seen Henry Murray kill two ; François Gravelle, three ; Isaac Bastian, five ; William Northover kill seven ; Harry Barnes kill eight ; John D. Press, five or six ; James E. Williamson, seven or eight ; Henry Mynson, five ; G. Longman, three ; Aubrey Dean, two ; George Dean, two ; Harry Smith, one ; Jean Baptiste Deschamps, three ; Peter Butler, four ; Nicholas Farron, eight ; James Boyce, two ; Jesse Varner, twenty-five. I have seen many other persons, strangers to me, whose names I did not know, kill the Company's cattle. I have seen persons from down the Sound, come and take away a boat load. I have been myself at different times employed since I left the Company's service, by American settlers, to kill cattle ; I have also been employed by settlers, to catch the calves and yearlings.”

The knowledge of John Montgomery on this subject is also given on page 59 in answer to *Int. 7* ; “ State whether you ever saw any one killing cattle without the authority of the Company or their agent ;” “ I have seen plenty of persons so killing them ;” He then gives the names of some of these persons, and says of the cattle, “ Pretty near all of them were driven away or lost ; I mean by this that the larger part of their cattle were lost to the Company through the trespasses of settlers.”

McLeod, in an extract made from his testimony above, agrees with Montgomery and the agents of the Company, and says that “ in 1855 the Company had but few cattle remaining,” and Fiander

thinks that "at least three-fourths of the Company's cattle were killed by American settlers, judging from the way they disappeared, and from my personal knowledge."

As Mr. Bolton, on page 86, refers fully to the method mentioned by Fiander of reducing the number of the Company's herd by taking the calves, and also to an export trade in the slaughtered cattle of the Company, his answer on page 86 to *Int. 5* is given in full: "State, what you know, if anything, about the use and destruction of the Company's cattle by squatters upon their claim;" "I have seen as many as eight shot down in a forenoon while riding out on the plains. I have also seen them shoot down cattle, take the choice pieces, and leave the balance for the wolves. I have seen as many as four calves to one cow in the yards of settlers, that they had taken from the Puget Sound Company's cattle. I know of settlers killing the Company's cattle and bringing them to Steilacoom to market, two or three in number, two or three times a week. I have also seen boat loads taken past my house down the Sound to the northward, I suppose to the saw-mills and logging camps."

It appears that this trade in beef was not confined to exportation alone, for Robert Downey states that he "knew one man that made a business of killing cattle, and fetching the beef to town for sale; others killed them for sale, and to use themselves. The effect of this was to make them wilder than they naturally would have been, and to run some of them off. I have seen them killed by getting after them on horseback on the plains and by following them on foot into the brush."

Peter Wilson, on page 53, admits his own participation in the killing, and says "they were killed by settlers on horseback and on foot, both for use and sale at the rate of twenty to thirty a week."

The testimony of Dr. Tolmie as to the admissions of settlers "who spoke of killing cattle as a matter of course," and who gives the names of three men who "made a business of selling beef for nearly two years," and of Huggins who swears on page 98, in answer to *Int. 28*, that he "believes that he has seen the remains of two hundred and fifty animals lying on the claim, that were destroyed by squatters," need hardly be quoted on this point after what has already been cited.

An attempt has been made on the part of the defence to show that the Company killed these cattle themselves or hired others to do it. The testimony of Geo. W. Shazer is relied on upon this point. In 1851, Dr. Tolmie allowed him to kill an ox that was running with Shazer's cattle in Thurston County off the Company's land. In 1855 he had an arrangement with Dr. Tolmie for killing the Company's cattle and delivering them at Nisqually at five cents a pound, he afterwards got four. In 1852, he got two cows and a yearling that were running with his cattle, it is presumed that these he did not kill. The statement of this witness merely shows what is undoubtedly true, that after the cattle had been rendered wild by the conduct of the settlers, that the Company were compelled to have them slaughtered in the only way by which it could be done.

How this shooting of cattle was carried on by the Company before the settlers destroyed so many, is described by Dr. Tolmie, in his answer to *Int.* 44, on page 120; "Did not the Company, in 1852, 1853 and 1854, send their servants, including Indians, on to the plains, to shoot cattle where they ran?" "They did so then and at an earlier date; but before the Company became satisfied that the cattle would soon be destroyed, they used to let intervals of time elapse, before shooting cattle twice in the same locality; and such shooting as the Company had done in this way, did not materially affect the cattle, nor drive them from their haunts."

The exact number of cattle which the Company obtained out of their large herd in the years from 1851 to 1855, is clearly stated on page 98, by Mr. Huggins, in his answer to *Int.* 33; "How many cattle were driven and shipped away by the Company from 1851 until 1855, state as near as you can?" "There were sold, shipped and slaughtered by the Company in 1851, about four hundred and sixty-four head of cattle; in 1852, about seven hundred and seventy-nine; in 1853 about one thousand and seven; in 1854 about five hundred and sixty-two; in 1855 not many."

"Were not considerable quantities, besides the numbers you have given, shipped to the Company's farm on Vancouver Island?"

"No; the shipments made to Vancouver Island are included in the figures already given."

After the inventory of cattle made on the 31st of October, 1852, the Company secured to themselves in 1853 and '54 and '55, about 1600 head of cattle. Increasing the number a little for the months of November and December 1852 (by 150), it would appear that the Company obtained about one-quarter of the original number of 6,777 on hand on the 31st of October, 1852. The increase in the year 1853, and in 1854 if there were any, would not be accounted for. This exact amount of cattle slaughtered and shipped, given by Mr. Huggins, disposes of the attempt made to show by the testimony of Gibbs, Goldsborough and others, that the great body of these cattle, or a large portion of them, were shipped by the Company to Vancouver's Island, by showing the number actually slaughtered and shipped, taken altogether.

The horses belonging to the Company were abused and injured by the settlers residing on the Company's claim, "the increase by births reduced in number and the quality of the stock deteriorated, and the mares and the young stock maimed by the universal use of the Company's horses in treading out the grain of the settlers." Huggins 92. *Int.* 12.—Tolmie 110. *Int.* 13.—Fiander 63. *Ints.* 7 and 8. Some of the horses were shot by the settlers, and many of the mares rendered useless permanently, and at length the Company "finding it impossible to keep them in safety and good condition on their claim any longer," sold in a final lot 215 of them at a cheap rate to the Hudson's Bay Company, for \$5,500, retaining about 30 or 35. Fiander 63. *Int.* 9.—Huggins 99. *Ints.* 36, 37, 39 and 40. This was at the rate of about twenty-five and one-half dollars per head. Hutchinson says, on page 130, that Indian and Spanish horses at any time from 1850 to the date of his examination, would average fifty dollars per head, showing the loss to the Company by this forced sale alone of some \$5,000.

The injury done by the settlers to the sheep that were reduced by sale, scarcity of pasturage and loss, during the severe winter, to between 1,400 and 1,500 in 1865, the time that Mr. Huggins makes this statement, is best shown by the statement of Dr. Tolmie, on page 109. He says:—"The settlers, as they encroached farther on the Company's land, and became more numerous, more boldly obstructed the Company's business in various ways; and, in consequence, very much limited the range of pasture land open to



“ their sheep. During the severe winter of 1861–62, the Company
 “ lost about four thousand five hundred head of sheep; had they, up
 “ till said period, remained in undisturbed possession of their claim,
 “ they would not have lost that year nearly so large a proportion as
 “ about nine-tenths of the whole. I would add, that the sheep
 “ suffered greatly and increasingly, from year to year, by the limi-
 “ tation of pasture, intimidation of shepherds, and driving about of
 “ the flocks; and, although it is difficult to arrive at a money esti-
 “ mate of the loss under this head, I can safely put it at ten thou-
 “ sand dollars.”

To estimate exactly the loss caused to the Company by this wholesale destruction of their cattle, the injury to and deterioration in value of their horses, the loss of their sheep and the reduction in the number kept, in consequence of their pasture grounds being so restricted, is a difficult task. Dr. Tolmie estimates the loss caused by the destruction of the cattle at one hundred and fifty thousand dollars. The reason for this estimate he gives in the following extract from his testimony, taken from page 127:—“ Had the
 “ United States Government, in 1847, confirmed to the Company
 “ its title, the Company, by enclosing in large parks the most
 “ valuable lands and by cultivating green and root crops on the
 “ various portions of the claim so admirably adapted for this purpose,
 “ would have had annually from 1850, when a steady market in Ca-
 “ lifornia first offered, until 1855, when their herds were entirely
 “ destroyed, at least one thousand head for sale, without diminishing
 “ the proper number of breeding stock. Considering that the Com-
 “ pany could, by stall feeding, have sold about one-tenth of these
 “ beeves at the highest winter price, forty dollars each is a moderate
 “ valuation for the whole thousand. This, for five years, gives two
 “ hundred thousand dollars, from which I deduct fifty thousand dol-
 “ lars for contingencies and expenses. The six thousand head of
 “ cattle destroyed by the squatters, would at a valuation of twenty-
 “ five dollars a head, also make up the amount claimed, viz., one
 “ hundred and fifty thousand dollars.”

In the demand for cattle and their price, he is sustained by Mr. Hutchinson and other witnesses, he himself being the best acquainted with the subject, is the best witness as to the amount to be deducted from the saleable value of cattle for contingencies and expenses.

The estimate made in the latter part of the answer, based upon the destruction of 6,000 head of cattle at twenty-five dollars per head, is a correct one, if we take the estimate of Mr. Hutchinson as to the value of cattle from 1850 till 1856, which he puts at eight cents per pound on foot. This would give an average of from seventy to eighty dollars for every full grown animal, and an average of at least thirty dollars per head for every animal in the herd, large and small, which is better than the average of Dr. Tolmie.

It has already been stated from the proof that the Company obtained about one-quarter of the 6,777 heads of cattle, the number on the inventory on the 31st of October, 1852. Their loss of the original number amounted to about three-quarters of those on the inventory, or 5,072 cattle. In this calculation no account is made of the increase of the year 1853. The increase of cattle in 1850, by the testimony of Mr. Huggins, on pages 96 and 97, was between 1,200 and 1,400. The larger number of cattle in 1852, over that of 1849, would give a larger proportionate increase for the year 1853. Taking into consideration, that the conduct of the settlers by shooting them would reduce this number, the actual increase may be fairly calculated at 1,000. Adding this number to the 5,072 cattle, and not counting any increase for the year 1854, it makes 6,072 cattle as the number lost to the company. These, at thirty dollars per head—the average of Hutchinson—would amount to \$182,160, or at the estimate of Dr. Tolmie—twenty-five dollars per head—the loss would be \$151,800.

The damage to the Company, by the injury to horses and deterioration of their value, is estimated by Mr. Huggins, on page 92, at about \$8,000, and by Dr. Tolmie, on page 110, at \$7,000. The calculation before made of the loss sustained by the Company in the sale of 215 horses to the Hudson's Bay Company, based upon the value of horses, as shewn by the testimony of Mr. Hutchinson, and that it amounted on that single sale to something like \$5000, would go to show that the estimates of both Dr. Tolmie and Mr. Huggins are below the amount of the actual loss.

Dr. Tolmie, in an extract already quoted from his testimony, has shewn how the loss sustained by the Company, in sheep, was occasioned, and has estimated the money value at ten thousand dollars. Mr. Huggins, on page 92, thinks, the loss in sheep amounted to about



\$20,000. The extract from Dr. Tolmie's testimony being full and explicit, it is not thought necessary to add anything further to what he has said.

Taking the loss on the horses, cattle and sheep, together, and at the lowest estimates, it amounts to \$151,800, for the cattle, and \$7000 for the horses, and \$10,000 for the sheep, making the damage sustained by the Company in the loss of and injury to their stock on the Nisqually plains, \$168,800, and at the highest estimate it amounts to \$182,160 for the cattle, \$8000 for the horses, and \$20,000 for the sheep: making in all the sum of \$210,160. The whole of this loss in cattle occurred before the close of the year 1855, the year, in the fall of which the Indian war broke out. After that time there was no loss of any practical value in cattle, the loss in horses was slight, and the loss in sheep ought not to be counted at more than half of the ten and twenty thousand dollars, yet from that time, the farms and lands of the Puget Sound Agricultural Company were of little value to them. The herds of cattle that once pastured over this great tract at Nisqually, were gone. Had they been there, the pasturage was so circumscribed and reduced, that there would have been but a small amount of pasturage to support them. Horses and sheep were reduced in number and had to compete with the stock of the settlers for places of *pasturage*. To estimate the damage that was caused to the Company by being deprived of this pasturage, and of their outlying farms, by the claimants under the Donation law settling upon this tract, it will be necessary, to arrive as nearly as possible at the amount of land taken up and occupied by the settlers.

Mr. Huggins thinks there were about 150 Donation claimants who had taken claims upon the land. Surveyor-General Tilton estimates the number at about two hundred.

All married men who came to the Oregon country before the first day of September 1850, were allowed to take 640 acres as a Donation claim, and all single men 320 acres, a privilege extending until the first day of December, 1853; and all of this first class, and all married men who arrived in the Territory before the 1st day of December, 1853, were allowed to take 320 acres, and all single men 160 acres, the privilege extending to the first day of December, 1855. When it is considered that this premium on

marriage, and the natural inclination and necessities of a frontier life left few of these settlers to take their claims as single men, it will be seen how large an amount of land these claimants must have taken possession of and included within their fences, and what is usually called the lines of their claims. Dr. Tolmie estimates the amount thus taken possession of, and the use of which was lost to the Company, at "at least eighty thousand acres of the best arable and pasture lands of the plains." In view of the facts above stated as to the quantity of land allowed to each settler, and the number of settlers, the amount of land stated to have been taken by them, seems to be reasonable enough, and in accordance with the facts.

The allowance to the Company of the damage suffered by them in the destruction of their cattle, up to the year 1855, might be supposed in some degree to compensate them for the loss of the use of a great portion of this eighty thousand acres up to the year 1855. But after that date and up to the time of this inquiry, another method of ascertaining the amount of damage sustained by the Company, in thus being deprived of the use of eighty thousand acres of their arable and pasture lands, must be adopted. There is no better, or clearer, or fairer way of doing this than by determining what would be the value of the annual rental of each acre of this eighty thousand acres of the use of which the Company were deprived. The facts necessary to ascertain the value of this annual rental with accuracy are to be found in this testimony.

It was shewn before in this argument, while discussing the value of pasturage lands on the Nisqually plains, by the testimony of Robert M. Hutchinson, W. W. Miller, and A. J. Burge, that the rental of every acre of enclosed pasturage was worth \$1.50 per year, and that the demand was greater than the supply. The average of the cost of fencing would be less than one dollar per acre for an outside fence for tracts of different sizes. If unfenced land on the Nisqually plains is worth, as it has been before shewn to be, five dollars an acre, and can be fenced at one dollar an acre, the difference in the value of the annual rent, would be very slight, the fence not costing one year's rental. But reducing the value to three dollars an acre, and putting the cost of fencing at two dollars, the difference in what ought to be the value

of the rental would more nearly approximate, and the rent of the unfenced land might be fairly stated at one half the value of the enclosed. This would be seventy-five cents an acre for the year, which is a much lower rate of rental than any difference in the cost of unenclosed and enclosed lands, as shown by the testimony, would warrant. Taking the eighty thousand acres at a rent of seventy-five cents a year for each acre, it will give sixty thousand dollars as the annual loss to the Company, caused by their being deprived of the use of this eighty thousand acres of land. For ten years up to 1865, it would give \$600,000 as the damage sustained by them during that time.

Leaving out any damage caused by the loss or injury to horses, or sheep, and taking the lowest estimate of the damage caused by the destruction of cattle, namely \$151,800 up to 1855, the method adopted for ascertaining the amount of damage up to that year, and adding to it the value ascertained by computation of the rental since that time, and it amounts to \$751,800, more than three times the amount of damages claimed in the memorial.

Dr. Tolmie, on page 128 says, and a portion of his statement has already been made use of, that "At Nisqually, since 1855, the Company have lost the use of at least eighty thousand acres of the best "arable and pasture land on the claim, which at the low estimate of "twenty-five cents per acre of annual rental for ten years, would "make the amount claimed." Dr. Tolmie, may well say that his estimate of twenty-five cents per acre for an annual rental is a low one, when Hutchinson swears that the pasturage for cattle in enclosed lands is worth one dollar a month per head, and Miller swears that he rented two hundred acres of "poor gravelly prairie" enclosed, for a part of the season, for two hundred dollars; but taking Dr. Tolmie's estimate, it makes \$20,000 per year, which for ten years is \$200,000, and taking the two classes of damages together it amounts to \$351,000. If fifty cents an acre, (the medium between twenty-five and seventy-five), be adopted as the annual rental of each acre, the amount of damage would be over \$500,000. It will be seen that the above calculation is based upon the assumption, that only one half of the claim is in the occupation of the settlers, and that no damages are claimed for the other half.

A calculation might easily be made of the damage caused by the

loss of the use and occupation of a portion of their lands prior to 1855, which would be satisfactory to the Company, but would not conform so strictly to the facts in the case; as the loss sustained by the injury to, and the destruction of cattle, horses, and sheep would not enter into the calculation.

COWLITZ.

VALUE OF LAND AND IMPROVEMENTS.

The claim for the establishment at Cowlitz is £20,000 sterling for the land, consisting of 3,572 acres, more or less, and £6,000 for the buildings and improvements, making together £26,000, equal to \$126,533.33.

The evidence for the claimants relating to this portion of the case is so direct and complete, that it will suffice to advert to it in general terms, with few observations or particular citations.

The map produced by the claimants (marked A) and referred to in Mr. Tilton's deposition (*Int.* 7, p. 7.), shows the boundaries of the land claim there; and that attached to the deposition of Mr. Roberts (*Int.* 3, p. 68, Claimants' map 4) shows the quantity under cultivation in 1845-6, which he states to be about 1,700 or 1,800 acres.

The possession and enjoyment by the Company of the whole quantity of this land, and of even a larger tract, stated by some of the witnesses at 3,800, and by other at 4,000 acres, is proved in direct and positive terms by eight witnesses, and more generally by all those produced by the claimants who speak to the point, and several of those examined for the respondents.

The witnesses who speak directly to the fact of possession are Plamondeau (p. 12), Jackson (p. 16), Miles (p. 23-4), Bernier (p. 31-2), Simmons (p. 35), Roberts (p. 68-9), Douglas (p. 79-80), and Tolmie (105-6); of these witnesses, Sir James Douglas, Dr. Tolmie, and Mr. Roberts, give the fullest and most reliable testimony on the subject, as from their relations to the Company they have a more complete knowledge of all the details concerning it. The same witnesses, together with Messrs. Tilton,

Smith, Walker and Fitzburgh, establish the value of the land, and some of them of the buildings at the Cowlitz. Of these Mr. Tilton's estimate is the lowest, \$10 to \$15 the acre (p. 2). He is the only one of twelve witnesses whose estimate is under \$20; this latter sum being the estimate of one witness alone, Simmons (p. 36). The lowest valuation by any of the ten other witnesses is \$25. Jackson's is from \$25 to \$50 (p. 17); that of Miles (p. 24), of Bernier (p. 33), of Roberts (p. 70), of Smith (p. 135), of Walker (p. 139), and of Fitzhugh (p. 143), is \$25 per acre. And Dr. Tolmie (p. 108) puts the value at \$30. The average of these estimates exceeds \$25, and that amount should be taken as the lowest value of the 3,572 acres, giving a total of \$89,300, exclusive of the buildings and improvements. That the estimate of \$25 is under the true value of the land, is manifest from the details given by several of the witnesses. Thus Miles, formerly clerk of the United States District Court, afterwards member of the Territorial Council and of the House of Representatives, and since 1852 a farmer resident near the Company's establishment on the Cowlitz, says (p. 23): "I should think the whole of this tract contains about four thousand acres. There are about two thousand acres of prairie, I think, and the rest wood. This prairie land, if properly treated would yield from two to two and a-half tons of timothy hay per acre, and on the average, twenty-five bushels of wheat per acre. When I first saw it, three-fifths of the prairie was in timothy, and a good deal of it still remains in timothy;" and further on (p. 24, *Int.* 5) he states that, in 1864, hay was worth at Cowlitz \$12 per ton, and wheat \$2 per bushel. This gives as the gross annual return of each acre in timothy from \$24 to \$30, and of each acre in wheat, \$50. This testimony of Miles, whose standing and intelligence are indicated by the important offices he has held, and who is not nor ever has been connected with the Company, is fully sustained by that of Bernier (p. 33).

But the whole of this evidence is conclusively strengthened by a reference to the "copy of Map of Cowlitz Farm, as cultivated in 1845 and spring 1846, attached to the testimony of Mr. Roberts, by agreement of parties." On this map the houses, barns, and other farm buildings, will be plainly seen. The different fields into which the whole farm is divided are marked out, and the

change of crops necessary to keep the land in good condition is shewn, the future crops of 1846-7 and '8 being put down in advance. A specimen of high farming is here exhibited, which the lapse of twenty years has not seen repeated in Washington Territory. This plan, in itself, is the best proof, and speaks louder than any number of witnesses could, as to the value of this land to a company which could thus cultivate it with science, skill and industry combined; for it shows that if unmolested by the inroads of settlers, with its farms and lands confirmed to it, and the inducements which the high prices of later years in this country held forth, that this tract of rich arable land, would have been made like a garden; and that every acre of the Nisqually plains fit for cultivation would also have felt the effect of skillful agriculture, impelled by a spirit of enterprise and sustained by a due amount of capital.

The buildings are specified and described by Mr. Roberts and Dr. Tolmie. The former says (p. 71):—"There was a large dwelling house for the agent, with its offices and outbuildings, worth, I should say, four thousand dollars; a very large granary 40 x 100 feet, three stories high, built in the Canadian style, worth four thousand dollars; servants' houses worth one thousand dollars; some ten or twelve barns and sheds worth at least one hundred and fifty dollars apiece. There was a large gang saw-mill, out of repair, which must have cost the Company about ten thousand dollars, worth at all events six thousand dollars in 1846. In addition to the buildings and other improvements described, I would estimate the value of the ditching made by the Company at eight thousand dollars. There was about fifteen miles of fence worth about fifteen hundred dollars."

Dr. Tolmie (p. 106-7) says: "They had a comfortable, commodious dwelling house; a large two story granary, with barns and sheds conveniently distributed at various points over the farm. They had a wagon road to the bank of the Cowlitz River, made at considerable cost. They had a gang saw mill on the timbered land, near the Cowlitz River, within the claim; also dwelling houses for their servants, at various points on their farms, stables, cow sheds and piggeries." He estimates these improvements at \$30,000.

Mr. Miles (p. 27-8) gives a less complete account of the buildings in 1853-4, when they were taken possession of by American Squatters, estimating their value at \$10,000.

The counter evidence, adduced by the respondents, relating to the value of the land, is drawn from sources so little to be relied upon, either upon the score of sufficiency of knowledge or of good faith, that a brief notice will dispose of it.

The first piece of information which we meet, is in the report of the notable three, Applegate, Carson and Rinearson. I will not trifle with the time of the Commissioners by entering upon any examination of the report itself, or of the statements given by its authors under oath in support of it. The worthlessness of the statements of these men has already been exposed in the argument in the case of the Hudson's Bay Company, and adverted to in this case, and if any further proof of it be required, it will be found in the cross-examinations to which they were severally subjected by the local counsel for the Company.

Besides these three, there are but three other witnesses for the United States who speak to the point: W. W. Miller, Fred. A. Clarke and Hugh A. Goldsborough.

MILLER, as already stated, is a broker and money-lender residing at Olympia (p. 74). His acquaintance with the farm at the Cowlitz is derived from *having several years ago rode over that portion of the prairie which he supposed belonged to the Puget Sound Company*, (p. 74) coupled with his experience as a money-lender. He estimates the prairie land there at from \$3 to \$5 (p. 74); the timbered portion at nothing at all. I do not intend to enter upon any analysis of this man's testimony. I merely contrast his estimate with his answers on cross-examination, and particularly those to the Interrogatories 25, 26, 27, on pp. 83-4, in which he says that, as he understands it, the prairie portion of the claim consists of the very best quality of upland prairie land known to that country, and will produce good crops of grain and the various grasses; that it will produce equally as fine crops of hay as the richest upland prairies of Illinois; and hay was worth in 1865, the year before he was examined, \$10 per ton. How the witness reconciles these and other statements in his cross-examination with the estimate of the value of this same prairie land at \$3 to \$5 per acre, it is difficult to understand.

FREDERICK A. CLARKE, is a farmer—evidently an unsuccessful one. He puts the land on the Cowlitz prairie at \$5 per acre (p. 91), and bases his judgment chiefly, it would appear, upon a forced sale of his own of 115 acres for \$500. He neglects, however, to state, until compelled to do so upon cross-examination, that this land was encumbered by a judgment to the amount of \$4,100, and was sold to the judgment creditor, who was no other than W. W. Miller.

GOLDSBOROUGH, whose reckless manner of testifying has been already noticed in connection with the evidence relating to the Nisqually Plains, confesses (p. 176) that he knows very little of the Cowlitz claim. Nevertheless, he takes upon himself to value it at \$12 the acre.

The evidence of these three men could not be received to overthrow or neutralize that of the twelve witnesses for the claimants, even if they all possessed equal knowledge of the subject; but when these three are contrasted, as to the sources and extent of their knowledge, with the other twelve, it is manifest that they leave the statements and valuation by the latter unimpaired. The value, then, of the land at the Cowlitz cannot consistently with the evidence be put at less than twenty-five dollars per acre, making for the 3572 acres, \$89,300.

The proof of the value of the buildings and improvements is less abundant and conclusive. That of Tolmie and Roberts, who are most competent to testify on the subject, indicate a difference of valuation. Tolmie's is \$30,000 (p. 108), while Robert's is less (p. 71-3), and Miles, still lower, putting it at no more than \$10,000 (p. 27-8). It is probable that \$20,000, the mean between the two extremes, would be the fairest adjustment of the amount to be awarded for them.

In relation then to their establishment on the Cowlitz, the claimants think they are entitled, on the foregoing evidence to receive for the land and improvements there, an amount of not less than \$109,300.

LOSS AND DAMAGE SUSTAINED AT COWLITZ.

The only important question that remains to be disposed of in the consideration of this case, is, What was the amount of damages

sustained by the Company on their land at the Cowlitz by the action of the settlers upon it?

How the farms at that place were taken possession of, the enclosures broken into, and the fencing changed by persons claiming under the Donation Law, and by one claiming under the pre-emption law, has been already mentioned, and the notice given to these settlers referred to.

In 1846 the Company was in possession of the land at the Cowlitz, set out in the memorial. About 1700 or 1800 acres of this land were enclosed, as the agent, Mr. Roberts, states (p. 74.) In the fall of 1852, when Mr. Miles first saw it, "three-fifths of this whole prairie was in timothy," of which the "ground would raise about two tons to the acre," of wheat it would produce about twenty-five bushels to the acre.

In 1851 the Company had upon this claim two hundred and fifty head of cattle, fifty horses, and perhaps one thousand sheep and one hundred hogs. The horses, sheep, and hogs were gradually reduced in number, or removed to Nisqually. Of the cattle, some were removed to Nisqually, and the remainder are believed by the Company's agents to have been driven about and destroyed by the settlers upon the claim. Of this there is some proof from other testimony, one witness having seen carcasses of cattle "that were shot lying by settlers' fences, not more than half a dozen." He had seen also two other wounded cattle and one wounded mule of the Company's.

That settlers, who "invariably carried pistols and other arms when ploughing up the Company's fields and taking possession of their fences," and who "threatened to shoot any man who ventured to occupy any of the fields of the Company heretofore occupied by them and now claimed by the settlers," one of whom was bold enough to tell Judge McFadden, in open court, "that he would shoot any of the Company's people who dared to interfere with him,"—that such men would hesitate to shoot cattle when their necessities required or their pleasure instigated them to do so, no one would believe. But the proof not being so full and explicit as in the case of the settlers upon the Nisqually plains, this claim is not now insisted upon.

That the Company were in 1852 dispossessed of the great body

of their lands at Cowlitz is clear,—Mr. Geo. Roberts at last retaining possession of an enclosure of about twenty acres only, and a sort of occupation of some hundred and forty outlying acres.—Plomondeau, page 13, *Int.* 6.

As in the case of the Nisqually plains, after 1855, the damage to the Company can best be ascertained by determining the value of the yearly rental of each acre in the possession of these Donation claimants. Dr. Tolmie, on page 128, in answer to *Int.* 7, has estimated the value of the yearly rental of 3000 acres at one dollar per acre. His answer is here given in full;

“The Company at Cowlitz have, for more than ten years, lost the use of the greater part of their claim, which at a reasonable rental of say three thousand acres at three thousand dollars a year would make up the amount claimed. The Company, if in secure possession, could have made more by the production of beef and bacon there, and also by the sale of hay or by letting the enclosed fields as pasture to Oregon drovers.”

Dr. Tolmie, in this statement as in the case of the Nisqually lands, puts the annual value of the land much too low. He may well add, that “the Company, in secure possession, could have made more” than this.

Henry Miles, on page 24, in answer to *Int.* 4:—“What is a fair and usual rent for arable land in your section of the country?” says:—“There is but little cash rental; one-half the crop on land, like the Cowlitz prairie, is a fair and usual rental. I have rented my own prairie at that.”

Three-fifths of this prairie in 1852 was in timothy, and as before stated, the ground would produce two tons to the acre.

Marcel Bernier, on page 33, on being asked “What has timothy hay been worth per ton during the last five years there?” says: “Not less than ten dollars, and as high as twenty dollars per ton.”

Three-fifths of this prairie would be about fifteen hundred acres; half the crop for rent would give the owner fifteen hundred tons of hay, or a rental of ten dollars an acre. Taking the remaining prairie for wheat lands and allowing twenty-five bushels to the acre, half a crop would be twelve and one half bushels, which at one dollar per bushel would give twelve and one half dollars as the yearly rental for the wheat lands. Reducing this rental to one

half of the yearly value of the grass lands, the result would be an annual value of five dollars per acre, making a total rental of ten thousand dollars for two thousand acres of the claim alone, and for ten years use and occupation, resulting in a loss to the Company of one hundred thousand dollars, an amount largely in excess of that stated by Dr. Tolmie, but fully as much below the annual value of the land as given by the witnesses whose testimony has been just examined.

What amount of injury and consequent damage has been done to the entire business of the Company, which, as Dr. Tolmie has stated on page 105, "at Cowlitz, has been the production of wheat, "oats, butter, pork, horned cattle, sheep, horses, and other farm "produce, and at Nisqually, the breeding of horned cattle, sheep "and horses, the exportation of the same, and of wool, hides, "tallow and salt beef," is apparent from the full statement that has already been made in this case. The exact money value of this injury could only be obtained by determining what the business would have been worth to the Company, had no interruption occurred. That the business would have been large and flourishing and the annual profits great, increasing from year to year, with the increased cultivation of its lands and new and improved methods of agriculture, may be safely asserted. The condition of the country, the necessity for supplies and the demand for agricultural produce greater than the annual production could equal, demonstrate this to be true. No calculation, however, has been made by any witness as to the amount of those profits, and the money value of this injury is left to be determined upon the evidence and the argument made in other parts of this case.

There is one matter connected with this question of damages, referred to in the letters of Governor Stevens and others, which should not be passed without notice. It is when they say, that the "courts of justice are open to the Company where they can obtain redress for any wrongs they may have suffered at the hands of the settlers."

That this was tendering to the Company the very mockery of justice, the testimony of the Hon. Edmund C. Fitzhugh, late Associate Justice of the United States Supreme Court for the Territory of Washington, clearly shows. He says, in language already

quoted for another purpose in this argument, and now restated with added force in this connection, that, "With regard to the administration of justice, in my opinion it would have been useless for the Puget's Sound Agricultural Company to have attempted to obtain any verdict in their favor at the hands of a jury. The Courts were open to them, but practically would have been of no use to them in any attempt to get rid of settlers on the land claimed by the Company. * * * The almost universal opinion among the settlers, that the lands taken possession of belonged to them (the settlers), would have made it impossible for any alleged rights of the Company to be maintained, and no counsel would have advised the prosecution of a suit with any hope of success."

Nothing need be added to this testimony of an upright man, who thoroughly knowing the subject upon which he spoke, has thus practically said that the suggestion made by Governor Stevens and others, of redress in the courts of justice, was utterly delusive. If anything were needed to give added strength to this statement, it is to be found in the fact that the settlers themselves would be jurors.

The acts of the first Legislative Assembly of the Territory of Washington, defining the judicial districts thereof, appointed terms of the United States District Court to be held for the County of Pierce and also for the County of Lewis. In the County of Pierce, the settlers on the Company's land made up the great body of its citizens. In the County of Lewis a smaller proportion of the citizens were settlers upon the Company's Cowlitz farms. From the citizens of these two counties, were to be taken by law the jurors to whose wisdom and sense of justice the questions arising between the Company and the trespassers upon their lands (in case litigation was entered into) were to be submitted.

This state of the law continued for several years. In 1859, before the United States District Court sitting in and for the County of Pierce, the appeal of the Company from the decision of the County commissioners levying a tax upon their lands, was heard and decided against them.

On this state of fact, and in view of the prejudice and feeling shown to exist in the community and adverted to and commented upon in a former portion of this argument, is it too much to say,

that any attempt upon the part of the Company to go into the Courts would have been practically useless and could only result in adding to the losses they had already experienced, and that the Company were, as has been already said, remediless in the courts of justice.

The amount of taxes paid under protest by the Company, is thus set out in full in the answer of Dr. Tolmie, on page 113, interrogatory 24 :—" In 1852, under protest, they paid taxes on the Company's land at Nisqually, \$645.12; in 1856, \$1400; in 1857, \$3500; and in addition, a road tax upon the land of \$1250; and school tax \$249, on forty sections of the Company's land. In 1858, the full tax on the Company's land was \$7250.02—which was paid. In 1859, the Company paid only \$301, on 40 sections of the land, and refused to pay the balance, which was \$7250.02; other land tax in 1850 was paid, but not under protest." Showing that the Company paid in taxes the sum of \$14,595.14 to the authorities of Pierce County. This sum of money for taxes was paid under protest. \$7250.02, the tax of 1859, the Company refused to pay, because, as their agent says, they did not consider the "taxation equal and uniform." How far the United States is liable to refund to the Company this amount of taxes, paid under protest upon lands of only part of which they had actual possession, lands which the United States by Treaty had agreed to confirm, but which to this day remain unconfirmed, is left to the judgment of the Commission.

SUMMARY AND CONCLUSION.

The claim of the Company for compensation from the United States, as set out in the memorial, is, for the lands at Nisqually, \$798,133.33, for the lands and farms at the Cowlitz River \$126,533.33. In these sums are included the buildings and improvements at both places. For the losses suffered by the Company, they have claimed the sum of \$243,333.34. The memorial also sets out that the Company have paid for taxes the sum of \$14,596. The entire sum claimed in it is \$1,168,000.

The evidence, compared and collated above, gives for the tract of land of 167,040 acres at Nisqually, at a valuation of five dollars per acre, the sum of \$835,200. This value is for farming and

grazing purposes alone. Adding to this the value of the oak trees at the lowest estimate of \$501,120, the buildings and improvements at \$11,000, and the water power of the two creeks at \$30,000, and it amounts to an aggregate of \$1,377,320 — a sum nearly approaching to double the estimate in the memorial.

The lands and farms at the Cowlitz, with the improvements, have been shewn to have been worth to the Company, at least, \$109,300.

The lowest estimate made of the losses at Nisqually was \$751,800.00, and the estimate of Dr. Tolmie of the losses at the Cowlitz was \$30,000, or an aggregate of losses sustained by the Company of \$781,800; an amount also largely in excess of that claimed in the memorial.

The amount then actually proved under the several heads of claims set forth in the memorial, stands as follows:—

Lands and improvements at Nisqually	\$1,377,320
Lands and improvements at Cowlitz	109,300
Losses of Cattle and of the use and profits of the land	781,800
	\$2,268,420

This amount is exclusive of the sum paid for taxes.

The attention of the Commissioners is respectfully solicited to the statements made in the argument in the Hudson's Bay Company's case concerning interest and costs. The equity of including these in settling the amount of the award is as great in this case as in that, and ought not to be overlooked. With respect to interest, it may to a large extent and more particularly in this case, be represented by the claim for the profits of the land, and of course both cannot be accorded, but when the one is not given, certainly the other ought to be.

As to the costs and expenses which this Company has been compelled to disburse in the prosecution of its rightful claims, they amount to not less than \$60,000. It is unnecessary to repeat here, what has been said on the subject in the other case, but it is obvious, that the claimants cannot, without manifest injustice, be subjected to a loss of this amount upon the declared value of their treaty rights, and that it ought to be covered by the award.

There are other portions of the argument in the case of the Hud-



son's Bay Company, which must be made common to this case also without specially repeating them. All that appertains to the establishment and recognition of the rights of that Company, and its *status* in the country, has, of course, its application to the case of the present Claimants who derived title from it. Equally applicable to this case is the argument under the head, "Former Negotiations and Official Statements," and much of what is said under the head, "General Considerations." Indeed the argument in that case must be received, as affording throughout, the substratum and general foundation of this, and as supplementary to, and sustaining it.

The claim of the Puget's Sound Agricultural Company has thus been presented to this Commission. The examination of the testimony bearing upon the different allegations of the memorial, has been of necessity long, and the quotations from that testimony have been numerous. It is believed, however, that the evidence fully sustains all that is claimed in the memorial of the Company, and much more; and that the amount of compensation there assumed to be due from the United States, is shown to be far below what the Company is entitled to receive by any just and equitable decision of this case.

Signed,

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