

BALL JANIK LLP

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KARL MORELL



January 7, 2009

224317

Hand Delivery

Honorable Anne K. Quinlan
Acting Secretary
Surface Transportation Board
395 E Street S W
Washington, DC 20423

ENTERED
Office of Proceedings

JAN - 7 2009

Part of
Public Record

Re STB Docket No. AB-1020X, East Penn Railroad, LLC – Abandonment
Exemption - In Berks and Montgomery Counties, Pennsylvania

Dear Acting Secretary Quinlan:

Attached for filing are the original and ten (10) copies of the Motion to Reject the Request for Establishment of Conditions and Amount of Compensation.

If you have any questions, please call me.

Sincerely,

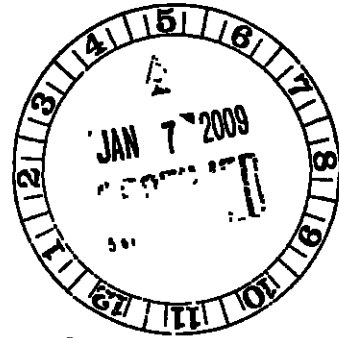
Karl Morell

Enclosures

BEFORE THE
SURFACE TRANSPORTATION BOARD

STB DOCKET NO AB-1020X

EAST PENN RAILROAD, LLC
-- ABANDONMENT EXEMPTION--
IN BERKS AND MONTGOMERY COUNTIES, PA



224317

**MOTION OF EAST PENN RAILROAD, LLC, TO REJECT THE REQUEST FOR
ESTABLISHMENT OF CONDITIONS AND AMOUNT OF COMPENSATION**

ENTERED
Office of Procurement

JAN - 7 2009

Part of
Public Record

Karl Morell
Of Counsel
Ball Janik LLP
1455 F Street, N W
Suite 225
Washington, D C 20005
(202) 638-3307

Attorney for
East Penn Railroad, LLC

Dated January 7, 2009

BEFORE THE
SURFACE TRANSPORTATION BOARD

STB DOCKET NO. AB-1020X

EAST PENN RAILROAD, LLC
--ABANDONMENT EXEMPTION--
IN BERKS AND MONTGOMERY COUNTIES, PA

**MOTION OF EAST PENN RAILROAD, LLC, TO REJECT THE REQUEST FOR
ESTABLISHMENT OF CONDITIONS AND AMOUNT OF COMPENSATION**

Pursuant to 49 C F R § 1104.10(a), East Penn Railroad, LLC ("ESPN") hereby urges the Surface Transportation Board ("Board") to reject the Request for Establishment of Conditions and Amount of Compensation filed by Berks County, PA (the "County"), on December 24, 2008 ("Request for Conditions"), and supplemented on December 29, 2008.

At approximately 2 p.m. on December 24, 2008, the County filed, via hand delivery, its Request for Conditions with the Board.¹ The Certificate of Service on that document, dated December 23, 2008, falsely states that the document had been served on counsel for ESPN by electronic mail. At 12:25 p.m. on December 26, 2008, the undersigned informed the County's law firm that service had still not been made and requested tracking information. See Exhibit 1. At 4:54 p.m. on December 26th, after Ball Janik's Washington D.C. office had closed for the weekend, the County's law firm informed the undersigned that "The filing was sent to our landlord's mail room for posting by first class mail on 12/24. I assumed it had been mailed. An

¹ The Board's web site reflected the filing of the Request late in the afternoon of December 24th, but the filing could not be accessed until the afternoon of December 29th.

e-copy of the filing is attached.” See Exhibit 2. The County’s December 24th filing contained 367 pages whereas the referenced e-copy contained a total of 107 pages, or less than 30 percent of the filing. Consequently, at 6:41 a.m., on December 27, 2008, the undersigned informed the County’s law firm that ESPN still had not received the entire filing. See Exhibit 3.

At around noon on December 29, 2008, the undersigned received a hand-delivered version of the December 24th filing. At around 4 p.m., on December 29, 2008, the undersigned received the mailed version of the December 24th filing.

Pursuant to 49 C.F.R. § 1152.27(g)(1), ESPN’s reply was due December 29th (five days after the Request for Conditions was filed), or less than 5 hours after first receiving the County’s entire filing. Pursuant to 49 C.F.R. § 1152.27(h)(4), ESPN’s reply was due December 31, 2008 (35 days after November 26, 2008, when the offer of financial assistance was filed).

Pursuant to 49 U.S.C. § 10904(f)(1)(A), the Board is required to render its final decision in this proceeding by January 23, 2009, which is 16 workdays from December 29th and 14 workdays from December 31st. Given the conflict in the Board’s regulations as to the due date for ESPN’s reply, and in light of the upcoming statutory deadline for the final decision, ESPN filed a preliminary reply on December 29, 2008, setting forth ESPN’s affirmative evidence as to the net liquidation value (“NLV”) of the rail line being abandoned. On December 31, 2008, ESPN filed its final reply which, for the convenience of the Board, restated the affirmative evidence contained in its preliminary reply and responded, as best as possible given the truncated response period, to the information contained in the Request for Conditions.

In filing the Request for Conditions, the County failed to comply with the service requirement of 49 C.F.R. § 1152.27(g)(1) (service by overnight mail) which specifically governs

requests for conditions in offer of financial assistance ("OFA") proceedings. The County also failed to comply with 49 C.F.R. § 1104.12(a) ("Service on the parties should be by the same method and class of service used in serving the Board.") The County's law firm hand-delivered the filing to the Board mid-afternoon and then provided their landlord a copy for mailing on Christmas Eve, with most Washington D.C. offices closed for the next 4 days.²

When pressed about their failure to comply with the Board's service rules, the County's law firm blithely responded that ESPN should simply treat December 29th as the filing date. The problem with this self-serving advice is threefold. First, it is the Board and not counsel for the County that has the ability to waive filing requirements set forth in the Code of Federal Regulations and there simply was not enough time to obtain such a ruling from the Board. Given the extremely short statutory deadline for rendering a decision in this proceeding, any additional time granted to ESPN would be at the Board's expense thus rendering an extension problematic. Second, it was the County that opted to file on December 24th rather than the 29th. Finally and most importantly, there is a vast difference between the NLV calculated by the County and the NLV calculated by ESPN. If the County does not like the price set by the Board, it can simply walk away. If the Board sets the price below fair value, ESPN will be forced to sell the line to the County at an unfair price. ESPN could not afford to run the risk of filing its reply late and having the Board reject its evidence.

In more normal Board proceedings, failure to comply with the applicable service rules

² ESPN finds it difficult to believe that the County's failure to comply with the Board's service rules was unintentional. Ball Janik's Washington DC office is located directly between the office of the County's law firm and the Board. Therefore, the County's counsel would have had to walk or drive by the Ball Janik office in order to file the Request for Conditions with the Board.

can be an irritant and at most result in minor inconveniences since the reply period is usually 20 days. In an OFA proceeding, the offeror's failure strictly to comply with the service rules deprives the railroad of any meaningful opportunity to present its case.

Whether deliberate or unintentional, the County's failure strictly to comply with the Board's rules governing service has prejudiced ESPN's ability fully to prepare its reply.

By the filing deadline on December 31st, ESPN was aware of additional errors, misstatements and omissions in the County's Request for Conditions but simply did not have ample time to incorporate them into the reply. Moreover, ESPN did not have adequate time to verify other information contained in the Request for Conditions.

ESPN is providing the following information for purposes of demonstrating prejudice in support of this motion. Because the Request for Conditions was not timely served, ESPN had inadequate time to (1) verify the reroll rail, scrap rail and scrap OTM cited by Mr. Landrio, and was thus forced to accept those prices, (2) present evidence that the author of the 1998 appraisal cited by the County (i) objected to the County's use of the appraisal in this proceeding, (ii) considers the use of that appraisal in this proceeding as unauthorized and improper, and (iii) subsequently changed his mind as to the quality of the title and now considers the vast majority to be held in fee by ESPN, and (3) to locate, copy and file with the Board Briefs of Title associated with many of the Releases which the County claims are less than fee. As an example, attached as Exhibit 4 is the "Brief of Title" associated with the Release from Henry and Jacob

Grabel³ The Briefs of Title further demonstrate that the Releases conveyed fee title

The above examples are representative of the types of information ESPN could have introduced if the County had timely and appropriately served its filing

The County failed to comply with the Board's rules governing the service of pleadings Whether intentional or inadvertent, that failure has significantly prejudiced ESPN ability fully to respond and refute the information contained in the Request for Conditions The only appropriate sanction for the County's conduct is the rejection of the Request for Conditions See *Petersen v Chicago, Great Western Ry Co*, 3 R R D 346 (1943)(motion for a new trial stricken because not served), *Evans v Port Authority of New York and New Jersey, et al*, 246 F Supp 2d 343 (2003)(motion for new trial denied because not served or accompanied by memorandum of law)

The requested sanction is particularly appropriate in OFA proceedings, given the very short statutory deadlines and the potentially high financial stakes involved Where, as here, the offeror games the proceeding so as to deny the railroad a meaningful opportunity to present its case, the only appropriate sanction is for the Board to summarily reject the Request for Conditions

³ The consideration for this Release was \$10,000 for 3.442 acres, or \$2,905.29 per acre It appears from the Brief of Title that the Grabels had purchased this property (from a widow), which included a flour and grist mill, four dwellings, and a plantation or tract of land of 275 acres for three separate mortgages totaling \$33,400 Less than a year later, the Grabels sold a little over 1 percent of the property to the Colebrookdale Railroad for about 30 percent of their purchase price It is inconceivable that the interest acquired by the railroad was simply an easement as alleged by the County

CONCLUSION

ESPN respectfully urges the Board to reject the Request for Conditions and to terminate this proceeding

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Karl Morell". The signature is fluid and cursive, with the first name "Karl" and last name "Morell" clearly distinguishable.

Karl Morell
Of Counsel
Ball Janik LLP
1455 F St . N W , Suite 225
Washington, D C 20005
(202) 638-3307

Attorney for
EAST PENN RAILROAD, I.I.C

Dated January 7, 2009

CERTIFICATE OF SERVICE

I hereby certify that on January 7, 2009, I caused the foregoing Motion to be served, by hand delivery, on Counsel for Berks County, PA


Karl Morell

Morell, Karl

To Jim Savage

Jim, according to the STB's web site, you filed a request to set conditions in AB-1020X on December 24th Pursuant to 49 C F R 1152 27(g)(1), you are obligated to serve all parties of record by overnight delivery As of 12 25 pm on December 26, we have yet to receive your filing Please let us know if you have complied with the Board's service rules and if so provide us with the necessary tracking information

Karl

Karl Morell
Of Counsel
Ball Janik LLP
1455 F Street, NW
Suite 225
Washington, DC 20005

kmorell@dc bjllp com
Tel 202-638-3307
Fax 202-783-6947

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EXHIBIT 2

 Attachments can contain viruses that may harm your computer. Attachments may not display correctly.

Morell, Karl

From: Jim Savage [jsavagelaw@aim.com]

Sent: Fri 12/26/2008 4:54 PM

To: Morell, Karl

Cc:

Subject: Re: AB-1020X

Attachments:  STB filing ltr.doc(40KB)  Req. to Set Terms.doc(113KB)  Landrio_VS_3.doc(65KB)  scan0003.pdf(1MB)
 Cremers Appraisal Report.pdf(340KB)  Landrio_Verification.pdf(43KB)  Stock Affidavit.pdf(1MB)

The filing was sent to our landlord's mail room for posting by first class mail on 12/24. I assumed it had been mailed. An e-copy of the filing is attached.

James H. M. Savage, Esq.
Attorney at Law
1750 K Street, N.W. - Suite 200
Washington, DC 20006
Tel: (202) 296-3333
Fax: (202) 296-3939
jsavagelaw@aim.com

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Morell, Karl

From: Morell, Karl
Sent: Saturday, December 27, 2008 6 41 AM
To: Jim Savage
Subject: RE AB-1020X

Based on a preliminary review, we still don't have the entire filing. For example, all of Landro's exhibits are missing. Your method of service is inexcusable but obviously intended to deny ESPN any meaningful opportunity of response

From: Jim Savage [mailto:jsavagelaw@aim.com]
Sent: Fri 12/26/2008 4:56 PM
To: Morell, Karl
Subject: Re: AB-1020X

Kindly acknowledge receipt of my 4 54 PM e-mail transmitting the filing

James H. M. Savage, Esq
Attorney at Law
1750 K Street, N.W. - Suite 200
Washington, DC 20006
Tel (202) 296-3333
Fax (202) 296-3939
jsavagelaw@aim.com

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-----Original Message-----

From: Jim Savage <jsavagelaw@aim.com>
To: kmorell@balljanik.com
Sent: Fri, 26 Dec 2008 4 54 pm
Subject: Re: AB-1020X

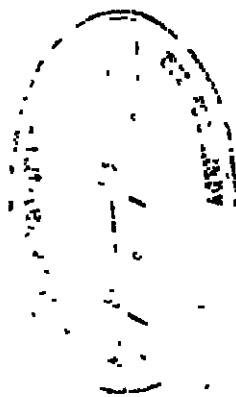
The filing was sent to our landlord's mail room for posting by first class mail on 12/24. I assumed it had been mailed. An e-copy of the filing is attached.

James H. M. Savage, Esq
Attorney at Law
1750 K Street, N.W. - Suite 200
Washington, DC 20006
Tel (202) 296-3333

Cholebrookdale RR,

Unit of Silo

H. H. of N. Gabel.



\$1.75

[illegible]

by tangent to said curve N 15° 4' East 92.5 feet to
Station 23+6.2 thence by a 3° curve left 141 feet
to Station 25+2.3 on line of land of Sam L.
Estate. The two pieces containing together
345 of an acre

Brief of Will

J. A. Merchant (The said) and Louis L. Hall & Hall
four dwelling houses, Cooper Shops and plantations
or tracts of land containing Two Hundred and some
five acres more or less situated in the Township of
Patterson in the County of Montgomery.
Bounded by the River Schuylkill, Lands of Jas.
Jes. James M. Massimus and James Patterson
in the Borough of Philadelphia.

Will and Codicil
of Daniel O'Hara

Will dated April 28. 1834

Codicil dated April 17. 1834

Proved before the Register of Montgomery Co.
March 11 1841. Recorded in Will Book 4. 5. p. 51

The will devises all the residue of his personal
real and personal (after the payment of debts) to his
four children, Daniel O'Hara, Henry O'Hara,
Margaret O'Hara, and Catharine O'Hara in
equal shares of one undivided fourth part thereof each.

The Codicil revokes the legacy or devise given
as above to his daughter Catharine O'Hara
and she devises to her during the term of
natural life the legal interest of the sum of
Two Thousand Dollars which sum he directs to be
or secured in his mortgage to the said Catharine

of land in Pottsgrove Township in case it is not,
 sold in his life time; the interest pay also annu-
 ally by the person or persons holding the
 said Estate aforesaid, to his own children or
 the orders the directs that the said interest -
 on the said sum of \$1000 shall as the same
 comes due be paid only to his said daughter
 Catharine or to such person as she shall appoint
 in writing by writing under her hand appoint
 to receive the same, to the end that the same
 may be for her sole and separate use, and
 not subject to the control, debt or engagements
 of her husband. And that her receipts for the
 same, and the same standing her name, shall
 be the only effectual receipts; for which
 and upon the death of his said daughter
 Catharine, he orders the directs that the said
 principal sum of \$1000 be paid to her children
 then living the same being received of such person
 as shall be directed in equal parts. And in case
 she shall not have any children or children
 issue then the same to be paid to his other
 children in his will named in equal parts.
 And all the rest and residue of his estate he
 gives to his wife, to wit, to
 Henry and Margaret in equal shares in

Daniel Mithers & wife }
 Henry & Mithers & wife }
 To }
 Margaret Mithers & wife }

Acts of Nov. 1841
 dated June 5, 1841
 Recorded in Book
 No. 46. June 7, 1841

Among other recitals the deed contains the following recital of the conveyance to David Hitts Union (the testator aforesaid) by virtue of which he became seized of the property described in the foregoing bequest as "his Messuage, Mill & tract of land in Pottsgrove Township

"Thomas Mathew Pearce & Mary his wife by Deed dated January 30 (18) 1814 granted unto Daniel Hitts Union a certain tract or parcel of land in Pottsgrove Township being the residue of a tract of five hundred & fifty four acres granted by Samuel Potts unto Thomas Potts by deed dated October 21 1763 after deduction therefrom two tracts therein mentioned viz: the first being estimated to be one equal half part thereof recd by Thomas Potts to Daniel Potts & the other being a grist mill, saw mill & about 24 acres of land which said Mathew Pearce & wife by deed dated January 2 1804 conveyed to Isaac Dues & William Dues said deed to Dues being recorded in Deed Book No 29 p 395 & by the same indenture the said Mathew Pearce & wife conveyed to the said Daniel Hitts Union in fee other land therein described & said Deed being recorded in Deed Book No 35 p 223.

And whereas the said Isaac Dues & Rebecca his wife & William Dues Jr by Indenture dated the 5th day of April 1813 granted unto said Daniel Hitts Union in fee all that the said grist mill, saw mill, & tract of 24 acres of land with the buildings appurtenant & restrictions as by said Deed recorded in Deed Book No 35 p 229 &c.

By force and virtue of which said two conveyances

unto Daniel Hittner, he the said Daniel Hittner
became seized in his demesne as of fee of and in
certain Manseion ^{the} with Grist or Merchant
Mill ^{and} other houses ^{and} buildings and a tract of
land estimated to contain about 288 ac. situate
Polk's grove Township, ^{and} being as then of record in
March, 2. 1841 leaving a will and codicil as afore-
said.

This deed then proceeds to recite the term of
an agreement of partition of the real estate of
Daniel Hittner Senior among his three children.
Daniel, Henry ^{and} Margaret ^{to whom the same}
was devised. (In this arrangement the
tract of 288 acres above mentioned was all
to Margaret ^{and} late Margaret Hittner and
appraised at the sum of \$32000.

For all the two undivided child's parts (of Daniel
^{and} Henry Hittner) of and in all that Messuage
Grist or Merchant Mill ^{and} other houses and
buildings ^{and} tract of land containing by esti-
mation about 288 acres

Subject to the payment of the said sum of \$3000
^{and} its interest mentioned in the will of Daniel
Hittner Senior in favor of Catharine D. Hittner.

^{and} also Subject to the payment of \$2000
to Henry Hittner according to the agreement for
the partition aforesaid particularly recited
in this deed.

Henry H. Jones & Margaret
 his wife } Deed
 To } Dated June 17, 1841
 Dr William Corson in fee } Recorded in Book
 No 59 p 45 June 17 1841

For the messuages, Mills & tracts of land con-
 taining by estimation about 288 acres.
 Being the same premises released to Margaret
 Corson by the foregoing deed.

Subject to the payment of \$10,000 & its interest
 under the will of Daniel Hittner
 And also subject to the payment of \$2000 in
 discharge of a bond & Mortgage executed to
 Henry Hittner by the said Henry H. Jones & wife
 arising out of the division of the real estate
 of Daniel Hittner Senior deceased.

Dr William Corson } Deed. Dated June 17, 1841
 To } Recorded in same book
 Henry H. Jones } as above p 45 June 17, 1841

For the same premises conveyed by the fore-
 going deed
 And under & subject as above made
 subject

Philip Baker, Sheriff } Deed. Dated Oct 27
 To } 1851
 John Ricketts ind. fe. } Entered in Sheriff's Book
 Vol. 1, p. 469, 470 & 471

For inter alia all the estate, right title & interest
 of Henry M. Cross of Ga. in all that certain
 Messuage, Dist. Mill & four dwelling houses
 Cooper Shop & plantation or tract of land in
 Pottsgrove Township containing about 275 a.c. or
 more or less
 (Being the same premises conveyed by the
 foregoing deed)

Michael C. Boyer, Sheriff } Deed. Dated
 To } May 19 1853
 Joseph Barnett, Alexander } Entered in Sheriff's
 Hebert & Edmund } Deed Book, to E
 Garnettson ind. fe. } Vol. 30
 Consideration \$250.

For inter alia all that Merchant Dist. and oil
 Mill four dwelling houses Cooper Shop &
 plantation or tract of land containing 275
 acres more or less in Pottsgrove Township
 (as above)

Joseph Barnett, Edmund } Deed. Dated July 9 1853
 Garnettson, Alexander Hebert } Recorded in Deed Book
 To } No 89 p. 112 Aug. 14 1853
 James Lynd ind. fe. } Consideration \$200

For the same property conveyed by the foregoing
deed from Sheriff Rogers.

James Lynd & wife	{	Deed dated July 13. 1853
To		Recorded in No 89 p 114
John I. Maxwell	{	Aug 4. 1853
in fee		Consideration \$19 000

For the same premises conveyed by the foregoing
deed.

John Richter & wife	{	Deed dated Nov. 4. 1853.
To		Rec. in A Rogers No 92
John I. Maxwell	{	Page 608 & June 21. 1854.
in fee		Consideration \$14 000

For the same premises conveyed by the foregoing
deed.

Subject to the charge of \$10 000 (made by
the will of) Daniel Richter Senior.

John I. Maxwell & wife	{	Deed dated Nov 16. 1853
To		Rec. in Deed Book
Franklin Baugh in fee	{	No 92 p 611 &
		June 21. 1854.
		Consideration \$20 000

For the same premises described in the foregoing deed -

Being the same premises which John Richter Senior and Elizabeth his wife by their Indenture dated Nov. 4. 1853 (before mentioned) granted unto the said John T. Maxwell in fee and also the same premises which James Lynd and wife by their Indenture dated the 13 day of July 1853 granted and conveyed unto the said John T. Maxwell

Franklin Baugh & wife } Deed dated June 14 1854
to } Recorded in deed book
William Davis in fee } No 72-A, 613 & June 21-1854
Consideration \$2000

For all that certain Merchant Mooring and Grist Mill and Mill House dwelling houses Cooper Shop and plantation or tract of land containing 275 acres more or less Situated in Pottersville Township, bounded by the River. Oakhill lands of James & James M. Leimer & James Kittenbower and the Borough of Port Jervis.

Being the main part and tract of land conveyed by the foregoing deed

1864

May 1

Last will and Testament of William Davis dec'd
 I give devise and bequeath to my dear wife Eliza B Davis her heirs and assigns forever all my
 property, or estate, Real, Personal and mixed, of
 what nature or kind so ever, wheresoever she shall
 may be at the time of my death, and appointed
 his said wife Eliza B Davis sole Executrix of
 said Will and Testament.

Proved January 5, 1867. Registered. Hills Book 11
 Page 51.

1868

May 9

Deed Eliza B Davis to Henry H Gable & Jacob H
 Gable sis. for for the before mentioned premises
 consisting of Merchant, Flouring & Sift
 Mill, Four dwelling houses & Plantation or tract
 of land. Containing 275 acres

Recorded May 21 1868 in 1868.
 to 109 Page 19; - subject to payment of legacy of \$10.000
 which was discharged by release - see Miscellaneous Book
 20 pages 154 - 171 & 501.

~~William Davis~~ Henry 1864

~~Eliza B Davis~~ Henry 1867

Henry 1867

May 22 1868

Henry H Gable &

Jacob H Gable. } 1 April 1868

In testis

C. Nyckhoff
Recorder

Please certify all mortgages
found in your office on
or against the tract of ground before described
given or executed by

William Davis June 1. 1867

June 6 1867

Eliza B Davis June 1. 1867

May 12 1868

Henry H. Gable }
Jacob H. Gable } 1 April 1868 Date of search
Montgomery County, Ill.



I Christopher Nyckhoff Recorder of Deeds
in and for said County do hereby certify
that I have searched the General Index
to Mortgages in the Recorder's Office at
Hemiston, Ill. and for said County and
have been unable to find any other than the foregoing
unsatisfied Mortgages therein contained on the premises
as described in the foregoing Brief of Title made or given
by either or any one of the above named Four (4) persons
within the periods of time therein specified.

Mortgage
Henry H. Gable, et al. } Executed May 9, 1868 Recorded May
12, 1868 in Mortgage Book No 64, page
52 to Twenty two thousand Dollars
Eliza B. Davis } \$22,000.00

Mortgage
 Henry H. Gabel, et al } Dated May 9, 1868 Readed May
 To } 12, 1868, in Mortgage Book No 64
 Eliza B Davis... } page 54 to for Six thousand
 Dollars --- --- --- --- \$6000

Mortgage
 Henry H. Gabel, et al } Dated May 9, 1868 Readed May
 To } 12, 1868 in Mortgage Book No 64
 Eliza B Davis } page 55 to Five thousand four
 hundred Dollars --- --- --- --- \$5400

In testimony whereof I have hereunto set my hand
 and seal of Office this Second - - day of March One
 thousand eight hundred and sixty nine (1869)

W. Wyckoff
 Recorder