NEW JERSEY COURT OF ERRORS AND APPEALS

CATHARINE C. O'REILLY, Executrix of Patrick O'Reilly,
Appellant,
and
JOHN H. OSBORNE,
Respondent.

To the Honorable Judges of the Court of Errors and Appeals of New Jersey:

The petition of John H. Osborne, the above named respondent, respectfully shows unto your Honors, that in the decision rendered in the above stated cause at the last term of this Court, certain conclusions were reached upon certain matters in issue in the cause, which had not been fully argued by the counsel therein, to wit:

1. That in the matter of the claim of the respondent against the appellant for the sum of $7,450, [Exhibit O8, page 576] your Honors adjudged that this claim should

be disallowed because it was not supported by competent evidence. Your petitioner desires, in respect to this claim, to present to the court, by way of argument, his contention that in the orderly conduct of proceedings for an account in equity, and antecedent to the interlocutory decree, directing an account, the items of the account, and the merits thereof, are not in issue, and that proof in support of the validity of such items cannot regularly be presented to the court and determined by it, but should be presented before the Master taking the account; and your petitioner refers your Honors to 1 C. E. Green, p. 475; that the proofs taken in the cause in respect to this item, (printed case, p. 347) were not taken in support of the merits of the claim, but merely to prove the fact that the respondent had an existing account upon his books for moneys paid by him to the appellant's testator. Your petitioner respectfully shows that the question before the court was not whether these moneys had been actually paid in the course of the mutual dealings, but merely whether they were *bona fide* claimed to have been paid, and appearing upon the books of the respondent, and if proved to have been so paid, whether upon principle a court of equity would allow such payments. Your petitioner refersto the affidavits and to Schedule No. 3 hereto annexed to show that such payments can and will be proved, and that the non-proof of the merits of the claim was caused by the oversight of your petitioner's solicitor. Your petitioner submits that he should have an opportunity of formally presenting argument in his behalf, in respect to the practice of the Court, and his right to prove his claim before the Master.

2. That one of the claims of the respondent was for the sum of $6,894.14, comprised in and supported by Exhibits U3 and V3, printed case, p. 497, and the testi-

mony appearing in printed case, p. 138, line 35, to p. 140, l. 18; p. 190, l. 36, to p. 191, l. 40; p. 215, l. 39, to p. 217, l 11. The respondent respectfully shows, that, although this claim is uncontradicted by proofs, and is claimed to be extra work, not included in the respondent's contract, it appears to have escaped the attention of the Court, and has not been either allowed or disallowed. Your petitioner shows that his claim and account therefore is *bona fide* and supported by proofs, and that he should have an opportunity of supporting the merits of the same before the Master upon the taking of the account.

3. That your petitioner set up a claim for services, hire of teams, etc., in the matter of Greenwood tract, amounting to $8,422.48, and that in the opinion of this Court such claim appears to have been disallowed upon principle; this court has determined that the dealings between the respondent and the testator of the appellant were, in fact, partnership dealings, which resulted in as heavy a loss to the testator as to the respondent. Your petitioner respectfully shows that according to the answer and the proofs in the cause, [see printed case, pp. 41, 66, 67, 462, 644] the partnership adventure, so far forth as the testator was concerned, has resulted in the testator's receiving $1,500.00 more than he has expended, assuming his statement of expenditures (viz, $21,000.00) to be correct, and your petitioner calls the attention of the Court to the fact, that as your petitioner contributed one-fourth of the capital, he is entitled to the benefit of one-fourth of the receipts, which, upon the proofs and the testator's own showing, would be $8,000.00. Your petitioner respectfully shows that the alleged expenditure, by the testator, of the sum of $21,000 00, during a period of about one year, for the wages of a few hands and the feed and keep of three six-mule teams, and other possible expenses, are

inherently incredible, and that these alleged expenses, although determined by this court to have been on partnership account, have not been supported by any proof whatever, although the books and vouchers for the same are proved to have been in the custody of the testator and the appellant. [See printed case, p. 156.] Your petitioner shows that he will be able to prove that such expenditures did not exceed $13,000.00, and that therefore your petitioner would be entitled to receive not only the $8,000.00, above claimed by him, but an additional sum of at least $2,000.00, and your petitioner refers to the statement, Schedule No. 1, hereto annexed, in elucidation of his rights to an account of said partnership dealings.

4. The petition of your petitioner further shows that of his claim on O4 (b) and P 4, pp 511—512, for suspension, the Court, by their opinion, have allowed him only $2,500.00 in addition to the $2,500.00 already allowed to him in the final estimate of the respondent; that the said statement O4 was made out by the complainant about May, 1856, (printed case, p. 339, l. 1–2) on information received from the complainant's clerk and bookkeeper, (p. 339, l. 26) and that P4 is a revision of O4 and for a much less sum; that this claim of the complainant was not recently made out as suggested by the opinion of this court, and that this court are under an error of fact in the statement of their opinion to the effect that the complainant is confined by his bill to the technical limit of $5,000 under this claim, the language of the bill (printed case, p. 5, l. 4) being "*not less* than $5,000" instead of "*no more* than $5,000" as stated in the opinion. Your petitioner therefore submits that he ought to be permitted to show before the Master that he is entitled to a larger sum upon this claim than already allowed by the court.

5. In the matter of the claim of the defendant, for sums

"in the shape of receipts, notes and checks, which seem "chargeable against the complainant in connection with "this contract, to an amount exceeding twenty thousand "dollars," other than the $434,260.53 mentioned in the opinion, your petitioner states that less than three thousand dollars thereof, if indeed any part, of said $20,000.00 are allowable to the defendant; and your petitioner states that he will be able to show, on a reference to a Master, that petitioner's indebtedness to appellant is not $3,000.00 in excess of the amounts allowed by your petitioner to the appellant in the account for Tarrant & Co., appended to the brief of the respondent in this Court; that the appellant will not be able to support any such claim, by collated and compared proofs, and your petitioner claims that he ought to have the benefit of the testimony of George W. Bowen, his former clerk, cashier and bookkeeper, upon this branch of the case of the appellant, on a reference before a Master, and that the production of said Bowen at a prior stage of this case in dis-proof of any matters of the appellant, purely of account, as these notes are, would not have been regular and orderly by the practice laid down in 1 C. E. G., 475. And your petitioner therefore desires to resist the allowance of any of said notes to defendant and refers in support of his resistance to the allowance of these notes and other vouchers to the depositions hereto annexed.

6. Your petitioner further shows that the introduction of laches of your petitioner as a potent element in this case is a surprise to your petitioner; that your petitioner is not properly chargeable with any laches; that any laches that may be properly chargeable to the respondent has been fully condoned by the appellant and her tastator. Your petitioner therefore prays leave to show that any delay or laches on his part has been condoned by the appellant and his testator and that a large part of the

delay was caused by the appellant and her testator. Your petitioner refers in support of this phase of his application to the depositions of himself and his present solicitor, hereto annexed. Also to printed case of the appellant, pp. 578-587 ; Exhibits S8 to L9, p. 381, l. 38, to p. 382, l. 40.

Your petitioner, therefore, represents that if he be afforded an opportunity for the taking of the account prayed in his bill, he will probably be able to prove his right to recover as follows, viz :

For money loaned, Exhibit O8.....	$7,450 00
For extra work, Exhibits N3 and V3.....	6,894 14
For share in Greenwood partnership.....	10,422 48
For additional suspension allowance.....	5,033 29

And that the claim of the appellant upon the notes and other vouchers mentioned in the opinion will probably not amount to more than $2,700, and that the probable balance upon taking the account would show your petitioner entitled to the sum of $16,149.28 as more specifically shown by Schedule No. 2 hereto annexed, to which your petitioner refers.

Your petitioner therefore prays that he be allowed a re-hearing and re-argument of the said appeal, and the cross-appeal of your petitioner in the same cause and to the same decree.

And your petitioner, as in duty bound, will ever pray, &c.

HERBERT A. DRAKE,
Sol'r for and of Counsel with the Petitioner.

Dated March 6, 1888.

NEW JERSEY COURT OF ERRORS AND APPEALS.

JOHN H. OSBORNE,
Appellant,
and
CATHARINE C. O'REILLY, Executrix, etc.,
Respondent.
} ON APPEAL, ETC.

CATHARINE C. O'REILLY, Executrix, etc.,
Appellant,
and
JOHN H. OSBORNE,
Respondent.
} ON APPEAL, ETC.

H. A. DRAKE, Solicitor for John H. Osborne.

Evidence taken before Charles V. D. Joline, Master and Examiner in the Court of Chancery, on the Third day of March, A. D. 1888, at 11 o'clock in the forenoon, in the above stated appeals, on a notice, of which the following is a copy:

To Peter L. Voorhees, Esq., Solicitor of Catharine C. Reilly, etc.

SIR:—

Please take notice of an application to be made to the

said court in this cause, at 11 o'clock in the forenoon of the 6th day of March next, at the State House, in the city of Trenton, for a rehearing of the two appeals of these two cases, and take further notice that at 10 o'clock of the forenoon of the 3d of March next, depositions of witnesses will be taken before Charles V. D. Joline, an Examiner of the Court of Chancery, at his office in the city of Camden, in support of said application. Dated Feb. 18th, 1888.

H. A. DRAKE,
Solicitor for John H. Osborne.

A copy of which was served on Mr. Voorhees on the 20th day of February last.

Mr. Voorhees objects to the taking of any depositions under the above mentioned notice, and denies the right of the said Master to take depositions in the said causes, or either of them, and requests these objections to be entered upon the record and says here the cross-examinations, if any cross-examination is made by him, subject to and without in any way waiving of such objections.

JOHN H. OSBORNE, a witness for the complainant, being duly sworn according to law, deposes and says as follows:

Ques. You are the John H. Osborne mentioned in this case?

Ans. I am.

Ques. Please state your name, residence and occupation?

Ans. My name is John H. Osborne; I am between sixty-eight and sixty-nine years of age; my business is that of a civil engineer; I reside at Morrisville, Pennsylvania.

Ques. When, prior to the reading of the opinion in

these appeals, was your attention first called to the fact that the defendant, Catharine C. O'Reilly, Ex'cx of Patrick O'Reilly, sought to take advantage of the length of time this case had been pending in court?

Ans. On reading the decision of the Court of Errors.

Ques. You were in attendance upon the taking of the proofs in the Court of Chancery in this cause at all or nearly all of the examinations, were you not?

Ans. All except one or two.

Ques. You were in attendance also at the meetings before the Chancellor, were you not?

Ans. All of them except one.

Ques. Before going into the argument of the case do you recollect being present before the Chancellor in the small room at Trenton, where the question of the manner of the argument of this case was discussed by the Chancellor and the counsel on both sides?

Ans. I was.

Ques. What do you recollect, if anything at all, the Chancellor said on that occasion about the taking of an account?

Ans. The Chancellor stated that this case was similar to, I think, the Locomotive Works.

Ques. The Locomotive Works case?

Mr. Voorhees: Let him state it.

(Mr. Drake: Very well, go on with your answer.)

The Witness: The Chancellor said he would not go into the details of the case, except in a general way, that the whole of the matter after his determination of the case would have to be determined when the account was stated before the Master. I do not know that those are the precise words, but that is my impression.

Ques. You were present at the final hearing of the case in Newark, on or about the 28th of July, 1886?

Ans. I was.

Ques. You heard the arguments of counsel on that day?

Ans. I did.

Ques. Did you hear the argument of Mr. Voorhees?

Ans. I did.

Ques. Was any question raised by Mr. Voorhees about whether an account should be taken or not, or was any question raised by him about the matter of laches before the Chancellor?

Ans. I did not hear any.

Ques. During the progress of the case, was any intimation made to you that the other side would rely on the question of the lapse of time or laches as a part of their defence in this case?

Ans. There never was.

Ques. Was there any intimation made to you that that would be relied upon, or did they give you notice that it would make part of their affirmative case?

Ans. I never heard anything upon the subject until I read the decision of the Court of Errors; that is the first intimation to me.

Ques. In the progress of the cause was there any delay or difficulty from the other side imposed upon you in the conduct of the case to get it to a hearing before the Chancellor; if so, state what it was?

Ans. In more than twenty instances the case was put off before the Master, the hearing before the Master. In my judgment defendant's counsel did delay and prevent the evidence being taken on several other times by the fixing of the time on which the evidence should be taken before the Master outside or independent of the twenty times in which it was put off; I say about twenty.

Ques. Do you have any recollection of a delay in the cross examination of Richard B. Osborne ?

Ans. Yes, I remember there was such delay.

Ques. When did you commence this suit ?

Ans. In January, 1861, I believe.

Ques. Before you commenced it, did you make any attempt with Patrick O'Reilly to get it settled ?

(Objected to by Mr. Voorhees.)

The Witness: More than a dozen times my letters will show—they are in the case and they will show for themselves.

Ques. When the case was commenced did you make any effort to have it settled ?

(Objected to by Mr. Voorhees.)

Ans. My bill was filed in 1861, and the answer was delayed until June, 1864, and between 1865 and 1875 I made several repeated efforts to have the case settled and arranged without going into Court.

Ques. What did you do after 1865, and until 1875 or '76; what action did you take towards the progress of proving your case and getting it before the Court of Chancery ?

Ans. Mr. Abraham Browning was my counsel up to 1876. I received instruction from Mr. Browning that year to bring on one of my witnesses from Rome, Georgia, and I did so.

Ques. What is the name of that witness ?

Ans. George W. Bowen. In his office and in my presence.

Ques. In whose office ?

Ans. In Mr. Browning's office, and in my presence Mr. Browning wrote out a notice whilst I was with him,

to the defendant's counsel to have the evidence of George W. Bowen taken. After some conference with him Mr. Browning appointed a specific day in which Mr. Bowen and myself were to come down to have this evidence taken. Mr. Bowen had been with me at that time something over two weeks. We came together to Camden, and Mr. Browning stated to me that he could not go on and take the evidence, assigning as a reason that he was very much pressed, and that it was no use of keeping Mr. Bowen here, and he consequently returned to Rome, Georgia, without his evidence being taken.

Ques. At whose instance was Mr. Bowen brought on here?

Ans. He was brought on here at my instance.

Ques. Why, before 1876, had you not gone on and put in proofs in your case?

Ans. Mr. Browning, when he took my case in 1861, was to have gone right along with my case, have gone into all my papers and matters, but on the sickness or illness of Mr. Carpenter, he being the junior counsel in the case of Richard Osborne.

Ques. Who was the junior counsel?

Ans. Mr. Browning. As the Richard Osborne case was transferred to Mr. Browning, Mr. Carpenter being unable to attend. The reason assigned by Mr. Browning for not prosecuting my case was that he thought that Richard Osborne's case should first be prosecuted, and that it would not be well to put the two cases together at the same time. Mr. Osborne's case, I think, was not closed until '80 or '81. In the latter part of 1876 I took my case out of Mr. Browning's hands.

Ques. Papers and all?

Ans. Papers and all.

Ques. Had you paid Mr. Browning a fee?

Ans. Yes; I had paid him more than one fee. I had

paid him a special fee when he instructed me to bring on Mr. Brown.

Ques. After you took the case out of Mr. Browning's hands, what did you do with it?

Ans. It remained in my hands for some time; I cannot state precisely how long, but I went to see my friend Judge Scudder.

Ques. Why did you go to see him?

Ans. Judge Scudder had acted for me in the matter some years before of the case of General Trimble against the Reading Railroad Company—I was acting as General Trimble's agent. Judge Scudder advised me to put my case in the hands of Mr. Barker Gummere, and I did so. Barker Gummere kept my papers for some time. I wrote to him and asked him whether he had an opportunity of looking into them or doing anything about that, and sent my son, who was then with me. He said that he had been so much pressed in business that he had been unable to look into my case, and that he thought I had better get some one else.

Ques. That was the report that came to you by your son?

Ans. That was the report that came back to me by my son.

Ques. Did he bring back the papers?

Ans. He brought back the papers.

Ques. About what time was this?

Ans. To the best of my knowledge and belief it was in 1879.

Ques. What had you done between 1876 and 1879, if anything, other than what you have already stated?

Ans. Nothing specific.

Ques. After the papers came back to you from Mr. Gummere what did you do with them?

Ans. I kept the papers for some short time in my

hands, and I went to see Mr. Wilson in Trenton, and I had, through a third person, a consultation with my present counsel, Mr. Drake.

Ques. What did Mr. Wilson do with the papers?

Ans. Mr. Wilson examined the papers and told me that he would act for me as counsel and advised me to go and see Mr. Drake, which I did.

Ques. When did you first see Mr. Wilson and Mr. Drake together in the case and give them each a fee and direct them to proceed with the conduct of your case?

Ans. In 1881 I saw both of those gentlemen; I had seen them both previously, but in 1881 the matter was definitely determined, that they would take up the case.

Ques. By the record it appears—(a copy of which I now offer) that no order was taken to revive your case until December 16th, 1882; what was the cause of the delay between the time you saw this gentleman in 1881, and December, 1882, when the order to revive the case against all of Patrick O'Reilly's executors was taken?

Ans. It was not because I did not urge it on counsel; he was very much engaged, so he stated to me; had a great deal of business on his hands, and that necessarily delayed the matter from time to time before going into the evidence. After the discouragement and the embarassment of the death of two of these counsel and the non-prosecution of it by Mr. Browning for so many years, I do not think I am personally responsible for not having the case brought on at a period earlier than it was.

Ques. The death of what two counsel do you refer to?

Ans. Mr. Wilson and Mr. Carpenter, who was junior counsel, and signed my bill as junior counsel.

Ques. Did Mr. Carpenter continue in business up to the time of his death, or did he cease doing business?

Ans. My impression is that he was broken down and had given up business some time before his death.

Ques. In relation to the $7,450.00 excluded by the court in the opinion, please state whether or not you have testimony to prove that the $7,450.00 is a valid claim against the estate of Patrick O'Reilly, and if you have, why you have not heretofore put it in.

(Objected to by Mr. Voorhees.)

Ans. I have testimony, undoubted testimony in regard to the money, that $7,450; my impression is that in the exhibits that were put in, at least in one of the exhibits put in, the $7,450 is stated. The whole amount, both the debit and the credit side of the account, was placed before my counsel, and if any fact, I do not know that there was any difficulty about it until I read the Chancellor's decision, for I was under the impression that I was to have that credit as a matter of course. The sworn evidence of George W. Bowen having been taken upon one side of the account, I think also upon the other, because it was all one account, a debit and credit side; on my speaking to my counsel, my counsel said it did not matter a great deal, because all of this account had to be referred to a Master, and that Mr. Bowen was still available, that his evidence was still available for me, and that it was not a matter of very much moment one way or the other; it was suggested by my counsel, since the decision of the Court, that I should bring on Mr. Bowen again, now at this time. I should very gladly have done so, and I am sure that I should be glad if Mr. Bowen would have come on to give me the requisite evidence, and satisfy the Court, but Mr. Bowen is a delicate man and he has been for a number of years suffering from an internal complaint, and he objected to coming on to this climate in the winter, and I really thought it would not be fair and right for me to ask him, and if I did ask him I do not think he would come on until warm weather.

Ques. What do these items consist of—this $7,450.00—in this connection I call your attention to a copy of the Exhibit O8 in the printed case, page 576, and ask you to state whether or not this contains the items making up the $7,450.00, which were thrown out by the Court in the opinion of Judge Dixon?

Ans. These are the items which comprise the $7,450.00 of the credits which were thrown out by the Court.

Ques. State whether or not you are able to prove by George W. Bowen that he paid those sums to Patrick O'Reilly?

Ans. I am able to prove by George W. Bowen that he paid those sums to Patrick O'Reilly.

Ques. When Mr. Bowen was on the stand do you recollect that on his cross-examination certain vouchers of the defendant were proved by him?

Ans. I do.

Ques. As to those vouchers state what recollection you have as to duplicate vouchers in the form of notes?

Ans. I have a recollection of such vouchers, and also of the attention of defendant's counsel being called to them, and defendant's counsel saying "yes, there are some of those notes which are included in the credits which were given to the defendant, and on which Mr. George W. Bowen was examined by the defendant's counsel."

Ques. State whether or not defendant's counsel called attention to the fact that the several notes or checks, or both, when footed up, amounted together in one instance or more to the amount of the larger voucher, which was put in at the same time?

Ans. That is my impression.

Ques. I call your attention to a copy of defendant's Exhibit 31, printed on pages 612 et seq. of the printed case, and I ask you to state whether or not it appears by

that account that you are there charged with bills payable?

Ans. I am.

Ques. Give the dates of the items?

Ans. 1854, December 21st, $1,380.00; 1855, February 28th, $800.00; 1857, August 31st, $1,240.00; 1857, October 7th, $1,000.00; November 13th, 1857, $2,500.00. I wish to state that in regard to these bills and notes that I have in my possession the notes and bills of the defendant, which I have not produced as I have always been under the impression that the whole of these accounts were to be verified and to be brought up before a Master, and I do not wish to complicate and extend the evidence beyond what it was; I thought that it was visibly voluminous—I just make that as an assertion.

Ques. Whose notes are these—are they notes, checks, or what are they?

Ans. To the best of my knowledge and belief one of them is a note of P. O'Reilly for $3,000.00. It never made a great deal of impression upon me; they are amongst my papers, and can be produced; my attention was called to them and I have got them.

Ques. What is the amount of them?

Ans. I could not say. I remember one; to the best of my knowledge and belief that was $3,000.00. I could not say how many there are; I do not remember.

Ques. Do you recollect stating an approximate account or with the assistance of Mr. Drake making a statement of the approximate account which was presented to the Chancellor on the argument?

Ans. I do.

Ques. Do you recollect the question of the allowance of disallowance of those notes coming up, or a portion of them, or any question being raised about a portion of them?

Ans. I do.

Ques. About how many notes were there, about which you were not clear as to their allowance or disallowance, and what other evidence, if any, have you to produce relative to the note about which you can give exact testimony?

Ans. The only note that I can call to mind was the one which I have spoken of, all the accounts having been kept by Mr. George W. Bowen. I turned that over in my mind for some time and was under the impression that I had paid that particular note; that is, that George W. Bowen had paid that particular note; besides that there were some six or eight notes or bills; I cannot possibly state what they were, but they amounted to some two or three thousand dollars, which I stated at that time to counsel, that defendant's counsel had improperly charged, for they had been already credited. I cannot state specifically about the note unless I went into the account, but I remember that the account was between two and three thousand dollars, perhaps twenty-seven hundred dollars. I would state further in regard to that matter that I was present when my counsel objected at bringing them in as only compensating complicating matters and the opposing counsel said, there are now, and they would have to be verified, but let them stay there for the present. I had reference more particularly to those several small notes which went to make up the sum as I stated of between two and three thousand dollars. At the time I always considered that those accounts would have to be gone into and verified before there was a final settlement of the account.

Ques. I now call your attention to the Bowen farm account, and ask you whether or not the matters touching that particular branch of that account were not in

progress and unsettled until a long time after the commencement of this suit by the filing of that bill?

Ans. I think that it was 1868; I cannot specify the time but it was some years after.

Ques. I now ask you whether or not the pending of the Boyne farm account and the unsettled condition of it up to 1868 had any bearing or influence upon you in delaying you in commencing the taking of proofs in your case or had any influence upon the progress of the case in any way?

Ans. There were several matters of a personal character entirely outside of the contract between Mr. O'Reilly and myself which from the relations we occupied to one another at one time I was satisfied that if I could have induced him to have met me fair and square that we could have settled them; that it would have been but little trouble to do so, and that was one of them.

Ques. State which was the older, you or Patrick O'Reilly?

Ans. I do not know; indeed, I could not tell you about that; I think we were about the same age, and I always looked upon him as a man in very good preservation, but I do not know about that.

Ques. Up to that time prior to Mr. O'Reilly's death, which I think occurred in the early part of 1881, had you any reasonable expectation or intimation that Mr. O'Reilly's death would precede your death?

Ans. No, sir; he was a very robust man, and always has been in that condition for twelve or fifteen years, as far as I know.

Ques. That is to say, you were more concerned about dying yourself than you were about Mr. O'Reilly's death?

Ans. Yes, sir; Mr. O'Reilly was sick only for a short time.

Mr. Voorhees: I renew my objection to the admissability of this testimony and the propriety of taking it at this time and decline to make any cross-examination.

HERBERT A. DRAKE, a witness produced on the part of the complainant, Mr. John H. Osborne, being duly affirmed, deposes and says as follows:

I reside in Camden, N. J., and have been a member of the bar since June term of the Supreme Court in the year 1871; I was spoken to about going on with this case on behalf of John H. Osborne some time, according to the best of my recollection, in 1879 or 1880; at least before the death of Patrick O'Reilly, and sometime after that upon information received by me that James Wilson, of Trenton, since deceased, had been consulted in regard to it; I had a conference with Mr. Wilson, in which he spoke to me about having examined the case, about Mr. Osborne's desire to take it up and about his desire that Mr. Wilson should be in the case, and that I should take the testimony. Following that sometime in the fall of 1881, I think, some considerable time before the order was taken reviving the suit, Mr. Wilson and myself on conference arranged with Mr. Osborne by letter to meet us in the library at Trenton; I have looked for the letter, but I cannot find it. Mr. O. there gave us each a satisfactory fee, and it was agreed that the case should be proceeded in with all possible dispatch. Owing to other business engagements, which I had at the time, and not being in very good health, the first step in the case, the order for the revival of the suit, was not taken until December, 1883, and then following that in February, 1884, the order which I took not satisfying Mr. Voorhees, who represented the other side, an order was taken in the matter by Mr. Voorhees, as solicitor and counsel for Catharine C. O'Reilly, a copy of which I now present, and ask to have

marked "Exhibit Q10 of complainant." What prevented the progress of the case or the putting in of the proofs between the February, 1883, and January, 1884, when the proofs commenced to be put in, I do not recollect beyond the fact that the case was a large and intricate one and some time was taken in the preparation of it, before I was satisfied to commence the taking of the proofs. Previous to making applications for my order to revive the suit, and previous, therefore, to December 16th, 1882, I saw Mr. Voorhees, and for the purpose of serving on him the notice, and I may have seen him for some other purpose about the same time, and at one of these interviews I stated to him the intention of the complainant of reviving this suit and going forward with it. Mr. Voorhees stated that on his view of the case the complainant owed money to the defendant and that they were willing that the suit should be revived. There was no intimation during the progress of the suit that the defense intended to rely on the question of the lapse of time; no intimation was given by the defendant that laches was a part of her defense until it was broached by the argument of Mr. Durr and Mr. James A. O'Reilly before the Chancellor in the printed argument of the defense before the Chancellor. Several meetings were held; one meeting at least was had before the Chancellor in which the plan of the argument of the case was discussed by all the parties, and I think the case went over once or twice before it was finally argued and the Chancellor stated to the counsel on both sides that he would determine only the questions vital or the principles vital and necessary to the statement of an account, and that he would not himself go into the statement of the account. It was agreed, or at least no objection was made by counsel on the other side to the statement made by the Chancellor, both at the final hear-

ing and at the previous hearing or conference; that there would have to be an account because an account was claimed by the bill, sought by the bill, and the answer acknowledged that an account should be taken and the Chancellor made the remark that it was perfectly clear to him that an account would have to be taken; to this no objection was made by counsel on either side. On the day of the argument I made the opening argument by printed brief principally, and Mr. Voorhees made the reply by oral argument, and no objection was then made or raised on account of the lapse of time, &c. I said the first objection on account of the lapse of time was by the agument of Mr. Durr and Mr. James O'Reilly printed and handed to the Chancellor afterwards. To this I made some reply in my printed argument, in reply before the Chancellor, but as no replication had been filed until after the case was revived, I having filed the replication myself, and as I found by inspection of the record that no effort had been made to dismiss the case, merely an order or two had been taken to speed the cause and no intimation on the other side, either by record or in the progress of the case of any design on their part to object to the lapse of time, my notice of the argument of Mr. Durr and Mr. O'Reilly before the chancellor on the ground of laches was, as it seems to me now, wholly immaterial and irrelevant. I was familiar with the practice as I thought of cases of this sort, having had connection with the case of Richard B. Osborne against Patrick O'Reilly, having had some connection also with the case of Foreman against Bulson, or Bulson against Foreman, and in the Richard B. Osborne case, I am distinct in my recollection that the course of practice there followed was that the first application to the Chancellor should be for a decree determining the principles of the account, and that the details

of the account and the matters specially verifying the account, should be put in after the interlocutory decree or order of reference to a master to state the account, and my recollection is that this course of practice was adopted and followed also in the Bulson-Foreman case. I was in Mr. Browning's office during portions of the time when those cases were under his management and assisted him in the conduct of them to some extent, and was in Court with him, and before the examiner with him in both matters to a very considerable extent and the course of practice in both of these cases, and in all cases of the sort, as I understood, was as the Chancellor stated to us in one of the meetings before him, that the principal of the account should first be determined, and afterwards the particulars of the account should be stated, so that when Mr. Osborne presented to me the $7,450, I think in the handwriting of George W. Bowen, and stated that we had overlooked calling George W. Bowen's attention to this particular exhibit, and had omitted to prove by him that those payments were actually made to Patrick O'Reilly, that Mr. Bowen was the person who made the payments, and he was the only person by whom they could be proved, I at once advised Mr. Osborne that it would not be necessary at the prior stage of the case, but at a subsequent stage of the case to produce Mr. Bowen to prove the items making up the $7,450, and if Mr. Osborne has to lose this money my advice to him not to recall Mr. Bowen is wholly responsible for his loss. Mr. Bowen was here but a few days in the summer time; he was in great haste to get away, and the amount of ground covered by him was hastily covered. We gave the matter our sole attention while he was here, and a stenographer was employed to facilitate the case, but this matter was overlooked, and when my attention was called to it after-

wards I stated to Mr Osborne that it was not necessary to call Mr. Bowen, to go to that expense, which was considerable, because he would have to call him any way at a subsequent stage of the case, and he could then as well prove the $7,450 as at a prior stage of the case. I went to work and expended considerable time, trouble and labor during the time, and I had the assistance both of Mr. Osborne and his brother in stating the account. My recollection is distinct that when some notes were presented Mr. Voorhees called attention to the fact that they were duplicates for other vouchers held by the O'Reilly estate, and he also called attention to the fact that two or three or more of them when footed up amounted to the sum of some larger voucher, and I think that the very notes which were presented in that way were pinned to the larger voucher. We had no difficulty in stating the account upon that evidence, in and upon the O'Reilly evidence as it was put in, and with the aid of the O'Reilly accounts, including Exhibits 31 and 32; we had no difficulty in stating the defendant's side of the account except at the very last, and the only question about which there was any dispute according to my recollection of the statement of Mr. Voorhees on presenting his side, was a matter of some eighteen hundred or two thousand dollars, perhaps nearly twenty-three hundred dollars—I do not recollect the exact sum —but our account on the complainant's side and their account on the defendant's side agreed entirely up to a certain point, and at that point at the very last there was some little discrepancy, and some notes which we could not decide whether they should go in or go out; but the amount of these at the most was under three thousand dollars, and this we could not determine about, because George W. Bowen, who knew about that, as I was informed by Mr. Osborne, would be able to testify about

that, could tell about that when the account came to be in and stated.

Mr. Voorhees has asked whether any testimony was taken in this case before the suit was revived, and I say that there was none taken to my knowledge; of course my connection with the case did not commence until the times I have stated, but no testimony as a part of the record has ever been called to my attention, and the statement of Mr. Osborne is not to that effect, as I understand it, that any testimony was taken, only that Mr. Browning gave notice in his presence for the taking of testimony; and that Mr. Bowen was here for the purpose. I recollect Mr. Bowen being in Mr. Browning's office, and Mr. Osborne being there with him, and was informed at the time that he was here for the purpose of giving testimony for John H. Osborne.

Mr. Voorhees calls my attention to the fact that the meeting before the Chancellor in the little room in the State House, where the Vice Chancellor now sits, was on the application made by Mr. Voorhees to close the testimony, and as I recollect the application, I cannot now produce the notice, it was that an account be taken, then without the hearing of the case by the Chancellor for the determination of the principles upon which it should be taken. I opposed the application and the Chancellor refused it, and it was then that the Chancellor stated what the practice was in cases of account and made reference to the case of Hudson vs. the Trenton Locomotive Machine Co. 1. C. Green, 475, as a case settling the practice.

Mr. Voorhees renews his objection and declines to make any cross-examination.

It is hereby agreed by and between counsel that the signatures of the witnesses shall be waived.

SCHEDULE No. 1.

In accordance with the decision of the court that the Greenwood Farm enterprise was a partnership between John H. Osborne and Patrick O'Reilly, then the receipts and losses must be shared in the same proportion that the partners contributed to the capital stock, and the account stands as follows :

Capital Stock.

O'Reilly contributed in cash (payment for land..	$4,000
O'Reilly avers (in his answer) he contributed actual expenditures, (of which there is no proof whatever to support the averment, although he has possession of the books showing the expenditures)	21,000
Osborne contributed teams and services (which are supported by evidence).....	8,500
Total.....	33,500

O'Reilly contributed 50–67 of capital.
Osborne contributed 17–67 of capital.

Proceeds.

O'Reilly received 45,000 ties, at 50 cents.....	$22,500
O'Reilly received from sale of land.....	9,000
O'Reilly received switch timber, &c., about.....	500
Total.....	$32,000

O'Reilly was entitled to 50–67 of the proceeds, amounting to $23,888.50. He received $32,000.

Osborne was entitled to 17–67 of the proceeds, amounting to $8,111.49. He receiving nothing.

O'Reilly says he received only 28,000 ties. It is proved beyond question that he received 45,000 ties. If proportionate inaccuracy prevails in the amount of expenditures he avers he made, he would have expended only 9-15 of $21,000, or $12,750, making the total capital contributed by him $16,750 instead of $25,000, and the actual capital contributed $20,900, of which Osborne contributed 85–209, and would be entitled to 85–209 of the proceeds, amounting to $13,014.35.

SCHEDULE No. 2.

Allowance to complainant as Tarrant & Co., by opinion		$429,732 18
Additional allowances claimed, viz:		
Exhibit O8		7,450 00
Exhibits N3 and V3		6,894 14
Suspension P4 in addition to the $2,500 allowed by opinion		5,033 29
Additional Greenwood allowance above the $8,442.48 also claimed		2,000 00
		$451,109 61
Defendant's allowance in Tarrant & Co. account by opinion	$432,260 33	
Portion of notes and other vouchers probably allowable	2,700 00	
	$434,960 33	
Probable difference in favor of complainant		$16,149 28

NOTE.—This statement refers to *the* Tarrant & Co account entirely. The claim on Greenwood above men-

tioned is only for the $2,000 additional claimed under the partnership, as the $8,422.48 disallowed by the court and now claimed must remain in the subsequent portions of the account to make the debit and credit sides balance, as they do almost exactly on the disallowance of the Bowen farm account, not claimed.

SCHEDULE No. 3.

Defendant's testator credits complainant in account of Tarrant & Co., Exhibit 31, p. 615, printed book	$421,409 73
Add to this the following items not included therein, but allowed to the complainant in the opinion of the Court, viz.:	
Ballast omitted from final estimate	836 20
Two notes of O'Reilly	1,000 00
Extra allowance for hard rock	7,333 08
Extra work	5,119 55
Loss by suspension—extra	2,500 00
Excess of final estimate over amount of payments allowed on current estimates, not credited in Exhibit 31 of defendant	6,833 15
	$445,031 71
Amount allowed by opinion to cover same ground	429,782 18
Excess in favor of the complainant on the basis of O'Reilly's allowances to complainant in Exhibit 31	$15,249 53

NOTE.—If the sum of $6,833.15 be unallowable in this connection, which is not admitted, (see Appendix No. 1, pages 9 and 10 of Mr. Drake's brief containing the approximate account) there is still here enough left to more than cover the $7,450.00 comprised in 08.

SCHEDULE No. 4.

EXHIBIT Q10 OF COMPLAINANT.

IN CHANCERY.

Between JOHN H. OSBORNE, Complainant, and The Executor of PATRICK O'REILLY, deceased, Defendant.	ON BILL, &c. ORDER AMENDATORY OF ORDER OF DECEMBER 16, 1882.

It appearing to the Court that Catharine C. O'Reilly is the sole representative of the said decedent in this State, by virtue of letters testamentary having been issued to her solely in this State on the last will and testament of the said testator, and it having been suggested to the Court that the said order of December 16, 1882, should be so amended that the said Catharine C. O'Reilly, the sole executrix of the said Patrick O'Reilly, deceased, only should enter an appearance to the said action and assume the burthen of the defence thereof. It is thereupon, on this seventh day of February, in the year of our Lord one thousand eight hundred and eighty-three, on motion of Peter L. Voorhees, the solicitor and counsel of the said executor, and on consent of the solicitor of the complainant, ordered that the said order made in this cause, on the sixteenth day of December last, be so amended that the mandatory part thereof read as follows, viz.: It is ordered that the said suit stand revived, and

that the said Catharine C. O'Reilly, executrix of Patrick O'Reilly, deceased, as above recited, be made defendant thereto, in the place and stead of the said Patrick O'Reilly, deceased, and that said executrix appear and put in her answer to the said suit at once; and in case she fail so to do at the end of five days from the date of this order, that then the complainant may cause her appearance to be entered, and the answer of Patrick O'Reilly heretofore put in, be deemed and taken as and for the answer of Catharine C. O'Reilly, executrix as aforesaid.

THEODORE RUNYON, C.

Respectfully advised.

JOHN T. BIRD, V. C.

SCHEDULE No. 5.

NEW JERSEY COURT OF ERRORS AND APPEALS.

NOVEMBER TERM, 1887.

Between

JOHN H. OSBORNE,

Complainant,

and

CATHARINE C. O'REILLY,

Executrix,

Defendant.

} ON APPEAL.

A Court of Equity will refuse to compel an executrix to account for her testator's transactions, where the party

asking the account has been guilty of great laches in failing to obtain an accounting during the lifetime of the testator, and does not show a probability that the balance will be in his favor.

MR. H. A. DRAKE, for Complainant.

MR. P. L. VOORHEES, and Messrs. JAMES A. O'REILLY and CYRUS G. DERR, of Penn., for Defendant.

The opinion of the court was delivered by DIXON, J.

On April 22, 1860, Patrick O'Reilly made affidavit that John H. Osborne owed to him the sum of six thousand dollars, and was not a resident of this State, and having filed such affidavit with the clerk of the Circuit Court of Camden county, caused a writ of attachment to be thence issued against said Osborne, which was levied upon six thousand six hundred and fifty dollars of the preferred stock of the Camden and Atlantic Railroad Company.

In January, 1861, Osborne exhibited his bill in Chancery, alleging that there were various complicated matters of account existing between himself and O'Reilly, including the claim made under the attachment, and praying that a full account of these matters might be taken in chancery, and that the suit at law might be enjoined. In June, 1864, O'Reilly filed his answer, consenting to the settlement in chancery of all unadjusted matters between himself and the complainant. Nothing further was done in the cause until after O'Reilly's death which occurred in 1881. Subsequently the suit was revived against his executrix, and in eighteen hundred and eighty-four the complainant began to put in his proofs.

This great delay might have justified the court in dis-

missing the complainant's bill without looking at the merits. It certainly requires of the court to take care that the dangers of injustice, which always attend the investigation of facts long since transpired, are not overlooked, and that, before disturbing the status acquiesced in by both parties for so many years very convincing evidence of the propriety of a change shall be adduced.

The defendant executrix, while insisting that upon an accurate statement of accounts a large balance would be found due to her, yet, because of the disadvantage under which she labored in not being personally cognizant of the transactions involved, which occurred more than thirty years ago, waives her right to an accounting, and asks that a simple decree of dismissal of the bill be rendered, unless the court shall conclude on the testimony already taken, that there appears a fair probability of a balance being shown in favor of the complainant. This course could not work injustice to the complainant, for in the six hundred and fifty printed pages of depositions and exhibits, mainly offered by him, the substance of the available proof on both sides is undoubtedly before us.

The chief element in the account relates to the construction of the Lebanon Valley Railroad. By articles of agreement made April 1, 1854, Patrick O'Reilly had covenanted with the Lebanon Valley Railroad Company to furnish all the materials and implements and to perform the labor necessary to construct and finish the grading, masonry, bridge superstructure and track laying, and other appurtenant work, of sections one to forty, inclusive of said railroad, and to complete the same by January 1, 1857, according to certain specifications and the instructions of the Chief Engineer of the company.

On April 24, 1854, the complainant and his partner, Charles Tarrant, (who soon withdrew), contracted with

the said O'Reilly to furnish all the materials and implements, and to perform all the labor necessary to construct and finish the grading and masonry of section fourteen to twenty-six, inclusive, of said railroad, and to complete the same by August 1, 1855, according to the same specifications and the instructions of said Chief Engineer. For matters arising out of this contract the complainant claims a credit of $499,153.75.

Of this claim the defendant admits three items, as set out in a synopsis by counsel of the complainant, viz :...	$84,194 00	
	327,135 55	
	2,500 00	
		$413,829 55
Which are the same as the Engineer's final estimate for complainant.....	412,993 35	
And a charge for ballast erroneously omitted from the estimate.....	836 20	
		$413,829 55

The next item in the claim is for $8,450, of which $1,000 are represented by two notes of O'Reilly, and may be conceded. The residue of the item, $7,450, has no support, except the testimony of the complainant that his bookkeeper, Mr. Bowen, sometime before 1859, presented to him an account showing that so much money had been returned by Tarrant & Co. to Patrick O'Reilly between June 15, 1855, and August 15, 1856. This sum, $7,450, should be disallowed.

The next item in the claim is for $61,608.91, a charge

made for the "additional cost of rock excavation and loss on the same under the modified contract."

In support of this item the complainant takes two positions. One is, that in the grading of his sections of the railroad there was discovered a flinty rock which was not embraced in his contract and for the excavation of which he is therefore entitled to charge a fair price; the other is, that, because of the unexpected hardness of this rock, O'Reilly agreed to pay him the cost of excavating it.

We think it clear that the rock is included in the contract. The complainant stipulated to furnish all the materials and implements and perform all the labor necessary to construct and finish the grading of his section, and the grading was expressly defined in the contract to include all the excavations and embankments required. This stipulation could not possibly be met without the excavation of the rock in question. It is true that in one clause of the contract Patrick O'Reilly engages that, whenever the contract shall be wholly completed on the part of the contractors, he will pay "for excavation of solid rock requiring blasting or sledging, ninety-five cents per cubic yard," and another clause declares that "stratified rock requiring sledging or blasting shall be paid for as solid rock;" yet there is nothing in these clauses which at all infringes upon the obligation of the complainant to do whatever was needed to grade the road. Nor do these clauses, fairly interpreted, contain any implication that by "solid rock" was meant only "stratified rock." On the contrary, the clause as to "stratified rock requiring blasting or sledging" was evidently introduced to repel a possible construction, unfavorable to the contractors, that rock of that character should be classed as "loose rock," for which a lower price was to be paid. It is plain as English words can

make it, that no rock can be too hard to be classified as solid rock. Nor can the contract be changed because of the fact that the railroad company, before asking for the proposals to build its road, had made borings, which indicated that the rock along its line was not so hard as that encountered by the complainant. The fulness and honesty of these borings are not questioned; their only defect was that they did not go far enough below the rock surface to reach the flinty substratum. But all parties concerned were bound to draw their own inferences from the facts which the borings disclosed, and there is nothing to show that either the company with O'Reilly or O'Reilly with the complainant assumed any risk touching the inferences which should be drawn.

With regard to the complainant's other position, that because of the unexpected hardness of the rock O'Reilly agreed to a modification of the written contract, much evidence has been taken. Upon a careful consideration of the testimony, we are unable to find that O'Reilly bound himself to any modification as to this rock beyond that stated in his letter to the complainant, dated December 24, 1855, wherein he agreed to make good to the latter a deficiency of $9,156.92, (which was the difference between his contract price and the actual cost of excavating the rock on five sections for the five months ending October 31, 1855, and to allow him thereafter seventy-three cents per cubic yard for hard rock, being the price which O'Reilly was to receive from the company. This modification is embraced in the final estimate already mentioned to the extent of allowing seventy-three cents per cubic yard for all solid rock excavated, whether before or after October 31, 1855. It only remains to determine how much more should be allowed to meet the stipulations of the letter. This would be ascertained by deducting from $9,156.92 the

New Jersey State Library

amount of eight cents per cubic yard for all solid rock excavated before October 31, 1855, (eight cents being the difference between the original contract price, sixty-five cents, on which the deficiency of $9,156.92 was based, and the modified price, seventy-three cents, which is covered by the final estimate.) The printed case does not show the total amount of solid rock excavated before October 31, 1855, but it does show that in the five preceding months, there were excavated 22,798 cubic yards on section 18, 19, 20, 21, 22, which at eight cents per yard amount to $1,823.84. It is therefore certain that of this item of $9,156.92 not more than $7,333.08 can be allowed.

The next item in the $499,153.75 claimed by the complainant is $5,119.55 for extra work. This item has sufficient support in the evidence to induce the court to regard it, for the present, as a possible credit.

The next item is for damages, $10,033.49, said to be occasioned by a suspension of work under the contract during the winter of 1854-5. On this head $2,500 are embraced in the final estimate already credited. The residue $7,533.49 is disputed. Passing by the objection to this item $2,500, for which the Chancellor rejected the surplus, it suffices to note that the bill of complaint asks no more than $5,000 for the aggregate of expenses and losses incurred through this suspension. Aside from the technical limit thus imposed upon the complainant's demand, it is just to conclude that a claim, made while the facts were yet fresh in the memory, but sufficiently long after the occurrence to permit of the fullest deliberation, is more likely to be accurate than one made over twenty years later, when the claimant's adversary is dead. This item should not be allowed for more than $2,500 beyond the final estimate.

The last item in the claim is $2,613.25 for property destroyed by the riotous conduct of the complainant's

three cents; and [illegible] that he should actually agree to pay the extra cost of [illegible] loss on this class of excavation; upon which agreement [illegible] could by [illegible] Suspension; and that he could, by means of this representation, then and afterwards get relief with which to repay himself for the loss represented to have been paid to the complainant; and could, out of the relief gotten, actually pay the complainant $8,000 on account of the complainant's loss on rock work over the complainant's estimate for November, 1856; and that he, O'Reilly, could then insist that the increase in price from sixty-five to seventy-three cents actually paid, was without consideration, and must be accounted for by the complainant; and also insist that the modified agreement to pay loss on rock work, used as a representation in the way alleged, had never been made, and if it had been made, in the way alleged, and relief gotten upon it, in the way alleged, that O'Reilly was not bound by it.

Osborne vs. O'Reilly: Cases Nos. 32 and 33 on the Court of Errors list. Sentence to be substituted for the first sentence in the argument of Mr. Drake in reply, just submitted, as that sentence is now erroneously printed:

The position taken by the other side is, that the agreement (Exhibit 17) by which O'Reilly was to pay the complainant's firm sixty-five cents per cubic yard for the excavation of solid rock, could be modified by him so that he should actually pay the complainant seventy-three cents; and could be further modified by him so that he should actually agree to pay the extra cost of or loss on this class of excavation; upon which agreement O'Reilly could, by [illegible] the complainant's loss on rock work and Suspension; and that he could, by means of this

127 Market Street, Camden,

December 5th, 1887.

Dear Sir :—

In the case of Osborne vs. O'Reilly, a large part of the argument presented by the O'Reilly people was not presented in the argument before the Chancellor. A large part of these new views were presented to the Court after I had finished my argument. I did not use up all my time, and as my responsibility, because of the absence of my client in Europe, and the withdrawal of my associate at a stage of the case too late to obtain another, is a very grave one, in view of it all, I ask to submit a short brief in reply, which I accordingly do. Copies are sent to counsel on the other side.

Very Respectfully,

H. A. Drake

To John N. C. Kelsey

Omission to be inserted at the end of the third paragraph on page 16 of Mr. Drake's brief in reply, beginning at line 28: Of course such parts of this work as entered into the complainant's estimates must be allowed by the complainant in the account; but those parts form a very small proportion of this expense and are matter for the Master upon the accounting.

employees; there is no principal upon which this can be charged against the defendant.

To sum up, we thus find, as the best possible showing of the complainant, on account of matters arising from this Lebanon Valley contract:

The engineer's final estimate	$412,993 35
Ballast omitted from estimate	836 20
Two notes of O'Reilly	1,000 00
Extra allowance for hard rock	7,333 08
Extra work	5,119 55
Loss by suspension—extra	2,500 00
Total	$429,782 18

Upon the other side of this railroad construction account the complainant admits debits against himself amounting to $432,260.53, and the defendant produces vouchers, not only for these admitted debits, but also for other sums, in the shape of receipts, notes and checks which seem chargeable against the complainant in connection with this contract, to an amount exceeding twenty thousand dollars. In explanation of this overpayment, it should be remarked that the last of complainant's current estimates, according to which payments were made, was for $435,976.05. These current estimates were confessedly only approximate, and were subject to correction by the final estimate, which was required by the contract to be exact. The final estimate was made by the complainant's brother, who is the chief engineer and its accuracy is not impugned. The discrepancies between it and the next preceding current estimate are accounted for on grounds which need not be further noticed than by saying that they lend no support to the complainant's claim.

Thus on this construction account, we find a balance against the complainant of not less than $2,478.35, and of probably much more than that.

The other elements of the account may be briefly disposed of. The complainant's counsel, in his synopsis, styles them "the Contractor Account," "the Sills Account," "the Greenwood Account," "the Sea Gull Engine Account," "the Plant Account," and "the Bowen Farm Account." According to his statement, the aggregate of all shows, to the credit of the complainant, $26,318.69, and to the credit of the defendant, $24,583.37, giving a balance in favor of the complainant of $1,735.32. Conceding to the complainant, therefore, everything claimed for him on these elements of the account, they would not meet the balance against him on the railroad construction account. But so much cannot be conceded. On the "Greenwood Account" he claims a credit of $8,422.48, which consists of charges against O'Reilly for the services of complainant, the labor of his teams and money expended by him in the Greenwood tract enterprise. Both the bill and the answer aver that this enterprise was a partnership affair between O'Reilly and the complainant, the bill alleging that O'Reilly *was to give* the complainant one-half of the tract, the answer averring that O'Reilly was *to sell* him the half at the price paid O'Reilly for it. The answer is in this responsive to the bill and being unopposed by any legal evidence must stand as the truth. The testimony indicates that the venture was a losing one, and that O'Reilly suffered as heavy a loss as the complainant sustained. This claim of credit therefore fails.

We have no hesitation in concluding that upon a full and fair accounting no balance would be found due to the complainant, and are, therefore, of opinion that his bill should be dismissed, upon the defendant's discontinuing the suit begun by attachment in the Camden circuit.

To that end, let the decree below be reversed.

NEW JERSEY COURT OF ERRORS AND APPEALS

No. 32—CATHARINE C. O'REILLY,
Executrix, &c.,
Appellant,
and
JOHN H. OSBORNE,
Respondent.

PETER L. VOORHEES, Solicitor for Appellant.
H. A. DRAKE, Solicitor for Respondent.

No. 33—JOHN H. OSBORNE,
Appellant,
and
CATHARINE C. O'REILLY, Executrix,
Respondent.

H. A. DRAKE, Solicitor for Appellant.
PETER L. VOORHEES, Solicitor for Respondent.

MR. DRAKE'S ARGUMENT IN REPLY.

The position taken by the other side is that the agreement by which O'Reilly was to pay sixty-five cents per

cubic yard for the excavation of solid rock had been so modified by him that he actually paid seventy-three cents per cubic yard; that he actually agreed to pay the extra cost of or loss on this class of excavation, upon which agreement, by Exhibit J5, in December, 1856, he appealed to his company for aid, representing that he had paid the complainant $37,212.59 because of the complainant's loss on rock work and arising out of the suspension, and by means of this representation, then and afterwards got relief from his company, then actually paid the complainant out of the relief gotten $8,000 solely on account of his loss on rock work, and then denied, not only that he had made with the complainant the modified contract alleged, but insisted that he was not bound by it if he made it. If a court of conscience can sanction anything so unconscionable as this, permit this defendant O'Reilly to say that he had paid his sub-contractors on the Second Divison $37,212.59 for the sake of getting relief, and then unconscionably deny that he is bound by his bargain to apply the relief to the purpose to which he said he had applied it, then indeed does the historical estimate of courts of equity need to be modified. O'Reilly said in effect, in J5: "I have paid Osborne "$37,212.59 more than I contracted to pay him, to make "myself sure of completing your (his company's) con- "tract." And now it is said a court of equity will not require him to make his solemn representation effectual.

And what is the excuse, the supposed sufficient excuse, urged for this extraordinary claim for sanctioning the obtaining of money under false pretenses? Want of consideration! Want of consideration to modify a sealed written contract, which it is admitted was modified any how, to the extent of actually paying seventy-three cents where sixty-five cents were agreed to be paid. But the discussion by the other side of want of consideration

leaves out of view a very important element of the case, namely the Suspension, and proceeds in entire disregard of this important element. It must be borne in mind, that this contract was to have been completed, and but for the Suspension of the work by O'Reilly and his company would have been completed by August 1st, 1855. See Exhibit 17, first clause.

The Suspension delayed the work from October or November, 1854, until April or May, 1855, and postponed the completion of the contract not only beyond the time provided for in the contract, but to a time when labor, provisions, horse feed, powder and other material were much more expensive than during the period of the Suspension. And it will be seen by an inspection of the letters of J. H. Osborne to O'Reilly, written during the fall of 1855, especially C3, p. 481, and H3, 484 and 39, p. 684, when he insisted upon O'Reilly agreeing to meet the loss on the rock excavation before he would go on, that he founded his right and claim to recission or relief not only upon the hardness of the rock but also upon the Suspension and the rise in wages, and the increased cost of material at the period to which the work was thus postponed, especially powder, which entered so largely into this hard rock excavation. And O'Reilly himself did not deny the justice and equity of the complainant's position. Quite to the contrary, as the Chancellor so aptly says in his opinion, O'Reilly acknowledged the justice of this complaint of Mr. Osborne, and in his answer untruthfully says that he offered to release the complainant from the performance of his contract and to pay his expenses up to the Suspension stage of its performance. To say that under these circumstances of the intervening Suspension, and of the excavation of flint which was not solid rock, because it was seamed and fissured with hidden openings through it,

that the parties could not modify their contract, is tantamount to saying that they could not determine the prices which entered into the original contract. Indeed, the contract was as effectually modified as if done by decree of court; for Osborne having claimed the legal right to rescind because of the intervening circumstances as above alleged, O'Reilly's acknowledgement of it as effectually determines Osborn's right to be legal as if settled by decree of court.

"There are cases which hold that where one party to a contract refuses to perform his part, a promise by the other party to pay something beyond the consideration agreed upon, if he will go on and perform, is binding."—Pollock on Cont, *164, note *c.*, citing Monroe vs. Perkins, 9 Pick., 298, and numerous other cases. And why should the cited cases be open to the objection suggested by the text writer, that they hold the doing of what one is legally bound to do a consideration for a promise, when they are clearly supportable, both because, as in this case, the contractee adjudicates the right claimed by the contractor to rescind, in the contractor's favor, "by acknowledging the justice of his complaint," and also because, as likewise in this case, the contractor gives up what he ingenuously claims to be his legal right to rescind. The consideration in this case, however, does not stand on a foundation subject to the semblance of a question. The violation of the agreement by Suspension by the contractee, O'Reilly, certainly gave the contractor some rights, especially as this violation was a serious damage, arithmetically equal to $10,000 and over, as shown by Exhibit P4, p. 512. The promise to the complainant was therefore analogous to "a promise of extra pay to a ship's crew for continuing a voyage after the number of hands has been so reduced by accident as to make the

voyage unsafe, so that the crew are not bound to proceed under their original articles."

Pol. on Cont., *162.
England v. Davidson, 11 A & E., 856.
Hartley v. Ponsonby, 7 E. & B., 872.
Davis v. Munson, 43 Vt., 676.
And other cases cited.

Then it is admitted, on the other side, that the contract was modified by raising the price of hard rock to seventy-three cents, and actually paying the money. This they admit made the whole contract parol, and modifiable at the pleasure of the parties by substituting a new contract without proof of consideration. Suspension was also a modification. But of this again below.

The question of consideration, which may be considered to lie at the threshold of this discussion, is thus disposed of.

THE AGREEMENT.

The question then is, was the agreement or contract so modified that O'Reilly agreed to pay the extra cost of the rock?

The decision of this question involves, in the first place, some investigation of the history of the formation and performance of this contract. The history of the formation of this contract has been sufficiently dealt with by the briefs before the Chancellor, and upon the conclusions there contended for, especially in the complainant's brief in reply, the complainant still insists. To continue:

1. There is one feature in the history of the performance of this contract which has not been touched upon by the other side, and which is now peculiarly relevant in reply to the position taken, that the modification of the contract contended for and found by the Chancellor,

has not taken place. This feature is the Suspension above referred to, and the consequent necessity of so working the final part of the complainant's rock excavation, at the intersection of sections eighteen and nineteen, where the hardest rock lay, not only from the two faces or breasts, by two gangs working toward each other, but also by working down in the middle, between the two faces or breasts, with the rock tied in or bound down on each side, like the excavation of a large well in hard solid rock; and the further consequent necessity of cutting a narrow passageway through at this point of intersection down to the level of the grade line in advance of bringing the whole width to grade, in order to permit the laying of a temporary track upon which rails and other track laying material could be transported up the road, where the track laying was in progress. These necessities largely increased the expense of the complainant's rock excavation, the only portion of his work then uncompleted. That they were the result of the Suspension, in large part at least, is an inference impossible to avoid. For when the Suspension took place, the seamed and fissured hard flint had not been discovered. The complainant's first loss, included in the $9,156, commenced or dated from June, 1855. See Exhibit B3, p. 478, which was for five months to Oct. 31, 1855. The Suspension ended in the previous April or May, and began about October, 1854. If there had been no Suspension during the winter of 1854-5, the complainant would have worked on his rock, unaffected by frost; and even if the existence of the flint excavation had been then known, the complainant could have been directed to expend the small sums he was allowed, from month to month, upon his rock work, as he would have done if left to himself. But instead of either of these alternatives, as the flint excavation was not anticipated, the com-

plainant was directed by a special order to expend his monthly allowances during the winter in question, (Exhibit 39, p. 685, ll. 2-3) upon a frozen earth section which he could have worked at a profit at any other season of the year, and thus, with the loss of profit on this earth work and the extra and unexpected difficulty of the rock excavation, arose because of the suspension which was entire upon the rock work, the delay in the completion in the rock work, and the consequent super extra cost of its excavation, as now detailed.

See Test. J. H. O., pp. 257, 258.
See Test. Bowen, pp. 140, 175.
See Test. R. B. Osborne, pp. 216, 368, 371.

But how are these circumstances relevant to show the modification of contract contended for by the complainant and found by the Chancellor? Very simply, for they show such changes in the carrying out of this contract as could never have been in the contemplation of the parties when the articles of agreement were signed.

Hartley vs. Ponsonby, 7 E and B. 872.
S. C. 26, L. J. Q. B., 322.

It is not reasonable that the complainant should have gone on under the circumstances, unless there was an agreement from O'Reilly to pay the extra cost, and it is additional evidence to show that the Suspension was a sufficient ground for the complainant to claim that he was not obliged to complete his contract without indemnity for his loss.

2. There is another feature in the history of the performance of this contract, which also has not been touched upon by the other side, and is necessary to be understood in order to form intelligible ideas of the transactions constituting that history, namely: The

terminology of the parties used by them in the progress of these transactions and in detailing them on the witness stand.

(a.) The original agreement contemplates monthly estimates, and a final estimate. The word, "*price*" or "*price paid*" or "*given*" refers to the estimate and the rate at which the work done entered into the estimate. An investigation of the usage of these words and phrases will show that they are invariably used, with reference to the estimate, and what was going from time to time into the estimate.

(b.) The modified agreement, whenever spoken of or testified about, did not refer to price paid or given, or to what was being paid or given, but to indemnity from loss. That this distinction or contrast existed in the minds of the parties at the time of these transactions, is shown by both the contemporary correspondence and the subsequent evidence on the witness stand. Confer O'Reilly's letter, F3, p. 483 [Brief of Messrs. O'Reilly and Derr, p. 20]: "I am aware that *your prices* for *hard*" [i. e., solid] "rock will not carry you through. I am also aware that my *prices* will not pay for taking out the *hard*" [i. e., solid] "rock on *some* of your sections; therefore, in order to enable you for the present to carry out the work, I will allow you for *hard*" [i. e. solid] "rock seventy-three cents, that being my *price*. I regret I cannot do better for you at present. However," [i. e., notwithstanding my present inability to do better] "I trust to be enabled" [i. e., in case I am relieved by my company] "to carry you through without sustaining any loss."

Here we see no distinction made, in usage, between "*hard* rock" and "*solid* rock," but a clearly marked distinction between *present price* to enter into the estimate and the executory agreement to pay the complainant his

loss when that should have been ascertained, (notwithstanding his then existing inability to do so) by means of the relief which Richard Osborne would help him to obtain. Test., pp. 96, 103-4, 115-16.

Confer also letter of O'Reilly of November 3, 1855—Exhibit N, p. 464—where "*price*" is used in reference to what was going into the estimate, while the executory agreement to pay loss on rock work or the expressed willingness to make it is phrased in the words "*I will assist you.*"

That the complainant, by reason of the loss from the arbitrary Suspension and the extra hardness of the rock, was entitled to assistance, is not even questioned.

And this distinction in usage between contemporaneous payment of then present *price*, and future payment of *loss* when ascertained runs through the letters of John Osborne and the testimony of Richard Osborne. To make this the more apparent, it must be borne in mind that, on the theory of the complainant, O'Reilly had agreed, if not in December, 1855, at any rate before February 29, 1856, to pay the complainant's losses on the rock. For in Exhibit O9, p. 591, J. H. Osborne, in a letter to O'Reilly of the latter date, says, were it not that "I have your assurance that you *would* see "me righted, it *would* be useless attempting to push my "work through." The testimony of Richard B. Osborne and the other letters of the complainant are all consistent with this theory. Compare, for instance, the temper of the complainant towards O'Reilly in the correspondence between them in the fall of 1855 and prior to F3 of December 14, 1855, and in O9 on p. 21 of Mr. Derr's brief. O'Reilly by the two letters, Exhibits N and F3, expressed a willingness to modify his contract, if indeed he did not agree to the modification contended for, and the letter of the complainant, Exhibit O9, shows that he

had done it; and it must be further borne in mind that although O'Reilly had agreed to pay this loss, he was not doing it. He had agreed, in December, 1855, to advance the price of hard or solid rock as temporary and tentative relief, and it was not until Sept., 1856, that hard rock was raised in the estimate price to seventy cents, and not until November, 1856, that it was raised in estimate price to seventy-three cents.—p. 387, l. 10. O'Reilly was a year in carrying out what he promised should be immediate relief, i. e. relief "for the present," as F3 says. And it was not until December, 1856, that O'Reilly paid Osborne $8,000 over his estimate on the November (1856) payment—Test., p. 410, l. 20. So it will be seen that although O'Reilly had promised to indemnify the complainant, he was not keeping his agreement. He had failed to redeem a promise to accord present relief, and the $8,000 over the November estimate of 1856 was his first distinct payment on losses of which he then had an account, and which had then amounted to nearly $50,000.

By complainant's brief in this court, p. 29, complainant's total loss on rock work amounted to... $61,608 91

Deduct P3 and M3 (should be U3) which had not then, in December, 1856, accrued, viz. P3..... $7,103 05

U3..... 6,894 00

——— $13,797 05

And the complainant's loss to December, 1856, was..... $47,611 86

The complainant's losses, of which O'Reilly had an account in December, 1856, amounted to at least $40,000, after making allowance for the temporary relief comprised in the estimates, and O'Reilly was not meeting them. It was perfectly natural then that the complain-

ant should say, Ex. V3 of April, 1857, (Messrs. D. and R.'s brief, p. 23) "the price you give me [i. e. are, now giving me] for the rock will never take it out.' Where was the use of the complainant's saying "you have promised to see me through," repeating O9 of February, 1856, and letter of October 23, 1856, p. 630, ll. 32, 36, 37, and p. 631, as quoted in the D. and R. brief, where Osborne speaks of "relying on O'Reilly to aid" him, and beseeching O'Reilly to come and examine the work for himself. Now, why should Osborne, while claiming that the rock work was costing him not less than $1.25 per yard," think, whilst the work was in progress, it would be more satisfactory," etc., for O'Reilly to come and examine the work then, unless O'Reilly had an interest in the cost of it above the estimate price.

The senior counsel for the defendant below seeks to point out incongruities in the letters of John Osborne and the testimony of Richard Osborne. An examination of these supposed incongruities and of the quotations in support of them, from the point of view now insisted on, will dissipate them. Thus Richard B. Osborne testifies on p. 213, l. 15, that O'Reilly promised the complainant to pay for this rock work, including the extra cost, and he testifies elsewhere (p. 387, l. 9) "the price of rock was raised from sixty-five to seventy cents in September, 1856, and in November, 1856, it was raised to seventy-three cents." There is no inconsistency in these statements, from the point of view now suggested. One refers to a promise which O'Reilly, on what is above contended to be good consideration, promised to perform; the other to a partial performance of that promise; and on p. 437, l. 25, the chief engineer approved the raising of these prices, as a step on the part of the chief contractor towards complying with the

promise to complete the work and meet the necessary extra cost of the same. The evident object of these painstaking arguments, the more painstaking because of the desperation of their cause, is, to discover and emphasize apparent incongruities. And as there is no denial of the complainant's evidence, except by the answer of O'Reilly, which is so untrue in every important respect as to make it unnecessary to spend argument upon it, the theory of the defense relative to Greenwood, for instance, having been abandoned below, without a argument—and the Chancellor and the letters of O'Reilly himself having found against it in so many important particulars, the defendant is obliged to *rely* upon apparent incongruities. But the desire of the court is not to adopt a theory which makes one part of the case inconsistent and incongruous with another part, but, by the adoption of a theory, like that now insisted on by the complainant, make all the facts, not only explicable, but consistent with it. Our case is not a theorem in geometry to which all the facts must *exactly* conform. We should be obnoxious to grave criticism if it were. We have given all the facts the bad with the good, and while some of the statements in the letters of J. H. Osborne do not show that the modification of the contract on the rock work contended for, and as proved by R. B. Osborne, was made, none of them show it was not made, and some of them actually show it was made. Else how could the complainant in 09 speak of O'Reilly's assurance that he would see him righted. And for what other purpose were the statements of loss, so denominated, forwarded to O'Reilly without complaint.

3. It is quite manifest why O'Reilly hesitated to permit the complainant the benefit of raising his prices, even to seventy-three cents, in the estimates. In Exhibit

A3, p. 477, O'Reilly says, October 9, 1855, "were I to give you my prices, this would not bring you and others out; therefore this matter must not be gone into harshly, but must be managed with a good deal of tact." I am working at this matter for the last six weeks. And by Exhibit 38, p. 683, O'Reilly, in June, 1856, notwithstanding F3 of December, 1855, untruthfully says, "I have "refused to pay any advances on the contract price for "rock" O'Reilly had numerous other sub-contractors on his forty miles of road, all which was sub-let in smaller portions than the second division. He desired, no doubt, even at the expense of the truth, to keep the increase he had made in the complainant's estimates from his other sub-contractors, and lays stress on the tact with which this increase must be managed, in view of the fact that he had other subs who were claiming losses, as from the Suspension, at least, they fairly could do.

4. The contention now is, that if the agreement to indemnify the complainant on his hard or solid rock excavation is established by the proofs, it was not sufficiently pleaded: i. e., that no agreement to indemnify was pleaded. But the excavation of rock costing at least (i. e. over) eighty-five cents per cubic yard is pleaded, with an agreement to pay at least (i. e. over) eighty-five cents for such excavation. But at least (i. e. over) eighty-five cents is pleaded to be the expense of this excavation, and that is what we are contending for, and that is the agreement pleaded.

5. O'Reilly's denial of this allegation in the bill is not responsive. Indeed, there is no denial of it. In his answer, p. 25, l. 25, O'Reilly denies that an agreement was at any time made, by which the price for the excavation of hard (i. e. solid) rock requiring blasting and sledging was increased to the sum of eighty-five cents per cubic

yard. The testimony of the complainant, touching transactions and conversations with O'Reilly, was confined to contradicting the statements made evidence by O'Reilly, by means of his answer, necessarily so, as I understand the statute. Therefore, it being inconsequential, to deny O'Reilly's irresponsive statement in the answer, nothing remained for denial by the complainant by which he could give testimony as to the modification of the contract price agreed to by O'Reilly.

PROVISION FOR ARBITRATION.

This provision shows that the contract was not entire, but severable, for it contemplates disputes, about modification such as this, and settlement of them by arbitration, or else it shows that the arbitration contemplated has no reference to a case like this. Whether it had such reference or not, the arbitration could not here apply, for both the parties and the arbitrator himself agreed upon another mode of settling this dispute, namely, by the arbitrator's promise to carry the whole matter to his company and recommend relief to O'Reilly with which to relieve the complainant, thus modifying, also, this provision of the contract, which had in the meantime, by the Pennsylvania authorities, become a *parol* contract. For rock prices were increased from sixty-five to seventy-three cents, by the admission of the defence, and by the contention of the complainant it had been also modified by the complainant's refusal to go on with the work, because among other things of the Suspension and the increased expense of the work occasioned thereby, unless O'Reilly would agree to meet the complainant's losses on his rock—D3 p. 482. It was then a parol agreement and the parties could then modify its arbitration clause as they pleased, or substitute a new agreement without proving other consideration than that which moved them to the first modification.

If this provision of the contract should defeat the complainant of his remedy, it would be a triumph of baseness on O'Reilly's part scarcely paralleled. For after procuring the complainant to forego this remedy of arbitration by promising to pay his loss; after procuring the complainant's brother to promise to seek for him relief, which he eventually got, he coolly pockets the money, and says to the complainant's right for relief, "You ought to have arbitrated." That is to say, O'Reilly can get money on the false pretense that he is going to pay it to the complainant; he can get the complainant to forego arbitration on the false pretense that he will pay the complainant, and then take advantage of both false pretenses, and rob the complainant of the hard earned money he was lawfully and legally promised to be paid. And this, howsoever unconscionable, is equity!!

This point of arbitration is further dealt with in my argument in reply before the Chancellor, among other things, to show that the Pennsylvania cases cited are not applicable to this case. After the agreed substitute for arbitration, most advantageous to O'Reilly, how could they be?

Query. After O'Reilly had stated, as in J5, page 521, for the purpose of getting money to pay complainant for increase in prices, that he had paid him $37,212.59 on that account, how can he now, in a court of equity, avoid paying him that sum?

THE ACCOUNT.

The claim of the defence, under this head, that the last current estimate of the complainant was in work estimated $22,982.70 in excess of his final, is bosh. This is fully dealt with and disposed of by R. B. Osborne—Test., pp. 88-89, 104, *et seq.* Exhibit D2, p. 468, shows excess of final over last current to be $1,089.70.

There are numerous other errors in the account as stated by both briefs, as will be seen by the account as approximately stated by me as an appendix to my brief. Many of the notes claimed by the defendant were notes given to the complainant in payment of his estimates, and it would be permitting the defendant to take an unfair advantage of the complainant, to take the statements of these briefs, with no support but the untrue answer of O'Reilly.

Besides this, the $9,156 of B3, as also the $6,894.14 of U3, p. 497, should be allowed to the complainant, even if, as it seems to me impossible, the court should fail to support the modification of the contract price of hard rock excavation as found by the Chancellor. Upon the claim of the other side that $8,000 paid in December, 1856, above the estimates, was on the account of the $9,156, the court will not disturb this executed agreement.

The complainant's claim for the $6,894.14, Exhibits U3 and V3, p. 497, and test. Bowen, p. 190-1, is based upon the agreement there testified to, and the consideration of it lies in the fact that the Suspension had imposed the necessity, after making a provisional cutting through the sections 18 and 19 there spoken of, of removing a bench or side considerable above grade to be afterwards brought down to grade while trains were passing. That this work, which was practically outside of the contract, under the circumstances, should have been done without extra compensation, was unreasonable to the last decree.

MONEYS PAID O'REILLY ABOVE HIS CONTRACT PRICES.

That these were not on his contract, were actually above it, is shown by P10, where the claim, by the O'Reilly suit, as shown by the demurrer, was upon a

modified contract. Then that O'Reilly was paid on his contract in October, 1857, all except about $30,000, is shown in this wise :

By Exhibit R, p. 637, the summation of O'Reilly's final estimate was..... $1,520,927 79
Sept. 30, 1857, he had been paid..... 1,488,273 80

Leaving balance at that date of..... $31,653 99

See test., p. 98, l. 34.

The complainant insists on an affirmance of the Chancellor's decree on the solid or hard rock excavation.

Respectfully submitted,
HERBERT A. DRAKE,
For J. H. Osborne, complainant below.

NOTE.—If the agreement, Exhibit 17, expressly classifies stratified rock requiring blasting or sledging, as solid rock, and by necessary implication classifies seamed and fissured trap and flint, unstratified and with hidden openings through it, also as solid rock, to be paid for at one price, it is a grave reflection on the classification made in this agreement.

New Jersey Court of Errors and Appeals.

CATHARINE C. O'REILLY,
Executrix of Patrick O'Reilly, deceased,
Appellant,
vs.
JOHN H. OSBORNE,
Respondent.
} On Appeal.

BRIEF OF JAMES A. O'REILLY AND CYRUS G. DERR.

On April 2, 1860, Patrick O'Reilly issued a writ of attachment in a plea of trespass upon promises, in the Camden County Circuit Court, against John H. Osborne, the respondent, who was then not a resident in the State, for a debt of $6,000.

On January 28, 1861, the said John H. Osborne filed

the bill in this case, asking for an account as to certain matters therein contained, and praying for and securing an injunction restraining the said Patrick from further proceeding in the said writ of attachment.

On July 5, 1864, the said Patrick filed his answer to the said bill.

The respondent took no further steps in the cause for seventeen years, and until after the death of the said Patrick, which occurred on January 16, 1881.

In December, 1881, the respondent revived his suit, procured the appointment of an examiner, and proceeded to take testimony. The case was heard before the Chancellor on bill, answer, replication and proofs. The Chancellor decreed that the appellant should account to the respondent as to certain of the matters mentioned in the bill, and the following argument is submitted on behalf of the appellant with a view to showing that the Chancellor erred in making such decree.

The said Patrick O'Reilly, in his answer, claimed that upon a settlement of differences between himself and the complainant, the latter would fall into his, the said Patrick's, debt to a large amount, and expressed a willingness that an account should be taken.

The great lapse of time, viz: thirty years, since the occurring of the transactions, as to which the account would have to be taken, the death of the said Patrick, and the consequent loss of his knowledge of the said affairs, the loss of his testimony and of the testimony of other persons who, in the long interval, have died, the disadvantages which his testatrix labors under, being without personal knowledge of the subject matter of the said bill, as against the respondent, who is personally cognizant of them, and, finally, the fact of the respondent's present insolvency, which would make a decree against him, if

obtained, worthless, induced the appellant before the Chancellor and now induces her to waive her claim for an account against the respondent and to ask the Court to dismiss the bill. In support of this general position, we will take up the matters which were decreed against the appellant by the Chancellor and discuss them in their order.

I.

The Engine "Sea Gull."

The substance of the controversy as to the "Sea Gull" engine is as follows: Patrick O'Reilly owned the engine in question and alleged that he leased the same to the respondent for $166.66\frac{2}{3}$ per month. The respondent, on the other hand, alleges that the engine was not leased to him, but that he, as O'Reilly's agent, leased the same to the Camden & Atlantic Railroad Company. It will thus be perceived that the difference between the parties upon this state of facts, was as to whether the railroad company or Osborne owes O'Reilly the rental. Under both theories the rental was owing *to* O'Reilly, and under neither theory did O'Reilly owe anything to Osborne, or have anything which the respondent could demand of him, or as to which the respondent can in equity ask for an account. Notwithstanding this fact, however, the Chancellor has decided and in his opinion says (page 709, line 6), that as to the engine "Sea Gull," "His," (the respondent's) "claim to an account is valid." In this, it is submitted, he erred.

II.

Greenwood, Extra Work and Solid Rock.

These three matters of controversy are briefly as follows:

Greenwood. O'Reilly purchased about 1,300 acres of woodland in Juniata and Snyder counties, Pennsylvania, called Greenwood. His contention with reference to this land was that Osborne was a partner in the purchase, but never paid any money on account of his one-half interest; that the transaction was unprofitable, and that Osborne should bear his one-half of the loss. Osborne, on the other hand, contends that he was to have one-half interest in the land for certain work he did in getting sills from it for O'Reilly; that O'Reilly afterwards sold the land without accounting to him for his share. The Chancellor has decided that neither of these theories has been established, but that Osborne "is entitled to compensation for his services and expenditures" done and made upon the said tract of land. (Page 710, line 2.)

Extra Work. This the Chancellor finds consisted of services rendered, viz: "Obtaining wood leaves, (the right to cut down and remove and use standing timber), for O'Reilly, and hauling ties for him to the railroad and distributing them there, &c." (Page 711, line 5.)

Solid Rock. Osborne, under a sealed contract with O'Reilly, for the construction of thirteen sections of the Lebanon Valley Railroad agreed to excavate "solid rock requiring blasting or sledging, at sixty-five cents per cubic yard." (Page 672, line 38.) In the bill he alleges that, owing to the unexpected hardness of the rock, O'Reilly "agreed to increase the price to at least eighty-five cents per cubic yard." (Page 3, line 40.) Osborne having been paid seventy-three cents per cubic yard, in the bill claims the difference of twelve cents per cubic yard.

That for all these matters Osborne had a full and adequate remedy at law, needs not to be demonstrated by

argument. A mere mention of the fact will suffice. The claim is an ordinary one for work and labor done—in the case of Greenwood and the extra work, under a parol contract, and in the case of the solid rock, under a sealed contract alleged to have been modified by parol. An ordinary action of assumpsit for work and labor done would have furnished Osborne with a complete remedy. Instead of pursuing his remedy at law, he filed this bill in equity asking for an account. O'Reilly might, by demurrer or plea, have excepted to the jurisdiction of the court on the ground that the complainant therein had an adequate remedy at law, but, having some counter claims against Osborne, who was then solvent, he filed an answer declaring his willingness that an account should be taken. Osborne, however, from the time of the filing of the answer in 1864, to the time of O'Reilly's decease in 1881, a period of seventeen years, took no steps in the case. He waited until death had removed all O'Reilly's witnesses; until Edward McDermott, O'Reilly's chief clerk, had died; until M. E. Lyons, principal assistant engineer, had died; until Richard F. Stack, the division engineer, had died; until the President of the railroad company had died; and, finally, until Patrick O'Reilly himself had died, and then, when death having given him the advantage, when there was no one left to defend but Mr. O'Reilly's widow, who is without any personal knowledge of the affairs to which the matter in controversy relates, he revived the suit which, for more than seventeen years, he had abandoned, and upon the testimony of his brother, who was the chief engineer of the railroad, proposes to sweep away and appropriate to his own use the bulk of Mr. O'Reilly's estate. If Mr. O'Reilly's witnesses had not died, or he, himself, had survived, the respondent would still have left his suit to slumber. But death was kind to the respondent;

it removed Mr. O'Reilly, leaving the respondent's brother to survive, and gave him an advantage which he has not been slow to seize upon. It is under the peculiar circumstances of the case that the appellant thinks she should be permitted to withdraw the declaration of a willingness that an account should be taken which her decedent made over seventeen years ago, when, doubtless, he supposed that the respondent would duly pursue the proceeding he had started, and to insist that the bill should be dismissed because the respondent had an adequate remedy at law, and because he has been guilty of such laches as to make the good faith of his original proceeding more than doubtful. Under the decisions of the United State Courts, and most of the State Courts, exception can be taken to a bill on the ground that the plaintiff has an adequate remedy at law without demurrer or plea, and without reservation in the answer, at any stage of the proceeding.

In the ninth edition of Story's Equity Pleadings, Section 473, note a, it is said:

"The objection that the plaintiff has a plain, adequate and complete remedy at law, is regarded in the United States Courts as affecting the jurisdiction, and may, therefore, be taken at any stage of the proceedings, or the court may raise the objection of its own motion, though not raised by the pleadings or suggested by counsel.

Parker *vs.* Winnipiseogee Lake Co., 2 Black, 545.
Oelrichs *vs.* Spain, 15 Wall, 211.
Lewis *vs.* Cocks, 23 Wall, 466.
Sullivan *vs.* Portland R. R. Co., 94 U. S., 806."

After referring to the different rule which prevails in Massachusetts, the note proceeds to say that "it has been quite generally held elsewhere that the bill may be dismissed at any stage of the proceedings where its subject matter is, or, however disguised, afterwards proves to be

not of equitable cognizance, but properly cognizable by a court of law only."

In New Jersey it has been ruled that under such circumstances a dismissal of the bill for want of jurisdiction is in the discretion of the court. Thus in *Seymour vs. Long Dock Company*, 5 *C. E. Green*, *page* 407, it is said:

"But while the court, in its discretion, at the hearing may dismiss a bill for want of such jurisdiction as is necessary according to the rules usually adopted, yet if the defendant submits to the jurisdiction and does not raise the objection by demurrer or in his answer, he cannot insist upon it as a matter of right, unless the court is wholly incompetent to grant the relief sought by the bill."

It is therefore to the discretion of the court that we appeal for a dismissal of the bill in this case, and we base our appeal upon the unreasonable delay of the respondent, leading inevitably to the conclusion that he did not intend to revive it until he thought that by Mr. O'Reilly's death and the survival of his own brother, clerk and superintendent, he had Mr. O'Reilly's estate at his mercy, and that he is now merely availing himself of an advantage which death has given him. The courts of New Jersey have always looked with suspicion and distrust upon a case so circumstanced.

In the case of *Shipman vs. Cook et al.*, 16 *N. J. Eq. R.*, 255, the Chancellor refused to refer a case to a Master where the complainant had been guilty of delay not nearly so flagrant as this. The Chancellor said:

"Another circumstance has impressed my mind unfavorably in regard to the justice of the complainant's demands. This difficulty originated thirty years ago. The complainant had it in his power at any time to have foreclosed the mortgage and have the controversey settled. He forebore to take this step until

the defendant absolutely refused to make further payments upon the mortgage. The bill was at length filed on the fourteenth of January, 1849. No testimony was taken until ten years after the defendant's answer was on file, and then not until an order of the court was made requiring him to proceed. After the evidence was closed the cause again slumbered until the complainant, on the motion of the defendant, was ordered to bring the cause to hearing, or have his bill dismissed. A simple case for foreclosure has thus been pending in the court, without an obstacle interposed by the defendant, for a period of over fourteen years. This is surely not the conduct of a party confident in the justice of his cause, and seeking the vindication of his rights. It is eminently unjust and oppressive to the defendant."

The case of *Sebring's Administrator vs. Sebring's Administrator*, 10 *Atlantic Reporter*, 193, recently decided by the Vice-Chancellor, is directly in point.

The complainant filed a bill, procured an answer and put the case at issue. He then took his testimony and stopped for seven years. The defendant moved the court to dismiss the bill on the ground of laches. The Vice Chancellor granted the motion, saying that "if he (the complainant) is now allowed to continue the prosecution of his suit, the defendant will, it is obvious, be compelled to bear all the injurious consequences of this great delay." The Vice-Chancellor further said:

"The rule under which this motion is made declares that, if a suit be suffered to lie without prosecution for one year, it shall be considered abandoned, and the bill may be dismissed. The court would, I think, be bound, in the absence of any express regulation on this subject, and simply in the enforcement of a general principle of justice, to dismiss the complainant's bill in any case where it appeared he had been guilty of such extraordinary negligence as has occurred in this case. A complainant is bound by every consideration of safety to himself, and of duty to his adversary, to use diligence in the prosecution of his suit. He is required to exercise reasonable diligence in matters of practice, as well as other matters. *Lee vs. Cargill*, 10 *N. J. Eq.*, 331. Laches are always discountenanced by courts of con-

science. Nothing, it has been said, will call forth the activity of a court of equity but conscience, good faith and reasonable diligence. The defendant has been extremely slothful in asking for a dismissal. He has delayed his application for nearly six years after he was entitled to make it. This is not a case, however, in which it can be held that laches cures laches. The defendant was under no duty to the complainant to assist him in the prosecution of his suit. The complainant was the actor, and was therefore under a duty to the defendant to prosecute his suit diligently. If he chose to go to sleep over his rights, the defandant was not bound to wake him, or to warn him, if he slept too long, that he would irretrievably lose his rights. He knew that himself. It was his duty to act accordingly, or to suffer the consequences of his failure. The complainant's bill must be dismissed, with costs."

In the above case, it will be noted, the complainant took his testimony and then rested seven years. In the present case the respondent did not take his testimony and then rest, but he rested for seventeen years, during which period Mr. O'Reilly and his witnesses passed away, while the respondent and his brother and chief witnesses survived. His advantage therefore is far greater than that of the complainant in the case of *Sebring's Administrator* just cited. The complainant therein had but the advantage of having taken his testimony while the facts were fresh in the minds of the witnesses. The defendant's witnesses had not died. Here he has the advantage of taking the testimony of his brother and chief witnesses, when Mr. O'Reilly, and other persons friendly to him, and having a knowledge of the transactions, are deceased, and, therefore, cannot testify at all.

In the case of *Piatt vs. Vattier*, 9 *Peters*, 416, Mr. Justice Story, quoting from Lord Camden's opinion in *Smith vs. Clay*, 3 *Brown's Ch. Rep.*, 640, said:

"A court of equity, which is never active in relief against conscience or public convenience, has always refused its aid to stale demands, where the party has slept upon his rights, or acqui-

esced for a great length of time. Nothing can call forth this court into activity but conscience, good faith and reasonable diligence. Where these are wanting, the court is passive and does nothing; laches and neglect are always discountenanced, and, therefore, from the beginning of this jurisdiction there was always a limitation of suit in this court."

In view, therefore, of the neglect of the respondent to proceed for seventeen years, and of the other circumstances above pointed out, and in view of the aversion with which equity regards laches, the Chancellor should, as to the other of the respondent's claims, have decided as he did with regard to the claim for damages resulting from the suspension of work, viz: that it was a "mere question of damages * * * not within the jurisdiction of the court," (page 712, line 14,) and consequently should have dismissed the bill, and in not having done so, we respectfully submit, the Chancellor erred.

III.

Should the court conclude that the bill cannot be dismissed on the foregoing grounds, then we presume an allowance will have to be made the respondent for such expenditures and services as he can show he made and rendered at Greenwood, and for his extra work as it is called. If, however, it can be clearly demonstrated from the testimony that the respondent is indebted to Mr. O'Reilly on other accounts, in a sum largely in excess of the value of his expenditures and services at Greenwood, and of his charges for extra work, and if his claim for solid rock is groundless, as we think we can show, then an account from the appellant cannot benefit the respondent, and an account from the respondent being waived by the appellant, the bill should be dismissed. We will, therefore, after having discussed the additional claim for solid rock excavation, return to the above items.

IV.

The Alleged Modification of Contract for Excavation of Solid Rock.

The contract was one under seal, by the terms of which the respondent, as sub-contractor to Mr. O'Reilly, was to receive "*For excavation of solid rock requiring blasting or sledging, sixty-five cents per cubic yard.*" (Page 672, line 38.)

The contention on the part of the respondent is that the contract was subsequently altered or modified so as to increase the above sum of sixty-five cents "to at least eighty-five cents per cubic yard." (See respondent's bill, page 3, line 41.) Mr. O'Reilly admits in his answer that he agreed to pay the respondent seventy-three cents per cubic yard for rock excavation, and it is a fact not disputed by either party that Mr. O'Reilly has actually paid the respondent in full for such excavation at the rate of seventy-three cents per cubic yard. The important question in this case, therefore, is not as to whether the price was raised to seventy-three cents, but as to whether it was raised to eighty-five cents per cubic yard. In discussing this question, it will be well first to contrast the allegations of the bill and answer on the subject.

Allegations of the Bill.

"That at the time of executing said articles, the said rock was principally covered and so situate that it was impracticable to discover its exact character, but it was supposed by the said parties to said article to be blue limestone, and the said price for the excavation thereof was fixed under that belief; but upon being uncovered and broken into, the said rock proved to be principally 'trap rock' containing 'greenstone,' 'horn-blende' and com-

pact 'feldspar,' exceedingly hard and very much more difficult and expensive to excavate than anticipated when said article was executed, the actual expense of excavating which proved to be at least eighty-five cents per cubic yard; *in consequence of which, as your orator claims and believes he will be able to prove, the said Patrick agreed to increase the price thereof to at least eighty-five cents per cubic yard.*" (See respondent's bill, page 3, line 26.)

THE ANSWER.

"This defendant does not admit that in consequence of the hard rock requiring blasting and sledging, proving very much more difficult to excavate than anticipated, this defendant agreed to increase the price thereof to eighty-five cents per cubic yard, *and this defendant denies that an agreement was made at any time between this defendant and the said complainant, or between this defendant and the said complainant and Charles Tarrant, by which the price for the excavation of hard rock requiring blasting and sledging was increased to the sum of eighty-five cents per cubic yard.*" (See answer, page 25, line 17, &c.)

It will thus be perceived that the answer is responsive and denies that there was a modification of the written contract by an increase of the price to eighty-five cents per cubic yard. The allegations of the answer denying such modification, will, under the familiar rule of equity practice have to be taken as true unless they are disproved by evidence of greater weight than the testimony of a single witness, that is either by the testimony of two witnesses or of one witness and corroborating circumstances.

Daniel's Chancery Pleading and Practice, 5 *American Edition*, *star page* 843, *note* 7.

Bird vs. Styles, 3 *C. E. Green*, 297.

DeHart vs. Baird, 4 *Ib.*, 423.
Bent vs. Smith, 7 *Ib.*, 560.

A careful perusal of the testimony will show that the above allegations of the answer are not disproved by such testimony as the above rule contemplates.

In the first place the testimony of John H. Osborne, the respondent himself, will have to be altogether disregarded. The Chancellor very properly decided that "O'Reilly was deceased when the complainant gave his testimony in the suit. The complainant is therefore not competent to testify to any transactions with or statement by O'Reilly." (Page 709, line 36.)

The only other witness who undertakes to testify to a modification of the contract by an increase of the price for solid rock excavation to more than seventy-three cents per cubic yard, is Richard B. Osborne, the respondent's brother.

In order that the court may better determine as to what importance is to be attached to Richard B. Osborne's testimony upon this subject, we will briefly quote such passages therefrom as relate to the modification of the contract with respect to the price for rock excavation. He says:

(1.)

"A. I was authorized by Patrick O'Reilly to allow to Tarrant & Co." (being the name under which the respondent was operating) "the same prices for certain work that he, as chief contractor, received from the company. This occurred in two items, of which, I think, this was one.

Q. What was the other?

A. The other was solid rock, the sub-contract having been 65 cents and the chief contractors 73, to which the former was raised by order of P. O'Reilly." (Page 80, line 34.)

He also says:

(2.)

"I had appealed to the chief contractor before for help to the

sub-contractors upon these special difficult sections. In September, 1856, he raised the price of solid rock for Tarrant & Co., and in November he made a still further increase in that price to seventy-three cents. Those sections were behind hand in their work, owing to the hardness of the rock. I was responsible for the opening of the road to Lebanon in July, 1857. I had frequent conferences with the chief contractor, and informed him that he must make arrangements to have those sections completed in time. He undertook to have those sections done; reminded me of his having increased the price of solid rock to his own price, seventy-three cents; said that he knew his price even would not be sufficient to complete it; that he had already given a considerable sum as extra pay on those rock sections and that while he would promise me that they should be done he would look to and expect the president of the road to give him such further allowances as would remunerate him for the extra expense he had to go to in completing those sections." (Page 95, line 37.)

Again:

(3.)

"The engineer relied upon the promises of the chief contractor that he would pay for the extra cost of this rock, but in the succeeding months he failed to do so up to the time of the opening of the line in July, 1857, and the engineer for the same reasons before mentioned was compelled to draw from the legitimate profits of Tarrant & Co. to pay the expenses on the chief contractor's work until the allowance had increased from $7,000 in March to $20,500 in July, 1857." (Page 102, line 14.)

(4.)

"I relied upon the promises of my old contractor, by which he had assured me that he would advance sufficient to finish those sections in time, he having extorted a promise from the engineer that he would aid him in a future application to the president to have the amount of the extra cost of this rock paid to him, P. O'Reilly." (Page 103, line 38.)

(5.)

"Q. What, then, had these sub-contractors, Tarrant & Co., or John H. Osborne, as it was then, to depend upon to meet the expenses above the small allowance on the final estimate?

A. The definite arrangement they made with the chief contractor for meeting the extra cost of this work." (Page 112, line 10.)

Again:

(6.)

"Q. When Patrick O'Reilly became acquainted with the difficulty and extra cost of excavating the hard rock, did he permit his sub-contractors, Tarrant & Co., or their successor, John H. Osborne, to cease work on that account, or did he order them or him to proceed with the excavation?

A. He urged them to finish the work and make good his contract with the company for him and that he would see that the work was paid for, including the extra cost of the work." (Page 213, line 9.)

(7.)

"The price of rock was raised from 65 to 70 cents in September, 1856, and in November, 1856, it was again raised to 73 cents. The rasing of the price of the hard clay I think was about June, 1856." (Page 387, line 9.)

(8.)

"The resident engineer returned everything at the prices named in the contract between the chief and the subs. up to the time when the chief contractor altered the contract price by raising it to the prices named; when that was done by the chief contractor, the chief engineer made out the estimates for the sums under the instruction and authority of the chief contractor over the entire yards contained in the whole work in those two items at the altered prices." (Page 387, line 18.)

(9.)

"The increase of the prices to 23½ and 73 from their original was approved of by me, as the engineer, as a step on the part of the chief contractor towards complying with the promises to complete the work and meet the necessary extra cost of the same." (Page 437, line 25.)

(10.)

"The chief contractor had increased the price of the sub. up to the amount of the same price that he received from the company. It was not in the province of the engineer to increase the price which the chief contractor had ordered to be allowed

to the sub-contractor under the new agreement between them." (Page 438, line 32.)

(11.)

"A. The contract included the excavation of the cubic yards contained in that charge," (charge of $9,156.93 in Exhibit B3, page 480); "the contract did not contain the price which was estimated by the engineer or paid for by the chief contractor, because the chief contractor had abrogated the contract by raising the price contained in the contract for solid rock from 50 (65) to 73 cents.

Q. For what quantity of rock was that allowance raised to 73 cents?

A. For the whole quantity of rock contained in the final estimate for the purpose of meeting in part the extra cost of the very hard portion of the rock excavated." (Page 212, line 24.)

The above extracts embrace all the testimony of Richard B. Osborne referring to the increase of the price for rock excavation. It will be perceived that in all of the said extracts, excepting five, that is, in extracts (1), (2), (7), (8), (10), (11), the witness testified to an increase of price from *sixty-five* to but *seventy-three* cents per cubic yard, the latter being the price which Mr. O'Reilly himself was to receive from the railroad company. In the excepted five extracts, viz: (3), (4), (5), (6) and (9), he speaks of Mr. O'Reilly having promised to pay "the extra cost" of the rock excavation, and in three of these five extracts, viz: (3), (4) and (9), he speaks of the promise to pay extra cost having been made to him, as chief engineer, while in the remaining two, viz: (5) and (6), and in those only, he speaks of a promise to pay the extra cost, made by Mr. O'Reilly to the respondent or Tarrant & Co. Of course, as the written contract was between Mr. O'Reilly and Tarrant & Co., any change in its terms would have to be made, not between Mr. O'Reilly and the chief engineer, but between Mr. O'Reilly and the respondent, standing for Tarrant & Co.; with this fact in view we will again

quote the two solitary extracts in which the said witness speaks of an agreement between Mr. O'Reilly and the respondent. They are as follows:

"Q. What then had these sub contractors, Tarrant & Co., or John H. Osborne, as it was then, to depend upon to meet the expenses above the small allowance on the final estimate?"

A. *The definite arrangement they had made with the chief contractor for meeting the extra cost of this work.* (Page 112, line 6.)

Again:

"He (O'Reilly) urged them to finish the work and make good his contract with the company for him, and that he would see that the work was paid for, including the extra cost of the work." (Page 213, line 16.)

It will be perceived that this witness states the making of this "definite arrangement" without time, place or circumstances. He does not say when it was made, where or who was present; indeed it does not appear whether he speaks from hearsay or from his own personal knowledge. Surely it would be dangerous to modify a solemn agreement in writing, and under seal, upon such uncertain testimony, and this is all the testimony in the case which has a tendency to show an increase beyond Mr. O'Reilly's own price of seventy three cents. It may here be stated, as a significant fact, that the respondent himself, in his testimony, nowhere states that there was an increase of price to eighty-five cents per cubic yard.

THE WRITTEN TESTIMONY.

The correspondence between the parties is not only not favorable to the respondent's theory, but is conclusive against it.

The following extracts from the letters exhibited in the testimony, taken in their chronological order, will demonstrate that, though Osborne demanded that Mr. O'Reilly increase the price for rock excavation to 85 cents, O'Reilly declined to raise such price to more than he was getting, viz: 73 cents per cubic yard, and that Osborne finally assented to this.

Letter of October 4, 1855, Exhibit Z2, page 475, line 26, Osborne said to O'Reilly:

> "*The least price that will enable me to prosecute the work to completion will be an average of twenty cents per yard. For less than this I would not undertake.*"

Letter of October 9, 1855, Exhibit A3, page 477, line 4, O'Reilly said to Osborne:

> "*You are well aware I am disposed to do all I can for you and others. Were I to give you my prices, this would not bring you and others out; therefore this matter cannot be gone into harshly, but must be managed with a good deal of tact. I am working at this matter for the last six weeks.*"

Letter of November 3, 1855, Exhibit N, page 464, O'Reilly said to Osborne:

> "*I am well aware that the rock on some of the sections on the second division is very hard and cannot be excavated at the contract price, therefore I will assist you on those sections and on some of the brick bridges which I perceive require an advance.*"

Letter of November 6, 1855, Exhibit H3, page 484, line 39, Osborne said to O'Reilly:

> "*What I expect you to do under these circumstances is to make me such an advance as will cover the loss I have up to 3d Oct. sustained and advance my price on the rock to 85c. per yard for the future. By doing this I shall be enabled to pay for my 70 or 80 cars and to prosecute my work to completion. I shall take no action till I hear from you.*"

Letter of November 7, 1855, Exhibit C3, page 481, line 15, Osborne said to O'Reilly:

> "*Though personally indebted to you and desirous of re-paying a portion of this indebtedness, I never contemplated the position of a suppliant, and yet I hold that this is the position your indecision would impose on me by withholding the aid which I have a right to expect and which you have repeatedly stated I ought to have. I cannot consent therefore that this matter should be longer deferred and before the 15th I shall thank you to give me a definite answer.*"

Letter of November 10, 1855, Exhibit E3, page 482, line 31, Osborne says to O'Reilly:

> "*I am in receipt of yours of the 3d Nov. this day. They were handed to me by Mr. Osborne. I regret it did not come to hand before as it would have relieved me of some anxiety respecting my condition on the Second Divn.*"

Letter of November 28, 1855, Exhibit D3, page 482, line 9, Osborne writes to O'Reilly:

"*I have not received your reply to my letter of 6th inst., though I was led to expect one, containing the assurance that you would make my losses right on the rock, which I stated was what I required at your hands, and which you told me you were willing to give me.*"

Letter December 14, 1855, Exhibit F3, page 483, line 13, Mr. O'Reilly wrote Osborne:

"*In answer to yours of Nov. 6 ultimo I would state: I am aware that your prices for hard rock will not carry you through. I am also aware that my prices will not pay for taking out the hard rock on some of your sections; therefore in order to enable you for the present to carry out the work, I will allow for hard rock seventy-three cents, that being my price. I regret I cannot do better for you at present. However, I trust to be enabled to carry you through without sustaining any loss. From my experience in rock excavation, I know that the rock on some of your sections cannot be excavat. for less than 80 to 85 cents per cubic yard. I will make good to you the deficiency, $9,156 as per statement.*"

About the time when Mr. O'Reilly wrote the above letter, agreeing to raise the price of rock excavation to 73 cents, an impression seems to have prevailed that the losses on rock excavation, as well as on other work under Tarrant & Co's contract, were owing to bad management on the part of the respondent or his foremen. The proof of this fact will be found in the next two letters. It was probably because, after having written the foregoing letter, he learned of this impression, that Mr. O'Reilly did not direct the engineer to allow the respondent the promised increase.

At all events the engineer continued to estimate the rock excavation monthly at but 65 cents. As we have before said, the two following letters will probably furnish the reason for this.

In letter of January 23, 1856, Exhibit H5, page 520, line 32, Osborne wrote to M. E. Lyons, associate engineer, saying:

> "*I have refrained from laying this matter before you in the hope that each succeeding estimate would bring me out. The rock no doubt costs more than I receive for it, but from the estimates of some of the sections a hundred per cent. advance would not cover the loss. I have expended large sums of money to afford facilities for doing the work.* HAVE CHANGED THE FOREMAN SEVERAL TIMES *and have left nothing undone to obtain different results. I can, therefore, only leave the matter with you and solicit such aid as you feel you can afford me.*"

In letter of February 29, 1856, Exhibit O9, page 591, line 5, Osborne wrote to Mr. O'Reilly, saying:

> "*I have frequently stated to you that the losses which appeared from month to mo. on my work was inexplicable. The engs are pleased to complain of my management. This is not borne out by facts, and were it not that I have your assurance that you wd see me righted, it wd be useless attempting to push my work thro. From the engineer's ests I glean this fact, and I conceived it to be an important one as based entirely on the eng's figures as returned to you.*

"*Mr. Nicholls of Mar.* 31*st*, 1855. *Estimated work to me on sections* 18, 19, 20, 21, *and* 22, *and* 23 *amtg to* $15,285, *on which my expenses were* $14,135=$1,152 *profits, or nearly* 7½ *per cent.*

"*Mr. Stack has estimated me on the same sections, viz:* 18, 19, 20, 21, 22, 23—$25,125; *my expenses,* $39,015, *showing a loss of* $13,890$\frac{0}{100}$ *to* 53.3 *per cent. The haul in both cases is thrown out, as also horse expenses. Mr. Stack's ests are from Apl* 1*st, to Dec.* 31*st*, 1855. *Under these circumstances I think I may be excusable in saying* THE WRONG DOES NOT LIE ALTOGETHER IN MY MANAGEMENT. *I am happy to inform you that the work is progressing and will be prosecuted with renewed vigor as soon as the spring opens.*"

In September, 1856, Mr. O'Reilly directed the engineer to advance the respondent's price for rock excavation to 70 cents per cubic yard. This appears from Richard B. Osborne's testimony.

"*The price of rock was raised from* 65 *to* 70 *cents in September*, 1856." (Page 387, line 9.)

In letter of October 23, 1856, page 631, line 3, Osborne wrote to Mr. O'Reilly, saying:

"*I have had occasion to point out for some time past the necessity of your doing something to aid me, and I have given you my reasons how I have been enabled to work through the summer without the increase on my rock prices, which I think you should have considered, and which I conceive is only my due.* * * * * *You will then see at a glance*

that to work rock sections, as I am compelled to do, cannot be done at less than $1.25 *per yard. The deficit must be met by some one. I think, whilst the work is in progress, it would be more satisfactory to you, and certainly far more so to me, that these matters should be examined or controverted, if necessary now, instead of the final closing of the contract.*"

In the month following Mr. O'Reilly directed the engineer to make a further advance of price for rock to 73 cents per cubic yard, that being all that he, O'Reilly, was getting for the same.

"*The price of rock was raised from* 65 *to* 70 *cents in September*, 1856, *and in November*, 1856, *it was again raised to* 73 *cents. The raising of the price of hard clay I think was about June*, 1856." (Richard B. Osborne's testimony, page 387, line 9.)

On April 23, 1857, just a few months before the opening of the road for travel, and when sections 18 and 19 were to be "trimmed up" for track laying (see Bowen's testimony, page 190, line 40) Osborne wrote to Mr. O'Reilly (Exhibit V3, page 497):

"*I have directed Mr. Bowen to try and start the force on* 18 *and* 19. *I have instructed him to keep an accurate account of the same, as I would not undertake it unless the expenses would be met, and I have not the means to do so; only on these terms would I go on, as you are aware* THE PRICE YOU GIVE ME FOR THE ROCK WILL NEVER TAKE IT OUT."

The foregoing epistolary evidence clearly overthrows

both the allegation of the bill and the allegation of the respondent's witness, Richard B. Osborne.

First. The allegation of the bill, it will be remembered, is that O'Reilly increased the price for rock excavation "to at least 85 cents per cubic yard."

Second. The allegation of Richard B. Osborne is, that Mr. O'Reilly agreed to pay "the extra cost" of rock excavation or that he agreed to make up "the loss," without any reference to a particular price.

1. As to the Allegation of the Bill.

The foregoing letters clearly show that, while Mr. Osborne urged O'Reilly to advance the price to 85 cents, O'Reilly refused to do so. Thus in the letter of Oct. 4, 1855, Exhibit Z2, page 475, he declares he will not do the work for less than an average increase of 20 cents, which added to the contract price, viz: 65 cents, would amount to 85 cents per cubic yard.

Mr. O'Reilly replies, Oct. 9, 1855, Exhibit A3, page 477,

> "*I am disposed to do all I can for you and others. Were I to give you my prices this would not bring you and others out.*"

Mr. O'Reilly writes Nov. 3, 1855, Exhibit N, page 464,

> "*That he will assist Osborne on some of the sections.*"

On November 6, 1855, Exhibit H3, page 484, Osborne again writes demanding an increase to 85 cents per cubic yard.

On the following day, November 7, 1855, Exhibit C3, page 481, Osborne writes upbraiding Mr. O'Reilly for his indecision and his withholding

"*The aid which I have a right to expect.*"

December 14, 1855, Exhibit F3, page 483, O'Reilly writes Osborne agreeing to increase the price of rock excavation to 73 cents, that being the price he was receiving.

The effect of the above letters is that Osborne demanded 85 cents, and O'Reilly in reply to such demand offered to give 73 cents per cubic yard.

That no arrangement for a greater price was afterwards made is clear from Osborne's subsequent letters and from the undisputed testimony.

January 23, 1856, Exhibit H5, page 520, Osborne wrote to M. E. Lyons, associate engineer, declaring that the rock excavation

"*Cost more than I receive for it.*"

In September, 1856, Osborne accepts an increase to 70 cents per cubic yard. This fact is testified to by the respondent's own witness and brother (page 387, line 9), and is not disputed.

On October 23, 1856, page 631, Osborne writes to Mr. O'Reilly asking for further aid.

In November, 1856, Osborne accepts an additional increase to 73 cents per cubic yard. This is an undisputed fact. (Page 387, line 10.)

On April 23, 1857, Exhibit V3, page 497, when the work was receiving its final strokes, Osborne wrote O'Reilly:

"*The price you give me for rock will never take it out.*"

From this brief and chronological recital of undisputed facts, it is so clear as to make argument unnecessary that the increase to which Mr. O'Reilly agreed was one to 73 cents, and not to 85 cents per cubic yard. Osborne demanded 85 cents; O'Reilly, in reply, offered 73 cents. That this offer was ultimately accepted is rendered clear by Osborne taking an increase to 70 cents in September, and finally to 73 cents in November, 1856.

It may here be noted that the increase to 73 cents was allowed Osborne, not only for future excavations, but for all excavations which he had previously made under the contract.

We submit that we have demonstrated that the allegations of the bill, that Mr. O'Reilly increased the price for rock excavation to 85 cents per cubic yard, is thus disproved.

2. As to the Allegations of Richard B. Osborne.

It will be remembered that Richard B. Osborne's allegation and theory are that Mr. O'Reilly increased the price for the said excavation not to 85 cents, but to the entire cost of the work; that is, that O'Reilly agreed to pay, in addition to the contract price, the loss upon such excavation.

The foregoing letters clearly contradict this theory also. It is not necessary elaborately to demonstrate this. Osborne's letter of April 23, 1857, Exhibit V3, page 497, written but three months before the opening of the railroad for travel and when the work was being completed, sufficiently establishes the fact. He says, "*you are aware the price you give me for the rock will never take it out.* Here is a clear and unmistakable admission, in writing, over the signature of the respondent,

made at the time of the completion of the work, that the price, which, under his arrangement with Mr. O'Reilly, he was getting, was a fixed price, and that it was *less* than the cost of the work. The respondent doubtless understood his arrangement with Mr. O'Reilly better than his brother Richard did, and, therefore, when Richard says the contract was that Mr. O'Reilly was to pay the entire cost of the work, and the respondent says O'Reilly was to pay a fixed price, which was less than the cost of the work, it is but reasonable that the respondent, and not his brother, is to be believed. Of course the expression of a hope to be able to carry Osborne through without loss, made in letter of December 14, 1855, Exhibit F3, page 483, was not a promise to do so; it was, in fact, a delicate refusal to do so.

Mr. Bowen, a witness for the respondent, gave some testimony as to the increase of price. He says (page 125, line 27,) "Mr. O'Reilly was notified of the hardness of the rock and the inability to complete the contract at the prices named, * * * * and he gave assurance that the price would be increased."

This promise O'Reilly made good by increasing the price to 73 cents, and the testimony does not support the contention for a contract to pay all the loss, or to pay 85 cents. It was merely a promise to increase and was performed as aforesaid.

This is rendered clear beyond a doubt by Mr. Bowen's subsequent testimony, page 158, line 1:

"Q. You have already stated that the attention of Patrick O'Reilly was directed to the difficulty of this rock work and he gave assurance that the price would be increased. State whether the price was increased?

A. The price was increased from 65 to 73 cents."

This is all the testimony in the case upon this subject.

We have thus, on the one side, the doubtful averment of the bill (page 3, line 39) that your orator "*claims and believes that he will be able to prove* the said Patrick agreed to increase the price thereof to at least eighty-five cents per cubic yard;" on the other, we have the distinct and emphatic denial in the answer of any such contract (page 25, line 22.) In behalf of the respondent we have the testimony of Richard B. Osborne that Mr. O'Reilly had promised "to pay the extra cost of the work," (page 112, line 16) a contract quite different from that averred in the bill, while the letters of the respondent, down almost to the time of the opening of the road, clearly indicate a fixed price, and the letter of Mr. O'Reilly, dated December 14, 1855, (Exhibit F3, page 483,) and the subsequent acceptance by Osborne of an increase to 70 and then 73 cents, conclusively show that the fixed price was 73 cents per cubic yard. The denial in the answer (page 25, line 22) that the price for rock excavation was raised beyond 73 cents per cubic yard is thus not overcome by competent testimony. Richard B. Osborne's testimony is the only testimony in the case which is in conflict with the answer, and he testifies to a contract different from the one set up in the bill, besides being confuted upon the subject by the unmistakeable evidence of the letters written by the parties, and of his own estimates. The contract must, therefore, be regarded as one to excavate hard rock for not more than 73 cents per cubic yard.

As it is not denied by the respondent that at the rate of 73 cents he has been paid in full, and as the testimony clearly shows that at such rate the respondent is overpaid many thousands of dollars, we submit the Chancellor erred in decreeing that the appellant should account to the respondent for rock excavation.

V.

No Consideration for an Increase of Prices.

If, however, it were to be admitted, for the sake of the argument, that the respondent had established as a fact that Mr. O'Reilly promised to allow him 85 cents per cubic yard for rock excavation, yet such promise would have no binding effect, because of the lack of a consideration to support it. Even the advance to seventy-three cents per cubic yard, which is not disputed by the appellant, was a mere gratuity.

When the respondent had executed the contract he became bound to a performance of it according to its tenor. He was bound to excavate "solid rock, requiring blasting or sledging, for sixty-five cents per cubic yard." (Exhibit No. 17, page 672, line 38.)

The word "rock" as defined by Webster, "the solid material of the earth's crust," would naturally embrace not only limestone, but also trap and flint, whether stratified or unstratified. If it had transpired that the rock upon the sections included in the sub-contract was unexpectedly soft, or had some other peculiarity of formation, enabling the respondent to remove it at a cost of twenty-five cents per cubic yard, Mr. O'Reilly could not have enforced a reduction of the contract price. Neither on the other hand, as it transpired that the said rock was unexpectedly hard, could the respondent have legally enforced an *increase* of the contract price.

The fact that the contract was difficult to perform, or that performance would entail loss upon the respondent, signified nothing. He was bound to perform it. This principle is forcibly illustrated by the case of *Superintendent and Trustees of Public Schools of Trenton vs. Bennett*, 3 *Dutcher*, 513, in which parties had contracted to build a

school house on a certain lot. When partially constructed it was blown down by a gale of wind; the contractors rebuilt it; it fell down a second time. They then refused to rebuild, contending that the falling of the structure was due to a latent defect in the soil. In an action against them to recover the money already paid them, the defense, based on the allegation of a latent defect in the ground, was overruled. In delivering the opinion of the court, Whelpley, J., said:

"If a party, for sufficient consideration, agrees to erect and complete a building upon a particular spot, and find all the materials and do all the labor, he must erect and complete it, because he has agreed so to do. No matter what the expense, he must provide such a substruction as will sustain the building upon that spot until it is complete and delivered to the owner. If he agrees to erect a house upon a spot where it cannot be done without driving piles, he must drive them, because he has agreed to do everything necessary to erect and complete the building. If the difficulties are apparent on the surface he must overcome them. If they are not, but become apparent by excavation, or the sinking of the building, the rule is the same. He must overcome them, and erect the building, simply because he has agreed to do so,—to do everything necessary for that purpose."

So in this case the respondent was bound to excavate the rock on the said sections of railroad for the sum of sixty-five cents per cubic yard, because he had contracted to do so.

Such, then, were the respondent's contractual obligations when, in his letter of November 6th, 1855, (Exhibit H3, page 485, line 2,) he demanded an advance of price for rock excavation to eighty-five cents per cubic yard. Mr. O'Reilly in his letter of December 14th, 1855, (Exhibit F3, page 483, line 18,) said that he would increase the price of rock excavation to seventy-three cents per cubic yard, which was all he was getting. What consideration was there for

this promise? The respondent was already bound, as before demonstrated, to remove solid rock for sixty-five cents per cubic yard. What did Mr. O'Reilly receive for this promise to increase, that he was not already entitled to? What loss, trouble or inconvenience would a violation of the promise to increase impose upon the respondent that he was not already subjected to? Clearly none. The said increase was, therefore, a mere gratuity, and did not alter or modify the original contract. The law is that a verbal contract, in order to have the effect of modifying a prior written contract, must be based upon a new and valuable consideration. In the case of *Cummings vs. Arnold*, 3 *Metcalf*, 436, the rule is thus stated:

"All such" (prior) "verbal agreements are considered as varied by and merged in the written contract. But this rule does not apply to a subsequent oral agreement made *on a new and valuable consideration*, before the breach of the contract. Such a subsequent oral agreement may enlarge the time of performance, or may vary any other terms of the contract, or may waive and discharge it altogether."

So in the case of *Thurston vs. Ludwig*, 6 *Ohio State*, 1 Bartley, C. J., said:

"It is well settled, as a general rule, that all parol negotiations between the parties to a written contract anterior to or contemporaneous with the execution of the instrument, are to be regarded as either merged in it or concluded by it.

* * * * * * * * * *

A valid consideration is an essential and indispensable element in every binding agreement. If a written contract be altered by verbal agreement, such agreement must have the essential ingredients of a binding contract, and although it may have reference to, and indeed embody, the terms of the written contract, yet it must be founded on a new and distinct consideration of itself.

* * * * * * * * * *

A verbal agreement, to have the effect to alter or modify the terms of a prior written contract, must be a valid and binding contract of itself, resting upon some new and distinct consideration. And it cannot be supported on the supposition that it is

founded on the continuation or extension of the consideration of the prior or written contract, which was complete of itself, and, so far as it went, fixed the rights of the parties."

The withdrawal of Tarrant from the work was alluded to by the respondent's counsel, in the argument before the Chancellor, as a modification of the contract. In the case of *McGrann vs. The North Lebanon Railway Company*, 29 *Penn. St. Rep.*, 89, two of the original contractors had withdrawn just as Tarrant did in this case, and it was contended that this worked a modification or abandonment of the contract. But Armstrong, J., said:

"It is true, two of the parties, contractors, withdrew, and two others took their place, but with this the company seemed to have no concern, for no new responsibility was created, nor did any change take place in the manner of doing business, as everything continued to be done in the name of 'McGrann & Co.'"

If the withdrawal of two contractors and the substitution of two others, who were strangers to the original contract, did not modify it, how could the mere withdrawal of one of two contracting parties have that effect, the work continuing to be done under the firm name?

As to the declaration of Richard B. Osborne, the respondent's brother, that "it was stated to the contractors, for the purposes of making their bids, that it was the ordinary magnesian limestone, easily drilled and affording good building stone, which the contractors could use in the erection of the structures" (page 217, line 24,) a number of things may be said.

1. Richard B. Osborne is the only witness in the case who testifies to the fact. There is much testimony to the effect that the rock was harder than was expected, but there is no testimony, save that of Richard B. Osborne, tending to show that the railroad company or Mr. O'Reilly had, previous to the execution of the contract, represented

the material to be ordinary magnesian limestone. There may have been opinions as to this, but as the rock was concealed in the bowels of the earth, no one could know its quality; even the trial pits which were dug would not demonstrate this fact as to the entire length of the road. It was still essentially and manifestly but a matter of opinion, the oral expression of which would not amount to a warranty, and would not, if mistaken, invalidate the contract.

2. Even if it be true that it was so stated to the contractors, yet it was one of those verbal declarations which are to be regarded as merged in the subsequently executed written contract, under the well-known rule already referred to.

3. There is no allegation in the bill of either fraud or mistake under which such testimony is admissible, or under which such position can be assumed.

4. If such statement to the contractor would furnish a consideration for the promise to increase the price, it would, in this case, furnish a consideration merely for the increase to seventy-three cents. Upon such increase, the representation was fully atoned for. It could not furnish a consideration for the alleged subsequent and additional increase to eighty-five cents, or to the entire cost of the work.

It thus appears that, even if the respondent had shown, as he has not, that Mr. O'Reilly had promised to increase the price for rock excavation to 85 cents or more, such promise would not be binding. It is still a fact, therefore, that the respondent is already overpaid for the rock, and the Chancellor erred, we submit, in decreeing that the appellant should account.

VI.

Engineer's Estimate Final and Conclusive.

If, again, however, we suppose, for the sake of the argument, that the promise of O'Reilly to increase the price for rock excavation was made and was binding on him, and that it varied the terms of the original contract, yet the respondent is not entitled to receive anything under such modified contract in this action, for the reason that, though the written contract may have been modified as to one of its terms, viz: the price for rock excavation, yet the other terms of agreement, including the one which makes the engineer the final arbiter of all questions, (page 671, line 34,) and the other which provides that Mr. O'Reilly shall not be bound to pay excepting upon a certificate from the engineer, (page 675, line 37,) remain binding, and the question in controversy should have been submitted to and decided by him, the court having no jurisdiction.

1. The alteration of the price for rock excavation, though it reduced the contract to parol, did not abrogate the other terms and conditions thereof.

In the case of *Lawall vs. Rader*, 24 *Penn. St. Rep.*, 283, Knox, J., said of the result of such alteration, that it "operates as abandonment, the specialty being relinquished, *except as matter of reference for the terms of the parol contract, which has supplanted it.*"

And in the case of *Carrier vs. Dilworth*, 59 *Penn. St. Rep.*, 410, Sharswood, J., said: "Any alteration of a specialty by parol makes the whole contract parol; covenant cannot be maintained upon it; *the terms of the specialty are in effect adopted and become a part of the parol agreement.*" The increasing of the prices, therefore,

still left the contract binding in all its parts, excepting in so far as it had been altered by the increase.

2. It follows, therefore, that the following clauses in the written contract (Exhibit No. 17) still remain binding on the parties.

"To prevent all disputes it is hereby mutually agreed that the said engineer shall in all cases determine the amount or quantity of the several kinds of work which are to be paid for under this contract, and the amount of compensation at the rates herein provided for; and also that the said engineer shall in all cases decide every question which can or may arise relative to the execution of this contract on the part of said contractor, and his decision shall be final and conclusive and without appeal." (Page 671, line 34.)

* * * * * * * * * *

"And it is further agreed that this contract shall be considered duly complied with when the said engineer has certified in writing to the same; and then, and not until then, will the said Patrick O'Reilly be liable for the payment of the final balance and the percentage due on account of said contract." (Page 675, line 37.)

3. Under the foregoing clauses, the claim of the respondent for payment under the modifed contract should have been submitted to the engineer for arbitrament. A favorable decision, evidenced by a certificate of the engineer, is a *sine qua non* to the respondent's recovery. The decisions of the Supreme Court of Pennsylvania, in which State the said contract was both executed and to be performed, are full and clear upon this subject.

In the case of the *Monongahela Navigation Company vs. Fenlon*, 4 *Watts & Sergeant*, 205, there was a contract for the construction of a dam and lock, which contained the following provisions: "It is also mutually agreed between the parties to these presents, that in any dispute which may arise between the contractor and the company, the decision of the engineer shall be obligatory and conclusive

without further recourse or appeal." In an action of covenant by the contractor on this agreement, it was adjudged that the plaintiff could not recover without a previous award by the engineer. Mr. Justice Rogers said:

"It must be recollected that the compensation to which the plaintiff is entitled, depends on the estimate of the engineer; that it is part of the contract that the valuation should be made by him, and that when any dispute arises between the contractor and the company, his award is final. It is then part of the *plaintiff's* case, and not matter which comes in by way of defense. From this it follows that it is incumbent on the plaintiff to aver and prove that a valuation or estimate of the work was made according to the requirements of the contract. Such proof is a *sine qua non*, without the benefit of which he is not entitled to recover.

In the case of *Reynolds vs. Caldwell*, 51 *Penna. St. Rep.*, 298, the Allegheny Valley Railroad Company contracted the construction of their road to Leach and others, who sub-contracted it to Caldwell & Co.

In the sub-contract was the following clause:

"And it is mutually agreed and understood that the decision of the chief engineer shall be final and conclusive in any dispute which may arise between the parties to this agreement, relative to or touching the same; and each and every of said parties do hereby waive any right of action, suit or suits, or other remedy at law or otherwise, by virtue of said contract, so that the decision of said engineer shall, in the nature of an award, be final and conclusive on the rights and claims of said parties."

The Supreme Court decided that the plaintiffs could not recover for work done by them under the contract until after estimates made by the engineer of the railroad company. Mr. Justice Strong, in delivering the opinion of the court, said:

"Those estimates, it was agreed, should determine the quantity of work done and its *value* or the sum due to the subcontractor. It was those that the defendants covenanted to pay and nothing else."

Even fraud on the part of the engineer was held not to release the contractors from the obligation of the agreement to submit to the engineer's decision. The court said :

"What had the fraud of the engineers, if any, to do with the plaintiff's covenant ? How could the misconduct of the chosen arbitrator deprive the defendants of a right secured to them by the contract,—a right of exemption from liability to any suit upon it ? If the engineer undertook to act as umpire and fraudulently injured the plaintiff, he had a remedy by action against the *guilty agent*, but not by suit on the contract."

In the case of *Hostetter vs. The City of Pittsburgh*, *Pittsburgh Legal Journal*, *O. S.*, *Vol. XXXIII.*, 67, Chief Justice Mercur said :

"We have shown the earlier, as well as the later authorities, clearly and distinctly hold that when a contract for the construction of work contains a stipulation that all questions of dispute arising thereon shall be submitted to a person named for final decision, that it is a bar to a common law action thereof."

In the case of *O'Reilly vs. Kerns*, 52 *Penn. St. Rep.*, 214, the action was by one of Patrick O'Reilly's other sub-contractors on the same railroad, upon the same form of agreement precisely as that under consideration. The Supreme Court decided that the clause making the engineer the sole and final arbiter was binding upon the sub-contractor. Mr. Justice Thompson, in delivering the opinion of the court, said :

"It is not necessary to cite authorities for what is so well settled, as that where a railroad or canal company and its contractors, *or in a contract between original and sub-contractors*, it is agreed that, to prevent disputes, the engineer of the work shall in all cases determine the amount or quality of the several kinds of work which are to be paid for under the contract, and decide every question which can or may arise relative to the execution of the contract on the part of the contractor, that his decision has been uniformly held to be final and conclusive. This is the substance of the stipulation in the contract before us between the contractor with the company and his sub-contractor, the plaintiff below."

And here it may be said once for all, that no award of the engineer will suffice to enable the respondent to recover, unless such award was made before the commencement of this suit, and such award must have been made by him who was then engineer of the company. Richard B. Osborne, who was the engineer of the company at the time of the construction of the railroad, but who has long since ceased to be so, cannot get upon the witness stand, and, in favor of his brother, the respondent, now make a decision binding upon Mr. O'Reilly. His testimony cannot have imputed to it the force of an award. What he failed to decide when he was engineer of the railroad company, he cannot now decide, much as he may want to do so. This was held in the case of the *North Lebanon Railroad Company vs. McGrann*, hereinbefore cited.

It is thus clear that the respondent should, before instituting this proceeding, have submitted his alleged claims against Mr. O'Reilly to the chief engineer, whose decision is a *sine qua non* to recovery. Not having done so, his claim should be dismissed, and for this reason, also, we submit, the Chancellor erred in decreeing that the appellant should account.

VI.

Moneys paid Mr. O'Reilly by the Railroad Company.

The testimony shows that the railroad company paid Mr. O'Reilly on account of his contract two several sums, viz: One of $20,000 in notes in December, 1856, and the other of $38,000 in March, 1862. It is contended on the part of the respondent that Mr. O'Reilly received these moneys on account of the unexpected hardness of the rock on several of the respondent's sections and the conse-

quent increased cost of excavating such rock, and that, therefore, Mr. O'Reilly received the said money as a trustee for the respondent and is liable to account to him therefor. The Chancellor, in his opinion, also referred at length to the receipt of those moneys by O'Reilly, but said that his "conclusion on this matter, however, is not based upon the assumption that O'Reilly did, in fact, receive such allowance of extra compensation from the railroad company, but upon his promise to pay the complainant such additional compensation for excavating the rock as would protect him from loss." (Page 717, line 33.)

We have already demonstrated that Mr. O'Reilly never made such contract, and as to the receipt by him from the railroad company, of the aforesaid sums of $20,000 and $38,000, while, in our judgment, admitting, for the sake of the argument, that the contention of the respondent is true, it in nowise affects the controversy, yet it may be well to explain the matter to the court.

As to the sum first received, viz: $20,000 in December, 1856. It was not received on account of the unexpected hardness of the rock, but on account of his (O'Reilly's) contract generally. (See testimony of Albert Foster, page 380, line 19.) But even if it had been received by reason of unexpected hardness of rock, as contended by the respondent, it was not so received on account of the complainant's sections alone. Mr. O'Reilly had contracted to complete 40 miles of the said railroad; 14 of these he sub-contracted to the respondent, the remaining 26 miles he sub-contracted to other parties. Osborne was not the only one of the sub-contractors whom O'Reilly was obliged to assist, and the said sum of $20,000, if given on account of unexpected hardness of the rock as contended for, was given to him, O'Reilly, as well by reason of his having had to assist his other sub-contractors as of his

having had to assist the respondent. In his letter to Osborne of October 9, 1855, (Exhibit A3, page 476,) O'Reilly says: "You are well aware I am disposed to do all I can for you *and others*. Were I to give you my prices this would not bring you *and others* out."

It is thus manifest that others of O'Reilly's sub-contractors needed assistance. Of the $20,000 so received from the company, it is claimed by the respondent, Mr. O'Reilly gave the respondent $8,000; if this be so, it was a larger proportion of the $20,000 than the respondent's 14 sections bore to Mr. O'Reilly's entire 40 sections.

If, as is alleged, the said sum of $20,000 was given to O'Reilly, not as Albert Foster testifies on account of the contract, but in excess of the contract price, then, as the money was so given to him generally, surely he could distribute it among his sub-contractors in such proportions as he deemed just; but suppose that he had not disbursed the remaining $12,000 to the other sub-contractors at all, what right would the respondent have to call him to account for it? Mr. O'Reilly had been obliged, through no default of his own, to advance prices for rock and clay excavation and other work to his sub-contractors; in the case of rock giving them all he was getting, and he might well have indemnified himself in part for his losses, by retaining a portion of the said $20,000.

As to the other sum of $38,000, it appears that Mr. O'Reilly received it upon the settlement of his suit against the railroad company, and upon his relinquishing his right to $50,000 of the stock of the company, then held and previously paid for by him.

The first clause in the agreement of compromise, Exhibit L10, page 601, is as follows:

"*First.* That the said release shall apply to, and the said sum is in compromise and settlement of all claims and demands

against the late Lebanon Valley Railroad Company, as well as the Philadelphia & Reading Railroad Company, of every matter whatever, the one thousand shares of stock claimed by O'Reilly to belong to and if needful to be transferred by him to the Philadelphia & Reading Railroad Company."

For this stock Mr. O'Reilly had paid its par value in money. Exhibit X9, page 596, line 6, extract from the minutes of the company, recites:

"WHEREAS, In accordance with the accounts of the Lebanon Valley Railroad Company with Patrick O'Reilly, there was due to him one thousand shares of the capital stock of that company, and as by the settlement with him the same became vested in and belongs to this company,

Therefore Resolved, That the said thousand shares, with the dividend thereon, be transferred to the president of this company."

In the copy of a letter of Mr. O'Reilly alleged to have been sent to the company, bearing date December 10, 1855, Exhibit J5, page 522, line 6, it is stated:

"*The large sums, the payment of my* $50,000 *stock in full*, and the purchase of cars, horses, mules and large tracts of woodland for sills and lumber, joined to the vigorous prosecution of the work without regard to cost, and the hard quality of rock on many heavy rock sections, have together exhausted my means and crippled my credit to such a degree that I cannot longer bear up under it unless relieved immediately."

It thus appears that the chief consideration for the $38,000, so received by Mr. O'Reilly, must have been the transfer of the $50,000 of full paid stock of the railroad company. How can the respondent ask for money derived by O'Reilly from a sale of his own individual property in which the respondent never had an interest? Besides, the $38,000 was received by Mr. O'Reilly's assignee in 1862, more than a year after the filing of the bill in this case; and neither the receipt of the $20,000 nor the

receipt of the $38,000 are mentioned in the bill nor is any claim made therein, under which this theory of the respondent could be admitted. As to the respondent's allegation that Mr. O'Reilly made large profits on his contract for the construction of the Lebanon Valley Railroad, this, too, is quite aside from the issues in this case; but it is, besides, untrue, as it sufficiently appears from the testimony that Mr. O'Reilly became insolvent shortly after the completion of the railroad, and if it were to become an issue, the appellant could readily show that his insolvency was occasioned by his having lost over $159,000 upon the said contract.

If Richard B. Osborne's testimony is correct, and the company offered to pay Mr. O'Reilly $40,000 for his additional claims, it is clear that O'Reilly lost $52,000, by his subsequent settlement alone, as he not only released the claims for which he had been offered $40,000, but also transferred his $50,000 of full paid stock, receiving in return but $38,000.

This may be regarded as a specimen of Richard B. Osborne's idea of Mr. O'Reilly's money making under the said contract.

VIII.

Osborne's Indebtedness to O'Reilly.

We have admitted that, unless the court decides that the bill should be dismissed because the respondent had an adequate remedy at law, and because of the inexcusable delay of seventeen years in proceeding with his suit, he would have to be allowed compensation for his extra work in hauling and distributing sills and purchasing sills and wood leaves in the Lebanon Valley, and also for his work done at Greenwood. The precise value of this work it

will be difficult for the appellant, after the lapse of thirty years, and the death at Mr. O'Reilly, to determine. Let us, however, take the respondent's own figures. His aggregate claim, Exhibit Y5, p. 540, for those two accounts and for work on Lebanon Valley Railroad, seems to be $15,520.90.

Now the last current estimate of the respondent, being No. 41, Exhibit Q, page 465, amounted to $435,976.05.

This estimate was paid in full by O'Reilly, the last amount of $2,500 due on the estimate being paid by two promissory notes of the Lebanon Valley Railroad Company of $1,250 each, being dated November 11, 1857. See receipt in Exhibit 9, page 410, line 23.

When the final estimate was made according to "rigid geometrical rules," (page 672, line 21) as provided by the contract, it transpired that Mr. O'Reilly had largely overpaid the respondent, even at the increased prices.

The last current estimate was, as above stated,	$435,976.05
The final estimate was	412,993.35
Difference,	22,982.70

Thus making an overpayment by O'Reilly to the repondent of the said difference of $22,982.70.

This sum, therefore, constitutes a valid claim in favor of the appellant against the respondent, and applying it to the payment of the amount of $15,520.90, claimed by him on account of hauling sills, Greenwood, &c., it still leaves a large balance due appellant.

It becomes unnecessary for us to point out double charges in the said account of the respondent amounting to nearly $2,000, and it becomes unnecessary to refer at length to the promissory notes of the respondent as Tarrant & Co. (Exhibits Nos. 21, 22, page 677; Nos. 23, 24, 25, 26, page 678; Nos. 27 and 28, page 679; also the tes-

timony, page 646), amounting to over $10,000, which the appellant holds against the respondent; and the admitted balance of over $1,000 due by the respondent upon the Camden & Atlantic account. (See Exhibit Y5, page 539.) And the rental of the "Sea Gull" engine amounting to nearly $4,500, which the respondent admits he received. (See page 331, line 12). It is manifest that upon an account stated between the respondent and the appellant the former will appear to be largely indebted to the latter. Such account can, therefore, be of no benefit to the respondent, and as the appellant waives an account from him and prays that the bill may be dismissed and this litigation ended, her prayer should be granted accordingly.

JAMES A. O'REILLY,
CYRUS G. DERR,
Solicitors for Appellant.

NEW JERSEY COURT OF ERRORS AND APPEALS

Between

JOHN H. OSBORNE,

Appellant,

AND

CATHARINE C. O'REILLY, executrix, &c.,

Respondent.

} ON APPEAL, &c.

BRIEF OF H. A. DRAKE, FOR MR. OSBORNE, APPELLANT.

The grounds of the appeal are fully stated in Mr. Osborne's petition of appeal in his printed case, page 725. They relate to Camden and Atlantic Railroad account and Suspension. 10

I.

CAMDEN AND ATLANTIC ACCOUNT.

On this branch of this appeal the statement of the petition of appeal is as follows:

And in respect to that portion of the said decree which directs "that the complainant shall account to the defen- "dant for a balance ($1,098.97) of moneys received by the "complainant as agent and superintendent for the said "O'Reilly in the construction of the Camden and Atlantic "Railroad, as shown on an account of the said moneys "made by a clerk of the said O'Reilly, together with any "additional money that may be due from the complain- "ant on said account arising from the alleged mistake "therein, if the defendant can establish such mistake," your petitioner humbly appeals from that part thereof comprised in these words, viz: "together with any "additional money that may be due from the complainant "on said account arising from the alleged mistake "therein, if the defendant can establish such mistake," upon the grounds that the words last quoted beginning, "together with, &c.," contain a direction which is erroneous, and which, with the words containing the same, as aforesaid, should have been omitted from the said decree.

2. The point made by the complainant is, that there could not have been an error or duplicate charge, because the alleged duplicate charge is stated on the face of the account by which the parties settled, to be included in the above account; that is to say, the $2,346.79, the amount of the alleged error, is stated to be a duplicate charge on the face of the account, must have been seen and known to the parties as such, the purpose of it understood, and it is as binding on the parties as any other portion of the account.

See also Exhibit Y5, pages 538 and 539, where the account is more fully stated and the double charge more fully explained.

Exhibit F9, page 584, line 20, being a letter dated April 27, 1859, from O'Reilly to Mr. Osborne, in which

O'Reilly speaks of Mr. Osborne owing him $1,100.00 with interest, on the Camden and Atlantic Railroad account; that is to say, the $1,098.97 which the complainant admits to be due. See Exhibit Y2, which is in the following words:

"READING, PA., Oct. 7, 1859.

This is to certify that I approve the account presented to me this day by John H. Osborne, showing himself indebted to me on a private account, and the disbursement of the Camden and Atlantic monies, in the sum of ten hundred and ninety-six dollars and ninety-seven cents.

Signed,

$1,096.97. P. O'REILLY.

See also brief of complainant in argument below, pp. 4 and 5 and 16, 17 and 18.

Exhibit No. 2 of defendant confirms this view.

Exhibit No. 2 of defendant is evidently the basis of Appendix A to answer, and the original account, and contained a duplicate charge against the complainant of $3,033.58.

See pages 639 and 640 of printed case and testimony of Bowen, p. 185, l. 40. The first item, by which O'Reilly is given credit in Exhibit No. 2, is composed of the first two items with which he is charged in the same exhibit, namely..... $2,734 79
298 79

Making together the..... $3,033 58

O'Reilly is thus credited with $3,033.58, exactly what he is charged to at the head of the account.

This appellant therefore claims that the learned Chancellor was in error in directing that this Camden and Atlantic account be opened after an acquiescence in it

by O'Reilly under the circumstances, and for so long a period of time, one of which circumstances, as shown by the Chancellor's opinion and decree, was that it was made by Bowen, who has been O'Reilly's clerk, and another circumstance is that there is not an iota of evidence anywhere to show that the account as stated is wrong.

The allegation of the answer goes only to the extent of showing that by an error upon the face of the account the balance, is incorrect and the other statements in the same paragraph of the answer, to the effect that the complainant has not accounted for this Camden & Atlantic money, are not only without proof, but the proof is that Bowen settled the account for O'Reilly long ago and passed him over all books, papers and vouchers.

See above references to testimony of Bowen, especially page 122.

The statement contained in the opinion of the learned Chancellor, that the item containing the alleged duplicate credit to O'Reilly was prior to the time when the salary twice charged became due, only goes to show that the error in credit having crept in or come in, it was necessary to make the duplicate charge to offset it when the account was settled.

The portion of the Chancellor's opinion relating to this branch of Mr. Osborne's appeal will be found on pp. 719 and 720 of the printed book.

See testimony of complainant in rebuttal, pp. 417–19, where complainant swears positively and directly that the account as now stated is correct, and that the balance of $1,098.97 is the correct balance.

The complainant is a competent witness to deny the answer, and the statements in it made by the decedent, on which this branch of this case of the defendant solely depends. Withdraw the probative force of the answer, and this branch of the O'Reilly case is baseless.

Insist on the probative force of the decedent's answer and exclude the testimony of the complainant, and an answer of a decedent, equal in probative force to two witnesses, stands, without power on the part of the complainant to contradict it. This certainly is not law.

If the objecting party, who sues or is sued in a representative capacity, testifies, for instance by a deposition or verified answer of his decedent, this opens the door to the production of the other party, as a witness to rebut or contradict within the scope of such answer or deposition. See Abbott's Trial Ev., p. 69, § 24, and note.

II

SUSPENSION.

The decree directs the Master not to include in his account, but to exclude therefrom, any allowances to the complainant for or on account of a certain suspension in the said decree and the recitals thereof specified, except the sum of $2,500.00 already allowed to the complainant therefor, as stated in the decree. Decree, 726, 728.

The statement of the bill in relation to the suspension begins on page 4, line 25.

The statement in the answer begins p. 27, l. 37, and claims that the allowance made by the engineer of $2,500.00 was full and adequate.—p. 29, l. 14.

The facts are that the engineer made allowance for horse feed, and actual expenses only during "Suspension," and his allowance embraced nothing but horse feed, and actual expenses (clerk hire).

See Exhibit M, p. 464, l. 13, and Exhibit P, p. 633, line 22.

O'Reilly received for the same thing and expenses of

other subs. in his final estimate for the whole forty sections, $9,294.

See Exhibit R, page 636, line 13.

That these allowances dealt with actual expenses only, and had no reference to consequential damages, and damage done to the work by the delay as charged in the bill, which was left to the R. R. board, appears by the testimony, pp. 435-6.

1. The conclusions reached by the Chancellor are brought here for review on the ground that they are erroneous from his point of view.

"Suspension" is discussed in the complainant's brief, beginning on page 22, line 16; also in the Chancellor's opinion, beginning on page 711, line 36.

2. The complainant makes a further claim to an account for allowance on account of Suspension, on the ground that O'Reilly, the chief contractor, basing claims for relief to his company on account of Suspension, obtained such relief from his company; that O'Reilly's claim for loss was in part the complainant's loss, and that out of any moneys obtained by O'Reilly for the relief of the complainant and his other sub-contractors, he was bound to account to the complainant for the complainant's share or portion. That is to say, O'Reilly made claims upon his company because of loss arising from the Suspension, but all of these claims were based upon like losses sustained by his sub-contractors, and whatever relief O'Reilly obtained therefor he was obliged, with the exception of the loss actually sustained by himself, to pay over to his sub-contractors in the proportion of their loss and damage.

The point therefore is, that of and upon all moneys obtained by P. O'Reilly from his company for loss to the

complainant arising out of the Suspension, there is a resulting trust in favor of the complainant.

By Exhibit J5, page 521, O'Reilly made an application to his company, on December 10, 1856, for loss in the second division alone of $37,212.59, and in the first and third divisions of sufficient to make the aggregate amount to $85,540.80. That this claim was based largely upon Suspension will be seen by an inspection of J5. On page 521, line 22, O'Reilly speaks of the increased cost of labor, powder, and horse feed, as well as "unexpected difficulties encountered in meeting rock of extraordinary hardness," and on page 522, line 19, he says, "I would remind your board of the fact that I "have been stopped by them for nearly a year at a period "when labor, powder and provisions were much lower "than at any other time since."

That O'Reilly received relief upon this application is shown by the concluding portion of this same Exhibit J5. He thus received—

1856.	December 11. p, 522, l. 37.....	$20,000 00

He also received—

1858.	February 22, p. 604, l. 10.....	20,000 00
1858.	March 5, p. 604, l. 23.....	25,000 00
1858.	March 5, p. 604, l. 27.....	9,742 00
1862.	March 17, p. 600, l. 11.....	38,000 00
	Making all together.....	$112,742 00

That the relief obtained December 11, 1856, immediately following the application contained in J5, made December 10, 1856, was partly on account of "Suspension" we have already seen.

That he received the relief of February 22, 1858, and also of March 5, 1858, there can scarcely be a doubt. That he received the $38,000 is unquestioned. None of

these sums were upon the regular payments to the contractor on account of his contract and none of them are exhibited or authorized on the current estimates of O'Reilly. O'Reilly was paid his regular estimates by drafts issued by the engineer on the treasurer of the railroad company. It will be found that no payments called for by the engineer, or exhibited or authorized by his estimates, were made to O'Reilly by the company on the dates of these payments, and hence O'Reilly must have got these $112,742.00 on his extra claim. That Suspension formed a large part of the basis of his claim, on which the $20,000.00 of December 11, 1856, was allowed, is shown conclusively by J5. But this $20,000 allowance following this application was a very small portion of the claim made by O'Reilly when he was nearing the close of his contract work. This claim was therefore necessarily the principal basis of the allowances, amounting to $112,742, made to him as above stated, and was based largely on a claim for loss arising out of the Suspension. See pp. showing O'Reilly was paid within $30,000 of the full total of his final estimate as early as October 1, 1857.

3. How large an allowance was made to O'Reilly on account of this Suspension does not appear, nor is that now material. That he was made an allowance at all, on account of his sub-contractors' losses arising out of Suspension establishes the trust and complainant's claim to an account. The amount of money to which the trust in favor of the complainant is applicable is matter of accounting which the Master stating the account must investigate and determine.

4. Another point of this appeal is, that the suspension was not ordered by the engineer, but by the company, and was not such a suspension of work by the engineer

as was according to the opinion contemplated in and by the contracts.—Ex. 17.

a. A suspension by the engineer is such a suspension as his engineering force may require, or any particular circumstance in the progress of the work may require. Indeed, there is no express power of suspension in the engineer, but only of direction.

But a suspension such as this, where the company arbitrarily, for a period of six months, because of lack of money, stopped the work, or nearly so, and in some cases did worse, by working a frozen earth section in midwinter, (Ex. H3, p. 484, l. 35, and B3, p. 479) and letting the rock sections stand idle, is not a suspension by the engineer under any reasonable construction of that part of the contract which provides that the contract should in every respect be prosecuted in such order, and at such places and parts of the work, and at such times and seasons as the engineer might direct.

Ex. 17, p. 698, l. 13.

5. To have thrown up the incomplete contract, with the large unsaleable plant, almost new, on his hands, for the performance of the contract, would have been ruinous to the complainant and was out of the question, although suggested by the opinion. And such an option was never available, for although O'Reilly, at p. 28, l. 14, so states in his answer, the complainant in his rebuttal, p. 422, l. 20, to p. 423, flatly denies the statement.

6. For the complainant to have carried on work of this magnitude, involving the expenditure of a large private fortune, work unavailable as a security upon which to raise money was simply impossible. The company was the only party that could raise the money and it had agreed to do so by taking advantage, in the usual way, of the performance of the work as it progressed

for use as a security upon which to raise money, and to pay the estimates or the sums exhibited and authorized on them to be paid O'Reilly, in order that he might pay Tarrant & Co. See Exhibit 40, p. 702, l. 24.

Exhibit P4, page 512, is a statement of loss by the Suspension, in which the actual expense of horse feed and one-half clerk hire amount to $2,500 allowed in the final estimate of T. & Co., and upon which statement, claim or account the said $2,500 are credited.

10

7. The engineer dealt with suspension only to extent of actual expenses—pp. 435–6.

An agreement to arbitrate that is never acted upon or submitted to, postponed indeed, indefinitely, does not destroy the usual and orderly legal remedy.

We insist that the complainant and appellant on this appeal ought to be allowed for loss by suspension, at least to the amount recovered for him by his trustee, O'Reilly.

20

Respectfully submitted,

HERBERT A. DRAKE,

For Appellant.

COURT OF APPEALS.

O'Reilly, executrix, Appellant, and Osborne, Respondent.	On Appeal, &c.

Brief of Mr. H. A. Drake, for Mr. Osborne, the respondent.

Judging from the argument of the defendant below, and the petition of appeal of the appellant in this case, the argument in this case will principally concern rock work under the modified contract for the excavation of solid rock.

This subject is discussed in the briefs of the complainant used in the argument before the Chancellor, and the attention of the court is especially called to them.

See brief of complainant, pp. 25, *et seq.*
" " " in reply *passim.*

A statement of the complainant's accounts, printed as an appendix to this brief, and a synopsis and analysis of the account of T. & Co., showing that O'Reilly paid the sum of nearly $25,000, in addition to the amount he originally contracted to pay, and which he claims was in large part a gift to the complainant and voluntary only, is a circumstance strongly corroborating the existence of the modified contract for rock work, on account of which the complainant claims this sum was paid.

The complainant or respondent's case touching and concerning the modified contract for the excavation of solid rock may be stated and pleaded thus:

It appears by the pleadings and proofs that a large amount of the excavation required to be made by the complainant in the grading of the thirteen sections embraced in the sub-contract of Tarrant & Co. with O'Reilly was of the material therein called "solid rock, requiring blasting or sledging," therein specified to be stratified rock, and represented to the parties to the said sub-contract at the time of the making thereof to be the ordinary magnesian lime stone, easily drilled, blasted and sledged, and affording a good building stone for use by the said sub-contractors in their bridges and other structures, and upon which representations the price for the excavation thereof was fixed at sixty five cents per cubic yard; that the said *solid rock*, when cut into for the purpose of the said excavation, proved, in large part, to be trap rock, containing large masses of white flint, almost impossible to drill for blasting, horneblende, quartz, felspar and minute imbedded crystals and iron all combined, with hidden fissures, into which the blasts would be ineffectually discharged, running through it, not stratified, exceedingly hard, almost impossible to blast, impossible to sledge, useless for building purposes and very much more difficult and expensive to excavate than the stratified lime stone, the excavation of which was contemplated to have been made by the said sub-contractors at the said rate of *sixty-five cents* per cubic yard when they entered with the said sub-contract; that the complainant, because of the unexpected expense and difficulty of the said solid rock excavation, refused to proceed with the work, unless he should receive a satisfactory assurance of increased and remunerative compensa-

tion for the said solid rock excavation; that the said O'Reilly acknowledged the justice of the complainant's complaint in relation to the said rock excavation, and did not insist upon the performance by Mr. Osborne of his said sub-contract as made in that relation, but on the other hand was anxious that the complainant should proceed with the work and induced him to proceed therewith, by increasing the price of said solid rock excavation from sixty-five cents per cubic yard, the complainant's price, to seventy-three cents per cubic yard, his own price, by agreeing to pay him $9,156 of current loss and by promising to indemnify him. See Exhibit F3, p. 483; that the complainant made up and kept accounts and statements of his loss upon, or expenses of, the said rock excavation, over and above the said price of seventy-three cents per cubic yard at which the same was estimated to him, and caused the same to be sent to or served from time to time upon the said O'Reilly; and it also appearing that the said O'Reilly received and recovered, in December, in the year eighteen hundred and sixty-one, on the settlement of an action at law theretofore brought by him against the legal successor of the said Lebanon Valley Railroad Co., the sum of $38,000, into which said settlement the said claim for extra compensation for the said rock excavation done and performed by the complainant not only entered but formed a very considerable part thereof, and of the consideration for which the said $38,000 were paid; that the amounts were paid to the said O'Reilly, amounting, together with this sum of $38,000, to $112,742, as above shown in the discussion on "Suspension;" that the said sub-contract was modified relative to the solid rock excavation therein specified, and that the said Patrick O'Reilly, deceased, agreed to pay the complainant such additional compensation for exca-

vating the said rock as would protect the complainant from loss, and that the complainant is entitled to an account of the work of excavating the said solid rock, at a fair and reasonable price therefor.

The Chancellor's statement of the complainant's claim upon his solid rock excavation is a very fair and conservative statement of it. It is repeated here with references to the proofs to show what portions of the proofs are embodied in it.

1. On page 713, line 15, the opinion says: "The contract provides that the complainant shall receive for the excavation of solid rock, requiring blasting or sledging, sixty-five cents per cubic yard. It also provides that stratified rock, requiring sledging or blasting, shall be paid for as solid rock." Exhibit 17, p. 660, l. 35; and p. 672, l. 38.

That is to say, the contract provides for the excavation of stratified solid rock at sixty-five cents per cubic yard. There is no provision in the contract for the excavation of unstratified solid rock.

2. On p. 713, l. 20, opinion says: "When the contract was taken the company represented that the rock to be excavated in the sections mentioned in the complainant's contract was limestone." Testimony of R. B. Osborne, p. 76, l. 20 to 40; p. 77, l. 30; p. 119, l. 30; p. 120 to l. 14; p. 212, l. 5-15; p. 213; p. 217, ll. 20-40; p. 218, ll. 1-30.

3. The opinion on pages 13-14 shows the quality of rock that was specified to the contractors as limestone only and useful for bridges and other structures, proved to be trap rock, which was useless for building purposes —p. 217, l. 35-40; p. 218, ll. 1-30; p. 240, l. 30 to 40; Testimony Benj. Scott, p. 269, l. 27 to 40, pp. 270-1 to l. 11; Exhibit J5, letter of O'Reilly to Lebanon Valley

Board, December 10, 1856, p. 521, l. 23-25; p. 522, l. 10; Exhibit A3, letter O'Reilly to Osborne, October 9, 1855, p. 477, l. 5; Exhibit N letter, November 3, 1855, O'Reilly to Osborne, p. 464, l. 28; Exhibit F3, letter O'Reilly to Osborne, December 14, 1855, p. 483, l. 22.

4. On page 714, l. 20, opinion states that the engineer was authorized by O'Reilly to allow the complainant the same price (seventy-three cents per cubic yard) which he received from the company for excavating solid rock. Testimony, p. 80, l. 40; Exhibits A3 and F3 supra.

5. The letter of O'Reilly, dated November 3, 1855, referred to in the opinion, is printed on p. 714, l. 23; Exhibit N, p. 464.

6. The letter of O'Reilly of December 14, 1855, is Exhibit F3, p. 483.

7. The letter of the complainant of November 7, 1855, referred to in opinion, p. 715, l. 7, is Exhibit C3, p. 481.

8. In the opinion, p. 715, l. 16, the reference to payment of $20,000.00 in December, 1856, is the relief which followed J5, p. 521, especially discussed under "Suspension."—Testimony Foster, p. 380, l. 10–37, and of engineer, p. 214.

9. On p. 715, l. 22, opinion says, that in November, 1859, O'Reilly brought suit against the Philadelphia and Reading Railroad Company, into which the Lebanon Valley Company has been merged.

Testimony 115, l. 32; Exhibit P10, p. 605, and subsequently compromised it for $38,000; testimony Foster, p. 376–7–8; Exhibit M10, p. 602; Exhibit L10, p. 601, l. 24.

10. On p. 716, l. 1, opinion says, O'Reilly got a promise from the engineer to sustain his application for extra allowance. Testimony, p. 96, l. 1–16; l. 23–9; p. 103, l. 38; p. 104, l. 1.

11. On p. 716, l. 3, opinion says the engineer fulfilled

this promise in December, 1861. Testimony, p. 115, l. 36–40; pp. 116–17, and that engineer's offer of $40,000 rejected by O'Reilly. Testimony, pp. 117–18.

12. The letter of October 4, 1855, spoken of in opinion, p. 718, l. 19, is Exhibit Z2, p. 475.

13. Testimony of Bowen referred to in opinion, p. 718, l. 38, is printed on p. 125, l. 30.

14. Testimony of R. B. Osborne referred to in opinion, p. 719, l. 2, is on *page* 213, *ll.* 10-20. Cognate references are on p. 102, l. 13-20; p. 103, l. 38-40; p. 112, l. 10.

15. The provision of contract referred to in the paragraph beginning on p. 719, l. 18, of opinion, is in Ex. 17 on p. 671, l. 34. See testimony R. B. Osborne, p. 433, l. 10; 434, l. 30; 437, l. 30.

These statements of this branch of the case of the complainant (now appellee) show:

First. A representation, made by the company to its chief contractor and by the chief contractor to the sub-contractors of the second division, of the kind and quality of the rock work to be performed, namely: the excavation of an aqueous stratified rock useful for bridges and other structures.

Secondly. A covenant by the chief to his company and by the sub. to his chief, conformable to this representation and making it a part of the contract, that stratified rock requiring blasting or sledging should be paid for as solid rock, at sixty-five cents per cubic yard.

Thirdly. The finding of unstratified, igneous trap and flint, with hidden fissures or openings through it, impossible to sledge, almost impossible to drill or blast and useless for masonry structures.

Fourthly. A complaint by the sub. to his chief in consequence, a recognition by the chief of the justice of the

complaint, a refusal of the sub. to proceed with his work without indemnity, and a promise from the chief to indemnify.

Fifthly. A claim by the chief contractor to and upon his company for the losses thus sustained by his sub-contractors, founded, in part at least, upon the very same ground of a modified contract as is now presented and urged by the sub. against the chief, and the obtaining of relief thereupon by the chief, for his sub., to a very large amount.

Sixthly. A claim by the sub. against the chief upon the modified agreement touching the rock work, for relief, to be paid, in part at least, out of the very moneys the chief had recovered for this sub.

Seventhly. A denial, by the chief, in his answer under oath, of the validity of the very claim of his sub., on which he had recovered relief for him, and a refusal to relieve the sub., even out of very moneys he had recovered for him.

It will thus be seen that O'Reilly first made a material representation that entered into and formed a part of his contract, which proved to be false; then acknowledging its falsity modified his contract to make it conform to the material altered circumstances of the case, by agreeing to indemnify the complainant; then having used these circumstances and this agreement to indemnify as a means to obtain relief from his company, he now seeks to take advantage of this very same representation, acknowledged by him over and over again to have been false.

This is such double—nay treble—dealing as merits the unequivocal condemnation of this Honorable Court.

The argument of the defence on this branch of the case, as made before the Chancellor, and in the printed argument of the defendant submitted to the Chancellor

and as outlined by the petition of appeal, proceeds without consideration of the representations upon which this work was bid for and the contract taken, and is founded largely upon the case of School Trustees of Trenton vs. Bennett, 5 Dutch., 513.

1. In the Bennett case, no representations were made about the character of the work to be done. Each party relied upon his own judgment relative to the ease or difficulty with which the builder could perform his contract.

2. There was no modified contract.

3. There was no relief obtained by a contractor-in-chief, because of loss to his sub-contractor, and there are so many other distinctions that it is sufficient to say that the cases are totally different, in the principles governing them—as different as possible for two cases each concerning the law of contract.

The logical outcome of the argument of the defendant, as presented to the Chancellor, that a party who covenants to perform one thing can be required to perform another and a much more difficult thing; that is to say, that a covenantor who agrees, upon the representation of a covenantee, to fell one hundred pine saplings averaging one foot in diameter, within a certain enclosure, is bound to fell at the same price, not the pine saplings represented to be there, but one hundred oak trees averaging two feet in diameter found there; or who agrees to transport a ton of merchandise from A to B, upon the representation that the distance, of which he is ignorant, was fifty miles over a good road, is bound to transport it one hundred miles over a bad road without increase of price, because, forsooth, he agreed to convey it from A to B.

The complainant contends for the principle, applied in Redgrave vs. Hurd, L. R. 20 Ch. Div. 1., and Smith v.

Reese River Mining Co., Finch Cas. on Law of Contracts, 622. For here was no reality of consent to excavate unstratified trap and flint at sixty-five cents; the possibility of such work was not mentioned or suggested; indeed that it would be necessary for the complainant to excavate such rock in the graduation of his thirteen sections was in effect denied, and the mental *consensus* was upon limestone and not flint.

The decree of the Court of Chancery, except in the particulars appealed from by the complainant, should be affirmed.

Respectfully submitted,
HERBERT A. DRAKE.

APPENDIX NO. 1.

APPROXIMATE

STATEMENT OF ACCOUNTS.

Between

JOHN H. OSBORNE, as Tarrant & Co., and JOHN H. OSBORNE individually, of the one part,

and

CATHARINE C. O'REILLY, Executrix of Patrick O'Reilly, deceased, of the other part.

CONCERNING THE CONSTRUCTION OF THE SECOND DIVISION

OF

THE LEBANON VALLEY RAILROAD,

Under the original and modified contract, showing the cost of said construction under the original contract, and the additional cost of solid rock excavation under the modified agreement, including *extra work*.

Also,

JOHN H. OSBORNE, Contractor, and

LEBANON VALLEY SILLS ACCOUNT,

GREENWOOD ACCOUNT,

CAMDEN AND ATLANTIC ACCOUNT, including "SEA GULL" ENGINE ACCOUNT,

PLANT ACCOUNT, and

BOWEN FARM ACCOUNT.

Statement of account between John H. Osborne, as contractor, for the construction of the second division of 24, 1854, as subsequently modified by the parties relative work and payments on account of the rock work under the

DR.

1854.				
June	(1) 15.	Accountant charges himself with cash received on current estimate for May, 1854.....a	$4,339 00	
July	(2) 15.	Do. for June, 1854.....a	7,740 00	
Aug.	(3) 15.	Do. for July, 1854.....a	7,740 00	
Sept.	(4) 15.	Do. for August, 1854.....a	8,170 00	
Oct.	(5) 16.	Do. for September, 1854.....a	7,900 00	
Nov.	(6) 15.	Do. for October, 1854.....a	6,000 00	
Nov.	(7) 25.	Do. on account of work (extra)....a	4,000 00	
Dec.	(8) 15.	Do. on current estimate for November, 1854.....a	7,000 00	
Dec.	(9) 15.	Do. on bond of city of Reading, received on account of work.....a	244 00	
1855.				
Jan.	(10) 18.	Do. for cash received on current estimate for December, 1854.....a	1,943 00	
Feb.	(11) 15.	Do. on account of work.....a	1,200 00	
Feb.	(12) 28.	Do. for note.....a	800 00	
Mar.	(13) 15.	Do. for cash received on account work (per Bowen's account an overcharge of $450).....a	2,000 00	
Apr.	(14) 5.	Do. for cash rec'd on acc't work...a	300 00	
Apr.	(15) 16.	" " " " " ....a	3,000 00	
May	(16) 15.	Do. for cash rec'd on current estimate for April, 1855.....a	9,000 00	
June	(17) 15.	Do. for cash rec'd on acc't work...a	10,500 00	
				$81,576 00
July	(18) 17.	Do. for cash rec'd on acc't work...ab	8,805 00	
July	(19) 23.	" " " " " ...ab	2,000 00	
Aug.	(20) 15.	" " " " " ...ab	13,337 00	
Sep.	(21) 27.	" " " " " ...ab	13,923 00	

Tarrant & Co., sub contractors, and Patrick O'Reilly, the Lebanon Valley R. R., under sub-contract of April to the excavation of solid rock, including certain extra modified contract:

CR.

1854.				
June (1) 15.	Accountants claim credit for payment allowed to them on engineer's estimate for May, 1854 ..... a	$4,339 00		
July (2) 15.	Do. for June, 1854 ..... a	7,740 00		
Aug. (3) 15.	Do. for July, 1854 ..... a	7,440 00		
Sept. (4) 15.	Do. for August, 1854 ..... a	8,170 00		
Oct. (5) 16.	Do. for September, 1854 ..... a	14,100 00		
Nov. (6) 15.	Do. for October, 1854 ..... a	5,660 00		
Dec. (7) 9.	Do. for November, 1854 ..... a	6,849 00		
1855.				
Jan. (8) 12.	Do. for December, 1854 ..... a	1,943 00		
Feb. (9) 10.	Do. for January, 1855 ..... a	2,874 00		
Mar. (10) 10.	Do. for February, 1855 ..... a	3,150 00		
Apr. (11) 11.	Do. for March, 1855 ..... a	2,210 00		
				$64,475 00
May (12) 4.	Do. for value of horses, wagons, harness and other property destroyed during fire and riot as shown by Exhibit S4 c	2,612 25		
				2,612 25
May (13) 14.	Do. for April, 1855 ..... a	14,103 00		
June (14) 9.	Do. for May, 1855 ..... a	5,616 00		
				19,719 00
June (15) 15.	Do. for cash credited by P. O'R. May 29, 1855 ..... m	250 00		
				250 00
July (16) 12.	Do. for June, 1855 ..... ab	8,805 00		
Aug. (17) 15.	Do. for July, 1855 ..... ab	13,337 00		
Sep. (18) 13.	Do. for August, 1855 ..... ab	13,923 00		
Oct. (19) 12.	Do. for September, 1855 ..... ab	14,487 00		
Nov. (20) 15.	Do for October, 1855 ..... ab	12,422 00		
				62,974 00
Nov. (21) 15.	Do. for additional cost of solid rock excavation under modified contract for five months, ending October 31, 1855, as shown by Exhibit B3 ..... b	9,156 92		
				9,156 92

Dr.

Oct. (22) 15.	Do. for cash rec'd on acc't work...ab	14,487 00		
Nov. (23) 16.	" " " " " ...ab	16,500 00		
Dec. (24) 12.	Do. for cash rec'd on acc't work...ab	1,200 00		
Dec. (25) 15.	" " " " " ...ab	14,516 00		
1856.				
Jan. (26) 15.	Do. cash received on estimate for December, 1855.....ab	13,169 00		
Jan. (27) 22.	Do. for cash rec'd on acc't work...ab	500 00		
Feb. (28) 15.	Do. for cash rec'd on acc't work...ab	10,480 00		
				$108,917 00
Mar. (29) 15.	Do. for cash received on account of work.....ab	8,654 00		
Mar. (30) 24.	Do. for cash received on account of work (Voucher A, p. 4).....ab	4,430 00		
Apr. (31) 15.	Do. for cash rec'd on acc't of work.ab	11,940 00		
Apr. (32) 19.	Do. for note ($2,000) (Voucher B, page 4)..... ab	1,978 67		
May (33) 15.	Do. for cash rec'd on acc't of work.ab	14,777 00		

Cr.

Nov. (22) 29.	Do. for cash paid to P. O'R. credited this date.....a	$1,200 00	
			$1,200 00
Dec. (23) 13.	Do for payments on engineer's estimate for November, 1855.....ab	14,516 00	
			14,516 00
Dec. (24) 12.	Do. for cash paid to O'Reilly.....m	1,500 00	
			1,500 00
1856.			
Jan. (25) 12.	Do. for payments, Dec., 1855....ab	10,669 00	
			10,669 00
Jan. (26) 15.	Do. for additional cost of solid rock excavation under modified contract for five months, ending December 31, 1855. as shown by Exhibit J3..... $13,390 00 Less amount of Exhibit B3 subsequently revised to $9,108, but as above credited ... 9,156 92b	4,733 08	
Jan. (27) 15.	Do. for cost of powder and tools for seven months, ending December 31, 1855, not included in J3 or B3 as shown by Exhibit K3.....b	2,674 75	
			7,407 83
Feb. (28) 12.	Do for payment allowed on engineer's estimate for Jan., 1856...ab	10,480 00	
			10,480 00
Mar. (29) 13.	Accountant claims credit for payment allowed on engineer's estimate for February, 1856.....ab	8,654 00	
Apr. (30) 14.	Do. for March, 1856.....ab	9,940 00	
May (31) 15.	Do. for April, 1856.....ab	14,777 00	
June (32) 14.	Do. for May, 1856.....ab	13,745 00	
			47,116 00
June (33) 15.	Do. for additional cost on solid rock excavation under modified contract for 5 months, ending May 31, 1856, as shown by Exhibit L3.....b	10,281 00	

DR.

(34)	Do. for cash received on account of work	$13,745 00		
		2,500 00ab		
				16,245 00
July (35) 15.	Do. for cash rec'd on acc't of work.ab		17,400 20	
Aug. (36) 15.	" " " " " .ab		18,300 00	
Sep. (37) 15.	" " " " " .ab		18,328 00	
Sep. (38) 29.	Do. for cash received on account of work (Geo. Campbell).....ab		1,531 66	
Oct. (39) 15.	Do for cash received on account of work .....ab		17,180 00	
Nov. (40) 17.	Do. for cash rec'd on acc't of work.ab		17,500 00	
Dec. (41) 19.	" " " " " .ab		10,101 00	
				158,365 53
Dec. (42) 19.	Do. for cash over the estimate on account of additional cost of rock excavations under modified contract. see defendant's voucher C...b		8,000 00	
1857.				8,000 00
Jan. (43) 27.	Do. for cash rec'd on acc't work...ab		16,106 00	
Feb. (44) 24.	" " " " " ...ab		12,000 00	
Mar. (45) 15.	" " " " " ...ab		10,716 00	
Apr. (46) 23.	" " " " " ...ab		11,900 00	
May (47) 21.	" " " " " ...ab		5,000 00	

CR.

June (34) 15.	Do. for cost of powder and tools not included in Exhibits B3, J3 and L3, as shown by Exhibit N3..... $7,230 00 Less amount of K3 above credited..... 2,694 75b	$4,535 25		
				$14,816 25
July (35) 14.	Do. for payment allowed on engineer's estimate for June, 1856..ab	1,740 20		
				1,740 20
July (36) 15.	Do. for cash paid to P. O'Reilly .m	3,500 00		
				3,500 00
Aug. (37) 14.	Do. for payment allowed on engineer's estimate for July, 1856..ab	18,300 00		
				18,300 00
Aug. (38) 15.	Do. for cash paid P. O'Reilly.....m	1,000 00		
				1,000 00
Sept. (39) 12.	Do. for payment allowed on engineer's estimate for August, 1856.....ab	18,328 00		
Oct. (40) 15.	Do. for payment allowed on engineer's estimate for September, 1856.....ab	17,180 00		
				35,508 00
Oct (41) 15.	Do for additional cost on solid rock excavation under modified contract for 5 months ending Oct. 31, 1856, as shown by Exhibit O3...b	16,230 86		
				16,230 86
Nov. (42) 15.	Do. for payment allowed on engineer's estimate for Oct., 1856..ab	17,500 00		
Dec. (43) 15.	Do. for payment allowed on engineer's estimate for Nov., 1856.ab	10,101 00		
1857.				
Jan. (44) 15.	Do. for payment allowed on engineer's estimate for Dec., 1856..ab	16,106 00		
Feb. (45) 14.	Do. for payment allowed on engineer's estimate for Jan., 1857..ab	12,000 00		
Mar. (46) 14.	Do. for payment allowed on engineer's estimate for Feb., 1857.ab	10,716 00		
				66,423 00
(47)	Do. for additional cost on solid rock excavation under modified contract for 4 months ending February 28, 1857, as shown by Exhibit P3.....b	7,103 05		
				7,103 05

DR.

May (48) 25.	Do. for balance of estimate for April, 1857.....ab	$6,440 00	
June (49) 22.	Do. for cash rec'd on acc't of work.ab	7,500 00	
July (50) 28.	" " " " " .ab	1,000 00	
Aug. (51) 5.	" " " " " .ab	500 00	
Aug. (52) 5.	Do. for bills payable.....ab	1,240 00	
Aug. (53) 24.	Do. for cash received on account of work .....ab	2,000 00	
Oct. (54) 8.	Do. for two notes, $500 each, on account of work.....ab	1,000 00	
			75,402 00
1862.			
Mar. (55) 17.	Accountant charges himself with interest on the foregoing charges from the average date of those charges to the date of this charge March 17, 1862.		

Cr.

Apr. (48) 18.	Do. for payment allowed on engineer's estimate for Mar., 1857.ab	$11,900 00		
May (49) 19.	Do. for payment allowed on engineer's estimate for Apr., 1857.ab	11,440 00		
June (50) 22.	Do. for payment allowed on engineer's estimate for May, 1857.ab	7,500 00		
July (51) 31.	Do. for payment allowed on engineer's estimate for June, 1857..ab	3,240 00		
Aug. (52) 31.	Do. for payment allowed on engineer's estimate for July, 1857..ab	2,000 00		
				$36,080 00
Oct. (53) 7.	Do. for two notes, $500 each, paid as cash in part payment on estimate and admitted by O'Reilly to be unpaid as shown by bill, page 14, and answer, page 54, printed book, and charged up by him...m	$1,000 00		
				1,000 00
Oct. (54)	Do. for payment allowed on current estimate No. 41 for September, 1857.....ab	$2,500 00		
				2,500 00
Nov. (55) 15.	Do. for expenses for labor, horse work, powder, &c., on sections 18 and 19, for 7 months, ending October 31, 1857, in finishing those sections as shown by Exhibit Y3.....b	$6,894 00		
				6,894 00
1858.				
Jan. (56) 5.	Accountant claims credit for excess of final estimate over amount of payments allowed on the several current estimates for which credit is above claimed.....ab	$6,833 15		
	This claim for credit is explained thus: Amount of final estimate and of the work estimated therein at the prices in the original contract, including $2,500 allowed on account of suspension taken out below.....	397,189 67		

Dr.

Cr.

	Add amount of increase of final estimate by reason of the increase of the prices in the original contract, as and for an allowance on account of the modified contract, viz :			
	On 154,316 cubic yards solid rock @ 8 c. increase	$12,345 28		
	On 166,150 cubic yards hard clay @ 1½ c. increase	2,492 25		
	On 891 cubic yards pier masonry @ 40 c increase	356 40		
	On 813 cubic yds. skew bridge masonry @ 75 c. increase.....	609 75		
		$15,803 68		
	And we obtain the am't of the final estimate...	412,993 35		
	From which deduct the sum of the payments on the several current estimates for which credit is above claimed, viz	406,160 20		
	And the result is the sum or balance for which credit is now claimed, viz.....	6,833 15		
Jan. (57) 5.	Do. for 1,393 67-100 cubic yds. ballast omitted from his final estimate as shown by Exhibit N5.....ab		$836 20	
				$7,669 35
1856.				
Mar. (58) 1.	Do. for extra work from July 1, 1855, to Nov. 30, 1856, as shown by Scott's bill Exhibit A4.....d		$4,827 80	

DR.

Balance due.....	66,893 22
Total.....	$499,153 75

Cr.

Nov. (59) 1.	Do. for extra work in retrimming sections 15 and 14, as shown by Exhibits Z4 and Y5.....d	$291 75		
				$5,119 55
(60)	Do. for horse feed, expenses, etc., during suspension of 1854-5, as shown by O4 and P4...$10,033 49			
	Deduct sum allowed on account thereof by chief contractor in final estimate of accountant as Tarrant & Co., and for which credit is above claimed e	2,500 00		
			$7,533 49	$7,533 49
1862.				
Mar. (61) 17.	Do. for interest on the foregoing credits from the average date to March 17, 1862, that being the date upon which final payment was made to P. O'Reilly by the Philadelphia and Reading R. R. Co. of $38,000, in settlement of his claim against the Lebanon Valley R. R. Co. (Vid Z9 and J10)			
1881.				
Jan. (62) 16.	Do. for interest to be computed with yearly rests on the sum of $38,000, mentioned in the foregoing credit, from March 17, 1862, to January 16, 1881, when P. O'Reilly died.			
Jan. (63) 16.	Do. for interest on the balance due accountant March 17, 1862, over said $38,000, viz: from March 17, 1862, to January 16, 1881.			
Jan. (64) 16.	Do. for interest from January 16, 1881, on amount then due till paid.			
				$499,153 75

JOHN H. OSBORNE'S ACCOUNTS,

VIZ:

(2) AS CONTRACTOR.

(3) THE SILLS ACCOUNT.

(4) GREENWOOD.

(5) CAMDEN AND ATLANTIC AND "SEA GULL" ENGINE.

(6) PLANT ACCOUNT.

AND

(7) BOWEN FARM ACCOUNT.

DR.

John H. Osborne in account

(2) CONTRACTOR ACCOUNT.

1857.				
June 22.	Accountant charges himself with cash paid on account of work done by him as contractor for the Lebanon Valley R. R. Co., part of which was properly within the contract of P. O'Reilly with that company, and a part not, as shown by Exhibit M5	(2)	$2,500 00	
July 22.	Do	(2)	2,000 00	
Aug. 24.	Do.	(2)	2,202 00	
				$6,702 00

(5) CAMDEN AND ATLANTIC AND SEA GULL ENGINE.

1858.				
Oct. 7.	This accountant charges himself with balance due on Camden and Atlantic account as shown by pages 5 and 6 of Exhibit Y5 and certificate of settlement. Certificate....$1,096 97 Exhibit Y2, Clerical error, 2 00	(5)	1,098 97	
1860.				
Mar. 1.	Do. for O'Reilly proportion of engine rent for the Sea Gull engine paid to accountant in stock of the Camden and Atlantic R. R. Co. as shown by Exhibit E8	(5)	4,419 95	$5,518 92

Cr.

with Patrick O'Reilly.

(2) Contractor Account.

1857.				
July 22.	Accountant claims credit for the part of the work contained in the final estimate of J. H. Osborne, contractor, for chief contractor, viz : total amt. of estimate.....$10,102 10			
	Deduct portion thereof done for the Leb. Val. R. R. Co.....(2) 3,600 10		$6,502 00	
				$6,502 00
July 22.	Do. for Sundry work about Lebanon on Y track, &c , as shown by Exhibit X3 (B6 omitted=(2) $68.70)...(23)	$267 37		
Apr. 1.	Do. for sundry work charged to the Lebanon Valley R. R. Co., a balance of which to $911.10 was properly chargeable to P. O'Reilly. See Y3.....(23)	911 10		
				1,178 47

(3) Lebanon Valley Sills Account.

June 7.	Accountant claims credit for hire of teams in hauling sills, horses hauling out sills from woods, moneys paid men for loading sills, &c., from woodland on the line of Leb. Val. R. R., as shown by Exhibit W3.(3)	$1,501 12	
June 7.	Do. for disbursing moneys for buying woodleave, hauling sills, logs and wood, cut and haul and for distributing same on the line of Leb. Val. R. R. in 1856 and 1857, amounting to $2,500 @ 5c. See Exhibits Z3 and Y5.....(3)	1,250 00	
			2,751 12

Dr.

Cr.

(4) Greenwood Account.

1856.			
Feb. 14.	Accountant claims credit for cash paid for 4 large wagons ordered by P. O'Reilly, and not paid for by him, with freight from Philadelphia to Reading and transfer of same thence to Newmanstown for use, and used in hauling sills at Greenwood....(4)	$680 00	
Nov. 11.	Do. for balance due on Greenwood as per book shown on Exhibit Y4...(4)	73 02	
1857.			
Aug. 31.	Do. for hire of teams and harness, services as general manager, etc., as shown by Exhibit X4, and relates to Greenwood.....(4)	5,372 23	
Apr. 23.	Do. for sundries consisting principally of cash expended for articles for P. O'Reilly, sent to Greenwood..... (4)	138 17	
Dec. 27.	Do. for sundries, consisting of expenses, percentage on disbursement, amount paid Clendinning as caretaker, all relating to Greenwood and shown by Exhibits W4 and D7.....(4)	1,099 53	
1858.			
Apr. 27.	Do. for cash paid Chas. Clendinning on account of labor done on dam at Greenwood and shown by Exhibit Z6.....(4)	75 00	
			$7,437 95
1857.			
Aug. 29.	Accountant claims credit for sundry cash and expenses contained in Exhibit O7..... $349 53 Less am't of Z6. $75 00 Less item contained in W4..... 200 00 $275 00 (4)	$74 53	
	do. for extraordinary depreciation of mule teams beyond ordinary wear and tear returning from Greenwood in useless condition by reason of over work or neglect by P. O'Reilly or his agent while at Greenwood....(4)	910 00	
			984 53

Dr.

(6) Plant Account.

1854.				
Oct. 31.	This accountant charges himself with sundries, chiefly for cash paid P. O'Reilly for horses, mules and other plant as shown by page 2 of Exhibit Y5.....(6)	$6,692 45		
1858.				
Jan. 5.	Do. for dumping cars furnished payable in monthly estimates (withdrawn)(6)	$5,670 00	$12,362 45	
			$24,583 37	
	To balance due John H. Osborne		$1,735 32	
	Total.....		$26,318 69	

Cr.

(6) Plant Account.

1858.				
Jan. 18.	Accountant claims credit for sundries, consisting of cash, &c., paid to or for P. O'Reilly on account of plant and cash expended by him for that purpose, as shown by page 1 of Exhibit Y5	(6)	$5,690 83	$5,690 83

(7) Bowen Farm.

Credit claimed and disallowed		$1,773 79
Total		26,318 69
By balance due John H. Osborne		$1,735 32

OSBORNE vs. O'REILLY.

SYNOPSIS

OF THE

TARRANT & CO. ACCOUNT.

Synopsis of account between John H. Osborne, as tractor.

DR.

Accountant charges himself with sum of items marked (a) being cash received on account of construction under the original contract.....$81,576 00

Accountant also charges himself with the sum of items marked (ab) being cash received both on account of construction under the original contract, and also on account of rock work, including loss on same under the modified contract... 342,684 53

Accountant also charges himself with the item marked (b) being cash received on account of rock work, including loss on same under modified contract only. 8,000 00

Balance of principal due accountant as Tarrant & Co..... 66,893 22

$499,153 75

Tarrant & Co., sub-contractor and Patrick O'Reilly, con-

CR.

1855.			
June 15, for work to May 31, 1855.	Accountant claims credit for the sum of items marked (a) being payments exhibited and authorized on current estimates of the engineer on account of construction (graduation and masonry) under the original contract up to date.....	$84,194 00	
	Accountant claims credit for the sum of items marked (ab) being payments exhibi'ed and authorized on the current estimates of the engineer, on account of construction, and also on account of rock work under modified contract except $2500 (suspension) included below in (e).....	327,135 55	
	Accountant claims credit for miscellaneous items marked (m) being payments in cash made to O'Reilly as shown by O8 and two notes of $500 each.....	8,450 00	
	Accountant claims credit for the sum of items marked (b) being additional cost rock excavation and loss on the same under modified contract.....	61,608 91	
	Accountant claims credit for sum of items marked (d) for extra work included in Scott's A4 and on sections 15 and 14.....	5,119 55	
	Accountant claims credit for the item marked (e) for horse feed and other expenses during the suspension of 1854–5 and increased cost of construction by reason thereof. Disallowed except $2,500 in final estimate	10,033 49	
	Accountant claims credit for item marked (c) for value of horses, &c., destroyed during fire and riot, as shown in S3. Disallowed.....	2,612 25	
			$499,153 75
	By balance of principal due accountant as Tarrant & Co., brought down....		$66,893 22

OSBORNE vs. O'REILLY.

ANALYSIS

OF THE

TARRANT & CO. ACCOUNT.

Analysis of the account of John H. Osborne, as Tartractor.

DR.

CONSTRUCTION ACCOUNT.

Accountant charges himself with sum of items marked (a)	$81,576 00	
Accountant charges himself with sum of items marked (ab)	342,684 53	
Total		$424,260 53

To balance due to P. O'Reilly on construction account proper brought down	$28,734 66

Rock account under modified con-

Accountant charges himself with balance due on the foregoing construction account	$28,734 66	
Accountant charges himself with item marked (b)	8,000 00	
Balance due accountant on rock work under modified agreement	24,874 25	
Total		$61,608 91

rant & Co., sub-contractors, with Patrick O'Reilly, con-

Cr.

Construction Account.

Accountant claims credit for the amount of the final estimate of January 5, 1858	$412,993 35		
Ballast erroneously omitted by engineer	836 20		
	$413,829 55		
Exclude sum allowed on account of suspension (e) included elsewhere	$2,500 00		
	$411,329 55		
Deduct sum included in final estimate as an allowance on account of the modified contract for loss on rock work by reason of the increase of prices in the original contract	15,803 68		
And we find the correct total for work done on construction under the original contract to be.		$395,525 87	
Excess of payments on account of work over amount due accountant on construction under original contract only		28,734 66	
			$424,260 53

tract, including loss on rock work.

Accountant claims credit for items marked (b) namely B3	$9,156 92	
J3 less B3	4,733 08	
K3	2,674 75	
L3	10,281 00	
N3 less K3	4,535 25	
O3	16,230 86	
P3	7,103 05	
M3	6,894 00	
Total		$61,608 91

DR.

Additional balance due accountant as Tarrant & Co	$42,018 97	
Add balance above claimed	24,874 25	
Total balance claimed by accountant as Tarrant & Co		$66,893 22

Cr.

Accountant claims credit for sum of items marked		
(c) Fire and riot S4	$2,612 25	
(d) Extra work..... A4 and Z4	5,119 55	
(e) Suspension [including $2,500.00, in final above excluded].. ..... P4	10,033 49	
(m)..... O8	8,450 00	
In all.....		$26,215 29
Restore allowance on account of rock work excluded above.....		$15,803 68
Add the balance due Tarrant & Co. in excess of balance due on rock account.....	$42,018 97	
To the balance due on rock account.....	24,874 25	
And the resulting balance claimed by John H. Osborne as Tarrant & Co. is.....		$66,893 22

IN CHANCERY

OF

NEW JERSEY.

Between

JOHN H. OSBORNE,

Compl't,

and

CATHARINE C. O'REILLY, Executrix, &c.,

Def't.

ON BILL FOR INJUNCTION AND ACCOUNT.

ARGUMENT FOR COMPLAINANT IN REPLY.

b. Construction Account, &c., including extra cost of Rock work.

The argument for the complainant on the opening went (1) partly on the ground that the complainant, under the agreement of himself and Tarrant with O'Reilly—exhibit 17 of Def't—never had covenanted to excavate the igneous trap and flint, which the complainant did excavate under the direction of O'Reilly, but only the aqueous stratified limestone which the officers and agents of the Lebanon Valley Railroad Company stated to O'Reilly, and O'Reilly stated to the complainant and Tarrant on their entering into the agreement, exhibit 17, 10 would be found there, and would have to be excavated under the classification of solid rock. But the argument of the complainant went (2) more especially on the ground that if the terms of the agreement, exhibit 17, were comprehensive enough to admit of a construction binding the complainant and his co-contractor to do all the work, of whatever character, necessary to complete the graduation and masonry of

the complainant's thirteen sections, including the excavation of the igneous unstratified trap, the complainant was not bound by it, because owing to the circumstances under which the agreement was made; and owing to material representations made at the time of entering into the contract to the effect that the solid rock was useful stratified lime stone, he had never consented to excavate useless unstratified trap and flint at the price named for solid rock.

The circumstances under which the contract was made above referred to, were the facts that the unstratified trap and flint rock to be excavated, lay in a limestone region, and was completely covered by a stratified limestone, and the material representations above referred to, were that the rock was actually stratified limestone useful for the complainant's bridge and masonry structures; and these representations were made to O'Reilly by the agents of the company in charge of the letting of the work and granting of the contracts, and were binding upon the company—see Brief of complainant, p. 37, l. 18—and were binding upon O'Reilly. Ib. l 25. Beside this the complainant was the agent of O'Reilly in the sub-letting of this work on the Lebanon Valley, printed case p. and by that relationship had necessarily imposed upon him through O'Reilly, the knowledge of the representations made to O'Reilly, and because of which O'Reilly himself afterwards sought and obtained relief upon from his company. This branch of the case, however, and the corroborating circumstances to which it led, consisting of the rescission of the original contract, the making of the modified contract of O'Reilly to pay the loss on the rock work, the claim of O'Reilly against his company, based upon the loss and wrong to his sub-contractors and upon which he sought and obtained relief, etc, were fully elaborated upon in the complainant's brief, and there is nothing in the argument of defendant to make any modification or amplification of that argument necessary.

1. To return to the first ground spoken of. To this branch of the case, it was stated at the close of the oral argument at bar that the Chancellor desired any additional arguments to be mainly confined.

a. The main question now to be argued, therefore, is, did the complainant agree to excavate the igneous unstratified trap and flint necessary to the graduation of his thirteen sections at ~~seventy~~ sixty-five cents per cubic yard?

b. It can be irresistibly contended that the excavation of unstratified and fissured trap and flint was entirely without the agreement of the complainant to graduate his thirteen sections. Counsel for defendant upon the argument admitted that because the Sills and Greenwood accounts were without the contract they were, therefore, extra work, or more

properly "auxiliary work" upon which the complainant was entitled to relief. If then the excavation of the trap and flint was outside of the contract for the excavation of them the complainant is also entitled to relief. True, this will be carrying the argument a step farther than is necessary, because if the former proposition *a.* is sustained the complainant prevails. Much more will he prevail if the latter proposition *b.* is sustained. But let us sustain *b.*

Generally speaking "within the contract" implies two things. A. The doing of certain work in this case by the complainant, in the graduation and masonry of his thirteen sections: B. The payment by O'Reilly of certain fixed prices for the doing of each separate kind of work. A promise by the complainant to do, without a corresponding promise by O'Reilly to pay, would not be binding. Attached to the agreement and forming part thereof was what was denominated a specification, the function of which was to specify the several kinds of work to be done (to which the prices agreed to be paid by O'Reilly referred) and the manner of doing the same; the comprehensive agreement of Tarrant & Co. to construct and finish the grading and masonry of their thirteen sections was subject to the proviso that they were to do it in all respects according to the following specification: "Exhibit of Defendant, No. 17, p. ~~22,~~ l. 20-5, and the agreement of O'Reilly was to pay for the work mentioned in the specification to be classified in accordance therewith, i. e. "that he will pay for *said work* as follows," etc, p. ~~38,~~ l. ~~20,~~ in Exhibits of Defendant. O'Reilly's covenant to pay for the work immediately follows the specification and the phrase "said work" by which O'Reilly covenants, refers to the work specified in the specification and to that only; necessarily so. The complainant as Tarrant & Co. has performed his agreement. He has graduated his sections including the solid rock excavation necessary therefor in the manner required by the specification. There is no dispute here; no complaint by the defendant on this score. That the complainant was not bound to excavate the solid rock, which proved to be unstratified, was insisted upon in the argument in support of a rescission and it is not now waived. But to maintain that proposition at this stage would be to anticipate the argument I am making in the establishment of the proposition that the unstratified solid rock excavation was outside of the contract. But to resume:

The complainant further says: I have not only performed the contract; I have not only done all the work which I could possibly be required to do, but I have done work outside of this agreement for which you have not adequately paid me; I refer to the excavation of unstratified solid rock.

The defendant.—Turn to our agreement and you will see that my agreement to pay ~~therefore~~ is in the following words, viz: "For excavation of solid rock, requiring blasting or sledging, sixty-five cents per cubic yard." I was bound to pay you that price and no more and I have overpaid you.

The complainant.—Refer to the specification which specifies the kind of work to be done, and in this case how it should be paid for and you will find that the solid rock for which you covenanted to pay sixty-five cents per cubic yard was stratified not unstratified, and is described in these words, viz: "*Stratified Rock*, requiring blasting or sledging, shall be paid for as solid rock." A large part of the solid rock which I as Tarrant & Co. excavated, was not stratified, but unstratified and very much more difficult and expensive to excavate, while the price to which you insist on limiting me refers to stratified rock only.

The defendant.—That clause is intended to protect you from a construction which would classify stratified as loose rock and was never intended to "create the impression that all the rock in the said sections was *stratified rock*." Argument of defendant, p. 10, l. 1—10.

The complainant.—Of course it is impossible for you to deny any longer that unstratified trap and flint was more expensive and difficult of excavation than stratified limestone or any other stratified solid rock and I see you do not. In fact you never did deny this except in your answer, drawn evidently to secure the dissolution of the injunction I obtained against you. Therefore, if stratified rock requiring blasting or sledging, was to have been paid for as solid rock, (viz. a 65 cts. per cubic yard), where is there anything in the agreement permitting you to pay for the excavation of unstratified rock that could not be sledged and that could scarcely be blasted, at that price any more than at the price of loose rock or earth excavation? I defy you to point me to anything in the agreement, exhibit 17, whereby the price to be paid by you for the excavation of solid rock which was unstratified, is agreed upon or fixed or even referred to; quite to the contrary your agreement is, exhibits of defendant, p. 38, line 20, that you will pay for "*said work*" and "*said work*" refers to what? To the specification of course, and in this connection it specifies "solid rock" to be stratified rock and none other, and when you by your agreement covenant how "said work" was to be paid for, you mean among other things that the excavation of said stratified rock was to be paid for at the rate of sixty-five cents per cubic yard and you make no covenant whatever about unstratified solid rock excavation. On familiar principles of law, the writing expresses the full scope of the agreement between us, and it says not a word about the price you are

to pay me for the excavation of unstratified solid rock. The clause in the specification was not intended to "create an impression," but to state positively what in this agreement constituted "solid rock." Solid rock and stratified rock meant the same thing. Unstratified solid rock meant quite a different thing; still means quite a different thing, and there is nothing in the agreement to show that thay ever meant the same thing or that the phrase "solid rock" specified to be "stratified rock" could be construed to include "unstratified solid rock." Your agreement about solid rock related to stratified rock. None other is referred to in the agreement. The unstratified solid rock, and the excavation of it are therefore matters as much outside of the agreement as the Greenwood and Sills accounts. When it is considered, as it necessarily must be, that the material representations made at the time of the entering into this agreement were to the effect that the solid rock to be excavated on the complainant's sections was a stratified limestone useful for bridge structures, the conclusion is irresistible that the complainant never agreed to excavate at 65 cents per cubic yard unstratified trap and flint, very hard to blast, impossible to sledge, and useless for masonry.

My conclusion is that trap and other unstratified solid rock excavation was not within the contemplation of the parties to exhibit 17, and was in no wise referred to or covenanted about in or by it.

With regard to the duty or obligation of the engineer contended for by the other side to settle all disputes under the contract, our reply is:

1. That the excavation of aqueous stratified limestone was within the agreement or contract, and that the excavation of igneous unstratified trap and flint was outside of the contract and therefore could not be dealt with by the engineer, for the engineer could not make an agreement between the parties about trap rock excavation about which they had not made any agreement. (See O'Reilly v. Kerns, infra.)

2. The disputes to which the agreement refers relate to quantities not qualities. The measurements belonged to the department of the engineer and upon them he was supreme and his decision without appeal. But the engineer could no more change classifications, nor fix prices for work not covered by the agreement, than he could have made the original agreement between the parties. The final estimate settles the quantities of the excavation, but it does not deal with qualities at all, and could not change classifications at all, and could not fix a price for unknown and unexpected work outside of the contract.

3. The agreement or contract provided that the engineer should settle disputes. But here there was no dispute. The unstratified

trap was encountered. The complainant was on the point of ceasing work. The chief contractor appealed to the chief engineer. Under the advice of the chief engineer the chief contractor directed the complainant to proceed and excavate the trap and promised to bring the complainant out without loss on his rock The complainant proceeded with his work, excavated the trap at a loss, which was partly paid for by O'Reilly, and the residue of that loss the complainant now asks may be accounted for to him by the estate of O'Reilly under the pleadings in this case.

4. The cases referred to in the argument of the opposing counsel do not va y these propositions. In the case of O'Reilly vs Kerns, the agreement referred to related to (*a*) the dispute between the parties Here there was no dispute. The modified agreement proved, and upon which large payments were made by O'Reilly settled the dispute. (*b*) As the trap excavation was not within the contract O'Reilly's direction to the complainant to proceed with that excavation, when the complainant refused, was an agreement by O'Reilly to pay the cost of it. (*c*) The provision for arbitration by the engineer does not amount to anything, when by the consent of the parties to the contract the engineer does not exercise any such power and testifies (1) that he was powerless to make an agreement between the parties where they had made none themselves, and (2) that in fact no such power was attempted to be exercised, but that the extra cost of the rock excavation, accounts of which were being furnished by the complainant to O'Reilly, was a matter deferred for settlement until the finishing of the work, the engineer to aid O'Reilly in O'Reilly's application to his company. (*d*) The opinion in O'Reilly vs. Kerns relates to the settling of disputes about both quantity and quality, the amount or quality—defendant's brief p. 10, l. 26—while the agreement in this case refers to quantity only. The words are "amount or quantity of the several kinds of work." (Exhibits of defendant p. ~~37, l. 24.~~) 637 – l 35

(*e*) The dispute between Kerns and O'Reilly was whether or not Kerns was entitled to relief, O'Reilly denying it, and there was no evidence of an agreement not to arbitrate, as in this case Here we prove that O'Reilly admitted the complainant's claim to relief, agreed to relieve him, paid him largely on account of it and got relief from his company on account of it, while the fact that the unstratified rock excavation performed by the complainant was outside of the agreement, furnished a good consideration upon which to found the new or modified agreement, and under the opinion of the Court, was therefore without the jurisdiction of the engineer.

The case of O'Reilly vs. Kerns is an authority in our favor in two respects.

a. The Court say, "we see no error in the second assignment. Cer- "tainly for work done outside of the contract, the engineer had no "jurisdiction to determine anything about it," and the unstratified rock excavation is outside of the contract as we have seen.

b. On the first assignment the dispute was, whether the plaintiff could recover more than the final estimate allowance on bridge masonry, which had been changed from one kind of work to another, and the Court held that the engineer had the authority to make the change, under the clause "that any alterations in the form or mater- "ials which may be directed in writing by said engineer, shall be made "by such contractor as directed," although it nowhere appears in the case, that the alterations were directed to be made in writing.

c. That phases of the agreement apply between company and contractor, but not between contractor and sub-contractor, as contended in the opening argument, seems not to have been called to the attention of the Court.

d. O'Reilly vs. Kerns could hardly be called a well considered case; the charge of the trial Judge to the jury, is better considered than the opinion of the Court overruling it, while the Judge delivering the opinion used the word "quality" when he should have used quantity, the word quality not appearing in the case elsewhere.

There is nothing in the case of O'Reilly vs. Kerns by which to determine Osborne vs. O'Reilly.

Nor is there in Reynolds vs. Caldwell, 51 Penna. St., p. 298, because there the engineer was to decide relative to quality as well as quantity, and the stipulation to arbitrate is followed by the additional stipulation not to sue, but to resort to arbitration in all cases.

Howard vs. Allegheny Valley Railroad Company, 69 Pennsylvania St., p. 489, is to the same effect as to quality, and the right of action at law was also actually waived. p. 492.

We do not contend, as stated by the brief of the defendant, p. 10, l. 10, that the provision in the contract, making the engineer the sole and final arbitrator of questions arising thereunder, is not binding upon the complainant ; but we do contend,

(1.) That the provision for arbitration relates to quantities only and not to quality ; that this provision would not permit the engineer to change a classification, or increase the price thereof, as O'Reilly. in his letter, defendant's exhibit, 38, p. 50, properly insists ; and that it does not extend to the fixing of the price for the excavation of unstratified rock under an agreement which provides for the excavation of stratified rock only. and ;

583-4

2. In addition to all this the parties themselves have agreed, with the consent and approval of the supposed arbiter, because in this matter he is none, that O'Reilly should pay the complainant the loss on extra cost of the rock excavation, accounts of which were from time to time furnished by complainant to O'Reilly.

The question raised on the other side relating to this branch of the case that the loss or extra cost of the complainant on his rock work can be recovered by him on a *quantum meruit* in an action of *assumsit*, as damages only, of which this court can take no cognizance was not pressed. It was simply mentioned by the senior counsel, with citations, and the printed argument submitted does not even refer to it.

The court will retain jurisdiction and direct an account upon all the branches of the case, including loss on rock, for the following reasons, viz. :

1. Of the extra cost of, or loss on rock excavation, the complainant rendered to O'Reilly as the work progressed, distinct and careful accounts, and these O'Reilly received, and of one of them, B 3 p. ~~482~~ 478, O'Reilly distinctly by his letter F 3 p ~~487~~ 483 promised to pay the actual loss of $9,156 as per statement B 3 (see brief of complainant p. 40), so that this loss or extra cost is as easily made the proper subject matter of an account as any other branch of the case.

2. Relative to the pleadings, the bill states that the cost of excavating this rock was at least 85 cents per cubic yard, and that O'Reilly agreed to pay for the said cost, to, at the least, said rate, and that he in part compensated the complainant, but that no account thereof had been had or made. Paper Book, pp. 3 and 4. No objection by the answer or otherwise has been interposed to this method of settling this or any other branch of the case; on the contrary, the defendant in his answer prays for an account of all the matters in the bill and of every other matter in dispute between the complainant and himself.

3. According to the authorities, only cases "of damages pure and simple" or "merely in tort," are excluded from equity jurisdiction.

PALYS vs. JEWITT, 5 Stew., 503.

STANFORD vs. LYON, 10 Stew., 94.

This case is not in tort, but "on contract," as our new Supreme Court rules now have it, in *assumpsit*. It is not a question of damages pure and simple, but a matter in relation to which long accounts are now in existence, the quantities ascertained, an account kept and rendered of the loss or extra cost sustained and claimed, with an account of the payments made on account thereof, and of the rest of the work. It is not even a case to be tried on a feigned issue by a

jury, but rather a case wherein, if a suit at law had been pending, a reference to a referee would be necessary to state and settle the account.

4. For the Court at this stage to refuse jurisdiction of the subject matter of this very important branch of this case, or any branch of it in fact, and direct the complainant to have recourse to his remedy at law, would be the gravest injury to the complainant because his remedy at law, pure and simple, has gone, except in so far as O'Reilly was, and his estate now is, chargeable, with trust moneys in the possession of that estate, received for the payment of this very extra cost of rock, and in so far the proper subject matter of equity jurisdiction only.

This brings us to the point of the alleged delay of the complainant in the prosecution of this suit.

1. The defendant delayed from January 28, 1861, when the bill was not filed until July 5, 1864, before filing his answer.

2. Before that time, from October 19, 1857, until September 17, 1860, by a series of letters extending over that period as shown by exhibits T. 8 to M. 9, pp. 584 to 593, the complainant had been trying to get a settlement with O'Reilly.

3 That any delay from the filing of the answer until the death of O'Reilly, properly attributable to the complainant, was acquiesed in by O'Reilly is shown by the fact, that O'Reilly never dismissed the suit for want of prosecution, and by the further fact that his representatives permitted the suit to be revived after the death of O'Reilly.

4. Explanatory of the complainant's delay is the fact that O'Reilly failed and put his property out of his hands about the time of the filing of the bill; see J, 8, dated January 14, 1861, p. 573; see also H, 8 and K, 8 Ib. The complainant could further have justified his delay by bringing into the case the actings and doings of persons, not parties to the record, but as O'Reilly had acquiesced in the delay and defendant had permitted the suit to be revived, without objection on that score, it was too unimportant to be added to an already voluminous record, no inconsiderable part of which consists of elaborate and diffuse objections to perfectly competent testimony.

5. The conduct of the case since the revival of the suit, the numerous postponements of the taking of the testimony made on the application of the defendant, the numerous orders upon the defendant shown by the record to produce papers, and to cross-examine the witness of the complainant, and to close her own testimony, and her hesitating and dilatory compliance therewith, show conclusively that

and the threat contained in the argument for the ~~Defendant~~ defendant, that unless the bill be dismissed it will take years to make up and

the responsibility for the delay in this suit lies at the door of O'Reilly and his personal representatives.

6. That O'Reilly's death is of any disadvantage to the defendant in the conduct of her defense, when the story of that defense is better told by the answer than O'Reilly could possibly have told it with his own credibility, as a witness, destroyed by letters showing the direct and inexplicable falsity of his theory of the defence, would, under these circumstances be difficult to show, and when it is further considered that, with the change in the statute permitting the complainant to testify against a defendant sued in a representative capacity, and with the additional advantage which the retention by the representative defendant of her decedent's answer gives to the ~~complainant~~ defendant. The complainant by reason of the right of the defendant to withdraw the probative force of the answer at any time before closing her case is still much embarrassed as a witness. We submit that O'Reilly's death has not been of any advantage to the complainant in the prosecution of this case, and that it is disingenuous in counsel to say that the complainant, realizing the advantage O'Reilly's decease had given him, in December, 1881, revived his stale and abandoned suit. (Brief of defendant p. 1, line 27.) Why was not the revival of the suit objected to on this ground at the time?

7. The reason of this change of base is not far to seek. The defendant relying on the false representations of O'Reilly, vainly hoped to procure a decree against the complainant, by suffering this suit to be revived. Now when she becomes aware, by the marshalling of the proofs against her on the argument, of the strength of the case of the complainant and of the weakness of her own, in the desperation of her cause, she by her counsel asks the Chancellor to do what he has distinctly refused to do, namely: to state and settle the account in order, as she pretends, that the Chancellor may ascertain the complainant to be in her debt, when she will gladly abandon the suit and save the Court any further annoyance from it. We prefer the Court to ascertain the schemes or principles on which these accounts should be stated, an ascertainment preliminary to the stating of them by Chancellor or Master, —— and then to let a master who probably will not hesitate about the trouble it will cost him, state it. The Court can scarcely fear that the complainant would press his case if the principles on which the accounts must be stated are adverse to him.

8. And what is the reason given for asking the Court to adopt this very novel procedure, so onerous, irksome and impossible for the Chancellor to undertake? The answer is, the pretense that the complainant is insolvent. I say pretense because there is not an iota of

proof to show that the complainant is insolvent, and the truth is that he is not. And this false pretense of insolvency is harped upon and harped upon, as if it were a material element of this defense. That the wealth of a party litigant, being the usual concomitant of greed, as instance the diabolical greed of O'Reilly in this case, may sometimes become a material element in dealing with some aspects of a case, it is at least possible to imagine; but that the poverty of a party (and that is what is meant here by insolvency), can be relied upon as material to the defendant's defense, is certainly amazing, the more so when this intended insult is added to the grievous injury which O'Reilly had heaped upon the complainant, and which it is the object of this suit to amend. Of this defence to aggravate

EXTRA WORK.

The claim for extra work, or auxiliary work, made by the complainant, against O'Reilly, is a perfectly legitimate claim, in so far as the complainant can establish it, and it arises in this wise: To the fact that O'Reilly was obliged to do extra work not contemplated, by his agreement with his company and the specifications annexed to it, he was entitled to be allowed for extra work. But O'Reilly's agreement with his company was broader than the agreement of Tarrant & Co. with O'Reilly. For instance, O'Reilly did not sub-let his track laying. There were other items. Therefore, what the complainant did to aid O'Reilly in his track laying, was auxiliary work for the complainant, or extra work, as we have called it, and while O'Reilly would have no claim against his company therefor, against O'Reilly therefor, the complainant has a perfectly legitimate claim. True, there is no allowance for track laying in the estimate of the complainant, as Tarrant & Co. ~~This was not for extra work, but for work which was taken from O'Reilly, because of his neglect in performing it, and given to the complainant.~~ We therefore claim, as a principle on which the claim for extra work be stated, the following, viz:

That for all auxiliary work of complainant in aid of extra work of O'Reilly himself, or in aid of the performance of those parts of the O'Reilly chief contract, outside of the Tarrant & Co. contract, the complainant should be allowed, except to the extent, if any, already allowed therefor.

(*m.*) MISCELLANEOUS.

Miscellaneous items of cash, amounting to $7,450, paid by the complainant to O'Reilly, are exhibited by the argument for the defendant under appendix B., and our right to them denied. We don't

deny that, as yet; we have not established these items, as the competent credit of a stated account. But our account is only approximate, and we are now only asking the Court what items we shall have leave to establish. These items will be established by competent testimony at the proper time, which has not yet arrived.

BOWEN FARM.

To the claim of the complainant under this head, two objections are made:

1. That there is no mention of it in the pleadings. We reply that this matter was not finally disposed of, the farm sold and the loss ascertained until in 1868. Exhibit K., 6 page, 556. It could not, therefore, have come into the pleadings in its present shape. It was, however a pending account between the complainant and O'Reilly, when O'Reilly filed his answer, in which he asks for a settlement of all accounts.

2. The other objection is that the complainant in taking from Bowen the mortgage, exhibit 16, relinquished all claim on O'Reilly and accepted the bond and mortgage in payment of what Bowen owed, as well to O'Reilly as to himself, and that this is further evidenced by the cancelling of the agreement, C. 6, p. 549.

Our reply here is:

1. If the complainant was thus paid and satisfied, why did O'Reilly permit him to retain O'Reilly's notes which the complainant had paid?

2. This second objection can be determined only on the taking of the account, when it can be ascertained by actual investigation whether in fact the taking of the mortgage and the cancelling of the agreement meant what the defendant claims. If O'Reilly owed this complainant on this joint venture, the evidence of which the complainant still holds, let the proof show whether this mortgage paid and satisfied it.

CAMDEN AND ATLANTIC.

If this account be opened then must accounts of disbursements on the Camden and Atlantic, to the beginning of the time the complainant came on that road, as the manager of O'Reilly be gone into, and all these books of account and vouchers have been in O'Reilly's hands since before the end of 1857. O'Reilly should not have taken the books and vouchers of the complainant and given him a certificate of the settlement, unless the account was correct. The long acquiescence of O'Reilly in the settlement is proof of its correctness. But we don't claim that O'Reilly acquiesced in a mistake to his disadvantage.

What we say is, that, if the account as settled was wrong, O'Reilly would have seen it at the time and afterwards, and that his long acquiescence in it proved that the apparent mistake was only apparent. Else why the certificate Y 2, and O'Reilly's letter F 9 ?

EXTRA COST OF OR LOSS IN ROCK WORK AGAIN.

The argument for the defendant. p. 133, contends, that apart from all other considerations, the clause in the agreement, viz; "For all other work not specified at the engineer's estimate," Exhibit 17, p. 10 40, l. 21, will include the trap and flint rock work and that therefore the trap and flint excavation are within the agreement. But the solid rock *was* specified and a large portion of it incorrectly specified as *stratified* when it was *unstratified* and the price set on it as stratified. Therefore excavation of solid rock incorrectly specified, is not covered by the phrase "other work not specified," and no proper construction of this phrase having in view the circumstances of the case and the consensus of the minds of the parties could by possibility construe "other work not specified" to include unstratified rock excavation distinctly specified as "stratified rock excavation." 20 This claim of the counsel for the defendant is only an ingenious wriggle, like the succeeding claim that the final estimate of the engineer is proof in this case of an arbitration and award by him as such engineer.

Besides, this ~~phrase~~ referred to minor omissions, and not to "*solid rock*," by far the largest single item of work in the contract.

At this juncture arises the question of the

O'REILLY TRUST.

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That the defendant should at this stage urge such reasoning as this in order to defeat the complainant of his plain and manifest rights, and strive to take advantage of the misrepresentation that the rock was soft and not hard, limestone not trap, stratified not unstratified, useful not useless, that induced the misapprehension under which the complainant made his contract, is certainly seeking to retain the benefit resulting from the transaction, and making herself *particeps criminis* with the decedent who outlined in his answer this fraudulent line of defense : Nicholson vs. Janeway, 1 C. E. Gr. 285—8.

The effrontery of this moral turpitude is the more manifest when it 40 is remembered, that before O'Reilly came into this Court with the weak lie on his lips that the rock was not unexpectedly hard (a lie fastened upon him not only by incontestable proof but by numerous admissions in his own letters) he went into the Supreme Court of the

State of Pennsylvania, based his claim for relief on the same ground of a modified contract as the complainant now urges against him, as shown by ~~p. 10,~~ recovered and received in a subsequent submission and settlement, a large amount of money, and then having fobbed the money he ~~comes~~ came into this Court and ~~seeks~~ sought to defeat the complainant on the very ground on which he himself succeeded; the picture is however, not complete until it be also remembered that the very relief ~~that~~ which O'Reilly sought and recovered he could only recover as the trustee of the complainant either for loss on, or extra cost of, unstratified rock work falsely claimed to have been paid to the complainant, or which he represented he would be obliged to pay him, and now withholds. Such baseness in a defense is scarcely consistent with even the smallest amount of good faith in it.

Counsel for defendant submits that it is absurd to claim that the $38,000 were moneys held by O'Reilly in trust for the complainant. What is the proof? Kerns, a sub-contractor, was defeated in his claim against O'Reilly, as shown by the case of O'Reilly vs. Kerns supra. There is no evidence that O'Reilly was entitled to be paid for any losses paid to sub-contractors other than Tarrant & Co. Richard B. Osborne's testimony is express to the point, that the assistance he, as engineer, would give O'Reilly in an application to his company was based on the losses in the second division of Tarrant & Co. Mr. R. B. Osborne estimated those losses at about $40,000, advised his company to pay that sum; he was not even cross-examined on this point; no contrary proof was offered and O'Reilly received the $38,000. Test. pp 103, 115-16. We stand on the proofs. Then the directors of the Lebanon Valley Company had agreed to a modification of its contract with the chief contractor and in December, 1856, in order that he might pay modified prices to his subs, as he had promised, and bring them out without loss, gave him $20,000 on on account of such modification, over and above what the engineer had estimated to him on the contract prices. He could have satisfied his other sub-contractors with this; he gave the complainant only $8,000 of it over his estimate.

There remains the pretense that O'Reilly gave $50,000 in Lebanon Valley R. R. shares for the $38,000 in cash he received from the Reading R. R. Co. There is not a word of proof to show that O'Reilly ever paid a dollar on this stock, or that he did not hold it as Trustee for a syndicate of his Directors, or how he held it, or that it was the same stock of which he speaks in J. 5, p. 525. But this is not the place, nor is this the time to ascertain how much of the $38,000 and $20,000 received by O'Reilly for the relief of his subs, belong in trust to the complainant. The fact, however, remains that O'Reilly

sought and obtained relief both in December, 1856, and also, it would seem, $34,741 prior to March, 5, 1858, as shown by O. 10 p. 609, l. 20-30, besides the $38,000 in December, 1861, and that such relief was grounded on losses paid or to be paid by him to his sub-contractors. The account only can settle the exact liability.

We contend then, as before we have contended:

1. That touching the unstratified solid rock, covenanted about under the impression that it was, and wrongly specified as, stratified, no agreement was made, and that the excavation of it was not embraced in the agreement.

2. That the contract finally made to meet the circumstances of the case was a modification of the original contract, and that the modified contract, so far as the rock work was concerned, was a covenant by O'Reilly to pay the extra cost of the rock work, accounts of which were from time to time rendered to O'Reilly denominated "Loss on Rock" and "Cost of Powder and Tools."

3. That the clauses in contract relative to the settlement of disputes by the engineer as arbiter, do not apply in cases when there is no dispute, and no consequent danger of delaying the progress of the work, or where the parties make a new agreement to settle on or after the close of the work, as in this case, on the assurance of the engineer, the arbiter, that he would aid the chief contractor in getting the extra cost from the company.

4. The final estimate is no evidence of the amount or value of the work done by the contractee, outside of the contract, and to say that he is not entitled to anything done outside of the contract beyond the final estimate is only another way of saying that the parties could not have made a new or modified contract.

5. To the fifth concluding point of the argument for the defendant no reply is necessary.

Respectfully submitted,

HERBERT A. DRAKE,

Of Counsel with Complainant.

CAMDEN, September, 18th, 1886.

IN CHANCERY OF NEW JERSEY.

Between

JOHN H. OSBORNE,

Compl't,

and

CATHARINE C. O'REILLY, Executrix of PATRICK O'REILLY,

Defndt.

} ON BILL, ANSWER, REPLICATION AND PROOFS.

10

BRIEF OF COMPLAINANT.

Bill filed January 28th, 1861.
Answer filed July 5th, 1864.

PETER L. VOORHEES, Defts
Sol'r for and of Counsel with ~~Complt.~~
HON. ABRAHAM BROWNING,
Originally Sol'r for and of Counsel with Complt. 20
Afterwards HERBERT A. DRAKE,
Substituted as Sol'r, who is now also of Counsel with Complt.
The late THOMAS P. CARPENTER signed the bill as counsel.

Patrick O'Reilly, the original defendant who answered the bill, died January 16, 1881.

Suit revived December, 1882—January, 1883, against present defendant, who is one of several persons named as executors in the will of Patrick O'Reilly, but the only one who took out letters in New Jersey.

1. The bill was filed for an injunction to stay proceedings on a writ of attachment, issued out of the Circuit Court of Camden county by O'Reilly, the original defendant in this case, against Jno. H. Osborne, the complainant, on an alleged indebtedness of the complainant to the then defendant, as sworn to, of $6,000, and for an account concerning the various matters to which the bill relates.

Printed case, pp. 1—19.

2. In the answer, which, as before stated, is the answer of the original defendant, Patrick O'Reilly, the defendant (p. 54) not only states that he is desirous to account and settle with the complainant, concerning all the matters set forth in the bill of complaint, but also prays that the complainant may be decreed to settle all unadjusted matters between himself and the complainant, as well those mentioned in the bill as any others.

3. The relief sought is an accounting between the parties, concerning all matters unsettled between them; on this both parties are agreed.

4. Of these matters, one of which is really adjusted, the first in importance, if not first in order of time, is the account between the defendant O'Reilly and the complainant as Tarrant & Co., relating to the graduation and masonry, including rock work, or rock excavation, of thirteen adjoining sections, 14-26 inclusive, of one mile each, called the Second Division of the Lebanon Valley

Railroad, under an agreement or sub-contract made and entered into in writing between the parties April 24, 1854,—see Answer, p. 23, and defendant's Exhibit No. 17, p. ~~22~~ 23—which agreement subsequently, owing to Suspension (*e*) Fire and Riot (*c*) and the necessity for Excavating Flint and Rock (*b*) of excessive and unexpected hardness, touching and concerning which no agreement had been made by the parties or price fixed by the writing or was contained in the sub-contract, etc., was materially modified.

See Bill, pp 3-4.

5. The contention of the complainant then is, that O'Reilly's sub-contract with the complainant has been legally and materially modified, and that the account between John H. Osborne as Tarrant & Co., sub-contractors, and Patrick O'Reilly, chief-contractor, should be stated under that contract, modified as above stated.

6. The contention of the defendant by his answer relative to this branch of the account is, that the modifications made were voluntary and unsupported by any consideration to make them binding upon O'Reilly, and that this branch of the account should be stated under the sub-contract in question, as originally entered into by the parties to it.

7. This chief question in this branch of the case is one of assent, or consent, or more exactly the reality of the consent of the complainant, under the sub-contract, to do certain portions of the work imposed upon him, and involves not only a discussion of the doctrines of Mistake or Error, and Misrepresentation, but broadens out into questions of ~~Subrogation~~, Trust and Fraud. The discussion of it is reserved for the concluding portions of the brief, and until the other portions of the case shall be fully before the court.

(5) Camden and Atlantic Account.

This is the branch of the account which stands first in order of time. It is comprised in a single item of $1,098.97.

See bill, p. 13-14.

Paper Book, ~~542-3~~, being pp 5 & 6 of Ex. Y5.

Ex. Y2, p. ~~478~~.

Testimony Geo. W. Bowen, pp. ~~121, l. 23.~~

F9, p. 589.

Test. 335, l. 17.

" 356, l. 6.

a. The contention of the complainant in this behalf is, that as this account was settled and adjusted on October 7, 1857, when both parties were alive and a note given in settlement of it, (bill, p. 14,) and as the complainant was given a certificate of settlement of it signed by O'Reilly, for the sum above stated, less a clerical error of $2.00, and as the defendant fully acquiesced in it, by writing the letter, Exhibit F9, this account cannot now be re-opened.

b. O'Reilly claimed by his answer that there was error in the account by which this item was arrived at, and that the complainant owed him thereon a much larger sum, viz.: $3,445.76. See Answer, p. 22 of paper book, and Schedule A to Answer, pp. 56-7. But the Answer is not here responsive. See also Answer, p. 53, l. 14.

c. The only question the Court is asked to decide is, whether the defendant has concluded himself against a re-opening of this account. We insist he has. The only evidence on this point outside of the exhibits is that of George B. Bowen, p. 181 and p. 184, *et seq.*, and J. H. Osborne, p. 263, and it shows account to be correct, except the clerical error of two dollars, a difference between $1098.97 and $1096.97, the account Y5 and the certificate

Y2. Bowen was O'Reilly's clerk in this account, not the clerk of the complainant.

Vid. test. pp. 183 l 36 pp 121-2

d. We insist that the evidence against the reopening of this account is so overwhelming, that the Court will not, simply on the *ipse dixit* of an irresponsive answer of low credibility (see answer, p ~~53~~ 57) and against the only evidence in the case disturb the action of the parties acquiesced in for so long a period of time, viz., from October, 1857, to July, 1864.

Continued see page 16 of this Brief

(5.) Sea Gull Engine.

The question of accounting in this branch of the case is a simple one.

Bill, p 8–13.

Answer, p 43–~~53~~ 57

a. The complainant claims that he purchased the engine on O'Reilly's request, and for him, and then rented it to the company. On the basis of the complainant's claim, the complainant is accountable to the defendant for the stock taken, and the dividends that have been paid on this stock, and ~~claims~~ is entitled allowance for O'Reilly's proportionate portion of the fees, costs and expenses laid out in obtaining this stock, and a proper allowance by way of compensation.

b. The defendant claims that the engine was leased to the complainant, and that the complainant must therefore account to the defendant for the rent, in money, from the time it came due, without any deduction for counsel fees or other expenses expended in the recovery of it.

c. The complainant's claim is supported by proof. See 87, p. ~~569~~ 564 —an unexecuted lease for "Sea Gull" engine

from O'Reilly to the Camden and Atlantic Company, V7, p. ~~570.~~ 565

Letter from O'Reilly to R. B. Osborne, W7, p. ~~571.~~ 566

Letter from O'Reilly to the complainant, ~~TS.~~ J 9-586 V 7

In Exhibit No. 7, O'Reilly says to the complainant: W

"This is hard treatment, and moreover, the President "has broken his word with me. Before I paid for the "engine, he stated, before our Engineer R. B. O., that no "matter who fell behind, I should be paid regularly "every month."

The statements of O'Reilly in the two letters V7 and W7 are entirely consistent with and support the theory of the complainant. Other references on this point are ~~TS.~~ J 9-586

d. The claim of the defendant, made in the answer of O'Reilly, is unsupported by proof. It is true the answer ought to go for something, but the claim of the answer that the complainant leased the Sea Gull engine of O'Reilly is incredible, and under the circumstances challenges and demands unbelief and discredit.

e. Besides this, all denials of O'Reilly in his answer, and statements in support thereof are contradicted on rebuttal by the complainant and R. B. Osborne, pp. 444

f. We contend therefore that the account, on this branch of the case, should be stated so as to charge the complainant with the stock received and the dividends thereon, and so as to allow complainant for his expenses and services for collection.

(2) Account of John H. Osborne as Contractor.

John H. Osborne, as Contractor for the Lebanon Valley Railroad Company, did a certain amount of work amounting to $10,102.10. O'Reilly credited the complainant, as shown by Exhibit 32, with the whole sum.

The complainant claims credit for $6,502, part thereof only, and we charge ourselves with the sum of $6,702, as charged by O'Reilly.

See bill, p 4. Exhibits K5 and M5.

Test. R. B. O., p ~~221.~~ 220

I know of no disputed question relative to this branch of the account which could affect the statement and settling of it, which can now be determined.

Further references are X3, B6, Y3.

(3) The Lebanon Valley Sills Account.

Bill, p. 4. Exhibits W3 and Y3. Test. G. W. B., p. 139-41. Complainant's supplemental Exhibits, pp. ~~1-8.~~ 618-24

Defts exhibits nos 3 & 4 pp

(6) The Plant Account.

Pages 1 & 2 Exhibit Y5. ~~Defendant's Exhibits 3 & 4.~~ 5345

Answer, p. 24. Rebuttal, p. 426.

These three accounts are subject, so far as I know, to the ordinary rules controlling the stating and settling of accounts. On these and the preceding contractor account (2), I will wait to hear from the other side. The testimony of George W. Bowen, page 141 & Exhibit K4, p. 51, show we are entitled to the wood leave and Sills account, and O'Reilly claims the Plant account. We propose however to state it according to the truth, not as he claims it.

(4) Greenwood Account.

The complainant claims credit for over $8,000 for expenses, outlays and services by him concerning a tract of woodland in Greenwood township, Juniata county, near the Susquehanna river, in Pennsylvania, under the following circumstances:

O'Reilly purchased the tract and then offered the complainant a one-half interest in it, after it had been denuded of its timber, merchantable as railroad ties or sills, if complainant would assist O'Reilly in getting off these sills and in boating them to Lebanon.

See bill, pp. 6-8.

Test. J. H. Osborne, ~~429.~~ 424

The bill goes on to state that the complainant performed his part of the bargain while O'Reilly refused to perform his. The complainant has therefore been deprived of the consideration which was to have been given him for his services, and asks that these services, as well as his outlays, may be accounted for to him by the defendant.

The defence is, that Greenwood was a partnership arrangement between O'Reilly and the complainant, and that the complainant was to have paid one-half of the cost of the land, to have furnished three six-mule teams to the defendant's one, to have assisted O'Reilly in obtaining sills therefrom, and to have shared the profits; but on what basis the answer is silent.

See answer, pp. 35-43, at p. 36, l. 8. 133

We contend that the complainant is entitled to an account in either aspect of the case.

1. Under the complainant's statement of the facts and agreement, the complainant is entitled to an account as to expenses because of the agreement; and also an account as to the complainant's services, because of the breach of the agreement by O'Reilly.

2. Under O'Reilly's statement of the facts, the complainant is also entitled to his full account, as we seek to have it stated, because O'Reilly got the full benefit of the part performance of the pretended O'Reilly agree-

ment, in furtherance of a contract very profitable to O'Reilly, and O'Reilly has put it out of his power to comply with his portion of the agreement by parting with the land, getting the full benefit of it, and divesting himself of the power of ascertaining its value; besides so carrying on the sill getting that there was no opportunity of complainant knowing anything about it. If this were partnership, the complainant was entitled to know not only what the accounts of it were, but also how they were being kept. He not only knew neither, but the possibility of his knowing them is now out of the question.

We likewise insist that the claims set up by O'Reilly that this was a partnership arranged between himself and the complainant, to share the profits of the sill getting at Greenwood, is without foundation.

The answer of O'Reilly is a tissue of falsehood, woven out of a foundation of facts, warped, misconstrued and distorted into the appearance of truth. There is not a particle of evidence to show that John H. Osborne was interested in this sill account, any more than he was in the Lebanon Valley sill account; on the contrary, there are numerous facts in the direct evidence to show that these Greenwood matters were carried on by O'Reilly exclusively; that all accounts of them were turned in to him; that all bargains were made for him; that this work concerned him solely; that the interest in the sills was his solely, and concerned the complainant in no way whatever. In support of these views,—

1st. See testimony of Devereux, p. 59, where he says that before he went to Greenwood he was in Mr. Osborne's employ, and that after he went to Greenwood he was in O'Reilly's employ; that he was employed there in getting out sills for O'Reilly, and under O'Reilly's direction in relation to it; that when he came away he settled his

account with O'Reilly, and was given the account, Exhibit A., p. ~~459~~, made out by Bowen in O'Reilly's presence. 465

2nd. Exhibit A is very important in this relation. The pages in the testimony where Exhibit A is referred to are ~~61~~, ~~66~~, 151, 161, 175 and ~~196~~. 195

Devereux testifies, in relation to Exhibit A, on page ~~66~~, "Mr. O'Reilly was in the office when this was made out, "and he knew it was being done at the time. When "Bowen made it out he was acting for O'Reilly at the "time, I think."

Bowen, testifies, on page 151, that his information, from which he made up Exhibit A, came from the books of Devereux.

Then, as Exhibit No. 5 of defendant on the same subject came from O'Reilly's books of account, Devereux and O'Reilly agree in charging O'Reilly solely with balance owing Devereux on Greenwood work.

See Test. of Bowen, pp. ~~195-6~~. 194-5
Exhibits of deft., p. ~~6~~. 643

Besides this account Exhibit No. 5 does not show that Devereux was untruthful, for there is no evidence offered that shows Devereux knew anything about it.

It is utterly incompetent except for the purpose for which Exhibit A was offered, and of that it is corroborative. See Bowen's Test., p. ~~195-6~~. 194-5

Here is circumstantial evidence of the strongest character contradictory of O'Reilly's theory of a Greenwood sill partnership.

Further evidence to negative any such theory is found in Exhibits D. E. F. G. H. J. K. and L., pp. ~~461-6~~.

In Exhibit F O'Reilly says, "I have made arrange- "ments to have the sills boated as fast as they will be "hauled. * * * I will pay fifteen cents for each sill

"delivered at Lebanon. * * I will do what is right, &c."

Mr. Osborne does not seem to have been consulted about the price to be paid for boating the sills. Every consideration of cost was to give way to O'Reilly's haste to have the sills sent down so that he could use these and arrange for obtaining the necessary residue, while what would have been to Mr. Osborne a paramount consideration under the alleged partnership arrangement, viz: the expense of boating the sills, is arranged by O'Reilly solely, without consultation with, much less on the consent of, Mr. Osborne. When Mr. Osborne and Mr. Bowen took charge of this for O'Reilly they wrote for proposals for boating sills from Greenwood, pp. 183 & 20

The manifest implication of all portions of these exhibits relevant to this investigation is, that the complainant was not O'Reilly's partner on the Greenwood sill account.

4th. Exhibit H4 of the complainant, (pp. 155, ~~510~~ 506,) also confirms the theory of the complainant and is inconsistent with the theory of O'Reilly relative to Greenwood. It is confirmatory of the complainant's claim of interest. On the other hand this was the very time that O'Reilly ought to have been displeased with the complainant for not furnishing the three six-mule teams; for Exhibit B, p. 460, shows that the second mule team of complainant was not sent to Greenwood until June 12, 1856, more than a month after H4 was written. Quite to the contrary O'Reilly seems to have been well pleased with the complainant, at the time of writing H4, concerning all the Greenwood matters; and he refers to the land, not to the sill getting, as the important matter. 58 559 58

5th. The circumstances surrounding this branch of the case are inconsistent with the O'Reilly theory and in support of the theory of the complainant.

458
F.

That, as O'Reilly says, the complainant should have agreed to superintend this work, to furnish three six mule teams to one of O'Reilly, and thus to leave O'Reilly to spend what money he pleased to hurry down the sills, as we have seen O'Reilly did, is simply ridiculous. O'Reilly, in his statement of his pretended agreement with the complainant, does not go far enough. He does not show or state how far the interest of the complainant in Greenwood, and consequently in the sills cut from it, should go, whether to a certain specified sum per sill or to market value of them, or to the value of them for use to O'Reilly, in his track laying, or in his contract generally. How much was the complainant to be allowed for the sills, and on what basis? Confer answer, pp. 36-38. O'Reilly states he was a large loser by Greenwood, but upon what basis he makes no intelligible showing of. The agreement insisted on by the complainant was perfectly clear. The complainant was to have one-half of the land after the sills had been cut off, upon assisting O'Reilly in getting them off. This involved no opening of a set of books of account between these parties as partners, as O'Rielly's pretended agreement did, and none, as such, were in fact ever opened. The truth was, that O'Reilly had theretofore supplemented his inferior intelligence and capacity by the superior intelligence and skill of the complainant, as in the Camden and Atlantic sub-contract, and in the subletting of the contracts on the Lebanon Valley (see by Schedule A. to Answer, p. 56, line 10, O'Rielly paid complainant $1000 for four months service on Lebanon Valley), and he now desired a continuance of the complainant's energy and efficiency, on Greenwood work. In this very connection how much more probable appears the statement of the complainant, that O'Rielly, impressed with the *vigor*, energy, intelli-

gence and capacity of the complainant, as evidenced by his continuing him for two years on the Camden and Atlantic at $2,000 a year and expenses, a large salary for those times, and as further evidenced by his giving the complainant charge of the sub-contract letting on the Lebanon Valley, at the rate of $3,000 a year, an advance of 100 per cent., and having purchased this tract and not knowing how to manage it in connection with the numerous other demands on his attention, went to the complainant, as stated in the bill, and using to the complainant the very words, honeyed words, here detailed, that being under many obligations of kindness to the complainant, [viz., for the efficient and important services in part above referred to], he would, as some remuneration therefor, give him one-half of the Greenwood tract if complainant would assist him in procuring sills therefrom, and in sending them to the Lebanon Valley. (See bill, p. 6, l. 25). And how, consistent with O'Reilly's well-established character for rascality, well established in this very case,—a statement which I shall amply justify—to repudiate the whole thing when he is called on to answer for it, and to insinuate that he expected the complainant (whom he had been paying at the rate of $3,000 a year, and who then had charge as sub-contractor of the most important of his Lebanon Valley contracts), to take charge of the getting out of sills miles and miles away—see answer, p. 38—personally, on the ground, and to say that the complainant besought him to enter into an outside speculation, when it appears by both sides that the land was purchased and $4,000 paid on account of it by Mr. O'Reilly,—p. 36, l. 30,—before the subject was broached by either side. 37 In other words, that O'Reilly did not go to the complainant until he had become owner of the land, and had need for the services of the complainant, and then O'Reilly was prepared to offer to the complainant an inducement to help him out.

6th. And what sort of accounts has the defendant kept? Devereux says there were 45,000 sills boated down from Greenwood, some of which were supplied from lands other than Greenwood: Test., p. 60, l. 7.

The statement of the bill is, p. 7, l. 25, that 35,000 were cut from Greenwood, and the defendant produces a certificate or memorandum, Exhibit No. 6, purporting to have been signed by Devereux, (speaking of the land as O'Reilly's,) in support of the statement of the bill, although O'Reilly's answer states that a much less number was sent. And there is not before the Court, in any form, any accounts or account books by which O'Reilly's income and expenses from this tract could be ascertained or any evidence of the existence of any such accounts.

This brings us back to the statement, made at the outset of my argument on this branch of the case, that owing to O'Reilly's statement of what the partnership agreement is, to the chaotic condition of a large portion of the accounts kept by O'Reilly concerning it, and to the impossibility of determining what the pretended partnership agreement was, in either aspect of the case, whether the version of Mr. Osborne or O'Reilly be adopted by the Court, the complainant is entitled to have his account stated, as he claims; that is to say, on his own claim for his expenses and outlays in any case, and for his services, because the consideration upon which they were rendered was never forthcoming; and on the other hand, under the defendant's claim of partnership for the complainant's part performance which the defendant got the benefit of, in the completion of a very valuable contract and which the defendant O'Reilly was never now or heretofore in position to requite or settle for, or perform his own part, it would be inequitable to the last degree not to allow the complainant for his part performance.

Britton v. Turner, 6 N. H., 495.
1 Sedg. on Dam., 467, [220], and notes.

If O'Reilly has desired to charge the complainant as a partner on this branch of the case, he should have conveyed to the complainant the Greenwood tract, (the one important matter here as see H 4), and have charged him with one-half of the purchase money of it; then he might have been in a position to say that the complainant has received all the defendant agreed to give him, and must help foot the bill; but the defendant gets the cake, and makes away with it, and then seeks to oblige the complainant to pay for half of it. We insist then that on the O'Reilly theory of the case, the complainant is entitled to whatever the services rendered by the complainant were worth to O'Reilly, and that is best measured by what they would have cost the defendant and what they did cost the complainant.

7th. If the mind of the Court should hesitate between the two theories, and decline to adopt either—but this is a violent presumption, because O'Reilly's want of credibility has destroyed the force of his answer as evidence—the like result, (an account as claimed by the complainant) would be inevitable, because it would be inequitable not to allow the complainant for services of which O'Reilly's estate got the benefit.

8th. We insist further, that there is no statement of a partnership agreement in the answer of O'Reilly—the only evidence on the point—of sufficient certainty to state a partnership upon.
Answer, pp. 36-38.

9th. There are some expressions in the letters of the complainant, printed in the Supplemental Exhibits, p. 9,

et seq., which might be tortured into a seeming support of the O'Reilly theory. A person of the vigor of the complainant at that time is apt to speak positively and personally and if he have the authority to give the direction or insist upon the advice under consideration he is most likely to speak of it as emanating solely from himself. But a full inspection of these letters will show that they contain other expressions and statements inconsistent with any other theory than that now insisted upon by the complainant. That is to say, the complainant's theory reconciles all these statements and expressions, and while the theory of O'Reilly may be reconcilable with a part of them, it is wholly irreconcilable with the rest.

10th. The continued possession and management of Greenwood by the complainant, after the sill getting closed, is consistent with the theory of the complainant in this behalf, while the delay of O'Reilly in calling upon the complainant for the part of the purchase money which O'Reilly pretended the complainant agreed to pay, until O'Reilly was in embarrassed circumstances (see T4), actually in financial distress, is certainly not consistent with the O'Reilly theory (See Test. Bowen, p. 164, Ex. T8).

(5.) Camden and Atlantic Again.

Confer Bowen's explanation of the double charge, to O'Reilly, of the $2,346.79. Testimony, pp. 181, 183.

Schedule A, pp. 56–8.

Exhibits Y2, Y5, and No. 2.

1. Bowen states that this double charge to O'Reilly was to offset a double credit to O'Reilly. By Schedule A the moneys which contain the double credit to O'Reilly were so credited at about the same time, viz.: January and March, 1854.

2. The credit of $3,753.06, containing the duplicate credit to O'Reilly, is out of its order, and could very naturally include moneys previously credited. The explanation is, that O'Reilly was credited with payments on account of salary due complainant, because the complainant had the moneys in complainant's possession undisbursed—Bill, p. 14. Then the complainant afterwards credited O'Reilly with undisbursed moneys without first reducing them by previous credits to O'Reilly, covering the same ground, viz.: the $2,346.79, as explained by Bowen.

3. The pretended double charge of $2346.79 to O'Reilly was as open as daylight, and in full view, on the face of the account as presented to O'Reilly. This account was presented to O'Reilly because he settled by it, by giving his certificate, and, as the complainant states—Bill, p. 14—by taking the complainant's note, and he produced in Court, as a schedule to his answer, a copy of it; and as the account was presented to him upon settlement when he was pressed for money (T4) he must have seen this pretended duplicate charge to himself, and he must have understood it then, and been satisfied with it, when he gave his certificate in settlement, which of course ends the matter.

4. O'Reilly had not discovered this mistake when he wrote (F9, p. 589) on the 27th of April, 1859, and he must have gone to the account to see what the amount was, because he says he didn't take the note, and he brings this same account into Court and has the temerity to ask the Court to believe that he settled by it and had it in his possession from October, 1857, until January, 1861, or July, 1864, with this "error on the face" of it, to use the language of counsel, and never saw it. Whatever else O'Reilly may have been, he was

not a fool, as he now asks the Court to believe. The adoption of the suggestion and supposed discovery of counsel will avail him nothing in the attempt to play a bold game and make $2,346.79, with interest thereon from October, 1857, to July, 1864, (when he filed his answer) at one stroke, on the turning of the black as it were. What I mean is, that counsel honestly supposed he had made a discovery, and that O'Reilly dishonestly adopted this supposed discovery. If, instead of saying there was "error on the face of said account," as he said in his answer, p. 22, l. 25, O'Reilly had said that a re-stating of the account showed this error, the statement would have challenged investigation. And O'Reilly was in position to say this, because he had all the books and accounts, not only of this matter, but also of the Lebanon Valley and Greenwood sills matters.—See test. Bowen, p.

6. But for O'Reilly to come into Court and seek to have an open charge, which had been staring him in the face for seven years, which he had settled by, and which he understood and approved seven years before, with all the accounts and papers concerning it, except the certificate of its correctness, (Y2,) in his own possession, was a manifest attempt to impose on the Court. He had evidently forgotten about F9 and Y2.

Exhibit No. 2 is of no relevancy. I have no recollection of its being offered as an exhibit; it was never shown to the complainant, at all events, and it is immaterial in any aspect because it was not acted upon in settlement.

(7) Bowen Farm.

"This accountant claims credit for one-half of moneys expended and services rendered touching a farm in Chester county, Pennsylvania, purchased by Patrick

O'Reilly and accountant for George W. Bowen as a reward, proposed by O'Reilly, for said Bowen's efficient services; which O'Reilly afterwards refused to have anything more to do with, and left the accountant to pay all the purchase money and expenses, and to manage as best he could."

See Test., 364–5.

Exhibits C6, E6, J6.

1. The above quotation I submit as a sufficient opening of the Bowen farm account, reserving the right to reply.

But see also T4, p. 517; V4, p. 519.

Test. Bowen, 169–71, 200–1.

GENERAL.

The above quotation, the basis on which the Bowen farm account is claimed, contains the words used in an approximate statement of the accounts between O'Reilly and the complainant, approximately stated by myself, in the various aspects above spoken of, in order that I may exhibit to the Court in the concrete what I have been insisting upon in the abstract, viz: A basis or scheme of statement of these accounts stated on the principles sought to be established by the complainant. I now exhibit it to the Court.

The divisions or aspects in which these accounts are sought to be stated and established by the complainant are, in the approximate statement now exhibited, seven; that is to say, the complainant seeks an account with the O'Reilly estate under the following seven divisions viz:

1. *As* Tarrant & Co.

2. As contractor on Leb. Val. R. R., for work done for O'Reilly.

3. Relative to wood leave and sill getting and the expense and superintendence thereof on the Lebanon Valley R. R., denominated "The Sills Account."

4. Relative to sill getting and the expense and superintendence thereof on the Susquehanna River, denominated "Greenwood."

5. Relative to "Camden and Atlantic" and "Sea Gull engine."

6. Relative to plant purchased by complainant of O'Reilly for use on the Lebanon Valley sub-contract of the complainant, denominated "Plant Account."

7. Relative to "Bowen Farm."

All of these different accounts or divisions of them have been sufficiently opened and argued except the first.

1. TARRANT AND CO.

The importance, already adverted to, of this branch of the account, will appear from the fact that by the approximate statement of it just exhibited, the complainant claims a balance considerably over $60,000, with interest for a long course of years.

This portion of the account for convenience of statement and discussion is sub-divided as follows:

a. CONSTRUCTION ACCOUNT PROPER under the original sub-contract between O'Reilly and the complainant and Charles Tarrant, dated April 24th, 1854—Exhibit No. 17 of defendant, denominated "construction account." It is not conceivable by counsel how any dispute can be

raised in this case about this subdivision of it. The discussion of it is therefore reserved for the present, except in so far as it may become necessary to elucidate the next succeeding subdivision, viz:

b. CONSTRUCTION ACCOUNT UNDER THE MODIFIED CONTRACT, embracing loss on Rock work, denominated "Rock Account under Modified Contract, including loss "on Rock." Owing to the importance of this sub-division, involving as it does over $60,000, disputed *in toto* by the defendant, the discussion of it is reserved until the concluding portion of the brief.

c. FIRE AND RIOT. Loss by "Fire and Riot." This subdivision consists of a number of items included in Ex. S4, amounting to $2,612.25.

See Bill, p. 5, line 10.

1. The direction to proceed with the work causing this Fire and Riot and consequent loss, given during an enforced suspension, could only come from O'Reilly; that is, could only be given by the complainant, with O'Reilly's direction and consent. Either made him liable on the relationship of contractor and sub-contractor existing between him and the complainant at the time.

2. That is to say, the complainant necessarily had O'Reilly's agreement to pay for what he would do, during the suspension. Therefore, a part of the natural and approximate cost of it, the Fire and Riot, O'Reilly is liable for as consequential damages.

3. Again, as O'Reilly was to get the principal part of the benefit of this work, ordered to be done by him against the orders of his company, it would be most inequitable if he should not compensate the complainant for any part of this loss.

See Test. Bowen, 167-8 and 172, l. 10.

d. EXTRA WORK.—This branch of the account is subject to the ordinary rules relating to the taking and stating of accounts; the complainant is clearly entitled to the items of credit claimed by him, and no discussion of it is now necessary, unless rendered so by the other side.

But see Exhibits A4, Z4, and Y5, and testimony relating thereto, especially of Scott, relating to A4, pp. 268-9, 277; also, Test., pp. 287-9, 290-1, 376.

In Exhibit M, p. 467, item 26, there is an allowance which, I suppose, should reduce Z4 by the amount there mentioned, namely, $100. But, as I said, this statement of accounts is only approximate, to illustrate principles, not to establish results.

e. SUSPENSION.—This sub-division is made up of a number of items, amounting in all to $10,033.49, as shown by p. 4. A portion of it, $2,500, has been allowed as on account of horse-feed during the suspension, and covers the major part of this claim on that basis.

The residue of this claim is on an entirely different basis. The bill states that the suspension greatly damaged the complainant's work, and postponed the performance of the complainant's sub-contract to a subsequent period, when labor and materials became and were much higher than during the period of said suspension, whereby the complainant was subjected to increased expenses, and sustained heavy losses.

See Bill, pp. 4-5.

1. The suspension extended from some time in September or October, 1854, until May, 1855, or even later.

See Exhibit 36 of defendant.

Test. Bowen, pp. 165-6.

Engineer's estimates for Tarrant & Co., March—July, 1855.

2. The prices before and during the suspension were the prices at which the complainant bid upon and was awarded the sub-contract.

3. If O'Reilly was obliged to order the suspension by orders from the company, that was no fault or affair of the complainant. O'Reilly must look to his company to cover his loss. He cannot shield himself behind a, to him, perfectly responsible and answerable party.

4. The suspension put it out of the power of the complainant to finish his contract within the time stipulated in Exhibit No. 17, viz: August 1, 1855.

5. The complainant's claim for relief is made under the rule of law law cognate to that which obliges the seller of goods for future delivery to pay the difference between the agreed price and the increased market price at the time agreed upon for delivery, in case he fails to deliver them at that time.

"The difference between the contract price and the "market value of the goods at the time the contract is "broken, as explained by Tindal, C. J., in Barrow v. "Arnaud, 8 Queen's Bench, 604. See Benj. on sales, §§ "758-870.

6. The rule is stated broadly in Hadley v. Baxendale, 9 Exchequer, 341.

"The law allows not only *general* damages; that is, "such as are the necessary and immediate result of the "breach, but *special* damages, which are such as are a "natural and proximate consequence of the breach, "although not in general following as its immediate "effect."—Benj. on Sales, § 870.

Hadley v. Baxendale is the subject of numerous and extended notes in Sedgwick on damages, especially in vol. 1, p. 218, ed. 1880, and is to the same effect.

See also DuBois v. Del. and Hudson Canal Co., *infra*.

7. We claim as general damages the cost of horse feed and the hire of stable men during the enforced idleness and suspension, when the complainant was obliged to incur the expense, without the power of reaping the advantage of it; and we claim as *special* damages the loss of the complainant by reason of the rise in wages and prices of material, which, after the suspension, as stated in the bill, "became and were much higher than during the "period of said suspension."

8 Whether this loss or damage to the complainant was much or little is immaterial at this stage of the investigation, that being a matter to be ascertained by a Master under the directions of the decree now sought.

9. The allowance of the engineer of $2,500 to cover horse feed and expenses during suspension does not conclude the complainant upon his claims for general damages, the $2,500 being Tarrant and Co's proportion of the whole allowance by the company's engineer to O'Reilly on this account. If O'Reilly did not get sufficient to pay his subs, or any of them, he must make that good. The decision of the engineer, under the contract, as we have below further contended, is binding upon company and chief contractor, and has nothing to say to the sub-contractor. The chief contractor looks to the company, and if he agrees to be bound by the decisions of its engineer, he cannot thereby prevent the sub-contractor from holding him for full damages when he obtains only part damages. The same reasoning applies to the cost in extra work of retrim-

ming sections 15 and 14 over the allowance of $100 therefor in Tarrant & Co's final estimate.

10. We insist that this sub-division of the account should be stated on the basis sought in the bill; namely, with an allowance for general damages not paid and for the special damages claimed.

Note. The sub-divisions of this division of the account are designated by *italics*, to correspond with the red letters used to designate the various items of the account in the approximate statement submitted.

m. MISCELLANEOUS. This sub-division amounts to $8,450. Part thereof, $7,450, is included in O8, p. 581, being items of cash returned to O'Reilly, or paid to him by the complainant. We are entitled to them, when established by evidence, as a matter of course. The residue thereof, $1,000, is the item of October 7, 1857, claimed as a credit on the fourth page of the account, bacause O'Reilly having given the complainant two notes of $500 each of that date, and having charged him with them, and I think taken a voucher for them, afterwards, as he states in his answer, p. 54, failed to pay them. We are entitled either to have this credit or to have the corresponding charge struck off.

b. CONSTRUCTION ACCOUNT UNDER MODIFIED CONTRACT DENOMINATED.

ROCK ACCOUNT UNDER MODIFIED CONTRACT INCLUDING LOSS ON ROCK WORK with relation to (*a*) construction account proper, and to (*ab*) both.

1. The first thing to be dealt with under this branch of the case is the agreement itself, and its construction and effect.

First of all, the agreement or sub-contract between Tarrant & Co. and O'Reilly was not an entire contract but a severable one. For while the first or opening paragraph, after the statement of the parties, makes an entire covenant on the part of the sub-contractors, when, as is necessary to its construction, the whole contract is considered, it will be found to be a collection or a number of contracts; for instance, a contract to clear and grub, a contract to excavate earth, a contract to form embankment, each at a separate price, with an attempt to adjust prices to each and every particular kind of work in each and every contract. Then the company in the chief contracts, and chief contractor in the sub-contracts, embraced in Exhibit 17, covenanted in relation to monthly estimates for furnishing the means to pay on account of the several contracts as they are severally partly performed. Part performance is arranged to be paid for as the work progresses. And the parties themselves, the engineer for the railroad company relative to the contractor, and the contractor relative to the sub-contractors, construed the contract as severable and not as entire, acted under it as such, and regarded the payment of part performance as a requisite.

Secondly. Many of the provisions of the sub-contract, Exhibit 17 (being written on a form of contract, and including a series of contracts intended for a chief contractor with a company), have no applicability to Tarrant & Co., and refer only to the chief contractor in his relationship to his company. The chief contractor agrees to be bound by the decision of the chief engineer in a number of instances. These same provisions are imported into this sub-contract, but we insist they do not bind us.

Thirdly. Now to consider the circumstances attending the entering into and signing of this sub-contract, which are material to its construction, we propose to in-

sist, as the contract is as before stated made up of a series of contracts to be severally performed and severally paid for, with so evident an attempt to fix a price for all kinds of work to be performed, that if any sort of work should become necessary to be done, for instance, hard pan, as in DuBois vs. The Delaware and Hudson Canal Company, or trap or other unstratified rock, as in this case, where the specifications provide for *stratified* rock only, the sub-contract here would not apply, because no price would have been fixed or could be found which applied to such work; and even if there were a provision in the chief contract, and in the sub-contract under consideration as well, providing that the chief engineer should estimate such work and his decision be final, if in fact the engineer declined or omitted to estimate, as such, this work outside of the scope of the agreement, there would be nothing in the sub-contract, or the estimates, concluding the parties upon this class of work. Furthermore, as we insist, this supposed provision for arbitration by the engineer is intended to apply between company and contractor, and them only, and has no application as between contractor and sub-contractor. Still further there is no provision, either in the chief or sub-contract, giving to the engineer power to make for his company a new contract, or to change classifications. The engineer is as much bound by the contract as any of the parties to it.

Fourthly. If, as a further circumstance attending the entering into and signing of this sub-contract, a misapprehension existed in the minds of both the chief contractor and the sub-contractors about material facts concerning the work to be done, or any material portion of it; for instance, if in the attempt of both to arrive at a fair remunerative rate for each different class of work, *i. e.* for each several con-

tract—an attempt dictated by a wise and indeed necessary precaution in providing for the gradution and construction of railroads—the minds of both the chief and the sub-contractors came together on the work denominated in the sub-contract "Solid Rock," and mentioned in the specification as "Stratified Rock requiring blasting or sledging," under the apprehension that such rock was stratified lime stone, or lime stone rock simply, which would blast and sledge at certain well known rates of cost and furnish a building stone for bridge structures; and this apprehension proved to be a misapprehension, and the rock proved to be trap and flint, very much harder than limestone, with seams and fissures, without homogeneity as "*stratified*" implies, unstratified in fact, almost impossible to blast, actually impossible to sledge, and furnishing irregular and small stones of no use for bridges or other masonry structures, this apprehension would be *error or mistake*, such as a court of equity would relieve against, for there would be no reality of assent or consent touching this sort of work, and no agreement or contract concerning it.

Fifthly. If, as a further circumstance attending the entering into and signing of *this sub-contract*, representations of material facts concerning the work to be done, or any material portion of it, were made by an indifferent person, or stranger, and if such representation were acted on by both the parties, and proved to be a misrepresentation, here would be a want of real consent to do the actual work necessary to be done, and if to the injury of the sub-contractor, such misrepresentation would be relieved against by a court of equity, and would be good ground for rescision, and a good consideration for a new or modified contract.

Sixthly. If, as a further circumstance attending the entering into of *this sub-contract*, and of the contract-in-chief out of which it grew, representations of material facts concerning the work to be done were made by the company to the contractor, and by him adopted and in turn represented to the sub-contractor, which proved to be misrepresentations, and the work to be done was in fact different from the work which it was represented would have to be done, this also is misrepresentation, under the authorities, and good ground for rescision, and would support an increased consideration in a new or modified contract and any attempt on the part of the contractor to take advantage of such misrepresentation, to the disadvantage of the sub-contractor, would be fraud.

Seventhly. If, as a circumstance attending the performance of this sub-contract, the complainant, because of a material misrepresentation of the character of the work to be done, rescinded the contract, or that material portion to which the misrepresentation related, and all subsequent portions of it, this rescision would be a good consideration upon which to found a new or modified contract.

Eighthly. If, as a circumstance attending the completion of this sub-contract, the chief contractor should, while the portion of his own chief contract relating to and covering the same work as this sub-contract was largely profitable to him, apply to his company for relief, grounding his claim on the misrepresentation affecting the complainant, and a loss to the complainant or an agreement or obligation on the part of the chief contractor to pay it, and should thereby obtain relief, the money recovered, or so much of it as was necessary to "bring the complainant out without loss on his rock work," would be trust money in the hands of this chief

contractor defendant for the complainant, entrusted to O'Reilly for the purpose of paying the complainant, with interest, with yearly rests until paid.

Ninthly. If, as a further circumstance attending the completion of this sub-contract, the chief contractor, after he had procured the complainant, by promising to to remunerate him and "to bring him out without loss," and partly paying him the increased consideration under the modified contract, to go on and finish his work, and after he has made use of the liability arising out of these promises to obtain relief from his company, and after he had obtained such relief, and after he had been called upon to answer to the complainant, he comes into Court and by his answer denies the unexpected hardness of the rock, and denies by indirection the error or misrepresentation which is necessarily implied from the fact that the rock was unexpecedly hard, denies and repudiates the modified agreement to bring the complainant out without loss, and by denying that the agreement if made was voluntary on his part and without consideration, thereby again by indirection the error or misrepresentation relative to the unexpected character of the rock, this is fraud.

Tenthly. A refusal of the complainant to excavate flint, when he had agreed to excavate stratified limestone and not flint, and a subsequent direction by the defendant O'Reilly to the complainant to proceed with the work and excavate the flint, is an agreement on the part of O'Reilly to pay for the excavation of the flint.

Eleventhly. If, as a further circumstance attending the performance of this contract, dated April, 1854, made between and by Charles Tarrant and the complainant, of the one part, and O'Reilly of the other part, covenant-

ing among other things, to excavate stratified limestone rock, easily blasted and sledged and making a good building stone, to the grade levels of the railroad on or before August 1, 1855—

1. Charles Tarrant withdrew with the consent of O'Reilly; and

2. On the 1st of October, 1854, an almost total suspension was ordered by O'Reilly, when labor, powder and horse feed were cheap, and lasted until May or June, 1855, when labor and materials became and were much higher, and

3. The limestone, or rather the solid rock which was represented to be, and contracted for as limestone, proved in large part to be trap rock, flint, felspar, and hornblende, very hard, not stratified, with hidden fissures and openings through it, almost impossible to blast and actually impossible to sledge, breaking up into irregular and small stones of no use for masonry, and fit only for embankment; here were changed circumstances, material and important, sufficiently so to support a new or modified contract, to pay the loss thereby occasioned; and

Twelfthly. If, as further circumstance attending the completion of this sub-contract, the chief contractor founds upon these important and material changed circumstances attending the performance of the contract, an application to his company for relief to meet his loss, or increased expense occasioned thereby, the complainant is entitled to be relieved thereout.

FIRST POINT.

References in support of the first point—that the contract is severable.

The whole contract must be construed, and all its parts, if possible, reconciled with one another.

The construction put upon it in the performance of it by the parties, is material; as instance payments on and of part performance, or rather, the payment for the work under the several contracts as they were completed, in accordance with the contracts or covenants relative to the estimates, the estimates carrying forward the completed payments, as in clearing and grubbing, etc.

The estimates themselves are another instance, each containing a payment exhibited and authorized to be made, with which Tarrant & Co. were uniformly credited on the books of the chief contractor. See Exhibit 31 of defendant, pp. 617 and 619.

See P8, p. 582, l. 1, where O'Reilly, in a letter to the complainant in March, 1855, towards the close of the suspension, regards his proceeding with the contract dependent upon the ability of the company to raise money to keep the work going.

See Test., pp. 93-5 of Richard Osborne, relative to the under estimating by Lyons, that the whole work would have stopped, notwithstanding O'Reilly's bond of $100,000. to perform his contracts, unless he, as chief engineer, had corrected his estimates so as to bring out to the chief contractor a payment sufficient to pay his subs.

SECOND POINT.

An inspection of the Exhibit No. 17 will support the views here expressed. The singular of contractor is used frequently, showing that no application is intended to sub-contractors—in the plural.

THIRD POINT.

1. The provisions of the sub-contract, quoted by O'Reilly in his answer, apply only to work within the sub-contract, and not to the making of a new contract. These clauses are not pertinent to the circumstances of the case in hand where parties bidding for one character of work are called upon to do work of a totally different character.

2. That these clauses are binding upon the chief contractor and his company and have no applicability to the sub-contractor is also the view of O'Reilly himself, as see his letter, Exhibit No. 38 of the defendant. f 683

3. Furthermore, the chief engineer, if he had the right of arbitration under the clauses in question, omitted to exercise it and told the chief contractor to proceed and do the work and the chief engineer would second his application to the Board for relief, which course O'Reilly adopted.

Test, R. B. O., pp. 99

FOURTH, FIFTH AND SIXTH POINTS.

All these points bear upon the general doctrine of assent or consent, as a branch of the law of contracts—"Reality of consent," as recent law writers designate it.

Anson on Cont., 115.

Finch, cases on the Law of Cont., 446.

The general subject is divided into Mistake or Error, Misrepresentation and Fraud. The cases elucidating the several sub-divisions of the general doctrine of consent run so imperceptibly into each other, the cases of each shading off into those of the others, that I here treat all under the same general head.

1. That Courts of Equity will relieve a complainant from the consequences of a mistake and misapprehension. See

Anson on Contracts, Ib.
Finch, Cases on Cont., Ib. et seq. especially note p 490
Foster v. MacKinnon, Finch, 466. Reported L R 4 C P 704
Bingham v. Bingham and note, Finch, 489–90.

Ey v Lindsay L R 3 a&p cas 459 Finch 474

A contract based on a supposed state of things which had no existence in fact, will be relieved against on the ground of mistake.

Horbach v. Gray, 8 Watts, 492.

Equity will relieve against a contract entered into under a mistake as to a material fact.

Jenks vs. Fritz, 7 W. and S., 201.

Where the mistake is material, relief will be granted.

Zane vs. Cawley, 6 C. E. Gr., 130.

2. Misrepresentation by a stranger.

Jenks vs. Fritz, supra.

3. Innocent misrepresentation by principal.

Redgrave vs. Hurd, L. R. 20 Ch. Div., 1.

In this case Redgrave, the plaintiff, had sold to Hurd, the defendant, both solicitors, a house, on the representation that the plaintiff's practice was worth a certain sum yearly. The plaintiff was seeking specific performance. No fraud was alleged in the case, the issue being misrepresentation. Jessel, M. R., in delivering the opinion of the Court, said :

According to the decisions of courts of equity, it was not necessary, in order to set aside a contract obtained by material false representation, to prove that the party who obtained it knew at the time when the representation was

made that it was false. It was put in two ways, either of which was sufficient. One way of putting the case was, "A man is not to be allowed to get a benefit from a statement which he now admits to be false. He is not to be allowed to say, for the purpose of civil jurisdiction, that when he made it, he did not know it to be false; he ought to have found that out before he made it." The other way of putting it was this :—" Even assuming that moral fraud must be shewn in order to set aside a contract, you have it where a man, having obtained a beneficial contract by a statement which he now knows to be false, insists upon keeping that contract. To do so is a moral delinquency; no man ought to seek to take advantage of his own false statements." The rule in equity was settled, and it does not matter on which of the two grounds it was rested, pp. 11, 12.

See also

1 Whar. on Cont., § 214, p. 311.

Smith v. Chadwick, 20 Ch. D., 27.

Reese River Silver Min. Co. v. Smith, L. R., 4 H. L., 64.

Hart v. Swain L. R., 7 Ch. D., 42.

3. Fraud.

The fraud which vitiates a contract, and gives a party a right to recover, does not in all cases necessarily imply moral turpitude.

Lord Abinger in Moens v Heyworth, 10 M. & W., 155.

The principal, by seeking to retain any benefit resulting from the transaction, becomes *particeps criminis*, however innocent of the fraud in its inception.

Nicholson v Janeway, 1 C. E. Gr., 285, 288.

THE GENERAL DOCTRINE.

It is quite essential to implied, as well as express, contracts, that there should be some act performed, or language used, by both parties, from which we may conclude their minds met upon the conditions of the contract.

Preston v. Hawley, N. Y., 4 Eastern Reporter, 570, April 24, 1886.

But it is unnecessary to further pursue the subject. The complainant was relievable against a contract entered into under a mistake, whether the mistake arose from misrepresentation or fraud. He certainly was not bound to excavate trap and flint when he had agreed to excavate limestone only.

THE FACTS MAKE A PERFECT CASE UNDER THE LAW.

Relative to the representations,

See *Test.*, p. ~~74, 75, 119, 218-9.~~ 75-76-119 20 217.8

The engineer of the company stated that the rock was limestone.—p. ~~75~~, l. ~~30.~~ 76-24

On this information the contractors were required to bid and on no other. They had no other information and they were not justified in taking any other.—p. 119, ll. 1-~~22.~~ 30 et seq

Bowen, p. 124, l. 25, says, the rock was found much harder than anticipated.

The testimony also shows that upper strata of limestone covered up the underlying "trap" and flint.

"There was not anything on the top surface more "than usual."—Scott, p. 272, l. 20–5."

"All the rock sections, the upper strata were the "ordinary limestone."—J. H. Osborne, p. 232, l. 89; R. B. O., 99, l. 14.

So that the representation of the character of the rock to be excavated was necessarily to the effect that it was limestone. The trial pits were only to the surface of the rock and necessarily reached limestone. But the material representation was made by the company's engineer and was, p. 75, l. 30; p. 219, l. 17, as the line lay through the Lebanon valley, a limestone district, the contractors must bid on limestone, p. 218, l. 12. The quantities only entered into the specifications bid upon. The quality—that the rock was limestone—was by statement only.

a. This representation was binding upon the company. It was within the scope of the agent's authority. This is the only question, even in cases of fraud.

Pollock on Cont., 502.

Citing Barwick, v. English Joint Stock Bank, L. R., 2 Ex. 259.

b1. And when O'Reilly, in order to form his contract with Tarrant & Co., adopted and imported into his negotiation with them the representations of his company to himself, as necessarily he must have done, by giving them his solid rock excavation, designated in their subcontract as Stratified Rock requiring blasting or sledging, at his own price, less about ten per cent.—73 less 8, or 65 cents per cu. yd., the usual profit—he adopted the representation the company had made to him, and against which, as we shall show further on, he himself got relief from his company; and

b2. O'Reilly having thus relieved himself against the misrepresentation made to him by the Leb. Val. R. R. Co. thereby again adopted its misrepresentation by refusing to relieve the complainant or to account to the complainant for the relief he had thus obtained.

2. *As to the resulting facts*, touching which the false representations were made, the evidence fully bears out the contrast stated and exhibited in the fourth point of the brief. The excavation of soft, useful, stratified limestone was covenanted for, and hard, useless, seamed and fissured, unstratified trap and flint were uncovered, found and under the direction of O'Reilly excavated.

Test. R. B. O., pp. ~~99~~, l. 8; ~~218~~, l. ~~25~~.
" J. H. O., pp. ~~233~~.
" Bowen, pp. 154, etc.
" Scott, pp. ~~271, 272, l. 13~~.
Particularly ~~218~~, l. ~~25~~, and ~~272~~, l. 13.

Numerous references to the hardness of the rock occur in O'Reilly's letters, as will be seen when they are quoted for another purpose, under the next point.

Further evidence of it is found in the complainant's statements of loss, viz: Exhibits B3, J3, K3, L3, M3, N3, O3, P3, U3, amounting to $61,608 over the increased prices in the estimates, in the increased prices in the estimates themselves to furnish the money actually necessary to carry on the work; in the increased prices particularly of the rock work in the estimates and in the crowding into the estimates, from March, 1857, forward, the reserved percentage of T. & Co., to bring out payments to them, also to carry on the work: in the Reports of Force of the Resident Engineer Stack, Exhibits Q2—U2, in the Progress Profile, P5, and in the evidence relating to these various exhibits, referred to in the lists and indices of the exhibits.

Seventh and Eleventh Points.

The evidence of a rescission of the original contract and the formation of a new or modified contract relative to the Rock work.

The character of this work proving to be so totally different from the representations made of it, when the work was bid upon and the contract was entered into, afforded ample foundation to support a rescission and new contract at an increased price.

See Du Bois v. Del. and Hud. Canal Co., 4 Wend., 285.
See Du Bois v. Del. and Hud. Canal Co., 12 Wend., 334.
See Du Bois v. Del. and Hud. Canal Co., 15 Wend., 87.
1 Red. on R'ways, § 116, 209.
School Trustees of Trenton v. Bennett, 5 Dutch, 513.

In Bennetts case 720 representations were m[illegible]

The suspension also has an important bearing. In case at bar [illegible]

It is also settled in New York, by repeated decisions, that if there be a special agreement to do a piece of work, and the work be done, but not pursuant to such agreement either in point of time or any other respect, the party can recover what the work is reasonably worth, on the common counts.

stratified [illegible] seamed and [illegible] trap and flint [illegible] represented as [illegible] ified aqueous

See Sedgwick on Damages, 467, [220] Ed 1880, note 1 beginning on p. 460, [216.]

Citing DuBois v. Del & Hud Can. Co., 4 Wend., 290.

The evidence of that rescission and new contract are contained—

1. In the following letters passing between the complainant and O'Reilly:

475 P 479. Exhibit Z2, Oct. 4, 1855, Osborne to O'Reilly.
476 P 480. " A3, " 9, " O'Reilly to Osborne.
464 P 468. " N, Nov. 3, " " " "
479 P 483. " B3, " 6, " Osborne to O'Reilly.
484 P 488. " H4, " 6, " " "
684 P 51. " 39, " 6, " " "
481 P 485. " C3, " 7, " " "
482 P 486. " D3, " 28, " " "
483 P 487. " F3, Dec. 14, " O'R. to O.

Which latter (F3) we claim as evidence of the new contract after O'Reilly had been notified by H3, C3 and D3 that the complainant had rescinded and would not go on. This rescission mark was not only at the time B3 for $9,156, the first statement of loss, but the letters of complainant from that time until O'Reilly's reply (F3) bore relation only to this time and kept urging O'Reilly to decide, reiterating the complainant's determination to stop work unless he did.

See Test., R B. O., p. 99, l. 14, showing that the unexpected hardness of the rock showed itself in June and July, 1855, corresponding with B3, the first statement of loss, which begins from June, 1855. No loss on rock work is claimed prior to that time.

2. Evidence of a new contract appears in the testimony of

George W. Bowen, p. ~~124.~~ 125 l 30
Richard B. Osborne, p. ~~214.~~ 213 l 15

John H. Osborne cannot of course testify on this point except by his letter sent to O'Reilly.

See page 630 l 15

3. Also by O'Reilly's application to the Lebanon Valley Board, (of which J5 is a copy,) and the testimony concerning it. 521

See J5, p. ~~525~~, and testimony concerning it. Other references are p 630 l 20 which confirms making of new contract.

For other matters of evidence the military precision and regularity with which this work was arranged and carried on, making it impossible to claim a loss on unexpectedly hard work, unless in fact such existed, and implying the consequent necessity of relieving it. For in this case there could not be any suit for specific performance.

1 Rorer on Rrds., pp. 466-7.

And the amount of money at high premiums and rates of interest locked up in the enterprise was too great to permit a lawsuit to be thought of.

5. A synopsis and analysis of the account of Tarrant & Co., showing a payment of over $20,000 on account of the modified contract, is a very strong exhibit in this regard, as are also the statements of loss, beginning with B3, which were made out and transmitted to O'Reilly. Consider also the payment by O'Reilly to complainant of $8,000 over his estimates in December, 1856, specially on account of the modified contract to pay this loss.

6. That O'Reilly's payments to complainant of so large an amount over the estimates was because of the size of the estimate, and not on account of the modified contract, is mere subterfuge—evidence of bad faith—because O'Reilly, as Exhibit 31 shows, credited T. & Co. only with the payments exhibited and authorized on each current estimate, and he has to this day failed to credit T. & Co. with about $6,800 because it was not exhibited on any current estimate and was included in the Final only.

The evidence of Richard B. Osborne shows the shallowness of this subterfuge of O'Reilly, and that O'Reilly well knew that the size of the current estimate, No. 41, Exhibit 2, contained $20,500 of percentage which went bodily out of the Final, as O'Reilly well knew. He cannot convict himself of being a fool here, any more than

on the Camden and Atlantic account, settlement and certificate.

7a. O'Reilly's suit against the Reading company, and the consequent settlement of it by arbitration, proceeded on this ground of a modified contract, which obliged him to pay the losses of these and other of his sub-contractors, necessarily so.—See Exhibit P10.

7b. The evidence of Richard B. Osborne shows that his application to the board was solely on the loss sustained by O'Reilly through these sub-contractors, T. & Co. Test. pp. 115-6

The obtaining of the money by O'Reilly from the Leb. Val. and Reading Companies—the $38,000 and $20,000, if not more, as the exhibits seem to show—especially the $38,000, is evidence to show that he was bound on a modified contract on which he was answerable to the complainant, for the most liberable construction would permit him to retain only ten per cent of these sums. The residue he held in trust for his sub-contractors, except what he had paid out of it to them. And the evidence shows that he realized on the Tarrant & Co. subcontract a profit of nearly $50,000—Test., p. 105 l 25 ef 229 besides the payments of $58,000—or more as the taking of the account will show—over his estimates, so that it is not anything inequitable that the complainant seeks.

EIGHTH POINT.

This sufficiently appears on the statement of it. Evidence of it is M10 cognate test., and references.

NINTH POINT.

But the defendants, after the mistake was brought to their notice, have refused to correct it, and have pertinaciously defended this suit when I am fully convinced they knew it was wrong and against good faith to defend it. This defence was an attempt at fraud. For this it is right that they should be condemned in the costs.

Loss v. Obrey, 7 C. E. Gr., 52, 55.

TENTH POINT.

Test. R. B. O., p. ~~214~~. 213

"Non-fulfilment of contract is letting energy be ex-"pended in expectation of a return, and then withholding the return."

Spencer on Study of Sociology, 286.

And to procure the fulfilment of contracts a necessity to the existence of society as at present constituted—is the object of the administration of justice.

TWELFTH POINT.

It, (subrogation) is treated as the creature of equity, and is so administered as to secure real and essential justice without regard to form, and is independent of any contractual relations between the parties to be affected by it. Sheldon on Subrogation, 2.

Here is at least a resulting trust in favor of the complainant.

Perry on Trusts,

COMPETENCY OF TESTIMONY.

1. Upon the question of the evidence of John H. Osborne, the complainant, we can at least prove by him what we could have proved by a stranger or person who had never seen O'Reilly in his lifetime, whose evidence was otherwise competent and material. that is to say the complete knowledge of material facts, which he possessed independent of his acquaintance of or association with O'Reilly.

This is the result of the cases under the statute, P. L. 1880, p. 52.

See Clawson v. Reilly, 7. Stew., 219, 348.

Ib. 8 Stew., 314.

Also, other cases, 8 Stew., 87. 9 Ib., 506.

2. That O'Reilly's answer should stand as his testimony, equal to two witnesses, without the right of the complainant to contradict statements in it, in confession and avoidance of the statements of the bill, is certainly not law. To these statements of the answer in confession and avoidance of the bill the rebuttal of the complainant, as a witness, is confined. O'Reilly's answer became evidence when the defendant concluded her testimony and until then the complainant could not be called to rebut it as such.

Respectfully submitted,

HERBERT A. DRAKE,

Of Counsel.

ft must withdraw probative force
answer or allow complanant to be
mmed to contradict it
s to effect of objecting party who
sued in a representative capacity
tifying by a deposition of a de-
dent see Abbotts Trial Evidence
9 par 24 note.

Page 21, after line 23.

The bill of complaint in this case was sworn to by the complainant, and was filed January 28th, 1861—less than three years and six months after the completion of the work under the article of agreement or contract for the grading, &c., on the Lebanon Valley Railroad. The bill sets out that the article of agreement for said grading, &c., was made and that the price for excavating solid rock requiring blasting or sledging was sixty-five cents per cubic yard; that at the time of executing said article the said rock was principally covered and so situate that it was impracticable to discover its exact character, but it was supposed by said parties to said article to be blue limestone, and the said price for excavation thereof was fixed under that belief; but upon being uncovered and broken into, the said rock proved to be principally "trap rock" containing "green stones," "hornblende" and "compact feldspar," exceedingly hard, and very much more difficult and expensive to excavate than anticipated when said article was executed, the actual expense of excavating which proved to be at least eighty-five cents per cubic yard, in consequence of which, as your orator believes he will be able to prove, the said Patrick agreed to increase the price thereof to at least eighty-five cents per cubic yard. The answer admits the price in the contract, and admits the price for solid rock, &c., was increased to seventy-three cents per cubic yard, but denies that the price for solid rock, &c., was increased to eighty-five cents per cubic yard.

This bill being filed so soon after the transactions and sworn to by the complainant, must, I think, be held to be a correct statement of the transaction and contract. By it the complainant's claims under a contract, and his relief, if he is entitled to any, should be in accordance with the case made by and sworn to in the bill of complaint, and not a decree that the complainant should have an account for the work of excavating the solid rock at a fair and reasonable price therefor, to be ascertained upon a *quantum meruit*.

The complainant can only recover upon the case made by his bill; the *allegata* and *probata* must correspond. The parties are confined to the case made by the pleadings; evidence to facts not put in issue should not be read or taken.

1 Gusley's Eq. Ev. 161.
2 Dan. Ch. Pr. 12, 14, note.
1 Barb. Ch. Pr. 339.
Hopper *v.* Sisco, 1 Hals. Ch. 343.
Evans *v.* Huffman, 1 Hals. Ch. 354.
Mann *v.* Bruce, 1 Hals. Ch. 413.
Plume *v.* Small, 1 Hals. Ch. 460.
Parsons *v.* Heston, 3 Stockt. 155.
Brantingham *v.* Brantingham, 1 Beas. 160.
Vansciver *v.* Bryan, 2 Beas. 434.
Howell *v.* Sebring, 1 McCar. 84, 90.
Moores *v.* Moores, 1 C. E. Gr. 275.
Walker *v.* Hill, 6 C. E. Gr. 191, 204.
Marshman *v.* Conklin, 6 C. E. Gr. 546.
Marsh *v.* Mitchell, 11 C. E. Gr. 497, 499.
Crane *v.* Ely, 10 Stew. 564.
Munday *v.* Vail, 5 Vr. 418.

NEW JERSEY COURT OF ERRORS AND APPEALS

CATHARINE C. O'REILLY, Executrix of P. O'Reilly, deceased,
Appellant.
and
JOHN H. OSBORNE,
Appellee.
} ON APPEAL.

BRIEF OF P. L. VOORHEES.

The bill of complaint in this cause was filed in the Court of Chancery, January 28, 1861.

The answer of Patrick O'Reilly, the only defendant, was filed June 13, 1864.

Patrick O'Reilly, the defendant, died January 16, 1881.

Order suggesting death of Patrick O'Reilly was made December 18, 1882.

Replication to answer was filed by complainant, December 21, 1882.

The case was argued before Chancellor on bill, answer,

replication and proofs, and April 4, 1887, the Chancellor decreed an account with certain directions. See printed case, 721, &c.

From this decree the defendant in the Court of Chancery appealed, and filed notice of appeal April 14, 1887. See p. 730. Petition of appeal was filed June 26, 1887. See page 732.

The complainant in the court below also filed petition of appeal June 22, 1887. See his book, p. 725.

The bill in this case was filed to procure an injunction to restrain the defendant, Patrick O'Reilly, from prosecuting a writ of attachment against the complainant, John H. Osborne, in the Camden County Circuit Court, issued April 2, 1860, on an affidavit of O'Reilly's that there was due to him from the complainant the sum of $6,000, (concerning certain transactions in the State of New Jersey) and to procure an account for certain dealings between the parties concerning the receipt and payment of large amounts of moneys by the complainant as the superintendent of the defendant in the construction of the Camden and Atlantic Railroad in New Jersey, and also in the construction of thirteen sections of one mile each of the Lebanon Valley Railroad, in Pennsylvania, by the complainant, as sub-contractor under the defendant, for which the price for the excavation of solid rock had been changed from sixty-five cents per cubic yard, named in the contract, to, as alleged in the bill, what the complainant "claims and believes he will be able to prove the said Patrick agreed to increase the price thereof to at least eighty-five cents per cubic yard," for damages which the complainant alleged he had sustained by reason of a partial suspension of the work on his contract, and for damages by reason of a destruction of his property by a strike or riot of his workmen in the construction of said sections of said railroad; for services

by the complainant in cutting and removing the timber from a tract of land in Juniata county, Pennsylvania, for which the complainant alleged that the defendant had agreed to convey him half of the land when the timber should be removed from it, and also for the rent of a locomotive engine called the "Sea Gull," purchased by the defendant and rented by the complainant to the Camden and Atlantic Railroad Company.

The answer of the defendant showed that the complainant had, as superintendent of the construction of the Camden and Atlantic Railroad for the defendant, received over $120,000, for which he had not made any final settlement, except on one occasion he had presented a statement for a part of the transactions, showing a balance due the defendant of $1,098.97, and that there were other large amounts due for said moneys received by the complainant; it denied that the defendant had agreed to increase the price for excavating solid rock under the contract to eighty-five cents per cubic yard, but admitted he had agreed to increase the price for excavating solid rock to seventy-three cents per cubic yard, and the price for excavating hard clay mixed with gravel and detached stones from twenty-two cents per cubic yard to twenty-three and a-half cents, being the prices for such work the defendant received from the company, and showed that he had greatly overpaid the complainant for all the work done under said contract; denied that he was liable in any manner for damages for said suspension beyond the sum of $2,500 allowed complainant, or for any damages for the destruction of the complainant's property, caused by his workmen at their "strike;" claimed that the tract of land called Greenwood was purchased for the complainant and defendant jointly, but that the same failing to prove profitable, the complainant failed

and refused to pay his part of the purchase money, and showed that the complainant rented the locomotive engine "Sea Gull" to the Camden and Atlantic Railroad for near or about two years, at $166.66⅔, per month, and had received from said railroad all of said rental, and had refused and failed to pay to or account for any part of said rent to the defendant, and claimed that upon a true account there would be large sums of money due him from the complainant, and by the answer averred that he was ready and desirous to account and settle with said complainant all the matters and things in said bill of complaint set forth or mentioned, and all and every other matter of account or indebtedness remaining unadjusted between them, and asked that the complainant might be decreed to account, not only for the matters in the bill, but for all other matters and things remaining unadjusted between them.

On the hearing the Chancellor decreed that there should be an account in reference to the grading and masonry of the thirteen sections of the Lebanon Valley Railroad; that the complainant should be allowed his services and expenditures touching and concerning the tract of land called Greenwood; for the rent of the locomotive engine "Sea Gull;" for the balance of $1,098.97 of moneys received for construction of the Camden and Atlantic Railroad, as shown in the account, with any additional money due thereon from an alleged mistake therein, and concerning any personal property sold and delivered by O'Reilly to the complainant. See ordering part of decree, page 727 of case.

The defendant appeals from this decree so far as it directs an account and the manner of taking the same and asks that it may be reversed.

The complainant states that he purchased the "Sea Gull" engine about July 1, 1855, and that he, by the

direction of the defendant, rented her to the company for $166.66⅔ per month, and that it was used on said railroad until July 1, 1857, when there was due for the rent of the "Sea Gull" $3,833.23; that afterwards the plaintiff in his own name brought suit for said rent in the District Court of Philadelphia and recovered a judgment, on which he brought suit in Supreme Court of New Jersey, and recovered, on the 18th day of March, 1858, in said court, a judgment for $6,243.06, of which judgment the sum of $4,419.95 belonged to the said defendant; that the complainant settled said judgment with the consent of the defendant, by the company paying him $1,000 in cash for moneys expended by him for counsel fees, costs and expenses, and the preferred stock of the company, for the amount of the judgment, and that he held the share thereof for the defendant. See bill of complaint, page 9–12 of case.

The answer states that the defendant purchased the locomotive "Sea Gull," at request of the complainant; that the complainant agreed to rent the same for $166.66⅔ per month and pay said rent to defendant; denies that the defendant rented or authorized the defendant to rent the locomotive to the Camden and Atlantic Railroad Company, or that he in any way authorized the complainant to accept in satisfaction of said rent, for or on account of said defendant, the preferred stock of the said railroad company, and shows that no part of said rent had been paid by the complainant or the said railroad company, or any other person, to the defendant. This answer was responsive to the bill.

See answer, pages 45-52 printed case.

Yet the Chancellor decrees that the complainant do account to the defendant for the rent of the locomotive "Sea Gull," with fair and reasonable allowances to the complainant for his services and expenses touching and

concerning the same. The complainant showed in his bill that he was fully paid for all moneys expended by him for counsel fees, costs and expenses in this matter by the railroad company. Submit it was erroneous to order, or direct, other or further allowances.

The complainant states that as superintendent for the defendant, he, on the 7th day of August, 1853, took charge of the construction of the Camden and Atlantic Railroad, then in process of construction by the defendant as sub-contractor, and so continued in charge thereof to its completion, in the month of July of the succeeding year, receiving from and disbursing for said defendant large sums of money, amounting in the aggregate to about $120,000. See page 1 of case.

That the only item of indebtedness from complainant to defendant, outside of unsettled accounts, in recollection of complainant, consists of note for $1,096.97, given for a balance, then in complainant's hands for defendant, and which proved more than sufficient for the purposes, a statement of which the complainant presented to the defendant, at the time of giving said note, the defendant then giving a certificate that said statement was correct. See pages 13 and 14 of case.

The defendant admits that the complainant acted as superintendent of the construction of the Camden and Atlantic Railroad for the time stated in the bill and states that during such time the complainant as superintendent received and disbursed large amounts of money for defendant, for labor, materials and expenses in building the railroad, but that the "defendant was unable to state with accuracy the full amount of money received or disbursed by the complainant for building said railroad, said complainant still retaining in his possession a great many of the accounts relating thereto, and refusing to come to any detailed account with the defendant of

and concerning the moneys received and disbursed by said complainant, for or on account of the defendant, towards the building and construction of said railroad, and this defendant believes the amount of money received by the said complainant for and on account of this defendant as aforesaid is $120,000, as stated in said bill of complaint; that the moneys received by the complainant, as defendant believed, were largely in excess of the disbursements made by the complainant for the building of said railroad; that the defendant had repeatedly applied to the complainant for a detailed statement of such moneys received and disbursed by the complainant for building said railroad, but he had refused to give such statement except at one time he handed defendant a statement of part of the moneys received and disbursed by him as aforesaid (a copy of which statement is Exhibit A to answer. See page 57 of case,) showing a balance due to the defendant of $1,098.97, which should have been, by reason of error on its face, the sum of $3,445.76; that no part of said sum had been paid and that other large sums of money received by the complainant for the construction of the Camden and Atlantic Railroad were wholly unpaid and not in any way disbursed by the complainant for and on account of the defendant. See answer, pages 21–23 of case.

The bill of complaint, page 15 of case, states that the complainant has long and repeatedly urged the defendant to account, to come to an account concerning the matters mentioned in the bill. The prayer of the bill, page 17 of case, prays a decree for an account for all matters mentioned in the bill. The answer, page 55 of case, avers that the defendant is ready to account and settle all matters set forth in the bill of complaint, and all other matters between the complainant and the defendant.

The decree, (see page 728, line 22, &c.,) is that the complainant shall account to the defendant for a balance ($1,098.97) of the moneys received by the complainant as agent and superintendent for the said O'Reilly in the construction of the Camden and Atlantic Railroad, as shown on an account of the said moneys made by a clerk of the said O'Reilly, together with any additional money that may be due from the complainant on said account arising from the alleged mistake therein, if the defendant can establish such mistake.

We submit that this direction is erroneous; that if any account is to be made between the parties it should embrace all the transactions set out in the bill, of which the particular statement is but a small part. Especially should this be the case when the complainant does not set out that the matters were finally settled or accounted for and the answer shows that they have not been settled by reason of the complainant not having given up or surrendered the accounts and the evidences thereof.

The attention of the court is called to the fact that the complainant appeals from that part of the decree above cited, begining with the words "together with any additional money," &c.

The bill, see page 2 of case, sets out that April 24, 1853, the complainant and one Charles Tarrant made an agreement in writing under seal with Patrick O'Reilly to construct and finish the grading and masonry of thirteen adjoining sections of the Lebanon Valley Railroad, in consideration of certain prices mentioned in said agreement. (See said agreement, Exhibit No. 17, page 657, &c., of case. See also agreement between P. O'Reilly and said railroad company for construction of forty sections of said railroad, Exhibit No. 40, p. 685, &c., of case.)

On page 3 of case, bill states the fine fixed by said agreement for excavating hard clay, &c., was twenty-two

cents per cubic yard and of solid rock, requiring blasting or sledging, was sixty-five cents per cubic yard; that the price for excavating hard clay, &c., was increased to twenty-three and a half cents per cubic yard; that at the time of making the agreement the rock was covered and so situate that it was impracticable to discover its exact character, &c.; that upon being uncovered the rock proved to be "exceedingly hard and very much more difficult and expensive to excavate than was anticipated when said agreement was executed, the actual expense of excavating which proved to be at least eighty-five cents per cubic yard, in consequence of which, as your orator claims and believes, he will be able to prove the said Patrick agreed to increase the price thereof to at least eighty-five cents per cubic yard."

On page four of case, bill avers there was a suspension or partial suspension of the work under the contract from about October 1, 1855, to about the middle of May, 1856, by reason whereof the complainant suffered $5,000 damages, which the defendant had not accounted for or paid to the complainant. On page 5 of case, bill states that at about the close of the month of April, 1856, there was a "strike," when the workmen tumultuously set fire to the stable and property of the complainant and destroyed his stock and property, to his damage $2,600, which the defendant had not accounted for or paid to the complainant.

On page 25 of the case, the answer admits that the price for excavating hard clay, &c., was increased from twenty-two to twenty-three and one-half cents per cubic yard, and for solid rock requiring blasting or sledging from sixty-five to seventy-three cents per cubic yard, and further states, "but this defendant does not admit that in consequence of the hard rock requiring blasting and sledging, proving very much more difficult to excavate

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than anticipated, this defendant agreed to increase the price thereof to eighty-five cents per cubic yard, and this defendant denies that an agreement was made at any time between this defendant and the said complainant, or between this defendant and the said complainant and Charles Tarrant, by which the price for the excavation of hard rock requiring blasting and sledging was increased to the sum of eighty-five cents per cubic yard." On page 27 of case and following, the answer admits that there was a partial suspension of the work as claimed in the bill of complaint, and shows that under the contract the engineer-in-chief allowed for such damages the sum of $2,500, which the defendant paid to the complainant, and denies that the said complainant has any other claim for damages for or by reason of such suspension of said work. The testimony shows that under the power given to the engineer-in-chief in the contract, the engineer-in-chief ordered such partial suspension of the work. See contract, page 670, and Exhibit No. 36, page 682. On pages 29-31 of the case, the answer states the circumstances of the strike and destruction of the property mentioned in the bill, and denies that the defendant is in any way or form accountable, responsible or liable for the property destroyed, or the value thereof, or for any damages that might arise from the destruction thereof, or any part thereof.

The decree, see page 728 of the case, directs that no allowance shall be made for said suspension, except the $2,500 already allowed in the estimate of the engineer, or for any of the property of the complainant destroyed by and during the strike, fire and riot of his workmen. The part of the decree that excludes the allowance for the suspension beyond the $2,500 allowed in the estimate is appealed from by the complainant.

It is a claim for damages only and submit is not a

matter over which a court of equity has any jurisdiction.

1 Pomery Eq., § 178.

2 Story Eq. Jur, § 794.

Iszard v. Mays Landing Water Power Company, 4 Stewart, 511, 523.

Palys v. Jewett, 5 Stewart, 303.

Stamford v. Lyon, 10 Stewt, 94.

In the decree, (see page 727 of case) in referring to the excavation of solid rock requiring blasting or sledging, it is recited, "and the Chancellor being of the opinion that the said sub-contract was modified relative to the solid rock excavation therein specified, and that the said Patrick O'Reilly, deceased, agreed to pay the complainant such additional compensation for excavating the said rock as would protect the complainant from loss, and that the complainant is entitled to an account of the work of excavating the said solid rock at a fair and reasonable price, it was ordered that it be referred to a Master to state an account between the said complainant and defendant of all the payments made by the said O'Reilly to the complainant under the said sub-contract modified as aforesaid."

This we submit was erroneous. There was no testimony in the case to show that there was any such an alteration of the contract as found by the Chancellor.

The bill charged that the actual expense of excavating the rock proved to be at least eighty-five cents per cubic yard, in consequence of which, as your orator claims and believes, he will be able to prove the said Patrick agreed to increase the price thereof to at least eighty-five cents per cubic yard. The bill required an answer under oath. The answer as above shown stated the price had been increased to seventy-three cents per cubic yard and denied that the defendant had ever made any agree-

ment to increase the price to eighty-five cents per cubic yard for excavating said solid rock. This answer being responsive to the bill must be overcome by the testimony of two witnesses or the testimony of one witness supported by other circumstances.

Gresley's Eq. Evd., p 4.
1 Danl. Ch. Pr., 843, note 7.
Bird v Styles, 3 C. E. Gr., 297.
Force vs. Dutcher, 3 C. E. Gr., 401.
DeHart v Baird, 4 C. E Gr., 423.
Calkins v Landis, 6 C. E. Gr., 133.
Stearns v Stearns, 8 C. E. Gr., 167.

The only witnesses who speak of the increase of the price are Richard B. Osborne and George W. Bowen. Mr. R. B. Osborne speaks of it in a number of places, to which I wish to call the court's attention.

1st. On page 80, line 33, he says he was authorized by P. O'Reilly to give the sub-contractor the same price he received from the company (seventy-three cents per cubic yard.)

2d. On page 95, line 37, to page 96, line 16, where among other things he says, P. O'Reilly told him he had increased the price of solid rock to his own price of seventy-three cents per cubic yard.

3d. On page 102, line 13, &c., he says he relied on the promises of the chief contractor to pay for extra cost of this rock.

4th. On page 103, line 38, &c., he says, because I relied upon the promise of my old contractor, by which he assured me he would advance sufficient to finish these sections in time, &c.

5th. On page 112, line 10, &c., he says, the sub-contractors relied upon the definite arrangement they made with the chief contractor for meeting the extra cost of this work.

6th. On page 213, line 16, &c., he says, O'Reilly urged his sub-contractors to finish the work and make good his contract with the company for him, and that he would see that the work was paid for, including the extra cost of the work.

7th. On page 387, line 8, &c., he says the price of rock was raised from sixty-five to seventy cents in September, 1856, and in November, 1856, it was again raised to seventy-three cents. The raising of the price of the hard clay, I think, was about June, 1856.

8th. On page 387, line 18, he says, the resident engineer returned everything at the prices returned in the contract up to the time the chief contractor altered the contract price by raising to the prices named. When that was done the engineer made the estimates on the entire yards contained in the whole work done.

9th. On page 437, line 25, &c., he says, the increase of the prices to twenty-three and a half and seventy-three from their original was approved by me as the engineer as a step on the part of the chief contractor towards complying with the promise to complete the work and meet the necessary extra cost of the same.

10th. On page 438, line 32, &c., he says, the chief contractor had increased the price of the sub up to the amount of the same price that he received from the company.

11th. On page 212, line 24, &c., he says, the contract included the excavation of the cubic yards contained in that charge; the contract did not contain the price which was estimated by the engineer or paid for by the chief contractor, because the chief contractor had abrogated the contract by raising the price contained in the contract for solid rock from fifty (should be sixty-five) to seventy-three cents.

Ques. For what quantity of rock was that allowance raised to seventy-three cents?

Ans. For the whole quantity of rock contained in the final estimate for the purpose of meeting in part the extra cost of the very hard portion of the rock excavated.

On page 385, line 29, &c., in answer to the question, "What proportion of it was the hard trap rock in these sections mentioned by you?" he says, "As near as could be estimated from time to time, we have based our calculations on about forty-eight per cent. of the total having been of the hard quality of the trap rock." As stated by the above extracts from R. B. Osborne, and further from the current estimate, Exhibit Q, page 465 and final estimate, Exhibit M, page 463, all the solid rock excavated was estimated at seventy-three cents per cubic yard. The increase of eight cents per cubic yard being equal to about 16.45 cents per cubic yard on the trap or hard rock.

In six of these extracts, viz: 1, 2, 7, 8, 10 and 11, the statement is that the price was increased seventy-three cents per cubic yard. In five of them, viz: 3, 4, 5, 6 and 9, he speaks of O'Reilly having promised to pay the cost of the rock excavation, and in three, viz: 3, 4 and 9, he speaks of the promise to pay extra costs having been made to him as chief engineer, while in two, viz: 5 and 6, he speaks of a promise to the sub-contractor.

Submit, this evidence does not prove the contract set out in the bill that O'Reilly agreed to increase the price of rock excavation to eighty-five cents per cubic yard. The bill alleges that the actual expense of excavating the solid rock proved to be at least eighty-five cents per cubic yard, and that the complainant believed he would be able to prove that the defendant agreed to increase the price to eighty-five cents per cubic yard. Nor does this evidence prove that the defendant agreed with the complainant to pay whatever was the cost of excavating the solid rock, or that the defendant made any contract

with the complainant to pay him a fair and reasonable price for excavating the solid rock.

George W. Bowen, who was the clerk, cashier and bookkeeper of the complainant, in his testimony, page 125, line 27, &c., says Mr. O'Reilly was notified of the hardness of the rock and the inability to complete the contract at the price named, at which he was to finish the work as our estimates for several months did not pay for the powder. His attention was called to it repeatedly and he gave assurance that the price would be increased, and on page 158, line 1, in answer to the question, "You have already stated that the attention of Patrick O'Reilly was directed to the difficulty of this rock work, and he gave assurance that the price would be increased, state whether that price was increased?" he says, "That price was increased from sixty-five to seventy-three cents."

Submit that the testimony of both R. B. Osborne and G. W. Bowen shows that the only alteration of the price for excavating solid rock was increased from sixty-five cents to seventy-three cents, as stated in the answer of the defendant, and does not prove that the price for excavating solid rock was increased from sixty-five cents to eighty-five cents per cubic yard, as stated or claimed in the bill of complaint.

The correspondence which is shown in the testimony shows that the price for excavating solid rock was only raised to seventy-three cents per cubic yard, as stated in the answer, and that the price was not raised in the engineer's estimates until the latter part of the year 1856.

In Exhibit No. 38, page 683, a letter from P. O'Reilly to R. B. Osborne, chief engineer, dated June 15, 1856, Mr. O'Reilly says, "I have refused to pay any advance on the contract price for rock," &c. On page 387, R. B.

Osborne says the price of rock was raised from sixty-five to seventy cents in September, 1856, and in November, 1856, it was again raised to seventy-three cents.

1. By the letter of J. H. Osborne to P. O'Reilly, dated October 4, 1855, Exhibit Z2, page 475, line 26, &c., Osborne says, "The least price that will enable me to prosecute the work to completion will be an average of twenty cents per cubic yard."

2. By letter of P. O'Reilly to J. H. Osborne, dated November 9, 1855, Exhibit A3, page 476, &c., O'Reilly says "You are well aware that I am disposed to do all I can for you and others. Were I to give you my prices they would not bring you and others out."

3. In a letter from O'Reilly to J. H. Osborne, dated November 3, 1855, Exhibit N, page 464, O'Reilly says, "I am well aware that the rock on some of the sections of the second division is very hard and cannot be excavated at the contract price, therefore I will assist you on these sections and on some of the brick bridges which I perceive require an advance."

4. In a letter of J. H. Osborne to P. O'Reilly, dated November 6, 1855, Exhibit H3, page 484, line 39, &c., Osborne says, "What I expect you to do under the circumstances, is to make me such an advance as to cover the loss I have up to 3d October sustained and advance my price on the rock to eighty-five cents per yard for the future. By doing this I shall be able to pay for my seventy or eighty cars and to prosecute my work to completion. I shall take no action until I hear from you." This letter, or almost a true copy of it, was received by P. O'Reilly. See Exhibit No. 39, page 684. Exhibit B3, page 479, is a copy of the first part of this letter, and was not received by O'Reilly.

5. In a letter, J. H. Osborne to P. O'Reilly, dated November 7, 1885, Exhibit C3, page 481, Osborne says,

"though personally indebted to you and desirous of paying a portion of the indebtedness, I never contemplated the position of a suppliant, and yet I hold that this is the position your indecision would impose on me, by withholding the aid which I have a right to expect, and which you have repeatedly stated I ought to have. I cannot consent, therefore, that this matter be longer deferred, and before the 15th I shall thank you to give me a definite answer."

6. In a letter of J. H. Osborne to P. O'Reilly, dated November 10, 1855, Exhibit E3, page 482, Osborne says, "I am in receipt of yours of the 3d of November. This day they were handed me by Mr. Osborne. I regret it did not come to hand before, as it would have relieved me of some anxiety respecting my condition on the second division. Your second letter, dated 6th, and addressed to Summer street, I also found on my return. These facts will explain the reason of my letter of the 7th from Womelsdorf."

7. In a letter J. H. Osborne to P. O'Reilly, dated November 28, 1855, Exhibit D3, page 482, Osborne says, "I have not received your reply to my letter of 6th inst., though I was led to expect one containing the assurance that you would make my losses right on the rock, which I stated was what I required at your hands, and which you told me you were willing to give me."

8. In a letter of P. O'Reilly to J. H. Osborne, dated December 14, 1855, Exhibit F3, page 483, O'Reilly says, "In answer to yours of November the 6th, ultimo, I would state, I am aware that your prices for *hard rock will not carry you through.* I am also aware that my prices will not pay for taking out the *hard rock* on some of your sections, therefore, in order to enable you for the present to carry out the work, I will allow for *hard rock* seventy-three cents, that being my price. I regret I can-

not do any better for you at present. However, I trust to be enable to carry you through without sustaining any loss. From my experience in rock excavation, I know that the rock on some of your sections cannot be excavated for less than eighty to eighty-five cents per cubic yard. I will make good to you the deficiency, $9,156, as per statement."

9. In letter J. H. Osborne to M. E. Lyon, Assistant Engineer, dated July 23, 1856, Exhibit H5, page 520, Osborne says, "The rock no doubt costs more than I receive for it. * * * I have expended large sums of money to afford facilities for doing the work. Have changed the foreman several times and have left nothing undone to obtain different results."

10. In letter J. H. Osborne to P. O'Reilly, dated February 29, 1856, Exhibit O9, page 591, Osborne says, "I have frequently stated to you that the losses which appeared from month to month on my work was inexplicable. The engineers are pleased to complain of my management. This is not borne out by facts, and were it not that I have your assurances that you would see me righted it would be useless attempting to push my work through. From the engineer's estimates I glean this fact, and I conceive it to be an important one as based entirely on the engineer's figures as returned to you. Mr. Nicholls of March 31, 1855, estimated work to me on sections 18, 19, 20, 21, 22 and 23, amounting to $15,285, on which my expenses were $14,135=to $1,150 profits, or nearly 7½ per cent. Mr. Stack has estimated me on the same sections, viz: 18, 19, 20, 21, 22 and 23—$25,125, my expenses $39,015, showing a loss of $13,890=53.3 per cent. The haul in both cases is thrown out, as also horse expenses. Mr. Stack's estimates are from April 1st to Dec. 31st, 1855. Under the circumstances I think I may be excusable in

saying the wrong does not lie altogether in my management. I am happy to inform you that the work is progressing and will be prosecuted with renewed vigor as soon as the spring opens."

11. In letter J. H. Osborne to P. O'Reilly, dated Oct. 23, 1856, page 239, Exhibit M3, page 631 of case, Osborne says, "I have had occasion to point out for some time past the necessity of your doing something to aid me, and I have given you my reasons, how I have been enabled to work through the summer without the increase on my rock prices, which I think you should have considered and which I think is only my due."

12. In letter J. H. Osborne to P. O'Reilly, dated April 23, 1857, Exhibit V3, p. 497, Osborne says, "I have directed Mr. Bowen to try and start the force on 18 and 19. I have instructed him to keep an accurate account of the same, as I would not undertake it unless the expenses would be met and I have not the means to do so; only on these terms would I go on, as you are aware the price you give me for the rock will never take it out."

It should be remembered, in considering these letters, that although P. O'Reilly agreed with J. H. Osborne to make the price of excavating hard (not solid rock) seventy-three cents per cubic yard, the same he received, by his letter of December 14, 1855, yet the estimates of the engineers for the rock excavation were not increased until September and November, 1856. See testimony R. B. Osborne, page 387, line 9, &c.

Submit, the results of this correspondence shows that there never was any arrangement or agreement such as testified to by R. B. Osborne, that the defendant would or should pay "the entire costs" of rock excavations, or that he agreed to make up or pay all loss on rock excavation, without reference to a particular price.

That the allegations of the bill, on page 3, line 38, that

as the complainant claimed and believed he would be able to prove that P. O'Reilly agreed to increase the price thereof to at least eighty-five cents per cubic yard, are not proved by the letters above produced and offered in evidence, but they show that the only advance agreed upon for excavating hard rock is that mentioned in the answer to seventy-three cents per cubic yard.

On October 4, 1855, Exhibit Z2, p. 475, Osborne states that the least price that would enable him to proceed would be twenty cents per cubic yard.

On Octobe 9, 1855, Exhibit A3, page 476, O'Reilly says, "You are aware I am disposed to do all I can for you and others."

November 3, 1855, Exhibit N, page 464, O'Reilly writes he will assist on some sections.

November 6, 1855, Exhibit H3, p. 484, Osborne writes, "What I expect you to do is to make me such an advance as will cover the loss I have sustained, and advance my price on the rock to eighty-five cents per yard for the future."

November 7, 1855, Exhibit C3, p. 481, Osborne would not consent that the matter should be longer deferred and complains of O'Reilly's delay, in withholding the aid he had a right to expect, and which he said O'Reilly had stated he ought to have.

November 10, 1855, Exhibit E3, p. 482, Osborne acknowledges receipt of letter of November 3, 1855, Exhibit N, p. 464, and also letter of the 6th, and says, "These facts will explain the reason of my letter of the 7th from Womelsdorf. See letter C3, p. 482 of case.

November 28th, 1855, Exhibit D3, p. 482, Osborne asks for an answer to his lettter of November 6, 1885, Exhibit H3, p. 484.

December 14, 1885, Exhibit F3, O'Reilly offers to allow for *hard rock*, not solid rock, seventy-three cents per

cubic yard, that being his price. This is an answer to the letter of November 6, 1855, Exhibit H3, p. 484, demanding advance to eighty-five cents per cubic yard.

This is the only advance O'Reilly agreed to, and is so stated in his answer January 23, 1856, Exhibit H5, page 520, he says to the assistant engineer, M. E. Lyon, "The rock no doubt costs more than I receive for it."

April 23, 1857, Exhibit V3, Osborne says to O'Reilly, "As you are aware, the price you give me for the rock will never take it out."

The letter shows that there was a price agreed upon under the contract for excavating solid rock, and that price was seventy-three cents, the same price that O'Reilly, as chief contractor, was receiving from the company.

As above stated, the hard rock was but about forty-eight per cent. of the rock excavation. See page 385 of case, line 31, &c. The contract price was sixty-five cents per cubic yard. The increase to seventy-three cents was eight cents on all the rock excavation, whether hard trap rock or solid rock agreed to be excavated by the contract. If the hard rock was forty-eight per cent. of the rock excavated, the increase was equivalent to sixteen and forty-five hundredths cents of the hard rock, making it about eighty-one and forty-five hundredths cents per cubic yard for hard trap rock.

The Chancellor as shown decrees that in the account, see page 727, the complainant is entitled to an account of the work of excavating solid rock at a fair and reasonable price therefor. This is not in accordance with the statements of the bill, that the actual expense of excavating the solid rock proved to be at least eighty-five cents per cubic yard, and in consequence of which the complainant claims and believes he would be able to prove the defendant agreed to increase the price thereof to eighty-five cents per cubic yard. Nor is it in accord-

ance with the testimony of R. B. Osborne to the effect that the defendant promised to pay for the excavation of solid rock the actual cost thereof; or in accordance with the testimony of G. W. Bowen, that the price for excavating solid rock was raised to the sum of seventy-three cents per cubic yard, and is erroneous.

The allegations of the bill in this case are, that the grading and masonry of the thirteen sections of the Lebanon Valley Railroad was done under the contract entered into between the complainant and Charles Tarrant and the defendant P. O'Reilly, and that the contract was changed by increasing the price for excavating hard clay, &c., from twenty-two to twenty-three and one-half cents per cubic yard; that the price in the contract for excavating solid rock requiring blasting or sledging was sixty-five cents per cubic yard; that the actual expense of excavating such rock proved to be at least eighty-five cents per cubic yard, in consequence of which, as the complainant claimed and believed, he would be able to prove the defendant agreed to increase the price thereof to eighty-five cents per cubic yard. The answer admitted the increase of the price for excavating hard clay, &c., claimed in the bill, and stated that the price for excavating the solid rock was increased to seventy-three cents per cubic yard, and denied that the price had at any time been increased to eighty-five cents per cubic yard. As above shown there is no competent testimony produced to disprove the allegations of the answer. The weight of the testimony supports the answer. Sumbit the complainant was bound to perform the grading, &c., mentioned in the contract in accordance with the terms thereof.

School Trustees vs. Bennett, 3 Dutch, 513.
Tomkins vs. Dudley, 25 N. Y., 272.
Dermott vs. Jones, 2 Wallace U. S. Sup. Ct. 1.
Cummings vs. Arnold, 3 Met. 436.

That if the complainant relied upon any other alteration of the contract he was bound to prove distinctly such alteration, and that it was made on a good consideration.

Thurston vs. Ludwig, 6 Ohio St. 1.

That this was a contract made and to be executed in the State of Pennsylvania and is to be governed by the laws of that State.

1 Rorer on. R. R'ds., p. 223, § 5, and cases cited.

That the withdrawal of Mr. Tarrant in the month of October from the performance of the contract did not in any way invalidate the contract.

McGrann vs. N. Leb. R. R'd Co., 29 Penna. St. R. 89.

That the changing of the prices for excavating hard clay, &c., and solid rock, &c., as above stated, did not avoid the contract but only changed it in the particulars named and reduced it from a specialty to a parol contract.

Lawall v. Rader, 24 Penn St., 283.

Carrier v. Dilworth, 59 Penn. St., 410.

This contract among other things provided, that in every respect it should be prosecuted in such order, at such places and parts of the work, and at such times and seasons, as the engineer may direct. See page 670, line 15, &c., of case. That to prevent disputes the engineer should in all cases determine the amount or quantity of the several kinds of work to be paid for, &c., decide every question that can or may arise relative to the execution of this contract on the part of the contractor, and his decision should be final and conclusive and without appeal. See page 671, line 33, &c., of case. That when the work should be increased by any enlarge-

ment of any part of the same, or by any contingent work the engineer should deem necessary * * * beyond what was contemplated in the contract, such increase or contingent work should be paid for at same rate as similar work therein contracted for, or if not similar to work therein contracted for, it should be paid for a an extra item according to the estimate of the engineer. See page 672, line 3, &c., of case. That the contract should be considered duly complied with when the engineer certified in writing to the same, and not until then should O'Reilly be liable for the payment of the final balance and the percentage due on account of said contract. See page 676, line 37, &c., of case.

The work was done under this contract, monthly estimates were made by the engineer, and when the contract was completed the engineer made his final estimate and certified the same; said estimates (the latter current, and the final estimates) were all made at the prices mentioned in the contract, and the prices for hard clay, &c., and solid rock mentioned in the defendant's answer, and shown as aforesaid by the weight of the testimony, and all the moneys shown by the estimates to be due were paid in accordance therewith. Submit that if the complainant would recover any increase for excavating solid rock, &c., he is bound not only to specifically prove the amount of such increased price, but that it was made on good consideration, and that the engineer of the railroad company had certified to and estimated said work at such price.

Monongahela Nav. Co. vs. Fenlon, 4 Watts & S, 205.
Reynolds vs. Caldwell, 51 Penn St., 298.
Hostetter vs. Pittsburg, 33 Pitts. Legal Jour., 67 O. Series.
Howard vs. Allegheny R. R., 69 Penn. St., 487.
O'Reilly vs. Kerns, 52 Penn St., 214.

The decree of the Chancellor is, that the complainant is entitled to an account to be stated between the complainant and the defendant touching and concerning the grading, &c., by the complainant of the thirteen sections of the said railroad under the aforesaid sub-contract so modified, as ascertained by the Chancellor.) See page 727, line 23, &c., of case), meaning the recital part of the decree, (See page 727, line 7, of case) where it is recited, "the Chancellor being of opinion that the sub-contract was modified relative to the solid rock excavation therein specified, and that the said Patrick O'Reilly, deceased, agreed to pay the complainant such additional compensation for excavating said rock as would protect the complainant from loss, and that the complainant is entitled to an account of the work of excavating the said solid rock, at a fair and reasonable price." As before stated, the bill states the work was done under the contract that the excavation of the solid rock was done, at an expense which proved to be at least eighty-five cents per cubic yard.

It may here be remarked that the bill in this case was sworn to by the complainant, and was filed within a few years after the occurrence of the transactions set out in the bill of complaint, and that the facts connected therewith would probably be more correctly stated by the complainant as to the costs of the excavation of solid rock, &c., and the agreement to pay for the same at a certain price, than could be made to appear by the testimony of witnesses of conversations and statements testified to more than twenty years after they occurred.

Submit that the decree for an account, not for any price stated or claimed in the bill or contract, or admitted in the answer, or proved by the testimony, but for an unliquidated amount or damages to be ascertained

by the Master as upon a quantum meruit, is erroneous and should reversed.

The bill of complaint in this case, after stating that the complainant had acted for about a year as the superintendent of O'Reilly in the construction of the Camden and Atlantic Railroad, had made a contract for the construction of thirteen sections of the Lebanon Valley Railroad and performed said contract; that he had rented the locomotive "Sea Gull" for near two years at $166.66\frac{2}{3}$ per month, and had collected by suit said rent, amounting to $4,419.95, and held said sum for O'Reilly in the preferred stock of the said Camden and Atlantic Railroad Company; that he had given O'Reilly his note for $1,098.97, and that O'Reilly owed him two notes each for $500, set out that O'Reilly had issued an attachment against him in the Camden County Circuit Court, returnable May 1, 1860, for $12,000; that auditors had been appointed, two defaults had been recorded; that O'Reilly threatened to obtain a report of auditors and proceed to judgment thereon and to a sale of the stock of the complainant attached under said writ of attachment unless restrained by the court; that the complainant was a non-resident of this State, and unable to procure the security required by law to dissolve said attachment and let the defendant into a defence of said suit under said writ, and prayed for an injunction and an account.

There is nothing shown in the bill, to take the case between these parties from the jurisdiction of the court of law to be adjudicated in a court of equity, or to show that full justice cannot be done between the parties by a court at law; the only thing that looks like an equitable relief or interference is the claim for an injunction to stay the proceedings in the suit in the Camden county circuit court, because it might be inconvenient for the

complainant to give security in the State of New Jersey and be let in to defend said cause.

In Dungan vs. Miller, 4 C. E. Gr., 218, a case exactly similar to this, the court says, " An attachment suit will not be restrained, on the ground that the amount of security required is so large as to make it inconvenient or impracticable for the defendant in such suit to dissolve the attachment. A right to set off is a mere legal right—a matter of practice in the courts of law—and has no claim to the protection of this court."

The bill in this case does not show that the matters for which an account is prayed are either intricate or complicated; it is not pretended that any matter of fraud, accident or mistake in any way appertains to any of the accounts sought or prayed for, or any necessity for a discovery for the maintainance of the suit by the defendant; the simple design of the bill is to get clear of appearing to the action of the defendant in the Circuit Court and setting off his claim against the claim of the defendant, and to have an account and recover the money due thereon from the defendant. It does not state a case for the exclusive jurisdiction of a court of equity under the head of account or otherwise.

1 Story Eq. Jur., § 72, 458, 458a, 459, 459a.

Story Eq. Pld., §482.

Kerr on Inj., page 57-64.

1 Pom. Eq. Jur. § 173-178.

Hoppock vs. United N. J. R. Rd. and Canal Co., 1 Stewart, 261.

Crane vs. Ely, 10 Stewart, 564.

Frue vs. Loring, 120 Mass., 507.

Badger vs. McMamara, 123, Mass., 117.

Dinwiddie vs. Bailey, 6 Vesey, 136.

Dungan vs. Miller, 4 C. E. Gr., 218.

Red Jackett Tribe vs. Hoff, 6 Stewart, 441, 443.

In 1st Story Eq. Jur., § 459, it is said, so that on the whole it may be laid down as a general doctrine that in matters of account growing out of privity of contracts, courts of equity have a general jurisdiction where there are mutual accounts, and also where the accounts are on one side, but a discovery is sought, and is material to the relief. And on the other hand, where the accounts are all on one side and no discovery is sought or required, and also where there is a single matter on the side of the plaintiff seeking relief and mere set-offs on the other side, and no discovery is sought or required, in all such cases courts of equity will decline taking jurisdiction of the cause. The reason is, that no peculiar remedial process or functions of a court of equity is required.

Dungan vs. Miller, 4 C. E. Gr., 218, is a case similar to this and to restrain a suit in attachment, the sum sworn to be due by the plaintiff being $23,000, the bill was drawn on the same plan as the bill in this case, the prayer for relief was the same as in this case, in effect copied from it. The Chancellor, on page 219, near the bottom, says: The complainant has the right to dissolve the attachment and present his defense at law. That the amount of security required is large and will make it inconvenient or impracticable for him to dissolve the attachment, is no ground for the interference of equity. He may lose the advantage of his set-off, but he will not lose his claim against the defendant Miller, whom he can prosecute at law, or call to account in equity for the amounts due him, whether due now or not, until the close of the transactions in which the advances were made. The right to set off is a mere legal right, a matter of practice in the courts of law, and has no claim to the protection of this court. Besides, Dungan could have appeared before the auditors and presented any legal defense to the claim of the defendant, and the court would have compelled them to regard it.

Red Jacket Tribe v Hoff, 6 Stewart 441. The bill was filed to supply the defect in a bond of want of seals omitted by accident or mistake, and to obtain a decree of the court for an account and the amount due on the bond. The bond was given by the defendant Hoff, with surety, and conditioned for the faithful performance by Hoff of his duties as treasurer of the complainant. The Chancellor says, p 443, "Though the subject matter of this bill, the rectification of the bond and the assessment of the damages thereon, are connected together, yet the latter relief is one which the court in the ordinary exercise of its authority cannot properly grant. The proper forum for such relief is a court of law."

Berry v. Van Winkle, 1 Gr. Ch. 269.

Iszard v. Mays Landing Co., 4 Stew, Eq, 511.

Palys v. Jewett, 5 Stew., Eq., 302.

To justify a court of equity in granting relief as consequent upon discovery, says Judge Story, it seems necessary that the relief should be of such a nature as a court of equity may properly grant in the ordinary exercise of its authority. If, therefore, the proper relief be by an award of damages which can alone be ascertained by a jury, there may be a strong reason for declining the exercise of the jurisdiction, since it is the appropriate function of a court of law to superintend such trials. And in many other cases where a question arises, purely of matters of fact, fit to be tried by a jury, and the relief is dependent upon that question, there is equal reason that the jurisdiction for relief should be altogether declined, or at all events, if the bill is retained, a trial at law should be directed by the court, and the relief granted or withheld according to the final issue of the trial.

1 Story Eq. Jur., §72.

The bill is therefore bad, so far as the purely legal

claim is concerned. In Varick vs. Smith, cited above, (page 5, 136) it was said that the proper course for the defendant, (in such a case as this,) to pursue, is to answer as to the equitable cause of suit, and demur to the legal claim for want of equity, or that he may answer as to both and make the objection as to want of equity in the legal claim at the hearing.

If the ascertainment by account or otherwise of the amount due on the bond of a treasurer of a beneficial society is such a relief that a court of equity in the ordinary exercise of its authority cannot properly grant, as decided in the above case, by what authority can such court ascertain the amount due for the excavation of solid rock under a contract at a fair and reasonable price therefor, which can only be properly ascertained by a jury upon a *quantum meruit.*

Fowle vs. Lawrason, 5 Peters, 494, a bill was filed, praying for the settlement of accounts and general relief; a *decree pro confesso* was signed and an auditor appointed and account taken. The auditor reported that there was due to the complainant from Fowle, the defendant, for rent, &c., the sum of $2,658.83. Fowle afterwards was admitted and answered the bill and upon hearing the auditor's report was confirmed and he decreed to pay said $2,638.83. From this appeal was taken to the Supreme Court. One of the grounds of the appeal or assignment of errors was that "the complainant had a plain and adequate remedy at law." Marshall, Ch. Just., on page 502, says, "Although the line may not be drawn with absolute precision, yet it may be safely affirmed that a Court of Chancery cannot draw to itself every transaction between individuals in which an account between parties is to be adjusted. In all cases in which an action of account would be the proper remedy at law, and in all cases where a trustee is a party, the jurisdiction of a

court of equity is undoubted. It is the appropriate tribunal. But in transactions not of this peculiar character, great complexity ought to exist in the accounts, or some difficulty at law should interpose, some discovery should be required, in order to induce a Court of Chancery to exercise jurisdiction. The decree was reversed and bill ordered dismissed."

Crane vs. Ely, 10 Stew. Eq., 564, an action of assumpsit was commenced in the Supreme Court for $4,077.21. The defendant pleaded the general issue and filed his bill in chancery, praying for an answer without oath, for a discovery, an account and injunction restraining the suit in the Supreme Court. The defendant in chancery answered and moved to dissolve the injunction. The Court of Chancery held it was bound, according to well-established principles, to take jurisdiction because the remedy at law is inadequate and denied the motion to dissolve the injunction. On appeal, the court, on page 573, say, the complainant having failed to show in his bill of complaint, a complicated account between him and the defendants, requiring the aid of a court of equity to settle the same, and the material facts on which he relied for the relief he has prayed for, being positively and sufficiently denied, by the answer made under oath, for the purpose of this motion to dissolve the injunction, the injunction should be dissolved and the case permitted to proceed at law, where cognizance of it was first obtained.

Chancery will not withdraw a case of this sort from the law courts after the latter has once acquired jurisdiction, unless adequate relief cannot be given at law.

1 Pom. Eq. Jur., § 179.

1 Story Eq. Jur., § 599.

South Eastern R. Rd. vs. Brogden, 3 McN. & G. 8.

Crane vs. Bunnell, 10 Paige, 333.

Crane vs. Ely, 10 Stew. Eq. 564.
Sweeney vs. Williams, 9 Stew. Eq , 459, 467.
Ib. Ib. 9 Stew. Eq. 627.

In that last case it is said in the Court of Errors, "But if there exists a concurrent jurisdiction in courts of law and courts of equity, the latter will decline to entertain jurisdiction, after the jurisdiction of the courts of law has attached, unless the relief that the applying party is entitled to ask cannot be fully obtained in the court of law."

In this case there is no discovery prayed for, or claimed as necessary to enable the complainant to properly defend the suit commenced against him by the defendant, and the jurisdiction of this court cannot be claimed on the ground of discovery.

1 Pom. Eq. Jur., § 223-230.
Rail Road Co. vs. Hoppock, 1 Stew. Eq. 261.
Little vs. Cooper, 2 Stock., 273.

Submit that the complainant having failed to show in his bill of complaint a complicated account between him and the defendant, or an account involving any matters of trust with the defendant, or requiring any discovery from the defendant to enable the complainant to prosecute or defend any suit pending between him and the defendant, has failed to show a case requiring the aid of a court of equity to settle the matters between him and the defendant. The account prayed for should have been denied and the bill should have been dismissed. That the case showing that the defendant P. O'Reilly had commenced his suit in a court of law to recover the amount alleged to be due to him from the complainant, and that the court of law could have done full justice between the parties in the case, the court of equity will not assume jurisdiction of the case and take it from the court of law, and the bill should have been dismissed.

As above stated, the bill in this case was filed January 28, 1861. The answer was filed June 14, 1864. Patrick O'Reilly, the defendant, departed this life January 16, 1881. Order suggesting the death of P. O'Reilly and reviving the suit was made December 18, 1882. Replication by the complainant to the answer of P. O'Reilly was filed December 21, 1882. From the time of the filing of the answer by the defendant to the filing of the replication, or suggesting of the death of the defendant, was a period of eighteen years six months and five days. The complainant did nothing with his cause, during that time. Edward McDermot, O'Reilly's chief clerk and book keeper; M. E. Lyon, assistant engineer in the construction of the railroad; Richard F. Stack, division engineer of the railroad during its construction; the president of the railroad company, and Patrick O'Reilly, the defendant, had their lips sealed by death. Within less than two years after the death of Patrick O'Reilly, the defendant, the complainant revives his suit against his widow, his executor in New Jersey, who was and is totally ignorant of the transactions mentioned in the case. After the case was revived the complainant, by his testimony and the testimony of Richard B. Osborne, his brother, engineer-in-chief of the railroad company at the time of its construction; George W. Bowen, his bookkeeper, clerk and assistant during the construction of the railroad, or the greater part of that time; Benjamin Scott, as superintendent of part of the work of constructing the railroad, and Lawrence Devereux, a former employee of the defendant, seeks to establish an indebtedness of Patrick O'Reilly to him which cannot in any way be denied or explained because of the death of O'Reilly, and which the complainant for more than sixteen years, during the lifetime of the said Patrick O'Reilly, failed or neglected to claim or try to establish.

We submit that these circumstances are not such as should recommend the case to the favorable consideration of the court. The power of the court, under the circumstances, to dismiss this cause, is full and complete.

The 30th rule of the Court of Chancery provides, "If a suit be suffered to lie without prosecution for one year it shall be considered as abandoned and the bill may be dismissed; five days' notice shall be given of a motion for that purpose to complainant or his solicitor." In this case, as above stated, it lay without prosecution over eighteen years and a half.

1 Fonbl. Eq., chap. 4, § 27, it is said, "The court will not encourage the laches and indolence of the parties, but will presume after great length of time some composition or release to have been made, since it would be too hard to force a man to keep his evidence by him forever."

1 Story Eq. Jur., § 529, it is said, "When the demand is not of a legal nature, but is purely equitable, or when the bar of the statute is inapplicable, courts of equity have another rule founded sometimes upon the analogies of the law, when such analogy exists, and sometimes upon its own inherent doctrine, not to entertain stale or antiquated demands, and not to encourage laches and negligence. Hence in matters of account, although not barred by the statute of limitations, courts of equity refuse to interfere after a considerable lapse of time, from considerations of public policy, from the difficulty of doing entire justice, when the original transactions have become obscure by time, and the evidence may be lost, and from the consciousness that the repose of titles and the security of property are mainly promoted by a full enforcement of the maxim, *Vigilantibus, non dormientibus, jura subveniunt.*"

Hoagland vs. Hoagland, 1 Gr. Ch. 501, was a bill filed

to establish a trust in lands purchased at a Sheriff's sale, as alleged for the complainant. On page 511, the Chancellor says, "More than twenty years have passed since these sales. Many persons acquainted with the circumstances are dead, and at so late a day the memory of those that remain must necessarily be imperfect. The bill was filed in 1827, and although the answer was put in the same year the first evidence was not taken until 1837, ten years after. The bill was dismissed with costs. This was decided in 1841.

Peacock vs. Black, Exect., &c., 3 Gr. Ch. 61, a bill was filed for a legacy thirty-one years after the death of the testator, twenty-four years after the settlement of his estate, and seventeen years after the death of the executor. The Chancellor, after stating fully the above facts, and that there was no positive evidence of payment, says, "If the case rested on the above stated facts, unexplained by any evidence on the part of the complainant to account for the delay, I should be disposed to give effect to the defense of the defendant.

In the case of Ellison vs. Representatives of Moffat, 1 John. Chan. R. 46, where the bill was filed for an account upon transactions before the Revolutionary war, which was interrupted by that war, the Chancellor observes, 'The parties lived in the same county, and without accounting for the delay, the complainant suffered a period of twenty-six years to elapse from the termination of the war to the time of filing his bill. It would not be sound discretion to overhaul accounts in favor of a party who has slept on his rights for such a length of time, especially against the representatives of the other party, who have no knowledge of the original transactions.' And in case of Jones vs. Turberville, 2 Vesey Jr. 11, Lord Commissioner Eyre remarks, 'That at law claims are presumed satisfied after a certain lapse of time, and courts

of equity would do very ill by not adopting this rule. So essential is it to general justice that though the presumption has often happened to be against the truth of the fact, yet it is better for the ends of general justice that the presumption should be made and favored, and not be easily rebutted, than to let in slight evidence of demands of this nature from which infinite mischief and injustice might arise.' I approve the doctrine of these cases." The bill was dismissed with costs. This case was affirmed on appeal. See 1 Hals Ch. R., 535.

Stout vs. Seabrooks Exects, 3 Stew. Eq., 187. This was a bill filed for an account. Seabrook and Walling formed a partnership in 1851, which was dissolved in April, 1858, Seabrook retaining the assets of the firm, which was indebted to him. In April, 1860, Walling assigned to the complainant his interest in the assets of the firm, after the payment of Seabrook's debt. The bill was filed May 20, 1874, after the death of Seabrook. The Vice Chancellor, on page 190, says, "The defendants have since answered and they now resist the complainant's demand for an account, upon two grounds; first, that his laches bars his demand; and second, that there is nothing due to him from them. Great delay is a great bar in equity. 1 Story's Eq Jur., 529; Fonbl, Book 1, ch. 4, §27; Chalmers vs. Bradley, 1 Jac. & W. 51, 62; Ray vs. Bogart, 2 John's cas, 432; Piatt vs. Vattier, 9 Pet. 405, 416. More than one hundred years ago Lord Camden said, 'A court of equity will always refuse its aid to a stale demand, when the party has slept over his rights or acquiesced for a great length of time. Nothing will call forth the activity of a court of equity but conscience, good faith and reasonable diligence.' Smith vs. Clay, 3 Bro. C. C., 640, note. A court of equity will not permit accounts to be over-hauled in favor of a party who has slept upon his rights without

just cause, for a great number of years; and more especially as against the representative of a party who may be supposed to have had the means of defense in his life time, but who may have left his successors without the requisite voucher. Mooers vs. White, 6 John's Ch, 360, 368. The court is always unwilling to decree an account when the transactions have become obscure and entangled by delay. Rayner vs. Pearsall, 3 John's Ch., 578, 585. The justice of this doctrine is obvious. He who delays asserting his rights until the proof in vindication of them is so indeterminate that it is very difficult to decide whether what seems to be justice to him is not injustice to his adversary, ought to lose all right to the aid of a court of conscience, for, by his laches, the path of justice has become so obscure that it cannot be traced with certainty. The law assists those who are vigilant, not those who sleep upon their rights. No inflexible rule can be prescribed as to the lapse of what period shall disen title a suitor to an account. The court may refuse to decree an account even when an action is not barred by the statute. Judge Story says: 'In matters of account, although not barred by the statute of limitations, courts of equity refuse to interfere after a considerable lapse of time, from considerations of public policy.' 1 Story's Eq. Jur., § 529; and Lord Eldon, in Foster vs. Hodgson, 19 Vesey 179, 185, said, 'If there has been that delay or forbearance that makes it not illegal but inequitable to demand an account, this court will deny it, and send the plaintiff away without relief.' Each case must be controlled by its own peculiar circumstances, but I think it may be laid down as a safe general rule that a decree for an account should be denied in every case where it clearly appears the party seeking it has, by his laches, rendered it impossible for the court to do full

justice to both parties, whether the infirmity of the case consists in the death of the party, loss of evidence or other cause. Tested by this rule it is manifest the complainant has no case. He does not demand an account until his delay has put him in the best possible position, and his adversary in the worst. He seeks to turn his faults into an advantage. It is not until the tongue of the person who had the most perfect knowledge of all the transactions of which an account is sought is silenced by death, and the memory of all others who ever knew any thing about them is obscured by the lapse of time, and very important written evidence, bearing strongly, most probably, in refutation of his claim, is lost, that he asks that an account shall be rendered to him. Why, the very first step which it is necessary to take in decreeing an account, shows how utterly impossible it is for the court to do anything like complete justice." The bill was dismissed with costs.

This case was affirmed in the Court of Errors and Appeals, for the reasons given by the Vice Chancellor. See—

Stout vs. Executors of Seabrook, 5 Stew. Eq., 826.

Shipman vs. Cook, 12 C. E. Gr., 251, was decided May Term, 1863.

It was a bill to foreclose a mortgage executed before 1833. The bill was filed in 1849. An answer was filed claiming credits that were disputed by the complainant No testimony was taken until ten years after the defendant's answer was filed. After the testimony was taken the cause slumbered until the defendant ruled the complainant to bring the cause to a hearing or have his bill dismissed. On page 255 the Chancellor says, "A simple case for foreclosure has thus been pending in the court without an

obstacle interposed by the defendant, for a period of over 14 years. This is surely not the conduct of a party confident in the justice of his cause, and seeking the vindication of his rights. It is eminently unjust and oppressive to the defendant. There is no need of a reference to a Master. If the credits are allowed, it is clear the complainant's debt is satisfied. The bill must be dismissed."

See further as to stale demands and delays in the prosecution of suits.

Sebrings Admst. v Admst. Sebring, Chancery of N. J., July 23, 1887, 10 Atlantic Reporter, 193.

Brown v Taylor, 12 C. E. Gr., 259.

Ib. Ib. 1 Stew. Eq., 625, affirming above case.

Wood v. Chetwood, 6 Stew. Eq., 19, 21.

Hance v. Conover, 4 Stew. Eq., 525.

Lee v. Cargill, 2 Stock, 331.

Dey Hathaway, P. & T. Co., 14 Stew. Eq., 419.

The delay in this cause being the voluntary act of the complainant for more than sixteen years, during the life time of Patrick O'Rilley, with whom all the transactions were had for which the account is claimed, we think that under the above rules and decisions the complainant is not entitled to an account against the executor of O'Reilly, and that, in justice and equity, the bill should be dismissed.

There is a rule in bills for account, to the effect that if the court is satisfied there would be nothing due to the complainant from the defendant, no further proceedings will be permitted by the court but the bill will be dismissed.

Campbell v. Campbell, 4 Hals. Ch., 356.

Ib. v. Ib. 4 Hals. Ch., 738, affirming above case.

Stout v. Seabrook's Exect., 3 Stew. Eq., 187, 193.

In this case the answer sets out the transaction between the parties with considerable particularity and shows, (see pages 33–35,) the payments on account of the contract for constructing grading, &c., on the Lebanon Valley Railroad, and on other accounts and the amounts of the final estimate for work under the contract and estimate for extra work, and shows that P. O'Reilly had overpaid the complainant on account thereof.

The amount of overpayment there stated is..		$24,065 30
Amount due for horses, carts, &c.....		9,026 98
Add rent of Sea Gull admitted by complainant's bill, page 12, line 10.....		4,419 95
Note of complainant, see bill, p. 13, line 33..		1,098 97
		$38,613 20
The complainant claims for hauling sills, purchasing wood leave, expenses of Greenwood, &c., Ex. Y5, p. 540.....	$15,520 90	
Two promissory notes $500 each, see bill, p. 14, line 22.....	1,000 00	
		16,520 90
Amount due O'Reilly.....		$22,092 30

The bill of complaint states that the actual expense of excavating the solid rock was eighty-five cents per cubic yard. The amount of solid rock excavated by the complainant, as shown by the final estimate, Exhibit M, p. 463, was 154,316 cubic yards. This is estimated at seventy-three cents per cubic yard. If the difference between the actual costs of eighty-five cents stated in the bill and seventy-three cents, the price allowed in the estimate, is multiplied by the number of yards excavated, and estimated, the increased costs of excavation would be $18,512.92. This sum is $3,579.38 less than the

amount overpaid to the complainant by the above statement. Thus allowing the complainant everything claimed by him in his bill of complaint, which we do not admit, he is in debt to the defendant, by this statement, $3,579.38.

By the testimony in this case, it is shown that the complainant received in money from Patrick O'Reilly, and O'Reilly held the notes and obligations of the complainant to large amounts:

See receipts, pages 405-410		$436,628 87
Notes and obligations, pages 411-414		11,025 40
Stock, horses, &c., in answer, p. 24, p. 35		9,026 98
Rent of Sea Gull		4,419 95
Promissory note		1,098 97
		$462,194 17
Amount complainant's final estimate	$412,993 05	
Estimate extra work, answer, p. 34	10,102 10	
Two promissory notes, $500 in bill, p. 14	1,000 00	
		$424,095 15
		$48,099 02
Amount sills, expenses of Greenwood, Ex. Y5, claimed by complainant		15,520 90
		$22,568 12

The increased price of excavation claimed in the bill of complaint, as above shown, was $18,512.92. Allowing this amount, which is all that is claimed in the bill of complaint, and which we do not admit to be due, the complainant is indebted to O'Reilly in the sum of $4,055.20. These statements are most favorable to the complainant, allowing him the alleged actual costs of the

hard rock excavation, claimed in the bill for the whole solid rock excavated. The hard rock was but forty-eight per cent. of the solid rock estimated for the complainant, the balance, fifty-two per cent., being of the character of rock supposed at the time the contract was entered into, and which was agreed to be excavated for sixty-five cents per cubic yard.

We submit that the decree in this case was erroneous and not in accordance with the case made by the complainant's bill, and shown by the testimony; that the complainant failed to show by his bill and testimony a case for the exclusive jurisdiction of a court of equity, or which would warrant a court of equity in withdrawing the case from the jurisdiction of the court at law; that his laches in the case have been great and unexplained, and that it appears that there is nothing due him from the defendant, and that the decree should be reversed and his bill dismissed.

P. L. VOORHEES,
Solicitor of Appellant.

CONTENTS.

COMPLAINANT'S WITNESSES.

	PAGE.
Bill	1
Answer	20
Bowen, George W.—Direct	121
Cross	183
Re-direct	209
Devereux, L. R.—Direct	60
Cross	69
Re-direct	71
Re-cross	72
Foster, Albert.—Direct	374
Cross	381
Longstreth, J. Cooke.—Direct	391
Osborne, John H.—Direct	231
Direct	285
Cross	357
Re-direct	363
Osborne, Richard B.—Direct	73
Direct	211
Direct	365
Direct	383
Cross	383
Re-direct	387
Platt, Clayton E.—Direct	389
Scott, Benjamin.—Direct	263
Cross	280
Re-direct	284

DEFENDANT'S WITNESSES.

Waitneight, Harry P.—Direct	395
Cross	396
Doyle, Joseph W.—Direct	396
Re-called	416
Heilig, Albert W.—Direct	415

COMPLAINANT'S REBUTTAL.

Osborne, John H.—Direct	417
Direct	440
Osborne, R. B.—Direct	431
Cross	450
Complainant's Exhibits	435
Defendant's Exhibits	638

Opinion—Chancellor	706
Decree—Chancellor	721
Notice of Appeal	730
Petition of Appeal	732

IN CHANCERY.

To the Honorable Henry W. Green, Chancellor of New Jersey :

Humbly complaining, showeth unto your Honor, your orator, John H. Osborne, of Morrisville, Bucks County, in the State of Pennsylvania, that for many years past your orator has been engaged in the management and construction of railroads, and has much experience in that business; that in the month of June, eighteen hundred and fifty-three, while your orator was the superintendent of the Richmond and Danville Railroad, in the State of Virginia, one Patrick O'Reilly, of Reading, in the State of Pennsylvania, (then the sub-contractor for construction of the Camden and Atlantic Railroad, in this State, extending from Camden to Atlantic City, a distance of about sixty miles), proposed by letter that your orator should resign his said position of superintendent, and take charge of the construction of the said Camden and Atlantic Railroad for him, the said Patrick, at a salary of three thousand dollars per annum; which proposition your orator accepted, and on or about the seventh day of August, eighteen hundred and fifty-three, took charge of the construction of the said Camden and Atlantic Railroad, then in process of construction, and so continued in charge thereof up to its completion, in the month of July of the succeeding year, receiving from and disbursing for said Patrick large sums of money, amounting in the aggregate to about one hundred and twenty thousand dollars; that while your orator was so in charge, at the request and by the direction of the said Patrick, without any increase of salary, your orator took charge, also, of the construction of the Lebanon Valley Railroad, extending from Reading to Harrisburg, in the State of Pennsylvania, a distance of about fifty-four miles, for the construction of about forty miles of which

the said Patrick was then the contractor; that while your orator was so in the employ of the said Patrick, on or about the twenty-fourth day of April, eighteen hundred and fifty-four, your orator and one Charles Tarrant entered into an article of agreement with the said Patrick, in writing, duly executed, under the hands and seals, as well of the said Patrick as of your orator and said Charles, bearing date the day and year last aforesaid, whereby your orator and the said Charles, in consideration of certain prices and sums of money therein stated and set forth, covenanted and agreed with said Patrick to construct and finish for him the grading and masonry of the thirteen adjoining sections of one mile each of the said Lebanon Valley Railroad, that is to say, sections from No. 14 to No. 26 thereof, inclusive, and to have the same completed in the manner therein described on or before the first day of August, eighteen hundred and fifty-five, as by reference to said article of agreement, now in the possession of your orator and ready to be produced and proved, will more fully and large appear.

And your orator further shows that at or about the time of the date of said article your orator and said Charles, as partners, under the partnership name of "Tarrant & Co.," entered upon the construction of the grading and masonry of the said thirteen sections of the Lebanon Valley Railroad, under and according to the provisions of said article, but that before the completion thereof, in or about the month of October, eighteen hundred and fifty-four, the said Charles abandoned all his interest in the said contract with said Patrick, and with the knowledge and by the consent of said Patrick, for a valuable consideration, assigned all his said interest therein to your orator, thereby giving to and conferring upon orator full power and authority to execute said contract and receive and convert to his own use all the moneys, profits and emoluments that had then or might thereafter in anywise accrue or become due or payable thereon, your orator assuming all the care, risks and responsibilities thereof, after which your orator alone, but in the said partnership name of "Tarrant & Co.," continued and prosecuted the said work to its completion, according to the true intent and meaning of said

article of agreement; whereby your orator alone became entitled to have and receive of and from the said Patrick the full compensation for said work, except so much thereof as had been paid to your orator and said Charles jointly, before he abandoned and assigned his interest in said contract, as aforesaid.

And your orator further shows that in and by the said article of agreement there were different prices fixed and agreed upon for the excavation of the different kinds of material required to be moved, in grading said several sections; that for the excavation of "hard clay mixed with gravel and detached stones" the price therein fixed is twenty-two cents per cubic yard, and that for "the excavation of solid rock, requiring blasting or sledging," the price therein fixed is sixty-five cents per cubic yard; that a large amount of the excavation, required to be made in grading said several sections was of the material called in said article "hard clay mixed with gravel and detached stones," which proved to be much harder and more difficult to excavate than had been anticipated in consequence of which, by subsequent agreement, the price thereof was increased to twenty-three and a-half cents per cubic yard; that a large amount, also of the said excavation required to be made, in grading said several sections, was of the material called in said article "solid rock, requiring blasting or sledging;" that at the time of executing said article the said rock was principally covered and so situate that it was impracticable to discover its exact character, but it was supposed by the said parties to said article to be blue limestone, and the said price for the excavation thereof was fixed under that belief; but upon being uncovered and broken into the said rock proved to be principally "trap rock," containing "green stone," "hornblende" and compact, "feldspar," exceedingly hard, and very much more difficult and expensive to excavate than anticipated when said article was executed, the actual expense of excavating which proved to be at least eighty-five cents per cubic yard; in consequence of which, as your orator claims and believes he will be able to prove, the said Patrick agreed to increase the price thereof to at least eighty-five cents per cubic yard; that

in addition to the work and labor so as aforesaid done and performed by your orator and said Charles Tarrant jointly and by your orator alone, as aforesaid, your orator, at the request and according to the directions of the said Patrick, done and performed for him in and about the construction of the said Lebanon Valley Railroad, a very large amount of extra work and labor, and furnished therefor a large amount of material not embraced in said article of agreement, and for which no definite agreement as to price was made, but a just and reasonable compensation for which your orator believes and charges would be between eighteen thousand dollars and twenty thousand dollars; and that such compensation for said extra work, labor and materials, added to the compensation to your orator for the work, labor and materials so as aforesaid done, performed and furnished under said article of agreement, according to the prices therein specified and agreed upon and the said subsequent agreements increasing those prices, as aforesaid, for portions of said work and labor, would, in the aggregate, amount to the sum of four hundred and forty thousand dollars, as nearly as your orator can ascertain the amount of such compensation, for which your orator has been in part compensated, but no account thereof has been had or made.

And your orator further shows that from about the first day of October, eighteen hundred and fifty-four, to about the middle of May, eighteen hundred and fifty-five, in consequence of some monetary difficulties between the said Patrick and the said Lebanon Valley Railroad Company, the said Patrick was unable to meet the current expenses of construction, and arbitrarily suspended for nearly all that period of time the operations of your orator under the aforesaid article of agreement, by which suspension a very large number of laborers, then in the employ of your orator, and nearly all his horses and mules, then in use in prosecuting said work, were thrown out of employment, and the said horses and mules, numbering from forty to fifty, during all that time were left not only useless, but expensive upon the hands of your orator, thereby greatly damaging the said work and postponing its execution to a subsequent period, when labor and materials became and were

much higher than during the period of said suspension, whereby your orator was subjected to great expenses and sustained very heavy losses amounting as he believes, in the aggregate to not less than five thousand dollars, for which the said Patrick has never accounted to your orator, and which remain unsettled and unsatisfied.

And your orator further shows, that in the latter part of February, eighteen hundred and fifty-five, during the suspension of said work as aforesaid, the said Patrick requested and directed your orator to resume operations on the first day of the ensuing month of March, promising to furnish money sufficient to meet the estimates for the work of that and the ensuing month by the middle of May following, instead of at the middle of the said month of April, which would be the usual time of paying therefor; and requested your orator to make an agreement with the hands, in re-employing them, to postpone the payment of their March and April wages until the middle of May following; but your orator, being apprehensive that any such arrangement with the said hands would avail nothing when the usual time of payment should arrive, and might result in serious loss or damage, declined making any such arrangement with said hands until strongly urged thereto, and with the understanding that if any such loss or damage should occur, it should be borne by said Patrick; that with this understanding your orator resumed operations upon the said railroad on or about the first day of the said month of March, eighteen hundred and fifty-five, making with the hands employed for that purpose a specific agreement not to pay their wages for that and the ensuing month of April until the fifteenth day of the ensuing month of May, according to the aforesaid request and directions of said Patrick; that at the close of the month of April, notwithstanding the said agreement with said hands, they demanded the wages of that and the preceding month, and being unable to meet such demands, and the said Patrick failing to make the necessary advances for that purpose, the said hands, or some of them, tumultuously set fire to the stable and feed-house of your orator, then being used in conducting said operations, and consumed them, and nine mules, seriously injuring two others, and consumed also, a large

amount of harness, grain, feed, hay, straw and other stores and provisions of your orator in and about said stable and feed house, thereby occasioning a loss and damage of about two thousand six hundred dollars, for which your orator insists the said Patrick should account to your orator, but which remains wholly unsettled and unsatisfied.

And your orator further shows that in or about the month of October, eighteen hundred and fifty-five, while your orator was engaged as aforesaid, on the said Lebanon Valley Railroad, and being on terms of close friendship with said Patrick, and having entire confidence in his integrity, the said Patrick informed your orator that he had then lately made a purchase of a tract of land called "Greenwood," situate in Susquehanna County, in the State of Pennsylvania, containing about thirteen hundred acres, principally covered with heavy timber, for nine thousand dollars; that he had made the purchase mainly for the purpose of furnishing sills for the construction of the said Lebanon Valley Railroad; that the timber upon it would be of great advantage to him for that purpose, and would be more than sufficient to discharge the entire purchase money, so that at least the land itself would be a profit, and that as he was under many obligations of kindness to your orator he would, as some remuneration therefor, let your orator have one-half interest in said tract if your orator would take charge thereof and assist him in procuring sills therefrom and in sending them to the said Lebanon Valley Railroad; that so far as the purchase money thereof was concerned he, the said Patrick, would attend to its payment so that no part thereof would be required to be paid by your orator, for that the sills which would come to him with the other timber thereon would certainly pay off the purchase money as fast it would be required; that with this understanding and agreement between your orator and said Patrick your orator agreed to take an interest in the said tract, and to become the one-half owner thereof as tenant in common with said Patrick, and, very shortly thereafter procured and purchased a number of horses, mules, wagons and other articles for the purpose of commencing operations thereon; that having thus made preparations, in the following month of December, the said Patrick and your orator visited the said

tract for the purpose of procuring the conveyance thereof, and of commencing operations thereon; that upon producing the deed of conveyance; (which had been prepared under the direction of said Patrick) your orator discovered that it had been drawn to said Patrick alone as sole grantee of said tract, and upon your orator requesting that it should be altered so as to make both said Patrick and your orator grantees, the said Patrick suggested that instead of making such alterations it would be better to execute it as it was, conveying the tract in severalty to him, and that he would afterwards, when required, convey the one-half to your orator, to which your orator assented, and the said conveyance was, thereupon, made to said Patrick alone, but with the express understanding and agreement that he would at any time thereafter, when requested, convey to your orator the equal one-half part thereof without your orator paying any portion of said purchase money; that the title to said tract having been thus obtained your orator, in the execution of his part of said agreement, at once took charge of said tract and commenced cutting and having cut the timber thereon and converting the same into railroad sills and other lumber, and transporting the same to the said Patrick for his use, and so continued on for nearly two years during which time your orator sent, or had sent, to said Patrick about thirty-five thousand railroad sills of the value of seventeen thousand five hundred dollars, besides other lumber, the amount and value of which your orator is unable to state; and, at his own expense, your orator furnished for and used in said work a large number of horses, mules, wagons, carts, and other implements, and also feed, grain and other provisions and necessary things, expending therefor, and for labor, large sums of money, amounting in the aggregate, with a reasonable allowance to your orator for his own care and attention to said business, and for the use of said horses, mules, wagons, carts and other implements, to about seven thousand four hundred dollars, as nearly as your orator can estimate the same; that after the completion of the said Lebanon Valley Railroad and the consequent suspension of active operations upon said tract in the month of November, eighteen hundred and fifty-seven, your orator handed to said

Patrick all the books, papers and statements relating to the operations of your orator on said tract, as aforesaid, for the purpose of enabling him to make a full account of all matters relating to said tract, which books, papers and statements he has ever since retained, but has come to no account with your orator; that matters relating to said tract as between your orator and said Patrick remained in this condition until the month of May, eighteen hundred and fifty-eight, when the said Patrick, without having made any conveyance of the one-half of said tract to your orator, demanded of your orator twenty-five hundred dollars to aid in paying off the purchase money mortgage on said tract which your orator declined to furnish, not being then able to raise that sum without material sacrifice, and because it was contrary to the aforesaid original agreement between the said Patrick and your orator in reference to said tract and because the accounts relating thereto remained wholly unsettled; whereupon the said Patrick refused to convey the one-half of said tract to your orator and informed your orator that he had conveyed it to another person, but to whom your orator has not been informed; and has ever since refused, and now refuses to come to any account with your orator of and concerning said tract and your orator's interest therein, or for your orator's services and expenditures herein above stated in and upon said tract for which no settlement or satisfaction has yet been made with your orator.

And your orator further shows that as sub-contractor in constructing the Camden and Atlantic Railroad Company as hereinbefore stated, or in some other way, the said Patrick became largely interested in that company, and at his solicitation in the summer of eighteen hundred and fifty-five, your orator accepted the appointment of general superintendent of the road of that company and entered upon the duties of his said appointment on or about the first day of July, in that year, at a salary of three thousand dollars a year payable one half in cash and the other half in stock of that company at its par value; that in thus entering upon said duties your orator found the said company in a very embarrassed and insolvent condition without engines

sufficient for conducting their business, and without the ability to procure them, or even to hold them in their own name; that in order to sustain said company and thereby promote the interest of said Patrick and others largely interested therein your orator, shortly after entering upon the duties of his said appointment, at the instance and request of said Patrick, and of George W. Richards, the then president of said company, purchased three locomotive engines, one called the "Sea Gull," for and with the money of said Patrick, but in the name of your orator; and another called the "Petrel," for and with the money of the said George W. Richards, but in the name of your orator, and the third called the "Curlew" your orator purchased in his own name, but for himself and said George W. Richards, jointly two-thirds for said George and one-third for your orator, each paying therefor in that ratio; that having thus purchased said engines your orator, at the request and by the direction of the said Patrick and George W. Richards respectively, rented said three engines to said company in your orator's own name by leases in writing, submitted to and approved of by them respectively, under and by virtue of which leases the said three engines were placed upon the said road and used thereon until your orator on or about the first day of July, eighteen hundred and fifty-seven, resigned his said office of general superintendent, left the road and took with him said three engines and delivered them to the said owners thereof who accepted them and approved of your orator's action in the premises; that in so leaving and surrending up of said engines your orator acted according to the directions of said Patrick and said George W. Richards, as their respective agent or trustee, having no other interest in the said engines than the ownership of the one-third of said "Curlew" as hereinbefore stated; that your orator in nowise rendered himself liable for the collection or payment of the rent of said engines to either said Patrick or said George W. Richards; that the said lease for the said "Sea Gull" (owned as aforesaid by said Patrick) bears date and was executed on or about the twenty-fifth day of July, eighteen hundred and fifty-five is for the term of four years next thereafter at the rent of

one hundred and sixty-six dollars and sixty-six cents and two-thirds of a cent per month, as by reference thereto will more fully appear, and to which for greater certainty your orator prays leave to refer; that when your orator resigned his said office of general superintendent as aforesaid there was due to the said Patrick, in the name of your orator as lessor as aforesaid for rent of said "Sea Gull" the sum of three thousand eight hundred and thirty-three dollars and twenty-nine cents, and to the said George W. Richards, also in the name of your orator as lessor as aforesaid, for rent of said "Petrel," and for his aforesaid portion of said "Curlew," the sum of eight hundred and sixty dollars and thirty-one cents, and to your orator for his aforesaid portion of said "Curlew" the sum of twelve hundred and fifty-eight dollars and eighty-eight cents, and to your orator also for amount of his aforesaid salary as general superintendent of said road, the sum of five hundred and sixty-eight dollars and fifty-six cents; that for the several indebtedness, so as aforesaid due for the rent of said three engines, your orator, with the consent and for the benefit of said Patrick and George W. Richards, in the ratio of their said interests therein, instituted a suit in his own name in the District Court for the City and County of Philadelphia, in the State of Pennsylvania, against the said company, and reversed a judgment therein; and for the said indebtedness to your orator for arrears of salary your orator, in his own name and for his own use instituted another suit in said District Court against said company, and also recovered a judgment therein; that after having so obtained said two judgments in said District Court your orator, with like consent, instituted suits thereon in the Supreme Court of New Jersey against the said company, and on or about the seventeenth day of March, eighteen hundred and fifty-eight; recovered judgments thereon in the case brought to recover the rent of said engine, for the sum of six thousand two hundred and forty-three dollars and six cents, debt, damages and costs, and in the other case brought to recover the salary of your orator for the sum of six hundred and forty dollars and fifty-three cents, debt, damages and costs, as by reference to the records and proceedings in said courts will more fully and at large appear, and to

which for greater certainty, your orator prays leave to refer; that in obtaining said judgments, as aforesaid, and other legal proceedings connected therewith, your orator expended of his own money for counsel fees, costs, and expenses several hundred dollars, the precise amount of which he is unable to state; and that the said judgments, by reason of the continued insolvency of said company, remained wholly unpaid and unsatisfied, until compounded and settled as hereinafter stated.

And your orator further shows that in consequence of the absolute insolvency of said Camden and Atlantic Railroad Company, many other judgments were recovered against said company in suits at common law, and a bill of foreclosure was filed in this court upon a mortgage or mortgages executed by said company to procure the payment of their bonds and other proceedings were instituted in this court enjoining the said company from the prosecution of their business, and asking the appointment of receivers to take charge and dispose of the corporate franchises and assets of said company, pending which proceedings against said company both at common law and in equity the creditors of said company, with the advice and consent of the said Patrick and of said George W. Richards, and in part by their advice and procurement, agreed upon terms of settlement and composition with said company whereby your orator, for his said judgment of six hundred and forty dollars and fifty-three cents, and for the money expended by your orator, as aforesaid, for counsel fees, costs and expenses, was to receive in full satisfaction thereof the sum of one thousand dollars in cash, and for his said judgment of six thousand two hundred and forty-three dollars and six cents was to receive in full satisfaction thereof for himself and for the said Patrick and George W. Richards in the ratio of their aforesaid interests therein, the preferred stock of said company at the par value thereof your orator having, as he claims and believes he will be able to prove, full authority as well from the said Patrick as from the said George W. Richards to agree to such terms of settlement and composition, they being the same terms of settlement and composition which was agreed upon by all the other creditors of said company of

the same class, and were the best that could be affected, and were, as your orator believes the only means of securing anything of value for said debts.

And your orator further shows that on or about the second day of April, eighteen hundred and sixty, in carrying into execution the aforesaid terms of settlement and composition the said company paid your orator the said sum of one thousand dollars in full satisfaction of his said judgment for arrears of salary, and for said counsel fees, costs and expenses, and issued to your orator in full satisfaction for the said judgment for rents of said three engines a certificate for one hundred and thirty-three shares of the preferred stock of said company, amounting, according to the par value thereof, to the sum of six thousand six hundred and fifty dollars ; that of the said preferred stock, so as aforesaid issued, part thereof to the amount of four thousand four hundred and nineteen dollars and ninety-five cents, belonged and still belongs to the said Patrick O'Reilly for his portion of interest in the said judgment for rent of said engines, nine hundred and ninety-two dollars and sixteen cents ; another part of said preferred stock, belonged and still belongs to said George W. Richards for his portion of interest in the said judgment; and the residue of said preferred stock amounting to twelve hundred and thirty-seven dollars and eighty-nine cents, belonged and still belongs to your orator for his portion of interest in the said judgment, as hereinbefore stated and set forth ; that at the time of issue said certificate of stock to your orator and still your orator owned and held other preferred stock in said company, amounting, to the par value thereof, to the sum of three thousand dollars.

And your orator further shows that on the said second day of April, eighteen hundred and sixty, (the same day on which the said certificate for the preferred stock was issued to your orator as aforesaid), the said Patrick made and filed an affidavit in the Circuit Court, in and for the County of Camden, that your orator did not reside in the State of New Jersey, and owed to him the sum of six thousand dollars, as nearly as he could ascertain the amount thereof, and thereupon caused a writ of attachment in a plea of trespass on the case upon promises, to be issued out of said

Circuit Court for the sum of twelve thousand dollars damages, tested the said second day of April, returnable to the first day of May, eighteen hundred and sixty, against the goods and chattels, rights and credits, moneys and effects, lands and tenements of your orator in the said County of Camden; that on or about the day of the issue of said writ of attachment it was delivered to Charles Wilson, Esq., then Sheriff of the said County of Camden, to be executed, who, thereupon, on the third day of the said month of April, attached, or attempted to attach, all the aforesaid stock of your orator in the said Camden and Atlantic Railroad Company, and with the assistance of one Isaac P. Wilson, appraised the same at the sum of six thousand dollars, your orator having no other property in said county to be attached, and on or about the said return day of said writ returned the said writ into said Circuit Court with the inventory and appraisement of the said stock annexed thereto, as by reference to the records, files and proceedings thereof in the said Circuit Court will more fully appear, and to which your orator for greater certainty, refers.

And your orator further shows, and claims the truth to be, that he is in nowise indebted to the said Patrick in the sum of six thousand dollars, as sworn to by him in his aforesaid affidavit, or in any other considerable sum of money; on the contrary that upon a just and fair account between your orator and the said Patrick, he, the said Patrick, is, and would thereby appear to be very largely indebted to your orator; that your orator has not been informed and is not able to state upon what ground it is that the said Patrick claims that your orator is indebted to him in the sum stated in said affidavit; that the only item of indebtedness, on the part of your orator to the said Patrick, of which your orator has any knowledge or recollection, outside of the unsettled accounts, hereinbefore stated (the balances, in which your orator believes and claims are very largely in favor of your orator) consists in a promissory note for ten hundred and ninety-six dollars and ninety-seven cents or thereabouts, which on or about the seventh day of October, eighteen hundred and fifty-seven, your orator gave to said Patrick, for a balance of that amount,

then in your orator's hands, from several sums of money, which said Patrick had theretofore given to your orator for specific purposes, and which proved to be more than sufficient for those purposes, a statement or memorandum of which, called a "private account" between your orator and said Patrick, your orator presented to him at the time of giving him said promissory note, and took from said Patrick a certificate or statement in writing (now in the possession of your orator) that said statement or memorandum was correct, and related only to said specific purposes; which said promissory note was so given as a memorandum note, not to be separately paid by your orator, but as an item of indebtedness on the part of your orator in a settlement of the then unsettled accounts, between your orator and said Patrick; that, on the same day, and at the same time that your orator gave said promissory note, said Patrick gave your orator four promissory notes for moneys which your orator had before then expended for said Patrick, in nowise connected with any of the transactions or accounts hereinbefore stated, and for which he was then jointly indebted to your orator two of which four promissory notes were for five hundred dollars each or thereabouts, are due and wholly unpaid and are now owned by your orator; and the other two of said notes were for between four and five hundred dollars each (the exact amounts not remembered) one of which was subsequently paid by said Patrick to your orator, and the other was negotiated by your orator and has long since been due, but whether actually paid by said Patrick, your orator is not informed; that the said Patrick is now justly and honestly indebted to your orator for the amount of the principle and interest of said two five hundred dollar notes over and above any balances that may be due your orator, on the aforesaid unsettled accounts between your orator and him; that the said attachment suit against your orator is still pending in said Circuit Court; auditors have been appointed, and two defaults therein have been recorded, and the said Patrick threatens to obtain a report of auditors, and proceed to judgment thereon, and to a sale of said stock, attached as aforesaid; and your orator believes that he will thus proceed unless restrained therefrom by this Honor-

able Court; that your orator is a non-resident of the State of New Jersey, and unable to procure the security required by law to dissolve said attachment and let your orator into a defence, even if the matters thereinbefore stated could be made available in defence thereto, but your orator is advised, and believes that they cannot nor except in a Court of Equity; that the said Patrick is not only a non-resident, and without the jurisdiction of the Courts of this State, but as your orator is advised and believes is greatly embarrased and insolvent in his circumstances, so that if suffered to obtain an *exparte* judgment in his said attachment suit and do dispose of said stock attached, your orator would be wholly without redress for the irreparable loss which he would thereby sustain; and your orator, therefore, respectfully submits that the further prosecution of said writ of attachment should be restrained, and that the said Patrick should be compelled to account to your orator in all the matters hereinbefore stated.

And your orator further shows that he has long and repeatedly urged the said Patrick to account with your orator, and has frequently, and in a friendly manner, in person and by letter, applied to him to desist from prosecuting said attachment, and to come to an account with your orator of and concerning the matters aforesaid, and to pay your orator whatever, upon such accounting, should be found coming to your orator, and your orator well hoped that the said Patrick would have complied with such reasonable requests as in equity and good conscience he ought to have done; but now, so it is, may it please your Honor, that the said Patrick, combining and confederating with divers other persons at present unknown to your orator, but whose names when discovered your orator prays may be inserted in this his bill of complaint, with apt and proper words to charge them, as defendants hereto, to injure and aggrieve your orator in the premises, not only refuses to desist from the prosecution of said writ of attachment, and to come to an account with your orator of and concerning the matters aforesaid, or in any other manner to comply with the aforesaid reasonable requests of your orator; but the said Patrick sometimes pretends that he did not employ your

orator to take charge of the construction of the said Camden and Atlantic Railroad and said Lebanon Valley Railroad at the salary and in the manner hereinbefore stated, and that your orator did not so take charge thereof; that your orator and said Charles Tarrant did not make and enter into the aforesaid article of agreement for the grading and masonry of the aforesaid thirteen sections of said Lebanon Valley Railroad, at and for the prices therein stated; that the prices were not subsequently increased by agreement, as hereinabove stated; that the said Charles did not abandon and assign his right and interest in said contract to your orator, and that your orator has no authority himself to demand compensation therefor; that the said grading and masonry of said thirteen sections were not constructed as stated nor the said extra work and materials done and furnished, and if so that the proper compensation therefor is not the amount stated; that the said work done under said article of agreement was not suspended or the aforesaid loss thereby occasioned; that he is under no obligation to account for the loss and damage sustained by the setting fire to and consuming the said stable and feed house, and the horses, mules, grain, feed and other articles; that your orator never had or acquired any interest in the said tract of land called "Greenwood," or expended the labor and money hereinabove stated to have been expended by him in and about said tract, or had the charge thereof; that your orator did not purchase the said three engines and lease them as aforesaid, nor prosecute and recover judgments for the rent thereof as stated; that your orator is indebted to him in the aforesaid sum of six thousand dollars and that he has a right to prosecute the said writ of attachment, and ought not to be restrained therefrom; that he is in nowise indebted to your orator, and that the accounts and transactions aforesaid, so far as they ever occur, have been accounted for and settled by him; and that he ought not to account further or otherwise therefor. Whereas, your orator expressly charges the contrary of all such pretences to be true; all which actings, doings and pretences of the said Patrick are contrary to equity and good conscience, and tend to the manifest wrong, injury and oppression of

your orator; in tender consideration whereof, and for as much as your orator is without adequate remedy in the premises by the strict rules of the common law, and without the assistance of this Honorable Court, where matters of this nature are properly cognizable and relievable.

To the end, therefore, that the said Patrick, and his confederates when discovered, may, upon their several oaths or affirmations, full, true, perfect and distinct answer make to all and singular the matters aforesaid, and that as fully as if the same were here again repeated, and they thereto particularly interrogated paragraph by paragraph; and that the said Patrick may be enjoined from further prosecuting his said writ of attachment, and, that he may be decreed to come to an account with your orator for, and of and concerning all and singular the matters of account hereinbefore set forth, and particularly that he may be decreed to come to an account with your orator for all the work, and labor, and materials done, performed and furnished in and about the construction of the said Lebanon Valley Railroad, either by your orator alone, or in connection with said Charles Tarrant; and for the losses and damages sustained by your orator by the aforesaid suspension of his operations on said Lebanon Valley Railroad, and for the loss and damage sustained by the burning of said stable, feed-house, mules, horses, wagons and other articles; and for all the moneys, services, stock, materials expended, done, furnished and provided in and upon the said tract of land called Greenwood, "and for all your orator's interests therein," and for all the said matters appertaining to and connected with the purchase and leasing said three locomotive engines, "Sea Gull," "Petrel," and "Curlew," and for the said two promissory notes of or about five hundred dollars each; and for all other matters of indebtedness of said Patrick to your orator—your orator hereby offering and tendering himself willing and ready to account for all matters of indebtedness on his part to said Patrick, and that said Patrick may be decreed to pay to your orator all and every sum and sums of money that upon such accounting may be found due and owing hy him to your orator; and that your orator may have such further and other relief in the premises

as the nature of the case may require, and as may be agreeable to equity and good conscience.

May it please your Honor, the premises considered, to grant unto your orator not only the State's writ of injunction issuing out of and under the seal of this Honorable Court, to be directed to the said Patrick O'Reilly, his counsellors, attorneys, solicitors, agents, and all other persons acting under him or by his authority, or direction, commanding them and each and every one of them, absolutely and entirely, to desist and refrain from all further prosecution of, or proceeding in, the said writ of attachment, in the Circuit Court in and for the County of Camden, wherein the said Patrick O'Reilly is plaintiff, and your orator is defendant, in a plea of trespass on the case, etc.; but, also, the State's writ of subpoena to be directed to the said Patrick O'Reilly, therein and thereby commanding him at a certain day, and under a certain penalty therein to be expressed, personally to be and appear before your Honor in this Honorable Court, then and there to answer the premises, and to stand to abide and perform such decree as to your Honor shall seem meet, and as may be agreeable to equity and good conscience; and your orator as in duty bound will ever pray, etc.

A. BROWNING,
Sol'r for and of Counsel with Compl't.

T. P. CARPENTER,
Counsel, Etc.

NEW JERSEY, CAMDEN COUNTY, ss:

John H. Osborne, of Bucks County, in the State of Pennsylvania, the complainant mentioned in the above bill of complaint against Patrick O'Reilly, the defendant therein named, being of full age, maketh oath and saith, that the fact, matters and things set forth and contained in said bill of complaint, so far as they relate to the acts and deeds of this deponent are true, as therein stated and set forth; and, that so far as they relate to the acts and deeds of

any other person or persons, he, this deponent, believes them to be true.

(Signed) JNO. H. OSBORNE.

Sworn and subscribed at Camden, this twenty-sixth day of January, A. D. 1861, before me one of the Masters in Chancery of New Jersey.

S. H. GREY, *M. C. C.*

10

IN CHANCERY OF NEW JERSEY.

BETWEEN	
JOHN H. OSBORNE,	
Compl't,	ON BILL, &c.,
AND	ANSWER.
PATRICK O'REILLY,	
Def't.	

The answer of Patrick O'Reilly, defendant, to the bill of complaint of John H. Osborne, complainant.

This defendant now and at all times hereafter saving and reserving unto himself all and all manner of benefit and advantage of exception which can or may be had or taken to the many errors, uncertainties and insufficiencies in the complainant's said bill of complaint contained, for answer thereunto, or unto so much and such parts thereof as this defendant is advised is or are material or necessary for him to make answer unto, he answers and says: that the said complainant, as this defendant has been informed and believes, was superintendent of the Richmond and Danville Railroad, in the State of Virginia, in or about the year eighteen hundred and fifty-three, and the defendant admits that at or about the said time he, this defendant, was engaged as a sub-contractor in the building and construction of

the Camden and Atlantic Railroad, in the State of New Jersey, and that this defendant, at or about the time stated in said bill, did write to the said complainant to come to New Jersey and take charge of the building of the said Camden and Atlantic Railroad for and under this deponent, at the salary of three thousand dollars per year; and this deponent wrote to the said complainant and made the proposals aforesaid, at the special instance and request of Richard B. Osborne, the brother of said complainant, who at that time was chief engineer of the said Camden and Atlantic Railroad, and chief contractor for constructing the same; and this deponent further admits that the said complainant, on or about the seventh day of August, eighteen hundred and fifty-three (the time mentioned in said bill) took charge of the building and construction of the Camden and Atlantic Railroad, under and for this defendant, and continued in charge thereof up to the time of the completion of the same, in or about the month of July, eighteen hundred and fifty-four.

And this defendant further answering admits that during the time the said complainant had charge for this defendant of the building and construction of the said Camden and Atlantic Railroad, the said complainant received from this defendant and from Richard B. Osborne, the chief engineer of said railroad company, and from said railroad company or other persons, for, and on account of this defendant, large sums of money for the purpose of paying for labor, material and expenses necessary and incurred in the construction of said railroad by this defendant, and that the said complainant paid out and disbursed large amounts of said moneys thus received for the labor, materials and expenses necessary and incurred in the building of said railroad, and this defendant is unable to state with accuracy the full amounts of moneys received or disbursed by said complainant for the building and constructing of said railroad, said complainant still retaining in his possession a great many of the accounts relating thereto and refusing to come to any detailed account with this defendant of and

concerning the moneys received and disbursed by the said complainant for or on account of this defendant towards the building and construction of said railroad, and this defendant believes that the amount of money received by the said complainant for and on account of this defendant, as aforesaid, is one hundred and twenty thousand dollars, as is in said bill stated.

And this defendant, further answering, avers, states and charges that the amounts of moneys received by the said complainant for and on account of the building and construction of the said "The Camden and Atlantic Railroad" greatly in excess of the amounts of disbursements made by said complainant for the purpose aforesaid, and that the said complainant is indebted to this defendant in large sums of money, received as aforesaid by said complainant, and that this defendant hath frequently applied to and requested said complainant for a detailed statement of the moneys received and disbursed by him for the building and construction of said railroad, and that the complainant neglects and refuses to furnish or render to this defendant any detailed statement or account of said moneys, and that the said complainant has always refused to give any detailed or other account of the moneys received and disbursed by him as aforesaid, except that on one occasion said complainant handed to this defendant a statement of a part of the moneys received and disbursed by him as aforesaid, a copy of which said statement is hereto annexed, and marked schedule "A," and which this defendant prays may be taken as part of this his answer, from which statement it appears that there is due to this defendant from the said complainant the sum of one thousand and ninety-eight dollars and ninety-seven cents, and this defendant avers and charges that by an error upon the face of said account or statement, the balance, instead of the amount above stated due this defendant, should be three thousand four hundred and forty-five dollars and seventy-six cents; and that the said complainant has not in any manner paid or satisfied to this defendant the amount of money admitted to be due by the aforesaid statement nor any part thereof, and that the same is still due to

this defendant, together with other large sums of money received by said complainant, as aforesaid, and not in any way paid out or disbursed by said complainant for or on account of this defendant.

And this defendant, further answering, admits that while the said complainant was engaged superintending the building and construction of the said Camden and Atlantic Railroad for this defendant, as aforesaid, the said complainant was employed by this defendant to assist in the construction and grading of the Lebanon Valley Railroad, and that while the said complainant was thus employed by this defendant, to wit, on or about the twenty-fourth day of April, eighteen hundred and fifty-four, the said complainant and one Charles Tarrant entered into an agreement with this defendant in writing, duly executed under the hands and seals of the said complainant and said Charles Tarrant and this defendant for the construction and finishing the grading and masonry of thirteen adjoining sections, of a mile each, of the Lebanon Valley Railroad, that is to say, sections from No. 14 to No. 26, both inclusive, and that the said contract contains, among other things, in substance, the conditions, provisions and prices set forth in said bill of complaint, which said agreement, or the counterpart thereof, this defendant is ready to produce and prove, as this Honorable Court shall or may direct.

And this defendant admits that the said complainant and the said Charles Tarrant, under the name of Tarrant & Co., entered upon the construction and grading of the said sections of the Lebanon Valley Railroad, and that the said Charles Tarrant afterwards, with the knowledge of this defendant, abandoned his interest therein and that the said complainant afterwards, with the knowledge of this defendant, continued the work under said contract by the name of Tarrant & Co., and would have been entitled to the compensation for said work upon its completion in accordance with the provisions of said contract.

And this defendant further answering shows that by a provision of said contract the same was not to be binding until signed and sealed by the parties and

attested by the signature of the chief engineer of the said Lebanon Valley Railroad; that Richard B. Osborne, brother of said complainant, was chief engineer of said railroad, and signed and attested said contract; that it was through and by the persuasion and representation of said chief engineer that this defendant was induced to contract with the said Charles Tarrant and the complainant for the construction of said sections of said railroad, he, the said chief engineer, representing that said Tarrant had great experience in railroad work and had ample means for carrying on and completing the contract, and that the said Charles Tarrant and the complainant would be abundantly able to carry out and complete the work specified in said contract in the time and manner therein required; that after the said contract was signed by the parties and approved by said chief engineer, as aforesaid, the said Charles Tarrant and the complainant were wholly unable to obtain the necessary stock and implements to effectively prosecute the work under their contract, and that this defendant, at the special instance and request of the said Charles Tarrant and the complainant, together with the request of the said chief engineer, furnished them with horses, mules, railroad cars, carts, barrows and other necessary stock and implements for that purpose, amounting to the sum of nine thousand and twenty-six dollars and ninety-eight cents ($9026.98), which sum the said parties agreed to repay to this defendant; but this defendant states and shows that the said Charles Tarrant and the complainant, before the said Charles Tarrant left the said work and gave up his interest under the said contract, as aforesaid, did not, nor has the said complainant, or the said Richard B. Osborne, or any other person since that time, or at any other time, paid or satisfied to this defendant the said sum of nine thousand and twenty-six dollars and ninety-eight cents, due as aforesaid, and that the same is still due and owing, and wholly unpaid to this defendant, together with large arrearages of interest accruing thereon.

And this defendant further answering admits that the prices fixed in the above contract for the several kinds of material mentioned in said bill were for "hard clay, mixed with

gravel and detached stones," twenty-two cents per cubic yard; for "solid rock requiring blasting or sledging," sixty-five cents per cubic yard, as in said bill stated, and this defendant admits that afterwards, by and with the consent and approval of the said Richard B. Osborne, the chief engineer of said railroad, as aforesaid, this defendant agreed to increase the prices for the excavation of the above named materials, as follows, viz: for excavating hard clay, mixed with gravel and detached stones, twenty-three and a half cents per cubic yard; for solid rock requiring blasting or sledging, seventy-three cents; and that, in accordance with said last mentioned agreement, all the work done by the complainant under said contract was estimated by the chief engineer at the prices last aforesaid, and that this defendant paid to the said complainant all the said several estimates made by the said chief engineer, as aforesaid; but this defendant does not admit that, in consequence of the hard rock requiring blasting and sledging, proving very much more difficult to excavate than anticipated, this defendant agreed to increase the price thereof to eighty-five cents per cubic yard, and this defendant denies that an agreement was made at any time between this defendant and the said complainant, or between this defendant and the said complainant and Charles Tarrant, by which the price for the excavation of hard rock requiring blasting and sledging was increased to the sum of eighty-five cents per cubic yard, and this defendant denies that said rock requiring to be excavated under said contract, on being uncovered, proved to be harder or more difficult and expensive to excavate, or materially different from what was anticipated when said contract was executed. And this defendant further says that if the pretended agreement to increase the price of said excavation had been entered into, the same would have constituted a mere voluntary agreement without any consideration proceeding from the said complainant, which this Court would not, as this defendant humbly insists, enforce, and this defendant prays the same benefit of this exception as though he had demurred to so much of said bill of complainant as sets up said pretended agreement.

And this defendant further answering, admits that the said complainant, in the construction and finishing the said sections of the said Lebanon Valley Railroad, did an amount of extra work and labor, and furnished therefor materials, but this defendant denies that a just and reasonable compensation for said extra work and materials done, performed and furnished by the said complainant would be between eighteen thousand dollars and twenty thousand dollars, as is in said bill alleged, and this defendant further shows that by the said contract or agreement for the construction and finishing the said sections of the said Lebanon Valley Railroad, made by the said complainant and Charles Tarrant, with this defendant as aforesaid, it was expressly provided "that when the work should be increased by the "enlargement of any part of the same, or by any contingent "work which said engineer might deem necessary to "facilitate the execution or render the work in any par-"ticular point conformable to local circumstances beyond "what was contemplated in said contract, such increase or "contingent work should be paid for at the same rate "as similar work therein contracted for, or if not "similar to work therein contracted for, it should "be paid for as an extra item according to the "estimate of the engineer," and that in accordance with this provision of the said contract, and with the knowledge and consent of the said complainant, and as, this defendant believes and charges, at the special request of the said complainant, the said Richard B. Osborne, the brother of the complainant, and the engineer-in-chief of the said Lebanon Valley Railroad, estimated the extra work and materials done, performed and furnished by the said complainant, as aforesaid, at the sum of ten thousand one hundred and two dollars and ten cents, and this defendant states, avers and charges that the said final estimate for the said extra work and materials done, performed and furnished, as aforesaid, by the said complainant was a large and liberal one, and this defendant denies that the said complainant was entitled to compensation for the work and labor done and performed and materials furnished under said contract,

as aforesaid, and the said extra work and materials performed and furnished, as aforesaid, to the sum of four hundred and forty thousand dollars, or about that sum, as is in said bill alleged, but this defendant shows to the Court here and states that by the final estimate of said work and labor done and performed and materials furnished under said contract by the said complainant and Charles Tarrant, before said Charles Tarrant left said work, as aforesaid, and by said complainant after said Charles Tarrant left said work, as aforesaid, made in accordance with the provisions of said contract by Richard B. Osborne, the brother of the complainant, and engineer-in-chief of said Lebanon Valley Railroad, the whole amount of work and labor done and materials furnished under said contract was the sum of four hundred and twelve thousand nine hundred and ninety-three dollars and thirty-five cents, and the whole amount of extra work done and materials furnished was the sum of ten thousand one hundred and two dollars and ten cents, as aforesaid, and that this defendant has paid the said complainant for the whole amount of work and labor done and materials furnished under said contract, and for extra work, as aforesaid, and that the said complainant was largely overpaid by this defendant for said work and labor done and materials furnished as is hereinafter more particularly set forth; and that this defendant has at all times been ready and anxious to account with said complainant for said work and labor done and materials furnished, and has repeatedly applied to said complainant to account with this defendant for said work and labor done and materials furnished, as aforesaid, and for said complainant to pay to this defendant the moneys overpaid to said complainant by this defendant, but that the said complainant has always refused, and still refuses, to account with this defendant, or to pay to this defendant the moneys overpaid to him by this defendant, as aforesaid.

And this defendant further answering admits, that there was a partial suspension of the work on the said Lebanon Valley Railroad from about the first day of October, eighteen hundred and fifty-four, to about

the month of May, eighteen hundred and fifty-five, in consequence of the said railroad company being unable to raise the money necessary to carry on said work. And this defendant further answering shows to the Court and states that the said complainant had full, actual and complete notice of the difficulties of the said railroad company and of the inability of the said railroad company to raise or procure the money necessary to carry on said work, and was informed thereof by this defendant, and that under the circumstances this defendant would probably not be able to raise money sufficient to pay him, the said complainant, the monthly estimates for all the work he might do under the said contract with his then force of hands, &c., and that if he, the said complainant, saw fit under the circumstances to throw up or abandon his said contract, this defendant would fully pay him for all the work done under the said contract and fully compensate him, the said complainant, from any and all loss or damage that might arise by reason of the non-completion of the said contract, and that the said complainant, with full knowledge of all the facts, was willing and anxious to retain said contract and agreed to and did retain the same, subject to the liability of the said railroad company and this defendant to make default to pay in cash each month for the amount of work that might be done under said contract, and the said complainant agreed to and did continue his work under his contract with a greatly reduced force of hands, &c.; and this defendant further shows to the Court and states that the work of the said complainant was not at any time entirely suspended between the said first day of October, eighteen hundred and fifty-four, and the month of May, eighteen hundred and fifty-five; and that this defendant, at a great sacrifice, raised and obtained large sums of money to pay and did pay said complainant for work done by him under said contract during said time; and that said complainant drew, and was paid by this defendant each and every month during said alleged partial suspension, the amount of the monthly estimates made by the chief engineer of the said railroad company of the work done by said complainant under said contract, as

aforesaid; and this defendant further states and shows that in and by the said contract made by and between the said complainant and the said Charles Tarrant and this defendant, as aforesaid, it was expressly agreed that, "to pre-"vent disputes, the said engineer should in all cases decide "every question which could or might arise relative to the "execution of said contract on the part of said contractor, "and that his decisions should be final and conclusive and "without appeal," and that in accordance with the aforesaid provisions of the said contract, and with the knowledge and consent and at the special instance and request of the said complainant, Richard B. Osborne, the brother of the said complainant, and engineer-in-chief of the said railroad company, in his final or last estimate of the work done and materials furnished under said contract, estimated the amount of damages and loss sustained by the said complainant, for and on account of the partial suspension of the work under said contract, and allowed to the said complainant for horse feed and expenses, &c., during the time of said alleged partial suspension, the sum of two thousand five hundred dollars, which sum was fully paid to said complainant by this defendant; and this defendant avers, states and charges that the allowance of two thousand five hundred dollars made to said complainant by said engineer and paid by this defendant, as aforesaid, was and is a full, ample and complete compensation and allowance for any and all damages, expenses or losses sustained by the said complainant, for or on account of his said alleged partial suspension of the work on said railroad under said contract, and this defendant denies that the said complainant has any other or further claim upon him for or on account of any damages, expense or loss alleged to have been sustained by said complainant on account of said alleged partial suspension of said work.

And this defendant further answering, shows and states that sometime in the month of February, in the year eighteen hundred and fifty-five, or about the first of March of that year, and during the alleged partial suspension of work on said railroad, as aforesaid, the said complainant informed this defendant that Richard B. Osborne, the

engineer-in-chief of the said railroad company, had told him, the said complainant, that certain bonds of the said "The Lebanon Valley Railroad Company" to a large amount were about being negotiated, and that the said engineer-in-chief wished this defendant to increase the forces and number of hands employed on the sections of said railroad, included in the contract of the said complainant, as aforesaid; that the said company would be able to furnish the requisite money and funds for such increase of forces in the month of May then following, and that the said engineer-in-chief had made, or would make, arrangements with the treasurer of the said railroad company to advance to this defendant sufficient moneys to meet the exigencies of such increased number of hands and forces at the time specified, as aforesaid; on the expectation of the negotiation of the said bonds, as aforesaid, and that he, the said complainant, depending and relying on the aforesaid representations of the said engineer-in-chief of the said railroad company, and in accordance with the wishes of the said engineer-in-chief, would increase his forces and the number of men he had employed doing the work under said contract, and that as his credit was then much better than it had been he would be able to get along until the time specified by said engineer-in-chief for the payment of said money by said railroad company, and that he, the said complainant, would take all responsibility and risk of increasing said forces and number of men employed, and that, accordingly, the said complainant, on or about the first day of March, eighteen hundred and fifty-five, did increase his forces and add to the number of men employed by him upon the said work under said contract; and this defendant denies that the said force employed by the said complainant upon said work under said contract was increased on or about the first day of March, eighteen hundred and fifty-five, at the request of this defendant, or that he, this defendant, agreed to furnish money sufficient to meet the monthly estimates of the work to be done by said increased forces employed by the complainant for the months of March and April, eighteen hundred and fifty-five, by the middle of the month of May, then following,

and this defendant denies that he authorized the said complainant, or any other person or persons, to make an arrangement or agreement with any hands or men employed by the said complainant to postpone the payment of their March and April wages for the year eighteen hundred and fifty-five until the middle of the month of May following, or to any other time, and this defendant denies that there was any agreement or understanding by and between the said complainant and this defendant that he, this defendant, should bear any loss or damage that might accrue or occur from or by means of any rebellion, riot or tumult that might arise among the hands or employees of the said complainant by reason of their not being paid their wages when the usual times of payment should arrive, and this defendant states and avers that the hands employed by the said complainant, at or about the first day of March, eighteen hundred and fifty-five, were employed only at the instance of the said complainant, as above set forth, and that the said complainant employed said men and hands on his own responsibility and at his own risk, and that while it may be true, as set forth in said bill, that a rebellion, riot or tumult did arise or occur among the hands or men employed by the said complainant, at or about the time set forth in the said bill of complaint, and that they did destroy the property of the said complainant, as set forth in said bill of complaint (though the said amount and value of the property destroyed this defendant does not know, except as stated in said bill of complaint, and cannot state as to his belief), yet this defendant denies that he is in any way or form accountable, responsible or liable for said property or the value thereof, or for any damages that might arise from the destruction thereof, or any part thereof.

And this defendant further answering, states and shows to the Court here that in and by the said contract made and entered in by the said Charles Tarrant and the complainant with this defendant, it was, among other things, provided and agreed that the chief engineer of the said railroad company should in all cases determine the amount or quantity of the several kinds of work which was to be paid for

under said contract, and the amount of compensation at the rates therein provided for; that the standard of measurement for graduation, masonry and brick work should be by the cubic yard; that in calculating the quantities of masonry, walling and excavation, the most rigid geometrical rules were to be applied thereto, any custom to the contrary, notwithstanding; that the prices specified in said contract were to be full compensation for all materials and labor required to put the same into the work therein contracted for, and to complete the same in all respects as provided for, in said contract; that in order to enable the contractor to prosecute his work advantageously the engineer should make an estimate once per month as the work progressed of the work done; said estimate not to be required to be made by strict measurement on unfinished work, but by measurement and estimation, so as to obtain an approximate result of the work done, and its value under said contract as compared with the whole contract; and that the said chief engineer should certify to this defendant the amount due under the contract, which should be ninety-three per cent. of the estimated value of the work performed; that the remaining seven per cent. should be retained by this defendant as a guarantee for the faithful performance of all the stipulations and conditions in said contract contained; that this defendant should pay to said contractor the amount of said certificates of said chief engineer on presentation; and further that the said contract should be considered duly complied with, when the said chief engineer should certify in writing to the same, and then, and not till then, should this defendant be liable for the payment of the final balance and percentage due on account of said contract; that Richard B. Osborne, the brother of the said complainant and engineer-in-chief of the said railroad company, from time to time made monthly estimates in writing as the work progressed, of the work done under said contract by the said complainant and Charles Tarrant, and by the said complainant after the said Charles Tarrant left said work, as aforesaid, and certified to this defendant the amount due to said complainant, and said Charles Tarrant and to

said complainant, as aforesaid, for work done in accordance with said contract at the prices specified in said contract, except that the price for excavating and removing "hard clay, mixed with gravel and detached stones," and for excavating "solid rock requiring blasting or sledging," were respectively estimated at the prices of twenty-three and a half cents and at seventy-three cents per cubic yard, in accordance with the subsequent arrangements between the said complainant and this defendant, as above set forth; that this defendant, having no means of ascertaining or knowledge of the truth of said current or monthly estimates of said work done by the said complainant and Charles Tarrant, and by said complainant after said Charles Tarrant left said work, as aforesaid, except the certificate of the said engineer-in-chief, supposed the same to be correct, or as nearly so as they could be made, and that the amounts certified by said engineer-in-chief in said current or monthly estimates to be due to the said complainant and Charles Tarrant, and to the said complainant, as aforesaid, were from time to time paid by this defendant to the said complainant and the said Charles Tarrant, while the said Charles Tarrant was engaged with said complainant, and after said Charles Tarrant left said work, as aforesaid, were paid to said complainant; that by the last of said monthly or current estimates made by said engineer-in-chief, taken on the last day of September, eighteen hundred and fifty-seven, and dated and certified by said engineer-in-chief on or about the eleventh day of November, eighteen hundred and fifty-seven, the amount of work estimated to have been done by said complainant, and the amount certified by said engineer to be due said complainant for work done under said contract, was four hundred and thirty-five thousand nine hundred and seventy-six dollars and five cents, and that the full amount of said estimates was fully paid by this defendant to the said complainant, and the said Charles Tarrant or to the said complainant after the said Charles Tarrant had left said work as aforesaid, except two promissory notes of five hundred dollars each, dated on or about the seventh day of October, eighteen hundred and fifty-seven, which

were not paid, as will be hereafter shown; that this defendant, believing the said monthly or current estimates of the said engineer-in-chief to be correct and true, and that under the said contract this defendant was and had been paying but ninety-three per cent. of the amount or value of said work done under said contract, as therein specified, this defendant, at the earnest request of the said complainant, and in order to aid and assist the said complainant in his general business, advanced and paid to said complainant, on account of the money supposed to be remaining due under said contract, and in accordance with the provisions thereof, other large sums of money amounting to the sum of eleven thousand one hundred and eighty-four dollars and forty cents, making the whole amount paid by this defendant to the said complainant and Charles Tarrant and to the said complainant, as aforesaid, on account of said contract to be four hundred and forty-seven thousand one hundred and sixty dollars and forty-five cents; that afterwards, on or about the fifth day of January, eighteen hundred and fifty-eight, the said engineer-in-chief made his last or final estimate of the work done under said contract by said complainant and Charles Tarrant, and by said complainant, after said Charles Tarrant had left said work, as aforesaid, by actual measurement in accordance with the said contract, and thereby certified to this defendant that the full value of all the work done under said contract, as aforesaid, and the full amount of compensation to which the said complainant was entitled for all work done and materials furnished under said contract, at the rates therein specified and afterwards agreed upon between the said complainant and this defendant, as aforesaid, amounted to but the sum of four hundred and twelve thousand nine hundred and ninety-three dollars and five cents, and that in consequence of said erroneous current or monthly estimates of said work made by said engineer-in-chief, this defendant had overpaid the complainant the sum of thirty-four thousand one hundred and sixty-four dollars and ten cents, or if we add to the said final estimate the sum of ten thousand one hundred and two dollars and ten cents, the amount estimated by

said engineer-in-chief, and allowed to said complainant for extra work and materials done and furnished, as aforesaid, this defendant has overpaid the said complainant, for and on account of work done and materials furnished on said railroad, the sum of twenty-four thousand and sixty-five dollars and thirty cents less; and this defendant charges, states and avers that the said sum of twenty-four thousand and sixty-five dollars and thirty cents overpaid to the said complainant, as aforesaid, as well as the sum of nine thousand and twenty-six dollars and ninety-eight cents, due to this defendant for horses, mules, cars, carts, barrows and other necessary stock and implements furnished said complainant, as aforesaid, together with large arrearages of interest, still remain wholly due and unsatisfied to this defendant from the said complainant, and that this defendant has frequently requested said complainant to pay to this defendant the said several amounts of money, with interest thereon, due to this defendant, as aforesaid; and this defendant denies that the said complainant has been but in part paid or compensated for the work done by him upon the said Lebanon Valley Railroad, and shows, states and charges that the said complainant has been fully paid, and overpaid, for all of said work, as aforesaid.

And this defendant further answering, admits that, about or near the month of October, eighteen hundred and fifty-five, this defendant purchased of one Benjamin Schatterly a tract of land containing about one thousand acres, situate in the Counties of Juniata and Snyder, in the State of Pennsylvania, near the river Susquehanna (and not in Susquehanna County, as is in said bill alleged), called Greenwood, for the sum of nine thousand dollars, principally for the purpose of obtaining railroad sills therefrom for the said Lebanon Valley Railroad; and this defendant admits that, at the time he purchased said tract of land, he supposed that the timber thereon would be sufficient to fully pay the price thereof and all expenses of cutting and hauling said timber, and that the land at least would be a clear profit out of the said purchase, and that he, this defendant, may have so stated to the said complainant, but this defendant denies that he stated to the said complainant

that he was under many obligations of kindness to the said complainant, and that he would, as some remuneration therefor, let the said complainant have one-half interest in said tract if the said complainant would take charge thereof and assist in procuring sills therefrom and sending them to said Lebanon Valley Railroad, and that so far as the purchase money thereof was concerned, he, this defendant, would attend to its payment so that no part thereof would be required to be paid by said complainant, and that the sills which would come to him, this defendant, with the other timber thereon would pay off said purchase money as it would be required as is in said bill alleged; and this defendant denies that any such obligation from this defendant to said complainant existed or that any offer or proposition made by this defendant to the said complainant was in consideration of or intended to repay any such obligation, and this defendant, further answering, shows that said complainant had repeatedly solicited this defendant to let him, said complainant, take part in or have an interest in any collateral matter connected with the business of this defendant out of which money could be made. And this defendant, believing as above stated, that said tract of land would prove a profitable investment, was disposed to assist said complainant and give him an interest in said purchase if he, the said complainant, should desire such interest after visiting and examining said tract of land; that sometime after this the said complainant visited and personally examined said tract of land and after said examination expressed a belief that the said investment would be highly profitable and solicited this defendant to give to him, said complainant, an interest in said tract of land, and permit him, the said complainant, to become and be part owner thereof; that thereupon it was agreed by and between the said complainant and this defendant that the said complainant should become and be half owner of said tract and have an equal half interest therein upon the said complainant securing to be paid or paying to this defendant, one-half part of the sum of nine thousand dollars, the purchase money for said tract of land agreed to be paid by this defendant, as aforesaid, and upon certain

other conditions hereinafter more particularly and fully stated, and that the said complainant should take charge thereof and should furnish three six mule teams, this defendant was to furnish one six mule team to work upon said tract, and should assist this defendant in procuring railroad sills therefrom. And this defendant further shows and states that the said complainant then representing to this defendant that he would be unable to immediately raise and pay to this defendant the sum of two thousand dollars, being one-half of the payment of the sum of four thousand dollars that had been required to be paid by this defendant upon the purchase of the said tract of land, this defendant agreed not to require of the said complainant the payment of the said sum of two thousand dollars immediately in cash, but that the said complainant should have a reasonable credit and time in which to pay said sum; and further, that the said sum of four thousand dollars, part of the purchase money of said tract of land, had been, and was, fully paid by this defendant before any agreement was made or thought of between this defendant and said complainant concerning said tract of land; that at the time said agreement was made by and between this defendant and said complainant, it was expected and believed by this defendant (and as this defendant believes and charges) by said complainant, that the sills and timber upon the said tract of land would pay the full purchase money thereof of nine thousand dollars, besides the expense of procuring and getting out the same, before a mortgage given by this defendant upon said tract of land to the said Benjamin Schatterly for the sum of five thousand dollars, the residue of the purchase money for said tract of land should become due and payable, and this defendant denies that there ever was any agreement or understanding between this defendant and the said complainant; that the said complainant should not be responsible for the payment of the one-half of the purchase money of the said tract of land amounting to the sum of four thousand five hundred dollars. And this defendant further answering, shows that the purchase of said tract of land was made by this defendant and in his own name before any consultation had by him with said com-

plainant in relation thereto, and that the deed was then made to this defendant as sole grantee of said tract, but this defendant admits that he did verbally agree with the said complainant that he, this defendant, would at any time thereafter, when requested by the said complainant, upon the said complainant paying or securing to be paid to this defendant the sum of four thousand five hundred dollars, the one-half of the purchase money of said tract of land, convey to said complainant the one equal undivided moiety, or half part of said tract of land; but this defendant denies that there was any agreement between this defendant and said complainant that this defendant should convey to the said complainant the one-half part of said tract of land without the said complainant paying to this defendant any portion of the said purchase money, as is in said bill stated and alleged. And this defendant charges, states and shows that the express understanding and agreement between said complainant and this defendant was that, if the amount of the purchase money was not realized out of and from the sills and timber on said tract of land over and above the expense of procuring and getting out said sills and timber, that the said complainant should raise and pay, or secure to be paid, to this defendant his portion, half or moiety of the said sum of nine thousand dollars, the purchase money of said tract of land, the said complainant then representing to this defendant that he would, under any circumstances, be able to raise his half or moiety of said purchase money before the bond and mortgage given by this defendant to said Benjamin Schatterly for five thousand dollars, the balance of the purchase money of said tract of land, would become due and payable.

And this defendant, further answering, admits that afterwards the said complainant did furnish two mule teams of six mules each and two horses that were used upon said tract of land in the procuring, getting out and hauling said railroad sills and transporting the same, but the said complainant failed to furnish three mule teams of six mules each, as he had agreed to do; that this defendant furnished one team of six mules, according to the agreement aforesaid; that on account of the failure of the complainant to

furnish said teams, as aforesaid, the getting out and transporting said sills was greatly delayed to the great damage of this defendant; and this defendant denies that the said complainant, in the month of December, eighteen hundred and fifty-five, or shortly after that time, as stated in said bill of complaint, took exclusive charge of the said tract of land and commenced cutting, and having cut the timber thereon and converting the same into railroad sills and other timber and transporting the same to this defendant for his use and so continued on for nearly two years; and this defendant further answering, states, shows and charges that the said complainant at no time after the commencement of operations on said tract of land gave his personal and exclusive attention to the operations on the said tract of land, nor did he at any time, except as hereinafter stated, attempt personally to direct or take charge of the operations on said tract of land; and this defendant, further answering, shows, states and charges, that from the commencement of the operations on said tract of land in eighteen hundred and fifty-five, until about the month of February, eighteen hundred and fifty-seven, the operations on said tract of land were conducted under the charge of Henry A. Landry, Edward McDermott and Lawrence Deveraux, and that the said Henry A. Landry, Edward McDermott and Lawrence Deveraux were employed by and received directions in reference to the operations on said tract of land, as well from this defendant as from the said complainant, and were severally paid by this defendant for their superintendence and direction of the operations on said tract of land; that in or about the month of February, eighteen hundred and fifty-seven, the said complainant went upon the said tract of land with the alleged intention of personally taking charge of the operations thereon, but that the said complainant remained upon said premises directing said operations but a very short time, not exceeding a week or two weeks, when he left said tract of land and premises and returned, to his ordinary business, but that from that time until the month of October, then next ensuing, the operations on said tract of land were nominally under the direction of

the said complainant, but that the said complainant did not give his personal attention thereto, nor was the said complainant upon said premises during all that time, except in the month of February, as aforesaid, and that, although the said operations on said tract of land during the time, from the month of February to the middle of October, eighteen hundred and fifty-seven, as aforesaid, were nominally under the direction of the said complainant, yet that this defendant furnished and paid all the feed, provisions, implements, wages and expenses, used, necessary or incurred in carrying on said operations on said tract of land during all that time as will be hereinafter more fully stated.

And this defendant further answering denies that during the time that the said complainant in his said bill of complaint alleges that he had control or charge of the said tract of land, the said complainant sent or had sent to this defendant about thirty-five thousand railroad sills, of the value of seventeen thousand five hundred dollars, besides other timber; and this defendant denies that he received from said tract of land during the time that the said complainant alleges that he had control or charge of said tract of land, or at any other time, thirty-five thousand railroad sills; and this defendant denies that the said complainant at his own expense furnished for and in said work a large number of mules, horses and wagons for said work, or that he furnished any mules, horses and wagons other than as above stated; and this defendant denies that the said complainant at his own expense furnished for and in said work, carts and other implements and feed, grain and other provisions and necessary things, or that the said complainant expended therefor and for labor large sums of money amounting, together with a reasonable allowance to said complainant for his own care and attention to said business, and for the use of his horses, mules, carts, wagons and other implements, to the sum of seven thousand four hundred dollars; and this defendant denies that the said complainant is entitled to any allowance for the care and attention bestowed by him to said business; and this defendant further an-

swering states, shows and charges that the whole number of sills received from said tract of land called Greenwood, during the whole time that this defendant, and said complainant, were engaged upon said tract of land, was only twenty-eight thousand seven hundred and fifty-six; and this defendant further answering shows that at his own expense this defendant furnished a large number of mules, horses, oxen, wagons, carts and other implements (that he furnished one six mule team more than was furnished by said complainant); and that this defendant also purchased and furnished provisions, feed, grain, hay and other necessary things for carrying on said operations and the support of the men employed therein, and that this defendant paid large sums of money for the wages of the men employed in the operations on said tract of land; and this defendant further shows that he paid all the expense and wages for carrying on the operations on said tract of land, and getting out and transporting the said railroad sills and the timber therefrom, or nearly so, and that this defendant paid and advanced for labor and wages in making, getting out and transporting said railroad sills and other timber, and for provisions, feed, grain, hay, implements and other necessary things for carrying on the operations on said tract of land, to the said complainant and to the other persons engaged and employed by this defendant, and by this defendant and said complainant in conducting said operations on said tract of land, the sum of twenty-one thousand dollars, or nearly that sum, and that the said railroad sills and other timber procured upon said tract of land, and received by this defendant did not exceed in value the sum of fifteen thousand dollars; and that instead of the said purchase of the said tract of land being a profitable investment to this defendant and the said complainant, the same (from the difficulties in getting out said railroad sills and other timber) proved to be a source of great loss to them respectively; and this defendant further answering admits that some time in the latter part of the autumn, or early part of the winter of the year eighteen hundred and fifty-seven, the said complainant delivered to this defendant certain books,

statements, &c., relating to and concerning the operations on said tract of land called Greenwood, which said books, statements, &c., remain in the same condition now as they were when left with this defendant by the said complainant; and this defendant shows, states and charges that at all times since said books, statements, &c., have been in the possession of this defendant, the said complainant could have had free access to them, and that this defendant has repeatedly and frequently asked and requested the said complainant to come to a settlement with this defendant, and pay to this defendant the expenses paid by him over and above those he was bound to pay as joint owner of the said tract of land, but that the said complainant has refused and neglected to come to any such account with this defendant or to pay to this defendant any part of the moneys overpaid by this defendant as aforesaid.

And this defendant further answering shows that the mortgage given by this defendant to the said Benjamin Schatterly, as aforesaid, for the sum of five thousand dollars, the balance of the purchase money of said tract of land called Greenwood, became due and payable, or an installment thereof became due and payable, about the month of May, eighteen hundred and fifty-seven, and before the operations of this defendant and the said complainant on the said tract of land had ceased; that sometime in the month of October, eighteen hundred and fifty-seven this defendant applied to the said complainant to raise his half or portion of said mortgage money, being the sum of two thousand five hundred dollars, in accordance with the agreeement between said complainant and this defendant as aforesaid, this defendant then intending and offering to said complainant, upon his complying with said agreement, to convey to said complainant one equal undivided half or moiety of said tract of land called Greenwood; that said complainant did not refuse to make said payment upon the ground stated in said bill of complaint, but stated that he was then unable to raise the cash, and then offered this defendant, and afterwards sent to this defendant a note held by the said complainant of the Catawissa Railroad Company, with the re-

quest that this defendant would try and negotiate the said note and appropriate the money raised from said note for or towards the payment of the complainant's half or moiety of the said money due the said Benjamin Schatterly on the said mortgage as aforesaid, but this defendant being wholly unable to negotiate said note, returned it to the said complainant; that subsequently this defendant, at different times, requested the said complainant to pay his half of said mortgage, but that the said complainant neglected so to do; and this defendant admits that in the month of May, eighteen hundred and fifty-eight, this defendant again requested the said complainant to pay the said sum of twenty-five hundred dollars, being his half of the said mortgage due to the said Benjamin Schatterly, as aforesaid, and to comply with his agreement with this defendant as aforesaid, this defendant being ready and desirous to convey to the said complainant the equal one-half part or moiety of said tract of land called Greenwood, upon said complainant complying with his agreement as aforesaid, and then so stating himself to be to the said complainant; but this defendant denies that the said complainant declined and refused to pay the said sum of two thousand five hundred dollars due on said mortgage on the ground that it was contrary to the agreement between the said complainant and this defendant in reference to said tract, as is stated in said bill of complaint; and this defendant denies that the said complainant declined paying said sum upon any other ground stated in said bill of complaint, but that the said complainant expressed a desire and willingness to pay said sum if it were possible for him so to do; that afterwards this defendant, at an interview with the said complainant requested him to pay said sum of two thousand five hundred dollars due on said mortgage, and offered to convey to said complainant one-half of said land upon his paying said sum and complying with his agreement with this defendant as aforesaid; that the said complainant then utterly refused to pay said money or to comply with his said agreement with this defendant as aforesaid, and then told this defendant that the said purchase had proven to be an unprofitable investment, and

that he, the said complainant, would not pay any of his money on account of said land, and that he would not hold any interest in the lands under his agreement with this defendant as aforesaid, if this defendant would convey it to him, and that he did not want to hear anything more about or have anything more to do with the said land, whereupon this defendant in consequence of the failure and absolute refusal of the said complainant to comply with his agreements relating to said tracts of land, and to pay his proportion of the purchase money and the expenses of getting out the sills and timber on said land, was compelled to sell and dispose of the same, and did sell and dispose of said tract of land on or about the fourteenth day of January, eighteen hundred and sixty-one, to one *for the* Henry F. Felix for the sum of nine thousand dollars; and this defendant states and charges that he is ready as above stated to account for all matters and things relating to said tract of land and the operations thereon, and has always been ready and willing to account since the books and statements relating thereto were delivered to this defendant by said complainant as aforesaid, and that this defendant has repeatedly called upon the said complainant and requested him so to account with this defendant concerning the same, but that the said complainant hath wholly refused so to do.

And this defendant further answering admits that he was sub-contractor for the construction of the Camden and Atlantic Railroad, and Richard B. Osborne, the brother of the complainant, the engineer-in-chief and contractor for the construction of said railroad as hereinbefore stated, and that this defendant has understood and believes it to be true, as stated in the said bill of complaint, that sometime in the summer of eighteen hundred and fifty-five, the said complainant was appointed and accepted the appointment of General Superintendent of said Camden and Atlantic Railroad and that he entered upon the duties of his said appointment, on or about the time stated in said bill of complaint and at a salary as therein stated, and that this defendant has been informed and believes that at that time the said railroad company was in or under some pecuniary embarrassment but this defendant denies that at

the time of the appointment of the said complainant as General Superintendent of the said The Camden and Atlantic Railroad, this defendant as sub-contractor or in any other way was largely interested in said railroad company, as is in said bill stated; and this defendant denies that the said complainant accepted the appointment of General Superintendent of said railroad at the solicitation of this defendant; and this defendant further answering, shows, states and charges that the said complainant accepted said appointment and entered upon said duties, not at the solicitation of this defendant, but in opposition to the advice and solicitations of this defendant; that shortly before the acceptance of said appointment by said complainant, this defendant was informed by Richard B. Osborne, the brother of the complainant, and engineer-in-chief and contractor for the said railroad, that they were about to appoint said complainant as General Superintendent of said railroad; that this defendant then advised and urged the said complainant to decline the said position and devote all his time and attention to his contract under this defendant, on the Lebanon Valley Railroad, as this defendant then thought and believed the same was absolutely required for the proper prosecution of said work on said last mentioned contract; and this defendant denies that in order to sustain the said The Camden and Atlantic Railroad Company, and thereby to promote the interest of this defendant and others, the said complainant shortly after entering upon the duties of his appointment at the instance and request of this defendant or at the instance and request of this defendant and the said George W. Richards, or other person, purchased a locomotive engine called the "Sea-Gull," or any other locomotive engine, with the money of this defendant, and in the name of the said complainant; and this defendant denies that the said complainant, at the request and by the direction of this defendant, or at the request and by the direction of this defendant and the said George W. Richards, rented the said locomotive engine Sea-Gull, or any other locomotive engines, to the said The Camden and Atlantic Railroad Company in the name of the said complainant, by

leases in writing, submitted to and approved by this defendant, or submitted to and approved by this defendant and the said George W. Richards, or in any other name or manner whatever, leased any locomotive engine to said railroad company; and this defendant further answering, says that he has been informed, and believes it to be true, that shortly after the said complainant became General Superintendent of said railroad, there were two other locomotive engines purchased, the one called the "Petrel" and the other called the "Curlew," but whether the same were purchased in the name of the complainant, or whether the same, or either of them, were paid for with the money of the said complainant, or of the said George W. Richards, or of other persons, this defendant does not know of his own knowledge, and cannot either admit or deny; and this defendant further answering, shows, states and charges that shortly after the said complainant became and entered upon the duties of General Superintendent of the said The Camden and Atlantic Railroad, he, the said complainant, applied to this defendant, and urged him to purchase a locomotive engine for the use of said railroad company, and to lease said engine to said company in the name of said complainant, but this defendant declined and refused to enter into any such arrangement or to make such purchase, or permit or make such lease to or with said railroad company; the said complainant then requested and urged this defendant to purchase a locomotive engine to be used by said complainant upon said railroad, he, the said complainant, then agreeing with this defendant to rent the said locomotive engine for the term of four years, and to pay this defendant therefor the monthly rent of one hundred and sixty-six dollars and sixty-six and two-thirds of a cent, agreeing to pay said rent to this defendant punctually every month during said term, and stating and representing to this defendant that he had the power and ability to make such payments of rent promptly, and that this defendant should have no trouble in the collection thereof; that this defendant, after said agreement with the said complainant, purchased a locomotive engine called the "Sea-Gull," and rented and delivered the same to the said com-

plainant in accordance with his agreement as aforesaid; and that the said complainant afterwards used the said locomotive engine upon the said The Camden and Atlantic Railroad with the knowledge of this defendant, as above stated, and continued to use said engine upon said railroad until some time about the first day of July, eighteen hundred and fifty seven, when the said locomotive engine called the "Sea-Gull" was by the said complainant returned to and accepted by this defendant, but this defendant denies that at the time the said engine was returned and delivered to him by the said complainant, that this defendant in any way approved of the action of the said complainant, in the premises, and this defendant denies that in the leasing of the said engine "Sea-Gull" to the said Railroad Company, or in surrendering up the same the said complainant in any way acted according to the direction of this defendant, and as the agent or trustee of this defendant, or that this defendant in any way sanctioned or approved of the said acts of the said complainant, except so far as the acceptance of said locomotive engine by this defendant as aforesaid, may be an approval of the acts of the complainant, which this defendant denies, and this defendant denies that he at any time or in any way released the said complainant from his liability for the payment of the aforesaid rent of the engine Sea-Gull to this defendant except so far as the acceptance of said engine by this defendant was or may be a release as to the rent for said engine for the unexpired part of said term, and this defendant denies that he at any time, either before or after the said engine Sea-Gull was by the said complainant returned to and accepted by this defendant as aforesaid, agreed with the said complainant to look to or accept the said Railroad Company for the payment of the rent of the said engine during the time she was used by the said complainant upon the said railroad, and release the said complainant from his liability to this defendant for the payment of said rent; and this defendant further answering, shows, states and charges, that the said complainant did not during the time that he used said engine "Sea-Gull" upon said railroad, nor has he at any time since

made to this defendant any of the monthly payments of rent for the said engine "Sea-Gull" as the said complainant covenanted and agreed to do as aforesaid, and that the said complainant still is indebted to this defendant for the whole rent of said engine from on or about the twenty-fifth day of July, eighteen hundred and fifty-five, until on or about the first day of July, eighteen hundred and fifty-seven, amounting to the sum of three thousand eight hundred and thirty-three dollars and thirty-three cents or about that sum, together with interest thereon from the time the several monthly payments thereof become due and payable as aforesaid; and this defendant avers, states and charges that as to the said acts and doings of the said George W. Richards, and the acts and doings of the said George W. Richards and the said complainant, in regard to any locomotive engines purchased or alleged to be purchased in said bill, or to leasing the same, or to any suits brought by the said complainant for the rent thereof, this defendant is not informed except by complainant's said bill of complaint, and by statements made by said complainant, and while this defendant admits that complainant's statements in reference thereto may be true, yet this defendant has no such knowledge of the subject as to enable him to admit or deny said allegations in reference thereto; and this defendant further answering says that as to the date of the lease of the engine "Sea-Gull" made by the said complainant to the said The Camden and Atlantic Railroad Company or the conditions or provisions of said lease, this defendant is not informed except by said bill of complaint, and by allegations of said complainant, never having seen said lease or had the same in his possession or control, and therefore cannot admit or deny any of said allegations, nor can this defendant admit or deny any of the allegations of said bill of complaint as to the amount of rent due on said lease to the complainant at the time the said complainant resigned his position of general superintendent of said railroad, this defendant having no knowledge or information thereof except from the allegations of said bill of complaint and of said complainant as aforesaid; and this defendant further answering shows, states and charges that

sometime after the said complainant had resigned his position as general superintendent of the said Camden and Atlantic Railroad as aforesaid, said complainant mentioned to this defendant that said railroad company owed him large amounts of money for the rent of the engines he had used upon said railroad, and that he intended or thought of bringing suits against said railroad company for the recovery of said rents; that this defendant then advised said complainant not to bring said suits, this defendant stating and representing to said complainant that as this defendant believed said railroad company was insolvent, or nearly so, and that to incur costs by bringing suits against said company was or would be a waste of money; and this defendant then told said complainant that if this defendant was acting for himself he would not institute any suit, but as he, this defendant, had no interest in the matter, he said complainant should do as he thought best in the premises; that afterwards as this defendant was informed and believes said complainant did bring suit or suits against said railroad company for rent of said engines remaining due and unpaid to said complainant as aforesaid, as well as for the arrearages of salary due said complainant in the District Court of the city and county of Philadelphia, in the State of Pennsylvania, and recovered judgments in said suits respectively; that afterwards other suits were brought by the said complainant in the Supreme Court of Judicature of the State of New Jersey against said railroad company, upon the judgments obtained as aforesaid in the District Court for the city and county of Philadelphia, and that judgments were obtained in said suits respectively in the Supreme Court of New Jersey, for the sums or about the sums specified in said bill of complaint; but this defendant denies that the said suits, or any or either of them, either in the District Court for the city and county of Philadelphia, or in the Supreme Court of the State of New Jersey, were brought with the consent and for the benefit of this defendant, or with the consent and for the benefit of this defendant and George W. Richards; and this defendant further answering states and says that he is not informed save by the complainant's

bill of complaint what amount said complainant expended for counsel fees, and expenses in obtaining said judgments, and cannot admit or deny the same; but this defendant states and charges that the said judgments, as this defendant has been informed and believes, remained wholly unsatisfied until settled and released by the said complainant; and this defendant further answering says that he has understood and believes that many other judgments were obtained against the said "The Camden and Atlantic Railroad Company," and that afterwards a bill of foreclosure was filed in this Court upon the mortgage or mortgages executed by the said railroad company to secure the payment of certain bonds; and that other proceedings were had in this Court to enjoin the said company, or the directors of the said company, from the prosecution of their business, but of the nature and extent of said proceedings this defendant has no knowledge or information, except from the said bill of complaint and from the reports of the said complainant and others, and cannot admit or deny the allegations of said bill concerning the same; and this defendant further answering says that he has been informed and believes that pending said suit and proceedings against said railroad company, both at common law and in equity, certain creditors of the said railroad company, of whom the said complainant was one, agreed upon terms of settlement and composition, whereupon the said complainant, as this defendant is informed and believes to be true, settled and satisfied the judgments obtained by him against the said railroad company, but upon what terms or conditions the said settlement and composition between the said complainant and the said company were made this defendant is entirely ignorant and has no knowledge or information except such as may be derived from the allegations of said bill of complaint and is unable either to admit or deny said allegations, nor can this defendant admit or deny whether the said terms of settlement, and composition between the said complainant and the said railroad company were the same as were agreed upon by the other creditors of the said railroad company of the same class, nor whether they were the best that could be effected.

And this defendant further answering denies that the creditors of the said company, or the said complainant, with the knowledge and consent of this defendant, or with the knowledge and consent of this defendant and George W. Richards; or by the advice and procurement of this defendant, or by the advice and procurement of this defendant and George W. Richards, agreed upon the terms of settlement with said railroad company; and this defendant denies that the said complainant had any authority from him, the said defendant, to agree to the terms of settlement and composition mentioned and set forth in said bill of complaint or to any terms of settlement; and this defendant denies that he had any right or power to give, or that he undertook to or did give any authority to said complainant, to agree to said terms, of settlement and composition made by, and between said complainant and said railroad company; and this defendant further answering, says that after the aforesaid judgments had been obtained by the said complainant, against the said company as aforesaid, about or during the month of March, eighteen hundred and sixty, the said complainant informed this defendant, that one of said judgments included an amount due from said railroad company to said complainant, for the rent of the locomotive engine "Sea-Gull" equal to the amount due from the said complainant to this defendant, for rent of said engine as aforesaid; and that he, said complainant, should treat and regard said amount as directly owing to this defendant; that this defendant then being in need of all the capital he could command, wrote to said complainant in the month of March, eighteen hundred and sixty, asking and requesting said complainant to send to this defendant an assignment of said interest in said judgment, or an acknowledgment of the amount of rent owing by said railroad company to the said complainant for the use of said engine then held by the said complainant in his said judgment, so that this defendant could use and deposit the same as a collateral security, but the said complainant refused, and neglected to execute, make, or furnish this defendant with such acknowledgment or assignment, and wholly re-

fused further to acknowledge the right of this defendant in said judgment, and subsequently settled and compounded the same with the said railroad company, without the knowledge or consent of this defendant as aforesaid; and this defendant further answering saith, that he has never heard or been informed save by the complainant's bill of complaint, whether the said railroad company paid to the said complainant, in the execution of the terms of the settlement and composition between them the sum of one thousand dollars, or whether the said railroad issued to said complainant, certificates for one hundred and thirty-three shares of the preferred stock of the said company; but this defendant denies that he ever agreed with said complainant to take any of the preferred stock of the said railroad company in payment for the said rent of the said engine Sea-Gull, due as aforesaid, from the said complainant to this defendant.

And this defendant further answering, admits that on or about the second day of April, eighteen hundred and sixty, this defendant made, and had filed in the clerk's office, of the County of Camden, an affidavit of the purport or of similar purport to that alleged in said bill of complaint, and caused a writ of attachment to be issued out of said Court, and delivered to the Sheriff of the County of Camden for execution thereof, and that the same was served and returned, and such proceedings had thereon as is in said bill alleged, and set forth; and this defendant further answering saith that as to so much of said complainant's said bill as alleges that he the said complainant is in nowise indebted to this defendant in the sum of six thousand dollars, as sworn to in the affidavit of this defendant, upon issuing said attachment as aforesaid, or in any other considerable sum of money, and that on the contrary upon a just and fair account between the said complainant and this defendant, this defendant would thereby appear to be largely indebted to said complainant; this defendant alleges the contrary thereof to be true, and this defendant alleges, states and charges that upon a just and fair account of all matters between said complainant, and this defendant, the said complainant would not only

be shown, and appear to be indebted to this defendant in said sum of six thousand dollars, as specified in said affidavit, but in a much greater sum; and this defendant further answering, shows to the Court, that the said affidavit made by this defendant as aforesaid, related to, and was only intended to cover certain specific indebtedness of said complainant to this defendant, arising out of the transaction between the said complainant and this defendant in the State of New Jersey, connected with the Camden and Atlantic Railroad; and the rent of the locomotive engine "Sea-Gull," that is to say the sum af three thousand eight hundred and thirty-three dollars and thirty-three cents, for rent due from said complainant to this defendant, for said engine, as aforesaid, and the sum of one thousand and ninety-eight dollars and ninety-seven cents for the balance admitted due this defendant from said complainant, on the account stated by said complainant, relating to moneys received and paid out by said complainant, and services rendered by said complainant for this defendant in the construction of the Camden and Atlantic Railroad as above set forth, as also an error in said account of two thousand three hundred and forty-six dollars and seventy-nine cents, which being corrected increases the indebtedness of said complainant to this defendant as exhibited by said account, which said several sums exceed the sum of six thousand dollars, stated in said affidavit, and to which this defendant then had particular reference; and this defendant shows and states that at the time said affidavit was made, this defendant happening to be in the city of Philadelphia, casually heard that the Camden and Atlantic Railroad Company were about, or had agreed to issue a large amount of the preferred stock of said company to said complainant, as well as to pay him a considerable sum of money; that this defendant, in order to secure the same, went to the city of Camden, and employed counsel to issue an attachment to secure and hold said stock and and money, if possible; and that said affidavit was made without any means of referring to said accounts, so as to state the exact amount, and that this defendant mentioned the sum of six thousand dollars, thinking that was

probably near the amount, and preferring to state an amount less rather than greater than the true amount; that at the time of making said affidavit, this defendant thought and believed that the said writ of attachment could only embrace the debts arising from and relating to transaction in the State of New Jersey, and that the said affidavit did not, nor was it intended to have any reference to any indebtedness of the said complainant, to this defendant arising out or from any other transactions between said complainant and this defendant, and that this defendant at the time of making said affidavit, did not inform his counsel that there were any other transactions between him and said complainant, other than those above specified as being referred to in said affidavit.

And this defendant further answering says that as to the allegations in the said bill of complaint in regard to a promissory note for ten hundred and ninety-six dollars and ninety-seven cents, allegated to have been given by said complainant to this defendant on the seventh day of October, eighteen hundred and fifty-seven, and the memorandum of account thereto relating, this defendant has no recollection of said note or said transaction, nor any knowledge thereof save by complainant's said bill of complaint, and cannot admit or deny said statement, but this defendant denies that he received said note from said complainant for the sum specified in said bill.

And this defendant further answering admits that on the seventh day of October, eighteen hundred and fifty-seven, this defendant gave to said complainant three promissory notes, (but this defendant denies that he gave to said complainant, at that time, four promissory notes, as alleged in said bill of complaint); and this defendant denies that said promissory notes were given for money that the said complainant had before then expended for this defendant in nowise connected with any of the transactions or accounts in the said bill of complaint stated, and for which this defendant was justly indebted to said complainant, except as hereinafter stated; and this defendant further answering states, shows and charges that two of said promissory notes were for five hundred

dollars each, and were given on account of the monthly estimates paid by this defendant to the said complainant on his contract for the grading, masonry, &c., on the Lebanon Valley Railroad above set forth, and that the said notes were not paid by reason of this defendant's discovering that he had largely overpaid the said complainant for work done on said contract, as above stated and set forth; that the third note was for the sum of four hundred and eleven dollars and thirty-one cents, being the amount due said complainant on an account of money due him on full statement and settlement for procuring sills for this defendant for the second division of the Lebanon Valley Railroad, after deducting four hundred and two dollars and ninety-four cents before that time loaned by this defendant to said complainant; and this defendant states and charges that the above settlement was the only settlement of accounts had by and between this defendant and said complainant on the said seventh day of October, eighteen hundred and fifty-seven; and this defendant further answering states and shows that the said complainant is indebted to this defendant in certain large sums of money for moneys lent, laid out and advanced by this defendant to and for the use of the complainant at his special instance and request, which are due and still remaining unpaid to this defendant by the said complainant; and this defendant states and avers that he is ready and desirous to account and settle with said complainant all the matters and things in his said bill of complaint, set forth or mentioned, and all and every other matter of account or indebtedness remaining unadjusted between them as this Court shall direct; and prays that said complainant may not only be decreed to account for the matters and things set forth in his said bill of complaint, but for all other matters and things remaining unadjusted between said complainant and this defendant.

And this defendant denies all, and all manner of unlawful combination and confederacy wherewith he is by said bill charged, without this, that there is any other matter, cause or thing in said complainant's said bill of complaint contained material or necessary for this defendant to make,

answer unto, and not herein and hereby well and sufficiently answered, confessed, traversed and avoided or denied, is true to the knowledge or belief of this defendant; all which matters and things this defendant is ready to verify and willing to aver, maintain and prove as this Honorable Court shall direct, and humbly prays to be dismissed with his reasonable costs and charges in this behalf, most wrongfully sustained.

P. L. VOORHEES,

Sol. for and of Counsel with Deft.

STATE OF NEW JERSEY } ss:
CAMDEN COUNTY. }

Patrick O'Reilly being duly sworn, deposeth and saith, that he is the defendant named in the above answer; that the matters and things set forth in the above answer so far as relate to his own acts are true, and so far as relates to the acts of others, he believes them to be true.

P. O'REILLY.

Sworn and subscribed at the county aforesaid, this thirteenth day of June, A. D. 1864, before me, the subscriber, a Master in Chancery, of the State of New Jersey.

MARMADUKE B. TAYLOR,
M. C. C.

5c. U. S. Rev. Stamp Cancelled.

SCHEDULE A.

Dr. P. O'Reilly in account with John H. Osborne. Cr.

1854.			1853.		
Aug. 7.	To services rendered on C. & A. R. R. fr. Aug. 7, '53, to Ap'l 7, '54,	$2000 00	Dec. 12.	By cash,	$501 48
"	To services rendered on Leb. V. R. R., Ap'l 7 to Aug. 7, '54,	1000 00	1854.		
	To expenses incurred,	14 00	Jan. 7.	" "	2233 31
	To expenses incurred C. & A. R. R. Aug. '53 to Aug. '54,	346 79	Sep. 15.	" "	889 00
Nov. 1.	To amount paid Wm. Stark pr. R. Stark,	50 00	1885.		
1855.			M'h 15.	" " lent me,	500 00
M'ch 26.	To d'ft, No. 227,	350 00	Dec. 27.	Surplus of purchase money of Sea Gull engine in July, 1855,	104 00
July 3.	To expenses incurred furnishing engine Sea Gull,	22 35			
Aug. 10.	Am't paid Landry,	30 00			
Dec. 27.	Am't paid Vanchrist pr. Donnelly,	38 00			
	Am't carr'd forward,	$3851 14		Am't carr'd forward,	$4227 79

	Am't bro't forward,	$381 145		Am't bro't forward,	4227 79
1856.					
Jan'y 8.	Am't Briscoe's exp's, 2.10; Geo. Woodhull, 20.00,	22 10			
"	Am't paid McWillis board ac't,	30 00			
Jan. 27.	Am't paid George W. Richards,	145 00			
Oct. 21.	Am't bal. of McWillis' ac't,	10 00			
1857.					
Sep. 21.	To exp'nses consequent on moving Sea-Gull engine,	65 74			
	Cash to balance,	103 81			
		$4227 79			$4227 79
	To cash p'd Humman watcher,	71 00	1854.		
	P. O'Reilly note to Harding,	86 00	M'h 24.	By bal'nce due on settl'm't with G.W.Bowen disbu'g Camd'n & Atlantic moneys,	3753 06
	Cash p'd for Brady,	32 64			
	P.O'R.note to Burr,	92 00			
	Cash paid notes to Drexel & sent,			By bal. on meadow work,	440 87
	Am't carr'd forward,	$281 64		Am't cr'd forwd',	$4193 93

Am't bro't forward,	$281	64	Am't bro't forward,	$4193	93
by me to P. O'Reilly,	570	34			
Salary exp's included in ab. ac't,	2346	79			
Balance on this ac't,	995	16			
	$4193	93		$4193	93

Making the total b a l - ance,	995	16
due P. O'- Reilly,	103	81
	$1098	97

$1098 97.

IN CHANCERY OF NEW JERSEY.

BETWEEN

JOHN H. OSBORNE,

Compl't,

AND

CATHARINE C. O'REILLY, Executrix of Patrick O'Reilly, dec'd,

Def't.

ON BILL,

ANSWER, &c.

TESTIMONY.

Depositions taken pursuant to notice, and agreement before Charles V. D. Joline, a Master and Examiner in Chancery, at his office in Camden, N. J., on Wednesday, January 16th, 1884, at 11 A. M., in the presence of Mr. H. A. Drake, solicitor of complainant, and Mr. P. V. Voorhees, of counsel with defendant.

Laurence R. Devereux, a witness produced on the part of the complainant, being duly sworn, deposeth and saith, I live at Philadelphia. I am stable boss of the Girard avenue division of the People's R. R. I know John H. Osborne, the complainant in this case. I have known him 28 or 29 years I guess. I knew him prior to 1856. I went to Greenwood the 14th of January, 1856. Immediately before I went to Greenwood, I was in Mr. John Osborne's employ. After I went to Greenwood, I was in Mr.

Patrick O'Reilly's employ. I knew Patrick O'Reilly prior to 1856. I was in his employ prior to 1856. Greenwood is in Juniata Co., Greenwood township, Penn'a. At Greenwood, I was employed at getting out timber for the Lebanon Valley R. R. sills; that is, what is known as cross ties. I was getting them out for Patrick O'Reilly. I was there not quite two years. After the sills were got out we hauled them to the Mahantago Locks on the Susquehanna canal, and they were shipped from there to Lebanon, to P. O'Reilly, I mean Patrick O'Reilly. According to my calculation there were 45,000 sills gotten out while I was there. I was under Patrick O'Reilly's directions about getting out the sills, and the quantity sent, and about the expedition in getting them out. Immediately before I went to Greenwood, I was taking care of Mr. John H. Osborne's stock for him. At that time Mr. Osborne was attending to his business on the Lebanon Valley R. R. as contractor. He was at that time engaged in building a part of the Lebanon Valley R. R. The teams of his, that I had charge of then, were in use for that purpose. When I went up to Greenwood, I took with me two six mule teams, a horse, a Dearborn wagon, and picks and shovels. One of these teams was Mr. Osborne's, and the horse was his, and there was one mule in O'Reilly's team that belonged to Mr. Osborne; one of the six. One of the wagons was Mr. O'Reilly's and one was Mr. Osborne's. I think that the Dearborn wagon belonged to Mr. Osborne, but I am not certain. Mr. Osborne's team that I took up there, stayed there all the time up till we left there, which was in 1857, I don't know exactly the date. The single horse and the Dearborn wagon stayed there all the time till I left. One team's harness belonged to Mr. Osborne, and I think the other belonged to Mr. O'Reilly. Mr. Osborne sent up another team. I can't recollect the date he sent it up. I think it was the next year. That team we sent away again after a while; I don't know how long it stayed. This was a team of gray mules. After that was sent away he sent up six horses I think. At the time he sent up the six horses he didn't get any team back; we sent the six mule team back before. I can't say for sure whether the man who

brought these horses up took the mule team back or not. I had a settlement with P. O'Reilly. I think it was in 1857. It was in relation to my services at Greenwood, in getting out these sills and shipping them down. There were also switch blocks got out there, less than half a hundred. There was no other heavy timber, while I was there, got out. I can't tell exactly now what month it was that I had this settlement with P. O'Reilly.

Paper shown witness marked Exhibit A of complainant, he saith: That is the settlement above referred to; that was made out in the handwriting of Geo. W. Bowen on the day that it bears date. I had come away from Greenwood then; I couldn't exactly say how long. When I sent back the green team of gray mules to Mr. Osborne they were worked down pretty low; they wern't fit to work any when they went away from me. I have knowledge of the value of the horses and mules. They vary in prices from time to time and were very dear when those mules were bought. In the business I am in I sell broken down horses; I don't buy. This green team of gray mules, when I sent them home, weren't worth half as much as when they came up here. To the best of my knowledge and belief they were worth $150 a piece when they came up there; probably more, I can't exactly tell. I kept at the time, I think, a memorandum in a book of the coming and sending away of the teams up there. I remember that I did. I don't know what has become of that book; it is lost I expect, or worn out, as it is many years ago now. I think that I gave Mr. Osborne a statement of the teams that he sent up there; the teams, and tools, and wagons. I think that was in 1858. It was after I had left Greenwood. It was before the settlement with P. O'Reilly contained in Exhibit A. I think it was warm weather. It was in a place called Quakake, in Pennsylvania, on the line of the Catawissa R. R. I think that I gave Mr. Osborne the book. I don't know what became of the book afterwards. Whether I lost the book or gave a statement to Mr. Osborne or gave him the book, I can't be sure. After I gave him the statement he read it over to me, I think; I think that I would know that statement now if I should see it.

Paper shown witness marked Exhibit B of complainant, he saith: That is the statement.

The first item in that statement as follows: "Jan. 14th, 1856, left Womelsdorf," is true. The words, "arrived at Greenwood" on 19th with two teams, one of them J. H. Osborne's team," is true. That is January 19th. The words "the second team was P. O'Reilly's, with five of "his mules, and one of J. H. O. from Elick making 6th" are correct. The next item, "I also furnished—I also put "on a bed and a guide pole and did sundry repairs to P. "O'R. wagon" is also correct. The words "I" refer to John H. Osborne. The item, "we also had the harness "repaired and fixed as it wanted much" is correct. The harness referred to there, was that on Mr. P. O'Reilly's team. The item, "he also took gray Billy, the spring "wagon, two carts all in good condition, and 2 picks and "4 shovels, new, also a lot of iron," is correct. The word "he" means me I expect; I took them, took them all. All of the things in this item belonged to Mr. Osborne; all that I have mentioned so far in this memorandum I took up with me when I went up on the 14th of January. The next item, "June 12th of same year, J. H. O. sent "up the other mule team (green mules, grey ones)" is correct. I knew then it was June 12th that they came up and I recollect so now, it was warm weather when they came up. The next item, "Oct. 17th of the same year, "L. Devereux sent back this team from Greenwood," is correct. This is the team that I said wasn't worth half as much when it went back as when it came up. The next item, "Oct, 1st, J. H. O. sent up two horses, old Peet and "black Billy," is also correct. The next item, "March "8th, 1857, J. H. O. sent up a team, (the day they arrived) "old Charlie, big George, farmer horse and the Jim horse "and 4 mules, and got back two, Alick and Dolly, "used up, which were returned J. H. O." is correct, except that Dolly should be Dolphin. I knew the mules well, I broke them. The next item, "Aug. 3d, 1857, the whole of J. "H. O's. stock left Greenwood for Womelsdorf, except "the Charlie horse and George" is correct. The date "Aug. 3d, 1857," is correct. I knew at the

time that it was correct. The next item, "there "is now at Greenwood, furnished by J. H. O. 2 "horses, 1 cart and harness, the harness for the two horses, "the spring wagon and harness," is correct. That means at the time the paper was made out. The next item, "J. "H. O. sent 4 wagons and P. O'R. two, one of his was an "old worn out wagon and did nothing for a long time," is correct. The 4 wagons sent by Mr. Osborne were good, new, heavy wagons for drawing sills. They were the wagons that we drove the six mule teams to.

The last item, "Devereux thinks I should have from "3.50 to 4.00 per day for each horse snaking (3 in No. $1 "per day less the feed, say 30c. each.)" This was my opinion at the time of what the teams were worth. Mr. Osborne asked me at the time and I told him they ought to be worth that. I had been acquainted with teaming, at the time this memorandum was made, always, ever since I could handle a horse. The work of a six mule team, at that time up there, if you fed it and supplied the driver, ought to be worth from six to seven dollars. I think it was worth that. O'Reilly paid the driver and furnished the feed for these teams; I suppose it would be worth at that time up there from thirty or forty cents a day to feed a mule, this does not include hay or bedding. We didn't have bedding and most of the time didn't have hay, but used rye straw cut up and mixed with the feed; the three horses were used for snaking the sills out of the woods that were made, so that you could get them to the road and load them on the wagons. Since Exhibit B was made out I examined it and found it was correct with the exception that I mentioned before; at the time I examined it I wrote a letter to Mr. Osborne.

Witness being shown letter marked exhibit C of compl't saith: That is the letter I wrote to him. In this letter I speak about looking for the book, and about the mistake in the name of the mule. I could't find the book at that time. I recollect when Mr. John Osborne purchased those gray mules in the green team. He gave $121 a head for them at Reading. I was in his employ at that time. I brought those mules from Reading to Womelsdorf. They

were unbroken and green when he bought them. I broke them before I left Womelsdorf. The wagons that Mr. Osborne supplied up there were pretty good wagons, I think, when they were returned. In my opinion when they were returned they weren't more than second-hand wagons, there was the wear and tear of two years. I took up one horse and seven mules which stayed there all the time I was there. Those mules were pretty well worn down too. They were better than the other mules. They were hardier and older than the other mules, when they went up there. The six of those mules that were in Mr. Osborne's team, were worth $1,200 when they went up there. When they came away I suppose they were worth on the average $140 apiece. The horse that I took up there was worth $200 when he went up there, and was worth $150 when he went away. He was a pretty good horse when he went away. Aleck and Dolphin belonged to the second team that came up. The six horses that came up in 1857, in March, were all young except one, and were all pretty good horses. I don't know what was paid for these horses. Four of them were worth $250 apiece. They were big, heavy, squat built, close built. The other horses were worth $125 or $150, somewhere in that neighborhood. They had to do hard, heavy work in the wagons. The roads were narrow, rough and muddy. I sent Mr. O'Reilly word about the roads, and then he sent me word to go to the supervisor and have him see to them. I don't know whether he sent me notice to serve on the supervisor.

Paper marked Exhibit D of complainant shown witness he saith: Yes sir, I think he did send me notice. That looks to me like McDermott's handwriting; McDermott was Mr. O'Reilly's clerk. I got such a notice as Exhibit D. I served it on the supervisor. We broke down some of the plank bridges which let the mules into the creek. The snaking through the bushes and brambles of all kinds and scrub oak was very hard on the horses. They did something at repairing these roads after I served this notice.

Q. How do you know that there were 45,000 sills gotten out?

A. I counted them. I counted every sill that was made on the place; those that were fit to ship, and those that weren't, I threw out and left there.

I understand from O'Reilly that there were 1,300 acres in this tract. There was a part of it occupied by other people which O'Reilly sued for while I was up there, but he didn't get it. I don't know, but I think that was included in the 1,300 acres. O'Reilly did not have any partner in these sills that I know of. There was nobody interested with him in getting them out. There was nobody up there while I was there, but Mr. O'Reilly once. Mr. Osborne was there once. I did not receive any directions from Mr. Osborne about taking out the sills, how fast to send them, or anything of that sort. I did not render any account to Mr. Osborne about the number of sills I got out. I heard that Mr. Osborne was to get half this land after the wood was cut off. I have heard it from McDermott and from Doyle when they came up there to pay the men off every month, sometimes two months. Doyle was in O'Reilly's employ. This McDermott is the same one that I supposed wrote the notice Exhibit D.

Q. Did you ever hear OReilly say that—that Osborne was to have half of the land?

A. I heard him say he was partner in the land.

I have been to the landing when the sills were being loaded on the boat. I didn't see them all loaded. Paper marked Exhibit E, of complainant shown witness, he saith: That is a letter to me from Edward McDermott. That is the said Edward McDermott I have spoken of, who was in Mr. O'Reilly's employ. I was up at Greenwood when I received this letter. While I was there I was the boss; nobody was above me. When I went there, Mr. Landry was there in charge. He was in O'Reilly's employ. I can't say whether he stayed a month or two after I went there.

Witness being shown paper marked Exhibit F, of complainant, saith: "That is Mr. O'Reilly's letter to me. I received it while I was up there. He sent me up a team

ster at the same time to drive the green team. He told me to put an old teamster with the green team, and give an old team to the new teamster, but the old teamster wouldn't give up his team."

Witness being shown paper marked Exhibit G, of complainant, saith: "That is from McDermott to me."

Witness shown paper marked Exhibit H, of complainant, saith: "That is a letter from McDermott to me. The team mentioned therein went down at that time."

Witness shown paper marked Exhibit J, of complainant, saith: "That letter is from Mr. O'Reilly."

Witness being shown letter marked Exhibit K, of complainant, saith: "That is a letter from Edward McDermott."

Witness being shown letter marked Exhibit L, of complainant, he saith: "That is also from Mr. McDermott to me, and is about the sills."

The attention of the witness being called to Exhibit A, he said: "Mr. O'Reilly was in the office when this was made out, and he knew it was being done at the time. When Bowen made it out he was acting for O'Reilly, at that time, I think. He had no special man there to ship the sills, except the man there at the lock. There was no man up there to supervise them, except the man at the lock, he kept a store at the lock. I had no charge of this —of seeing that they were properly shipped. The boats were hired at Lebanon I think. I know that they came up there and took the sills away. All of these 45,000 sills were shipped down to Patrick O'Reilly, at Lebanon. These 45,000 sills didn't all come off of this 1,300 acre tract. Some outsiders brought sills there, but very few. There were very few bought that didn't come off of this tract."

Mr. P. L. Voorhees being absent in Court, it is agreed between counsel that he shall have the opportunity to object to any of the above testimony, and also to cross-examine the witness.

Adjourned until Wednesday, January 23rd, 1884, at 11 A. M.

Wednesday, January 23rd, 1884, at 11 A. M., parties met, and upon the statement of Mr. P. L. Voorhees, that his associate counsel, Mr. James A. O'Reilly, is engaged in Court and unable to be present to-day, and upon the application of Mr. P. L. Voorhees the examination is adjourned until Wednesday, January 30th, at 11 A. M.

Wednesday, January 30th, 1884, at 11 A. M., examination continued in presence of respective counsel.

Lawrence R. Devereux being still upon the stand under his direct examination saith:

Q. What sort of bodies and racks were on these wagons that were sent up by Mr. Osborne?

A. Open beds, and standards in the beds.

We loaded two lengths of the ties in the bottom of the beds, and then one across them; the beds were long. I didn't mean one across the wagon, but lengthways across the joints of the other two lengths.

Q. When the wagons were returned to Mr. Osborne, what was the condition of the beds?

Counsel for defendant objects to the question as irrelevant and inadmissible. Objection overruled.

C. V. D. JOLINE, *Examiner.*
January 30th, 1884.

Defendant appeals.

A. Pretty well worn out sir.

Q. Were they more than half worn out?

Objected to as last above. Overruled. Appeal.

C. V. D. JOLINE, *Examiner.*
January 30, 1884.

A. Yes, sir.

Q. How much would you say they were worth?

A. Well, they were worth very little. I couldn't say how much; they were no good for any other business. They were worn out.

Q. How about the running gears?

A. They were in a better condition; about half worn.

It is agreed by and between counsel that the above objection, ruling and appeal, shall apply to all evidence between it and this point.

By reason of the agreement on page 16, Mr. Voorhees now objects to all statements of the witness between himself and others and between himself and the complainant, made or had in the absence of Patrick O'Reilly, deceased, and also to the statements contained in Exhibits B, C, E, G, H, K and L, and all statements of and concerning said Exhibits respectively as irrelevant and inadmissible in the cause. Objections overruled. Appeal.

C. V. D. JOLINE, *Examiner.*
January 30, 1884.

CROSS EXAMINATION.

I was at Greenwood not quite two years. I left Womelsdorf January 14th, 1856, and I got to Greenwood on the 19th. I can't exactly tell you the date I left there.

Q. Who was there, when you went there, operating for Mr. O'Reilly?

A. There was a man named Landry. I can't tell how long he was there; I don't know. He had control when I went there. I can't exactly tell you the date when Mr. Osborne's teams went away from Greenwood. I left there about a month after the teams went away from there. I can't fix the date when I went away from there. I can't tell how long I had been away when I settled with Mr. O'Reilly. I had been at Danville and came down to Reading and settled with Mr. O'Reilly in his office. I can't exactly tell what Mr. Landry was doing when I went there; I saw a yoke of oxen hauling logs to the saw mill, and he had one man making ties. He had one horse besides the yoke of oxen. Mr. Landry used to use him. I used him afterwards to snake out ties. I used the oxen for hauling the empty wagons into the woods, where the horses couldn't go, and loading them up and hauling them into the road again. I loaded the wagons up with sills or cross-ties. I used the horse for about a year, and then he wouldn't work any more; he was old and balky. I used the oxen all the time I was there. I did not work at anything else besides getting out sills. I should say in addition to that, we farmed a piece of ground there, sowed it with potatoes,

corn and oats, and I left it all there in the barn. The second spring I was there we sowed a field of oats and planted some potatoes. I got the seeds, plows and harrows from a neighbor there. I don't remember Mr. O'Reilly furnishing any farming utensils. He didn't furnish us any turkeys, fowls, geese or pigs, I bought them after I had been there awhile. I paid for them. Mr. O'Reilly never paid me for them. Mr. Clindenning came there two days before I left. He came to take charge of the place. I don't know who sent him there. I can't tell who sent him. Mr. Bowen, I think, sent me word to leave. Mr. Osborne had no teams there until I went there. I made the statement to Mr. Osborne, about the number of teams there, that I have mentioned in my testimony, at Quakake. I can't tell about what time it was.

Exhibit B of complainant shown witness, he saith this is in Mr. John H. Osborne's handwriting. It is not in my handwriting. I can't tell the date when I made it.

Mr. Osborne was at Greenwood once when I was there. I can't exactly tell what time of the year it was, or what date it was. Mr. Osborne stayed there one night; that is all. He gave directions about the work, about the teams. It was a good while after I went there. I can't exactly tell what season of the year it was.

Mr. Osborne never wrote me any directions while I was there that I know of. He didn't write me at any time, directing me that I should leave the place that I know of I have no recollection of it.

Witness shown paper signed L. Deveraux, dated Sept. 4, 1859, and marked Ex. No. 1 of defendant saith: That is my handwriting. I wrote that letter. It is to Mr. Patrick O'Reilly. I wrote the truth in that letter. I recollect writing it now. I must have had a letter from Osborne too. Horses and mules, are worth about the same now as they were in 1856 and 1857. They were pretty dear then and are now. I think that horse hire is higher now than it was then. Three dollars and three and a half a day during last summer, around where I was, were paid for horse, cart and driver, the driver finding himself and horse,

as I have understood; I haven't hired a horse in sometime.

Q. What was your special business while you were at Greenwood?

A. I laid out the sections for the men to fell the timber to get the sills, counting the sills, taking an account of them, and everything in general over the place.

I sent the account of the sills that I kept down to Lebanon. I counted all the sills that came off the tract. All the sills were not merchantable, some that the men made didn't come up to specifications, and were thrown out. I sent the account of the sills down to Mr. O'Reilly's office. He used to write to me and McDermott used to write to know how many I had on hand, and I would write and tell him. I did not keep an account of how many were shipped from there, I kept an account of those that were delivered on the landing. I don't know whether there were any delivered on the landing by other parties or from other tracts of land. What I stated in my testimony the other day was that I understood there were some delivered by other parties. I never saw them. Mr. O'Reilly's teams and Mr. Osborne's teams did not haul from other lands.

RE-DIRECT.

Witness shown Ex. No. 1 of defendant's saith: The man that I speak of in the foot of that letter is the man Clindenning. There was no more work in getting out cross-ties to be done when I left there.

Q. You state in your cross-examination that when Mr. Osborne was up there he gave directions about the work, about the teams? Please state what directions he gave about the work and what about the teams.

A. He talked about how the teams were getting along; I can't express the exact words he said to me at that time.

Q. What directions did he give you about getting out the sills, and how fast to get them out and where to cut them from?

A. He told me all the dead wood that was sound and

lying about and good, to get them into ties and not to fell any more timber.

Q. What directions did he give you, if any, about how fast you should send the ties down?

A. I don't recollect Mr. Osborne giving me any directions about how fast I was to send them down. I had a letter from Mr. O'Reilly that I should run these teams two trips a day.

Q. Who gave you the directions to run the dead wood up into ties?

A. I couldn't swear which one of them. I can't say.

RE-CROSS.

Q. Did you stop making ties after Mr. Osborne's directions to you when he was there at Greenwood?

A. Yes sir. I hadn't left Greenwood when I wrote the letter Ex. No. 1 of defendant's. It was written before I left, about the time I left there in 1857, and I think the date of the letter was meant for 1857. When we did the farming up there, we used the teams we had up there. I farmed those three or four little fields there by Mr. O'Reilly's directions and he told me to go to the lime kiln and haul some lime which I did.

Sworn and subscribed this 30th of January, A. D. 1884. } L. P. DEVEREUX.

C. V. D. JOLINE, *M. C. C.*

Adjourned until Thursday, February 7th, at 11 A. M.

Thursday, February 7th, 1884, adjourned until Wednesday, February 27th, 1884, at 11 A. M.

Wednesday, February 27th, 1884, at 11 A. M., examination continued in presence of Mr. Drake and Mr. P. L. Voorhees.

Counsel for complainant gives notice that the agreement in writing referred to in the bill of complaint, and therein

stated to have been made between Patrick O'Reilly, of the one part, and the complainant and Charles Tarrant, of the other part, relative to the grading and masonry of sections 14 to 26, both inclusive, by them as sub-contractors for him as contractor, and which as counsel is informed was executed in duplicate, has been lost so far as the duplicate copy of Tarrant & Co. is concerned, as will be proved by the witness following the next witness, and counsel for complainant here gives notice to produce at the next adjourned meeting of this examination, the duplicate copy of the said agreement which was made and delivered to Patrick O'Reilly, if the same be in the possession or control of the counsel of the defendant, or of the defendant, to be marked as an exhibit and used in evidence in this cause.

Richard B. Osborne, a witness produced on the part of the complainant, being duly sworn deposeth and saith: "I live in the city of Philadelphia. I know John H. Osborne. He is my brother. I knew Patrick O'Reilly in his life time very well."

Q. Where was your brother John in the year 1853?

A. Up to about the middle of the year 1853, he was on the Richmond and Danville Railroad, as superintendent; during the remainder of that year, he was manager of the construction work of the Camden and Atlantic Railroad, acting for Patrick O'Reilly, sub-contractor.

Q. Between what points does the Camden and Atlantic Railroad extend?

A. Between Cooper's Point in Camden and Absecon Beach, in Atlantic County, N. J.

Q. How long did John H. Osborne continue in the position of manager of construction, under Patrick O'Reilly, on the Camden and Atlantic Railroad?

A. He continued up to the close of the work and the opening of the road in July, 1854.

Q. Where did John H. Osborne go next?

A. He went to Reading to take charge for Mr. P. O'Reilly of the sub-letting of the contract work on 40 miles of the Lebanon Valley Railroad. (Last part of an-

swer objected to as not responsive). Objection overruled. Appeal.

C. V. D. JOLINE, *Examiner.*
February 27, 1884.

Q. When was the Lebanon Valley Railroad built?

A. The award of the contract for the old line was made on the 4th of March, 1854, and on the 29th of September, 1858, the whole road was opened to Harrisburg.

Q. Between what two points is it built?

A. From the city of Reading, in Berks County, to Harrisburg, the capital of the State, 54 miles.

Q. Who was the engineer-in-chief of the building of this road?

A. Richard B. Osborne, myself.

Q. Of what part, if any, was Patrick O'Reilly, the contractor.

A. The first forty sections from Reading westward. The average to a section was about one mile.

Q. It was of the sub-letting of these forty sections then that John H. Osborne had charge for Patrick O'Reilly?

Objected to as leading. Objection sustained.

C. V. D. JOLINE, *Examiner.*
February 27th, 1884.

Q. What part of this railroad had John H. Osborne charge of the sub-letting of for Patrick O'Reilly?

Objected to as irrevalent and inadmissible. Objection overruled. Appeal.

C. V. D. JOLINE, *Examiner.*
February 27th, 1884.

A. The forty miles or sections west of Reading.

Q. What part, if any, of these forty sections were sublet by Patrick O'Reilly to the complainant?

Objected to as last above. Objection overruled. Appeal.

C. V. D. JOLINE, *Examiner.*
February 27th, 1884.

A. Those comprising what was termed the second divi-

sion of the road extending, I think, from the 13th to the 26th section, both inclusive. The 13th perhaps may not have been included.

Q. As engineer-in-chief how much knowledge, if any, was it your duty to have about the contractor, the sub-contractor and the contracts?

A. Very full and complete knowledge of the work done by the sub-contractors, and the prices upon which they took that work from the chief contractor, and of any additional prices given by the chief contractor to the sub-contractor, within the limits of the prices contained in the chief contractor's own contract with the company.

Q. How was the chief contractor enabled to make the estimates upon which he took the contract work?

A. By the quantities and specifications furnished to him, and all other contractors who bid, by the chief-engineer.

Q. How did the chief-engineer get his information of quantity and specifications?

A. From the notes and levels made by the locating party and from his plans prepared for the complete construction of the line of the road.

Q. Of whom was the locating party composed?

A. The gentleman in charge of the field work, and of the office work appertaining thereto, was Michael E. Lyons, my principal assistant. Without reference to my notes I could scarcely give the individual names of the gentlemen composing the various parties.

Q. State if you please what personal information you, yourself, as chief-engineer, had of the work of this line?

A. From the fact of being superintendent, and constantly on the line with the parties, my information with regard to all points connected with the construction of the line was full.

Q. What personal information had you, as chief-engineer, of the quantity and quality of the excavations and grading up of this line, prior to the proposals by the contractors, upon which this contractor-in-chief based his estimates?

A. Trial pits were dug in the various hills where cuttings would be, by an officer appointed for that purpose, who

made his reports regularly to me of the various qualities which he passed through and the level at which he encountered solid rock wherever it occurred. These were duly aggregated, tabulated and put upon the profiles, that the contractors bidding for the work might have the information beforehand.

Q. Upon the sections which were sub-let to John H. Osborne and Charles Tarrant, under the style of Tarrant and Co., what did your specifications give to the contractors bidding for the work, as to the quality of the solid rock to be excavated?

Question objected to and withdrawn.

Q. Where are the specifications furnished to the contractors?

A. It was just about 30 years ago. The Philadelphia and Reading R. R. Co. in 1858 obtained all the documents with reference to that public letting, and I suppose that it still has them.

Q. When, if at any time, were they in the possession or control of yourself.

A. Up to the completion of the road and at all times open for reference to by the contractors.

Q. Did you have full knowledge, and do you now know what those specifications contained in reference to the excavations from sections 13 to 26?

A. I had full knowledge then of the estimate of what they contained, and I have full knowledge now of what they were by subsequent absolute measurement.

Q. State if you please what your information was as to the character or kind or sort of the solid rock excavations in the sections of 13 to 26 of this line, and whether that information went into the specifications upon which the proposals were made?

Objected to as irrelevant, inadmissible and as already answered. Overruled. Appeal.

C. V. D. JOLINE, *Examiner.*

February 27th, 1884.

A. The sections mentioned are all situated in what is known as Lebanon Valley. It is what is called a lime-

stone district. That description of rock was the kind embraced in our own specification as the quality of rock throughout the whole 54 miles generally.

Q. From your actual knowledge, subsequently obtained, during the construction of the road, state if you are able to do so, of what quality the solid rock excavations of sections 13 to 26, proved to be?

Objected to as secondary, that there were made current estimates of the quantity and character of all the excavations made in writing during the progress of the work, by the chief engineer or under his direction, and that they are the best evidence of the character, quality and quantity of the rock and other excavations.

Counsel for complainant replies that the knowledge of the chief engineer, who is the witness, was antecedent to and of higher authenticity than either the current estimates or the final.

Objection overruled. Appeal

C. V. D. JOLINE, *Examiner.*

February 27th, 1884.

A. The character of the rock upon the whole proved to be correct as to its limestone character, but with one exception, where there was an intervening stratum of trap rock, which occurred on one of these sections. I think only one, or one or two, I won't be certain till I look at my notes. The character of which rock was of excessive hardness, and rendered the finishing of that part of the road within the time specified very questionable because of the difficulty of making the requisite excavation through that rock.

Q. To what extent did the current estimates disclose the quality and character of the rock taken from the excavations?

Objected to as irrelevant and improper, and calling for secondary evidence.

Objection overruled. Appeal.

C. V. D. JOLINE, *Examiner.*

February 27, 1884.

A. Those estimates only entered into the measurements

of the quantity of that which was characterized solid rock, according to the specifications under which the contractors built, under those specifications it was solid rock without any reference whatever to its quality.

Q. What, if anything, did the current estimates show as to the relative hardness or softness of the solid rock?

Objected to as above. Overruled. Appeal.

C. V. D. JOLINE, *Examiner.*
Feb. 27th, 1884.

A. Nothing whatever, it was all put at the price of solid rock.

Q. Have you any knowledge, and if so state what it is, of the abandoning of this sub-contract of Tarrant and Co., with Patrick O'Reilly, by Charles Tarrant?

Objected to as inadmissible. Overruled. Appeal.

C. V. D. JOLINE, *Examiner.*
Feb. 27th, 1884.

A. Charles Tarrant had been in my employ as an engineer. He received an appointment from the commissioners of the County of Waterford, Ireland, stating that he had been appointed the engineer of that county, and ordering him to report accordingly. For that reason he was compelled to resign the commission offered him or this contract work, and he chose the latter.

Q. At what stage in the completion of this sub-contract was this?

A. It was at the early commencement of the contract as I remember. I can't fix the date exactly.

Q. By whom was the work carried on after that, and in whose name?

A. It was carried on by John H. Osborne, in the name of Tarrant and Co., as the title on the company's books.

Witness being shown paper now marked for identification Exhibit M of complainant, is asked:

Q. State if you please what that paper is?

A. This is a copy of the final estimate of Tarrant and Co., sub-contractors, made by me, as chief-engineer of the Lebanon Valley R. R. Co., on the 5th day of January, 1858, and is a correct copy thereof.

Answer objected to as secondary. Overruled. Appeal.

C. V. D. JOLINE, *Examiner*
February 27th, 1884.

Q. Where is the original of which that is a copy?

A. My original is in my general estimate book. The original from which this has been taken must be in the hands of the heirs of Patrick O'Reilly to whom it was returned.

Counsel for complainant gives notice to counsel for defendant to produce the original of which this final estimate is a copy at the next adjourned meeting of this examination.

Q. Does the final estimate, of which this is a copy, and does this copy contain the totals of all the current estimates, as to quantity, of the work to which this refers?

Objected to as irrelevant, secondary and inadmissible, without production of current estimates.

Question withdrawn.

Q. Which is the former original, the original in your book or the one that was given to P. O'Reilly?

A. The one in my book was the first. The one that P. O'Reilly had was the first copy issued and the one that the company was bound by, and by which he was paid. At the same time I gave a similar copy to the company.

Q. How do you know this to be a copy of the original entered in your book?

A. It has been compared with the estimate in my estimate book.

Q. By whom?

A. By myself it was compared.

Q. State if you please what was the allowance made to Tarrant and Co. for excavating hard clay mixed with stone in this work?

Objected to unless original estimate is produced; the witness being handed the copy of the estimate, Exhibit M. Objection sustained. Appeal.

C. V. D. JOLINE, *Examiner.*
February 27th, 1884.

Q. Was the rate allowed to Tarrant and Co. in the final

estimate for excavating hard clay mixed with stone the same as fixed in the agreement of Tarrant and Co.?

Objected to as secondary evidence and inadmissible until original papers are produced.

Counsel for defendant states that the question is only asked as a preliminary to another question.

Objection overruled on that ground. Appeal.

C. V. D. JOLINE, *Examiner.*
February 27th, 1884.

A. It was greater under the instructions given to the engineer.

Q. From whom did the engineer receive those instructions?

A. From the chief contractor, Patrick O'Reilly.

Q. What was the extent of the increase?

Objected to as secondary. Overruled. Appeal.

C. V. D. JOLINE, *Examiner.*
February 27th, 1884.

A. I could answer that question more correctly by reference to my notes, which I have not here. I can tell you what I believe.

Q. How did it correspond with Patrick O'Reilly's allowance or rate in his contract?

Objected to as being irrevelant and inferring that there was an allowance made on the contract with P. O'Reilly, which is not proven, and can only be proved by the production of the contract and estimates made to P. O'Reilly. Overruled. Appeal.

C. V. D. JOLINE, *Examiner.*
February 27th, 1884.

A. I was authorized by Patrick O'Reilly to allow to Tarrant & Co. the same prices for certain work that he, as chief contractor, received from the company. This occurred in two items, of which I think this was one.

Q. What was the other?

A. The other was solid rock, the sub-contract having been 65 cents, and the chief contractors 73, to which the former was raised by order of P. O'Reilly.

Counsel for complainant gives notice to counsel for defendant, to produce at the next meeting, if in his possession or control, or of the defendant, the current estimates of Tarrant & Co., also the original agreement between the Lebanon Valley Railroad Company and Patrick O'Reilly, as chief contractor for the building of the first 40 sections of the railroad of that company, west of the city of Reading.

Adjourned until Saturday, March 8th, 1885, at 10½ A. M.

Saturday, March 8th, 1884, at 10½ A. M., examination continued in presence of respective counsel.

Richard B. Osborne being still upon the stand, upon his direct examination saith: "I would like to make a correction as to that portion of my testimony, in which I say I can tell what I believe. The increase of price on hard clay to the sub-contractor brought his price for that up to within one and a half cents of the price of the chief-contractor, the one being 23½ and the other 25.

Counsel is asked to produce the agreement in writing referred to in the bill of complaint as made between Patrick O'Reilly of the one part and Charles Tarrant and the complainant of the other part, relative to the graduation and masonry of sections 14 to 26, both inclusive of the Lebanon Valley R. R. by them as sub-contractors for for him as contractor-in-chief.

Counsel for defendant states that he hasn't got the paper called for, nor has he, as he believes, any of the papers called for in his possession; that he sent the demand for those papers to Mr. James A. O'Reilly, at Reading, on Tuesday evening last, asking him to have them here to-day; that his brother Francis A. O'Reilly came to his, counsel's, office this morning, stating that Mr. A. O'Reilly did not receive said letter until last night, as he had been away from his home all of the week; and that search will be made for said papers, and, if found, they will be produced at some future meeting.

Witness being shown paper in writing purporting to be a letter dated Reading, Nov. 3d, '55, from P. O'Reilly to Jno. H. Osborne, and now marked Exhibit N of complainant, saith:

Q. What is that?

A. This is a letter written by P. O'Reilly, signed by him, to J. H. Osborne, dated, I read it, Nov. 30th, '55. It is in the handwriting of P. O'Reilly.

Q. Who is the P. O'Reilly there mentioned, what relation does he bear to the bill of complaint?

A. He is the chief contractor and the defendant in the bill of complaint in this case. I have my book here containing the original final estimate of Tarrant & Co. It is to be found on page 62 of that book. Page 62 of said book is marked by me, Exhibit O of complainant. It has pencil marks on it made by me years and years ago.

Q. What does the opposite page contain?

A. It contains the final estimate of the same work exactly as shown on page 62, but at the prices of the chief-contractor, and the total amount paid to him on said work.

Witness being shown Exhibit M of complainant, is asked?

Q. Does that agree with page 62 of your book, now marked Exhibit O?

A. It does exactly.

Q. Are the items in Exhibit O numbered the same way that they are in Exhibit M?

The numbers have been attached to Exhibit M lately for the purpose of more easily testifying in the present case, and do not occur in Exhibit O at all.

Q. Have you recently had occasion to revise the final estimate, of which exhibit M is a copy, and if so, state with what result as to its accuracy?

Objected to as irrelevant. Objection overruled.

C. V. D. JOLINE, *Examiner.*
March 8th, 1884.

A. As far as Exhibit O goes it is correct, but there has been an omission from it of the sum of $836.20, which $836.20 have been estimated to the chief-contractor, and to the sub-contrac-

tors in the last current estimate, and should not have been omitted in the final estimate marked O and M.

Answer objected to as irrelevant and inadmissible at the present time. Overruled.

C. V. D. JOLINE, *Examiner.*
March 8th, 1884.

Page 83 of said book of final estimates is marked Exhibit P of complainant.

Objected to. Overruled.

C. V. D. JOLINE, *Examiner.*
March 8th, 1884.

Q. Does this book contain, or have you anywhere, the originals of the current estimates made to and for Tarrant and Co.?

A. I have no copies of the current estimates; they were returned to the chief-contractor for his sub-contractors and himself, and were returned to the company for the chief-contractor. I have a copy of the last current estimate.

Paper produced marked Exhibit Q of complainant, witness saith:

This is it, marked Estimate No. 41, September 30th, 1857, 2nd Division of the Lebanon Valley R. R., Tarrant and Co., sub-contractors.

Q. Does that show the $836.20 omitted from the final estimate of Tarrant and Co., and if so point out where it appears?

A. It is included in two items, which amount in current estimate, No. 41, to $16,900. Those two items are marked with bracket, No. 24, as contained in Exhibit Q, and as one item in exhibit M, under the same number.

Q. Is the omission shown in the final estimate to P. O'Reilly for Tarrant and Co. on page 63, Exhibit P?

A. It is not, because p. 63, Ex. P, is a mere statement of the same quantity as contained in Exhibit O at the chief contractor's prices.

Q. Have you got the final estimate of Patrick O'Reilly for his whole 40 miles west of Reading?

A. I have a certified copy of it, and I have in this book the original on page 26 and 27.

Q. Would that show the omission of the $836.20 without having the final estimates of the other sub-contractors?

A. It shows that the chief contractor received for ballast $59,834.40, and the final estimates of the sub-contractors show that they were estimated $58,538.46, making a deficit on the part of the sub-contractors of $1,295.94, of which Tarrant and Co.'s proportion, is, as before stated, $836.20.

Pages 26 and 27 are marked Exhibit R of complainant.

Objected to. Overruled.

C. D. V. JOLINE, *Examiner.*
March 8th, 1884.

Witness being shown copy of final estimate of Tarrant and Co., marked Ex. S of complainant, saith: That is a correct copy of the final estimate of Tarrant and Co.

Ex. S of complainant objected to. Overruled.

C. V. D. JOLINE, *Examiner.*
March 8th, 1884.

Q. By whom are Exhibits Q and S certified, and at what date?

A. They are in the handwriting and certified by M. E. Lyons on March 23d, 1860. His name is Michael E. Lyons.

Mr. Voorhees objects to the admission of Exhibits Q and S in evidence. Objection overruled, as they have not yet been offered. Appeal.

C. V. D. JOLINE, *M. C. C.*
March 8th, 1884.

Counsel for complainant now withdraws for the present paper marked Ex. Q, being copy of current estimate No. 41 of Tarrant & Co. Witness being shown Exhibit S of complainant, is asked:

Q. How does Exhibit S correspond with Exhibits M and O?

A. They agree precisely, all three agree, with the exception af the addition added by Lyons to the bottom of Exhibit S.

Adjourned until Saturday, March 22d, 1884, at 10½ A. M.

Saturday, March 22d, 1884, at 10½ A. M., examination continued in presence of Mr. Drake and Mr. P. L. Voorhees. Richard B. Osborne being still upon the stand upon his direct examination saith:

Counsel for defendant says that they have made a partial search for the papers called for and have been unable to find them, and that if able to find them they will produce them. Counsel for complainant calls upon the defendant to produce at the next meeting the final estimate of John H. Osborne for work on the Lebanon Valley R. R.

Adjourned until Monday, April 7th, 1884, at 10½ A. M.

Monday, April 7th, 1884, adjourned until Thursday, April 10th, 1884, at 10 A. M.

Thursday, April 10th, 1884, examination continued in presence of Mr. H. A. Drake and Mr. P. L. Voorhees. Counsel for defendant now states that by a letter dated April 8th, and mailed on the 9th, and received by him on 9th, he is informed by his client that after considerable search he has been unable to find the papers heretofore demanded by the counsel of the complainant.

Counsel of complainant now gives notice that he will apply to the Chancellor for an order on the defendant to require her to produce the papers called for, and that he will make his on the 16th inst., at Camden.

Adjourned until Thursday, May 1st, 1884, at 10 A. M.

Thursday, May 1st, 1884, at 10 A. M., examination continued in presence of Mr. Drake and Mr. P. L. Voorhees, Counsel for complainant now calls upon counsel for defendant to produce papers mentioned in the order of the Court, dated April 16, 1884, a copy of which was served upon the counsel for the defendant on the 21st of that

month. Counsel for defendant says that the defendant and her son, Mr. James A. O'Reilly, were notified of said order, and promised to have said papers here to-day if they could be found; that he is not advised that said papers have been found; that Mr. James A. O'Reilly was to have been here to-day, but has not yet arrived.

Richard B. Osborne, being still upon the witness stand, upon his direct examination saith:

Q. Have you got a copy of the final estimate of Tarrant & Co., sub-contractors?

A. It has been already put in, and marked Exhibit O. Exhibit S is a true copy of it.

Witness being shown paper marked Q, witness is asked.

Q. What is that paper?

A. It is the last current estimate returned for Messrs. Tarrant & Co., to P. O'Reilly.

Q. Have you copies of any current estimates for Tarrant & Co., or any current estimates for Patrick O'Reilly, the chief-contractor, for work on the Lebanon Valley Railroad, under the contract mentioned in this bill?

A. I have most of the current estimates for both parties for 1856 and 1857. There may be one or two missing.

Q. Are these copies or originals or draughts?

A. They are the originals from the engineer's office.

Q. Have any of the said current estimates been entered or copied into a book, for preservation, as the final estimates of Tarrant & Co., and P. O'Reilly?

A. The final estimates have alone been kept in book form, but they contain the work actually performed as stated in said current estimates.

Q. Please produce the first current estimate of P. O'Reilly and Tarrant & Co., in order of time, that you can produce?

A. (Witness produces a paper which is now marked Exhibit T of complainant). This is the current estimate of P. O'Reilly, for January, 1856, No. 21, to which is annexed the current estimate of Tarrant & Co., and other sub-contractors for that month as contained therein. I have also, the same thing for the months of February, March, April, May and July of the same year.

(They are produced and marked Exhibits U, V, W, X, and Y, of complainant respectively.)

There are two statements for P. O'Reilly for April, one being an altered statement of the other. I may have very many more of 1856, but I haven't them here. I have several of 1857 here. I have January, 1857, March, 1857, April, 1857, and July, 1857, which is wanting in Tarrant & Co's estimate. Those are all I have here of 1857. I think that I have several others.

Last named estimates produced and marked, respectively, Exhibits Z, A 2, B 2 and C 2, of complainant.

Q. Have you any other estimates of Tarrant & Co., or P. O'Reilly that you can produce to-day?

A. I have not.

Q. Where did you find these that you have just produced, and where have they been since the time the work was done, and they were made?

A. They were found among my papers, which were sent to the residence of John H. Osborne, when removing from my country seat to Philadelphia in 1880. Including what I have stated, they have been in my possession since I gave up my position as engineer on the Lebanon Valley Railroad, on its completion. My final report is dated September 29th, 1858. I was acting for the company up to 1862.

Q. What is the date of your appointment?

A. I was appointed early in the year 1853. I have looked for the exact date, and can't find it.

Q. When were the first forty sections of the Lebanon Valley Railroad let by contract to P. O'Reilly?

Objected to. Objection overruled.

C. V. D. JOLINE, *Examiner.*

A. March 4th, 1854.

Q. Which part of the Lebanon Valley R. R. was denominated the second division?

A. The second division was covered by Tarrant and Co.'s contract, and was composed of sections 14 to 26, both inclusive.

Q. How does the work comprised in the current esti-

mates, marked as Exhibits T to C 2, inclusive, get into the final estimates recorded in the book containing Exhibit O?

A. As far as they go the work contained in them is contained also in the final estimate O. They form the basis, in conjunction with the final measurement, upon which the final estimates are founded in this book, the final estimates being, in all cases, greater, in the record of work done, than the current estimates.

The attention of the witness is called to memorandum at the foot of final estimate of Tarrant and Co., Ex. S, and is asked: If that memorandum correctly shows the last current estimate to be greater than the final estimate by $22,982.70, how he explains the difference in view of his last answer?

Objected to, because the memorandum is no part of the estimate, and is a mere memorandum put down by some other person.

Question withdrawn for the present.

Q. When was the work on division 2, comprised sections 14 to 26, inclusive, completed?

A. We opened the line from Reading to Lebanon on the 15th of July, 1857, as soon as we could get through the 2nd division.

Q. Had you direct charge of P. O'Reilly's work and of his subs. from March 4th, 1854, to July 15th, 1857?

A. I gave it my personal superintendence the whole of that time, with the exception of from the latter part of January, 1856, to about the middle of May of the same year, when I was absent on sick leave in England, and left my principal assistant in charge. My principal assistant was Michael E. Lyons.

Q. Which is the greater in summation current estimate No. 41, the last current estimate of Tarrant & Co., Exhibit Q, or the final estimate, Exhibit S, of Tarrant & Co.?

A. As the figures stand in the two, Estimate 41, Exhibit Q, appears to exceed the final estimate by $22,982.70.

Q. How do you explain that difference, in view of your statement that the final estimates are always greater in amount of work done?

Objected to, as the papers will speak for themselves. Overruled.

C. V. D. JOLINE, *M. C. C.*

A. Estimate 41 contains percentage; also temporary allowance for current work, always deducted from a final, which makes the final in question actually, as it stands now, $253.50 greater in the amount of work done, as exhibited therein, and evidences further that work performed by Tarrant and Co. allowed to them in estimate 41, and allowed to P. O'Reilly in his final estimate has been, by the error of the engineer, left out of the final of Tarrant and Co., amounting to $836.20, making the true final estimate contain more actual work as done by Tarrant and Co. in the final estimate, than in estimate 41.

Q. Does the $836.20 show the error, in Tarrant and Co.'s final estimate, against them, or should that sum be reduced by the $253.50, so that $582.70 would express the actual error, in work done against Tarrant and Co., in their final estimate?

A. The $836.20 is the error. The $253.50 is now in the final, and shows the excess of work in the final over estimate 41 now.

Q. Then does the sum $1,089.70 express the true excess of work done that should actually be comprised in this final estimate?

A. It does exactly.

I wish to state something in connection with my answers to the last few questions. Mr. Voorhees objects to the same.

Objection overruled.

C. V. D. JOLINE, *M. C. C.*

Statement by witness: The summation of the present estimate 41, I have discovered, is more than it should have been if correctly made, by $1,000, the true total being $434,976.05. This would leave the difference $21,982.70, instead of $22,982.70.

Q. You mean then that there is an actual error in the footing of estimate of No. 41, amounting to $1,000?

A. Yes, sir.

Q. How do you account for the $21,982.70; how is it made up?

A. There is $20,500 percentage to be throw bodily out of

the final. Next in place comes this $836.20, which has been omitted, but should not have been. I must account for it in that way. Then there is also an item as a temporary allowance, afterwards paid for in masonry, which amounts to $445, and is excluded in that shape on the final. Then there is an item of $700 thrown out as a separate allowance, an addition being made to another item which composed the total sum given to the contractor on that account. Then there is another amount of $1,836.38. That sum is the difference between the estimate made on judgment in No. 41, and the actual measurements returned for the final, being less by the amount stated. The last item is an item of $200, which was put into the current estimates of Tarrant and Co., but which really belonged to another account altogether, and was excluded from the final of Tarrant and Co., therefore, and put into its proper account. The items which I have given you make the sum of $24,567.58. Those are the minus quantities; now I will give you the plus quantities. The plus quantities, in which the final estimate is more than the current estimate 41, are as follows: In earth excavation, $132; in hard clay, $143.82; in loose rock, $141.98; in solid rock, $659.92; masonry of Skew bridge, $609.75; in the retrimming of sections 14 and 15, $100; in bridge superstructure, $1.65; in white oak in bridge superstructure, $9.98; in white oak plank, $37.45; in wrought iron, $10.43; in horse feed and expenses during suspension, $500; in coping of bridges, $131.50; in pointing of masonry, $30.00; in dry masonry, $50.00; in drain under public road and widening of road, $26.40. These fifteen items of excess in the final estimate amount to $2,584.88.

Take this from the minus quantities, and it leaves $21,982.70 as the excess of minus. Take that excess of minus from the corrected current estimate 41 of $434,976.05, and it leaves the final estimate $412,993.35, to which add the $836.20 left out of the final, and it makes the true final $413,829.55.

Witness being shown paper marked D2 of complainant, saith:

Q. What does that paper show?

A. It shows the details of the result I have just given worked out.

Q. What do the numbers of the items on D 2 correspond with?

A. The small upright red figures in the second column, prefixed to the quantities in the final estimate marked Exhibit M, similar figures in lead pencil on Exhibit Q, are intended to correspond with those on the final Exhibit M.

Witness being shown book marked Exhibit E 2 of complainant, is asked:

Q. What does that book contain?

Objected to. Overruled.

C. V. D. JOLINE, *M. C. C.*

A. It contains the official final estimates returned to the railroad, by which the contractors were paid for the construction of the Lebanon Valley R. R.

Q. Do all the work done and material used by the various sub-contractors, make up the amount of work done and materials used estimated to P. O'Reilly in his final estimate?

A. They do in conjunction with his prices and profit allowed him on the same.

Q. Have you scheduled that up lately?

A. I have a schedule from the various final estimates to show that plainly and conclusively.

Paper shown witness marked Exhibit F 2 of complainant, he is asked:

Q. Is that it?

A. This is a statement showing that the work estimated to Tarrant & Co., on sections 14 to 26 inclusive is included in the final estimate of P. O'Reilly, chief contractor of 40 miles of the Lebanon Valley R. R., to do which it was necessary to tabulate the quantities of each sub-contractor on the whole 40 miles. The central column in red figures shows the quantities contained in the Tarrant & Co. estimate. The last column gives the totals as contained in the final of P. O'Reilly, Exhibit R.

Q. With what exhibit and estimate does the middle column of red figures of Exhibit F 2 correspond?

A. It corresponds with the final estimate of Tarrant & Co. marked Exhibit O in book Exhibit E 2.

Q. As it stands in Exhibit O, or as corrected by you according to D 2?

A. As it stands in Exhibit O, without the correction of the $836.20.

Q. Please point out the $20,500 of percentage which you say was thrown bodily out of the final.

A. It is to be found on estimate No. 41, marked Exhibit Q, on the 17th line of figures on the first page, between items numbered 15 and 19. It is stated there, "sundry unestimated work and percentage." By unestimated work is meant what I have given you in those fifteen items.

Q. What is percentage?

A. Percentage is a certain portion of each payment that can be retained by the R. R. company as security for the performance of the work contracted for; that is, each of the monthly payments on the work done.

Q. What is the contractor and sub-contractor credited by by the R. R. company?

A. The sub-contractor is credited each month with the work performed by him at his prices. The same amount of work is credited to the chief contractor at his increased prices by the company.

Q. What is the chief charged to, and what are the sub-contractors charged to?

A. The payment made to the chief contractor includes the payments due upon the same month to the sub-contractors, and the whole amount paid by the company is charged against the chief contractor by the company.

Q. What does the chief charge against his sub, the actual amount of payment, or the difference between the last and the previous current estimate?

A. The payment exhibited on the estimate returned by the chief engineer for the sub-contractor.

Q. When did you say the work was completed on this R. R.?

A. In January, 1858; on the inauguration of Gov. Pollock, the whole road was open to Harrisburg.

Q. Is there any percentage in current estimate No. 24, of Patrick O'Reilly, Exhibit W, for April, 1856?

A. There is not in the estimate of Patrick O'Reilly.

Q. What was the occasion of your altering that estimate?

A. The last estimate made under my immediate control before my absence was January, 1856. When in England I received a letter from the chief contractor complaining of this very estimate (Ex. W, April, 1856) and asking the engineer to return to his post, that there was something wrong about the estimate; that there was an under estimating of the contractors under Lyons, and that he was paying them their expenses out of percentages. I returned accordingly in May following and immediately took up and investigated the estimate Exhibit W. I found large percentages had been allowed, as stated, to the sub-contractors amounting to $48,000, which was about three-fourths of the percentages retained in the hands of the company as security; that no percentage had been allowed to P. O'Reilly in that month; that he, Lyons, had returned for P. O'Reilly in that month a payment of $13,443.74, but that Tarrant & Co.'s payment, by reason of a large allowance of percentage, amounted to $14,777.00, and that the other sub-contractors to be paid by O'Reilly, out of his $13,443.74, amounted, including Tarrant & Co.'s, to $41,343.39; that a quantity of the work done by the sub-contractors and all the percentage allowed to them to pay their monthly expenses had been excluded by Lyons from the estimate, Exhibit W, and made it absolutely necessary for the chief engineer to investigate that estimate made for P. O'Reilly, which amounted to $799,903.16; that after the errors were detected the alteration in the estimate made it amount to $828,903.16, increasing Lyons' false estimate by $29,000 and giving to P. O'Reilly $42,443.74 to meet his payment to his subs as stated above. The figuring on the bottom of the fourth leaf of Exhibit W. in red ink, was made by me in May, 1856.

Q. Then, if I understand you, you were obliged to carry the percentage, which Lyons had allowed to the subs, into the correction you made of Exhibit W?

A. Returning in May I could but take the figures of the estimates already returned and correct them in the current estimate of P. O'Reilly, which I see I was not able to accomplish until June, 1856. In May I was not able to investigate everything sufficiently to enable me to correct the wrong allowances made by Lyons up to the end of April, but I ordered the assistants to send to me, as chief-engineer, direct, all the returns for the estimate of May, and ordered the assistant on the 2d division to send me also his detail measurements, and cautioned him about the necessity of being accurate in his measurements on those difficult rock sections, calling his attention to the fact that the expenses of the second division were being paid most unjustly out of the percentages that had been kept back from the contractors. Before or about the time the May estimate was made up officially, the influence of Mr. Lyons had been thoroughly removed, and the result of that estimate coming directly, without his influence, to the chief-engineer was as follows: a payment to P. O'Reilly of $60,389.00 as against $13,443.00 the previous month, being an excess of $46,946.00.

Q. Were you enabled after that to get the percentage out of the estimates of the sub-contractors?

A. Not having the June estimate, I have to pass to that of July, 1856, Ex. Y. That estimate, owing to the close and fair measurements upon the whole of the forty miles of P. O'Reilly enabled me, as in duty bound, to strike out the whole of the percentage which had been allowed improperly by Lyons to Tarrant & Co., as well as to some other of the sub-contractors, whose work still required some time additional for completion. In striking out this $15,000 of percentage from Tarrant & Co.'s estimate there had to be, of course, work estimated to enable me to do so, but there was also work enough returned by assistant that month to pay Tarrant & Co. $18,300, showing a gross wrong done to the chief-contractor and to the sub-contractor, amounting to $33,300.

Q. Why, in striking out the percentage of $15,000 from Tarrant & Co.'s estimate, had there to be work estimated to enable you to do so?

A. The $15,000 represented work that had been already done, it belonged to the company as their security. The fact of previous under-estimating the sub-contractors afforded a sufficiency not only for the placing of that $15,000 back into the company's coffers, but of paying for the work which it was put in wrongfully to represent, and for supplying a sufficient amount of work to produce the means for the payment of $18,300, after the deducting of $1,015.79 as percentage.

Q. Suppose with the under-estimating which had been done under Lyons' administration, while you were absent, no percentage had been added to the current estimate of work done by the subs, what would have been the result?

A. A dead stop of the work. It would have stopped anyhow but for the expectation of the return of the chief engineer, because it was robbing the sub-contractors and cheating the chief contractor.

Q, Why would the work have stopped?

Objected to. Overruled.

C. V. D. JOLINE, *M. C. C.*

A. The chief contractor would have turned out or struck because he wouldn't have had money to pay his subs, the subs would have struck because they hadn't money to pay their hands, and the hands would have struck because they weren't paid.

Q. Why did you insert percentage into the last current estimate of Tarrant & Co., No. 41, Ex. Q, if a similar thing in April, 1856, was robbing the sub-contractors and cheating the chief?

A. I but followed up the necessity I was under in March previous. The percentage that I threw out in July, 1856, did not appear again in the estimates till March, 1857; eight months without it, and then I was obliged to make the advance.

Q. Why?

A. I had appealed to the chief contractor before for help to the sub-contractors upon these special difficult sections. In September, 1856, he raised the price of solid rock for Tarrant & Co., and in November he made a still further

increase in that price to seventy-three cents. Those sections were behind-hand in their work owing to the hardness of the rock. I was responsible for the opening of the road to Lebanon in July, 1857. I had frequent conferences with the chief contractor, and informed him that he must make arrangements to have those sections complete in time. He undertook to have those sections done; reminded me of his having increased the price of solid rock to his own price, seventy-three cents; said that he knew his price even would not be sufficient to complete it; that he had already given a considerable sum as extra pay on those rock sections, and while he would promise me that they should be done, he would look to and expect the president of the road to give him such further allowances as would remunerate him for the extra expense he had to go to in completing those sections. The reason therefore that I made the allowance of March, 1857, was that I knew he had done nothing to aid the sub-contractors since the December previous. It was in this month, March, 1857, that he raised the price of hard clay to 23½ cents per cubic yard. This aided the sub-contractors to the amount of $2,485, a sum quite insufficient to pay the expenses on this difficult work. The work must stop, or the engineer must supply the funds to keep it going, and rely upon the promises of the contractor and his future application to the president for an extra allowance on this rock, which application O'Reilly had extorted a promise from the engineer that he would endorse and personally second, to enable him to get this extra allowance. It was for these reasons that the $7,000 was put into the March estimate as percentage, which was $8,000 less than had been put into the same estimate 14 months before, when comparatively little work had been done, while in March, 1857, we were within four months of opening the line.

Q. What objection, if any, had the chief contractor to drawing down the reserve fund of the sub-contractor by adding percentage previously kept back to the last current estimate as the work neared completion?

A. There is only one case in which the chief contractor could possibly object to percentage being allowed the sub,

and that is where the sub-contractor is under estimated in the quantities done, and his expenses paid for the same out of the percentage, because there are no quantities then to be carried into the estimate of the chief contractor, on which he would have his profits. Every payment on percentage, to the sub-contractor, where the work has been fully estimated to both parties, is a direct advantage to the chief contractor, for the company thus pays a debt which the chief contractor would have to pay to the sub at the close of the work.

Adjourned until Wednesday, May 7th, 1884, at 10 A. M.

Wednesday, May 7th, 1884, at 10 A. M., examination continued in presence of H. A. Drake and P. L. Voorhees.

Richard B. Osborne being still upon the stand, upon his direct examination saith:

Q. Have you found any additional estimates besides those offered the other day?

A. I have for August, September, October, November and December, 1856.

Q. Did you find an estimate or a copy of an estimate for September, 1857, besides the part you already had of that estimate relating to the work of Tarrant & Co. for that month?

A. I produce the September estimate of 1857, of P. O'Reilly, and also of Tarrant & Co., of the same date.

Q. Are these copies originals, abstracts or memoranda?

A. They are originals.

(Paper produced and marked Exhibit G 2 of complainant, witness saith):

This belongs to the package of estimates marked C 2, and is of Tarrant & Co. for July, 1857. It may be a duplicate, I don't know.

Q. Exhibit C2 contains a memorandum on the back as follows: "Certificate given Oct. 7, 1857. I hereby certify that by approximate final estimate made up to 31st

"of July, 1857, of work done by P. O'Reilly, contractor "on the Lebanon Valley Railroad, there is a sum due him "as balance to that date of $7,726." By whom was that made, and when, and in whose handwriting is it?

A. It was made October 7th, 1857, by me and is my own handwriting, and was given by me to the chief contractor.

Paper marked Exhibit H2 of complainant, and Exhibit I2 of complainant, shown witness, he saith:

Q. Are those the estimates of September, 1857, above referred to?

A. They are.

Q. On the 2d page of Exhibit I2 there is a memorandum, partly in ink and partly in pencil, showing a balance due to P. O'Reilly to September 30th, 1857, of $3,606.20, when and by whom was that made, and in whose handwriting is it?

A. It was made in the first week in October, 1857, by my office assistant, J. C. Briscoe, and it is in his handwriting, that portion in ink. The figures in pencil made to check the former calculation are in my handwriting and marked correct with my initials.

Q. When was the penciling made by you?

A. It was made immediately after the portion in ink had been submitted to me by my assistant.

Q. Does that show the portion of percentage and the portion of work in the sum total of the estimate?

A. It shows that $21,945.67 of percentage had been put into the estimate; that in order to arrive at the true credit to be given the contractor for work actually done it had to be subtracted from the total summation of the estimate which left the amount of work done at $1,491,880. Then it showed the amount which had been paid up to date on account to P. O'Reilly, namely, $1,488,273.80, leaving a balance due to him up to that date of $3,606.20.

Q. When percentage is put into the estimate before the work nears its close what does it show?

A. It exhibits to the contractors what they thoroughly understand, namely: that either they are losing on their work or that they have been under-estimated on the work done.

Q. From the commencement of this work up to January 1st, 1856, what percentage had gone into the estimates of P. O'Reilly or Tarrant & Co.?

A. The estimates returned to P. O'Reilly from April, 1855, to January, 1856, contained no allowance on percentage whatever.

Q. What means had P. O'Reilly and Tarrant & Co. of knowing this?

Objected to. Overruled. C. V. D. JOLINE, *M. C. C.*

A. They had the estimates which were returned monthly to them and in which this particular was clearly stated and exhibited.

Q. When percentage allowances were put into the estimates as already stated, during your absence in England, state, if you please, any conversations or transactions with them, that is Tarrant & Co. or P. O'Reilly, in which those percentage allowances were under discussion.

A. The chief contractor immediately on my return complained that my principal assistant had not been giving the contractors and himself full estimates for the work performed, and in order to meet the expenses and keep the work going had been drawing upon the reserved percentage of the sub-contractors, without allowing him, in some months, corresponding sums on percentage so as to meet his payments to the subs; and called upon the engineer to investigate and make due correction. The chief contractor was the first to call my attention to it.

Q. When, by July, 1856, you had succeeded by correcting the estimates so that the percentage could be all thrown out, as before stated, what statements did Tarrant & Co. or P. O'Reilly make to you, or what transactions had either of them with you with reference to that, showing their satisfaction or dissatisfaction therewith?

Objected to. Overruled.

C. V. D. JOLINE, *M. C. C.*

A. The work went on satisfactorily for some four months on the corrected estimates; about October or November the expenses of the second division had increased

on these heavy sections, and I called upon the chief contractor to take some action that would ensure that work being pushed through; that I protested against paying for his work out of the back earnings of the sub-contractors; that it was evident that the character of that rock was unexpected in its hardness, and that he had grounds sufficient to make application to the board of directors for money to pay the extra expense of excavating that rock. Under the advice of the engineer he made an application by letter to the board of directors for money to pay his extra cost of this rock. This was in December, 1856.

Q. When did the unexpected character of this rock become evident?

A. As early as about the middle of June or July, 1855; after they had got down some eight or ten feet from the surface then the rock became exceedingly difficult to drill and blast.

Q. Why didn't you at this point, in October or November, 1856, make allowances to Tarrant & Co. from their reserved percentage?

A. Because the action of the chief contractor, urged on him by the engineer, was taken preparatory to his definite application to the board; to that application on the 11th of December, 1856, the board, at a meeting, ordered their treasurer, for the purpose of payment to O'Reilly on this application, to give to the chief contractor notes at ninety days, four, five and six months respectively, for $5,000 each, making a total of $20,000 paid to him therefor. It wasn't paid to him then, because at a meeting on the 16th the board ratified the previous resolution.

(All statements as to the action of the board objected to.)

Q. What payments, if any, were made by Patrick O'Reilly, at or about this time, out of this $20,000, and on what account were they made?

A. On the 19th of December the chief contractor paid on account of this hard rock excavation, $8,000 out of this $20,000 received from the board, thus relieving the engineer from an immediate advance to Tarrant & Co. out of their reserved percentage.

Q. In January, 1857, what was the relative condition

or advancement of the work on the sections of Tarrant & Co. in the second division, and on the other sections of Patrick O'Reilly in this railroad?

A. These rock sections were the cause of the delay of the opening of the road to Lebanon; the rest of the line to Lebanon was in a forward, and in some cases a finished condition.

Q. Why in March, 1857, did you put into the estimate of Tarrant & Co., as I think you have already stated, $9,000 of their reserve percentage?

A. I put in $7,000. January and February had passed without aid to Tarrant & Co. from the chief contractor; in the month of March, the pressure on the engineer from these sub-contractors had increased, because of the increase of expenses. The engineer had conferences with the chief contractor on the subject; he failed to make them any further advances out of the means received from the company, but, in order to give some assistance to the subs, raised the price as before stated of hard clay, which added to the estimate of the subs $2,485.00, leaving the engineer to make up the deficiency, and in order to prevent the stoppage of the work, to prevent riot, and perhaps worse, as had already occurred on that division before by reason of non-payment of the estimate he drew on the reserve percentage of the sub-contractors to pay for this work of the chief contractor which he had promised the engineer to have performed, and for which the engineer was responsible to his president. That was the reason of my advance of $7,000 in March.

Q. Can you tell by how much less the estimate for Tarrant & Co. for March, 1857, was less than their expenses, up to the end of that month?

Objected to as improper.

A. The amount allowed by the chief contractor as before stated, and the addition made by the engineer, is the measure of what the estimate was less than the expenses.

Q. What would have been the result on this second division, if no means could have been found to pay Tarrant & Co.?

Objected to.

A. Work would have stopped in the first place, and the engineer would have forthwith abandoned the contract of P. O'Reilly.

Q. Was P. O'Reilly willing to give up his contract at that time?

A. That was the difficulty; he retained his contract and failed to provide for its execution, as he had promised the engineer. Had he relinquished it the works would have been executed at an earlier date, for the sub-contractors would have been supplied directly by the company with the necessary means.

Q. How was this difficulty dealt with?

A. The engineer relied upon the promises of the chief contractor that he would pay for the extra cost of this rock, but in the succeeding months he failed to do so up to the time of the opening of the line in July, 1857, and the engineer for the same reasons before mentioned was compelled to draw from the legitimate profits of Tarrant & Co. to pay the expenses on the chief contractor's work, until the allowance had increased from $7,000 in March to $20,500 in July, 1857.

Q. State if you please, how the prices for excavation, hauling to embankment, and for ballast were fixed between the chief contractor and his subs, and then state how, if at all, alterations could be made in the prices thus fixed?

A. The prices for those three items, as well as for all items contained in the sub-contractors' contracts, were bid for by the sub-contractors in their proposals to the chief contractor. The chief contractor then submitted them to the chief-engineer and according to his approval or otherwise those prices were fixed, and on them the contracts between the chief and sub-contractors were made. This was after the work was awarded to the chief contractor. Any alterations after that could be made only by the agreement between the respective parties, except where the chief contractor for his own benefit saw fit to increase the price of any one item previously determined on for the sub-contractor, with-

out which the engineer had no power whatever to increase the prices of the sub-contractors, and never did.

Q. What percentages were kept back at the commencement of the work from the amounts currently estimated to the chief contractor and his subs, and who arranged and fixed the percentages retained?

A. Ten per cent. was retained from the chief contractor on the whole of his estimate; seven per cent. was kept back from the estimate of each of the various sub-contractors. The chief-engineer was the sole arbiter and judge how far those general rules of percentage should be carried out. What should be added and what should be retained each month he decided on as the best for the interest of the company and of the contractors.

The counsel for complainant now produces and offers the six estimates for August, September, October, November and December, 1856, above referred to, and which are now marked Exhibit K2, L2, M2, N2 and O2, respectively, of the complainant.

Q. To what did the increase in price of hard clay, amounting, as you have stated, to $2,485, refer—to all the hard clay previously excavated, or to the portion excavated during the current month?

A. To all that had been previously excavated up to the end of that month.

Q. What power had you in case the chief contractor wouldn't furnish the means to carry on the contract, to abandon the contract of Patrick O'Reilly, the chief contractor in this case?

Objected to as irrelevant.

A. The same power that I exercised against George M. Lauman and his brothers, the contractors on the other portion of the same road, by which I took possession of the work and sub-let it to the sub-contractors or finished it myself at the expense of the company.

Q. Why didn't you do that in this case?

Objected to.

A. Because I relied upon the promises of my old contractor by which he had assured me that he would advance sufficient to finish those sections in time, he having extorted

a promise from the engineer that he would aid him in a future application to the president to have the amount of the extra cost of this rock paid to him, P. O'Reilly.

Q. To what does your testimony, relative to fixing of prices between the chief contractor and his subs, and the amount of percentage retained from the chief and his subs, refer; to work under this contract or work of this sort generally?

A. To the work of the construction of the whole Lebanon Valley R. R.

Q. In addition to the $20,500 of percentage which you had allowed to Tarrant & Co. in the estimate of July, 1857, what money or moneys had Patrick O'Reilly allowed them, except by raising the price of hard clay, and paying the $8,000 before stated?

Objected to.

A. There was a sum still of the percentage left, amounting to about $8,000 and there was a balance of $12,000 out of the $20,000 that the chief contractor received from the board, all of which was still, to the best of my knowledge, unpaid to Tarrant & Co.; on account of Tarrant & Co.

Q. What moneys had he paid to them, besides those, on account of allowance above their contract?

Objected to.

A. The engineer is not cognizant of his having paid anything on account of the extra cost of this work after December 19th, 1856?

Witness being referred to Exhibits Q and H 2 is asked:

Q. What payment was made to Tarrant & Co., on current estimate 41, for September, 1857?

A. The total payment on that estimate which included all the work previously done, and which contained an addition for that month, of $1,000 for rock excavation and $1,500 for ballast, as the total estimate for the month of September, 1857, which made up a payment from the chief contractor to Tarrant & Co. of $2,500, the whole sum which he was authorized by the engineer to pay to them on the current estimate 41.

Q. To what figure did this allowance of percentage reduce the profits of Tarrant & Co. at this time?

Objected to.

A. It left of their reserve percentage but a sum of a little over $8,000.

Q. Taking into account that the summation of current estimate 41 was too large by $1,000, as before stated, how much did it leave them?

Objected to.

A. It ought to make $1,000 against them.

Q. State if you please what opportunity P. O'Reilly had of knowing the extent of the payment to Tarrant & Co. on percentage, and of the consequent reduction of reserve percentage as shown by this estimate 41, Exhibit Q?

A. It was clearly stated in the estimate made for the sub-contractor that $20,500 in payment of the chief contractor's debt on account of retained percentage had been made in the estimate 41, and in the estimate for the same month made and given to him there was a marginal note before referred to showing that in the chief contractor's estimate for that month, there was a sum of $21,945.67 which had been paid for him to the sub-contractors, and the liquidating of so large an amount of his indebtedness to his sub-contractors was too plainly visible to be passed over by any one interested therein; I mean by him interested therein.

Q. Have you any means of showing what Patrick O'Reilly's profit on this work of Tarrant & Co. was?

Objected to.

A. I have. The final estimate returned by the engineer for Tarrant & Co., corrected by the addition of $836.20, left out by error, taken from the final estimate on the same work of P. O'Reilly, at P. O'Reilly's prices, without any allowance or addition for the extra sums he obtained from the company, upon the same work, will amount to about $49,000, which is the profit of P. O'Reilly according to the engineer's statement.

Q. The memoranda endorsed on the back of Exhibit M, a copy of the final estimate of Tarrant & Co., namely "P. O'Reilly's estimate on this work is $463,114-79," was made by whom?

A. I would not like to swear to its being mine, but it

will be found in the book that the master marked Exhibit E2 on page 63 marked Exhibit P.

Q. How is the sum or balance of about $49,000 computed or arrived at?

Objected to.

A. By subtracting $412,993.35, plus $836.20 from $463,-114.79. Those two large sums are the summation of the same work at the prices of the chief and at the prices of the sub-contractor, and are shown on pp. 62 and 63 of book marked Exhibit E 2, which pages are marked repectively Exhibit O and P.

Q. To what is a payment on an estimate after it is made out referred?

A. On being made out it is referred by the engineer to the general account kept by the contractor, all percentage allowed in the estimate being deducted therefrom to arrive at the true credit to be given to the contractor for work done, and as the work approaches to a close the engineer is in the habit of making marginal notes on the estimate of the total sum previously paid, which, taken from the amount decreased by the deduction of the percentage, gives the balance due to the contractor up to that date. Such a marginal note will be found, as before alluded to, on the estimate ending September, 1857, made out to the chief contractor marked Exhibit I 2. It is information both for the contractor and chief engineer, showing the state of the account at that time.

Q. Was this memorandum, the marginal note on Ex. I 2 just referred to, brought to the notice of P. O'Reilly?

A. They were usually made out for that purpose; that note will probably be found on the estimate returned to the chief contractor. It was open, as all such memoranda were, to him whenever he chose to ask for it. I cannot at this long period since state positively whether he got it or not, but it was made for him and he could get it if he chose.

Q. How much of the item in this memorandum, namely "to percentage in estimate $21,945.67," and again in the lead penciling, "percentage, &c., allowed in do. $21,945.-67," went to Tarrant & Co.?

A. All of it but $1,445.67.

Q. Is Exhibit R, on pp. 26 and 27 of Exhibit E2, the original or the copy of the final estimate of Patrick O'Reilly, and did it go to Patrick O'Reilly or to the railroad company, and if so, when?

A. It is the original and official estimate from which the copies were made that were sent to the Philadelphia and Reading R. R. Co., September 29th, 1858, and to the chief contractor, I should suppose, early in that year. He got it whenever he wanted it. On the first date, September 29, 1858, it was returned to President Cullen, of the Philadelphia and Reading R. R. Co., as an unclosed account, referring the matter to him on the resignation of my position upon the road.

Q. What amount of percentage was retained or kept back from the sub-contractors, Tarrant & Co., on current estimate No. 41, Exhibit Q?

A. Without being able to state precisely to the dollar, the amount did not exceed much $8,000 still retained in the company's hands.

Q. What amount of percentage was kept back from the same sub-contractors on the same current estimate on work currently estimated for the month of September, 1857, and not previously estimated?

A. These sub-contractors had been drawn on to pay their own expenses to the amount of $20,500 in this estimate, and it was not deemed worth while to go through the formality of deducting from them seven per cent. upon the small amount of work which actually formed the estimate 41.

Q. Is it usual when it is deemed necessary by the engineer to draw on the sub-contractor's reserve of previously retained percentage, in order to get a payment to meet the expenses of the sub-contractor, to retain a percentage on the work of the current month?

Objected to as irrelevant.

A. It is a question which is left with the engineer. He only falsifies his own action when he gives with one hand, and takes away with the other.

Q. What amount of this sum of $435,975.05 of esti-

mate 41, Exhibit Q, was paid in cash to Tarrant & Co.?

A. I never had any payments to make to any sub-contractor, and don't know what they were paid. I could make out the estimate of the work done, and bring out a payment to guide the chief contractor under the contract in the payment of his subs.

Q. What was the amount of the payment of Tarrant & Co. on that estimate No. 41, Ex. Q?

A. Only $2,500.

Q. To what extent is the summation $435,976.05, of this same Exhibit Q, evidence of the payment of that sum by Patrick O'Reilly to his sub-contractors, Tarrant & Co., under their contract with him?

A. That summation is made up by adding the total work estimated in the month of September, 1857, to the summation of the estimate of August previous, and then deducting from that aggregate amount, the total of the August estimate leaving as the entire amount of work estimated by the engineer for this September estimate 41, the very small sum of $2,500.

Q. How would you get at the payments made by the chief contractor O'Reilly to these same sub-contractors, except by taking the summation of the last current estimate, and how would O'Reilly get at them?

Objected to.

A. The summation of the last current estimate would be no criterion whatever, by which to arrive at the payments enquired about. The engineer could arrive by the examination of all the current estimates of the payments, he authorized the chief contractor to make under the contract. The actual payments to Tarrant & Co. can only be obtained by the receipts given by Tarrant & Co. for the moneys they received, and the corresponding accounts kept by the chief contractor.

Q. Where are those receipts to be found?

A. Among the papers left by P. O'Reilly in the hands, I presume, of his sons.

Q. Would they or would they not be found in the chief contractor's copies of the current estimates for Tarrant &

Co. written into the blank form, printed on the forms of those current estimates, at the bottom?

A. I should think not. The payments were more or less irregular, and that form would not be suitable therefor.

Adjourned until Friday, May 23, at 10½ A. M.

Adjourned until Monday, June 2nd, at 10½ A. M.

Monday, June 2nd, 1884, in presence of respective counsel examination resumed. Richard B. Osborne being still upon the stand upon his direct examination, saith:

Witness being shown paper now produced, and marked Exhibit P 2 of complainant, is asked: What is that?

A. It is the form on which all the contracts with the chief and sub-contractors on the Lebanon Valley R. R. have been made.

Counsel for defendant objects to the above exhibit being marked or received in evidence because it doesn't purport to be an agreement between the parties to this suit or either of them, and as irrelevant and inadmissible.

Q. What resemblance does that bear to the agreement between Mr. O'Reilly and Tarrant & Co.?

Objected to above.

A. It is precisely the same except in that portion in manuscript designating the names, particular work and date of contract.

Witness being referred to page 6 of Exhibit P 2, is asked:

Q. How were the prices of work, originally agreed upon between P. O'Reilly and Tarrant & Co., stated on that page?

A. They were stated by writing the same with pen and ink in their proper places.

Witness being referred to first paragraph of page 7, is asked:

Q. What was that paragraph left blank and struck out in the agreement between P. O'Reilly and Tarrant & Co.?

A. It was always acted on as an unnecessary clause and was in fact a dead letter.

Q. Did the agreement between the company and Patrick O'Reilly, for the construction of his forty miles, contain the provision embraced in the second paragraph of p. 7 of Ex. P2?

Objected to.

A. It did.

Q. What resemblance did the agreement between Patrick O'Reilly and the company bear to this Exhibit P2?

Objected to.

A. The same resemblance exactly that the chief contractor bore to it and to Tarrant & Co.'s contract.

Q. Do you mean to say by that that Patrick O'Reilly's contract with the company was written upon a form similar to that?

Objected to.

A. As far as the engineer was concerned it was; what the counsel of the company may have done afterwards I am unable to say.

Counsel of defendant objects to all the questions asked relative to Ex. P2, or in comparison therewith, upon the same grounds as stated in the objection to the exhibit.

Q. When the engineer began in March, 1857, with borrowing from Tarrant & Co.'s percentage to try to meet their current expenses, and continued this borrowing until there were $20,500 drawn from this reserve profit, what expenses of Tarrant & Co. was this sum intended to meet?

Objected to.

A. The percentage thus drawn on was for the purpose of meeting or paying the current monthly wages of the men employed. The cost of powder, steel, fuse, &c., could only be obtained from the sub-contractors' bills payable, and were not included in the foregoing.

Q. You have before stated that the percentage of the sub-contractor, put into his estimate to meet his expenses, was doing an injustice to the sub and to his chief, why does not the allowance of $20,500 in July, and September, 1857, inflict this injustice on the same parties?

Objected to as irrevelant and calling for opinions and not facts.

A. It is an injustice to the sub-contractor to use any

portion of his percentage to pay his current expenses. It is unjust to the chief contractor if the quantities contained in the sub-contractor's estimate is not also put into the estimate of the chief contractor, and the deficiency is made up by drawing on the percentage, but in this case when $20,500 had been drawn on in July, 1857, the chief contractor had been allowed everything that was contained in the sub's estimate. The chief contractor was therefore gainer, because the sub's percentage was drawn on to keep this difficult work in progress and pay the chief contractor's debt, the sub-contractor being the loser as shown to the amount of $20,500.

Q. How does drawing on percentage to pay sub-contractor's current expenses show an injustice to the sub?

Objected to.

A. It draws on a fund which is reserved by the company as a portion of the legitimate profits due to the sub-contractor at the close of work.

Q. How does drawing on percentage, as in this case, to the extent of $20,500, pay the debt of the chief contractor to the sub?

Objected to.

A. The railroad company anticipates the payment of a debt that would ultimately have to be met by the chief contractor and supplies the funds for the payment thereof.

Q. Was the chief contractor fully informed of the payment of this $20,500 percentage, and did he have an opportunity to object to its being drawn on and paid to Tarrant & Co. before it was paid?

Objected to.

A. He had it brought before him as it accumulated in every monthly estimate till it reached $20,500.

Q. What objection if any did he make?

Objected to.

A. He never made any objection. If he had he would have been obliged to pay the deficiency himself to keep the work in progress, as he had done in December, 1856, when he paid $8,000 to the sub-contractors. It was not his interest to object to the railroad company paying his debt for the finishing of this difficult work.

Q. Why weren't the expenses paid out of the allowances for the work?

Objected to.

A. The prices paid to the sub-contractor were totally inadequate to supply funds for that purpose, although the estimates were so liberal that on the final estimate there was but a balance of some few hundred dollars to pay the current monthly expenses, the bills due, and close up the whole.

Q. What then had these sub-contractors, Tarrant & Co., or John H. Osborne, as it was then, to depend upon to meet the expenses above the small allowance on the final estimate?

Objected to.

A. The definite arrangement they made with the chief contractor for meeting the extra cost of this work.

Q. What opportunity had you for knowing what the cost of this work on the second division was?

A. After this work was let an official order was sent to each of the resident or assistant engineers, stating that the end of each week a return should be prepared showing the number of laborers, mechanics, horses at work, horses idle, clerks, cooks, attendants, boys, engaged by each sub-contractor, that these returns would be made by a time-keeper appointed by the company, by the engineer in-chief, who should pass over each division in an easterly direction one day, in a westerly direction the next day and on every second day he should submit these returns to the assistant engineer to record in the report of force book, and at the end of each week the returns should be prepared, showing the labor expended by the sub-contractor on each section, according to the subjoined form. There is the official order to the assistant engineer of the second division, Richard F. Stack, and an example of the form by which they were kept.

Answer objected to.

Q. What means had the assistant engineer of knowing that the time-keeper performed his duty?

Objected to.

A. He had a daily supervision of his work; he had the

opportunities of knowing the numbers employed at various points. He had the power of comparing his returns with the pay-lists of the sub-contractor.

Q. What was done under this order and subjoined form, now offered and marked Exhibit Q 2, to inform you of the expenses of these sub-contractors?

Objected to.

A. In pursuance of that general order returns were made by the assistant engineers of all the forces employed by the sub-contractors during the different months, or for each month; really they came in each month. Here are a number of these returns.

Paper marked Ex. R 2, purporting to be, "Report of "force employed by Tarrant & Co. for month ending July "31st, 1856," made by R. F. Stack, assistant engineer to R. B. Osborne, engineer-in-chief, shown witness, he is asked:

Q. Is that one of the papers just referred to relating to force employed by Tarrant & Co., and is it an original or a copy?

Objected to as irrelevant, inadmissible and not binding on defendant.

A. It is, and it is an original. Richard F. Stack was the assistant on that division till near its close.

Witness being shown papers marked respectively, Ex. S 2, T 2 and U 2, of complainant, is asked:

Q. What are these?

Objected to.

A. They are examples of the same returns for other months, made to me by the same assistant and are originals.

Q. What was done with these to preserve the information they brought to you?

Objected to.

A. They were recorded by the assistant engineer in the report of force-book, which book was to have been here by Adams' express to-day, but which has failed to come, and will be here at the next meeting.

Q. For what purpose was that book kept?

Objected to.

A. To afford information to the chief engineer by which

he would know whether the work was profitable to the contractor or otherwise.

Q. What assistant engineer kept the book for the second division?

Objected to.

A. Richard F. Stack. He is dead, I think; to the best of my knowledge and information he is.

Q. What knowledge or information had Patrick O'Reilly of these returns and of the expenses of the second division kept in this way?

Objected to as irrelevant.

A. He had every opportunity of getting the full information from the time-keeper or from the engineer's office where every particular about the work was duly made known to him on his application.

Q. Were these returns, such as shown by Exs. R 2 to U 2, inclusive, and the particulars of the work, which were kept in your office just referred to, kept for the company or for the chief contractor and the several sub-contractors?

Objected to.

A. The record I stated was kept by the assistant engineer of the division. He was the company's officer. The records were kept for the chief engineer to be used for the interest of all parties concerned.

Q. Suppose a contractor or sub-contractor complained that his monthly allowance on his estimates, didn't meet his expenses, what means had you of testing the truth of that fact supporting that complaint?

Objected to.

A. By ascertaining from the returns made what his monthly expenses were.

Q. Were any such complaints made by the sub-contractors of the second division, Tarrant & Co.?

Objected to.

A. Those complaints had frequently been made at the engineer's office after about one-half of the rock excavation had been made.

Q. Have you any means of showing what the actual amount of rock excavation on the second division was?

Objected to.

A. That division was an important one, and received from the engineer that close attention which the interests of the company demanded. I produce a profile which exhibits the exact position of the rock below the surface at each point, the depth of the rock at all points, the quantities between each station, and the total quantities of this rock upon the whole division in the line of the railroad proper amounting to 151,085 cubic yards, being some 3,000 yards below the quantity stated in the final estimate of Tarrant & Co., the difference being the solid rock contained in the approaches of the public road crossing the railway.

Q. What does this profile show as to grade, embankment, cuttings and distance?

Objected to.

A. It shows the excavation and embankment as formed to the grade line as finished and completed by Tarrant & Co. The section and distances are all marked, and it embraces the whole of the second division, from 14 to 26 inclusive. This profile is the original made by Richard F. Stack. It was made previous to July, 1857. Said profile is now offered and marked Exhibit V2 of complainant.

Q. What became of your promise to Patrick O'Reilly to personally make an application to the board for him for an extra allowance on this rock? What action did you take on it?

Objected to.

A. That promise was made while the road was under the control of the Lebanon Valley R. R. board. In December, 1858, the road was merged into the Philadelphia and Reading R. R. Co. In November, 1859, Mr. O'Reilly brought suit against the Reading company to recover on his claim against the Lebanon Valley R. R. Co. It dragged along through 1860 and up to 1861 without any result, and in the fall of 1861 he called at my office, acting still for the company as engineer, and put me in remembrance of my promise made to him of a personal application on my part to the president for an allowance to be made to him as chief contractor for the extra cost of the work on

the second division. Mr. O'Reilly made verbal statements to me of his claim of which I made notes at the time, and selected such items as I thought I would be justified in including in my application to the president. I then left Mr. O'Reilly in my office waiting for my return and went down stairs to the president, and laid before him the items upon which I deemed it proper as engineer that he should make an allowance, stating at the same time that the board of the Lebanon Valley R. R. Co. had already given to the chief contracter in December, 1856, the sum of $20,000 on account of his claims on this and other sections. The result placed before the president appealed to him for an allowance additional to the chief contractor of $40,000. In this the president acquiesced and authorized me to offer to him the sum of $40,000 in round numbers to close the account. I returned to my office and found the chief contractor there; I made a memorandum showing upon what I had based my statement to the president, of the allowance this time of $40,000 after deducting the $8,000 which the chief contractor had paid to the sub-contractors in December, 1856.

Q. Can you produce the memoranda upon which this claim was based?

Objected to.

A. The memoranda which was handed to the chief contractor I kept no copy of. The basis upon which the offer was made, I can give some statement of now without the memoranda.

Q. Please state as well as you can upon what basis the application was made.

Objected to.

A. I based it upon my knowledge of the work during its progress. I took forty-eight per cent. of the solid rock as the proportion upon which the loss in excavating it had occurred. The total amount of solid rock estimated to Tarrant & Co. was 154,316 cubic yards, 48 per cent. of that amounted to some 74,071 yards. I put that at $1.38 per cubic yard which was sixty cents in addition to the price paid by the chief to the sub. That brought out a sum of $102,217. The amount estimated for the same

$53,999, which taken from the previous sum left $48,218, subtracting from it the amount paid by the chief contractor to Tarrant & Co., $8,000, it left a balance of $40,. 218 which was the offer made to P. O'Reilly.

Q. Was the chief contractor Patrick O'Reilly aware of the basis upon which this application was made?

Objected to.

A. The memoranda given to him by me at the time, contained to the best of my knowledge the particulars I have stated?

Q. State what other items of cost or expenditure Patrick O'Reilly desired you to include as the basis of this application, beside that which you did include.

Objected to.

A. There was a very large number of items on which he claimed additional compensation from the company, and all of which were provided for by prices contained in the contract. There was nothing in the character of the work contained in those items that the engineer deemed sufficient to justify him in making any claim for the contractor, or interfering with the contract. Mr. O'Reilly complained that these had been omitted by me. I reminded him that it was only on those sections where he had given his own price to the sub-contractors to complete work which he was forced by the engineer to finish at whatever its cost might be within a stated time; that the engineer was justified in calling upon his company to pay him the additional price that was necessary to enable him to meet the demands on him by his sub contractors for the same.

Q. What cost, if any, would pushing work bring over and above not pushing it?

Objected to.

A. The fact of having to give up the most economic mode of working heavy rock cutting, which is from the two faces or breasts, and compelling a contractor to make intermediate openings from the surface down, would increase the cost of the excavation of that rock, according to circumstances, from fifty to one hundred per cent.

Q. Was this offer, which the president authorized you to make, accepted by the chief contractor, P. O'Reilly?

Objected to.

A. It was rejected, and the whole matter was carried before referee, with what result I am unable to say.

Q. State if you please what Patrick O'Reilly said at the time he would be willing to take in settlement of his claim.

Objected to.

A. I had no authority to confer with him except so far as I have stated. As a matter of duty, I referred him to the president and board of directors.

Q. You have referred to the extra cost or loss of excavating these hard rock sections; what means have you of knowing what that loss was, and upon what information did you base your application of an increase of sixty-five cents on forty-eight per cent. of the hard rock excavating?

Objected to.

A. First upon the reports regularly sent to the engineer's office of the expenditure by the sub-contractor for labor; secondly, by the statements made by the assistants of the cost of the necessary material; thirdly, by comparison of those statements with the statements made by the clerk, Geo. W. Bowen, of Tarrant & Co., a very definite estimate could be made of the cost of excavating this rock. The first class were upon such reports, as shown by Exhibits R2 to U2 inclusive.

Q. Did any complaints come to you from the sub-contractor about the difficult character of this work on division two?

Objected to.

A. During the absence of the engineer in England, when Tarrant & Co. had been very much under-estimated in their work, and during a time of seven months when they were kept very improperly without being supplied with the requisite rails for the removal of the material into their embankments, the haul on some of which was a mile and a half in length, there were some complaints, as I learned afterward from a letter from the clerk of Tarrant & Co., which I now produce. Yet on this second division containing more work than any other firm of sub-contractors

on the line there was performed by Tarrant & Co., under all the impediments thrown in their way during the engineer's absence, thirteen per cent. more masonry than there was on the third division, and forty-three per cent. more masonry than there was on the fourth, four per cent. more grading than there was on the third, and as to the extra cost of the work being caused by their mismanagement, it is stated that Benjamin Scott, the foreman in charge of all the work and workmen, the engineer knows by experience, was the most efficient and most economical manager he ever had on important railroad construction, and further in proof that the complaint before mentioned was untruthful the resolution of the board of directors thanking Tarrant & Co., through their representative, John H. Osborne, clearly shows that the complaint was unfounded and can be produced. (Answer objected to.) It was on this efficiency, and the promise made by Tarrant & Co. to the engineer and to the chief contractor that the reliance was placed on having the line completed in time.

Paper marked Exhibit W 2 of complainant shown witness, he saith:

This is the letter from Bowen, the clerk of Tarrant & Co., referred to.

Exhibit W 2 objected to as irrelevant.

Q. Are the complaints against Tarrant & Co., which you have spoken of, referred to in this letter?

Objected to.

A. They are.

Q. By whom were the trial pits, which were dug to get information upon which to make proposals, made, by the company or by the contractors?

Objected to.

A. They were under the orders of the company's engineer by a foreman and gang of hands specially detailed for that work and paid by the railroad company.

Q. Had the contractors in making proposals any information upon which to make them except that disclosed by the digging of these trial pits, as to the hardness of the rock which would be encountered?

Objected to.

A. Schedules were made out by the engineer at the letting of the works showing to the contractors the quantities of rock, its character, quality, also of the excavation as to the approximate quantities of hard clay and common excavation, the quantity and class of all masonry; and on the quantities and the character of the work so given the contractors were required to bid, and on no other.

Q. What information, if any, had Patrick O'Reilly and Tarrant & Co., the sub-contractors on the second division, upon which to base their estimates and proposals, for the works on the second division, except such as was furnished by the company?

Objected to.

A. They had none, and they were not justified in taking any other.

Witness being shown paper marked Ex. X2 of complainant, is asked:

Q. What is this?

Objected to.

A. This is the resolution referred to by me of the directors of the Lebanon Valley R. R. testifying to the faithful and energetic prosecution and satisfactory completion of the sub-contract for grading the second division of the above road by John H. Osborne, Esq., including the fourteen miles between Womelsdorf and Lebanon, &c., &c., &c., signed, Simon Cameron, president; Isaac Eckert, G. A. Nicolls, J. M. Killenger, Samuel Bell and Joseph Henry. I know Simon Cameron and G. A. Nicolls' signatures and handwriting, and the signatures of theirs to this resolution is theirs. Simon Cameron and G. A. Nicolls are alive; the rest I cannot say whether they are living or dead. I know that Samuel Bell is dead.

Adjourned until Monday, June 9th, 1884, at 10.30 A. M.

The examination of Richard B. Osborne is now deferred until the conclusion of the examination of George W. Bowen.

Mr. Richard B. Osborne's testimony is resumed on p.

Camden, Monday, June 9th, 1884, 10 A. M.

Examination continued in the presence of the respective counsel. Further examination of Mr. Richard B. Osborne is deferred until after the examination of George W. Bowen.

A. E. Irwin, stenographer, was duly sworn.

George W. Bowen, sworn and examined.

By Mr. Drake—

Q. Do you know John H. Osborne, the complainant in this case?

A. I do.

Q. How long have you known him?

A. Since 1852, July, 1852.

Q. Where and how did you first become acquainted with him?

A. I became acquainted with him in Richmond, Va., in July, 1852.

Q. What was your first business with him?

A. I was his private secretary, with the Richmond and Danville Railroad Company.

Q. What was the next business you had with him?

A. As clerk and cashier on the Camden and Atlantic Railroad, in September, 1853.

Q. Did you know Patrick O'Reilly?

A. I did.

Q. When did you first become acquainted with him?

A. In September, 1853.

Q. What were the first business transactions you had with him?

A. As clerk and cashier for the payment of moneys on the Camden and Atlantic Railroad.

Q. What was Patrick O'Reilly's business there?

A. Sub-contractor for building the Camden and Atlantic Railroad from Camden to Atlantic City.

Q. In whose charge were the moneys placed for disbursement, and by whom were they so placed?

Objected to.

A. They were placed in my hands, at times by John H. Osborne, and at times by Mr. O'Reilly.

Q. What was the nature of the business between J. H. Osborne and Patrick O'Reilly on the Camden and Atlantic Railroad?

Objected to as to form.

A. Mr. Osborne was manager for O'Reilly on the work.

Q. Was that business ever settled up?

Objected to.

A. Not that I am aware of. I turned over the papers and all the disbursements and everything to Patrick O'Reilly at Reading, in April, 1854.

The witness being shown paper marked Y 2, is asked:

Q. In whose handwriting is that paper?

A. The certificate is in the handwriting of John H. Osborne; the signature, the handwriting, is that of Patrick O'Reilly. It is as follows:

"Reading, Pa., Oct. 7th, 1857.

"This is to certify that I have approved the account pre-"sented to me this day by John H. Osborne, showing himself "indebted to me on above account for the disbursement of "Camden and Atlantic moneys in the sum of $1,096.97.

(Signed) P. O'REILLY."

Q. What knowledge have you of the account mentioned in this certificate?

A. I don't know that I have any particular knowledge of the account, other than the disbursement of the Camden and Atlantic moneys. I made up for Mr. Osborne a statement of the account, the moneys he had expended for Mr. O'Reilly, that was an unexpended balance due Mr. O'Reilly by John H. Osborne at that time.

Q. Was the account, to the best of your knowledge, therein referred to made up by you?

A. I cannot say whether or not it was; it has been some time since then.

Q. The disbursement of moneys on the Camden and Atlantic Railroad, referred to in this certificate, is that the

business you have referred to which you were in charge of as clerk of John H. Osborne?

Objected to.

A. My other account was separate from that, the moneys and disbursements by me.

Q. How much money did you disburse on the Camden and Atlantic Railroad for Patrick O'Reilly through John H. Osborne?

A. I don't remember how much; my recollection is, though, over one hundred thousand dollars.

Q. What business relations had you with John H. Osborne after the close of the Camden and Atlantic business?

Objected to.

A. I was cashier and book-keeper on the second division of the Lebanon Valley Railroad.

Q. How were you associated there with Patrick O'Reilly?

A. Mr. O'Reilly was chief contractor for forty miles, I think, three divisions of the road; Mr. Osborne was sub-contractor for the second division, thirteen miles.

Q. State, if you know, to what this sub-contract related?

Objected to.

A. It referred to the graduation of the thirteen miles, completing the road ready for the track laying.

Q. Did that include masonry?

A. Yes, sir.

Q. When did the work commence there?

A. It commenced, I think, some time in April or May, 1854. I went out on the work about the first of June, 1854.

Q. How long did you continue in charge there?

A. Until the completion of the work, in 1857.

Q. What did you have charge of during that time?

A. I was a cashier, book-keeper, and during Mr. Osborne's absence, general manager. All orders in reference to the work were issued through me during his absence. I gave general supervision to the work.

Q. Who was the engineer-in-chief?

A. Richard B. Osborne.

Q. How long did the work continue after you went there, without interruption?

A. I went there in June; we stopped work, I think, in October; suspended work in October, 1854, or nearly so, all except one section, for a month or two.

Q. How long did this suspension continue?

A. We commenced increasing our work again in the following March, but we received no regular estimate until either May or June, 1855. There were some forces put to work on some of the rock sections in the spring of 1855, March and April.

Q. In whose name was this part of the contract of Patrick O'Reilly called the second division?

A. Tarrant & Company.

Q. How long did Mr. Tarrant continue actually engaged in the work or interested in the contract?

Objected to.

Q. How long did Mr. Tarrant continue actually engaged in the work?

A. I think he left before I went on the work, or about that time; I could not say.

Q. What control or direction of the work was assumed or done by Tarrant & Co. after you left there?

Objected to.

A. None.

Q. What was the nature of the work on this second division?

A. It was excavation of the earth, of earth and rock and hard clay, building embankments and culverts and bridges.

Q. Who received the money on the monthly estimates?

A. I did, principally.

Q. Who disbursed those moneys?

A. I did.

Q. To whom did you disburse them?

A. To the men employed on the work, laborers, foreman, teamsters and for other purposes, buying provisions, hay and provender for horses.

Q. How was that money paid to you?

A. Generally by check on the bank of Reading and on the bank of Pennsylvania.

Q. How would you pay it out to the men?

A. In currency and gold.

Q. How much solid rock excavation was there?

Objected to.

A. Do you mean how many cubic yards?

Q. State any way you please.

A. I don't know how many; a great many.

Q. State what difficulties there were in the excavations in the solid rock.

Objected to.

A. The rock was found to be very much harder than anticipated, with stratas of white flint through them. It was very difficult to work, blasting, and almost impossible to drill it. I know that an ordinary drill would not cut more than two inches before it would have to be sharpened. We kept two blacksmiths at work on one section.

Q. Can you tell in what sections this rock of unexpected hardness was found?

Objected to.

A. Sections 18 and 19.

Q. State what transactions, if any, took place between John H. Osborne and Patrick O'Reilly, relative to the unexpected hardness of this rock, within your knowledge and notice.

A. Mr. O'Reilly was notified of the hardness of the rock, and the inability to complete the contract at the price named, at which he was to finish the work, as our estimates for several months did not pay for the powder. His attention was called to it repeatedly; and he gave assurance that the price would be increased.

The witness, being shown paper marked Exhibit Z2, is asked:

Q. What do you know about this?

Mr. Voorhees—I object to this Exhibit, and all the testimony connected with it.

A. It is in the handwriting of Mr. Clendening; that is all I can say about it. It is a copy of a letter by John H. Osborne to Patrick O'Reilly; it is dated October 4, 1855.

Q. Who was James A. Clendening at that time?

A. He was acting as clerk for Mr. Osborne in the city of Philadelphia I think.

The witness, being shown paper marked Exhibit A3, is asked:

Q. What is that?

Mr. Voorhees—We object to this Exhibit, and all the testimony connected with it.

A. This is a letter in the handwriting of Patrick O'Reilly, dated Reading, October 9, 1855.

Q. It appears to be a reply to Mr. Osborne's letter of October 4th.

A. Yes, sir; it is in reply to John Osborne's letter of October 4th.

Objected to.

Q. Is the endorsement on that in your handwriting?

A. No sir.

The witness, being shown paper marked Exhibit B3, is asked:

Q. State what that is?

Objected to.

A. The first is a copy of a letter in the handwriting of John H. Osborne, dated Nov. 6, 1855, to Patrick O'Reilly, Esquire, contractor; the next is a memorandum explanation in lead pencil, in reference to rock-work.

Q. In whose handwriting is it?

A. In the handwriting of John H. Osborne; and the next is a memorandum in pencil and in ink in John H. Osborne's handwriting, expenses for June, July, August, September, October, 1855, showing the cost of work at that time and the expenses, showing a loss of $9,156.92 in rock-work; the next is a statement showing the amount of rock, &c., excavated on sections 18, 19, 20, 21 and 22; being five months ending October, 1855, showing a loss of $9,156.92.

Objected to.

Q. In whose handwriting is the last paper referred to, the one actually marked as Exhibit?

A. A portion of it, I think, is Mr. Clendenning's; a portion, of it, I think, is Mr. Osborne's, some of these figures.

Q. Was a copy of any of these papers sent to Patrick O'Reilly?

Objected to.

A. They were, to the best of my knowledge, and they were made up for that purpose.

Q. Who had charge of the information and memoranda from which Exhibit B 3 was made?

A. I had charge of it in the office; the actual expenses were made up from data furnished by me to Mr. Osborne.

Q. Through whom was that information accessible beside you?

Objected to.

A. No one else.

The witness being shown paper marked Exhibit C 3, is asked:

Q. State what that is.

Mr. Voorhees objects to the paper and all the evidence connected therewith.

A. It is a copy of a letter from John H. Osborne to P. O'Reilly, dated Womelsdorf, November 7, 1855. This copy is in my writing. The original was sent to P. O'Reilly.

Q. In whose handwriting is the endorsement?

A. The endorsement is mine.

Q. Read the endorsement.

A. (Reading:) "Copy of letter to P. O'Reilly, November 7, 1855, refers to section 18."

The witness being shown paper marked Exhibit D 3, says:

Objected to.

This is a copy of a letter in the letter-book from John H. Osborne to P. O'Reilly, dated, Womelsdorf, November 28, 1855.

Q. In whose handwriting is that copy?

A. John H. Osborne's.

The witness being shown exhibit marked M3 of complainant, is asked:

Q. What is that book?

Objected to, and all the testimony connected therewith.

A. It is a letter-book of Tarrant & Company and John H. Osborne.

Q. Covering a period of what time?

A. From June, 1854, to 1858.

Q. In whose charge was that book during the progress of this work; whose business was it to copy letters?

A. Mine.

Q. And afterward they each are copied into that book?

A. Yes; mine.

Q. State whether or not Exhibit D3 is a copy of the letter copied into this letter-book at page 144?

Objected to.

A. This is a copy of the copy that is in the letter-book.

Q. Was this letter forwarded to P. O'Reilly?

A. It was, to the best of my knowledge.

Q. What is the date of that letter?

A. November 28, 1855.

The witness being shown copy of the letter dated Philadelphia, November 10, 1855, from J. H. Osborne to P. O'Reilly, is asked:

Q. In whose handwriting is that exhibit marked E3?

Objected to as to the exhibit and all the testimony connected therewith.

A. John H. Osborne's.

Q. Have you any knowledge of that being sent to P. O'Reilly?

A. I have not.

The witness being shown letter dated Reading, December 14, 1855, from P. O'Reilly to John H. Osborne, is asked:

Q. In whose handwriting is that letter?

Objected to as to the exhibit and all the testimony connected therewith.

A. P. O'Reilly's.

Q. Is that the Patrick O'Reilly who was the chief contractor on this road?

A. Yes, sir.

Q. Have you any knowledge of that letter being received by John H. Osborne?

Letter marked Exhibit F 3 shown witness.

Objected to.

A. Yes, sir; I saw the letter before and at his office.

The witness being shown Exhibit H 3 is asked:

Q. What is that letter?

Objected to as to the exhibit, and all the testimony connected therewith.

A. This is a letter of John H. Osborne, dated November 6, 1855 to P. O'Reilly.

Q. Is it a copy or a draft?

A. I think it is a draft of the letter.

Q. Is it the same letter attached to B 3 bearing the same date?

A. Yes, sir; it seems to be the same letter, one is a copy of the other.

Q. Can you state whether the letter of P. O'Reilly, dated December 14th, is a reply to the letter of which these are copies?

A. I think it is, because he promises to make good the deficiency of $9,156, which this letter shows as having been lost on the rock at that time, he says in answer to yours of November 6.

Q. Do you say that Exhibit F 3 is an answer to the letter of which Exhibit H 3 is a draft?

Objected to as to form.

A. Yes, sir.

The witness being shown paper marked Exhibit J 3, says:

Exhibit objected to, and all the testimony connected therewith.

This is a statement showing the loss on sections 18, 19, 20, 21, 22, 23, for seven months ending December 31st, 1855, of $13,890 in seven months. This statement was made up by myself, and certified to by me at the time it was made as being correct from the books.

Q. State whether or not that paper includes the $9,156 referred to in the letter of P. O'Reilly, Exhibit F 3, also in Exhibit B 3.

Exhibit J 3 also shown witness.

A. Yes; it includes $9,156, that being for the months of June, July, August, September and October.

Q. Do the losses for the five months, as stated in Exhibit J 3, correspond exactly with the loss for the same months stated in Exhibit B 3?

A. There is a slight discrepancy. This statement only makes it $9,098, instead of $9,156.

Q. Why is it that the cents are left out in this statement?

A. I believe that is the correct amount. The wages of the men were $1 a day; this is the correct amount.

Q. How do you explain the discrepancy?

A. It occurs in the engineer's estimates. For instance, an engineer estimating for work in a certain month may over-estimate it in the subsequent month when the work is near completion, he may make more accurate measurements and take them off; it is often the case that they are; sometimes they over-estimate to help the contractor out. If they find the estimate is going to be small and not to pay the expenses, they add to the estimate and the next month probably cut it down. I suppose that is the way there may be discrepancies in the quantities returned by the engineer.

Q. How can you state that the loss, as shown by Exhibit J 3, is the correct amount of the loss and that the statement and figures on that paper are correct? Referring to Exhibit D 3.

Objected to.

A. This is made up for five months, the end of the year. These corrections may have been made in the months of November and December, because there was a discrepancy for the previous five months. I have no doubt if they were compared you will find there was but a discrepancy of the return of the engineer of the rock or something, or some other expense.

Q. State how you know that these statements and figuring and the result of this paper, J3, show the correct result.

Objected to.

A. They are made up by me from the proper data in the office at the time.

Q. Were you in a position to know what the expenses were?

A. I had sole control of all the accounts, paid all the moneys, every dollar passed through my hands that was paid on the road, on the division.

Q. State whether or not the amounts of money shown to have been paid out by J3 for expenses were actually paid.

Objected to.

A. They were paid by me, taken from my cash book.

Q. To whom were they paid?

A. To the various laborers and men on the work and for material—it is merely to the foreman's and laborers' expenses, not the horses.

Q. Why were not the horses' expenses included?

Objected to.

A. Because it was difficult to obtain the correct result. I threw out the horses, thinking as I could not get the correct haul, the horses and the drivers would about counterbalance the money received on the haul.

Q. For what purpose was that statement made out?

Objected to.

A. It went to P. O'Reilly, also a copy was sent to the chief engineer, showing the expenses and the amount of work there was done, the loss on the work.

Q. State whether or not that copy was made for the office or actually sent to somebody.

Objected to.

A. I guess that was sent to the chief engineer from the note that I made here.

Q. State whether or not Patrick O'Reilly received a copy of that paper.

Objected to.

A. I can't state that he received it, I can only state that I sent him one.

Q. State whether Exhibit B3 was sent to somebody or made out simply for the office.

A. They were all made out to send to the chief contractor and chief engineer, they were copies of all these statements.

Q. Was this copy actually sent to anybody that you know of? (Referring to B3.)

A. I can't say.

The witness is referred to page 175 in the letter-book, marked Exhibit M3, and asked:

Q. What does that page contain?

Objected to as to the exhibit and all the evidence thereunder.

A. It is a copy of the letter from John H. Osborne to P. O'Reilly, contractor, dated Womelsdorf, February 29, 1856.

Q. What reference, if any, does that letter contain?

A. It refers to the statement showing the loss of $13,890, contained in J3.

Q. Was that letter sent to P. O'Reilly?

A. It was.

The witness being shown paper marked Exhibit K3, is asked what it is.

The exhibit is objected to and all the testimony connected therewith.

A. This is a statement showing the powder used for seven months, ending December 31, 1855; it is in the handwriting of John H. Osborne.

Q. How much loss does it show?

A. It shows a loss of $2,674.75, powder used.

Q. On what sections was that powder used?

A. 18, 19, 20, 21, 22 and 23.

Q. Turn to page 175 of Exhibit M3 and see whether there is any reference in that letter to the expense for powder mentioned in Exhibit K3.

Objected to.

A. I don't see any reference to it in that letter.

Q. State whether or not the powder expense is included in that loss of $13,890 mentioned in J 3.

A. The expense of the powder was not included.

Q. Do you know whether a copy of that statement of loss of powder in K 3 there was sent to Patrick O'Reilly or not?

A. On page 169 of M 3 there is a copy of the statement sent to P. O'Reilly.

Q. Is that in reference to the same matters contained in Exhibit K 3?

A. It includes this statement and other statements this $2,674.75 is included in this page 169; it includes just the result, the total of K 3 and not a copy of it.

The witness being shown paper marked Exhibit L 3, is asked:

Q. In whose handwriting is that paper?

The exhibit and all testimony connected therewith are objected to.

A. Mine.

Q. By whom was the statement made up?

A. By me.

Q. For what purpose?

A. For the purpose of showing the loss on the rock or loss on the work on sections 14, 15, 16, 17, 18, 19, 20, 21, 22 and 23, copies of which were sent to P. O'Reilly and the chief engineer of the road.

Q. Is that a correct statement of the loss or not?

A. It is.

Q. When was the certificate there which you have added and signed made?

A. The time when the statement was made, all were made at the same time.

Q. In whose handwriting is the blue ink about the loss on powder?

A. In mine.

Q. State whether or not the amounts of expenses of L 3 were actually paid out and by whom?

A. They were paid by me.

Q. To whom were they paid?

A. To men employed on the work.

Q. What work, if any, besides grading and masonry?

A. Nothing besides grading and masonary.

Q. State whether or not the haul is included in that statement?

A. No, sir; I think not.

Q. Can you count and see whether it includes expenses for powder?

Objected to.

A. It does not. There is a note to the bottom showing the expenses of powder and tools used for twelve months amounting to $7,230 which is not included in this statement, or the preceding seven months, J 3.

The witness being shown paper marked Exhibit N 3 is asked:

Q. In whose handwriting is that paper; and state what it shows?

Objected to; the exhibit and all the testimony connected therewith.

A. It is in my handwriting. It is a statement showing the aggregate loss for seven months on sections 18, 22 and 23, from June to December 31st, 1855, amount, $13,890; also the loss for five months on sections 14 to 23 inclusive, from January 1st to May 31st, 1856, $10,281; also showing the total loss for twelve months, being $24,171, and the total amount used for powder and tools, $7,230; the statement making a total loss to the 31st of May, 1856, of $31,401. This statement was made June 25th, 1856, by George W. Bowen.

Q. What period does it cover?

A. A period of twelve months, ending May 31st, 1856.

Q. Upon whose responsibility was that statement made?

Objected to.

A. Do you mean by whose direction was it made?

Q. Who had the responsibility at the time of the correctness of the information upon which it was based?

A. I had.

The witness being shown paper marked Exhibit O 3, is asked:

Q. What is that paper?

The exhibit is objected to and all testimony connected therewith.

A. It is a statement showing the loss on the rock from June to October, inclusive, 1856. It includes the month of June and October on sections 18 to 23 inclusive.

Q. In whose handwriting is it?

A. John H. Osborne's; it shows the loss for 5 months, $16,230.86.

Q. By whom was that made up?

A. It was made up by John H. Osborne.

Q. Who furnished the information?

A. The information as to the cubic yards of the rock was obtained from the engineer's estimates, the amounts of the expenses he obtained from me.

Q. Is there any certificate on that paper of yours to show its correctness?

A. There is not.

Q. What can you testify as to its correctness?

Objected to.

A. I can testify as to the amount of expenses being correct and that this statement was made up from the papers in the office with my assistance, because it was impossible for Mr. Osborne to obtain this information except through me.

Q. State whether or not the moneys mentioned there as expenses were actually paid out and by whom.

A. They were paid out by me.

The witness being shown Exhibit marked P 3 of complainant, is asked:

Q. What is that paper?

The Exhibit is objected to and all the testimony connected therewith.

A. The total expenses on section 19.

A. The total expenses on section 19 from November 1st, 1856, to March 31st, 1857, also showing the amount of estimates for that period, showing a loss of $7,103.05.

Q. Where were the figures to show the amounts on the stimates obtained from?

A. They were obtained from the engineer's estimates in the office, copies of them.

Q. From whom were the amounts of expenses stated in that paper obtained?

A. From me.

Q. There is an endorsement "correct. George W. Bowen."

A. This endorsement was made by me at the time the statement was made out.

Q. In February, 1857?

A. It was made until February, 1857, I suppose for several days afterward.

Q. It was made to March 31st, 1857?

A. No, sir; only to February, March was not put in; the statement was made up afterwards, I could not say about the date, a few days afterwards; we never got the

returns until the 10th or 12th of the month, subsequent to the work being done. These statements were made up as soon as possible afterwards.

Q. By whom were the moneys mentioned in that exhibit as expenses paid out?

A. By me.

Q. For what work?

A. For work on sections 18 and 19.

Q. Whose handwriting is that?

Exhibit P3 shown witness.

A. John H. Osborne's.

Q. What, if anything, did Mr. O'Reilly ever pay to Mr. John H. Osborne on account of loss on this rock?

A. He paid December, 1856; $8,000, was one payment that I remember, a specific payment on the rock; I don't now remember any other.

Q. Was it paid on any particular loss, or any particular one of the statements that have been shown here this morning?

A. It was paid after the reception of the statement marked O3, amounting to $16,230.86.

Q. Was this $8,000 paid in the usual way on the estimate, or outside of the estimates?

A. It was paid outside the estimates.

Q. At what time did you say the work commenced after the suspension, re-commenced in October, 1854?

A. There was some work being done by Mr. O'Reilly's orders during March and April; the force were put on in March and April; my recollection is the first estimate we got after the suspension was on the 15th of May, it may be possibly for the 15th of June, 1855.

Q. State what that paper marked Exhibit Q 3 is. (Same shown witness.)

The exhibit and all the testimony connected therewith is objected to by Mr. Voorhees.

A. It is a statement from which the costs of the rock on section 18, from June to October, was taken, and the report to Mr. O'Reilly on November 7, 1855, marked 9. It is in the handwriting of John H. Osborne.

Q. Is the letter marked 9 the letter of which C 3 is a copy?

A. This copy is marked 9; C 3 is the paper marked 9, referred to in this statement Exhibit Q 3.

Q. Whose handwriting is the endorsement "copy sent to P. O'Reilly?"

A. In my handwriting, this endorsement on Q 3.

The witness being shown paper marked Exhibit R 3, is asked:

Q. State what that paper is?

Mr. Voorhees objects to the exhibit and all the testimony connected therewith.

A. This is a statement in reference to loss on rock for the months of January, February, March, April and May, 1856; it is part of it in my handwaiting and part of it in John H. Osborne's, showing a loss of $10,281.

Q. State whether or not that is the same loss covered by L 3?

A. It is the same.

The witness, at the request of counsel, marks the part that is in the witness's handwriting, and also his initials in lead pencil.

Q. How did Mr. Osborne get the information from which to make those figures which are in his handwriting?

Objected to.

A. He got that from me.

The witness being shown paper marked Exhibit S3, states:

Mr. Voorhees objects to the exhibit and all the testimony connected therewith.

This is a statement showing the cost of powder used on the second division of the Lebanon Valley Railroad; was used in graduation.

Q. Turn to the page of the letter-book where that is copied. Is that a statement copied into the letter-book M3?

A. Yes; on page 169, N3.

Q. Was a copy of it sent to P. O'Reilly?

A. I suppose there was; it was made up for that purpose, a copy of all these statements were sent to him.

The witness being shown paper marked Exhibit T3, is asked:

Q. State what that is.

Mr. Voorhees objects to the exhibit and all the testimony connected therewith.

A. It is a statement of the quantity of rock, and so forth, on sections from 18 to 23, inclusive, in January, February, March, April, May, June, July, August, September and October, 1856, and for June, July, August, September, October, and November and December, 1855.

Q. In whose handwriting is that paper, and by whom was it prepared?

A. It was prepared by John H. Osborne.

Q. With whose assistance?

A. With mine.

Q. Are there any markings or handwriting on the paper of yours?

A. I think not, nothing other than some checks I have there myself, the check and the quantities.

Q. Those checks in pencil you think are yours?

A. Yes; I think they are mine, they look very much like my work.

The witness being shown paper marked Exhibit U3, is asked:

Q. State what that paper is.

Mr. Voorhees objects to the exhibit and all the testimony connected therewith.

A. It is a bill, "P. O'Reilly Dr. to J. H. Osborne," amount expended for labor, horses, work, powder, tools, &c., on sections 18 and 19 of the Lebanon Valley Railroad, April, 18, 1857, May, 1857, June, 1857, July, August, September and October, amounting to $6,894.14; that bill was made out by myself; it was for work done on those sections by Mr. O'Reilly's orders, the accounts kept by me and rendered to him under instructions received from him.

The witness being shown paper marked Exhibit V 3, is asked:

Q. Under what circumstances did P. O'Reilly order you to perform the work comprised in Exhibit U 3, amounting to $6,894.

Mr. Voorhees objects to the exhibit and all the testimony connected therewith.

A. This letter of J. H. Osborne to P. O'Reilly is as follows (reading) :

"Dear Sir : I have directed Mr. Bowen to try and start the force on 18 and 19 ; I have instructed him to keep an accurate account of the same, as I would not undertake it unless the expenses would be met and I have not the means to do so. Only on these terms would I go on, as you are aware the price you give me for the rock will never take it out.

Truly yours, JOHN H. OSBORNE.

Womelsdorf, 23d of April, 1857."

I delivered the original of which this is a copy to Mr. P. O'Reilly and demanded an answer from him, and I received instructions from him to put the force to work and to keep the account and he would settle the bill. That bill I have just read, for $6,894, was the money expended for that work done under the direct instructions to me.

Q. Does the bill for $6,894, as it stands there, include any percentage of profit or anything more than actual expenses ?

A. Actual expenses and nothing else ; actual money paid out.

Q. By whom was the money paid out ?

A. By me.

Q. To whom ?

A. To the men who did the work; the laborers, the foreman, and drivers.

Q. How much of this money did Mr. Osborne receive under his estimates ?

A. None that I know of.

Q. How much did you receive for him under the estimate ?

A. Nothing.

Q. When was the certificate annexed to U 3, certifying "The above account is correct. George W. Bowen" ?

A. At the time it was made out; it was all made out and put on at the same time; it may have been put on some time after October, 1857, I couldn't say exactly; it included the work for October.

Q. Do you say this was the finishing up work ?

A. It was on section 18; it was quite rocky down to grade on sections 18 and 19, and the roads were cut through to lay the track to go through at one side, leaving part of the rock on the other side; there was a general cleaning up and getting the rock cut down to grade, a complete finishing of those two sections, 18 and 19; the regular work extended nearly through those two sections.

Q. Where is the original account you kept of those expenditures?

A. It is on the books that I kept.

Q. Was that bill, as it stands there, presented to P. O'Reilly?

A. Yes, sir.

Q. Did you present him with that bill in person or send it to him?

A. I don't remember whether it was presented in person or sent to him.

The witness being shown paper marked Exhibit W 3, is asked:

Q. State what that paper is.

Mr. Voorhees objects to the exhibit and all testimony connected therewith.

A. It is a bill against P. O'Reilly in favor of John H. Osborne for hauling sills and men loading sills and distributing them along the Lebanon Valley Railroad, for P. O'Reilly, amounting to $1,501.12.

Q. Where is the original of that bill from which it is taken?

A. Among the papers; I suppose Mr. Osborne has them. The reports were made to me every day by the men doing the work and charged up to Mr. O'Reilly and memoranda made of them.

Q. Did you know the men to be at work at the time the reports were made?

A. Yes, sir; they were working under my instructions and order; I was having the work done by Mr. Osborne's orders for Mr. O'Reilly.

Q. In whose handwriting is that?

A. John H. Osborne's; this endorsement here is my handwriting.

Q. And this endorsement is in your name?
A. Yes, sir.
Q. Whose handwriting is "E. E."
A. G. W. Bowen's.
The witness being shown paper marked X3, is asked:
Q. What paper is that?
Objected to, the exhibit and all the testimony connected therewith.
A. The bill of John H. Osborne against Mr. O'Reilly for extra work done, culverts, hauling, sills, making roads, &c., amounting to $267.37. The bill is in the handwriting of John H. Osborne; "E. E., Geo. W. Bowen," is in my handwriting.
Q. Were these copies furnished to P. O'Reilly?
A. I think they were.
Q. Are these for actual expenses or services?
A. These are for actual expenses, for teams and men connected with the teams, men loading and unloading the teams and the sills.
Q. How did you get the information by which you made up "X3"?
A. From the report of the foreman and teamsters doing the work.
Q. Did Mr. O'Reilly know you were doing this work for him at the time?
A. Yes, sir; it was done by his orders; it was work entirely outside of the contract of Tarrant & Co. for the graduation and masonry of the second division.
Q. Did John H. Osborne receive any pay on either of those Exhibits, X 3 and W 3?
Objected to.
A. I think not.
The witness being shown paper marked Exhibit Y 3, is asked:
Q. State what that is.
The exhibit is objected to and all the testimony connected therewith.
A. This is a bill against the Lebanon Valley Railroad Co. to John H. Osborne for work done on various places along the line, material for propping bridge, unloading

boats, furnishing timber for propping bridges, and work about at various places along the line, amounting to $2,-742.26. This bill was made out against the Lebanon Valley R. R. Co.; when rendered the chief engineer they allowed $1,831.16 as being work chargeable to the company, the balance, amounting to $911.10, was to be charged to P. O'Reilly, as work which was done under his contract with the company.

Q. What is the amount due on that bill to Mr. Osborne?

Objected to.

A. $911.10.

The witness being shown paper marked Exhibit Z 3, is asked:

Q. What is that paper?

The exhibit is objected to and all the testimony connected therewith.

A. It is a bill of J. H. Osborne against P. O'Reilly, disbursing money for buying wood leaves and hauling about 13,000 sills, 2,000 saw logs, 500 cords of wood cut, that is having that done, paying for hauling the same to the railroad and saw mill, having logs cut into planks, splice-plates, and pay for disbursing the same along the line of the rail road $56.57, amount disbursed $25,000, and at five per cent. $1,250.

Q. What did the services for which Mr. Osborne claimed that sum of money consist of?

A. It was for buying wood land, having the sills cut, saw-logs and cord-wood cut and hauled, paying the men who did the work, hauling the saw-logs to the saw-mill, having them cut into planks, &c., and paying for having it done, distributing the sills along the line of the railroad, and paying the men for so doing.

Q. By whom was that bill made up?

A. It was made up by me.

Q. Whose handwriting is that?

A. It is mine.

Q. In whose handwriting is "E. E., Geo. W. Bowen"?

A. Mine.

Q. Are you able to state the amount of money actually disbursed; did it amount to $25,000 for those purposes?

A. Yes, sir.

Q. In what way did you become possessed of the information upon which you made that statement?

A. I received the money and paid it out and turned the accounts over to Patrick O'Reilly; the money all passed through my hands, every dollar of it.

Q. What would be the proper date of that bill.

A. It would be sometime in 1857, the time the work was completed, I suppose probably in May or June, 1857; it says 1856 and 1857.

Q. When were the services rendered and the expenses incurred which are covered by bills in exhibits W3, X3, Y3 and Z3?

A. All the dates as stated there in 1856 and 1857.

Q. Was the bill Exhibit Z3 ever rended to P. O'Reilly?

A. I think it was; I don't remember exactly.

Q. You do not know for certain?

A. No, sir.

Q. Was the bill Exhibit Y3, upon which there is an unpaid balance of $911.10 rendered to P. O'Reilly?

A. I don't think it was, I don't remember. The bill was sent to the engineer.

The attention of the witness is directed to page 239 in the letter book Exhibit M3, and he is asked:

Q. State what you find there.

The exhibit is objected to and the testimony connected therewith.

A. A letter from John H. Osborne to P. O'Reilly, October 23, 1856.

Q. In whose handwriting is it?

A. J. H. Osborne.

Q. Who had charge of the forwarding of those letters to P. O'Reilly at the time that the copy was put in there?

A. I had. They generally took the letters to the office. There was no one at the office except myself; I was the only clerk.

The witness being shown paper marked Exhibit A4, is asked:

Q. In whose handwriting is that?

The exhibit is objected to and all the testimony connected therewith.

A. It is a bill of Tarrant & Co. againt P. O'Reilly, for work done at various points of the second division of the Lebanon Valley R. R., for $4,827.80.

Q. What do you know about the correctness of it?

A. I know this statement was made up from data furnished Mr. Osborne by me.

Q. When was the work done?

A. It was done during 1855 and 1856.

Q. Was a copy of it rendered to P. O'Reilly?

A. I cannot say.

The attention of the witness is called to page 37, letter-book, Exhibit M3.

Q. State what you find there.

Objected to.

A. It seems to be a copy of an advertisement, dated Reading, October 24th, 1854.

Q. In whose handwriting is it?

A. In mine.

Q. And signed by whom?

A. Signed by P. O'Reilly, Contractor.

Q. Is that signature in P. O'Reilly's handwriting?

A. The signature is in mine.

Q. For what purpose was that done?

A. It was done for the purpose of obtaining sills for the Lebanon Valley R. R.; sills or cross-ties; we called them sills, in these days cross-ties.

Q. Were any of them put up or sent by mail?

Objected to.

A. My recollection is, the hand-bills were struck on that and distributed through the country, that the parties might apply to Mr. O'Reilly and Mr. Osborne, who has sills of wood to furnish. It is headed "Proposals will be received by P. O'Reilly, Reading, and J. H. Osborne, Reading, for supplying the sills on the line of the Lebanon Valley Railroad, between Lebanon and Reading," and describing the quality.

Q. Can you tell by whose direction you put that in there?

A. It was done by the direction of Mr. O'Reilly; it has his name.

Adjourned to Thursday, June 12, 1884, at 10 A. M.

Camden, June 12th, 1884.

Examination continued in the presence of the respective counsel.

Direct examination of George W. Bowen continued.

By Mr. Drake:

Q. What opportunity had you of knowing the quality of this rock?

Objected to.

A. I was on the line of the road nearly every day while the work was being done into the rocky sections, and all the rock work, and I had an opportunity of examining them.

Q. On what sections did you find the most difficult work?

A. On 18 and 19, and on 21.

The witness now being shown Exhibit V 2, is asked to point out on that exhibit, and mark with his initials, the portion of the work which appeared to be the most difficult.

Mr. Voorhees objects to the witness marking the exhibit, and to the question.

(The witness marks the exhibit with his initials as requested.)

A. I have marked on section 18 running into 19 and on 19, and on 21 in two places.

Q. How was the work on the solid rock at the junction shown on the exhibit, of sections 18 and 19, from the breasts?

Objected to.

A. From the face—there was work from both two places and I think that there was an approach made in there also (indicating.)

Q. It is just past the mark of your initials in the hollow shown there?

A. Yes, sir.

Q. Which is the more expensive sort of work, working from the face, or in the middle between the faces?

A. Working in the middle making a face in the work is more expensive than working from the face.

Q. State what additional expenses, if any, working in the middle between the faces causes in the removal of the rocks blasted out to embankment.

Objected to.

A. We have to make a road, or make a steeper hauling. The horses are not able to haul quite so much as they would be on level grade. Here they work starting on grade, and working on level (indicating). There we would have to haul up out of the cut into the upper hill (indicating).

Q. What did the difficulty in working this rock consist in?

A. In the hardness of the rock, and the difficulty of getting it to blast. The rock would not blast; the rock was very hard; the drill made very little impression on it.

Q. What would be the sizes of the blast?

Objected to.

A. Some of them would be very small indeed.

Q. After this rock was blasted, how easy was it to sledge for the purpose of hauling away from the embankment?

Objected to.

A. It was difficult, always very hard.

Q. State by what name this hard rock was known; what kind of a rock was it?

Objected to.

A. I am not familiar with it. There was blue limestone interspersed with veins of white flint, which I believed they called fieldspar; I am not certain about it; I always named it as white flint.

Q. As shown by Exhibit V 2, near where your initials are marked, there is an excavation not marked as solid rock. What did that excavation consist of?

A. Clay.

Q. Was it pure clay or mixed?

A. I don't remember now; there must have been some loose rock in most of it as there were pockets of clay in those cuts.

Q. State whether or not Patrick O'Reilly was frequently or unfrequently upon this work, and whether he knew the character of it?

A. He was on the work frequently.

Q. What conversation did you have with him on the subject?

Objected to.

A. I do not think that I ever had any particular conversations except in reference to the time that letter was delivered; I think that was in April, 1857.

Mr. Drake states that the letter is marked V 3.

Q. Where did you live at this time?

A. At Womelsdorf.

Q. With whom did you live?

A. My father and mother were keeping house there.

Q. Where did John Osborne stay?

A. He was staying with us whenever he was in Womelsdorf.

Q. Where did Patrick O'Reilly stay?

A. He often stayed with us when he was there.

Q. How often would he come up and stay over night?

A. I cannot say how often. He was there quite often.

Q. Were he and John Osborne there at the same time ever?

A. They were. I don't remember his ever being there except when Osborne was there, to stay all night.

Q. Did he and Mr. Osborne have conversations together there?

A. Yes, sir.

Q. Frequently or otherwise?

A. Whenever they were together they always held conversations in the office in the evening.

Q. What duties were you charged with there?

Objected to.

A. I was cashier, book-keeper, and had general supervision of the outside work during Mr. Osborne's absence.

Q. State whether or not the keeping of the expenses of Tarrant & Co., and the various work placed in your charge by John Osborne, was a part of your duty?

A. It was.

The witness being now shown Exhibits J3, L3 and P3 is asked:

Q. What person was there on the Lebanon Valley Road,

besides yourself, who could have made up an account of the expenses contained in those three exhibits?

Objected to.

A. No one.

Q. Were your sources of information obtained entirely from books and vouchers in the office, or part of it from such books and vouchers, and partly from your own knowledge of transactions which they related to?

Objected to.

A. These statements, J3 and L3, were made up from the time-sheets, the absolute money paid out. P3 was made up from returns given to Mr. Osborne by me from the time-sheet and from the engineer's estimate.

Q. (Repeated.)

Objected to.

A. These were made up from papers and vouchers that were in the office statements.

Q. How would you have succeeded in making those up from the papers and vouchers, without your knowledge of the transactions of the payments of money shown by the pay-sheet?

Objected to.

A. It could not have been done without personal knowledge of the transactions.

Q. State how you know that the moneys certified to on these three exhibits, J 3, L 3 and P 3, were paid out for expenses and not for profit on work.

Objected to.

A. They were paid out for expenses; paid out by me for the expenses.

Q. How can you tell by looking at these papers that these moneys were actually paid out.

Objected to.

A. Because they have my signature to them at the time they were made out.

The witness being now shown Exhibit N 3 is asked:

Q. How can you state by a reference to this exhibit that the moneys there charged as expenses were actually paid out as such?

Objected to.

A. It was paid out by me and an account kept at the time.

The witness being now shown Exhibit O 3, is asked:

Q. How do you know that the expenses therein charged to expenses or stated as expenses were actually paid out?

Objected to.

A. The money was paid by me and the accounts were kept by me.

Q. Was that certified to at the time by you?

A. This statement is not certified at all.

Q. How do you know those moneys were paid out as expenses?

Objected to.

A. Because there was no way of obtaining information except through me who paid the money and kept up the accounts.

Q. Who made up that statement?

A. John H. Osborne.

Objected to.

Q. With whose assistance?

Objected to.

A. Mine.

Q. What time did you go to the Lebanon Valley road?

A. Some time in the latter part of May, 1854.

Q. What part of the work there, after you were in charge, was directed and managed by John H. Osborne, and what part was directed and managed by Charles Tarrant?

Objected to.

A. Mr. Tarrant left before I went there, or about the time.

Q. What part did Mr. Tarrant take in the direction of the work after you went there?

A. None.

The witness being shown Exhibits W 3, X 3, Y 3 and Z 3, is asked:

Q. What do the words and characters on these four exhibits, namely: "E. E., George W. Bowen," in your handwriting, mean?

A. It means that the accounts are correct with the ex-

ception of any clerical errors, such as any calculations or additions with the items. It is a term that is used by clerks for that purpose.

Q. What does it stand for?

A. "Errors excepted."

Q. What warrant had John Osborne for charging the work done (in Exhibit W 3) to Patrick O'Reilly in Exhibit X 3?

Objected to.

A. The work was done for Mr. O'Reilly by his instructions. They are for hauling sills; the other is for extra work around, and removing lumber, and things of that sort.

Q. State where the vouchers show the disbursements of money stated to have been made by Exhibit Z 3.

Objected to.

A. They were turned over to Mr. O'Reilly, all the vouchers and papers in reference to it.

Q. Who disbursed that money?

A. I did.

Q. Had the disbursement of that money any reference to Greenwood?

A. No, sir.

Q. In whose handwriting is part of the Exhibit Y3, on the second page of exhibit below the place where your name is signed?

A. Richard B. Osborne, I think.

Q. Whose handwriting is the part of exhibit above your signature?

A. Mine.

Q. All of it?

A. All of it; both pages.

The witness being shown Exhibit B, is asked:

Q. What do you know about the statements contained in that paper, and whose handwriting is it?

A. The paper is the handwriting of John H. Osborne.

Objected to.

The first memorandum, June 14, 1856, referring to two teams leaving Womelsdorf for Greenwood, one of those teams being John H. Osborne's, and the other belonging

to P. O'Reilly, I know that to be the case; these teams left, that is Mr. O'Reilly's team only had five mules, and we put a mule to supply the sixth one from Jonathan Illig. I know that there was a horse and spring wagon sent at the same time belonging to John H. Osborne. We sent a lot of feed and tools, I don't remember as to the quantity, with the teams. There are some other memoranda in reference to mule teams being sent; I could not say as to the exact date. I know there were other teams sent by him before, and also horses.

Q. Who was in charge of Greenwood?

A. Laurence Devereux.

Q. In whose employ was he?

Objected to.

A. P. O'Reilly's.

Q. How often were you up there?

A. I was there twice; I don't know whether I was there oftener or not. I remember being there twice; I think it was in April and August, 1857, that I was there.

Q. Whom did you find up there in August, 1857?

Objected to.

A. Mr. Devereux was there at that time.

Q. When did Mr. Devereux come away from there?

A. I think he came away about that time with me, or about that time, at least he left Greenwood about that time.

Q. Was Mr. Devereux fully paid for his services?

Objected to.

A. I think not.

The witness being shown Exhibit A for the complainant, is asked:

Q. State what that paper is.

Objected to.

A. This is an account of Mr. O'Reilly with Laurence Devereux, showing the balance charged Devereux of $1,057.48, made up November 3, 1857, by me; certified by me.

Q. From whom did you get the information to make that up?

Objected to.

A. I got it from the books kept by Mr. Devereux.

Q. Against whom?

A. Against P. O'Reilly.

Q. For what purpose did you go up to Greenwood?

A. I went up there to pay the bills of the men for getting sills and logs and so forth.

Q. For whom did you go?

A. For Mr. O'Reilly.

Q. Who furnished you with the money with which to pay the men?

A. Patrick O'Reilly.

Q. What account, if any, did you keep of the money you disbursed at Greenwood?

Objected to.

A. I had regular accounts and receipts for every dollar I paid, which I turned over to Mr. O'Reilly when I settled with him.

Objected to.

Q. To what extent did you settle with him?

A. I settled with him for the amounts of moneys I had received, accounted to him; I suppose he paid me the balance if there was any, or I paid it over to him. I don't remember whether or not the balance was for or against me, but I accounted to him for all the moneys I had received from him.

Q. State whether or not you accounted to him for moneys you received and disbursed for wood leave.

A. I did.

Q. What became of those vouchers?

A. They were given to Mr. O'Reilly.

Q. Did you settle with him for any of the services claimed by John Osborne in Exhibit B before you?

A. I did not.

Q. Did you settle with him for any part of the $1,501.12, and $267.37 claimed by John Osborne in Exhibits X 3 and W 3?

Objected to.

A. I did not.

Q. State to what these settlements related beside the disbursements of money by you for wood leave on the Lebanon Valley road and at Greenwood.

A. It did not relate to anything else.

The witness being shown paper marked B 4, is asked:

Q. State what that is.

Mr. Voorhees objects to the exhibit and all the testimony connected therewith.

A. It is a letter from E. McDermott, September 6, 1856, to John H. Osborne, requesting him to send a man to Reading for money, also for a horse, and a postscript to it, "I hoped the men and horse have gone to Devereux."

The witness being shown a paper marked Exhibit C 4, is asked:

Q. State what that paper is.

Mr. Voorhees objects to the exhibit and all the testimony connected therewith.

A. It is a letter written from Mohontongo, August 25, 1856, to John H. Osborne by Edward McDermott.

Q. The same who wrote the letter before?

Objected to.

A. Yes, sir.

Q. What was Edward McDermott at that time?

A. He was clerk of P. O'Reilly.

Q. Where is Mohontongo?

A. Up near Greenwood, I think that is the post-office of the Greenwood farm.

Q. Who was "Ham," referred to in Exhibit B4?

A. Ham Stout; he was employed by Mr. Osborne as stable-man at Womelsdorf.

Q. There is a reference to Devereux; does that mean Greenwood?

Objected to.

A. Yes; that refers to Devereux at Greenwood.

Q. Where was Devereux at the time that reference was made?

A. He was at Greenwood.

Q. During what time was Devereux in charge at Greenwood?

A. He went there in January, 1856, and stayed there until sometime in 1857.

Q. Are you able to state by reference to that letter marked Exhibit B4, when you were last at Greenwood?

Objected to.

A. Yes, sir; this letter is written August 14th, 1857, and says, "I returned this day from Greenwood. Devereux came down and I suppose has seen you ere this."

Q. Where were you at the time the letter was written?

A. I was at Womelsdorf when this was written.

Q. When were you, then, last at Greenwood?

A. I must have left about the 13th of August from this letter. It would not have taken me more than that time to come down.

Q. Who was there at that time?

A. A man by the name of Clendenning went up there about that time or just before; I don't remember his first name.

Q. Where was Devereux?

A. Devereux moved his family away from Greenwood and came down with me and went on to Reading, I suppose, from that letter.

Q. Does it say there?

A. Yes, sir.

The witness being shown Exhibit F 4, is asked:

Q. State whether or not you went to Greenwood in accordance with that letter.

Mr. Voorhees objects to the exhibit and all the testimony connected therewith.

A. The exhibit says: "I shall start from here on Monday next and will be with you on that day if possible. If anything happens to prevent, will write you. You had better go to the office on Saturday. George W. Bowen, April 30th, 1857; to Laurence Devereux." I think I went at that time.

Q. How many times were you there beside?

A. Twice in August, 1857. I have no recollection of being there but twice, although I may have been; I don't remember now.

The witness being shown paper marked Exhibit E 4, is asked

Q. State what that is?

A. This is a letter from P. O'Reilly, May 1st, 1856, Mr. John H. Osborne. The principal reference is he

visited the work three times this week and found the work progressing well. The rest relates to the sales of land in the Lebanon Valley and Catawissa.

The witness being shown paper marked Exhibit G 4, is asked:

Q. State what that is.

Objected to, the exhibit and all the testimony therewith connected.

A. It is a letter of P. O'Reilly to Mr. John H. Osborne:

"January 4, 1856.

"Dear Sir:—Your's just come to hand. Mr. McDermott was going up to-day to pay Campbell's hands. The moment he returns I will give you a statement in full. I hope you will get Devereux to go, I think he would make an excellent man to take charge of the place. We cannot get on with the work until we get a good man, and we have to take charge of the whole concern. Come down to-morrow, I want to have a talk with you.

"Very truly, P. O'REILLY."

Q. Who was the Campbell referred to in the last exhibit?

A. He was a man working on the Lebanon Valley; I think he was a mason, I am not sure.

Q. Was Mr. Campbell working under Mr. Osborne?

A. I don't remember.

The witness being shown paper now marked Exhibit H4, is asked:

Q. State what that is.

Mr. Voorhees objects to the exhibit and all the testimony therewith connected.

A. From P. O'Reilly to John H. Osborne, May 3, 1856:

"John H. Osborne, Esq., Dear Sir:—I am in receipt of yours of the 2nd and am glad to learn that you are so far recovered that you will be on Tuesday. I hope Mr. O. will have a pleasant visit, and I trust he will not defer his return any longer. I regret that your note for $2,700 was

not done at the Farmers' Bank. From what I could learn they had discounted very little outside this week. The land is all surveyed and holds at 1,300 acres, and the beauty of it is that all the old land has been used, which strikes a great blow to the land sharks. Could you manage to send Mr. Devereux one barrel of sugar, one of hams, two boxes of salt, for the stable? You will please enclose find $235 is all I could raise at present. Hoping to see you soon, I remain, Yours truly; P. O'REILLY."

Q. In whose handwriting is the endorsement?

A. P. O'Reilly's; great difficulty in getting sills, work on Lebanon. I suppose that is burning stable. That is in Mr. John H. Osborne's handwriting; it is an endorsment to show what the letter contains.

Q. State whether you have any recollection of a conversation between Patrick O'Reilly and John H. Osborne in 1855 relative to John H. Osborne's taking charge of the Camden and Atlantic Railroad as superintendent at that time; if so, what the conversation was.

A. I recollect they had an interview in the office.

Q. In your presence?

A. Yes; in which Mr. O'Reilly urged Mr. Osborne to take charge of the Camden and Atlantic as superintendent, to protect his and Mr. Richard Osborne's and Mr. Patrick O'Reilly's interest.

Q. What time in 1855 was this?

A. It was, I think, in the latter part of the spring or early in the summer of 1855.

Q. What account did you receive at your office of the sills which were cut and forwarded from Greenwood?

Objected to.

A. I think probably the only return I had was from Mr. Devereux, a statement of the amount sent by the boats by the canal.

Q. Where are those accounts now?

A. Mr. O'Reilly had them; at least they were given to him.

Q. Who gave them to him?

A. I did.

The counsel for the complainant now calls on the counsel for the defendant to produce at the next meeting the books and vouchers referred to by the witness this morning as having been turned over by him to Patrick O'Reilly, consisting of vouchers and books relating to the disbursements of money for wood leaf on the line of the Lebanon Valley Road and for disbursements of money in relation to sill getting from a tract of land known as Greenwood in Juniata county.

Q. What do you mean by "wood leaf"?

A. Wood leaf is buying standing timber on land with the right to remove it.

The witness being shown paper marked Exhibit J4 is asked:

Q. State what that paper contains?

Defendant's counsel objects to the exhibit and all the testimony conneted therewith.

A. This is a leter from P. O'Reilly to John H. Osborne, dated February 22, 1855.

Q. It is in P. O'Reilly's handwriting?

A. Yes, sir.

The witness being shown paper marked Exhibit K 4 is asked:

Q. State what is that paper?

Objected to.

A. A letter from P. O'Reilly to John H. Osborne, dated April 10th, 1857.

Q. In whose handwriting is it?

A. P. O'Reilly's.

The witness being shown paper marked Exhibit L 4, is asked:

Q. What is that paper?

The defendant objects to the exhibit and all the testimony connected therewith.

A. This is a statement or a number of statements made up by me as to the cost of work on sections from 14 to 26 inclusive on the Lebanon Valley Railroad.

Q. Are the most of those statements contained or comprised in statements previously offered in evidence?

A. Yes, sir.

Q. You have already stated that the attention of Patrick O'Reilly was directed to the difficulty of this rock work, and he gave assurance that the price would be increased. State whether that price was increased.

A. That price was increaseed from 65 to 73 cents.

Q. Did that cover all or any part of the loss mentioned in Exhibits J 3, L 3, O 3, N 3, P 2 and U 3?

Objected to.

A. It may have covered part, not all.

Q. How could it be ascertained whether or not it covered any part?

Objected to.

A. By the engineer's estimate.

Q. Are you able to say whether the increase in price which Patrick O'Reilly made was made before or after these statements were made up?

A. They were made after some of them were made up.

Q. As to others do you know?

A. I don't know without going into the estimates thoroughly; I can't tell.

Q. The records say here, "Our estimates for several months did not pay for powder," as a part of your testimony given at a previous meeting. State what particulars you know upon which you base that statement.

Objected to.

A. I think that must have been an error, the word "several." I stated "some" months. I remember one month. I remember one time the estimate did not pay for the powder we used, and that our pay-sheets for that month for the men and labor employed was about $4,000.

Q. Can you tell from recollection how much you were allowed on that section on the estimate?

Objected to.

A. My recollection is the estimate was probably $100 less than the cost of the powder, and I remember calling the engineer Stack's attention to the fact at the time that it was impossible for us to continue work under such circumstances.

Q. Do you recollect the amounts "spent" for powder, also the estimates for that month for that particular section?

A. I think we used 100 kegs of powder, which cost $485; if memory serves me, the estimate was less than $400.

Q. You have already stated that an ordinary steel drill would last in use only two minutes.

A. I didn't know that I specified any time; I don't think it ever went two inches, if I said two inches I was wrong there. I know that the rock was very hard and we kept two smiths at work to sharpen drills, and it was all they could do to keep the men in drills.

Q. On what sections were these smiths employed?

A. On sections 18 and 19, working together, and also another one on section 19.

Q. Under what sort of use would a drill last two minutes if it would last that time?

Objected to.

A. The rock would have to be very hard if the drill would not last two minutes.

Q. How many men were working on it at the time?

A. There were always three; that is, one man to hold and two to drive; and very often in that rock there were three drills making four men.

Q. I find by reference to the testimony that you have stated: "I know an ordinary drill would not cut more than two inches before it would have to be sharpened." State what opportunities came to your knowledge by which you are able to make that statement.

Objected to.

A. I was at the work, as I said before, every day, and spent a great deal of time there with the men to see the drills when they were taken out; the foreman would show me the drills or show me how hard the work was, that the drills were not being sent to the smith, except when really needing sharpening.

Q. Would a drill with two men at work on it be driven in two inches in this hard rock?

A. No, sir; not so far.

Q. What size drills did you use up there?

A. We used there 1⅞ steel; I think some of it as large as 2, which would make the bit run from 2¼ to full 2½

inches; the bits are spread out, larger than the size of the steel.

Q. Is 2½ inches a large or small bore?

A. Large.

The witness being referred to page 164 of Exhibit M3, is asked:

Q. What is contained on that page?

A. It is a letter from John H. Osborne, dated Womelsdorf, the 14th of February, 1856, to M. E. Lyons, Esq., associate engineer.

Q. Refer to Exhibit L4 and state whether or not the $16,087 is intended to cover the same loss as is covered by $13,890 in Exhibit J3, and if so, the reason of the discrepancy.

Objected to.

A. This statement on L4 of $16,087 shows a loss on the rock. This statement, J3, shows the expenses and the estimates for not only rock but for clay and earth upon the clay and earth upon the whole, and probably some profits which reduced the absolute loss on the rocks, showing the last loss for the time and the rock itself.

Q. Was there a loss on all the work that Mr. Osborne did on this contract of grading and masonry?

Objected to.

A. There was some of it, we paid a profit.

Q. Did any of it pay a large profit, any more than a fair profit, on the work?

Objected to.

A. I think not.

Q. Have you any acquaintance with work of this character and what ought to be allowed for it?

A. I had some experience at that time; none lately.

Q. Upon the work upon which there was a profit do you feel from the knowledge you have gained in this sort of work you are able to say the allowance was a fair allowance or too large allowance?

Objected to.

A. I don't think it was too large.

Q. Are you, from your knowledge of the kind of work upon which there was a profit, a competent judge of what

would be a fair allowance on that kind of work, in your opinion?

Objected to.

A. I think I am.

The witness being shown paper marked Exhibit M4, is asked:

Q. State what that exhibit is.

The defendant objects to the exhibit and all the testimony connected therewith.

A. This is a letter from G. W. Bowen to John H. Osborne, dated October 1, 1857.

Q. By reference to that letter are you able to state when you made out the account Exhibit A?

A. That Exhibit A was made out November 3, 1857.

Q. That shows for itself, you mean?

A. Yes, sir.

Q. Is there any reference in this letter to the making out of the account Exhibit A?

A. This last part only refers to the amount that is due Lawrence Devereux by P. O'Reilly for wages, &c.

Q. Refer to page of letter-book where proposals for wood leaf are, page 37?

Exhibit N 4 shown witness:

The defendant objects to the exhibit and all the testimony connected therewith.

A. This is a letter from H. T. Hoffman, of Lebanon, March 6, 1857.

Q. What does it have reference to?

A. It has reference to contract with Mr. Hoffman for boating sills from Greenwood to Lebanon and to different points convenient to the railroad.

Q. What is that letter (shown witness.)

Objected to.

A. This is a letter from me to M. E. Lyons. It refers to getting sills for Mr. O'Reilly for wood leaf on the line of the Lebanon Valley Road, and also for the purpose of getting sills for work on the 2nd division.

Q. Was that letter sent to M. E. Lyons?

A. Yes, sir.

Q. What was the condition of these teams and wagons when they came back from Greenwood?

A. I remember one team in particular was in very bad condition when it came back. All of the stock was very much run down.

Q. Were they fit to go to work or did they have to be turned out?

Objected to.

A. I think there was probably only one team that was turned out, the first team that was returned.

The witness being shown page 294 of letter-book M3, is asked:

Q. What does that page contain?

The defendant objects.

A. It contains a letter from George W. Bowen to E. McDermott, dated Tamaqua, January 27, 1858. This letter refers to a statement that I have received from Mr. McDermott as to the moneys paid to Tarrant & Co. and John H. Osborne by P. O'Reilly, calling his attention to some errors, among the rest to an error of $8,000. In fact, at the time it was paid it was paid to John H. Osborne individually and not to Tarrant & Co., but was charged to Tarrant & Co. by Mr. McDermott. This $8,000 I understood was for Mr. Osborne in pay for loss on rock.

Q. When was the $8,000 paid to Mr. Osborne?

A. December 19th, 1856.

Q. What statement is there in there about charging John H. Osborne with $10,000?

Objected to.

A. It says, "I find that you have charged Tarrant & Company with $18,101 on December 19th, 1856. I understood at that time that $8,000 of the amount was to be charged to John H. Osborne, Esq., and I gave him credit on the books for the amount." It also refers to some other errors in the account; $400 had been charged to Tarrant & Company, being for money I had received from Mr. O'Reilly to pay for wood leave and sills, &c. I called his attention to that, I found that $400 accounted for in my statement of March 8th, 1857, and it must be taken out of Tarrant & Company's account, also asking him for a full statement of account between P. O'Reilly and Tarrant & Company, which I never received.

Q. State what you find on Exhibit M3, page 211.

The defendant objects to the exhibit and all the testimony connected therewith.

A. I find the letter from George W. Bowen, dated June 26, 1856.

Q. To what letter do you refer as being sent to P. O'Reilly?

A. "I send you the enclosed letter." I can't tell what that letter referred to is.

Q. Turn to page 153 of the letter-book and state what you find there.

The defendant objects to the exhibit and all the testimony connected therewith.

A. I find a letter from John H. Osborne to L. A. Landry, dated Womelsdorf, January 11, 1855.

Q. What was Mr. Landry doing at that time?

A. I don't know what he was doing.

Q. Turn to page 277.

Objected to.

A. This is a letter from John H. Osborne to P. O'Reilly, dated Womelsdorf, March 6, 1857.

Q. Refer to page 278.

Objected to and all the testimony therewith connected,

A. There are two letters on page 278, one from J. H. Osborne to Hoffman, of March 9th, 1856, in reference to bringing sills from Liverpool, and stating that some are to be delivered at Lebanon and some at Palmyra, and requesting him to write me what he would haul them for. This letter of Mr. Hoffman was a reply to that part.

Q. The letter marked Exhibit N 4 is a proposal from H. T. Hoffman, dated March 9, 1857, in answer to Mr. Osborne's letter of the 7th, proposing to haul the sills from Liverpool and deliver them at Lebanon at fourteen cents apiece. Is not there a reply there on page 280?

A. Yes, sir; on page 280 is the letter from George W. Bowen to H. T. Hoffman.

"March 18th, 1857.

"Dear Sir :—I will accept your proposition for hauling sills, . . . on the following terms: You to load, unload, sort and count the sills and deliver them at Lebanon

for the sum of fourteen cents per sill, payment to be made you on account every thirty days. Please reply at once when you will commence. Respectfully yours,

BOWEN."

The witness being referred to the right hand side of page 279 of letter-book M3, states:

The defendant objects to the exhibit and all testimony connected therewith.

A. "John H. Osborne and P. O'Reilly, 13th of March, 1857. I have not received any reply to my last week's note. Hoffman will not take the sills at less than fourteen cents. Send me the name of the men who will do it at thirteen cents, he to load and unload, pay all tolls, and deliver on landing. Write me without fail by return mail or by express stage of this day.

"Truly yours, JOHN H. OSBORNE."

Q. Look at page 284.

The defendant objects.

A. John H. Osborne, April 7th, 1857.

The witness being referred to page 287 of letter-book M3, is asked:

Q. What do you find there?

The defendant objects to the exhibit and all the testimony connected therewith.

A. A letter from J. H. Osborne to P. O'Reilly, dated April 9th, 1857. It has reference to the row on section 19, about the men not being punished. It concludes, "I want $5,000; write to me in the city when you can arrange the matter."

Q. Who had charge of the forwarding of the letters and the copying them into that letter-book at the time these letters were written, copies of which you have just testified about?

A. I generally copied the letters and enclosed them; there was no other clerk in the office but me.

Q. In whose charge was the book during the time?

A. In mine.

Q. State whether these particular letters you have testi

fied about some were written by you and some by John H. Osborne, and were forwarded to the persons to whom they were directed.

A. They were, to the best of my knowledge. There was no object in writing them except to forward them.

Q. You have already stated that there was a suspension from October, 1854, to some time in the spring of 1855. State whether or not there was any loss on that suspension to John H. Osborne, or to Tarrant & Company.

Objected to.

A. Yes, sir; there was a loss to them from the fact that at the time of the suspension the wages were low and feed was low. When we commenced to work again both had advanced considerably, wages from about 75 cents and 87½ cents up to $1 and $1.12½, and feed had advanced considerably. I don't remember so well about that just now, I know we paid as high as $24 a ton for hay during the summer of 1855. There was also a loss from horses being idle and from having to pay men to look after them, and paying the clerks that had been retained to look after the work, or to take care of things.

The witness now being shown statement marked for the first time Exhibit O4, is asked:

Q. State what that paper is and in whose handwriting it is.

The defendant objects to the exhibit and all the testimony connected therewith.

A. It is in the handwriting of J. H. Osborne and is a statement showing the difference between the pay of men in the different months from November, 1855, to May, 1856, inclusive, also the number of men employed for a period of seven months. It shows the salary of these clerks and agents who kept on the work for seven months, looking after stock, and so forth, and who were in their employ, amounts expended for feeding horses and mules not employed during seven months ending May, 1855.

Q. When?

A. It says ending May, 1855; it must have been the 31st of May—the cost of feed per head of horses or mules for seven months ending May, 1855, and the amount of

feed per head for horses and mules for the seven months ending May, 1856, show the cost of both; also the difference or increased cost of horse feed in the seven months ending in 1856, it says it is $3,024.

Q. What does it show the total loss?

A. Excess paid in wages or labor and wages ending May, 1856, in the course of seven months ending May, 1855, $6,150.59; excess paid in horse feed for the same months, 1856, $3,024; the amount expended in feeding mules and horses not in any way employed during the seven months ending May, 1855, is $5,181; half salary of these clerks and agents, who were only partially employed as care-takers, and so forth, during the three months ending May, 1855, is $934; total, $11,679.59, less amount allowed by contract and pay-roll, $2,500, still due $9,179.59. $2,500 allowed. Endorsed by Richard B. Osborne.

Q. What do you know about the facts stated there?

Objected to.

A. These statements of the wages of the men at different periods were taken from the time books.

Q. What do you know about the correctness?

A. The time-book will show for itself.

Q. State whether or not there was an increase in the wages paid to laborers and in horse feed between the fall of 1854 and May, 1855?

Objected to.

A. I stated that the wages increased from 1855 up $1.12 and $1.10 and horse feed had considerably advanced.

The witness is shown paper marked Exhibit P 4.

The defendant objects to the exhibit and all testimony connected therewith.

Q. In whose handwriting is it?

A. J. H. Osborne.

Q. What is it substantially?

A. It gives the total expenses for seven months ending May, 1855, and the total expenses for seven months ending May, 1856; and one makes $9,070.79, the other is $48,220.09.

Q. It goes over the same ground as the preceding statement, O 4, goes over?

A. In part.

Q. What does it show the total loss to have been?

Objected to.

A. The total loss is $10,033.49, less the $2,500 allowed, leaving $7,533.49 as the result or balance.

Q. Your knowledge contained in that is substantially the same as in the others?

Objected to as to form.

A. Yes, sir.

Q. To the best of your recollection, what is the first estimate upon which you received any money after this suspension?

A. Either May, 1855, or June, 1855; I don't know exactly which; I rather think it was June, 1855.

The witness being shown paper marked Exhibit Q4 of complainant, is asked:

Q. What is that paper?

Objected to.

A. This paper is an inventory of the harness destroyed by fire on section 16, May 3, 1855; also of hay, oats, corn, &c., destroyed; also a memorandum of what they saved from the fire, in the handwriting of Cornelius L. O'Brien, who was storekeeper, or who had charge for Tarrant & Company of the burnt things and such matters at Newmanstown store.

Q. Who had charge of those horses and teams at that time?

A. This is only in reference to the harness. There is a memorandum below of the horses that were lost; I think that is in Mr. John Osborne's handwriting. Mr. O'Brien had charge of all the harness, keeping an account of the harness and the hay and feed generally; it was his business to give it out to the section stable-keepers on the sections. He kept the books and knew what was destroyed.

Q. Where is Mr. O'Brien now?

A. He was in Philadelphia the last time I saw him, a few years ago.

Q. When was the statement, Q4, made up by Mr. O'Brien?

A. It must have been made very soon after the loss; it must have been made immediately after the loss.

The witness being shown Exhibit R4, is asked:

Q. State what that paper is?

The defendant objects to the exhibit and all the testimony connected therewith.

A. This statement is in the handwriting of John H. Osborne, and is a statement of the cost of the articles that were destroyed by the fire—wagons, feed and horses—amounting to $2,472.75.

Q. When was that paper made out?

A. I can't say when it was made out; it was made out pretty soon after the fire, I suppose. It has no date to it.

The witness being shown paper marked Exhibit S4 of complainant, is asked:

Q. When was that paper made out and in whose handwriting is it?

The defendant objects to the exhibit and all testimony connected therewith.

A. This paper was made out on the 10th of June, 1854, by George W. Bowen. It is merely a copy of Exhibit R 4, with the addition of $140, the amount paid the men who were hired by the month, and who were idle from a destruction of the stock. This bill makes it $2,612.75 as a total. I made it out from the fact there was no bill, but merely a memorandum; I made it at the request of Mr. Osborne, the complainant.

Q. What was the occasion of this loss?

A. It was caused by the men setting fire to the stables during a riot. They had demanded an increase of wages or payments due them on the 1st of May, which, as we had agreed with them when we went to work, we should not pay them until the 15th, and we were not in the possession and not receiving money from P. O'Reilly, the contractor, for the work they had been doing; we were unable to pay them, and during the riot some of them set fire to the stable at night, and would not allow the men to save anything from the stables. There were a lot of them standing around; they interfered, preventing them saving a good deal of property that might have been saved.

Q. At whose request or direction was this work done and these promises made to pay the men on the 15th of May?

Objected to.

A. The forces had been increased on the sections by Mr. O'Reilly's request, with the understanding that he would pay out on the 15th of May; that we would get an estimate.

Q. Why did the men break out in this riot on the 3d of May if he did not promise to pay them until the 15th?

A. The object was to force us to raise their wages to $1.12 a day; knowing that we were unable to pay them, they made the demand either for their wages or an increase of wages.

Q. Was Patrick O'Reilly informed, to your knowledge, that if the men were not set to work before you had money to pay them it would be likely to result in difficulty?

Objected to.

A. I don't think he was; I don't know.

The witness now being shown paper marked Exhibit T 4, is asked:

Q. What is that paper?

The defendant objects to the exhibit and all the testimony therewith connected.

A. It is a letter of P. O'Reilly to G. W. Bowen, dated Reading, October 2, 1857; it is in reply to a letter of mine, this letter from O'Reilly to me, in reference to sending him money to pay a note which he endorsed to Mr. Bean.

The witness is shown paper marked U 4.

The defendant objects to the exhibit and all the testimony connected therewith.

A. It is a letter from George W. Bowen to John H. Osborne, dated Summit, October 17, 1857.

The witness is shown a protest and three notes together, marked Exhibit V 4.

The defendant objects to the exhibit and all the testimony connected therewith.

A. These notes are three notes dated at three, six and nine months; drawn by me , and two of them to the order of P. O'Reilly, and one to the order of John H. Osborne, or endorsed by P. O'Reilly and John H. Osborne, and two of them by Nicholas Bean. The other is for the protest of the non-payment of the note dated April 1st, and drawn at six months, endorsed by Osborne, O'Reilly and Bean.

Q. By whom were these notes paid?

A. Paid by John H. Osborne.

Q. Two of the notes have an endorsement across the face in red ink stating what?

A. The endorsement is, "May 1st, 1858, paid by John H. Osborne," signed "George W. Bowen;" a note at six months and one at nine months.

Q. What was the purpose of that endorsement?

Objected to.

A. To show who paid the note.

Q. What was the arrangement between John H. Osborne and P. O'Reilly, out of which the carrying of these three notes arose?

Objected to.

A. Mr. O'Reilly and Mr. Osborne proposed to buy a farm for me in the spring of 1857, and they were to advance the money and give me time to repay it. We bought the farm from Nicholas Bean for $4,800, $2,800 of which was to be paid at once or within a short time, and the other $2,000 was to remain on mortgage to Mr. Bean. Mr. Osborne paid $1,300 in cash to Mr. Bean, and he and Mr. O'Reilly endorsed these notes which I drew for the other $1,500, Mr. O'Reilly agreeing to pay half of the costs of the farm.

Q. Under that arrangement who was to meet and pay those three notes?

A. Mr. O'Reilly was to pay two of them, I should suppose by the endorsement, and John H. Osborne the other; they were to pay the $2,800 between them. Mr. Osborne paid the $1,300, the first payment.

Q. State whether the letter, Exhibit T4, from P. O'Reilly is in reference to any of those notes; and if so, which?

Objected to.

A. It is in reference to one of the notes which was then due.

Q. What is the Exhibit U4 in reference to?

Objected to.

A. A portion of it refers to one of those notes, requesting Mr. Osborne to write Mr. Bean in reference to it, as O'Reilly could not pay or would not pay.

Q. Why did not Mr. O'Reilly meet the notes which he agreed to meet?

Objected to.

A. I can't say why he did not; he refused to do it.

Q. When was this arrangement entered into by Mr. Osborne and Patrick O'Reilly for the purchase of this farm for you by paying cash $2,800 in equal parts, before or after the purchase of the lot?

A. It was before.

Q. Were the $1,300 paid by Mr. Osborne paid before or after the arrangement between the complainant and P. O'Reilly?

A. Paid after.

Q. To whom was the deed made?

A. It was made to me, I remember, and I gave Mr. Osborne and Mr. O'Reilly a second mortgage for the payment of $2,800; Nicholas Bean held the first mortgage for $2,000.

Q. What became of the lot?

A. Mr. Osborne had to take it back; I don't know what he did with it.

Adjourned.

Camden, June 13, 1884.

Examination continued in the presence of the respective counsel.

Direct examination of George W. Bowen continued.

By Mr. Drake—

Q. What were the laboring men doing in the year 1855 during the suspension, before they went to work prior to the fire and riot?

A. A good many of them were doing nothing, waiting there during the winter after the suspension, waiting for work to commence.

Q. State whether or not Patrick O'Reilly knew of the men being out of work and kept there. State if you had any conversation with him on the subject?

Objected to.

A. I had a conversation with him during the winter and spring of 1855, in reference to these men being idle.

Q. Where did the conversation take place?

A. I don't know whether it took place in the office or along the line of the road; it took place on the Lebanon Valley Road at some point I can't designate just now.

Q. State what the conversation was.

Objected to.

A. I spoke to Mr. O'Reilly about these men being idle and it would be a good thing if they could be put to work, that they could be had very cheap, at 75 cents a day, and there was a good deal of heavy work that ought to be done. He suggested that probably the men would go to work and agree to wait for their pay until the 15th of May, that there would be an estimate taken on the 1st of May and paid on the 15th, and that probably these men would be willing to go to work and wait until that time. I adopted the suggestion, and the men were put to work at various points along the line of the road, 500. They turned out on the 1st of May, after this agreement, demanding their back pay or an increase of wages to $1.12. We were unable to pay them and refused to make the advance. They then turned out on a strike, as it is termed, and during the continuance of that strike our stable was destroyed at Newmanstown and the horses and mules and other things destroyed by fire.

The witness being shown paper marked W4, is asked:

Q. State what it is.

The defendant objects to the exhibit and all the testimony connected therewith.

A. It is a bill of John H. Osborne against Patrick O'Reilly, commencing December 27, 1855, and ending December, 1857, in the handwriting of John H. Osborne; $1,099.53.

Q. What is that in relation to?

A. Relating to the expenses incurred in going to and from Greenwood farm, and also for moneys paid out on Greenwood farm and for services in disbursing moneys or paying for sills, teamsters, and so forth, et cetera.

Q. What is the amount there for services?

A. $750; five per cent. on fifteen thousand dollars.

Q. Those services are for disbursing moneys?

A. Yes, sir.

Q. When is that account made up to, to the best of your knowledge?

A. I can't say.

Q. What knowledge have you of those stated there?

Objected to.

A. I have no special knowledge of them except I have received receipts for some of these items.

Q. Relative to a charge of $750, what knowledge have you of the disbursing of the moneys for which that service is claimed?

Objected to.

A. Mr. Osborne must have got the amount from me as I had disbursed most of the money and the accounts and papers and so forth, were turned over to Mr. O'Reilly.

Q. Can you tell from recollection now what was the amount of money actually disbursed by you?

A. I cannot.

The witness being shown paper marked X4 for complainant, is asked:

Q. State what that paper is.

The defendant objects to the paper and all the testimony connected therewith.

A. It is a bill of J. H. Osborne against P. O'Reilly in John H. Osborne's handwriting; it is the hire of teams working at Greenwood, the hire of horses, and items for mules and harness furnished P. O'Reilly, and bills for items sent to Greenwood for sundry articles, and to salary of the manager from January, 1856, to August, 1857, $805. The amount of the bill is $5,372.25.

Q. What is the charge made for these mule teams by the day?

A. $4 a day.

Q. Who furnished the feed for them?

A. P. O'Reilly.

Q. There is a charge of $875. State whether or not that is the same charge and for the same services as the $750 on Exhibit W 4.

A. It is not, one being for services for money disbursed, the other for salary as general manager.

Q. What did these services of John H. Osborne, as general manager for P. O'Reilly as they are charged consist of?

Objected to.

A. Services in looking after the business at Greenwood, having the sills cut and hauled and distributed along the line of the Lebanon Valley Railroad, hauled from Liverpool and along the canal down to Lebanon and distributed looking to a general distribution of the work at Greenwood, the getting out of the sills and logs.

Q. Who had charge of those accounts of expenditures of P. O'Reilly at Greenwood?

A. I had towards the last.

Q. Who had charge before you?

A. I had charge I think from April, 1857. Previous to that Mr. McDermott and Mr. Devereux was furnished with money which he expended up there, for which he had to account to Mr. O'Reilly; Mr. O'Reilly's clerk, McDermott, used to go up there and pay the men before I took charge. Mr. O'Reilly became dissatisfied with Mr. McDermott's management, and asked Mr. Osborne to let me go up and look after it for him.

Q. After you went up in April, 1857, who had charge of the accounts?

A. I had.

Q. From whom did you get the previous accounts so you could go on with the accounts subsequent to that time?

A. They were furnished by Mr. O'Reilly.

The witness being shown paper marked Exhibit Y4, is asked:

Q. State what that is?

The defendant objects to the exhibit and all the testimony connected therewith.

A. It is a statement of balance due on Greenwood as per book in my handwriting, showing the balance of $2,858.15 due laborers.

Q. What is the balance there in favor of Lawrence Devereux?

A. $1070.10.

Q. How does it compare with Exhibit A?

A. It is larger. In Exhibit A the balance is $1057.48. This was the last one made up, Exhibit A, for the other, I suppose. He had received some money, something on account, which reduced the balance slightly.

Q. Where is the book from which you made this?

Objected to.

A. It was given to Mr. O'Reilly. I don't know where it is now.

The witness being shown paper now marked Z4, is asked:

Q. State what that is.

The defendant objects to the exhibit and all the testimony connected therewith.

A. Tarrant & Company against P. O'Reilly, "November, 1856. To extra work on sections and re-trimming sections 15 and 14, $291.75."

Q. What do you know about the services or expenses charged in that bill?

Objected to.

A. I know that sections 14 and 15 were retrimmed. Owing to the bank being very heavy it settled after it was trimmed up ready for the track, and work had to be done on it again to put it in order for the track.

Q. Describe the character of the work which is charged in Exhibit U3.

Objected to and all the testimony connected therewith.

A. This was for work on the rock in 1357, in the Lebanon Valley, I made out the bills, cleaning up the sections, getting it down to grade, and leveling it, and also for taking off a small side that was left when it was cut through to allow the track to go through, that the train might go through with the iron of the track, leaving a bench as it

were, along the one side of the road. Owing to the track being there we had to be very careful in taking that bench out, which added to the expense of the work.

Q. Why was not that allowed in the estimates?

Objected to.

A. The work, I suppose, had been allowed in the estimates, or nearly so. They would have a very small amount to allow this bench through, and the nature of the rock made it very difficult and this side piece in trimming the banks. There may have been a few hundred yards of embankment, also in the estimate taken out. The estimate ought to show that, however.

Q. What time was that work done?

A. That was in April; it commenced in April and run through to October; April, May, June, July, August, September, to October that bill is for.

Q. What expenditure was it that Mr. Osborne refused to incur until Mr. O'Reilly assured he would bear the expenses of it?

Objected to.

A. That is it. This is a bill for that work which Mr. O'Reilly ordered me to have done and keep the accounts, he would pay the bill.

The witness being shown Z 4 for the complainant, is asked:

Q. Where is the original charge upon which that is based?

Objected to.

A. I couldn't say where it is now; I suppose Mr. Osborne has it among his papers; it was made up about the time.

Q. When was that made up?

A. It was made up yesterday; this bill was made out yesterday from memoranda. The original bill was mailed.

Q. Have you seen an original bill for that?

A. Yes, sir; and it was endorsed by me No. 6 in the statement we made up the bills from one to eight; that $291.75 was No. 6.

Q. State whether the original bill was certified to by you as being correct?

A. I think it was.

The witness being now shown time-book marked Exhibit A 5, is asked:

Q. What is that?

The defendant objects to the exhibit and all testimony connected therewith.

A. It is a time sheet book of the second division of the Lebanon Valley Railroad Company; it contains a list of the men's names and the amounts paid them for work during the months of April and May, 1854.

Q. What is this book marked B5? (Same shown the witness.)

The defendant objects to the exhibit and all testimony connected therewith.

A. It is a time and pay sheet from July 1, 1854, to May 31, 1855. This Exhibit A5 is April, May and June, 1854.

The witness now being shown Exhibit C5, for complainant, is asked:

Q. What is this?

The defendant's counsel objects to the exhibit and all testimony connected therewith.

A. This is a time and pay sheet and commences from June 1st, 1855. and goes to November 30th, 1856.

Q. What was the biggest force of men and horses you had employed on your division at any one time?

A. I think about 500 men, and we had in all from 108 to 110 horses and mules.

Q. Is that on work in the second division under the contract?

A. Yes, sir.

The witness being shown book now marked Exhibit D5, is asked:

Q. What is that?

The defendant objects to the exhibit and all the testimony connected therewith.

A. It is the time and pay sheet from December 1, 1856, to October 31, 1857.

Q. Are there any more pay sheets among these?

A. No, sir; that covers the whole period of the work on the second division.

Q. How were the moneys paid out on those pay sheets, and how were the receipts of the money to the men to whom they were paid taken?

Objected to.

A. At first the men were required to sign the pay sheets, but, finding it took a great deal of time, I adopted a plan of taking a man with me, generally J. W. Doyle, and sometimes my father. I would drive to the pit where the men were working, call the foreman out to the buggy. I sat in the buggy with the book and the money, with one of these kind of pay sheets; the clerk would call out the man's name and the amount, and the man would come out of the pit, and I would hand him the money in the presence of the clerk; he would mark it paid, and foreman of the work also being present so as to be certain that we paid the right man. Some few of them were paid in the office at Womelsdorf, and when they were discharged from the work they were paid on an order of the foreman whom they worked with.

Objected to.

Q. How did you get at the time?

Objected to.

A. The time was marked by the foreman who worked the men.

Q. Did you keep accounts of your cash to show the payments charged on the pay-roll agreed with the amounts paid out on the time-book in that way?

Objected to.

A. I took so much money with me and when I returned home I added it to see what I had left and see what I laid out, and see if it corresponded.

The witness being shown account book marked Exhibit E5, is asked:

Q. State what that is.

The defendant objects to the exhibit and all the testimony connected therewith.

A. This is a day book of Tarrant & Company in which are recorded all the business transactions of the firm, moneys received and paid out, and various bills entered to the credit of parties, and so forth. From this book the accounts are made out.

Q. What does that relate to besides the grading and masonry on the second division?

A. It relates to all the transactions that took place on the second division, all working of every section, store account and other matters. It extends from May 24, 1854, to November 15, 1858.

Q. As far as you know in whose handwriting is the book E 5, kept?

A. In mine.

Q. By whom was it kept?

A. By me; it is all in my handwriting.

Q. In whose handwriting are the time and pay sheets kept?

A. Mine and J. W. Doyle and William Bowen.

Q. What part of the handwriting is yours?

A. It runs through the book at various times, through the book. When I was very busy I would get my father or Mr. Doyle to make the entries.

Q. In whose handwriting generally are the entries marked "Paid" or "Pd" on the time sheets?

A. Mr. Doyle's and mine and William Bowen's.

The witness being shown book marked F 5, is asked:

Q. What is that?

The defendant objects to the exhibit and all the testimony connected therewith.

A. It is a book kept by Cornelius O'Brien of the amount of feed received and given out on the second division of the Lebanon Valley Railroad. Mr. O'Brien was the storekeeper for Tarrant & Company, at Newmanstown.

Q. What opportunity had Mr. O'Brein for knowing the correctness of the entries he made there?

A. He received all the feed and gave it out and saw the delivery to the different stablemen.

Q. What did Mr. O'Brien's duties as storekeeper consist in?

A. Buying and selling the goods to the men and receiving and taking care of the feed, powder, tools, and giving out the same.

Q. This is an account with the men, is it not?

A. Yes, sir; this is an account of the things furnished the men.

Q. What were you doing between the times that you left the Camden and Atlantic Road and went on the Lebanon Valley Road?

A. I left Camden, I think, the latter part of March, 1854, went to Reading and stayed there about six weeks, during which time I was making up the accounts, in Mr. O'Reilly's office, of the Camden and Atlantic Railroad expenditures.

Q. After you got those accounts made up, what did you do with them?

A. They were turned over to Mr. O'Reilly.

Q. Did you buy any mules or horses, tools, or cars for hauling through the embankment of Patrick O'Reilly while you were engaged on this work?

A. Yes, sir; there was some bought from him.

Q. Did Tarrant & Company pay for these, or not?

Objected to.

A. Part of them were paid for—all were paid for, I think, except the cars, I don't remember about the cars.

Q. How did P. O'Reilly take pay for those?

A. They were taken out of our estimate or paid for after the estimate was received.

Q. When you had a conversation with P. O'Reilly in the spring of 1855 relative to the men being idle, and said to him that these men ought not to be idle, did he dissent to or agree with that?

Objected to.

A. He agreed that they ought not to be idle; that is, it would be better to put them to work.

Adjourned to Friday, June 20th, 1884, at 10 A. M.

Camden, June 20th, 1884.

The examination was continued in the presence of the respective counsel.

Direct examination of George W. Bowen resumed.

By Mr. Drake—

Q. The witness is referred to a copy of Schedule A, an-

nexed to the defendant's answer. I find on the debit side of the first of these accounts a charge of $2,000, of August 7, 1854; also, a charge to expenses incurred, C. & A. R. R., August, 1853, and August, 1854, $346.79; in the second of these accounts in the same schedule there is another charged, salaries and expenses included in above account, $2,346.79. The witness is now asked whether the entry last referred to, of $2,346.78, is a real or apparent error or an error at all. (Same shown witness.)

Objected to as improper, inadmissible and irrelevant.

A. This item seemingly charged twice is an error in making up the account, Mr. Osborne having charged himself with $2,346.79 in the account, and also in the same amount in the item of $3,753.06 charged March 24, 1854, there was really no error, although it seems that the items are charged to O'Reilly twice.

Q. What items in the first account of credits to P. O'Reilly make up the $2,346.79, which is also entered in the second account of credits as a part of $3,-753.06.

Objected to as improper.

A. On December 12, 1853, there is $113.48 in the item of $501.48, and on January 7, 1854, there is a credit of $2,233.31; those items make the $2,346.79.

Q. What error is there in these accounts embraced in Schedule A, showing a balance due P. O'Reilly of $1,-098.97.

Objected to.

A. There is no error. That is a correct item due O'Reilly, $1,098.97.

Q. Have you ever made any application to Patrick O'Reilly since the finishing of the work on the Lebanon Valley Railroad for a statement of the account between himself and John H. Osborne, the complainant, and if so, state when, as near as you can?

Objected to as improper and irrelevant.

A. I made several applications to Mr. O'Reilly personally for a statement of the account, and also by letter to Mr. McDermott, his clerk, after the completion of the work in the winter of 1857. In 1858 I got a small state-

ment from Mr. McDermott at one time, just merely the cash items and nothing else. I wrote him them to send me a full statement of the account with all the items, but never received any.

The witness being shown a letter dated January 14th, 1858, written by the witness to R. B. Osborne, is asked:

Q. State, if you please, when you made the application to Mr. O'Reilly referred to in that letter.

Objected to as inadmissible and improper.

A. This letter was written on the 17th of January, 1858, in the absence of John Osborne in England, and Mr. Richard B. Osborne was attending to his business for him. I, as his agent, wrote to him in reference to not being able to get an account from Mr. O'Reilly. "After leaving you I went to his office and Mr. McDermott refused to give it, and I then saw Mr. O'Reilly. He promised to have it made out by five o'clock. When I called he (McDermott) said that O'Reilly had not said anything to him. I afterwards saw Mr. O'Reilly and he said they were so busy just now they could not have it done; all of which is merely an excuse, as I don't believe he intends to give it, although he promised to send it up in a few days." I also referred in the letter to Mr. Osborne trying to get that account from Mr. O'Reilly, and a settlement.

Q. How long after the application there spoken of was made was that letter written?

Objected to.

A. I don't remember; it must have been a very short time.

Q. State whether you are able to state now whether the application was made to Patrick O'Reilly, as stated in that letter.

Objected to.

A. It was.

Q. Did you make your statement upon recollection or from reference to and confidence in the paper?

A. I make it from recollection and from reference to that paper. I recollect perfectly making the application.

Objected to.

Complainant's counsel now offers in evideuce, to be used as exhibits in this case, all the papers heretofore marked as exhibits and the schedule attached to the defendant's answer.

CROSS-EXAMINED.

By Mr. Vorhees—

Q. What is your business?

A. I suppose I may call myself an orange grower now.

Q. How long have you been at that business?

A. About three years.

Q. What was your business in 1854 and 1855?

A. I was cashier and book-keeper for Tarrant & Company.

Q. Prior to that time what business had you been engaged in?

A. I had been clerking in Virginia in a commission house and I was clerk on the Richmond and Danville Railroad for about eighteen months, and in 1853 I was with Patrick O'Reilly in the Camden and Atlantic Railroad, in the fall of 1853.

Q. When did you commence business on the Danville Railroad?

A. In July, 1852.

Q. Was that your first employment on railroads?

A. My first employment.

Q. What business did you have there?

A. I was superintendent's clerk.

Q. Who was the superintendent?

A. John H. Osborne part of the time and Charles Talcott.

Q. Where were you next employed?

A. I was next employed on the Camden and Atlantic.

Q. What position there?

A. As cashier and book-keeper.

Q. For whom?

A. For P. O'Reilly.

Q. Were you employed by him or by Mr. Osborne?

A. I was employed by Mr. O'Reilly and paid by him.

Q. Were you acting under his instructions or another one's instructions.

A. I was acting under his direction under John Osborne, who was manager for Mr. O'Reilly.

Q. How long did you stay there?

A. I stayed there until some time in March, 1854, I think.

Q. Where did you go to then?

A. I went to Reading?

Q. What business did you go in there?

A. I was several weeks at Reading settling up the accounts of the Camden and Atlantic Railroad.

Q. Did you make out a statement of the results of the accounts between Mr. O'Reilly and Mr. Osborne on that road?

A. I think I did.

Q. Is this a copy of the result of it? (Paper shown witness.)

A. This is not my handwriting.

Q. Whose writing is it?

A. I don't know.

Q. I see it makes the same balance as the statement?

A. It is not my writing.

Q. Did you present the statement of the result of that account to Mr. O'Reilly?

A. Yes, sir; all the papers were turned over to Mr. O'Reilly.

Q. Were you present when the result was presented to him?

A. I was present when he was presented with the statement of accounts.

Q. On the presentation of that statement did he give you a receipt, which you marked an exhibit here the other day?

A. I did not present him with that account; John Osborne presented that.

Q. John Osborne presented that statement of the result?

A. Yes, sir; that was a statement showing the balance due by Mr. Osborne for moneys he had received from Mr. O'Reilly and not accounted for, and also a private account that he and O'Reilly had; I had nothing to do with that.

Q. You know nothing about that except Mr. Osborne had made that account up?

A. Mr. Osborne made that account up. I examined the books afterwards and showed him that error of $2,346.79, just referred to, and he had charged himself with the same amount twice.

Q. How was that error made up?

A. That error was made up by his charging himself with an item of $113.48 and $2,233.31, enough to make up the difference in settling with me for the amount that he owed the Camden & Atlantic; he also included that same amount.

Q. Is the charge on that statement of cash, $501.48, erroneous?

A. Yes, sir.

Q. Is that charge of cash, $2,233.31, erroneous?

A. Yes, sir.

Q. He never received that money?

A. He received it, but it is included also in that statement of $3,753.06. Those two items are included also in that $3,753.06.

Q. What is the balance of the $501.48 made up of?

A. I don't remember.

Q. What was the $113.48 for?

A. I don't remember now what it was for; I only know the same amount was put in twice.

Q. Do you know that adding $113.48 and $2,233.31 will make $2,346.79?

A. I know that O'Reilly was credited twice with $2,346.79.

Q. Do you remember what the item of $2,233.31 was composed of?

A. There was a cash item, I think, from the account.

Q. Was the $501.48 also a cash item?

A. Yes; it was made up of these items of cash.

Q. Did you see Mr. O'Reilly sign that certificate, Exhibit Y2?

A. I don't remember whether or not I did.

The witness being shown a paper now marked Exhibit No. 2 for the defendant, is asked:

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Q. In whose handwriting is that paper?

A. John H. Osborne's.

Q. To what does it refer?

A. It is the account of O'Reilly, in account with John H. Osborne.

Q. (Question repeated.)

A. I could only tell you from the account.

Q. You can only tell what it refers to from the account itself?

A. Yes, sir.

Q. Where is the account you made to O'Reilly about the Camden and Atlantic?

A. It is impossible for me to state. I gave them to O'Reilly at Reading.

Q. Did you make a statement of the whole amount of the moneys received and disbursed by you and John H. Osborne to the Camden and Atlantic Railroad?

A. I did; I made a full statement of all the amounts that had been received by John H. Osborne and by myself and also for vouchers returned by me for moneys paid P. O'Reilly, individually; the whole account was given to me to make up.

Q. Was the the whole statement made out in the account by itself?

A. I think so. I know that the vouchers were all entered on a book and that showed the amounts that had been received, which book was given to Mr. O'Reilly. There was a list made of the vouchers, showing for what they were paid and to whom paid.

Q. Were the accounts completed when you left there?

A. No; they were not completed; there was some work done on the road after I left; I only completed up to the time I left.

Q. Then do you only include the accounts up to the time you left?

A. Up to the time I left.

Q. When was the work suspended on the Lebanon Valley Road?

A. I think October, 1853.

Q. What was the cause of the suspension?

New Jersey State Library

A. Want of money, I think.

Q. Was the company able to raise the money to pay the contractors?

A. I believe not.

Q. When did you next work after that?

A. I commenced work on section 16 some time in February or March or probably earlier; I don't remember exactly; it must have been earlier. I know we worked during the winter of 1853 and 1854.

Q. What was the character of the work upon which loss is charged on sections 18, 19, 20, 21 and 22, $9,156.92, as shown in Exhibit B 3.

A. The loss was caused by the hardness of the rock.

Q. Was it in removing the rock that was required to be removed under the contract of Osborne?

A. Yes; it was rock included in the contract.

Q. Did it make part of the engineer's estimate, and under the contract, the work referred to there?

A. Yes.

Q. You stated in your testimony there was a discrepancy between those two Exhibits B 3 and J 3, one was $9,098 and the other was $9,156. How did you account for that discrepancy?

A. I accounted for it in the fact there was an error in the engineer's estimate. Engineers sometimes overestimated the work one month and corrected it in the succeeding month, when they made more careful measurements.

Q. Was the work done and stated in both those exhibits work under the contract of Mr. Osborne?

A. Yes, sir.

Q. And for work that would be estimated by the engineer in making his estimates?

A. Yes, sir; it was work under the contract.

Q. Whose handwriting is that?

Exhibit K3 shown witness.

A. John H. Osborne's.

Q. All of it?

A. All of it.

Q. Whose is that upper line of figures? (Indicating.)

A. I think it is all his.

Q. What does that exhibit show?

A. It shows the amount of powder used.

Q. At what time?

A. For seven months ending December 31st, 1855.

Q. On what sections was that powder used?

A. On 18, 19, 20, 21, 22 and 23.

Q. Does that show anything beside the amount of powder used on those sections?

A. It shows a statement of the amount of solid rock.

Q. Excavated also?

A. Excavated, I suppose; that is, it shows the cubic yards of solid rock, and the amount is carried out; I suppose it is.

Q Then the upper figures represent the amount of powder used on those sections for the different months?

A. Yes, sir.

Q. And also the figures are the amount of cubic yards of rock?

A. Yes, sir; cubic yards of solid rock.

Q. Is that all that is shown on it?

A. There are some calculations made to show the percentage of powder, the cost of powder, the percentage to the yards of cubic yards; I suppose that is what it is, 2675 divided by 37048.

Q. You suppose that is to show the cost of powder?

A. The cost of powder per cubic yard.

Q. What kind of work is represented on that exhibit? Exhibit V3 shown witness.

A. I suppose it is all the graduation on those sections, clay and rock.

Q. Does it represent the work done under the contract with Mr. Osborne?

A. Yes, sir.

Q. And work included in the estimate made by the engineers?

A. Yes, sir.

Q. What kind of work is referred to in Exhibit O3? Same shown witness.

A. Excavation of earth, hard clay and solid rock.

Q. Is that all work done under the contract of Mr. Osborne?

A. Yes, sir.

Q. Is that work included in the estimates of the engineers?

A. It was; the number of yards of earth, hard clay and loose clay and solid rock are in the engineers' estimates; the expenses were not.

Q. Whose handwriting is that?

Exhibit P shown witness.

A. John H. Osborne.

Q. What is shown by that exhibit?

A. It shows the expenses on section 19 from November, 1856, to March 1st, 1857.

Q. Is that all that is shown?

A. It shows the number of yards of earth, hard clay and solid rock for November, December, January and February, four months, the same period.

Q. Is that for work included in Mr. Osborne's contract and estimated in the engineer's estimates?

A. Yes, sir.

Q. When was the price for the excavation of hard rock increased on that contract?

A. I can't say exactly; it was increased from time to time during 1856 and 1857, I don't remember the dates.

Q. Would it appear on the current estimates of the engineer when the price for the excavation of solid rock was increased?

A. The engineers did not make any estimate to us; the estimates were made to Mr. O'Reilly, who was the contractor.

Q. They didn't make any current estimates for Tarrant & Company's work there?

A. I don't think they did—yes, I guess they did furnish us with copies.

Q. State whether it would appear on those current expenses when the price for the excavation of rock was increased.

A. Yes; it would appear on those copies.

Q. Can you state whether or not after the price was in-

creased they estimated the whole amount of excavation at the increased price?

A. No, sir; I can't state it. I have not seen the estimates.

Q. You said the other day that Mr. O'Reilly paid on account for excavation of hard rock, for loss on account of excavation of hard rock?

A. That was in 1856, I think, $8,000.

Q. Did he pay no other sum than that?

A. Not specially.

Q. Do you know that he did not pay any other sum?

A. I don't remember about that just now.

Q. Could he have paid any sum to Mr. Osborne that would not come to your knowledge?

A. No, sir; I received all the money that was paid, and it was all credited to Mr. O'Reilly.

Q. Could not Mr. O'Reilly have paid Mr. Osborne any money without your knowing it?

A. He might have paid him some money without my knowing it, but he never paid him anything on the estimates.

Q. My question is as to the payment of any extras.

A. I stated he paid him $8,000, that is all I know of that I remember just now.

Q. That, you think, was in December?

A. December, 1856.

Q. Are those works included in Mr. Osborne's contract?

Exhibits Q3 and R3 shown witness.

A. Yes, sir.

Q. Would they be included in the estimates of the engineers?

A. They would be included in the estimates of the engineers.

Q. What work is included in that estimate?

Exhibit U3 shown witness.

A. This is work for cleaning up these two sections, 18 and 19, labor, horses, powder, and so forth.

Q. What do you mean by cleaning up the sections?

A. Trimming up, getting down to grade and leveling off the work, getting into shape.

Q. Was that part of the work required to be done by Mr. Osborne's contract?

A. Some of it was and some of this I don't think was under the contract; I can't tell exactly.

Q. It was for getting the sections down to grade; do you mean ready for tracklaying?

A. That there was some other work in reference to this not properly under the contract.

Q. What was the character of that work not under the contract?

A. We had to force through these two sections to get them ready for the contract, and in getting up the remainder of the work there was unnecessary expense attending it from the fact the track was alongside of it and we had to be very careful in putting in blasts. It entailed an extra expense, and Mr. Osborne refused to do the work unless he was paid for this special work.

Q. What do you mean by there being extra work alongside of the track?

A. I mean that Mr. Osborne found it was going to cost a great deal more than he was going to get paid for the work and he refused to do it.

Q. Was it work necessary to make the excavation in accordance with the contract?

A. Not all of it.

Q. What part was not?

A. I can't tell you now. He refused to do any of it without he was compensated for the work that was done; under Mr. O'Reilly's order that work was done and I kept the account for these particular bills by Mr. O'Reilly's orders and returned him a copy of these bills, and I know that some of this work, the filling up work and the grading, had been taken too low, by an error of the engineer's I suppose.

Q. Would that filling up be in the rock excavation?

A. No, it would not; they only estimated down to grade.

Q. Do you know in what sections the filling up was that you refer to?

A. Probably 18 and 19, in the rock cuts.

Q. Did part of those sections require embankments?

A. Yes, sir.

Q. Then that work which is mentioned in that exhibit refers to the cutting down of the rock to grade and filling up the embankments to grade for laying the track?

A. No; not filling up the embankment to grade; filling up some holes in the cut that were made too deep.

Q. Was it necessary to be filled up before the track could be laid?

A. Yes, sir.

Q. Whose handwriting is that?

Exhibit W3 shown witness.

A. John H. Osborne's.

Q. What work has that reference to?

A. This has reference to mule teams, hauling sills, horses, snaking sills out of the woods, so the teams could load them.

Q. Where was that work done?

A. At Greenwood.

Q. Has that bill reference to the Greenwood work?

A. No, sir; this has reference to mule teams, hauling sills in Lebanon county.

Q. It only has reference to work done at Lebanon?

A. In Lebanon county, I guess, most of it was done.

Q. Was any of it done at Greenwood?

A. No, sir; none of this.

Q. What work was that?

Exhibit X3 shown witness.

A. This is for scattering work done for P. O'Reilly about Lebanon.

Q. Has that anything to do with the getting of sills?

A. It seems to be work on culverts and removing sills and lumber at Lebanon; work on Y track, surfacing and so forth, on these platforms of warehouses, moving lumber and piling sills, getting engines, and cars, and so forth.

Q. What is shown in Exhibit Y 3 and Z 3?

Same shown witness.

A. Y 3 is a bill against the Lebanon Valley Railroad Company of John Osborne for extra work done along the line of the road from Womelsdorf to Lebanon, and down below, and some work at Robinsonian Station.

Q. Whose handwriting is it?

A. Mine, all except this memorandum below. (Indicating same.)

Q. Whose handwriting is that memorandum?

A. Richard B. Osborne's, I think.

Q. What is the memorandum that is in his handwriting?

A. This memorandum shows the amount allowed by the engineers for this extra $831.16, leaving $911.10 to be charged to O'Reilly under his contract. The other, Z 3, is made out in my handwriting, and is a bill of John H. Osborne against P. O'Reilly for disbursing moneys for buying woodleaf, and so forth, in Lebanon county, for sills made, and saw logs, splice plates, and so forth, amounting to $1,250.

Q. What did you do in reference to buying woodleaf and so forth?

A. I bought a good deal of woodleaf, hired men, had sills cut, superintending the hauling of them and distributing them along the railroad, had the saw logs cut and hauled to the railroad, and up to the mill at Norristown and cut into spliced plates and hauled back again to the points on the road for distribution.

Q. Was all that work charged for readily?

A. There is one charge of it.

Q. Is that the only charge for all the work that you did in connection with it?

A. Yes, sir; that is the only charge.

Q. Did you not charge Mr. O'Reilly for all the time that your teams were employed?

A. Yes, sir; we charged him for the teams; that was a separate matter; this was for personal service, that $1,250, and for my time.

Q. Did not Mr. O'Reilly pay you for the time you had taken in reference to it?

A. Never a dollar.

Q. Did not he send you the money to make the payments with it?

A. He did.

Q. Is that a letter in reference to it?

The witness is shown a paper marked for identification Exhibit 3 for defendant.

A. That is a letter from me to P. O'Reilly, dated the 10th of December, 1856.

Q. "Cash receipts." State generally what that is.

A. I received the money paid to these parties for woodleaf. This is an acknowledgment of the money paid for the leaf.

Q. This charge in exhibit Z3 is a percentage upon the amount of moneys that were disbursed for woodleaf?

A. Yes, sir.

Q. Did Mr. O'Reilly pay Mr. Osborne for the cutting off and carting of the wood, and for the teams, and so forth.

A. He has not paid him anything; those bills are for that purpose now. He never paid a dollar for any of the work excepting for getting sills; he paid the men for getting sills and for the woodleaf.

Q. (Question repeated.)

A. He paid for the cutting of the sills; he has paid nothing for the hauling—he may have paid some parties who were hired; I don't remember now whether he had any hired, the teams, but he never paid John H. Osborne for the use of his teams.

Q. Do you know whose handwriting that is?

Paper marked for identification Exhibit 4 for defendant shown witness.

A. It is my handwriting; the first page in amount brought over is in my handwriting, showing the amount, $5,196.25.

Q. "Should be $4,296;" that is somebody else's handwriting?

A. Yes, sir.

Q. Whose receipt is it on page 2?

A. John H. Osborne's.

Q. The memorandum "by note" and "old balance" is John H. Osborne's?

A. I think not.

Q. Whose is it?

A. I don't know.

Q. Is it Mr. McDermott's?

A. The note may be.

Q. Is the note on the third page signed McDermott?

A. It is signed by McDermott.

Q. What does that paper have reference to marked Exhibit No. 4?

Same shown witness.

A. This has reference to sums expended for woodleaf and for men cutting sills and saw-logs.

Q. Has it reference to hauling sills too?

A. It might possibly to some parties that were hired by outside parties; I don't remember really about that; I don't remember whether or not we had some teams outside of our own, that might possibly have been so; if they were, they were included in this list.

Q. In whose handwriting is the receipt, and whose signature is it?

A. The receipt is written, I think, in the handwriting of McDermott; the signature is John H. Osborne's.

Q. Do you know when Mr. Devereux started in taking charge of Greenwood?

A. I think he went up in January, 1856.

Q. How long did he stay there?

A. I don't remember how long; it was very near two years, I think.

Q. Do you know whose handwriting that is?

Paper marked for identification Exhibit 5 for defendant, shown witness.

A. No; I don't.

Q. Is it McDermott's.

A. It looks somewhat like McDermott's.

Q. Is that a statement made subsequent to the statement you made marked Exhibit A on the part of the complainant?

A. I can't tell you. (Paper shown witness.) This purports to be made out August, 1861.

Q. Did not you state the other day you made Exhibit A August or September, 1857?

A. November, 1857; it is dated November 3, 1857.

Q. Is that according to the date of that other statement Exhibit No. 5, subsequent to this?

A. Subsequent to this.

Q. Do you know Mr. Devereux's handwriting?

A. I think I do.

Q. In whose handwriting is that paper, and whose signature is there?

Paper marked for identification Exhibit No. 6, shown witness.

A. I couldn't say that is Devereux's handwriting; I don't think it is because his name is L. B. Devereux, as well as I remember; he may have signed it.

Q. If his name is L. B., how did you make out the statement A. Devereux?

Paper shown witness Exhibit No. 5.

A. I may be mistaken about that; I don't know that is his signature; I couldn't swear to it.

Q. Do you know anything about that book and whose handwriting it is kept in?

Book marked for identification Exhibit No 7, shown witness.

A. The first portion of this seems to be in McDermott's handwriting, up to and including page 8; page 9 and 10 and part of 11 is in the handwriting of John H. Osborne; part of 11, 12, 13 and 14 are in my handwriting.

Q. What does it purport to be?

A. It purports to be a memorandum of sales made at Greenwood; I think that is all it purports to be.

Q. Is there a memorandum of the hauling and the persons who hauled, and so forth?

A. Yes, sir; there appears to be a memorandum of the haulers here too.

Q. Whose handwriting is that?

Paper shown witness marked for identification Exhibit 8 for defendant.

A. It is not in my handwriting.

Q. Are none of those memoranda yours?

A. No, sir; none of those are in my handwriting.

Q. You do not know the handwriting?

A. Some of it looks like McDermott's; that little memorandum looks like Mr. Osborne's; "Conrad Markles, ties got from his own land and hauled by Greenwood teams of

O'Reilly and Osborne," that looks like Mr. Osborne's writing.

Q. Who was Mr. Campbell referred to in that exhibit?

Paper marked Exhibit G4 shown witness.

A. Mr. Campbell in this exhibit was the man who was building a bridge, I think, at Messimer.

Q. Where was that bridge?

A. That was on section 16 or 17 of the Lebanon Valley Railroad.

Q. Was that one of the sections included in the contract of Tarrant & Company?

A. Yes, sir.

Q. Do you know whether or not that was part of the contract of Tarrant & Company?

A. I don't remember just now.

Q. Was the work done on that bridge part of the work that was included in the estimates for work done on the road?

A. Yes, sir; it was included in the estimates of the second division.

Q. On section 16 or 17?

A. Yes, sir.

Q. Those were parts of the sections for which Tarrant & Company contracted to build?

A. Yes, sir; I don't know whether or not they had contracted for the bridge.

Q. Does that book have any reference to accounts kept by you in reference to Greenwood, which you spoke about the other day in your examination?

Book marked for identification Exhibit 7 shown witness.

A. This is merely a memorandum of the sills and ties; it had no reference to the price, or vouchers paid out.

Q. Can you tell whether or not that has any reference to cutting off other properties than Greenwood?

A. No, sir; I can't tell.

Q. I point you to that note.

A. Those were the sills alluded to in the notes; this 805 sills Conrad Markles cut off the land.

Q. Your memorandum on page 14 has reference to the sills cut off of this land?

A. Yes, sir.

Q. That has reference to the same thing on page 12?

A. Yes, sir; the same items on page 12.

Q. You do not know anything about anything on page 9?

A. No.

Q. And page 11?

A. No.

Q. In whose handwriting are those memoranda?

A. John H. Osborne's.

Q. You spoke in your examination the other day about a conversation between Mr. O'Reilly and Mr. Osborne about the superintendency of the Camden and Atlantic Railroad. When was that conversation?

A. Some time in the spring of 1855; I can't give the exact date.

Q. How soon after that did Mr. Osborne go there?

A. My recollection is Mr. Osborne went down there about the 1st of July, 1855; I can't say; a great time elapsed between the conversation; not a very great while, though.

Q. How long did he continue there?

A. I think he was there fully two years; probably about two years.

Q. During the time he was there was he working on his contract on the Lebanon Valley Road?

A. Yes; the work was under way all the time.

Q. When was the work on the Lebanon Valley Road completed?

A. Some time in the latter part of 1857.

Q. You spoke of the account of the sills you received from Greenwood; is that the book, No. 7, the one you referred to the other day in your examination?

A. I don't think it is; I think I had other returns from Mr. Devereux; I think there were other returns; that, probably, may have been one of them.

Q. Where was it you made the entries in that book you say were made in your handwriting?

A. They were made at Greenwood.

Q. How long were you at Greenwood?

A. I was there two or three times; I don't remember how long I stayed each time.

Q. How long were you there the last time?

A. I can't say.

Q. Were you there more than two days?

A. I may have been there three or four days, or two or three; I don't remember as to the time.

Q. You stated in your examination the other day that some estimates for your work were less than the powder you used upon it. At what time was it that there was an estimate that amounted to less than the powder you used?

A. I stated in one of the sections, in one instance; I didn't say for the whole work. I don't remember the exact time. I know it was when powder was worth $4.85 a keg. I only stated one section, not the whole work; we may have been talking about a particular section at the time I mentioned it.

Q. State what you want to say.

A. There was one estimate that I remember, at one time, on the work for one particular section, section 18, when the estimate did not pay for the powder that was used. That is what I intend to say.

Q. Was there ever any time when the estimates for Tarrant & Company per month amounted to less than the amount of powder that was used?

A. No, sir; never.

Q. Was there ever a monthly estimate made in favor of Tarrant & Company on the work done on the Lebanon Valley Railroad that amounted to $400 only?

A. No, sir; I don't think there was.

Q. Who was Mr. Bean you speak of in Exhibit T4?

A. He was the man who owned the farm in Chester Valley; Nicholas Bean, I believe is his name.

Q. Where was that farm situated that you speak of?

A. It was up in Chester County, out, I think, about three or three and a half miles from Phoenixville, and about an equal distance from Valley Forge; it was over on a hill between the two places.

Q. What became of that farm; was the mortgage foreclosed?

A. I think it was; I can't tell. It was while I was away; I went away.

Q. Was the title to the farm made to you?

A. I think it was.

Q. How did you secure the payments of moneys that were advanced and agreed to be advanced by John H. Osborne and P. O'Reilly?

A. I think they were secured by second mortgage; that is my recollection.

Q. Who afterwards got the farm?

A. J. H. Osborne took the farm.

Q. Was there ever any writing made between you and Mr. Osborne about it?

A. No, sir.

Q. It was a mere verbal offer on their part to advance the money?

Objected to as irrelevant.

A. Yes, sir; endorsing the notes.

Q. What were these three notes marked B4 given for?

Same shown witness.

A. They were given for the part payment of that farm.

Q. Who paid these notes?

A. John H. Osborne.

Q. Did he pay all three of them?

A. I think he did.

Q. How do you know it?

A. I think they got my endorsement on them; I am not sure of it—he paid them.

Q. That is all answer you have to that question?

A. Yes, sir; he paid them.

Q. Was there any consideration given by you to him or by Mr. O'Reilly.

A. None.

Q. They were mere accommodations to raise the money?

Objected to.

Q. They were endorsed by them merely to raise money to pay on the farm.

Objected to as to form.

A. Yes.

Q. Can you state how large a mortgage the first one was?

A. $2,000; the other for $2,800; the second for $2,800.

Q. To whom was the first?

A. Nicholas Bean.

Q. He made the conveyance to you?

A. Yes, sir.

Q. Can you state about the time the transaction was from the notes?

A. The notes were dated the 1st of April, I think all the notes were dated the first of April; I know I went on the place the 1st of April, 1857. This occurred a very short time before that the notes were dated.

Q. How long did you hold the place?

A. We stayed there until 1860.

Q. Can you state how many horses and mules Mr. Osborne had at Greenwood?

A. I cannot, definitely.

Q. Or how many teams of any kind you had there?

A. I think he sent up about three six-mule teams, and there were some odd horses for snaking out the sills besides.

Q. Were all those his teams?

A. Yes; those were his own teams.

Q. Did anybody else have any teams there?

A. Mr. O'Reilly had teams there; I know that one team of Mr. O'Reilly's went over; Mr. Osborne's first team went because we bought a mule to make it up; there were only five mules.

Q. Who paid for that mule?

A. John H. Osborne.

Q. Did he charge it to O'Reilly's account?

A. Yes, sir.

Q. Do you know whether or not it was ever paid for?

A. I don't think it was.

Q. What work is referred to in that exhibit, Z4?

Same shown witness.

A. It is trimming and re-trimming the section; it is a

pretty heavy bank on 14 and 15. It was made and settled and had to be brought up to the grade again; it was sometime before the track was laid on it.

Q. It was work done to bring the embankment to grade to put the track on it?

A. Yes, sir; it was extra work; the bank had already been made according to the contract, and that was for extra work for putting it in order the second time.

Q. How long prior to putting the track on had the embankment been completed?

A. I suppose probably six or eight months; I don't remember exactly when the embankment was completed; I know that was what the work was for.

A. Is that a book and account of the work done by Tarrant & Company on the Lebanon Valley Railroad?

Exhibit E5 shown witness.

A. This is a book of the moneys expended and business connected with the work. I don't know whether the estimates were entered in this or not; that is a mere closing up of the different sections.

Q. Does that credit the moneys you received on account of that work from Patrick O'Reilly?

A. Yes, sir.

Q. Will you look at May 24th, 1854, and see if there are any moneys paid on account.

A. There is a credit of $300 there that was received by John H. Osborne, on the 15th of June, is the first item, cash to P. O'Reilly, $4,339.

Q. Is that the first entry that you referred to, May 24th, paid by P. O'Reilly; what was that entry made for?

A. That must have been money received through O'Reilly; it was credited to John H. Osborne, for money received for P. O'Reilly.

Q. What is on June 7th?

A. On June 7th the same amount credited to John H. Osborne for this sum to O'Reilly. I suppose that Mr. Osborne got it from Mr. O'Reilly; he accounted to Mr. O'Reilly for it. It was not credited to Mr. O'Reilly, it was credited to John H. Osborne.

Q. When was the first credit to Mr. O'Reilly there?

A. On the 15th of June.
Q. How much is it for ?
A. $4,339.
Q. How did Mr. O'Reilly pay the moneys on this ordinarily to Tarrant & Co., on the Lebanon Valley work ?
A. He generally paid it to me on my receipt.
Q. In cash or by check generally ?
A. Generally by check.
Q. Whose signature is that ?
Book marked for identification Exhibit No. 9 for defendant shown witness.
A. John H. Osborne.
Q. The receipt to No. 6 for Tarrant & Company is made by John H. Osborne ?
A. Yes, sir.
Q. No. 19.
A. That is John H. Osborne's.
Q. Is receipt No. 19 of Tarrant & Company, July 15, 1854, John H. Osborne's ?
A. Yes, sir.
Q. The signature of Tarrant & Company to this receipt dated August 15th, 1854, is John H. Osborne's ?
A. Yes, sir.
Q. Whose signature is that, No. 46 ?
A. September, 1850, to 1854, John H. Osborne's.
Q. September 29th, 1856; whose receipt is that pasted on the front part ?
A. That is March 24, 1856.
Q. Whose signature is that ?
A. That does not look much like John H. Osborne's. That looks something like his writing (indicating), but that don't look like his signature. (Indicating.)
Q. Is the body of the receipt in Mr. Osborne's handwriting ?
A. It is somewhat similar, but I would not like to say positively. I can't say whose that is.
Q. No. 60 ?
A. That is October 15, 1854; that is Tarrant & Company signed by John H. Osborne.
Q. No. 69 ?

A. November 15, 1854; signed Tarrant & Company, by John H. Osborne.

Q. No. 82, November 24?

A. November 24, 1854; Tarrant & Company, per George W. Bowen.

Q. No. 79?

A. December 15, 1854; Tarrant and Company, signed by John H. Osborne.

Q. No. 87?

A. That is December 15; Tarrant & Company, signed by John H. Osborne.

Q. No. 103?

A. January 15, 1854, it ought to be 1855; it is dated 1854 by McDermott; signed Tarrant & Company, per George W. Bowen. The next is 5.

Q. 107?

A. February 15, 1855; Tarrant & Company, by George W. Bowen.

Q. No. 119?

A. 119, February 28; Tarrant & Company, by John H. Osborne.

Q. 125?

A. March 15, 1855; Tarrant & Company, by John H. Osborne.

Q. 133?

A. April 3, 1855; Tarrant & Company, by John H. Osborne.

Q. 140?

A. Tarrant & Company, by John H. Osborne; April 16, 1855.

Q. 145?

A. Signed, Tarrant & Company, per John H. Osborne; May 15, 1855.

Q. 162?

A. June 15, 1855; Tarrant & Company, by John H. Osborne,

Q. 174?

A. July 16; Tarrant & Company, per George W. Bowen.

Q. 179?

A. July 23, 1855; Tarrant & Company, per George W. Bowen.

Q. 189?

A. August 15; Tarrant & Company, per George W. Bowen.

Q. 203?

A. September 17, 1855; Tarrant & Company, per George W. Bowen.

Q. 215?

A. October 15; Tarrant & Company, signed per John H. Osborne.

Q. 229?

A. November 15, 1855; Tarrant & Company, per George W. Bowen.

Q. 241?

A. December 17, 1855; Tarrant & Company, signed by John H. Osborne.

Q. 248?

A. December 17, 1855; Tarrant & Company, by John H. Osborne.

Q. 264?

A. January 15, 1856; Tarrant & Company, John H. Osborne.

Q. 263?

A. Tarrant & Company, by John H. Osborne; January 22, 1856.

Q. 270?

A. February 15, 1856; Tarrant & Company, per George W. Bowen.

Q. 282?

A. Tarrant & Company, by John H. Osborne; March 17, 1856.

Q. 293?

A. April 15, 1856; Tarrant & Company, by John H. Osborne.

Q. 298?

A. April 15, 1856; Tarrant & Company, John H. Osborne.

Q. "B"?

A. April 19, 1856; Tarrant & Company, by George W. Bowen.

Q. 305?

A. Tarrant & Company; May 15, 1856; by John H. Osborne.

Q. 318?

A. June 16; Tarrant & Company, by John H. Osborne.

Q. 325?

A. June 16; Tarrant & Company, John H. Osborne.

Q. 331?

A. July 15, 1856; Tarrant & Company, John H. Osborne.

Q. 344?

A. August 15, 1856; Tarrant & Company, John H. Osborne.

Q. 357?

A. September 15, 1856; Tarrant & Company, per George W. Bowen.

Q. 372?

A. Tarrant & Company; October 15, 1856; John H. Osborne.

Q. 381?

A. November 17, 1856; Tarrant & Company, per George W. Bowen.

Q. 393?

A. Tarrant & Company; December 19, 1856; John H. Osborne.

Q. "C"?

A. It is signed by John H. Osborne; December 19, 1856. That is McDermott's writing; that is John H. Osborne's; December 19, 1856.

Q. 409?

A. January 27, 1857; Tarrant & Company, per George W. Bowen.

Q. 417?

A. February 24, 1857; Tarrant & Company, per George W. Bowen.

Q. 418?

A. March 18, 1857; Tarrant & Company, John H. Osborne.

Q. 434?

A. April 21, 1857; Tarrant & Company, per George W. Bowen.

Q. 442?

A. May 21, 1857; Tarrant & Company, per George W. Bowen.

Q. 452?

A. June 22, 1857; Tarrant & Company, per George W. Bowen.

Q. In whose handwriting is that?

A. That is all mine.

Q. 453? Is that in your handwriting?

A. Yes.

Q. 470?

A. Tarrant & Company, George W. Bowen; July 27, 1857.

Q. 472?

A. August 15, 1857; Tarrant & Company, per George W. Bowen.

Q. 478?

A. August 24, 1857; Tarrant & Company, per George W. Bowen.

Q. 485?

A. Tarrant & Company, John H. Osborne.

Q. 473?

A. August 5; Tarrant & Company, per George W. Bowen.

The witness (being shown receipt dated November 12, 1857, pasted in book Exhibit No. 9, on fly leaf page, "Received of P. O'Reilly, contractor, on account of work on Lebanon Valley Railroad, two notes of Lebanon Valley Railroad, dated November 11, 1857, at ninety days and four months, for $1,250 each. John H. Osborne.") is asked:

Q. In whose handwriting is that signature?

A. John H. Osborne's.

Q. Do you know that signature to that one? (Indicating.)

A. Yes, I think; it was a long time since I saw any of his handwriting.

Q. In your opinion is that Briscoe's signature fastened to the receipt last referred to?

A. I think that is his signature.

Paper shown witness, now marked Exhibit No. 10, being dated February 6, 1856. Six months after date pay to the order of John Pepper.

Q. Whose signature is that to that note?

A. John H. Osborne's.

Q. Do you know whose endorsement that is?

A. No, sir.

Q. Do you know who John Pepper was?

A. Yes, sir; he was President of the Reading Railroad at that time.

Book marked Exhibit 11 shown witness.

Q. Do you know in whose handwriting that receipt is?

A. That receipt is in the handwriting of Edward McDermott.

Q. Whose signature is it?

A. It is signed by McDermott.

Q. Whose is that? (Indicating.)

A. That is McDermott's.

Q. "Per Wm. Bowen, Sr."?

A. Yes; it is signed by William Bowen, Sr. It is all done by McDermott; I don't know who did "William Bowen, Sr." That is not my father's writing. His name was not William Bowen, Sr., and it is not his writing, either. He may have signed a receipt for $800, but that is not his writing. I think that must be a copy of the receipt, it may be a copy of the receipt. It says "signed."

Q. Was there $800 received by Mr. Osborne at or about September 23, 1854, for Mr. O'Reilly?

A. I can tell you if you let me look at that book. (Book marked Exhibit E5 shown witness.) That was it; that is the transaction. You will find in one of my letters there is that amount Bowen received. I say I received that money by my father. He never signed that receipt.

Q. "Received, Reading, September 22, 1854, from P. O'Reilly his note at 6 months for $1,100 for which $800 is for Tarrant & Company"?

A. Yes; my father received the net proceeds of the note because I remember seeing a letter which stated just that amount; it was the transaction no doubt.

RE-EXAMINED.

By Mr. Drake—

Q. Look at Exhibits W3, X3, Y3, and Z3, and state whether those were for work done under the contract or estimated in the estimates?

Objected to as not rebuttal and as inadmissible.

A. It was for work outside of the contract and not included in the estimate.

Q. State whether or not O'Reilly paid Osborne for cutting off the wood on the woodleaf and carting away the sills and timber, or whether he paid parties who did the work?

Objected to.

A. He paid the parties who did the work. Paid the men who were doing the work.

Q. Was there ever a current estimate for any one month for any one particular section which amounted to less than $400 for work done on that section for that month?

Objected to.

A. I think there was.

Q. When you stated that there was no consideration to Patrick O'Reilly for the purchase of the Chester county farm along with Mr. Osborne for you, did you mean there was no valuable consideration, or no consideration of any sort, such as past kindness or love and affection.

Objected to as to form, and as irrelevant.

A. I mean there was no valuable consideration.

Q. In your long association with P. O'Reilly previous to the purchase of the Chester county farm had you been led to believe from his action towards you that your conduct toward him was satisfactory or unsatisfactory?

Objected to.

A. That my conduct was satisfactory.

Q. In your long association previous to that time, direct and indirect, with P. O'Reilly had you opportunities to do him favors; if so, what particular favors had you done for him that you can now state?

Objected to as irrelevant and as inadmissible.

A. I don't know that I had done any particular favors except in looking and helping him about the woodleaf

and matters of that sort in Lebanon Valley, for which I got no pay.

Q. When you went to Greenwood for him and paid out moneys for him up there, what pay did you ever get for that?

Objected to.

A. Nothing; I never got a dollar except my current expenses.

Q. When were you at work on his account in his office at Reading in the spring of 1854 and winter, you straightened up his accounts for Greenwoods and passed them over to him; what pay did you ever get for that?

Objected to.

A. I was paid for my services on the Camden and Atlantic and nothing for Greenwood.

RE-CROSS-EXAMINED.

By Mr. Voorhees—

Q. When you went to Greenwood were you employed by John H. Osborne?

A. I was employed by Tarrant & Company; it was the same thing, I guess; it was not at the time started, but it was subsequent to the time I went to Greenwood.

By Mr. Drake—

Q. I have overlooked a question. In the fall of 1854, when the planning commenced, by whose default or failure to pay was that brought about? P. O'Reilly's or the Lebanon Valley Railroad Company's?

Objected to.

A. P. O'Reilly's.

Q. I mean so far as John H. Osborne was concerned?

Objected to.

A. P. O'Reilly's.

By Mr. Voorhees—

Q. When you purchased the woodleafs that you spoke of in your examination, in whose employment were you?

A. Tarrant & Company's.

Q. Did they pay you your wages all the time?
A. Yes, sir; every dollar.

It is agreed by the respective counsel that depositions taken by the stenographer need not be signed by witnesses.

Adjourned.

Pursuant to notice the examination was resumed on Friday, November 28th, 1884, and on that day was adjourned until Wednesday, December 3d, 1884, at 10½ A. M.

Wednesday, December 3d, 1884, 10½ A. M., examination resumed in presence of respective counsel.

Richard B. Osborne being recalled for the continuation of his direct examination, deposeth and saith:

Q. On the day you were last on the witness stand, I put a question to you as follows: "Did any complaints come "to you from the sub-contractor, representing the former "firm of Tarrant & Co., about the difficult character of this "work in division two." State, if you please, what you understood that question to be?

Objected to as improper and inadmissible at this time.

A. I understood counsel to ask whether there had been any complaints against Tarrant & Co., on that subject, and I answered it fully.

Q. Now state if you please what complaints came to you as the chief engineer of the road, from the sub-contractor, John H. Osborne, about the difficult or the unexpected character of the rock work, or the rock excavation on division two of Tarrant & Co.?

Same objection.

A. The statements were made from time to time by the contractors verbally, the only official letter which I have upon the subject I now produce, it was to my associate engineer, who was in charge during my absence.

The above letter is now marked Exhibit H5 of Osborne.

Mr. Voorhees objects to the said letter being marked an exhibit and to its being admitted in evidence in this case.

What were the statements made, not in the letter, but to you verbally?

Objected to as inadmissible.

A. The statements were made with reference to the unexpected hardness of the rock because of its being of a different character from what was represented to the contractors when they bid for the work.

Q. What right had these sub-contractors to claim, or how, under the circumstances could they claim, that the rock they were excavating was unexpectedly hard?

Objected to as inadmissible.

A. The right consisted in the fact that they contracted to excavate a rock of a different character from that which they really were obliged to excavate in the construction of the road.

Witness being shown Exhibit B 3, is asked:

Q. Is the balance of loss, or the charge of $9,156.92 shown on this statement or exhibit for work in the contract and in the estimate of the engineer?

Objected to.

A. The contract included the excavation of the cubic yards contained in that charge; the contract did not contain the price which was estimated by the engineer or paid for by the chief contractor, because the chief contractor had abrogated the contract by raising the price contained in the contract for solid rock from 50 to 73 cents.

Q. For what quantity of rock was that allowance raised to 73 cents?

Objected to.

A. For the whole quantity of rock contained in the final estimate for the purpose of meeting in part the extra cost of the very hard portion of the rock excavated.

Q. What quantity of rock excavation did the 73 cents represent, a cubic foot or a cubic yard or how much?

A. A cubic yard.

Q. What knowledge, if any, had the chief contractor, Patrick O'Reilly, of the unexpected hardness or difficulty of this rock excavation?

Objected to.

A. He conferred with me from time to time with reference to the difficulty of the excavation of this rock; he made a full and forcible statement with the aid of his sub-contractors in an application made by him to the board of directors for increase of price to meet the extra cost of excavating this rock, the difficulty of which was not expected when he entered into the contract to excavate it.

Q. When Patrick O'Reilly became acquainted with the difficulty and extra cost of excavating this hard rock, did he permit his sub-contractors, Tarrant & Co., or their successor, John H. Osborne, to cease work on that account, or did he order them or him to proceed with the excavation?

Objected to.

A. He urged them to finish the work and make good his contract with the company for him, and that he would see that the work was paid for, including the extra cost of the work.

Q. When the chief contractor applied to you to obtain for him from the company allowances over the amount stated in the engineer's estimate of the second division, did the chief contractor, Patrick O'Reilly, make any demand on the loss he had sustained by reason of the suspension of the work, and if so, what?

Objected to.

A. He did. It was a part of the general claim that I can't separate and divide up now without reference to the document.

Q. What facts came to your knowledge or notice relative to this claim for loss of Patrick O'Reilly, by reason of the suspension of work on this road, and what document or documents do you refer to in your answer?

Objected to.

A. His claim for loss on account of the suspension was based on the claims of his sub-contractors on him as chief contractor. The document which states the fact of the application is his letter to the board, which was duly submitted to me; and the answer to which was made by the board under their resolution, I made a copy of from the

minute books of the board and sent to Tarrant & Co. That resolution ordered the secretary to pay to the chief contractor, outside of the estimates of the chief engineer, the sum of $20,000.

Q. Was that sum of $20,000 to cover loss for suspension on division 2 only, or for other purposes, and if so, what?

Objected to as inadmissible without production of letters and resolutions referred to.

A. The letters and resolutions will tell more accurately than I can now what it was intended to cover. Those letters and resolutions are, I presume, in the hands of John H. Osborne—that is, the copies I made. The letters and resolutions themselves are in the book of minutes of the company. My recollection of it is that it was a payment on account of the chief contractor's general claim, the largest proportion of which was on account of the second division of the road.

Witness being shown paper now marked Exhibit J5 of complainant, saith:

Q. State, if you please, what reference this letter, or the letter of which it is a copy, bears or bore to the application of Patrick O'Reilly for $20,000 made to the board of directors of the Lebanon Valley Company?

Objected to. Exhibit also objected to.

A. This is a true copy of the letter of Patrick O'Reilly referred to making application for additional payment, by reason of the extra cost of work included in his contract with the company, and for advances which he had been compelled, he states, to make to his sub-contractors to enable them to proceed with the work. It was received and read by the secretary of the company at their board meeting on the 10th day of December, 1856. It is signed by P. O'Reilly, contractor, and certified as a true copy by Richard B. Osborne. I will correct one thing, if you please; it was December 29th it was read.

Q. Where did Mr. O'Reilly obtain the figures making up his statements of loss contained in that Exhibit, J5?

Objected to as improper and irrelevant.

A. He could only have obtained it and did only obtain it from those who had suffered the loss.

Q. Who were they, and what part of the loss, if any, refers to the second division?

Objected to.

A. His sub-contractors in the construction of the railroads, his agents, I presume, with regard to the sills he speaks of. There is set down here in this letter nearly one-third of the loss as arising from the second division. Whether those sums are correct as received from the parties I cannot say; that must be for future investigation.

Q. State whether or not Patrick O'Reilly apprised you of this application in advance of it, and if so, what conversation you and he had about it at that time?

Objected to.

A. He conferred upon the subject generally and fully; he sought my acquiescence in making the application to the board and he obtained it. The particulars of his claims I did not adjudicate upon.

Q. Were you present at the meeting of the board of directors when this application was read?

Objected to.

A. It was my duty to be there. I feel certain that I was there, but I wouldn't like to swear it positively. I was there on the same day, if I wasn't at the meeting.

Q. Whose handwriting is the pencil memoranda on the the third page of Exhibit J 5?

Objected to.

A. It is in my own handwriting, stating the particulars of the payments ordered by resolution of the board, to be paid to the said P. O'Reilly as relief under his application.

Q. Did he get the money or the notes there mentioned, and if so, when?

Objected to.

They were paid by the secretary, not by me; I only know from the assertions of the secretary, that they were paid sometime during that month. I can't state the date without the documents.

Q. Please state how the excavation to grade of the half-width of the rock-cut on section 18, and whether or not

such excavation involved any extra cost above what the excavation of the whole width to the grade at the same time would have been.

Objected to.

A. The hardness of the rock on section 18 prevented its being done in due time, and the track layers would therefore be impeded in their progress, and the contractors were ordered to put their forces up on one-half of the cut and take it out to grade so that the track could be laid through the cut without delay. The excavation of this rock in a narrow passage, bound in on both sides, was very much more costly than the the taking out of the whole breadth of the cut to grade. The cost also of the other half of the cut having to be blasted with care, so as to leave the track which had been laid alongside uninjured, and also to offer no impediment or injury to the passing trains, was necessarily increased.

Q. What proportion did the cost of the excavation of the rock on section 18, as actually made in the manner just now described by you, bear to what the cost would have been if the whole would have been excavated simultaneously from one breast to the width of the cut?

Objected to.

A. I should say, from my experience and judgment as an engineer, in that peculiar rock especially, that the additional cost would be from two to three times as much as in the full breast of the cutting.

Q. Why would the full breast cutting cost so much less than taking it out by piecemeal as described.

Objected to.

A. Because there is very much less bond of the rock itself, and further the deep holes and large blasts can be made use of in the full breast, while the reverse is requisite in the more curtailed space and under the circumstances mentioned.

Q. State, if you please, how much time, if any, was gained by running through the section a narrow cut down to grade, for the purpose of running a track through the cut, over the time it would have taken to make

the cut full width to grade, before the track was laid through it?

Objected to.

A. The time actually saved in this occasion I cannot positively state, I have no doubt we saved from four to six weeks by it.

Q. In making this narrow cut through this section, was the cut made through the middle or to the one side of the full width cutting?

Objected to.

A. I do not remember.

Q. What was the full width of this rock cut on section 18?

A. At the level of the ballast it was twenty-eight feet, for a double track.

Q. What was stated to the contractors to be the character of the rock excavations on the second division before they put in their bids and on which they based their proposals?

Objected to as inadmissible and improper.

A. From the information which was gleaned upon the line and from the general knowledge of the character of the rock through the Lebanon and Cumberland valleys at that time, it was stated to the contractors for the purposes of their making their bids that it was the ordinary magnesian limestone, easily drilled and affording good building stone which the contractors could use in the erection of their structures.

Q. What structures do you refer to?

Objected to.

A. The bridges chiefly; culverts.

Q. What was the rock subsequently ascertained to be when it was cut into for the purpose of excavation?

Objected to.

A. A large portion of this rock was found to be trap rock, a rock in which hornblende, quartz, feldspar and minute imbedded crystals and iron are all combined, which afford good barriers against a steel drill, and do not give a building stone; the blast producing irregular and small stones.

Q. How much of the rock was of this unexpected character, as nearly as you can tell?

A. It commenced some miles west of Reading, ran in a great measure through the second division, and was not met with, I think, west of Lebanon.

Q. Which portions of the rock excavated on the second division were of the unexpectedly hard character, the uppermost or the lower?

Objected to.

A. The whole of the rock on the second division partook of the character of the trap rock, but the upper portions of that rock, to perhaps half of its depth, was not so hard as that part which was below; something more than half of that rock which embraced that upper portion was done by the contractor at about the middle of 1855, and although it was not so hard as the portion underneath, yet at that date there had been a loss to the contractor, and it was subsequent to that that it became evident to the engineer and to the contractor-in-chief that the prices contained in the contract were inadequate.

Q. Who furnished the information upon which the contractor and the sub-contractors on the second division, relative to the character of the excavations upon which they based their proposals, and contained in their bids for the work?

Objected to.

A. The Lebanon Valley Railroad Co., by their engineers, furnished all the information upon which the bids were based.

Q. Did John H. Osborne do any work for Patrick O'Reilly other than such as was comprised in the agreement of Tarrant & Co. for the graduation and masonry of the second division?

Objected to.

A. He did under a separate agreement with himself personally as distinct from Tarrant & Co.

Q. State whether or not that work was included in the final estimate of Patrick O'Reilly, or in any final estimate between Patrick O'Reilly and John H. Osborne?

Objected to.

A. John H. Osborne performed under the agreement mentioned work to the amount of $6,502, which is included in the final estimate of P. O'Reilly as against the R. R. Co.

Q. State if you please, whether he did any work under the contract just mentioned, which was not included in the final estimate of P. O'Reilly against the R. R. Co.?

Objected to.

A. He also did work for the Lebanon Valley R. R. Co. for the laying of track under the agreement of John H. Osborne personally, which has been charged to the company and is not included in the final estimate of P. O'Reilly.

Book marked Exhibit E2 of complainant.

Q. State what parts of this book comprise the final estimate of John H. Osborne in his contract with Patrick O'Reilly now being testified about?

Objected to.

A. Page 121, and contained also on page 122, requiring an explanation which I am ready to give.

Q. The total of the final estimate spoken of on p. 122, viz: the sum of $10,102.10, is made of what portion of the $6,502 and $3,600 just spoken of?

Objected to as irrelevant, improper and inadmissible.

A. The estimate on p. 122 as it stands in this book is not correct ascribing the whole of the amount of $10,102.-10 as work done by John H. Osborne for P. O'Reilly. The estimate of $3,600 in favor of John H. Osborne for work done by him for the Lebanon Valley R. R. Co. had been made out in favor of J. H. Osborne before the final estimate of $6,502 for work done by him for P. O'Reilly had been made, and when the latter was written in the estimate book, office book, the office assistant, Joseph C. Briscoe, put the two estimates of $3,600.10, I think, with the $6,502, together making one estimate of $10,102.10 under the supposition that John H. Osborne had done the whole of this work for P. O'Reilly. The error of placing both these estimates together when done for different parties by the same contractor was not discovered till after a copy had been furnished to P. O'Reilly, but before he had made

any payments on the same and he was immediately notified and the error was corrected, and he paid only the $6,502 for work done for him by John H. Osborne. In proof positive of the truth of my assertion, I submit the letter of my assistant, Joseph C. Briscoe, of September 1st, 1858, to John H. Osborne, which states positively that the work done by him for the R. R. Co., part of the $10,102.10, was paid by the R. R. Co. and not by P. O'Reilly, showing that the work had been charged to each of two parties who paid their respective portions, and that the engineer had not charged the company work to both them and P. O'Reilly, for the purpose of benefiting J. H. Osborne as accused.

A portion of said book (which is marked Exhibit E2), the same being a part of p. 121, a part of p. 122, and a blue leaf opposite p. 122, I have marked Exhibit K5 of complainant.

Said exhibit and all testimony in reference to it objected to.

Letter referred to, written by J. C. Briscoe to John H. Osborne, dated Reading, September 1, 1858, is marked Exhibit L5 of complainant.

Said exhibit and all testimony connected with it objected to.

Paper now marked Exhibit M5 shown witness, he is asked:

Objection is entered to said paper being marked as an exhibit and to all testimony about it.

Q. State please what that paper, Exhibit M5, is?

Objected to.

A. This is a tabulation for the purpose of explaining to counsel clearly the items contained in the estimate of $10,102.10 which have been already placed in the final estimate of the chief contractor, and also the items contained in the same estimate K5 which have been done by J. H. Osborne and charged only to the Lebanon Valley R. R. Co.

Q. What are included in the column on the extreme right, footing to $6,502?

A. All the work done by John H. Osborne for P. O'Reilly, and included in said P. O'Reilly's final estimate against the R. R. Co.

Q. The explanations and data designating those items contain references to pages of some final estimate; please state what those references are?

A. The references are to the pages of Exhibit E2.

Q. What are included in the column in the middle of Exhibit M5, footing to $3,600.10?

Objected to.

A. They are the items of work done by John H. Osborne for the R. R. Co., paid by them, according to Exhibit L5, to John H. Osborne, and have never been included in the final estimate of P. O'Reilly.

Q. Why wasn't P. O'Reilly entitled to have those items, amounting to $3,600.10, included in his final estimate?

Objected to.

A Because he failed to perform his work under a portion of that contract and said work was given to three other different parties to insure the work being done according to the interests of the company.

Q. What R. R. sills, if any, were got under the contract with P. O'Reilly.

Objected to.

A. Mr. P. O'Reilly made efforts first to obtain the sills from parties residing on the line of the Catawissa Road. The charges of freight on those sills coming to Reading he deemed too high to justify him in getting the required number from there and soon discontinued obtaining his sills from that quarter. He then purchased a tract of land on the Susquehanna, from the timber of which he expected to get the requisite supplies. He made engagements with John H. Osborne, as his agent, to superintend and supply teams and wagons, subsequently fearing still that there would be a large number wanted to meet the demands, through the same agent, he obtained woods leave on the line of the road from which a considerable number of sills was obtained by the agent's teams, mules, men and so forth engaged therein. In addition to that I felt it imperative on me, having cause to fear that we would run short in our supply of sills, to make contracts with outside parties that the progress of our track might be ensured. These

contracts with outside parties amounted to 15,325 sills. The sills to be furnished by Mr. O'Reilly from the Susquehanna arrived, as far as a great many were concerned, too late in the time of delivery to be used by the track layers. The consequence was that there were 22,727 sills furnished by Mr. P. O'Reilly that were subject to rejections because delivered beyond the time stipulated, that were, however, accepted by the engineer at the contract price, were put into the final estimate and paid for by the company.

All above answer not in response to question objected to as improper.

Adjourned until Thursday, December 11th, 1884, at 10.30 A. M.

Thursday, December 11th, 1884, examination resumed in presence of respective counsel.

Richard B. Osborne, being still upon the witness stand, upon his direct examination, saith:

Q. Who acted as agent for the Lebanon Valley R. R. Co. in making the contract with Patrick O'Reilly to furnish the sills by O'Reilly to the company?

Objected to as inadmissible and irrelevant.

A. I did, as their chief engineer and agent.

Q. Whom besides Patrick O'Reilly did you know or make arrangements with concerning the contract for furnishing sills to the R. R. Co.?

Objected to.

A. No one, in the original contract, and only on the failure to supply the quantity contained in the contract did I receive proposals from and make contracts with some outside parties, whose names can be produced if required.

Q. On the failure of Patrick O'Reilly to furnish the quantity of sills required, to whom did you make complaint about it?

Objected to as irrelevant.

A. To Mr. O'Reilly himself, personally.

Q. State, if you please, in the conversation you had

with Mr. O'Reilly about his failure to furnish these sills under his contract, what statements, if any, Patrick O'Reilly made to you in reply?

Objected to as above.

A. When the amount expected from the Catawissa road proved to be not forthcoming, I urged upon Mr. O'Reilly the necessity of prompt action in making adequate arrangements to meet his contract in this particular; that it was my duty to see that a sufficient quantity of sills was furnished in due time by him or to make contracts with other parties to insure the supply. In answer he informed me that he had purchased a tract of land on the Susquehanna that would yield him all the sills that he had to supply to the company; that to insure the sills being got out in proper time and quantity he had made an arrangement with Mr. John H. Osborne to superintend generally the work of the same, and to supply wagons, teams, tools and sundries for the same, which arrangement was satisfactory to me, thus far, as the engineer.

Q. When were the sills which were purchased along the line of the road, stated by the witness Bowen to have been wood leave purchases, made, before or after you heard about the sills from the Susquehanna?

Objected to.

A. When the deliveries from the Susquehanna were less prompt than desired in order to quiet the demands of the engineer and insure sufficient deliveries in his estimation, Mr. O'Reilly arranged, through Mr. John Osborne as his agent, and the co-operation of my resident engineers, to secure woodleave along the line of railroad which supplied to us a considerable number of sills and thereby kept the track layers going.

Q. What complaints, if any, did you make to John H. Osborne about the slowness of the delivery of the sills, either from the Susquehanna or the woodleaves?

Objected to.

A. None officially, the party that I held responsible was the chief contractor, Mr. O'Reilly.

Q. What arrangements had the Lebanon Valley Co. with John H. Osborne, either as partner or otherwise, for furnishing any of the sills?

Objected to.

A. None whatever, the only person that they had anything to say was Mr. O'Reilly.

Witness being shown papers already offered in evidence as Exhibits P3 and W3, is asked:

Q. What are these bills?

Objected to.

A. These bills, W3 and X3, are for work done for the chief contractor by John H. Osborne, in getting out, loading and hauling sills from the woodleave on the line of the road, the particulars of which I am not cognizant of. I am aware that such work was done as stated generally, and is all included, as far as the chief contractor is concerned, in his contract price per sill with the company.

Q. Who was in charge of this work just spoken of, under John H. Osborne?

Objected to.

A. Foremost George W. Bowen. Who was the active foreman under him, Bowen, I can't say.

Witness being shown paper heretofore marked Y 3, is asked:

Q. Please explain that?

Objected to.

A. This is a bill for work done by John H. Osborne sent in to the engineer with the view of having it included in his estimates; it amounted to $2,742.26, and the engineer went over the items contained in this bill and allowed of it as due by the R. R. Co., which items were put into the sub-contractors estimate, and also into the estimate of the chief contractor the sum of $1,831.16, excluding, not allowing sundry items of work which had been done by John H. Osborne for the chief contractor himself, amounting to $911.10, with the instruction from the engineer that the same was not chargeable to the company but to Mr. O'Reilly.

Q. In whose handwriting are "E. E., Geo. W. Bowen, Clerk," at the bottom of the bill?

A. In the handwriting of George W. Boweu.

Q. In whose handwriting are the words and figures

"total $2,742.26, amount not allowed $911.10, charge "O'Reilly, not the company, balance $1,831.16," at the bottom of the bill?

Objected to.

A. In my handwriting when the estimate was made up.

Q. When did you put them there?

A. Immediately on determining the amounts that were due by the R. R. Co. and by the chief contractor.

Q. Give the date as nearly as possible?

A. This bill was probably sent to me in August, 1857; if so, it was put into the current estimate about that time, and was continued regularly down to the final estimates where the items stated as due by the company have been duly allowed.

Witness being shown paper heretofore marked Z3, is asked:

Q. Please explain that.

Objected to as irrelevant.

A. It is a bill against Mr. P. O'Reilly by John H. Osborne for the disbursement of moneys for the purchasing of woodleave and hauling some 13,000 sills, 2,000 saw logs and 500 cords of wood cut on the said woodleave, paying for hauling the same to the railroad and saw-mills and for having the logs cut into planks and splice plates, and paying for distributing the same along the line of the R. R. in 1856 and 1857. The disbursement on which amounted to $25,000, on which a charge of five per cent. for services amounts to $1,250.00.

Q. What advantage had Patrick O'Reilly from the disbursements and services mentioned in this bill, Z3, and how was he paid?

Objected to as above.

A. It was the performance of work which he had to have done to enable him to meet his contract for the supply of sills, all such work was paid for to him in the price he had contracted with the company to deliver the sills at.

Q. What was the price per sill allowed to Patrick O'Reilly?

15

Objected to as irrelevant.

A. Fifty cents per sill.

Q. Please state how Patrick O'Reilly got his pay for the $911.10, on Exhibit Y3, the amount not allowed by the engineer as a charge to the company and noted to be charged to Mr. O'Reilly?

Objected to as above.

A. The chief contractor was paid for all work as complete and finished and allowed in full. This $911.10 represents the costs of making parts of his work finished and complete.

Witness being shown paper heretofore marked A4, is asked:

Q. What is this paper?

Objected to as above.

A. That paper is the return of sundry work done for P. O'Reilly under the direction of a man by the name Benjamin Scott who was foreman of Tarrant & Co. He has styled it extra work. I know nothing further about it.

Witness being shown paper heretofore marked Exhibit Z 4, is asked:

Q. What is this paper?

Objected to as above.

A. This is a bill of extra work against P. O'Reilly. After the road on these sections, 14 and 15, had been trimmed and finished, the embankments were found to be in a sunken condition, and had to be retrimmed and brought to their proper level before the track could be laid. This is the cost of it.

Q. How was the chief contractor paid or allowed for this work?

Objected to as above.

A. If the work had been accepted when first finished and had to be retrimmed again after being accepted it would be an extra item chargeable against the company, but if not accepted until the track laying was ready to progress on it the chief contractor's payment for the same would be included in the amount paid him under his contract for the work on those sections.

Witness being shown paper heretofore marked W4, is asked:

Q. Please explain this paper.

Objected to as above.

A. This is a bill against P. O'Reilly by John H. Osborne on account of sundry disbursements of moneys, and so forth, which I don't know much about as to details. It is with reference to Greenwood, the property on the Susquehanna spoken of.

Q. What is the amount of the bill?

Objected to.

A. $1,099.53.

Witness being shown paper heretofore marked as Exhibit X4, is asked:

Q. Please explain this paper.

Objected to as above.

A. This is a bill of John H. Osborne against P. O'Reilly for teams, wagons, supplied for the Greenwood tract of land and his own services as agent; amount, $5,372.23.

Q. What do you know about it?

Objected to.

A. I know generally that such things were supplied, that John H. Osborne acted as agent; but of the particulars I am not cognizant.

Witness being shown paper now marked Exhibit 5 of complainant.

Objected to.

Q. What is that paper?

Objected to as irrelevant.

A. This paper is a bill of Tarrant & Co. against P. O'Reilly for 1,393 67-100 cubic yards of ballast supplied by them and included in their current estimate, No. 41, of September, 1857, when they were estimated 28,166 67-100 cubic yards, while in the final estimate of said sub contractors only 20,773 cubic yards were estimated, thereby erroneously omitting 1,393 67-100 yards which at sixty cents per cubic yard equals $836.20, the amount of the bill Exhibit No. 5.

Q. Who did the work in that bill No. 5?

Objected to.

A. Tarrant & Co.

Q. How was Patrick O'Reilly allowed or paid for it?

Objected to as inadmissible.

A. He was allowed for it in the 99,724 cubic yards of ballast allowed him, while all his subs received but 97,564 cubic yards, showing a difference of 31.60 cubic yards, of which the 1,393.67 cubic yards are a portion.

Witness being shown paper now marked Exhibit O5 of complainant, is asked:

Objected to.

Q. What is that paper?

Objected to.

A. It is a letter from the resident engineer, Richard F. Stack, forwarding the report of force of second division, and the progress profile in which the month's work on the profile is marked, stating that he has done all he could to make the estimate sufficient to meet the expenses of the contractors, perhaps even more than the quantities quite warrant.

Q. When was it dated and when was it received by you?

Objected to as above.

A. It was February 6th, 1857, and was received by me in due time by mail.

Q. What do you know about the facts therein stated?

Objected to.

A. It confirms the statements I have already made with reference to the insufficiency of the estimates to meet the expenses on the second division and which obliged me as the engineer at that time to commence the allowance of back percentage retained as profit for the sub-contractors for the purpose of enabling them to meet the payments to their hands.

Q. What part of the Lebanon Valley R. R. was Richard T. Stack the engineer of?

Objected to.

A. Second division.

Q. Please state whether or not this is an official report and whether or not it was within the line or scope of resident Engineer Stack's duty?

Objected to.

A. It was an official report, with the regular monthly official returns sent to the chief engineer, as was his duty.

Mr. Drake announces that he has concluded the direct

examination of Mr. Richard B. Osborne, the witness on the stand.

Mr. Voorhees asks for an opportunity to read over the testimony of the witness which has been taken at various days and times, and extends over one hundred pages of manuscript, before he commences the cross-examination.

Mr. Drake consents to the postponement, and asks that as a matter of precaution the witness sign his deposition.

Mr. Voorhees thinks that it is informal for the witness to sign his deposition at this time and does not consent to the same.

Sworn and subscribed December 11th, 1884, } RICHARD B. OSBORNE.
C. V. D. JOLINE.

Mr. Drake now calls for the production of the papers heretofore called for, being the papers mentioned in the order of the court of April 16th last for that purpose, viz: the original agreement between Patrick O'Reilly, chief contractor, and the Lebanon Valley R. R. Co., for the grading, masonry, timber and iron work of the first forty sections of the Lebanon Valley R. R., the agreement between Patrick O'Reilly, chief contractor, and Tarrant & Co., sub-contractors, for the grading, and masonry of the second division of the Lebanon Valley R. R., comprising sections 14 to 26, both inclusive; the current estimates of Tarrant & Co., sub-contractors as aforesaid, also for the books and vouchers called for on the 12th of June last, mentioned on page 186 of the testimony, viz: the books and vouchers relating to the disbursement of moneys for woodleave on the line of the Lebanon Valley R. R., also for disbursements of money relative to sill-getting from a tract of woodland known as Greenwood on the Susquehanna river in Juniata county, Pa.

Mr. Voorhees says that he has notified his client as to Mr. Drake's request for the production of the contracts of Tarrant & Co., and the Lebanon Valley R. R., and the estimates, and is assured by her that she has made diligent search for the same and has been unable to find them, and that she will continue the search and that they

will be produced, if found, as soon thereafter as possible, and that he has advised her that it is important that they should be produced for her defence in this action. As to the books about woodleave and Greenwood he will notify his client and have search made for them and produce the books and vouchers if they can be found, that he has already produced two of the books which he will try to have here at the next meeting.

Adjourned until Friday, December 19th, 1884, at 10½ A. M.

Friday, December 19th, 1885, at 10½ A. M., Mr. Drake appeared and called for the production of papers, &c., demanded at last meeting.

The examination was then adjourned (Mr Voorhees being absent attending court) until Saturday, December 27th, at 11 A. M.

Saturday, December 27th, 1884, at 11 A. M., examination resumed in presence of respective solicitors.

Mr. Drake now calls for the production of the papers directed by the court to be produced, viz., the original agreement between Patrick O'Reilly and the R. R. Co.; Patrick O'Reilly's copy of the original agreement between Patrick O'Reilly, chief contractor, and Tarrant & Co., sub-contractors, and the current estimates of Tarrant & Co. from No. 1 to No. 41; also books and papers not included in the order of the court, consisting of the accounts and vouchers for money paid in sill getting (1) at Greenwood, and (2) on the line of the Lebanon Valley R. R.

Mr. Voorhees answers, as he has before answered, that the papers referred to, if in the possession of the defenddant, have been mislaid and she has been unable to find them, and if found they will all, or such of them as may be found, be forthwith produced; that this statement includes as well the papers referred to in the order of the court as those relating to sill getting at Greenwood and along the line of the railroad, except one paper which has already been marked Exhibit No. 8.

John H. Osborne, the complainant, being sworn in his own behalf, deposeth and saith:

Mr. Voorhees now enters an objection to the examination of this witness in this cause, as against the defendant therein, who is defending solely and only in a representative capacity, and makes this objection before the commencement of the examination of the witness so that all his testimony may be subject to such objection, whether specially objected to in the course of examination or not. Subject to the agreement heretofore made between counsel that all objections to testimony shall be settled at the final hearing.

Q. Where is your duplicate copy of the agreement between Patrick O'Reilly, chief contractor, and yourself and Charles Tarrant, sub-contractors, for the grading and masonry of the second division of the Lebanon Valley R. R.?

Objected to as above.

A. I gave it with my other papers to Mr. Browning who was then acting as counsel for me. On his returning those papers to me this agreement was not among them.

Q. What effort have you made to get it from Mr. Browning?

Objected to as above.

A. I first wrote to him and then saw him in person. He stated that he had looked for the paper, could not find it, and he thinks he must have returned it to me with the other papers. I looked, on my return home, through all my papers and have never been able to find it. I am satisfied that it is not among my papers.

Q. Where did you get your information whereon to formulate bids for the work you did on the Lebanon Valley R. R., in grading and masonry?

Objected to as above.

A. I was in possession of all the data connected with the sub-letting of Mr. O'Reilly's work, took an active part in this sub-letting, having been instructed to do so by Mr. O'Reilly, in whose employment I then was.

Q. Where did the information as to the hardness of the rock come from, Mr. O'Reilly or the company?

Objected to as above.

A. From Mr. O'Reilly on data furnished by the engineer of the company.

Q. What was the character of the rock work which you were obliged to perform, in making the cuts and excavations on your part of the work?

Objected to.

A. All the rock sections, the upper strata was the ordinary limestone; in some of the later cuttings it continued so to grade, but on sections 18, 19 and the section opposite Myerstown, either 21 or 22, I don't remember which now, its character was entirely different from what we were led to expect when the work was let. Instead of being in layers it was more of a conglomerate character, with numerous veins of flint, so that it was entirely different from the ordinary limestone formation.

Q. What effect did this difference have upon the cost of excavating the rock just spoken of?

Objected to as above.

A. It required more labor, the largest steel bits, running to 2¼ and 2½ inch bits, and involved the use of steel octagonal from 1¼ inches to 1⅞ and two inches. It consequently increased the labor, the smithwork and the powder.

Q. What effect did it have on the size of the blast?

Objected to as above.

A. It made it more difficult to blast, not only from the increase of the labor in putting in the hole, but frequently from faults in the veins, which I have spoken of, the charge would blow out through these veins and leave the mass intact.

Q. When you would get a good blast in this hard rock what would be the amount moved as compared with the ordinary limestone of the upper strata?

Objected to as above.

A. As a rule it had no effect on the rock below the blast, and very frequently detached only small pieces. The trouble with the rock was that we rarely got a good blast unless it was what we call a sand blast, which was not frequent. Then large angular masses were thrown out of which, as they were too large, had to be re-blasted.

Q. What is the result of a good blast in the ordinary limestone found in the upper layers or strata in your excavation?

Objected to as above.

A. One blast would frequently throw out sufficient material to keep all hands in the gang prying up with bars the layers and rendering further blasting unnecessary for a considerable time, thereby greatly saving powder, steel and labor.

Adjourned until Friday, January 2d, 1885, at 10 A. M.

Friday, January 2d, 1885, adjourned until Thursday, January 8th, 1885, at 10 A. M.

Counsel for complainant now calls for the production of the vouchers relating to the disbursement of money at Greenwood and for woodleave on the line of the Lebanon Valley R. R., also the papers or instruments in writing mentioned in the order of the court heretofore referred to.

Mr. Voorhees answers that if those papers, or any of them, are in the hands of the defendant they are mislaid and can't be produced; that diligent search has been and is still being made for them.

John H. Osborne, being still upon the stand, upon his direct examination, saith:

Q. What was the value of the limestone for building purposes, for use in the masonry, specified in your contract?

Objected to as above.

A. It was worth from one to two dollars per yard according to its proximity to or distance from the particular structure upon which it was contemplated to use it.

Q. What was the value of the trap rock and other rock found in the excavations where you expected to find limestone, for use in the masonry of your division?

Objected to as above.

A. It was of no value, and could not be used for the masonry of R. R. structures.

Witness being shown paper heretofore marked Exhibit B3 of complainant.

Q. What does this paper refer to?

Objected to as above.

A. This paper is a statement of the cost of the solid rock on sections 18, 19, 20, 21 and 22 for the five months ending October 31st, 1855, together with the engineer's estimate on those sections for the same period, including the various materials, of solid rock, loose rock, hard clay and earth, amounting to $18,688.46. The aggregate expenses for the same sections and for the same period, deducting horse work, of $27,845.38, showing an actual loss in excavation on these sections and for these months of $9,156.92.

Q. Who made up that statement?

Objected to as above.

A. I made it up sometime in the month of November, 1855. It is dated November 6th, 1855, upon a letter attached to this paper in which the $9,156.92 loss is stated to have been made.

Q. Whose assistance had you in the making up of that paper?

Objected to as above.

A. For all the details I relied entirely on my clerk and book-keeper, George W. Bowen, who handed them to me.

Witness being shown paper heretofore marked Exhibit K3 of complainant, is asked:

Q. Please state to what this paper refers and who made it up.

Objected to as above.

A. This paper purports to be the powder used on sections 18, 19, 20, 21, 22 and 23 for the seven months ending December 31st, 1855, together with the number of cubic yards of solid rock excavated in the same period amounting to 30,748 cubic yards. The cost of the powder for the above mentioned period amounted to $2,674.75, which was equivalent to .0869 per cubic yard.

Q. When, by whom and with whose assistance was that paper made up.

Objected to as above.

A. It was made up by me with George W. Bowen's assistance, who furnished me the details. It was made up sometime in January, 1856, after the returns came in.

Witness now being shown paper marked Exhibit J3 of complainant, is asked:

Q. To what does this paper refer and who made it up?

Objected to as above.

A. It refers to the loss on solid rock excavation on the six sections from 18 to 23 inclusive for the seven months ending December 31st, 1855; shows the aggregate expenses on these sections to be $39,015; the engineer's estimate for the same period on these sections to be $25.125, and the loss, exclusive of the haul and horse work, to be $13,890. The paper is in Mr. George W. Bowen's handwriting, the details furnished by him, the arrangement of the same made by me. This paper does not appear to have had any notice taken of hard clay and earth either in the engineer's estimate or the expenses, both being confined to solid rock excavation. It was made up in the succeeding month, January, 1856.

Witness being shown paper heretofore marked Ex. L3 of complainant, is asked:

Q. In whose handwriting is this paper, who made it up, with whose assistance, and to what does it relate?

Objected to as above.

A. It is George W. Bowen's handwriting. It was made up by me with George W. Bowen's assistance. It purports to be a statement showing loss on ten sections from 14 to 23 inclusive, and for five months ending May 31st, 1856, to show the yards as returned by the engineer of each material, the total expenses of same for each month, and to show a loss for this period on these sections of $10,281, equal to 41 2-10ths per cent. over the engineer's estimate. It also purports to show, but without detail, that the cost of the powder and tools for twelve months, including $7,230 for the same, makes an aggregate of $31,401 for twelve months.

Witness now being shown paper marked Ex. N3 of complainant, is asked:

Q. What is this paper, in whose handwriting is it, and what does it show?

Objected to as above.

A. This is a summary in George W. Bowen's handwriting.

Counsel for defendant desires Master to note that Mr. Drake now shows witness Ex. J3, K3 and L3, and asks witness to answer the question with reference to these three exhibits. Statement objected to by Mr. Voorhees.

Continuation of answer: The first summary shows a loss on sections 18 to 23 inclusive for the seven months ending December 31st, 1855, of $13,890, being 55¼ per cent. loss and has reference to J3. The second for five months ending May 31st, 1856, for 10 sections from 14 to 23 inclusive, showing a loss of $10,281, being 41 1-5 per cent. loss, and has reference to Exhibit L3. The third summary is the aggregate of the other two for the twelve months ending May 31st, 1856, and shows the loss to be 48 7-10 per cent. The fourth statement asserts that the $7,230 for powder and tools, as stated in L3, is not included in the amount of expense as shown on that exhibit, the $31,401 of actual loss being to May 31st, 1856.

Q. Please state what reference, if any, the $7,230 for powder and tools, has to Exhibit K3.

Objected to as above.

A. It has no reference except for the seven months ending December 31st, 1855; the one, $7,230, being for powder and tools, the other, K3, being the cost of powder alone.

Q. After these statements, viz: Ex. B3, J3, K3, L3 and N3, had been made up, to whom did you hand them?

Objected to as above.

A. To George W. Bowen.

Q. For what purpose?

Objected to as above.

A. To transmit to Mr. P. O'Reilly and to the chief engineer, some of the letters for the same having been written, but which I cannot now identify. My letter-book will probably show.

Q. Who had charge of your letter-book, Exhibit M3, and of copying your letters into it, and of forwarding them after they were copied, during the period relative to which

you have just been testifying, viz: the twelfth month ending May 31st, 1856?

Objected to as above.

A. My letter-book was kept in the office with all my papers in charge of George W. Bowen. He copied, mailed and transmitted all my correspondence which emanated from my office in Womelsdorf.

Q. When was this statement, Exhibit M3, made up and handed to Bowen for transmission?

Objected to as above.

A. June 25th, 1856, signed George W. Bowen, clerk.

Witness being now shown paper heretofore marked Ex. 03 of complainant, is asked:

Q. What is this paper, and who made it up, and with whose assistance?

Objected to as above.

A. This is a paper showing loss on rock from June to October, 1856, inclusive, on sections from 18 to 23 to inclusive, showing the total number of cubic yards excavated, the total expenses, the amount of horse expenses on those sections, the total estimate on those sections, the difference between the expenses and the estimate after deducting the horse expenses, showing the loss to be $16,230.80 for the five months, as above stated. It was made up by me, is in my handwriting; the detail of the same being given me by my clerk, George W. Bowen.

Witness being shown paper heretofore marked P3 of complainant, is asked:

Q. What is this paper, who made it up, and whose assistance had he?

Objected to as above.

A. This paper was made up by me with George W. Bowen's assistance, stating to be the expenses for four months ending February 28th, 1857. It is corrected from being five months ending March 31st, 1857. It is evident, however, that it is but four months. It shows the amount of the excavation and what I received for the same, and the amount of the expenses, and shows a loss on this section for that period of four months of $7,103.05. The endorsement is in George W. Bowen's handwriting and is

"Statement cost of rock on sections 18 and 19, four months, Nov., 1856, to Feb'y, '57, inclusive; loss, $7,103.05. Correct, George W. Bowen." The discrepancy upon the endorsement and the inside of the paper has arisen that section 18 terminated in the middle of that rock-cutting, and section 19 commenced at the same point on the same line, hence it would be impossible to say whether the statement referred to section 18 or 19, but probably 19, as section 18 had been worked out.

Witness being shown paper now marked Ex. P5 of complainant, is asked:

Q. What is this paper?

Objected to as above.

A. This is the progress profile, showing the grades, cuttings and embankments of the road, and having on said cuttings and embankments the amount of the work done during each month, and marked on the profile by the company's resident engineer, Richard F. Stack, of Myerstown. This profile shows the division line of the two sections, 18 and 19, being about central in the cutting to which I referred in my last answer.

Q. To whom were these statements, Ex. O3 and P3, handed after they were made up by you as already stated, and for what purpose?

Objected to as above.

A. To George W. Bowen to copy, file and transmit,

Adjourned until Friday, January 16th, 1885, at 10½ A. M.

Friday, January 16th, adjourned until Friday, January 23rd, 1885, at 10½ A. M.

Friday, January 23rd, 1885, adjourned until Friday, January 30th, 1885, at 10½ A. M.

Friday, January 30th, 1885, examination resumed in presence of respective counsel.

John H. Osborne, the complainant, being still upon the stand, upon his direct examination, saith:

Witness being shown Exhibit P5 of complainant is asked:

Q. When were the figures and the lines directing them to the progress of the work, indicated in colors, made and by whom?

Objected to as above.

A. They were made about five weeks ago; I don't remember. The figures are in Richard B. Osborne's hand.

Q. What are they intended to indicate?

Objected to as above.

A. They are intended to show the approximate cubic contents of the colored shading in the profile.

Q. When and by whom were the other words, figures, coloring and shading on this profile, Exhibit P 5, made?

Objected to as above.

A. They were made by Richard F. Stack, the division engineer, from time to time as the work progressed, each division representing the approximate amount of the work excavated from month to month.

Q. For whom was this made, for the contractor, sub-contractor or chief-engineer?

Objected to as above.

A. For the sub-contractors, Tarrant & Co.

Q. In whose possession has it been since the completion of the work?

Objective to as above.

A. In mine.

Q. During the progress of the work, when not in the possession of the resident engineer, how much of the time, proportionately, was it in your possession, and how much of the time in the possession of George W. Bowen or Benjamin Scott, if any?

Objected to as above.

A. It was usual for Mr. Bowen to take this profile to Myerstown and leave it with Mr. Stack every month, for a period of two or three days, when it was returned by Mr. Stack to Mr. Bowen, and it remained in my office at Womelsdorf to be referred to by either Scott, Bowen or myself.

Q. Who was Benjamin Scott just referred to?

A. He was the general manager of my work on the second division from about April 1st, 1855, to somewhere about January 1st, 1857. The profile has always been in the case in which it now is. It is the case in which it was kept and carried about the line. It was made by Jasper W. Nicolls and handed over by him to Stack when he left the line in March, 1855.

Said case is now marked Ex. Q5 of complainant.

I will correct a statement that I made, that it was made by Mr. Stack; a great many of the figures such as the section, the number, the grade and the stations were made by Mr. Nicolls, and the drawing out of the profile was made by him. I don't refer by that to the filling in as the work progressed.

Witness being shown paper now marked Ex. R5 of complainant, is asked:

Q. Please state what this paper is.

The marking of the exhibit and the question both objected to as irrelevant and inadmissible.

A. This paper does not refer to the profile. It is a summary of two sections, 18 and 19, showing the cubic yards excavated on those sections, of solid rock, commencing May 31, 1855, and terminating December 31st, 1856, for section 18, and for February 28th, 1857, for section 19, taken from the detail furnished me every month by Richard F. Stack for all work done on the second division. It is intended to show that whilst the stratified rock on those two sections was, for a period of four or five months, easy of excavation, in the succeeding months, when we got into the unstratified the quantities are so small, comparatively, as to show with the same, or frequently an increased force, the extreme hardness and tenacity of the unstratified rock. This unstratified rock having changed its character from that of a magnesian limestone to an igneous trap rock composed of green stone hornblende, feldspar, with particles of clinkstone and basalt interspersed.

Q. Does this represent entirely a solid rock excavation, or partly solid rock and partly other sorts?

Objected to as above.

A. All classified by the engineer under the name of solid rock.

Q. The gradual decrease in cubic yards excavated, specially noticeable in the column devoted to section 18, was owing to what, a decrease in force or a difference in the rock?

Objected to as above.

A. It was owing entirely to the different texture of the rock from what it was the first four, or five, or six months, contained in the statement. The forces were rather increased than diminished.

Q. When was that statement made up and by whom?

Objected to.

A. It was made up by me about four or five weeks ago from the details furnished me from month to month by Mr. Stack and to which my attention was then directed.

Witness being shown paper now marked Ex. S5 of complainant, is asked:

Objected to as above.

Q. When was this paper made, by whom and for what purpose?

Objected to as above.

A. Part of this paper, namely, June, July, August, September, was made by me immediately after Mr. Bowen received his monthly returns in October, 1855. The lower portion, embracing October, 1855, was added to the paper about the same period of the month in November, 1855. It was made by me as a rough draft to ascertain what my estimate and expenses were on section 18 for the first four months named, and afterwards for the fifth month, viz: October, 1855.

Q. State, if you please, what it shows, loss or profit, and how much.

Objected to.

A. Loss. For the four months ending September 30th, 1855, a loss of $3,898.34. It shows also the aggregate expenses for the same four months, $9,146.34. For the same expenses and for the same period, but excluding horse work, $7,887.61. It shows also the estimate for October, 1855, to be $1,206.10; the expenses to be $1,873.00 for the same month. The aggregate loss for these five months on section 18 to be $5,771.00, to which the loss on other

sections for the same period, amounting to $4,232.00, makes a total loss on this section 18 and on these other sections of $10,003.

Q. Is this inclusive of or exclusive of the horse expenses?

Objected to.

A. Inclusive of the horse expenses for the four months first named. I cannot say for October, nor can I say whether it is inclusive or exclusive on the other sections. The paper itself is roughly drawn, contains clerical errors, and was intended only as an approximate.

Q. Does the paper show the cost of excavation of solid rock for the period named, and if so, what was that cost, and to what sections does it refer?

Objected to as above.

A. It does. It shows the cost to be, it is not placed here together and of course I can't show it in a lump, for these five months $9,146.34, and $1,873 for this particular section 18. It shows the loss also for the same period on the other sections to be $4,232. It shows the estimate on this particular section 18, for the four months, to be $5,248. It shows the difference for this period on this section, excluding horse work, to be $2,638. It shows the estimate for October, on this section, to be $1,206.10. It shows the loss on this same section for that month to be $1,873. I cannot say whether this last amount excludes horse work, nor can I state whether the loss on the other sections, for the five months, excludes horse work, but it shows the total loss for the above period to be $10,003.

Q. Please state whether or not the paper shows the number of cubic yards excavated for the period, for section 18, what the amount is, and if the summation of the cubic yards be divided into the whole expense what will be the cost; per cubic yard for the period, on section 18.

Objected to.

A. It shows the cubic yards on section 18, for June, July, August and September, and also for October. For the first four months the aggregate was 3,898, which would give per cubic yard a loss of .538 cent per yard, if this amount were added to the 73 cents which I was paid for the excavation it would make a cost per yard, on this

section, for this period, of one dollar and twenty-six and eight-tenths cents. For the month of October, the cost per yard has not been calculated, nor for the other sections from June to October.

Q. In whose handwriting are the words and figures, "Handed Mr. O'Reilly, October 17th, 1855," and when were they put there?

Objected to.

A. In my handwriting, put there in October, 1855, the day, or may be the hour that I gave it to Mr. O'Reilly. He was at my office.

Q. What was there on this paper, Ex. S5, relative to expenses or anything else, for the month of October, when you made the memorandum referred to in your last answer?

Objected to as above.

A. There was nothing on the paper about the month of October, the returns for which month did not come in till after the 1st of November.

Q. What are the numbers of cubic yards excavated on section 18 during the four months ending September 30th, 1855, stated in Exhibit S5?

Objected to.

A. 7,235 cubic yards for the four months.

Q. What is it made up of?

Objected to.

A. June, 1,700; July, 1,400; August, 2,285; September, 1,850.

Q. Does the cost per yard given by you as $1.26.8, include or exclude horse work?

Objected to.

A. The ($1.26.8) one dollar, twenty-six and eight-tenths cents does not include the horse work.

Q. What did the horse work relate to beside rock excavation, if anything, and why have you excluded it in several statements of loss?

Objected to.

A. It may have included earth, hard clay, loose rock, as well as solid rock hauled into embankment. I wish to arrive at the actual cost of the excavation of the rock.

Q. What influence, if any, did the difficulty and slowness of the rock excavation have upon the horse work?

Objected to.

A. There was a certain force of horses, men to attend them, the man employed on the dump for dumping the loaded cars, the hands engaged in extending and shifting the track, all of whom, if not fully employed, enhanced the cost of the horse work, and consequently of the rock.

Q. If the difficulty of the excavation increased the cost of the horse work, what is the reason you can't include all the horse expenses in the expense of excavation of the solid rock?

Objected to.

A. The embankments were paid for by the number of cubic yards hauled into embankment, and this result was arrived at by the number of mills per hundred feet paid for the haul. Now to arrive at this result would have involved a return by the engineer of the material hauled into embankment and the number of feet such material was hauled, this latter multiplied by the mills per hundred feet hauled would give the amount per cubic yard. This would have required the division engineer to specify the various classification of materials and would have involved great labor on his part, and hence I threw it out in toto.

Q. Could you have told what proportion of horse expenses related to excavation, whether of earth, hard clay or solid rock, and what proportion related to hauling to embankment, and if so please state it.

Objected to.

A. It all went into embankment. I have not calculated the percentage of the material other than solid rock that was hauled into embankment, but in these four months I should judge it to be from five to ten per cent. of the horse expenses, and from 90 to 95 per cent. of the solid rock, of the yards hauled into embankment.

Q. If you should apportion the horse expenses, for the month of September, 1855, charging part of this expense to what you were allowed for hauling to embankment, charging the other portion of this expense to what you were allowed for excavating solid rock, what proportion of the expense would you charge to each?

Objected to.

A. It would be requisite, before I could answer specifically, to know the distance that the yards excavated in September, were hauled into embankment. The whole of the excavation of that month was solid rock, and hence there would be no deduction made for other classification. I should say therefore, without having made the calculation, presuming the rock to have cost $1.26 per cubic yard, that the reduction per yard, from looking at the profile, would perhaps be from 9 to 10 cents per cubic yard, leaving the cost for the excavation of the solid rock per cubic yard from $1.16 to $1.18 per cubic yard.

Q. How great would the difficulty be, which you would encounter, in ascertaining how much slowness and tardiness in rock excavation would increase the horse expenses?

Objected to.

A. There would be no difficulty in ascertaining the fact if the excavation proceeded sufficiently rapid to keep the horses, drivers and men on the dump actively employed. The embankment would have at least paid for itself. If they were only very partially employed there would be an absolute loss in the formation of the embankment, and this loss would be due to the excavation of the rock.

Q. If the excavation was unexpectedly and exceedingly slow so that the horses and men in charge of them were only partially employed, even with the aid of all the engineer's returns, how would you go to work to find out how much loss there was on horse work by reason of slowness in excavation?

Objected to.

A. Very simply. The returns at the end of the month would show the number of horses, drivers, men on the dump; a tape-line stretched on the embankment would give the probable amount of yards put into embankment for that month, distance hauled per hundred feet, would give the amount by which the yards in the embankment could be multiplied. This last would be the estimate of money earned. The expenses for these hands and horses would give the cost; the one taken from the other would give the profit or loss.

Q. If it was a simple matter to ascertain what part of the horse expenses should be included in the expense of excavation, why haven't you included some part of the horse expenses in your loss on rock, instead of throwing it all out?

Objected to.

A. Whilst it would be a very simple thing to do for one section, it would involve a great deal of labor extending over thirteen miles, because all the classification of other material and solid rock would have to be deducted, and this on one piece of embankment might have involved a great many calculations, for there were pockets of clay in some of the sections, which would have to be separated from the yards of the solid rock. This I could not expect the division engineer to do for me, besides I wanted to establish the actual cost to me of the excavation of the solid rock.

Witness being shown two papers pinned together marked Ex. T5 of complainant is asked:

Ex. objected to.

Q. What is that paper?

Objected to.

A. This paper contains the rough calculations of sections 19, 20, 21, and 22 for the months of June, July, August, September and October, 1855, showing the classification of the various material, the amount of dollars estimated for said material, the horse work upon each section. and for each of the above-named months, the expenses for the same period, the total expenses, the estimate, the deficiency over and above the price which I was to receive for this work, as also the number of yards, divided into the expenses and showing the deficiency for those particular expenses.

Q. What does this paper show the expenses on those sections for that period to be, and what were the allowances on the estimates, and what is the deficiency?

Objected to.

A. The total expenses were $19,397.61. The horse expenses upon these sections for the same period were $2,948, leaving the expenses for excavation $16,449.61.

The estimate for the same period on these sections was $12,217, showing the actual loss on excavation $4,232.

Q. What is the deficiency per cubic yard?

Objected to.

A. 30.8. Thirty and eight-tenths cents per cubic yard.

Q. In whose handwriting is that paper?

Objected to.

A. In mine. It was made out by me as soon as I received the October returns in the first part of November, 1855.

Adjourned until Friday, February 6th, 1885.

Friday, February 6th, 1885, examination resumed in presence of respective counsel,

John H. Osborne being still upon the stand upon his direct examination saith:

Witness being shown Ex. T5, is asked:

Q. What was the purpose of the computation contained in that paper, and what are the results reached?

Objected to as incompetent, irrelevant and inadmissible.

A. To arrive at the cost of workings of the four sections from 19 to 22, inclusive, for five months ending October 31st, 1855, and to ascertain whether such sections were worked at a profit or loss. The result showed a loss of $4,232 for that period after deducting horse expenses.

Witness shown paper now marked Ex. U5 of complainant, is asked:

When was this paper made up and by whom?

Exhibit U5 and all testimony under it objected to as above.

A. It was made up, I can't state the precise date of it, but about February, 1856. It was made up by me. It is in my handwriting.

Q. What was the purpose of the summation and computations contained in that paper, and what does it show?

Objected to as above.

A. To ascertain the cost of the powder per cubic yard

of solid rock excavated between June, 1854, and May, 1855, both inclusive, as compared with the month of January, 1856. This paper shows the cost per yard on the first named sections to be .0454 cents per cubic yard. That includes 2,092 cubic yards on section 14, on which the classification was changed from solid rock to hard clay, as per Richard Stack's return to me, and hence the cost would be .049 cents per yard, in place of what I first stated. On the paper there is a clerical error showing it to be .053 cents per cubic yard. In January, 1856, it shows that the cost was nearly 10½ cents per cubic yard.

Witness being shown Exhibits S5 and T5, is asked:

Q. Whether these computations show the loss exactly and correctly, or only so for the time being?

Objected to as above and as leading.

A. They show the loss exactly and correctly for the periods stated, taking the exception to whatever clerical errors there may be in them, from their roughness, but do not materially affect the results stated.

Witness being shown paper heretofore marked Ex. J3, is asked:

Q. What is the loss for the five months ending October 31st, 1855, shown by this paper, for the sections included in it, from 18 to 23, inclusive?

Objected to as above.

A. The statement and question is for seven months ending December 31st, 1855. The loss for each month is stated; for the five months ending October 31st, it appears here to be $9,098.

Q. Does the loss show the cents, and if not, why not?

Objected to.

A. No, I can't say why. The paper was made out by Mr. Bowen, and I suppose he threw out the cents to simplify it on all occasions. It was usual in the returns made to me by the division engineer, not to include fractional parts.

Q. Who made the computations from which Mr. Bowen made up the statement of loss contained in Ex. J3?

Objected to as above.

A. That I can't say. I made the the approximates, but

I suppose they were all checked and put through by Mr. Bowen, ratified.

Witness being shown paper heretofore marked Ex. B3, is asked:

Q. What is the loss shown by this paper for sections 18 to 22, both inclusive, for five months ending October 31st, 1855?

Objected to.

A. The loss is stated to be $9,156.92.

Q. Does this statement cover the same sections as Ex. J3?

Objected to.

A. No, it does not; one includes six sections, the other only five; one is for five months, the other for seven months.

Q. Which paper shows the loss, revised and corrected by the use of all the information obtainable at the time?

Objected to as above.

A. The seven months' paper, Exhibit J3. The five months' paper, B3, was made very early in November, 1855.

Q. Why does Exhibit J3 show the loss for the five months ending October 31st, 1855, to be less by $58.92, than Exhibit B3 shows the loss for those five months?

Objected to as above.

A. I couldn't tell you without going into the whole thing; some discrepancy either in the expenses or the quantities.

Q. Why does Ex. S5, for the same five months, show the loss to be $10,003?

Objected to.

A. The papers have no reference one to the other; one is for section 18 for four months; the other is for the four months, ending August 31st, for sections 19, 20, 21 and 22 for five months ending October 31st, 1855. The $9,156 contains the sections from 18 to 22 for the five months.

Q. The attention of the witness is called to Exhibit S5 to a subtraction therein of $5.248 from $9,146.34, showing a difference of $3,898, thereby dropping the thirty-four cents from the remainder; by whom was that done, and why were the cents dropped in continuing the computation?

Objected to.

A. It was done by me. The object and aim of this paper was to bring out an approximate only within a few dollars, one way or the other, of the cost to me of the excavation of the solid rock on these sections.

Q. For what sections and for what time do the $10,003, at the right hand lower corner of Ex. S3, show the loss?

Objected to.

A. I can't say for what sect ions, but the time was from June to October, 1855. There are several clerical errors on this paper.

Q. Do the $10,003 include horse expenses or not?

Objected to as above.

A. I should think that that $10,003 included horse expenses.

Q. Do the sums $9,156.92 in Ex. B3, and the $9,098 in J3, loss for the five months ending October 31st, 1855, include horse expenses or not?

Objected to as above.

A. I should think that they did not include horse expenses from the fact that the horse expenses are deducted in Exhibit B3. In Exhibit J3 the $9,098 do not include horse expenses.

Q. Can you tell me whether or not $4,232, on Ex. S5, include horse expenses or not?

Objected to as above.

A. No, sir; it does not include horse expenses.

Q. You have heretofore stated in answer to a question relative to the $10,003 in Ex. S5, that the paper S5 had no reference to Exhibits B3 and J3, now before you; is that statement correct or incorrect?

Objected to as above.

A. It is partially incorrect.

Q. State now, if you please, what reference the $10,003, in Ex. S5, have to the $9,156, in Ex. B3, and the $9,098, in Ex. J3?

Objected to as above.

A. The $10,003 in S5 include the horse work, which is not included in B3. It does not include the statement of J3, there being one section more in the last named than

the figuring at the bottom on the right-hand side of S5. In regard to J3, the one, J3, includes one section more than is contained in the figuring on the right-hand side of S5, near the bottom. The $10,003 in S5 includes horse work, which the $9,098 on J3 does not.

The attention of the witness is called to the sum $4,232, in S5, and to the same sum in T5, and is asked what reference these two sums have to each other?

Objected to as above.

A. These sums refer to the same sections for the same time.

Q. Where was the $4,232, in Ex. S5, taken from to the best of your knowledge?

Objected to as above.

A. It was taken from T5, or a memoranda of George W. Bowen's of these particular sections, I can't say which.

The attention of witness is directed to page 239 of Exhibit M3, and is asked, in whose handwriting was the letter from which this was copied, and when was that letter written?

Objected to.

A. It was in my handwriting and was written October 23rd, 1856.

Q. To what does that letter refer?

Objected to.

A. It refers generally to my work on the graduation of the second division, more particularly the rock excavation, and contains more particularly a statement of my expenses, and of the engineer's estimate for the following rock sections 18, 19, 21, 22. The amount of expenses for this month of September, 1856, being $8,948.32, and the amount of my estimate on the same work $4,922. The total estimate by the engineer being $6,281, showing a loss of $2,667 in my expenses.

Q. After that letter was written what was done with it?

Objected to.

A. I gave it to George W. Bowen to copy, and to forward to the person to whom it was addressed.

Counsel for defendant now enters another objection to said letter and all testimony about it, in addition to his objection at the time the letter-book was first introduced.

Witness being shown paper heretofore marked Ex. B of complainant:

Q. In whose handwriting is this paper and what does it contain?

Exhibit objected to, and all testimony connected with it.

A. It is in my handwriting. It contains a statement of the mules, horses, wagons, which I sent to Greenwood.

Q. From whom did you get the information upon which you made the statement?

Objected to as above.

A. Laurence Devereux.

Q. When did he give you the information, and when did you make up the statement?

Objected to.

A. He gave it to me from his memorandum book, in my office near Quakake Junction, in the summer, to the best of my knowledge and belief, of 1858. I can't tell the month. I made up the statement at that time from his dictation.

Q. What has become of this book of Devereux's from which he dictated the statement?

Objected to.

A. He told me he had lost it. I don't know anything about it. It was not my book.

Q. When did he tell you this?

Objected to.

A. About the time he was on examination before this court.

Witness being shown paper heretofore marked Ex. X4 of complainant, is asked:

Q. What does this paper contain, and who made it up?

Objected to as above.

A. This paper contains charges made by me, with the price, and the details taken from Exhibit B. It is in my handwriting.

Q. You have charged here for a six mule team at the rate of four dollars per day; how much expense of keeping teams and furnishing drivers does this include.

Objected to.

A. It doesn't include anything for the keep of the team or the driver.

Q. Does that include wagon or not?

Objected to.

A. Yes, it includes the wagon and harness.

Q. What induced you, or lead you to charge four dollars a day for a six mule team, with wagon and harness?

Objected to.

A. Such a team at that time was worth from $6.50 to $7.00 a day. Devereux thought that the team was worth from $3.50 to $4.00, and as I had gone to the expense of buying mules, wagons and harness to fill the places of those that I took from my work, I thought that $4.00 a day was a moderate charge.

Q. Do the $6.50 or $7.00 include horse feed, or driver, or both, or none of them?

Objected to.

A. It includes both driver and horse feed.

Q. Were you acquainted at the time with the value or price per diem of the services of a six horse or mule team, with wagon and harness?

Objected to as above.

A. I was. I paid that when I hired, which was occasionally.

Q. From your knowledge at the time, was the charge of four dollars a day for a six mule team, with wagon and harness, reasonable or unreasonable?

Objected to as above.

Reasonable.

Q. You have made a charge here of horse hire, charging seventy cents a day for the hire of a horse, or rather at that rate for the hire of several horses; were you acquainted with prices of that sort of work, and if so, state whether the price is reasonable or unreasonable?

Objected to as above.

A. It was very reasonable. I used to pay $1.50 a day for a single horse till I could supply myself. Many of these single horses having been trained dump horses, and sent by me hence at great inconvenience.

Please state what the charge numbered 7 is, and explain it.

Objected to as above.

A. There was a five mule team sent me, with a request that I would add a mule to it to make the six, which I did. I paid $193.25 for the mule and harness.

Q. What are the other charges, for services rendered or for articles furnished?

Objected to.

A. For both; a lot of groceries, tools, grain, blankets, et cetera.

Q. Where are those?

Objected to.

A. They are not contained in Exhibit B; those I have just mentioned.

Q. What charges for services are contained in that account below item numbered 7?

Objected to.

A. No. 17; $875.00.

Q. What is hat for?

Objected to.

A. General supervision of Greenwood, and the work incident thereto.

Q. What charges are there in Exhibit X4, below item numbered 5, which are taken from Ex. B?

Objected to.

A. No. 8; I think all the rest came from Mr. Bowen.

Adjourned until Friday, February 13th, 1885, at 11 A. M.

Friday, February 13th, 1885, at 11 A. M., examination resumed in presence of respective counsel.

John H. Osborne being still upon the stand upon his direct examination, saith:

Witness being shown paper now marked Exhibit V5 of complainant, is asked:

Exhibit and all evidence under it objected to as irrelevant and incompetent.

Q. In whose handwriting is that paper, and when was it made out?

Objected to as above.

A. Part of it is in O'Brien's handwriting, who used to have charge of the store at Newmanstown; part of it in Scott's handwriting, the general manager. It is dated January, 1856.

Q. How far does O'Brien's handwriting extend?

Objected to.

A. It extends to the second 8 lbs. of rosin. The rest of it is in Scott's handwriting, with the exception of some writing and figures in the left-hand corner, which are mine.

Witness being now also shown paper heretofore marked Ex. X4, is asked:

Q. What reference have the items numbered 10, 11 and 12 in X4 to Exhibit V5, just testified about?

Objected to as above.

A. The three items, $139.99, $17.56 and $10.86, are the same in V5 as they are in X4.

Q. Which is the prior paper?

Objected to.

A. V5.

Witness being now shown paper now marked Ex. W5 of complainant, is asked:

Exhibit and all testimony under it objected to.

Q. In whose handwriting is this paper, and when was it written?

Question objected to as above.

A. In O'Brien's. It is dated March 9th, 1857.

Q. What reference, if any, has that paper to papers heretofore marked Ex. B and X4?

Objected to.

A. It seems to have reference directly to the item, the third item from the top, of $580, of March 5th, 1857, in X4, and mentions the names of some mules and horses, and from what sections they were taken. It has reference to the memoranda of the same date contained in Ex. B.

Witness being shown paper now marked Ex. X5 of complainant, is asked:

Exhibit and all evidence under it objected to.

Q. Please state what that paper is, in whose handwriting it is, and when it was written.

Objected to.

A. It is a note in my handwriting to Laurence Devereux, apprising him of some stock sent by me to him at Greenwood. It is dated March 5th, 1856.

Q. Who rendered the services for which the charge numbered 17 on Ex. X4, amounting to $875, is made, and what did they consist of?

Objected to.

A. I rendered the service by general management of the force and supply of teams for hauling the sills from Greenwood, a distance of about six miles, to Mohantongo Lock, receiving and piling and distributing these sills when they arrived at Lebanon; contracting for the boating of those sills, which were brought down the Pennsylvania canal and then over the Union to that point; for sending my clerk and bookkeeper to Greenwood to disburse moneys for the payment of the men who were getting out the sills from the tract; for carrying out the instructions received from Mr. McDermott generally; for sending these teams for the supply of wagons, harness, &c., the wagons being built by a man named Hoskin, in Philadelphia, specially adapted for this particular service; for service rendered by my bookkeeper in attending to the many details which this work involved.

Q. How often, if at all, did you go to Greenwood, during the rendering of the services, covered by the $875.00?

Objected to.

A. Once, I think, in December, 1855, and once at the close of 1856 or the commencement of 1857, I don't remember which.

Q. What reference had your going there to the services you are now testifying about?

Objected to.

A. To give me particular knowledge of its locality and the requirements of the work.

Witness being now shown paper heretofore marked Ex. U3, is asked:

Q. What did the services consist of, which are charged for in that exhibit, amounting to $6,894.14?

Objected to.

A. Specially for the finishing of the rock on sections 18 and 19, to admit, in the first place, for the track to be put through, for the supply of materials from Reading westward, for finishing these sections, the cost of which as kept by my bookkeeper and clerk, George W. Bowen, amounted to $6,894.14, extending over a period from April to October, inclusive, of 1857. (The witness now refers to Ex. P5, and states): Extending, I should judge, in the cutting on section 19, from 140 to 200 feet.

Q. Who was your clerk and bookkeeper spoken of in your answers preceding the last answer, as rendering services for you in relation to Greenwood?

Objected to.

A. George W. Bowen.

Witness being now again referred to Ex. U3, is asked:

Q. What was the condition of the work to be done, and where was it situate at the beginning of the rendering of the labor and materials charged for on this exhibit, and how did the work progress from that out?

Objected to.

A. It consisted of a mass of rock extending across the cut about 28 feet wide, from which the stratified rock had been removed, and lying between stations 965 and 967. It was worked with a gang of men on the east face, another gang on the west face, and a third gang by a slip passage intermediate between the two faces, where the material was hauled up the incline by wagons and carts, taken down about 1,000 feet, put into cars through shoots, and from thence into the embankment between stations 940 and 945.

Q. Was or was not the full width of the cut, to twenty-eight feet, taken out, or was a lesser width first cut through?

Objected to.

A. There was a width running longitudinally through the cut, of 14 or 16 feet wide, to admit the passage of the material train west. After that had been done, whatever remained in the cutting, on either side of this passage, was taken out between the passage of the trains.

Q. Which was the cheaper, the working from the two faces, with two gangs of men, or the working from these two faces, and the additional slip cut down between the two?

Objected to.

A. The working from the two faces.

Q. Which was the cheaper, the taking out the full width the first time you went through, or the taking of the part width first, and doing the rest between the passing of trains?

Objected to.

A. Working the full face of the rock was the cheapest.

Q. Why were the more expensive plans of working the additional slip between the faces and taking out the part width, adopted?

Objected to.

A. To insure the passage of the material train at the earliest possible period. Those were my instructions.

Q. From the engineer or from the chief contractor?

Objected to.

A. Both.

Q. What materials was it desired should be transported up through this half finished cut, and what materials were transported through it, and for what purpose were those materials used?

Objected to.

A. The iron and spikes for the track. That was the object in cutting this passage. There were, however, large amounts of other materials for stations, &c., &c., &c., transported besides the track materials.

Q. Were any ties transported through there?

Objected to.

A. I don't know. I should think not, the ties came from the west.

Q. What was the length of this cutting, the unexcavated part of it, when the work, charged in Ex. U4, commenced?

Objected to.

A. I gave the answer to that question as extending from station 965 to 967. In looking again at the profile its actual length was 240 feet.

Q. As near as you can tell, what was the everage depth of the unexcavated part when this work commenced?

Objected to.

A. I suppose the average depth was seven feet.

Q. Is it shown on the profile there?

Objected to.

A. No, it is not shown on the profile. The depth of the whole cutting is shown.

Q. Can you, by means of the shading on the profile, point out the shading intended to designate this cutting?

Objected to.

A. I can.

Q. Please do so?

Objected to.

A. I have stated that it extended between certain stations.

Q. Please state whether it lies at the bottom or top of the grade or where.

Objected to.

A. I don't understand the question; the length of the cutting that I gave was on the grade line of the road. This excavation ran from that point to a height of twelve feet I should judge.

Q. State whether or not the contents of the shaded portion, extending from the grade line of the road to a height of twelve feet, and extending longitudinally the distance of about 240 feet westward from station 965, is indicated in cubic feet or cubic yards, and if so, what is the amount?

Objected to.

A. It is stated on the profile in pencil to be 2172 cubic yards.

Q. Was the cut the same width at the grade line, as at a height of twelve feet?

Objected to.

A. It was not.

Q. What was the difference?

Objected to.

A. It sloped from the grade line at an angle a quarter to one.

Q. What difference would that make twelve feet above the grade line?

Objected to.

A. Six feet.

Q. A total width of how much at that height above the grade line?

Objected to.

A. Thirty-four feet.

Q. Have you made any computations to ascertain how nearly 2172 cubic yards express the contents of the rock excavated for the $6,894.14 charged in Ex. U3, and if so, state with what result.

Objected to.

A. On the basis I have stated it would amount to $3.17 per cubic yard.

Question repeated.

Objected to.

A. I have. I don't know what the meaning of the latter part of the question is.

Q. Taking seven feet to be the average height of the cutting, 240 feet to be the length of it, and 28 feet to be the width of it at its base, with an expansion of one-quarter to one, how much would the cubical contents of the cutting be?

Objected to.

A. I haven't calculated it. I can do so if desired.

Q. Taking 2,172 cubic yards as the correct contents of the cutting, at the expense charged in Ex. U3, what was the cost per cubic yard?

Objected to.

A. $3.17.

Q. Was this cutting partly on sections 18 and 19, or wholly on section 19?

Objected to.

A. The cutting commenced about ten feet west of the end of section 18; the larger portion of the material went to make up the embankment on section 18.

Q. Why in the exhibit are the charges made for labor, &c., done on sections 18 and 19?

Objected to.

A. Because the work was done on those sections. The dividing line between sections 18 and 19 was in the center of this particular cut.

Q. Why were horse expenses included in these charges in Ex. U3?

Objected to.

A. A large part of the material was handled twice.

Q. What bearing did this handling twice have on the horse work?

Objected to.

A. It doubled the expense of the horse work at least.

Witness being shown detached papers, five in number, paged continuously from one to nine, and now marked Ex. Y5 of complainant, is asked:

Exhibit and all evidence under it objected to.

Q. What do the first two pages of this exhibit show?

Objected to.

A. They show an account between Patrick O'Reilly and John H. Osborne.

Q. In whose handwriting is the account and who made it up?

Objected to.

A. It is in the handwriting of George W. Bowen and was made up by him.

Q. What does it relate to?

Objected to.

A. To the payments of certain moneys on the debtor side, and to sundry articles furnished by Mr. O'Reilly to me, on the credit side, and other moneys.

Q. What do the third and fourth pages show?

Objected to.

A. They show an account between P. O'Reilly and John H. Osborne; on the debtor side for certain articles furnished Mr. O'Reilly and certain moneys paid for him.

Q. In whose handwriting is it, and who made it up?

Objected to.

A. It is in George W. Bowen's handwriting, and was made up by him.

Q. What do pages five and six contain?

Objected to.

A. On the debtor side certain moneys paid for Mr. P. O'Reilly to various parties, including payment for my services on Camden and Atlantic R. R., and on the credit

side certain moneys received by me, for which I was indebted to Mr. O'Reilly.

Q. What is the balance shown there to be due to O'Reilly?

Objected to.

A. The balance shown here as due to P. O'Reilly is $1,098.97.

Q. What reference has that balance to the $1,096.97 mentioned in Ex. Y2?

Objected to.

A. The account, Ex. Y5, is in Mr. Bowen's handwriting, and made up by him. The balance $1,098.97 is for the same items, and the same account, less a clerical error, made by me when I drew up the paper, October 7th, 1857, Ex. Y2.

Q. What do the 7th and 8th pages of this exhibit, Y5, contain?

Objected to.

A. They contain an account between P. O'Reilly and John H. Osborne, in Mr. Bowen's handwriting, made out by him of sundry items, on the debtor side, due by Mr. O'Reilly to John H. Osborne.

Witness being shown a letter, dated Phila., June 21st, 1853, and now marked Ex. Z5 of complainant, is asked:

Exhibit and all evidence under it objected to.

Q. Please state what that is.

Objected to.

A. A letter from Richard Osborne to John H. Osborne, addressed to me, when I was serving the Richmond and Danville R. R. Co. as superintendent, in Richmond, Va.

Q. In whose handwriting is it?

Objected to.

A. It is in Richard Osborne's handwriting.

Q. Where are your letters to Richard Osborne, referred to in this exhibit, Z5, as dated on the 15th and 17th?

Objected to.

A. Richard Osborne has them if he hasn't destroyed them.

Witness being shown paper now marked Ex. A6 of complainant, purporting to be a letter from P. O'Reilly to John H. Osborne, dated Reading, June 20th, 1853, is asked:

Q. In whose handwriting is this letter?

Exhibit and all testimony under it objected to.

A. In Mr. P. O'Reilly's.

Q. The letter states near the bottom of the first page as follows: "Circumstances are in such a condition that I "feel certain you can be kept employed for the next "two years on the terms you stated in your letter to your "brother." State, if you can, from recollection, what the terms there referred to, were?

Objected to.

A. $3,000 a year and my expenses, when on his business from home.

Adjourned until Friday, February 20th, 1885, at 11 A. M.

Friday, February 20th, 1885, at 11 A. M., adjourned until Friday, March 6th, 1885, at 11 A. M.

Friday, March 6th, 1885, at 11 A. M., adjourned until Saturday, March 7th, 1885, at 10 A. M.

Saturday, March 7th, 1885, at 10 A. M., examination resumed in presence of respective counsel.

The further examination of John H. Osborne is now deferred until after the examination of Benjamin Scott.

Benjamin Scott, a witness produced for the complainant being duly sworn, deposeth and saith:

I live in the town of Eden, Lemoille County, in the State of Vermont. I know John H. Osborne, the complainant in this case. I knew Patrick O'Reilly in his lifetime. It was in 1855 and 1856. I first knew John H. Osborne in 1851, at Richmond, Va.

Q. How were you employed from April, 1855, to December, 1856?

A. I was employed by John H. Osborne on the Lebanon Valley R. R.

Q. In what capacity?

A. As general manager of the work.

Q. What work?

A. It is the Lebanon Valley between Harrisburg and Reading; the line of road between Harrisburg and Reading.

Q. What part of that line and what part of its construction did John H. Osborne have charge of?

A. It was from section 14, I think, to section 27, covering 13 miles of work. Section 14 was at Womelsdorf. The sections were numbered out from Reading.

Q. In whose name was the work done by John H. Osborne, and what part of it did he do on the 13 miles spoken of.

A. It was Tarrant & Co., so I understood. He did the whole of it.

Q. Was this the first time you had been in charge of the building of a railroad or any portion of it, if not, how much previous experience had you had?

A. I had about five years' experience.

Q. What did you have charge of here, from the time you took charge in April, 1855?

A. I had general charge of the work, men, horses, construction, derricks and shanties and what constitutes building a railroad.

Q. Did you do this work for Tarrant & Co. as contractors with the Lebanon Valley Co., or were they subcontractors; what was your information on the subject?

Objected to as irrelevant and inadmissible.

A. My information was that I was working for Mr. Osborne as sub-contractor. I knew very little on the subject. I was employed by John H. Osborne.

Witness being shown paper heretofore marked Ex. P5, is asked:

Q. What acquaintance had you with this profile during the progress of the work?

A. I carried it a good share of the time.

Q. For what purpose?

A. For the construction of the work; for reference.

Q. On how many of the sections represented on this profile, did you do work or have charge of work?

A. From 14 to 23, both inclusive.

Q. What work did you do on those sections besides graduation and masonry?

A. I did work that came under the head of extra work, outside of the contract.

Q. When you say outside of the contract do you mean outside of graduation and masonry and work properly included by those terms, or do you speak from knowledge of the contract and of what its provisions were?

Objected to.

A. I knew nothing about the contract. I mean work outside of graduation and masonry and work properly included by those terms which would naturally come under the head of contract.

Q. Did you do extra work or work outside of graduation and masonry, upon your own responsibility or upon orders?

Objected to.

A. Upon orders.

Q. Always upon orders or generally upon orders?

Objected to.

A. Always upon orders. I never did any work without an order.

Q. How did you get these orders and from whom?

Objected to.

A. Stack, the resident engineer.

Q. What account, if any did you keep of this extra work?

Objected to.

A. I kept a daily account.

Q. Consisting of what? What did you enter in the account?

Objected to.

A. It was day labor with a percentage.

Q. What did you write down on your account book, to show when the work was done, where it was done, and what it consisted of?

Objected to.

A. It was mostly roadways and trestle work.

Question repeated.

Objected to.

A. It was a regular account that I kept of extra work, the same as you would keep any other account. The character of that work was day labor.

Q. Where is the book in which you kept this account of extra work?

Objected to.

A. I couldn't tell you, sir.

Q. What became of it?

Objected to.

A. I left it at Mr. George Myers' store, in Wilmington, North Carolina. That was 1861, after Fort Sumpter was fired on. I have never seen it since. I went to Wilmington in 1866, to see what I could find of my effects. The gentleman that I left the books with—there was quite a number of books—was dead, and there weren't any books to be found; there weren't any books about the store. From 1861 to 1866 I was in Ohio and Pennsylvania. I came up in June, 1861.

Q. What memorandums, if any, did you keep in this book of the places where the work was done?

Objected to.

A. I kept a memorandum of all the work. That book was a diary; a large 400-page book, in the form of a ledger.

Q. In the memorandums in this book how did you designate the places on these sections where you did the extra work?

Objected to.

A. By the stations; 100-feet stations.

Q. Where are those stations marked on profile, Ex. P5?

Objected to.

A. Right along the bottom.

Q. What return of this extra work did you make to Mr. Jno. H. Osborne?

Objected to as above.

A. He drew it off of my book; that is, I suppose he did.

Q. When, if at all, did you show him the account kept in this book?

Objected to.

A. Why, it was in the fall of 1856, if my memory serves me right. I know it was before I left.

Q. What did it then amount to, to the best of your recollection?

Objected to.

A. Well, I should say it was $8,000 or $9,000; somewhere between $8,000 and $9,000.

Q. What, if anything, did Mr. Osborne say about the amount of it?

Objected to.

A. I speak from memory; the general conversation I couldn't say. He thought it was a pretty large amount.

Q. Was he surprised at the amount, or was it about what he expected?

Objected to.

A. I couldn't say.

Q. What synopsis, if any, kept by you in the book, left by you at Wilmington, N. C., did you make for or leave with Mr. Osborne?

Objected to.

A. I couldn't tell you anything about it. I wouldn't state way back that far. I didn't charge my memory with such things.

Witness being shown paper heretofore marked Ex. A4, is asked:

Q. In whose handwriting is this paper?

Objected to.

A. Not mine.

Q. What does the paper contain?

Objected to.

A. I should say those charges would come under the head of that work. Some of them look smaller than they did?

Q. What work?

Objected to.

A. I speak from memory. The Lebanon Valley work.

Q. Within or without graduation and masonry?

Objected to.

A. I should say without.

Q. This Exhibit A4, the first item of it, is "to sundry "work on Messimer's Roads, from Oct. 17, '55, to April 26, 1856, $1,252.85;" what extra work, if any, was done on Messimer's Roads?

Objected to.

A. There was a large amount of extra work done there. We had two roads there, one under the bridge and one at grade. By under the bridge, I mean it was under the arch. We had three arches there, across that stream, so as to get to this man's mill.

Q. Was any extra work done at Mandebach's road or bridge or water trunk?

Objected to.

A. Yes, sir; there was.

Q. Look at the Exhibit A4 and state, if you can, if extra work was done at the stations, on the trestlings and bridges mentioned in items numbered in pencil from 5 to to 20, exclusive of 13?

Objected to.

A. These were temporary trestles, and came under the head of extra work.

Q. What were these temporary trestles made for and used for?

A. For the accommodation of the public.

Q. During what time?

Objected to.

A. The time of the construction of the work.

Q. After a road crossing had been finished and given to the public, what extra work, if any, was to be done on it?

Objected to.

A. It was a temporary matter all the while through, we were doing the work.

Q. Whose business was it to keep these crossings in condition, so that the public travel shouldn't be interfered with during the progress of the work?

Objected to.

A. I used to hold the engineer's responsible.

Q. Was the work done, in keeping the crossings in order, after they had been cut through below grade, or filled

up or cut through to grade, within graduation and masonry, or was it extra work?

Objected to.

A. Extra work.

Q. Was the work at a road crossing, below the grade of the railroad, necessary to provide a passage for the public while the passage intended for permanent use by the public was filled with the centering of the arch spanning it, extra work or not?

Objected to.

A. Yes, sir; it would come under the head of extra work because you would have to make a temporary road at grade for the passage of the travel while that road was blocked up.

Q. Was the temporary tressling on which you built your temporary track over a road crossing below grade, extra work, or was it within graduation and masonry?

Objected to.

A. I used to get an order from the engineer for all trestles.

Q. Was the work necessary to build roads for your own use to facilitate your hauling stones for bridges, extra work, or within graduation and masonry?

Objected to.

A. It was extra work; it didn't come under the head of graduation and masonry.

Q. What was the quality of the rock which was excavated in the cuttings on these sections where you directed the work?

Objected to.

A. We had one or two sections that we made up our mind would beat us.

Q. What was the quality of the rock?

Objected to.

A. I used to call it "nigger heads."

Q. What difficulty, if any, did it give you in the excavation of it?

Objected to.

A. When we struck one of those "nigger heads," a hard substance, it took sixty or seventy drills to a foot; when

we would pass through that, one drill would run five or six feet.

Q. What influence had this hardness upon the work necessary to excavate the rock?

Objected to.

A. We had to enlarge the drills in order to get sufficient hold.

Q. How long would a drill last in this hard rock?

Objected to.

A. I don't know. You can be your own judge; sixty or seventy drills to a foot. Sometimes they wouldn't last three blows, and at other times longer.

Q. How wide were the drills?

Objected to.

A. Well, I believe we increased them up to very near three inches; an inch and a half we started with.

Q. Why was it necessary to make them so wide?

Objected to.

A. To get sufficient sized holes for a sufficient volume of powder.

Q. Which way would the drill wear in use?

Objected to.

A. It would wear the sides and face all at the same time, general wear.

Q. How many blacksmiths did you employ to keep the faces of these drills in order?

Objected to.

A. We used to have a couple of blacksmiths on section 18, at the end of 19, all in one cut.

Q. Were these ordinary blacksmiths or blacksmiths skilled in this kind of work?

Objected to.

A. There was one of them, I believe, who went on the roll about a dollar higher a day than the others, getting a dollar higher a day.

Q. Why did you pay this man this much extra?

Objected to.

A. Because he could make the drills stand longer than the rest of them. He had a secret of tempering them, something he used in the water; I don't know what. I

could tell you without questioning a little more about that rock. It was full of seams and wouldn't hold powder. If you put off a charge, in a great many instances it would pass out through the seam, and do no execution in throwing out the rock. That is quite a serious objection after you put down a ten or fifteen foot hole.

Statement of witness objected to.

Q. Was the character of this rock expected or unexpected?

Objected to.

A. Well, it came under the head of unexpected.

Q. When you first began excavating, for instance at the junction of section 18 and 19, what was there in the rock you first took out to indicate the seams and hardness that you found there?

Objected to.

A. There wasn't anything on the top surface more than usual.

Q. Did you have any conversation with P. O'Reilly during the progress of this work, and if so, what?

Objected to.

A. I had different conversations with him.

Q. Did you buy any woodleave for him?

Objected to.

A. I so understood it.

Q. State what took place between you and Patrick O'Reilly in relation to woodleave?

Objected to.

A. We had a few words about the woodleave. The conversation first took place between Mr. Osborne and myself.

Objected to.

Q. What did Mr. Osborne direct you to do; what did he say to you?

Objected to.

A. He wanted that I should purchase some woodleave for P. O'Reilly. I did it.

Q. What did P. O'Reilly say to you about it after you had purchased it?

Objected to.

A. He gave me to understand that I had paid too much. I so took it.

Q. What reply did you make to that?

Objected to.

A. As near as I can recollect I told him that he had better buy his own timber.

Q. Did you buy any more for him after that?

Objected to.

A. Not right away; after some little time.

Q. What conversation did you have with him about what you last bought?

Objected to.

A. He said that he was satisfied with the purchase I had made, and if I could buy some more as well as the former purchases, he would like to have me do so; but he made the remark that it was an unmerciful price to pay for woodleave.

Q. Did you comply with his request, or refuse to do so?

Objected to.

A. I bought some for him.

Q. Did you consent to act at once, or did you at first refuse?

Objected to.

A. I believe I told him I would buy some for him, if I could find it.

Q. What, if anything, did you say to him at this time about his dissatisfaction with the prices you had paid at the former purchase?

Objected to.

A. If my memory serves me right, I told him it was mighty little satisfaction to do a person a favor and then be found fault with.

Q. What reply did he make to that?

Objected to.

A. He gave me to understand that it was nothing personal.

Q. How much did he pay you for buying this woodleave?

Objected to.

A. O, nothing.

Q. What, if anything, did Patrick O'Reilly say to you at this time about trying to buy woodleave himself on the line of this road, without success?

Objected to.

A. I don't think he ever said anything to me about it.

Q. When were these conversations with P. O'Reilly about woodleave?

Objected to.

A. During the summer of 1856.

Q. What did he want of the wood that he was going to take off of this woodleave?

Objected to.

A. Cross-ties.

Q. For what road?

Objected to.

A. The Lebanon Valley R. R.

Q. Whose time were you on when you bought this woodleave, and who was paying you for that time?

Objected to.

A. Mr. Osborne.

Q. Were you at any expense in buying this woodleave, and if so, what?

Objected to.

A. I used to get a man to go out with me who could speak German. I used to pay him three dollars a day. If we spent a half a day, I paid him in that ratio. He was afterwards agent of the company.

Q. If you built a road, not for the use of the public, but exclusively for the use of Mr. Osborne, a temporary road to carry stones and mortar over to a bridge you were building, would that be extra work or within the contract?

Objected to as having been already asked and answered before the adjournment for dinner.

A. That would be within the contract.

Q. When I asked you this morning, was the work necessary to build roads for your own use to facilitate your hauling stones for bridges extra work or within graduation and masonry, why did you answer then it was extra work; it didn't come under the head of graduation and masonry?

Objected to.

A. It does come within the head of graduation and masonry.

Q. Why was it, in making your answer this morning, that you stated that it did not come within graduation and masonry?

Objected to.

A. I did not so understand that question. You had reference to some trestles before that.

Q. What experience, prior to your experience on this road, had you had to teach you what was comprised within the terms of graduation and masonry?

Objected to.

A. I had about five years' experience.

Q. On what road?

Objected to.

A. The Richmond and Danville, running out of Richmond, Va.

Q. In what capacity were you employed there?

Objected to.

A. As an agent for the company, for wood and material. I purchased all the material for the depots. I was general purchasing agent for the company.

Q. What did you have to do with the graduation and masonry?

Objected to.

A. Not anything.

Q. What experience have you had since the building of the Lebanon Valley R. R. in the construction of railroads; where did you go next?

Objected to.

A. I went on to the Ohio and Mississippi road, between Cincinnati and St. Louis.

Q. How long were you on this road, and in what capacity?

Objected to.

A. I was general manager of one hundred and four miles; general manager of construction. I was there nearly two years in 1857 and 1858.

Q. Prior to your Lebanon Valley experience, what rail-

road experience, if any, had you other than that on the Richmond and Danville?

Objected to.

A. I furnished 80,000 ties for the Southside R. R. between Farmville and Lynchburg.

Q. Were you on the Norfolk and Petersburg; if so, when and in what capacity?

Objected to.

A. Yes, sir. It was in 1854. I was contractor for ten miles, sections 9 and 10.

Q. Chief contractor or sub?

Objected to.

A. Chief contractor. I took it directly from Bill Mahone, who was chief engineer.

Q. As chief contractor of these ten miles what did you do?

Objected to.

A. Graded. There was no masonry or track laying.

Q. How long were you there?

Objected to.

A. If my memory serves right, some eight or nine months.

Q. When you left the Ohio and Mississippi, where did you go?

Objected to.

A. To the Nashville and Chattanooga, in Tennessee.

Q. In what capacity and for how long?

Objected to.

A. I was four months; putting up station houses and water works, laying pipes.

Q. Where did you go next?

Objected to.

A. I ballasted the road between Alexandria and Leesburg, called the Hampshire and Louden R. R., in Virginia. The road was somewhere about thirty miles long.

Q. When did you finish this up?

Objected to.

A. In 1859.

Q. Where did you go next?

Objected to.

A. To Wilmington, N. C., on the Wilmington, Charlotte and Rutherford R. R.

Q. In what capacity and for how long a time?

Objected to.

A. I stayed there till the war broke out. I did the grading and trestle works as manager.

Q. Where was this book in which was kept the account, mentioned in Ex. A4?

Objected to.

A. I had it with me.

Q. Did you use it for any purpose during this time?

Objected to.

A. Always used it in all my transactions, as a memoranda.

Q. What use were you making of it on the Wilmington and Charlotte?

Objected to.

A. I used this book right along, always used it as a diary.

Q. How did you keep the extra work on the Lebanon Valley, the account of it, in this book?

Objected to.

A. Every day's occurrence, and then used a couple of sheets as a ledger in the latter part of the book, and if it had been necessary to have any more, I had the leaves right there.

Q. The entries of extra work on the Lebanon Valley, made in this book, were they made daily, weekly or monthly?

Objected to.

A. Daily, in the evening.

Q. Of what work?

Objected to.

A. All the work through the day.

Q. What memoranda did you make to show dates?

Objected to.

A. I put down the dates themselves.

Q. What memoranda did you make to show the character of the work and the section or station at or on which it was done?

Objected to.

A. I didn't keep it in detail every day. The character of the work was general.

Q. Consisting of what?

Objected to.

A. Grading, earth work, stone work, and so forth.

Q. Any trestling?

Objected to.

A. No, sir; not that came under the head of the contract; the trestling was all extra work.

Q. Then did you keep the contract work as well as the extra work in this book?

Objected to.

A. Yes, general entry, and the extra work was checked off at night, and the other remained as it was.

Q. In this last answer that you have made were you referring to work on the Lebanon Valley or on the North Carolina road?

Objected to.

A. Lebanon Valley.

Q. Did Mr. Osborne know that you were keeping this extra work on the Lebanon Valley?

Objected to.

A. I don't think he did, sir.

Q. When did you first apprise him of it?

Objected to.

A. In the summer of 1856.

Q. Who was chief engineer of the Lebanon Valley while you were under John Osborne?

Objected to.

A. Mr. Richard Osborne.

Q. Were any teams taken away from you during the progress of the work, to send up to Susquehanna; and if so, for what purpose?

Objected to.

A. I understood to haul ties for Mr. O'Reilly.

Q. What teams were they?

Objected to.

A. Mule teams.

Q. Were these teams returned while you were there?

Objected to.

A. Yes, sir.

Q. In what condition?

Objected to.

A. They weren't looking very well.

Q. How many and what sized teams were returned?

Objected to.

A. I couldn't say whether one or two or three or four. I had no use for them, and couldn't say. They had seen hard times.

Q. Do you know the size of the teams?

Objected to.

A. They started off with four and six mule teams, I think.

Q. What were the team or teams which you saw returned from the Susquehanna worth, for sale or use, when they were returned?

Objected to.

A. They weren't worth much for sale, in my estimation. It was a very hard matter to get the use in there.

Q. Where did you go after you left North Carolina in 1861?

Objected to.

A. To St. Mary's, Elk county, Pa., on the Sunbury and Erie R. R.

Q. For how long and in what capacity?

Objected to.

A. For about five months in taking out a rock cut.

Q. For what period and in what capacity were you on the Pittsburg, Ft. Wayne & Chicago?

Objected to.

A. I was there about seven years, on construction, straightening the lines and relaying track.

Q. Who was the chief engineer of this Pittsburg & Ft. Wayne R. R?

Objected to.

A. John B. Jervis, of Rome, N. Y.

Q. Where did you go after this work?

Objected to.

A. A piece of road from a place called Clinton to Mas-

silon, a branch about twelve miles long of the Pittsburg, Ft. Wayne & Chicago.

Q. In what capacity and for how long?

Objected to.

A. I did a large portion of the grading and all of the tracklaying, as manager.

Q. How long?

A. Ten or twelve months.

Q. At what time and for how long were you engaged on the Western Maryland R. R.?

Objected to.

A. It was in the fall of 1870 and the winter of 1871.

Q. In what capacity?

Objected to.

A. As tracklayer.

Q. Where is the road and how long is it?

Objected to.

A. It was Mechanicstown, where I did the work; in Maryland at the foot of the Blue Ridge; in the central part of the state.

Q. Who was the chief engineer of that road?

Objected to.

A. Richard Osborne.

Q. Since 1861 how much of your time has been occupied and given to railroad construction and railroad work in one way and another?

Objected to.

A. I wound up in 1873 on railroads.

Q. In how many States have you done railroad work?

Objected to.

A. I believe in thirteen of them. I have lived in thirteen of them, and I have done work wherever I lived.

Q. When were you on the Allegheny Valley?

Objected to.

A. 1871, 1872 and 1873.

Q. Where is that road?

Objected to.

A. Following the Allegheny river from Pittsburg up to Oil City.

Q. Were you there as manager or contractor?

Objected to.
A. As contractor.

Adjourned until Monday, March 9th, 1885, at 8 A. M.

Camden, Monday, March 9, 1885, at 8 A. M., examination continued in the presence of respective counsel.

It is agreed that the examination shall be continued before the stenographer, A. E. Irwin, and that the witness need not sign his name.

Benjamin Scott, being still on the stand and being cross-examined, saith:

By Mr. Voorhees—
Q. Did you ever see the contract of Osborne and O'Reilly?
A. No, sir.
Q. Who was the engineer under whom you worked?
A. Stack.
Q. Can you give the first name?
A. I can't tell you.
Q. Do you know whether it was Richard?
A. I can't tell; we just called him Stack.
Q. Did you do all the work that you have spoken of "as extra work" under his direction.
A. Yes, sir.
Q. Who built the arches and stone work at Messimer's bridge?
A. Campbell had the contract.
Q. Can you tell what his first name is?
A. I can't tell. He didn't finish it though.
Q. Did Mr. Osborne build any other bridges on his division?
A. Yes, sir; we had seven or eight arch bridges.
Q. Was Mr. Osborne there continuously?
A. No, sir.
Q. Can you tell where he was engaged?

A. He was superintending this Camden and Atlantic road at that time; that is, after I got there on the work.

Q. Did he continue it on the Camden and Atlantic road all the time you were on the work?

A. I think he did.

Q. Did you keep a day-book of all the work you did there?

A. A general memorandum.

Q. What was the character of that memorandum?

A. If I ordered certain things from certain sections I noted them down; if I moved a derrick from one point to another, I noted that down, and all outside of the foreman that was working the gang, anything that took place and any extra work I had from the foreman every day.

Q. You had extra work from the foreman?

A. Yes, sir; and the names were put in.

Q. Was this book kept as a day-book or as a diary?

A. As a diary of what we are doing; it was for my own protection.

Q. It was not then kept as a book of regular account with extra charges?

A. No, sir; except this extra work I kept.

Q. That was what was reported to you by the foreman?

A. Yes, sir.

Q. It showed what work you were doing each day?

A. Yes, sir.

Q. Did it tell the character of the day, &c.

A. No, sir.

Q. Whether it was clear or cloudy?

A. No; I didn't bother about that, I guess.

Q. Who went with you to buy the woodleaf.

A. A man that was agent for the company afterwards, at Myerstown. He was running the foundry at Myerstown, a Donner, or Doner or something of that kind. I found him as agent of the company as I passed over the line.

Q. Was it Donelly?

A. It has gone from me, Weighly is the only name can recall.

Q. Who paid him for the expense of going with you?

A. I don't know.

Q. Did Mr. O'Reilly pay you for any of those expenses?

A. No, sir.

Q. You do not know who did?

A. No, sir; I told him Mr. Osborne would pay him the $3 a day, or I would; but I never paid him.

Q. You do not know whether he got any pay?

A. I don't; I handed the amount, that is, the number of days, in to Mr. Osborne.

Q. Have you talked about this business any since you left there?

A. No; I never thought of it.

Q. Your testimony then is simply from your recollection of that time?

A. That's all.

Q. Have you talked any about it recently to anybody?

A. No, sir.

Q. Did not you talk with Mr. Osborne about it before you went on the witness stand?

A. Not a word about it. I didn't know anything about it until I came down to Mr. Osborne. On my way he said, "Would not you like to ride down to the city tomorrow?"—that is in January. I said, "Yes, I didn't care." I came down. The first I knew he took the ferry and came across, and never said a word until he landed in Mr. Drake's office.

Q. Then you talked about it with Mr. Osborne and Mr. Drake.

A. Yes, sir; that is the first intimation I had about it.

Q. That was in January last?

A. Yes, sir. I told him I didn't know anything about it; I had nothing but memory to go from; the confederacy used up all the accounts I had.

Q. When did you change your mind about the building of roads for carting stone as being extra work?

A. I didn't understand the question; he was speaking about the roads, this trestle work, where the traveling road went under the railroad; I thought he had reference to something about this road having a right to use that road, and I made the statement, we took the same right

the public did afterwards, I so understanding it in relation to this roadway; but if the question was from the quarry to get it on to the work I could have soon told him about it. I can tell you enough of it now with twenty-five years' experience afterwards.

Q. Most of your experience in building railroads was after this work on the Lebanon Valley road?

A. Yes, sir; twenty-five years or thirty years.

Q. Did you know who paid for that woodleaf?

A. No, sir; I didn't.

Q. Did you charge Mr. O'Reilly with it?

A. No, sir.

Q. You did not charge him for any services in buying woodleaf?

A. No, sir.

Q. How much time did you take to buy woodleaf?

A. I don't know. I know I drove one day about seventy miles to some lake above Lebanon.

Q. How many days did you drive altogether?

A. I can't tell. When it came handy and I was going to make up to some point where my business called me, and I learned where a certain line of woodleaf could be bought, whenever it was handy for me to call in that direction, I said, can you go with me to-day, I have an hour to spare?

Q. You took it at odd times?

A. Yes, sir.

Q. You never made any charge to Mr. O'Reilly for it?

A. No, sir; only they paid me for my services—Mr. Osborne did.

Q. You never made any return to Mr. O'Reilly for what you did?

A. No, sir.

Q. And only returned the expenses of this man that went with you?

A. That's all.

Q. How many days did he go with you altogether?

A. I can't tell; I have not the least idea; he went times enough to buy a lot of woodleaf though.

Q. How big a lot did you buy?

A. I guess seventy or eighty acres, I should judge, to come within bounds.

RE-DIRECT EXAMINATION.

By Mr. Drake—

Q. Were these orders given to you by Mr. Stack relative to extra work, verbal or written orders?

A. Written orders.

Q. What did you do with them?

A. I kept them.

Q. Where are they now;

A. In the Southern Confederacy, I suppose.

Q. Were they left with your books down at Wilmington, North Carolina.

A. Yes, sir.

By Mr. Voorhees—

Q. Were they orders made by him as engineer?

A. Yes, sir.

Q. For the carrying on of the work of the construction of the road?

A. Yes, sir; I would not do anything without a written order.

By Mr. Drake—

Q. You would not do any extra work without a written order you mean?

A. No, sir.

By Mr. Voorhees—

Q. All the work you did on the road was under the direction of the engineer?

A. Yes, sir.

By Mr. Drake—

Q. Did you have any written orders for the work under the contract?

A. No; it was left to my judgment.

By Mr. Voorhees—

Q. All the work was done under the supervision of the engineer?

A. Yes, sir; of course.

Adjourned.

Adjourned until Friday, March 13th, 1885, at 11 A. M., at which time the examination was resumed in the presence of respective counsel.

John H. Osborne being still upon the stand upon his direct examination, deposeth and saith:

Q. How long have you known Benjamin Scott, the witness who was on the stand at the two previous meetings?

Objected to.

A. I think since 1851; I don't remember the precise date.

Q. How long was he employed by you on the second division of the Lebanon Valley road?

Objected to.

A. Eighteen or twenty months.

Q. What did you know and what do you now know about a book kept by him, in which he entered the record of his work?

Objected to.

A. I never knew anything about the book.

Q. What return did he make to you of extra work done under the contract of Tarrant & Co. with P. O'Reilly?

Objected to.

A. He gave me a book containing the extra work itemized, just before he left.

Q. What was the amount of that return and what was the date of his leaving?

Objected to.

A. My impression is that the amount was about $9,000. He left about November, 1856. I don't remember the precise date.

Witness being now shown paper heretofore marked Ex. A4, is asked:

Q. What reference have the items in this exhibit to the

return made to you by Scott for extra work under the contract?

Objected to as improper and irrelevant.

A. These are some of the items in that account.

Q. Where is the book containing all of the items returned to you by Scott?

Objected to.

A. I do not know.

Q. When was it given to you by Scott, and when did you last see it?

Objected to.

A. He gave it to me just before he left, and my impression is that when I moved from Philadelphia to Morrisville I had the book.

Q. Have you recently looked for it or tried to find it?

Objected to.

A. I have looked for it repeatedly, together with another paper which I have missed, and I have never been able to find either of them.

Q. Has the other paper anything to do with this suit, and if so, what is it?

Objected to.

A. The contract of Tarrant & Co. with P. O'Reilly. I have never looked amongst Mr. Browning's papers, but I have no recollection of taking the book to him. The contract I did take to Mr. Browning, and upon Mr. Browning returning my papers to me, I wrote to him immediately upon not finding it amongst them. I have never seen it since.

Q. What did this contract that you have spoken of relate to?

Objected to.

A. The sub-contract for the graduation and masonry of the second division of the Lebanon Valley R. R.

Q. What did the book that Scott gave you contain?

Objected to.

A. It contained an itemized account of what he stated to be extra work, mentioning the station, the character of such work, and the dates between which such work was done.

Q. In whose handwriting was it?

Objected to.

A. In Benjamin Scott's.

Q. To what is owing the difference in amount of the extra work, as returned by Scott, and as charged on the extra bill, Ex. A4?

Objected to.

A. I excluded everything which, in my judgment, was either not extra work, or what had been placed in my estimate by the engineer.

Q. In making up Ex. A4, what items found in Benjamin Scott's book did you exclude from A4?

Objected to.

A. As far as my memory serves me, the centering for the bridges and culverts, the timber, iron, carpentering work of some bridges on the road and over the railroad, the cost of the cement and the covering of the arches with cement, the pointing of Mandebach's bridge with cement. There may be other items, but I have forgotten them.

Q. Where are the numbers, headed page and item, in pencil on the left hand margin of Ex. A4, taken from?

Objected to.

A. Taken from Scott's book which he left me. This answer refers particularly to the page. I don't remember about the item.

Q. What items have you included in that bill?

Objected to.

A. The metaling on some of the level crossing roads, keeping them in repair from the time they were first constructed during the progress of the work; the trestling for the purpose of passing the common traveled road under the railroad.

Q. During what time?

Objected to.

A. During the progress of the work.

Q. Was the common traveled road, passed under the railroad during the progress of the work, a permanent or temporary road?

Objected to.

A. In nearly all cases a permanent road, except where

the road may have been swung for the convenience of the contractor to construct the road, as was the case in some cases, notably under the arch bridge at Messimer's.

Q. Were you entitled to charge for putting a permanent public road under the railway as extra work, or only for the temporary road which was used by the public while the permanent road was being constructed or awaiting construction?

Objected to.

A. I was entitled for all work done, both on the public road and the temporary road, other than the cubic yards which such roads contained, for all labor in maintaining and repairing such roads.

Q. What other extra work is charged for in this bill besides metaling, trestling, and the extra work on roads spoken of?

Objected to.

A. There is a charge here for a water tank at Mandebach's; I can't call to mind the various items of detail. Those that I have given are the principal ones.

Witness being shown paper heretofore marked Ex. P5, is asked:

Q. Can you extend your answer by reference to this profile?

Objected to.

A. There was one of the bridges between 919 and 1047, I cannot particularize which, where the embankment was put over the crown of the arch, before the order was given by the engineer to cover the arches with cement, from which the embankment was removed, the extrados of the arch was cleaned off before it was cemented; after that had been done the embankment was put back again in layers. That is the only item that I can remember.

Q. How much of the work just spoken of is charged in this bill, A4, as extra work?

Objected to.

A. The whole of the embankment and its reformation.

Q. Can you point out the item in A4 in which it is charged?

Objected to.

A. I cannot. It was in one of the upper sections, I don't remember which.

Q. In work of this sort are you acquainted with the percentage which the cost of extra work usually bears to the cost of the work for the graduation and masonry under the contract?

Objected to.

A. It is usually a small percentage; I can't state exactly what that is now from memory, but I have always allowed such small bills on all the work I have had charge of.

Q. How have you become acquainted with the proportionate cost of the extra work to the whole work?

Objected to.

A. It is usual when work is let on a schedule of prices to allow the contractor for such items as he may have done outside of his contract in graduation and masonry.

Q. How do you know this; what experience have you had which would qualify you to express an opinion on this subject?

Objected to.

A. I was principal assistant on the Northern New York road, extending forty miles between Malone and Rouse's Point. I built and finished up twenty-five miles on the South-Side road in Virginia. The other lines I was on were not on schedule prices.

Q. Is this proportion or percentage of cost of extra work in this bill Ex. A4, as compared with the whole cost of the division, a small or large percentage?

Objected to.

A. A small percentage.

Q. The work of getting out ties, purchasing woodleave, getting out splice plates, and getting them on the line of the road, is not that also extra work?

Objected to.

A. It is not extra so far as the graduation and masonry is concerned. The last named was work entirely separate and independent of the graduation and masonry, and done in my individual capacity.

Q How was the work in Ex. A4 done?

Objected to.

A. That was done under the style and title of Tarrant & Co., and is directly connected with the graduation and masonry.

Q. Could the graduation and masonry have been performed without the extra work charged for in Ex. A4, or could it not?

Objected to.

A. It could not, unless the work in this extra bill was done by some one.

Q. Could the work, necessary for graduation and masonry, have been done without the doing of the extra work which you have spoken of as having done individually?

Objected to.

A. It could; nearly all of that work of which you have asked me had reference to the track.

Q. How much of the time during the examination and cross-examination of B. Scott were you present?

Objected to.

A. I was present during the examination only.

Q. Who paid him for the service rendered by him in the purchase of woodleave, and his expenses in so doing?

Objected to.

A. George W. Bowen paid him, by my direction.

Q. How much did he pay him?

Objected to.

A. His expenses, the expense he incurred, and $50 as some compensation for the extra duty that devolved upon him in purchasing this woodleave, by my instructions from Mr. O'Reilly.

Witness being shown paper now marked Exhibit B6 of complainant, is asked:

Q. What is that bill, and in whose handwriting is it?

Question and exhibit, and all evidence under it, objected to as irrelevant.

A. It is a bill for sundries to the Lebanon Valley R. R. Co. by Tarrant & Co., in George W. Bowen's handwriting and endorsed by him.

Q. What part of it, if any, is chargeable to P. O'Reilly?

Objected to.

A. $68.70.

Q. Explain on what principle it is so chargeable?

Objected to.

A. It was sent to the chief engineer, R. B. Osborne. He paid on that bill $117.30, and instructed George W. Bowen to look to Mr. P. O'Reilly for the balance.

Witness being shown paper heretofore marked Ex. N, is asked:

Q. When was that letter received by you, and whom was it from?

Objected to.

A. Early in Nov., 1855. It was from Mr. P. O'Reilly in reply to a letter addressed to him by me, which is stated here to be the first.

The attention of witness is directed to p. 144 of letter book, Ex. M3, and is asked what he finds there.

Objected to.

A. I find a copy of a letter here to Mr. O'Reilly, dated November 28th, 1855, in which I apprise him that I have not received a reply to my letter of the 6th, though I was led to expect one.

Witness is directed to turn to page 156 of M3, and is asked what he finds there.

Objected to.

A. This is a copy of a letter to M. E. Lyons, associate engineer, dated January 23rd, 1856, containing a statement of the sections from 16 to 23 inclusive, and stating that 100 per cent. increase on the estimates would not cover the loss I had sustained.

Q. Is that the same as Ex. H5?

Objected to.

A. It is.

Witness is directed to turn to p. 239 of M3, and says:

Objected to.

This is a copy of a letter to Mr. P. O'Reilly, dated Oct. 23rd, 1856.

Witness is referred to p. 161 of M3, and asked what he finds there.

Objected to.

A. A copy of a letter to M. E. Lyons, dated February

1st, 1856, showing the cost of the powder used on 18 and 19 for seven months.

Adjourned until Friday, March 20th, 1885, at 11 A. M.

Friday, March 20, 1885, examination resumed in presence of respective counsel.

John H. Osborne being still upon the stand upon his direct examination, saith:

Witness being shown paper heretofore marked Ex. T4, Ex. U4, and Ex. V4, and being also shown paper now marked Ex. C6 of complainant, being an agreement dated April 1st, 1857, between Patrick O'Reilly and John H. Osborne of the one part, and George W. Bowen of the other part, acknowledged before William B. Schoener, and recorded in the Recorder's office of Chester County, in Miscellaneous Deed book No. 9, page 367.

Q. Please state whether or not the three exhibits heretofore marked and the exhibit now marked refer to the same or different transactions.

Question and above exhibit and all testimony connected therewith objected to as incompetent, irrelevant and inadmissible.

A. They refer to the same transaction.

Q. In whose handwriting is the Ex. T4, including the signature and body of the letter?

Objected to.

A. In P. O'Reilly's.

Q. In whose handwriting is the Ex. U4, and by whom is it signed?

Objected to.

A. In the handwriting of George W. Bowen and signed by him.

Q. In whose handwritings are the canceled endorsements P. O'Reilly and Jno. H. Osborne on the backs of the three notes embraced in Ex. V4?

Objected to.

A. In P. O'Reilly's and John H. Osborne's.

Q. Did you see those endorsements before they were canceled?

Objected to.

A. I did.

Q. Do you know William B. Schoener and Joseph Kendall, the witnesses to this agreement, Ex. C6?

Objected to.

A. I was personally acquainted with Wm. B. Schoener. I don't remember Joseph Kendall. It was a great many years ago.

Q. What has become of Schoener?

Objected to.

A. I don't know.

Q. Where did they live at the time of the execution of Ex. C6?

Objected to.

A. In Reading, Penn'a.

Witness being shown paper now marked Ex. D6, is asked:

Q. What is that?

Exhibit and all testimony under it objected to as above.

A. This is a copy of C6 handed me at the execution, or immediately after the agreement, C6, by Geo. W. Bowen.

Witness being shown paper now marked Ex. E6, is asked:

Exhibit and all testimony under it objected to.

Q. By whom was this made up and what transaction does it refer to?

Objected to.

A. It was made up by me, and refers to this transaction.

Q. What are the three items of cash, in Ex. E6, of $500, $250 and $750 respectively, paid on account of or for?

Objected to.

A. They were the payment of the three notes as contained in Ex. V4.

Q. By whom was the cash, $1,300, paid?

Objected to.

A. By me.

Q. When was this account, Ex. E6, made up by you?

Objected to.

A. It was made up about the time I closed up my work

on the Lebanon Valley, with a view to some settlement between Geo. W. Bowen and myself in 1858.

Witness being shown paper now marked Ex. F6, is asked:

Exhibit and all testimony under it objected to.

Q. Please state what that is.

Objected to.

A. It is a letter from my counsel, P. Frazer Smith, to me, relative to the character and design of the agreement between John H. Osborne, P. O'Reilly and Geo. W. Bowen, marked Ex. C6. The letter is dated Oct. 13, 1856.

Witness being shown paper now marked Ex. G6, is asked:

Ex. and all testimony objected to.

Q. Please state what this is.

Objected to.

A. This is a letter of P. Frazer Smith to John H. Osborne, dated Dec. 5th, 1856, and details the authorizing of the sale and settlement between O'Reilly, Osborne, Bean and Bowen, as I understand it.

Q. In whose handwriting are these two letters, F6 and G6?

Objected to.

A. In Mr. Frazer Smith's.

Witness being shown paid check of John H. Osborne's to the order of P. Frazer Smith, dated March 26th, 1861, and now marked Ex. H6 of complainant, is asked:

Ex. and all testimony under it objected to.

Q. By whom was that check drawn; to whom and for what purpose?

Objected to.

A. It was drawn by me to the order of P. Frazer Smith for professional advice in the matter of P. O'Reilly, Geo. W. Bowen, Nicholas Bean and myself, in regard to this farm mentioned in Ex. C6.

Q. In whose handwriting is the endorsement P. Frazer Smith on the back of that check?

Objected to.

A. In Mr. Frazer Smith's.

Q. What services were rendered by P. Frazer Smith,

under the agreement contained in C6, entitling him to the payment of the $113.62, paid him by check Ex. H6, in addition to the payments which he acknowledges the receipt of in Ex. G6 ?

Objected to.

A. The examination of the title of the Alexander Osborne farm, and also of the agreement, which agreement, my impression is, was drawn by Mr. Bowen's counsel, and in final payment of all other matters in this transaction.

Q. How long did Geo. W. Bowen continue to hold you and Mr. O'Reilly on the Ex. C6 ?

Objected to.

A. George W. Bowen removed his family from the farm in 1861 and went south. On the 6th of April, 1868, I sold the farm and notified Geo. W. Bowen of the fact, and applied to him to make good to me the loss I had sustained in part, offering him most liberal terms, if he would compensate me for my loss.

Q. Did you write to him on that occasion, and have you a copy of your letter?

Objected to.

A. I did and I have.

Witness being shown paper now marked Ex. J6, is asked :

Q. Please state what this paper is.

Ex. and all testimony under it objected to.

A. It is the copy of a letter dated April 6th, 1868, sent Geo. W. Bowen to his then residence, Milford, Caroline Co., Va. It is based in part upon a certificate of P. F. and G. F. Smith showing the absolute loss on the sale of the farm, of $1,114.50. It contains also the interest on $2,800 for seven years ending April 1st, 1868, and the fees and expenses incurred by me in this sale. It also contains the proposition I made him for settlement.

Witness being shown paper marked Ex. K6, is asked:

Q. What does this paper writing contain, and by whom was it made up?

Exhibit and all testimony under it objected to.

A. It contains a partial loss sustained by me in this transaction, and was made up by Mr. Frazer Smith, under the signature of himself and son.

Adjourned for dinner until 2 P. M.

At 2 P. M., examination resumed.

Q. Who held this argreement, Ex. C6, before Bowen left the farm mentioned in it?

Objected to.

A. George W. Bowen.

Q. When and how did you come into possession of it?

Objected to.

A. He sent it to me before he went south.

Q. By whom were the signatures to this agreement, John H. Osborne and P. O'Reilly and their respective seals, canceled or struck out with a pen, and for what purpose?

Objected to.

A. I cannot say by whom they were canceled. For the purpose of enabling me to sell the farm in 1868, and making a clear title.

Q. Did George W. Bowen ever give up his interest under this agreement by any writing, signed by him, that you know of?

Objected to.

A. I cannot say. George W. Bowen was in Virginia at the time I sold the farm.

Q. The item "Interest paid from Apr. 1, 1861, to Apr. 1, 1868, $840———" represents which interest; the paid on the $2,000 mortgage, or on the notes, or on the $1,300 cash?

Objected to.

A. On the $2,000 mortgage.

Witness being shown paper now marked L6, is asked:

Q. What part, if any, of the $840 above spoken of, is covered by the receipt Ex. L6?

Exhibit and all testimony under it objected to.

A. L6 is a receipt in full for the interest due upon the $2,000 mortgage up to April 2d, 1868, by Nicholas Bean, the holder of that mortgage. The $840 is the interest on the $2,000 mortgage from April 1st, 1861, to April 1st, 1868, inclusive.

Q. What is the amount of the receipt L6, and what time does it cover, and in whose handwriting is the signature to it?

Objected to.

A. The amount is $137.34. The time that it covers is not stated. It is in full to April 2nd, 1868. The signature is in the handwriting of Nicholas Bean.

Q. Do the sums $840 and $137.34 represent interest on the same or on different mortgages?

Objected to.

A. On the same mortgage.

Witness being shown paper now marked Ex. M6, is asked:

Q. In whose handwriting is this paper, and when was it made?

Exhibit and all evidence under it objected to.

A. It is my handwriting. It was after the payment by me of the $1,300 cash and the $500 note, the first note after July, 1857. I can't specify the precise date.

Q. When it was made had all three of the notes been paid?

Objected to.

A. Only one of them?

Q. How are you able to say that, when this memoranda and the endorsement on it were made up only out of the notes embraced in V4 had been paid?

Objected to.

A. There is a memoranda on M6 of $1,300 cash paid on the farm, $500 on the note, and that the next note, which was the six month note of $500, was not due until October 1st, 1857.

Q. The $1,300 mentioned in this memoranda was paid when and how?

Objected to.

A. To the best of my knowledge and belief there was a delay in consummating the purchase of the farm and the agreement. George W. Bowen was fearful that he would lose the farm. I gave him $1,300 in Womelsdorf at my office. He drove down to Reading, took the money with him, paid Nicholas Bean, and thereby secured the farm. I remember giving him the money and his going down to Reading with it distinctly. Some little time afterwards the sale was perfected, I paid the first note. The second

was protested. I paid the other two notes, on one of which there was a payment of $250. The other note, and the balance due on it, I paid, with the interest thereon, as contained in this memoranda, E6.

Q. In whose handwriting is the memoranda on the envelope marked J6, and when was that put there?

Objected to.

A. It is in my handwriting and was placed there on the day and at the time I mailed the within letter to Geo. W. Bowen.

Q. Has Geo. W. Bowen ever repaid you the money laid out and expended by you on the Alexander Osborne farm, or not, and if so, how?

Objected to.

A. He has never paid me.

Q. Where were these papers and memoranda, which I now hold, from C6 to M6 inclusive, in June last, when Geo. W. Bowen was sojourning here, during which time he was on the witness stand as a witness in your behalf.

Objected to.

A. They were in my possession.

Q. Did you know of their existence, and if you did, why were they not submitted to George W. Bowen, while he was on the witness stand, and be examined on them?

Objected to.

A. I knew that I had a lot of papers bearing on this particular transaction. I never found them, however till this week, when I found them in a box of private papers carefully stowed away. This answer refers to seven of these papers, viz: C6, D6, E6, F6, H6, J6, K6. The other two papers, L6 and M6, I found amongst my railroad papers long ago.

Witness being shown paper now marked Ex. N6, and also paper now marked Ex. O6, is asked:

Q. What are the papers?

Ex. and all testimony under it objected to.

A. O6 is a policy of the Mutual Fire Insurance Co., of Chester county, to George W. Bowen, taken out by him November 28th, 1856, and enclosed N6, which is a receipt to John H. Osborne for George W. Bowen. It is dated

February 25th, 1861, for the year commencing January 7th, 1861.

Q. This $1,300 on Ex. M6, is that the same $1,300 that you paid on the Alexander Osborne farm?

Objected to.

A. It is.

Q. Did the suggestion that you and Patrick O'Reilly should purchase this Alexander Osborne farm for Geo. W. Bowen, come from you or some other person; was it made by you or was it made by some other person?

Objected to.

A. It did not come from me; it came from some other person. The suggestion of the purchase of the farm was not made by me; it was made by some other person.

Q. What was there peculiar in the condition or circumstances of Geo. W. Bowen, or of his family, in the spring of 1857, to bring about an arrangement by which other people were to purchase, and you to pay for, a farm and dwelling for him to live on and in?

Objected to.

A. He was without means, had faithfully disbursed a large amount of money for me as well as for another person, had an old father and mother, had brought them on from Virginia, my work was closing up, they were without a home, his mother specially had sought not only my comfort, but of all those who came to see me on business, and frequently stopped over night with me. I believe that her affability and kindness had a great deal to say to the offer of another person to provide for her a home, and I have no doubt the same influences impressed me.

Q. How much of the money which you expended and laid out on this farm, did you get, in the way of returns or income, as rent over and above expenses after Geo. W. Bowen left in 1860 or 1861, and 1868 when the farm was sold?

Objected to.

A. I rented the farm after the payment of the requisite repairs, fences, building, &c., and the fees of an agent, it lying idle, I think, for nearly a year, and to the best of my knowledge and belief the net proceeds of the farm failed

to pay the interest on the first mortgage, by from $80 to $100 a year. That is my recollection. I remember twice receiving $50 from the agent, and one or two years nothing.

Q. What was the interest on the mortgage yearly?

Objected to.

A. Six per cent. on $2,000.

Q. After the payment of taxes, insurance, expenses and repairs, at what sum can you put the average yearly net income, applicable to the payment of interest on the first mortgage, for the years from April 1st, 1861, to April 1st, 1868?

Objected to.

A. As far as my memory serves me $50 would be the outside of my net receipts from the farm between the years from 1861 to 1868.

Q. Do you mean by that that $50 was the highest sum you received or the highest possible average during the whole time?

Objected to.

A. I have a recollection of receiving $50 twice. I should say that $50 was a large average. My impression is now that the farm didn't rent for more than $100. Part of the time it was rented on shares, I believe, and if my memory is correct, my share in those years was very small.

Q. How much of the money expended by you on this farm has been re-paid to you by Geo. W. Bowen?

Objected to.

A. Not a dollar of the principal, and of the interest on the $2,800, he owed me when he left some $200 or $300. He settled with me when going south and gave me a number of small notes for this amount, extending over one or two years. He paid some of those notes, but I have in my possession one or more that I believe were never paid. I cannot state definitely; these little matters have passed out of my mind. I believe I have one of the notes with me. (Said note is produced and marked Ex. P6 of complainant.) (Ex. objected to.) Our civil troubles and the distress which visited Bowen, in common with all our southern people, was my reason for not urging the pay-

ment of the moneys which, under other circumstances, I should have tried to collect.

Q. Besides the moneys received on the sale of the farm, and from the rent, and Bowen's repayment to you of the interest, how have you been repaid?

Objected to.

A. Bowen never paid me the interest; I have never been repaid; not a dollar.

Q. What changes have taken place in the account between you and Bowen on this farm, since you submitted your offer of settlement to Bowen of April 6th, 1868, exhibited by J6?

Objected to.

A. The matter stands to-day precisely as it did on April 6th, 1868.

Q. Without the accumulation of interest?

Objected to.

A. Without the accumulation of interest.

Adjourned until Friday, March 27th, 1885, at 11 A. M.

Friday, March 27th, 1885, adjourned until Saturday, April 4th, 1885, at 11 A. M.

Saturday, April 4th, 1885, at 11 A. M., examination resumed in presence of respective counsel.

John H. Osborne being still upon the stand upon his direct examination saith:

Witness being shown paper now marked Ex. Q6 of complainant, is asked:

Q. Please state what this is.

Ex. and all testimony under it objected to.

A. This is a letter of George W. Bowen to Richard B. Osborne, dated Tamaqua, 20, '58. It is the 20th of January, but it doesn't state from the context of the letter. It was returned to me by Richard Osborne on my return from England, some disbursements that I had made.

Q. To what does this letter refer?

Objected to.

A. It refers to the interest due upon the mortgage on the Bowen farm and the notes.

Q. Why was it written to Richard B. Osborne?

Objected to.

A. He had charge of my affairs when I was in England between December, 1857, and May, 1858.

Witness being shown paper now marked Ex. R6 of complainant, is asked:

Q. What is this paper?

Ex. and all testimony under it objected to.

A. It is a transcript of a letter from John H. Osborne to Robert Frazer, taken from letter book, Ex. M3, p. 228, stating the parties who were the agents appointed by the Orphans' Court of Alexander Osborne, with the name of his counsel and Bowen's counsel, et cetera, and reciting the payments to be made on the Alexander Osborne farm for Bowen.

Q. How did this letter come to be written to Mr. Frazer. What had he do with it?

Objected to.

A. I wrote consulting him as a lawyer and he referred me to his cousin, P. Frazer Smith.

Q. Is the copy from which you took this Exhibit R6, in the letter book M3, and if so, on what pages, when was it put there and by whom?

Objected to.

A. It is on pages 228 and 229. It was put there October 9th, 1856, by me or by Bowen, I don't know which.

Q. In whose handwriting is the copy in the letter-book?

Objected to.

A. In mine.

Witness being shown paper now marked Ex. S6, of complainant, is asked:

Q. Please state the date of that paper and by whom it was signed.

Ex. and all testimony objected to.

A. Its date is September 21st, 1857; it is signed by Charles Clendinning and John H. Osborne. It is a copy.

Q. What has it reference to?

Objected to.

A. A lease of a farm, of part of the Greenwood tract, to Charles Clendinning.

Q. Was the original of which this is a copy signed by you and Clendinning?

Objected to.

A. Yes, sir.

Q. In whose handwriting is this copy?

Objected to.

A. In James Clendinning's.

Q. Who was James Clendinning?

Objected to.

A. The son of Charles, and my clerk on the Camden and Atlantic when I was superintendent.

Witness being shown paper now marked Ex. T6, purporting to be a letter dated October 10th, 1857, from P. O'Reilly to John H. Osborne, is asked:

In whose handwriting is this, including the signature of the writer, and what is the agreement, herein referred to, which O'Reilly states he returns without his signature?

Exhibit and all testimony under it objected to.

A. In Mr. O'Reilly's handwriting. The agreement is S6.

Q. Is the agreement S6, or the original of which S6 is a copy?

Objected to.

A. S6 is a copy of the original agreement to which T6 refers.

Witness being shown paper now marked U6, purporting to be a copy of a lease of land in Greenwood, Juniata county, Penn., by Patrick O'Reilly and John H. Osborne to Charles Clendinning, is asked:

Q. In whose handwriting is this copy, where is the original, and for what purpose is it your possession?

Ex. and question objected to.

A. It is in James Clendinning's handwriting. I don't know where the original is. I was furnished with this copy by James Clendinning.

Q. Were the originals, of which S6 and U6 are copies, executed by the parties who seem to have signed them by these copies?

Objected to.

A. They were.

Q. When were these copies made, and when were they put into your possession?

Objected to.

A. S6 is dated September 21st. U6 October 1st, 1857. They were placed in my possession about that time. I can't say the specific day.

Q. Were the originals signed in duplicate, or was there but one copy executed?

Objected to.

A. I don't know.

Witness being shown paper now marked Ex. V6, purporting to be a letter, dated Phila., Oct. 10, 1857, to P. O'Reilly from J. H. Osborne, is asked:

Q. In whose handwriting is this; is it the original or a copy, and when was it written in the shape in which it now is?

Ex. and all testimony under objected to.

A. In my handwriting. It is a copy of my reply to Exhibit T6. It was written the day I received T6.

Q. Is this in letter book M3, and if not, why not?

Objected to.

A. It is not; it was written in Philadelphia, and M3 was in Womelsdorf.

Witness being shown paper heretofore marked R6, is asked:

Q. Was this copy made at the time, or copied recently out of the letter book M3, to get a more legible copy?

Objected to.

A. It was copied recently to have a more legible copy.

Witness being shown paper now marked Ex. W6 of complainant, is asked:

Q. Please state what this exhibit is?

Ex. and question objected to.

A. A letter dated October 2d, 1857, from James Clendinning, enclosing me S6 and notifying me that his father had signed it.

Q. What had James Clendinning to do with this thing; why did he write you letters about it?

Objected to.

A. He was the son of Charles and transacted his business.

Witness being shown paper now marked Ex. X6 of complainant, is asked:

Q. In whose handwriting is this paper, when did it come into your possession, and what does it relate to?

Ex. and all testimony under it objected to.

A. In the handwriting of James Clendinning. It came into my possession some short time after Charles had gone to Greenwood, and is a proposal for certain work to be done on or about the Greenwood tract.

Q. Was the erasure made when you received the paper, or was it made afterwards by you?

Objected to.

A. It was not made by me; it was made when I received the paper.

Q. When did Charles Clendinning go to Greenwood?

Objected to.

A. From a letter from his son, James Clendinning, dated May 2d, 1861, he and his family left Philadelphia on the 7th or 8th of August, 1857.

Q. When did Devereux leave Greenwood?

Objected to.

A. About that time, August or September, 1857.

Q. According to the best of your knowledge and information, when Charles Clendinning and his family reached Greenwood, had Laurence Devereux left?

Objected to.

A. He had not.

Witness being shown paper now marked Exhibit Y6 of complainant is now asked:

Q. In whose handwriting is this paper, and when was it received by you?

Ex. and all testimony under it objected to.

A. In Mr. Charles Clendinning's handwriting and received by me about December 5th, 1857.

Q. What is it?

Objected to.

A. It is a letter from Charles Clendinning, notifying me that he has finished the dam.

Witness being shown two papers pinned together, marked Ex Z6, is asked?

Q. What are these papers?

Ex. and all testimony objected to.

A. One marked H2, dated April 2th, 1858, is a receipt for $75, paid by me, and signed Charles Clendinning per James Clendinning. The other is a letter dated May 22d, 1858, saying James had sent him, Charles Clendinning, my check for $75, stating also that Mr. P. O'Reilly was pleased with what he saw at Greenwood, and that the tax collector was displeased because he had not received the taxes.

Q. Are Charles and James Clendinning still living?

Objected to

A. Both dead.

Q. Why were repairs necessary on this dam?

Objected to.

A. Part of the dam was undermined and washed out, and I think one of the wing walls; I don't remember.

Q. Do this letter and receipt show that the $75.00 were for half of the repairs on the dam?

Objected to.

A. I don't know, sir. He states that he is much obliged for my remembering him so soon after my arrival; that is all I know about it. The receipt of April 27, 1858, says it is for work done on the dam at Greenwood.

Q. What relation has the payment of the $75.00 in Z6, and in the receipt annexed to it, to the item "staunching "dam and making it perfectly water tight, $150.00," in Ex. X6?

Objected to.

A. It is one-half of the proposal contained in that exhibit.

Witness being shown paper now marked Ex. A7 of complainant, is asked:

Q. What is this paper?

Ex. and all testimony under it objected to.

A. A letter dated August 6th, 1858, from James Clendinning, saying he is afraid his father's crops will be seized for the taxes.

Witness being shown paper now marked Ex. B7 of complainant, is asked:

Q. When was this letter received and from whom?

Ex. and all testimony under it objected to.

A. It was received about August 25th, 1858, from James Clendinning, stating that his old father had been killed.

Witness being shown paper now marked Ex. C7, of complainant, is asked:

Q. From whom did you receive this letter, when, and in whose handwriting is it?

Ex. and all testimony objected to.

A. From James Clendinning, about October 5th, 1858. It is in James Clendinning's handwriting.

At 12.50 P. M., adjourned until 2 P. M.

At 2 P. M., examination resumed in presence of respective counsel.

Witness being now shown two papers marked Ex. D7, is asked:

Q. What are these papers?

Ex. and all testimony objected to.

A. They are receipts, the one dated August 6th, 1858, from Charles Clendinning, per his son James, for one hundred dollars paid him, Charles, as care taker; the other dated May 25th, 1859, is a receipt for $200.00, as care taker for two years' service and a release to me from any further payment by James Clendinning, administrator of his father's estate.

Q. In whose handwriting are they, and when were they received by you?

Objected to.

A. They are both in the handwriting of James Clendinning, and they were received by me about the respective date of each.

Witness being now shown paper marked Ex. E7 of complainant, is asked:

Q. What is this paper?

Ex. and all testimony under it objected to.

A. It is a letter of James Clendinning, dated January 5th, 1859, urging me to use my influence with Mr. O'Reilly to induce him to carry out his agreement about the Greenwood farm.

Q. In whose handwriting is it, and when did you receive it?

Objected to.

A. It is in Mr. Clendinning's handwriting, and I received it about the date thereof.

Witness being shown paper now marked Ex. F7 of complainant, is asked.

Q. What is this paper?

Question and exhibit objected to.

A. It is a letter from James Clendinning, dated May 23d, 1859.

Q. With reference to what?

Objected to.

A. Stating that he served a writ on Mr. O'Reilly; that the constable was about to levy on everything he could find for the taxes, asking me to furnish him money and what I would advise his doing in the premises.

Q. In whose handwriting is this letter and when did you receive it?

Objected to.

A. James Clendinning's. I received it about the date thereof.

Q. Is the request to you made in this letter to furnish money to James Clendenning of which you have spoken, a request for a loan to be made by you, or a desire expressed to you, that you should pay moneys that you owed?

Objected to.

A. Either a loan or such advice as would secure their crops from being seized for the taxes, as I understand it.

Q. Why didn't you pay those taxes, and why didn't James Clendinning call on you to do do so?

Objected to.

A. I had no interest in the woodlands. I had an incidental interest in the land itself after it had been denuded of its timber. I presume that Mr. Clendinning was aware of that fact, and that I was not the party he should look to for the payment of the taxes.

Witness being shown paper now marked Ex. G7 of complainant, is asked:

Q. What is that paper and when did you receive it?

Ex. and all testimony objected to.

A. it is a letter from Charles Clendinning, dated September 19th, 1857, to me, stating that some ties and boards were missing, had been taken from the tract, and reporting the same to me.

Q. In whose handwriting is it, and when was it received by you?

Objected to.

A. In Charles Clendinning's, and was received about that date.

Witness being shown paper now marked Ex. H7 of complainant, is asked:

Q. What is that paper?

Ex. and all testimony objected to.

A. It is a letter from James Clendinning to me, dated May 2d, 1861, stating the time of his father's removal to Greenwood.

Witness being shown paper now marked Ex. J7 of complainant, is asked:

Q. What is that paper?

Ex. and testimony objected to.

A. This is a letter from James Clendinning, dated August 10th, 1859, enclosing the release and receipt of May 25th, 1859, heretofore marked Ex. D7.

Witness being shown paper now marked Ex. K7, purporting to be a writ of summons against Patrick O'Reilly and John H. Osborne at the suit of James Clendinning, administrator of Charles Clendinning, issued out of the District Court, Philadelphia county, Penna., tested May 17th, 1859, is asked:

Q. When was this copy of summons served on you and where were you at the time?

Ex. and testimony objected to.

A. I suppose about that time; I notice the memoranda of Summer street, where I lived then. I don't know where I was at the time, but I lived at 1603 Summer street, Philadelphia.

Q. Did Mr. Brewster, the plaintiff's attorney in this suit, write to you or send any word to you before beginning this suit against you?

Objected to.

A. My impression is not until he served the notice on me of interrogatories, when I called on him at his office on Sixth street.

Witness being shown paper purporting to be copy of declaration in case of Clendinning, admn'r, against O'Reilly and Osborne, and now marked Ex. L7 of complainant, is asked:

Q. When was that paper served on you, and by whom?

Question and Ex. objected to.

A. I could not say; I don't remember.

Q. Was it served on you about the time the summons K7 was served on you, or a long time after?

Objected to.

A. All the papers were about at that time; I couldn't say; it is too long ago.

Witness being shown paper now marked Ex. M7, purporting to be a copy of a bill of discovery filed by James Clendinning, admn'r of Charles Charles Clendinning, dec'd, against Patrick O'Reilly and John H. Osborne, containing twelve interrogatories, and to which is annexed a press copy of a lease uniform in date, parties and witnesses with Ex. U6, supposed to have been filed in the District Court of Philadelphia county aforesaid, is asked:

Q. How did you come into possession of that paper and when?

Ex. and all testimony objected to as inadmissible, irrelevant and improper.

A. It was served on me subsequent, my impression is, to the other two papers; somewhere about that time. I can't say positively when. It was on the occasion of the service, to the best of my knowledge and belief, I called on Mr. Carroll Brewster, at his office in 6th street, where I remonstrated against being hauled up, when I had done all and more than I had agreed to. He explained to me that it was necessary that I should be made a party to the suit of James Clendinning, administrator of his father's estate, against O'Reilly and Osborne, and instructed me to answer the interrogatories, which I did about that time.

Q. What reference had these two suits, the one at law

and the other in equity, to the lease shown by Ex. U6, a copy of which said lease appears to have been annexed to said bill?

Objected to.

A. To compel, as I understood, Mr. Brewster, Mr. P. O'Reilly to comply with the agreement he entered into jointly with me in that lease.

Q. Is the copy of the lease, annexed to the copy of the bill M7, and the exhibit U6, a copy of the same lease?

Objected to.

A. The signature to M7 and the name of the witnesses are alike. I have not examined the papers themselves. I presume they are.

Q. To the best of your knowledge do these two copies of lease and the bill of complaint annexed to one of them refer to the same transaction, or to different transactions?

Objected to.

A. To the same transaction.

Q. What action did you take on the twelve interrogatories contained in that bill?

Objected to.

A. I answered them and took them down to Mr. Brewster.

Q. Did you save a copy of your answers, and if so, can you produce it?

Objected to.

A. I saved a rough draft of my answers, which I herewith submit.

Draft now produced and marked Ex. N7 of complainant.

Ex. and all evidence connected with it objected to as irrelevant, improper and inadmissible.

Witness being shown two papers marked Exhibit O7 of complainant, is asked:

Q. What are those papers, in whose handwriting are they, and when were they made up?

Ex. and question objected to.

A. The one is in the handwriting of James Clendinning,

and is the disposition of forty dollars which I gave him to purchase a cow. The other is in the handwriting of John H. Osborne, contains a memoranda with the date of expenses to Greenwood and back in December, 1856, and February, 1857. The other items pertain to this Greenwood farm, the aggregate of all being $349.53.

Q. Does that contain a true statement of all the moneys paid by you on account of Greenwood from the time Charles Clendinning went there?

Objected to.

A. The two first items do not belong to this account, $23.73 and $10.80. The remainder of the $349.53 does, of moneys paid by me to Clendinning and the administrator of his estate.

Witness being shown twenty-two papers purporting to be abstracts of estimates for all the sections of the second division of the Lebanon Valley R. R. from the month of May, 1855, to the month of January, 1857, both inclusive, and now marked Ex. P7 of complainant, is asked:

Q. When did you receive these papers, and from whom?

Question and each paper constituting exhibit objected to.

A. I received them in the beginning or at the commencement of each month, commencing 1855, and terminating January, 1857, from Richard F. Stack, resident engineer, as abstracts of the monthly estimate of work done on the second division, and from which abstracts ——

Q. Did you receive those at the commencement of the months to which they relate, or at the commencements of the succeeding months?

Objected to.

A. At the commencement of the succeeding months. The estimates were taken at the last of each month, and the payments for such work were usually made on the 15th of the succeeding month. Between these two periods I received an abstract of work done the previous month.

Q. Of what portion of the work was this Richard F. Stack the resident engineer?

Objected to.

A. Of the second division; sections 14 to 26 inclusive.

Q. In whose handwriting are these abstracts, and by whom are they signed?

Objected to.

A. In the handwriting of Richard F. Stack and signed by him.

Q. Do those carry forward the total amount of work, or are they for each month by itself?

Objected to.

A. All of them except two, I think, are abstracts of the work done in each month as specified.

Q. Which are those two, and how do they differ from the others?

Objected to.

A. The two first, viz: They give the aggregate to the date.

Q. What use did you make of these papers or abstracts Ex. P7 in making up your statements of loss?

Objected to.

A. By examination of these abstracts I could tell the loss or gain on each section, and in some cases the loss or gain on the particular material that was being worked during the month. By particular material I mean some sections contained rock excavation and earth excavation or borrowed material all worked during the month, but this was not usually the case.

Q. What was the different material that you worked as shown by these abstracts?

Objected to.

A. These abstracts contain the several materials which go to make up the excavations and embankment of a railroad.

Witness being shown paper now marked Ex. Q 7, is asked:

Q. What is this paper, by whom was it made and when?

Objected to question and exhibit.

A. It is a summary made by me within a late period of the cubic yards of solid rock excavated in sections 18 and 19 for twenty months, taken from these abstracts, between June, '55, and February, 1857.

Witness being shown paper now marked R7 of complainant, is asked:

Q. What is that paper, by whom was it made and when?

Question and exhibit objected to.

A. It is a summary of the yards of solid rock excavated from sections 14 to 23 inclusive, for twenty months ending February 28th, 1857, as reported by resident engineer Stack, taken from abstract P7; made by me within a late period.

Adjourned until Friday, April 10th, 1885, at 10½ A. M.

Friday, April 10th, examination resumed in presence of respective counsel.

John H. Osborne being still upon the stand on his direct examination saith:

Mr. Voorhees presented a telegram from Mr. James A. O'Reilly stating that he was sick in bed and unable to be present, and asks for an adjournment. Mr. Drake objects, and the examination is resumed.

Witness being shown paper heretofore marked Ex. Z2, is asked:

Q. In whose handwriting is this exhibit?

Objected to.

A. In James Clendinning's.

Q. In whose handwriting is the certificate and signature at the end: "I certify this to be a true copy, Jas. Clendinning, Oct. 6, '55"?

Objected to.

A. In James Clendinning's.

Q. On whose request was that copy made?

Objected to.

A. On my request. He was superintendent's clerk at that time.

Q. Of what road was he superintendent's clerk, and who was the superintendent?

Objected to.

A. The Camden and Atlantic road, and I was the superintendent.

Witness being shown paper heretofore marked Ex. B3 his attention is called to a letter, or copy of letter, attached to paper marked B3, and he is asked:

Q. In whose handwriting is this letter?

Objected to.

A. In James Clendinning's.

Q. In whose handwriting is the part of the exhibit showing the loss?

Objected to.

A. In James Clendinning's; it is all in Clendinning's handwriting except the signature to the letter, and the paper explanatory marked, "belongs to B1"; those are in mine.

Q. State on whose request these copies were made by Clendinning, and whether or not he was still your clerk as superintendent of the Camden and Atlantic, when they were made, and the date of making them?

Objected to.

A. They were made at my request; he was my clerk at that time. They were made at that date, November 6th, 1855, in the superintendent's office at Cooper's Point.

Q. For what length of time and up to what date did James Clendinning continue to be your clerk as superintendent of the Camden and Atlantic R. R.?

Objected to.

A. For two years and up to July, 1857.

Q. For what purpose did James Clendinning make these copies?

Objected to.

A. To preserve the record before I transmitted them; before I sent them off.

Q. From what point or place were this statement and letter marked B3, transmitted by mail?

Objected to.

A. Exhibit B3 is a clean copy of H3, which was written at Womelsdorf, in my office by me. They were sent from Philadelphia or Cooper's Point.

Q. Is H3 or the letter attached to B3, in letter book M3?

Objected to.

A. To the best of my knowledge, no.

Q. Please examine M3 and see if they are there?

Objected to.

A. On the 28th of November, 1855, there is a transcript of a letter referring to this letter of November the 6th. It is on page 144 of Exhibit M3. The letters are not in M3, I find on examination.

Witness being shown letter heretofore marked Ex. V3. is asked:

Q. In whose handwriting is this, and is there a copy in letter book M3?

Objected to.

A. It is in James Clendinning's handwriting, and is to be found on page 288 of Exhibit M3.

Witness being shown paper heretofore marked Ex. W3, is asked:

Q. In whose handwriting is this bill, and when was it made up?

Objected to.

A. It is in my handwriting; at an early day, I cannot state the exact date.

Q. What do the charges therein made refer to?

Objected to.

A. Certain returns for hauling, made to me by Geo. W. Bowen for sundry work connected with the woodleave on the Lebanon Valley, and is certified to by Bowen.

Q. Who did the work or rendered the service therein charged for?

Objected to.

A. The work was done by my teams under Mr. Bowen's instructions. I knew nothing of the details till he made the return to me.

Q. Whose men were in charge of these teams?

Objected to.

A. My men.

Q. During what period of time was the work done?

Objected to.

A. Between December, '56, and June, '57.

Q. Where was the land situated on which this woodleave, spoken of by you, obtained?

Objected to.

A. On the line of the road between and about Myerstown and Womelsdorf.

Q. On the line of what road?

Objected to.

A. On the line of the Lebanon Valley road.

Q. Between what points was the hauling done, and what was or were hauled and snaked?

Objected to.

A. It seems to have been for hauling sills, and snaking in this woodleave. There appears to be but one item here in which the sills were hauled south of Myerstown. All of the rest of the hauling appears to have been done at points adjacent to the woodleave.

Q. Was this snaking done on the land covered by the woodleave or elsewhere?

Objected to.

A. It was done in the woodleave tracts, so that the sills could be snaked to roads from which they could be hauled by mule teams.

Q. Was the hauling entirely of sills, or were splice plates and other timbers embraced?

Objected to.

A. There was a large amount of hauling plank for crossings, splice plates. I can't say whether it was all for sills, or part for splice plates and crossing plank. All three of those items were obtained from the woodleave.

Q. To the line of what railroad was this material, consisting of sills and other timber, hauled?

Objected to.

A. To the line of the Lebanon Valley R. R.

Q. What was done with it after it was hauled there?

Objected to.

A. Used for laying the track of the Lebanon Valley R. R.

Q. To the best of your knowledge, are the charges made in this bill, Ex. W3, reasonable or unreasonable charges for the services rendered?

Objected to.

A. Reasonable, both for the hauling and snaking.

Witness being shown paper heretofore marked Ex. B4,

being a letter dated September 6th, 1856, purporting to be from E. McDermott to John H. Osborne, he is asked:

Q. In whose handwriting is that letter, and from whom did you receive it?

Objected to.

A. It is in Edward McDermott's handwriting and I received it from him.

Witness being shown letter heretofore marked Ex. C4, is asked:

Q. In whose handwriting is that letter, and from whom did you receive it?

Objected to.

A. It is in Edward McDermott's handwriting, and I received from him.

Q. When did you receive those two letters, B4 and C4?

Objected to.

A. I received them about the time they were written; about the date of each.

Q. What was Edward McDermott's employment at the time?

Objected to.

A. He was Mr. O'Reilly's clerk and bookkeeper.

Q. Where is or was Mohantongo from which Ex. C4 is dated?

Objected to.

A. I don't know whether it is the name of the post office or the locks of the canal. It is in the vicinity of Greenwood.

Q. Please refer to page 63 of letter book M3, being transcript of letter dated February 17th, 1855, and state what relation if any, Ex. J4, being a letter from O'Reilly to you, of February 22d, 1855, bears to the same.

Objected to.

A. Page 63 of Ex. M3 is the transcript of a letter from me to Mr. O'Reilly, and J4 is a letter dated February 22d, 1855, which appears to be a particular reply to this letter of February the 17th.

Witness being shown paper heretofore marked Ex. K4, is asked:

Q. When was that letter received by you, and whose handwriting is it?

Objected to.

A. It was received by me within a day or two of its date. It is in Mr. O'Reilly's handwriting.

Witness being shown paper now marked Exhibit S7 of complainant, is asked whether the agreement, of which this is the blank form or draught, was ever executed.

Ex. and all testimony under it objected to.

A. It was not.

Q. Why wasn't it executed?

Objected to.

A. The secretary refused to execute it; not being in accord with the agreement that had been made.

Q. When did the secretary refuse to execute this paper?

Objected to.

A. When I presented it to him on its receipt by me.

Adjourned from 1 P. M. to 2 P. M.

At 2¼ P. M. examination resumed.

Q. At what date as nearly as you can tell?

Objected to.

A. Somewhere about July, 1855. It may have been August.

Q. When did you become superintendent of the Camden and Atlantic?

Objected to.

A. In July, 1855. I entered upon its duties in the middle of June.

Q. What was the condition of the road when you took charge?

Objected to.

A. Very much run down, both in its roadway and machinery.

Q. What was the condition of the roadway across the meadows?

Objected to.

A. Bad; wanting both line and level from being neglected.

Q. What engines were there on the road?

Objected to.

A. I can't call their names to mind now. There was one called the Surf. That was a small engine, but the best there was; comparatively new; two or three second-hand engines that had been bought from the Reading, and a Baldwin and a Norris engine, the names of which I have forgotten. The stock of engines, three or four, had been sold by the party owning them, James Milholland, to the Camden and Amboy. The motive power was very inadequate for the wants of the road.

Q. What measures did you take to make the motive power adequate to the business of the road?

Objected to.

A. I went to Rogers' shop in Jersey City, to two shops in Jersey City, to two shops and building establishments in Paterson, and one in Boston.

Q. What kind of shops?

Objected to.

A. Locomotive.

Q. Did you do this for the company or for persons interested in the success of the company?

Objected to.

A. I did this at the request of parties who were interested in the Camden and Atlantic R. R.

Q. Why didn't you make the attempt to purchase additional motive power for and in the name of the company?

Objected to.

A. The company had no credit, and was, in fact, insolvent at this time.

Q. What engines, if any, did you purchase, and of whom did you purchase them?

Objected to.

A. I purchased three engines; one from the Boston Locomotive Works, in Boston; one, the Curlew, from a shop in Paterson, and the Petrel from another shop in Paterson.

Q. In whose name did you purchase these engines?

Objected to.

A. In my own.

Q. Whose money purchased and who in fact owned the Petrel?

Objected to.

A. It was owned and purchased by Mr. Geo. W. Richards.

Q. What was Geo. W. Richards at that time?

Objected to.

A. He was president of the company.

Q. Is he still living?

Objected to.

A. He has been dead some years.

Q. Whose money purchased and who in fact owned the Curlew?

Objected to.

A. Geo. W. Richards owned two-thirds; I owned one-third. The purchase money was divided in that proportion.

Q. What part of the purchase money used in purchasing the Sea Gull was furnished or supplied by you, and how much, and what part of her did you own?

Objected to.

A. I did not supply any, nor did I own any portion of the engine.

Q. Whose money was used in the purchase of her, and to whom did she belong?

Objected to.

A. Mr. P. O'Reilly's and she belonged to him.

Q. Of whom did you purchase the Sea Gull?

Objected to.

A. Boston Locomotive Works.

Q. Who was the superintendent of those works?

Objected to.

A. Holmes Hinkley.

Witness being shown bundle of papers now marked Ex. T7 of complainant, is asked:

Q. What are these papers?

Ex. and all testimony objected to.

A. The correspondence between Holmes Hinkley and myself in regard to this Sea Gull engine.

Q. Touching what business about the Sea Gull engine?

Objected to.

A. Touching her price, the freight, insurance, &c., in bringing her on from Boston.

Q. After the purchase of these engines by you, as already stated, what was done with them?

Objected to.

A. Put to work on the road.

Q. On what terms, and as whose property?

Objected to.

A. At a rent of about $166 a month, and as my property.

Q. What business were you engaged in when you took the superintendency of the Camden and Atlantic R. R.?

Objected to.

A. I had a sub-contract on the Lebanon Valley R. R. for the graduation and masonry of thirteen miles of it.

Q. How could you leave that work, or give full attention to that and this also?

Objected to.

A. I couldn't do so; I left my work on the Lebanon Valley for eight weeks, and devoted myself to the re-organization of this line.

Q. What additional expense or inconvenience, or loss or damage did your absence from your Lebanon Valley subcontract entail?

Objected to.

A. The loss, damage and injury of trusting to others to manage my work there, instead of giving it my personal supervision.

Q. Under those circumstances, how was it that you were willing to take the superintendency of the Camden and Atlantic R. R., and to be so much absent from your Lebanon Valley work in consequence?

Objected to.

A. I was not willing. I nevertheless did sacrifice my individual interests to the interests of those who urged me to take the superintendency of the Camden and Atlantic road to aid and assist those who solicited me, and whose interests in that company were very large at that time.

Q. Which company?

Objected to.

A. Camden and Atlantic R. R. Co.

Witness being shown paper now marked Ex. U7 of complainant, is asked:

Q. Whose handwriting is that?

Ex. and all testimony objected to.

A. It is the handwriting of a young man, who was either son or kin of Mrs. Farquhar, of Philadelphia. His name I have now forgotten; he was a clerk in the Camden and Atlantic office.

Q. State whether or not an agreement or instrument in writing similar to this, *mutatis mutandis*, was executed for and relating to each of the three engines, the Petrel, the Curlew and Sea Gull?

Objected to.

A. It was.

Q. Was the one that you now have Ex. U7, executed at the time it bears date, or at some subsequent time?

Objected to.

A. The lease for the Curlew and the Petrel was executed shortly after they came on the road. The lease for the Sea Gull subsequently about the time the sheriff seized the Surf. I can't exactly state the time.

Q. Was this rent paid promptly by the company?

Objected to.

A. No, sir; it never complied with the conditions of the leases.

Witness being shown paper now marked Ex. V7 of complainant, is asked:

Q. What is that paper, in whose handwriting is it, and when was it received?

Ex. and all testimony objected to.

A. It is a letter to Richard B. Osborne from P. O'Reilly, dated July 18th, 1855. It is in Mr. P. O'Reilly's handwriting. I don't know when it was received; it is not to me.

Q. What reference, if any, has it to the Sea Gull or any of these engines?

Objected to.

A. It refers to the Sea Gull, and to renting them to the company.

Witness being shown paper marked Ex. W7 of complainant, is asked:

Q. From whom and to whom is this letter, and in whose handwriting is it?

Ex. and all testimony objected to.

A. It is from Mr. P. O'Reilly to John H. Osborne, dated October 17th, 1857. It is in Mr. O'Reilly's handwriting. It refers to lease, and complains that the president did not keep faith with him about paying him the rent for the engine.

Q. When was it received by you?

Objected to.

A. About the time it is dated.

Q. When you left the road in 1857, what became of these engines; did you leave them on the road or did you deliver them to their owners?

Objected to.

A. I left the Curlew on the road, and delivered the other two engines, the Petrel and Sea Gull, to their respective owners.

Q. What time in 1857 was it that you took these engines off of the road?

A. In July, 1857.

Witness being shown paper now marked Ex. X7 of complainant, is asked:

Q. Can you tell by referring to that paper when it was?

Ex. and all testimony objected to.

A. July 2d, 1857.

Q. What is that paper?

Objected to.

A. It is a memorandum of the closing up of my superintendent's account with the Camden and Atlantic R. R. Co., showing an account between James Clendinning, my clerk, in account with me. It is in James Clendinning's handwriting.

Adjourned until Friday, April 17th, 1885, at 11 A.M.

Friday, April 17th, 1885, adjourned until Friday, April 24th, 1885.

Friday, April 24th, 1885, examination continued in presence of respective counsel.

John H. Osborne being still upon the stand upon his direct examination, saith:

Witness being shown paper heretofore marked Ex. X7, is asked:

Q. By whom were the moneys paid, specified in Ex. X7?

Objected to as irrelevant and inadmissible.

A. They were paid by my clerk, James Clendinning, as the expense of loading, unloading and scowing across the Delaware to the Richmond wharves of the Petrel and Sea Gull engines.

Q. To whom is that money chargeable?

Objected to.

A. To me.

Q. For whom was it paid by you?

Objected to.

A. The removal of these engines from the Camden and Atlantic R. R. to the Richmond wharves; for the owners of these engines.

Q. How was your salary of $1,500 a year as superintendent of the Camden and Atlantic R. R., from July, 1855, to July, 1857, paid to you, in cash or in stock?

Objected to.

A. $1,500 in cash, $1,500 in stock, per annum.

Q. Was this stock preferred or common stock, and what was the value of it at that time?

Objected to.

A. Preferred stock, no marketable value.

Q. What part of the salary received by you, if any, during these two years, were you obliged to pay to an assistant superintendent, or for clerk hire?

Objected to.

A. The whole of the salary for six months, from the first of July in cash (in 1855), I paid to Mr. R. T. Mason for his services as assistant superintendent.

Q. How much stock and how much cash did you pay him for those six months.

Objected to.

A. $750, in cash.

Q. Why couldn't you have gotten along without his services.

Objected to.

A. The road and its machinery were very much run down. I had absented myself from my work on the Lebanon Valley R. R. for eight weeks, and I did not care to incur the responsibility devolving on me as superintendent without leaving some person in charge, when I returned to the Lebanon Valley R. R.

Q. Why didn't you get the company to allow you the assistance and salary of an assistant superintendent?

Objected to.

A. The company was in a very embarrassed condition. I never sought the position of superintendent; I knew when I accepted it that it involved great sacrifice on my part; I had no reason to suppose that the board of directors would have been willing to pay two officers. My relations at that time were such with the parties interested in its securities, that I thought it was the cheapest way to get out of the difficulty to pay a man myself, who would carry out my instructions.

Witness being shown paper now marked Ex. Y7, is asked:

Ex. and all testimony under it objected to.

Q. What is that paper?

Objected to.

A. It is a report from James Millholland, master mechanic of the Phila. and Reading R. R., to G. A. Nicolls, superintendent of transportation of said road, induced by a letter of mine to R. D. Cullen, president of the Reading road, offering him the three engines Petrel, Sea Gull and Curlew.

Q. Is the Millholland letter the original or a copy?

Objected to.

A. A copy, sent to me by Mr. Nicolls.

Q. In whose handwriting is it?

Objected to.

A. I don't know.

Q. When was it received by you from Mr. Nicolls?

Objected to.

A. About that time, about its date.

Witness being shown paper now marked Ex. Z7 of complainant, is asked:

Ex. and all testimony under it objected to.

Q. Please state what this is, and whether it is the letter referred to as having relation to Y7, or a copy thereof.

Objected to.

A. This is a copy of a letter in my handwriting, written by me to R. D. Cullen, offering him the three engines for sale, and stating that whatever arrangements he made with Mr. Geo. W. Richards as to terms would be acceptable to me. It is the letter referred to as having relation to Y7?

Q. Which of these engines, if any, did the Reading Co. purchase?

Objected to.

A. The Petrel engine.

Q. Why were you fixed upon or set upon as the person to make the sale of these three engines?

Objected to.

A. From the time of the purchase of these machines I had been instructed to keep these engines in my own name, and to care for and manage them for the best interests of their owners, they having at that time perfect confidence in my capacity and reliability to look after their property.

Q. What became of the Sea Gull, who took her in charge after the sale of the Petrel?

Objected to.

A. The Sea Gull was delivered by me, from instructions I received, on the same scow that took the Petrel to the Richmond wharves of the Reading road.

Q. After she reached there who took charge of her?

Objected to.

A. She was placed in the engine house at Richmond, and was taken charge of by the then superintendent of motive power at the Richmond shop, subject to the order of her owner.

Q. Whom do you mean by the owner, yourself or Mr. P. O'Reilly?

Objected to.

A. Mr. P. O'Reilly.

Witness being shown paper now marked Ex. A8 of complainant, is asked:

Ex. and all testimony under it objected to.

Q. What is that, Mr. Osborne?

Objected to.

A. It is a copy of a letter, in my handwriting, to Mr. P. O'Reilly, dated Oct. 14, 1857, showing the cost of the engine Sea Gull delivered on the road.

Also a paper annexed to A8, and being marked a part of A8, being shown witness, he is asked:

Objected to.

Q. What is this and in whose handwriting is it?

Objected to.

A. One part of the paper, which was torn out of a memorandum book, gives the detail of the Sea Gull engine, two trial trips made by her when she was put on the road. On the other side is the detail of the cost of the engine, made at the time.

Q. When was the memoranda in ink, "Sent P. O'R. "receipts for $7,796, and my order to G. W. R., Oct. 14th, "1857," put there, and in whose handwriting is it?

Objected to.

A. In my handwriting. It was put there at the time the engine was received by me on the Camden road.

Q. My question refers to the date of the memoranda of sending the receipt to P. O'Reilly.

Objected to.

A. Oct. 14th, 1857.

Q. To whom do the initials "G. W. R." refer?

Objected to.

A. George W. Richards.

Witness being shown paper now marked Ex. B8 of complainant, is asked:

Ex. and all testimony objected to.

Q. What is this paper?

Objected to.

A. It is a copy of a letter dated August 24th, 1857, to Mr. William M. Meredith, of Philad'a, in regard to the suit entered into by me against the Camden and Atlantic R. R. Co. for the rent of these engines.

Q. When was the letter, of which this was a copy, sent to Mr. Meredith?

Objected to.

A. At that date.

Witness being now shown a letter marked part of B8, is asked:

Objected to.

Q. What is this paper?

Objected to.

A. This is a letter dated 18th of Sept'r, 1857, in my handwriting, written by me to Mr. Meredith, making a correction of a former letter, and giving the items in detail of the suit against the company.

Witness being shown paper also marked part of B8, is asked:

Objected to.

Q. What is this?

Objected to.

A. It is a letter from Mr. Meredith, dated September 28th, 1857, in relation to my claim against the Camden and Atlantic R. R. Co.

Q. Did you pay him any more than the retaining fee of $100 mentioned in B8?

Objected to.

A. I paid several sums, I don't remember whether to him or Mr. Stratton and the other gentlemen who were here in obtaining the judgment.

Q. What law business did Mr. Meredith do for you?

Objected to.

A. He recovered a judgment against the Camden and Atlantic R. R. Co. for engine rent, which stood in my name, and for other moneys due me by the company.

Q. What did you do with the judgments after you got them over in Philadelphia?

Objected to.

A. Mr. Meredith sent them to Mr. Stratton. The company then had its office in the Farquhar buildings. I was instructed to sue the company in Philadelphia; I don't know why when the judgment was obtained it was placed in Mr. Stratton's hands.

Witness being shown paper now marked Ex. C8 of complainant, being the original execution issued out of the Su-

preme Court of N. J. against the Camden and Atlantic R. R. Co., at the suit of John H. Osborne for debt $6,091.31, damages $121.82, costs taxed $29.88 making in all $6,243.06, is asked:

Ex. and all testimony objected to.

Q. What relation did the suit upon which this execution was issued bear to the engine rent?

Objected to.

A. $5,952.48 of it appears to be for engine rent. My impression is that Mr. George W. Richards got something from the company for a portion of his engine rent before the judgment was obtained in N. J.; I don't remember positively.

Witness being shown paper now marked Ex. D8 of complainant being the original execution issued out of the Supreme Court of N. J., against the Camden and Atlantic R., R. Co. at the suit of John H. Osborne for debt $598.68 damages $11.97, costs taxed $29.88, making in all $640.53, is asked:

Ex. and all testimony objected to.

Q. What relation does this suit bear to the item, salary $585, in your letter of September 18th, 1857, to Mr. Meredith, being the second part of B8?

Objected to.

A. I presume it was included in the judgment, I don't know anything about it.

Adjourned at 1 P. M. till 2 P. M.

At 2.20 P.M., examination resumed.

John H. Osborne being still upon the stand, saith:

Witness being shown paper now marked Ex. E8 of complainant, is asked:

Ex. and all testimony objected to.

Q. Please state what this paper contains?

Objected to.

A. It is memoranda dividing up the judgment which I obtained against the Camden and Atlantic R. R. to the parties whose interests were in that particular judgment.

Q. When did you make this statement up?
Objected to.
A. Some short time after the judgment was obtained. I can't state the precise date.
Q. How were the judgments divided?
Objected to.
A. Into engine rent and salary; they are the two items of the judgments.
Q. How much to Richards, how much to O'Reilly, and how much to yourself?
Objected to.
A. $992.16 to Richards, $4,419.95 to O'Reilly, and $2,302.09 to Osborne.
Q. Of the latter how much was salary and how much engine rent?
Objected to.
A. $1,258.88 was engine rent and $737.56 was salary and $305.65 was interest.
Q. What were your legal expenses in the way of fees, &c., and are they shown by that paper?
Objected to.
A. There is a memoranda here of law expenses amounting to $187.50. There is a discrepancy between what is stated to be the amount of the judgment and the judgment itself, amounting to $64.20.
Q. What is the $200 item pd. by R. B. Osborne to Mr. Wood?
Objected to.
A. The $200 were in some way connected with the foreclosure proceedings which were instituted by one or other of the mortgage bond holders, and which Mr. Osborne resisted through Mr. Wood as counsel. I cannot state particulars, as they have passed out of my mind.
Q. How were the engine rent and salary, due on the judgments, settled with or collected from the company?
Objected to.
A. By preferred stock.
Q. What is the paper to which that exhibit is attached?
Objected to.
A. It is an attachment of Patrick O'Reilly vs. John H. Osborne.

Q. How were the legal fees, the $187.50 and the $200.-00, settled by the company?

Objected to.

A. The company never allowed anything for them. I never received anything from the company for them.

Q. Did you ever receive anything from anybody for them?

Objected to.

A. No, sir.

Q. Who paid the $200.00 to Mr. Wood, you or Richard B. Osborne?

A. I don't remember; the memoranda says Richard Osborne.

Q. What has become of the stock which you received for Patrick O'Reilly's portion of the engine rent?

Objected to.

A. I held it till the time the attachment was issued; gave Mr. O'Reilly credit for it in his account, as he owed me a great deal of money, and am still responsible for it, with the interest accruing thereon—I mean with the dividends, not the interest.

Witness being shown paper now marked Ex. F8 of complainant, is asked:

Ex. and all testimony objected to.

Q. What is that paper?

Objected to.

A. A copy of a letter, in my handwriting, to Mr. Owen O'Reilly, the brother of Mr. Patrick, about the settlement of his account for work done by him, Owen O'Reilly, on the Camden and Atlantic R. R., and which Mr. Patrick desired I would settle with him, Owen O'Reilly.

Q. When was it written?

Objected to.

A. Nov. 18th, 1857.

Witness being shown paper now marked G8 of complainant, is asked:

Ex. and all testimony objected to.

Q. What is that paper?

Objected to.

A. It is a memoranda of a portion of a letter, dated

June 18th, 1857. Both papers appear to refer to the same thing, and have reference to the agreement, Ex. U7, sent by me to Mr. O'Reilly, for the rent of the Sea Gull engine, in my name, to the Camden and Atlantic R. R., and which agreement was returned to me.

Q. What reference has it, if any, to Exhibit S7?

Objected to.

A. S7 has reference to U7, and was the lease sent to me in lieu of U7, to be executed, and which the company refused to execute.

Q. Of the two papers pinned together, the one marked G8, and the other pinned to it, which is the original memoranda, and which is the copy of the original?

Objected to.

The attention of the witness is directed to pencil memoranda on G8, "memoranda copy made in 1866."

A. I believe that the inside, the blue paper, is the original.

Q. Was any lease of the Sea Gull engine, to the Camden and Atlantic R. R. Co., ever executed to that Company in your name, as the owner of that engine?

Objected to.

A. There was.

Q. Under what circumstances?

Objected to.

A. When the Surf engine was seized, I went into the secretary's office and signed a lease similar in character to U7, to the best of my knowledge and belief, to protect this engine from seizure.

Q. How and for what was the Surf engine seized, and how near the end of your term as superintendent did it happen?

Objected to.

A. I don't remember the date when it was seized. The company was embarrassed at the time, and I have understood that Mr. Peter Voorhees was counsel for the party to whom the company was indebted.

Q. By what officer and upon what process was the Surf seized?

Objected to.

A. I don't know anything about the legal question; I know the fact only. She was not allowed to be moved from the track on which she stood. That is what I remember.

Q. Can't you tell whether she was seized by the sheriff or some other officer, and whether it was upon an execution attachment or some other process?

Objected to.

A. I don't know anything about it.

Q. Was the Surf seized between July, 1855, and July, 1857, and if so, of what part of that period?

Objected to.

A. It must have been some time after August, 1855, because I was acting in contradistinction to the agreement which Mr. O'Reilly had sent to me to have signed, and which the company would not accept.

Q. How much money, if any, did Clendinning recover against O'Reilly in the suit brought by the former against the latter by Mr. Brewster, relative to the Greenwood farm?

Objected to.

A. Never recovered anything, to the best of my knowledge.

Q. What became of that suit?

Objected to.

A. On the report, or the fact, I don't know which, of Mr. O'Reilly having made an assignment, the suit was not continued.

Witness being shown paper now marked Ex. H8 of complainant, is asked:

Ex. and all testimony objected to.

Q. What is that?

Objected to.

A. A deed of assignment of Patrick O'Reilly to his brother-in-law, Henry F. Felix, for land in Reading, Pa.

Witness being shown paper purporting to be copy of deed from Patrick O'Reilly to Henry F. Felix, recorded at May's Landing, in Atlantic county, in Book P of Deeds, folio 921, and now marked Ex. J8 of complainant, is asked:

Ex. and testimony objected to.

Q. What is this?

Objected to.

A. It is a deed from Patrick O'Reilly and wife to Henry F. Felix for certain lands in New Jersey.

Witness being shown paper now marked Ex. K8 of complainant, is asked:

Ex. and testimony objected to.

Q. What is this?

Objected to.

A. A copy of the will of Henry F. Felix, deceased.

Counsel for complainant states that Exhibits H8 and K8 are certified under the acts of Congress from the records of Berks Co., Penna.

Adjourned until Friday, May 1st, 1885, at 11 A. M.

Friday, May 1st, 1885, at 11 A. M., examination resumed in presence of respective counsel.

John H. Osborne being still upon the stand upon his direct examination, saith:

Witness being shown paper heretofore marked Ex. Z3, is asked:

Q. What did the services consist of for which the charge of $1250.00 is made in this bill?

All testimony connected with this exhibit objected to.

A. For disbursing moneys, for buying woodleave, paying for the hauling of the sills, with the log, plank, splice plate, &c., lying between Womelsdorf and Lebanon, principally between Myerstown and Womelsdorf.

Q. What part, if any, of this charge refers to superintending the having log cut into plank, splice plate, &c., and paying for and distributing the same along the line of the railroad?

Objected to.

A. George W. Bowen made this charge, and appears to have included the buying the woodleave, its payment, getting out of the sills with their payment, hauling the logs and having them cut at the saw mill, and the plank splice

plates. Under the term "et cetera" I suppose he included a number of long switch sills which were in some cases cut from these logs and distributed.

Q. Along what railroad were they distributed, and what part of the railroad?

Objected to.

A. Along the Lebanon Valley R. R., between Lebanon and Womelsdorf, and some of the long sills to the siding at Robesonia Furnace.

Q. On what sections and divisions on the Lebanon Valley road?

Objected to.

A. Principally on the second division, but any that were sent to Robesonia were on the first division.

Q. When, before or after the laying of the track, and in what years as nearly as you can tell?

Objected to.

A. Before; in the latter part of 1856, and the first part of 1857, principally in 1857.

Q. What was done with these sills, splice plates and logs, after they were distributed along the railroad, in the parts you have mentioned?

Objected to.

A. They were used in the track laying of the Lebanon Valley R. R.

Q. The $25,000, here spoken of as disbursed, was disbursed by you, how, personally or by means of an agent?

Objected to.

A. By means of my clerk and bookkeeper. He kept all of the accounts and handled all of the money. I know nothing of the details except through him, beyond the fact that I was cognizant that such work was being done.

Q. How do you know that these sills, switch sills, splice plate, and other timber mentioned in this bill, were used in the track laying of the Lebanon Valley R. R., from him, your clerk and bookkeeper, or by your own knowledge?

Objected to.

A. By my own knowledge. I lived at Womelsdorf, was on the work every day that the weather permitted

me to be out doors. I visited the timber tracts and saw mills, and saw the teams loading and unloading the stuff, and saw the largest portion of the track laid, in part, with these materials.

Q. What was done with these sills which were boated down from Greenwood and Mahantongo locks?

Objected to.

A. Some of them were hauled by teams east of Lebanon, the larger portion, when the engine was sent from Reading over the turnpike, were loaded on cars, and after a portion of the track had been laid, was hauled by that engine to the then end of the track, to enable the tracklayers to continue their work.

Q. After they were distributed along the line of the Lebanon Valley road, as you have stated, what use was made of these Greenwood sills?

Objected to.

A. The track was laid on them. Those that remained at Lebanon, some of them, were taken west of that point.

Witness being shown paper heretofore marked Ex. X3, is asked:

Q. What does the service consist of which is charged in this bill amounting to $267.37?

All testimony under this exhibit objected to.

A. The amount $267.37 contains a variety of items as stated in the bill. The work was done at and about the Lebanon station and ground, as therein stated.

Q. Are the charges affixed to the various details of the service, reasonable charges for such service, or unreasonable?

Objected to.

A. The charges were made by Mr. Bowen. The rates attached will show that they were reasonable.

Q. What railroad, if any, did this work relate to?

Objected to.

A. The second division of the Lebanon Valley.

Q. What part of that railroad, graduation, track laying or maintenance of way?

Objected to.

A. Well, it has reference to graduation and track laying. There are a few small items for surfacing road.

Q. Who had charge of the details of this work, you or Mr. Bowen?

Objected to.

A. Mr. Bowen.

Witness being shown paper heretofore marked Ex. Z4, is asked:

Q. What railroad does the charge here made refer to, and what was the particular kind of work done?

Objected to.

A. Lebanon Valley R. R. sections 14 and 15 had been completed at an early day, consisted of a long cutting and a long embankment; they had been finished early in 1855. This charge has reference to the clearing out of the cuttings, making up the embankments preparatory to the track laying in 1857. When I state "early in 1855," I allude particularly to the long cut on 14, and to the embankment between the cutting aud Mandebach's bridge.

Q. Who did the work?

Objected to.

A. I did the work.

Q. Why wasn't it included in your contract for graduation and masonry?

Objected to.

A. The completing and trimming the sections was part and parcel of the graduation and masonry, and that had been already done. This was for retrimming after the work had been lying for fifteen or eighteen months.

Q. What effect did lying for fifteen or eighteen months have on work of this sort?

Objected to.

A. The rains and frost fill up the cuttings and their water tables, and wash the embankments, so that it would be impossible to lay a track on them until the work was retrimmed.

Witness being shown paper heretofore marked Ex. O4, is asked:

Q. What is that paper?

All testimony under this exhibit objected to.

A. It is a rough memorandum showing the difference between the wages paid for labor for seven months ending

in May, 1855, and the seven months ending May, 1856. It was made about the last mentioned date.

Witness being shown paper heretofore marked Ex. P4, is asked:

Q. What is this paper?

All testimony under this Ex. objected to.

A. This paper is a statement covering the same named periods, and is taken directly from Ex. O4. Some of the errors corrected and made more intelligible.

Q. During which period of time were labor and materials for railroad construction on the Lebanon Valley road, especially wages paid laborers and teamsters, the higher, during the seven months ending May 31st, 1856, or the seven months ending May 31st, 1855?

Objected to,

A. During the seven months ending May 31st, 1856.

Q. In what way does the Exhibit P4 show the difference?

Objected to.

A. It shows the average wages for seven months ending 1855, and the seven months May 31st, 1856, with the difference of laborers, teamsters employed on the work.

Q. What information had you by which you could fix the average rate of wages for the periods mentioned?

Objected to.

A. I had all the information of my clerk and bookkeeper, from whom I got the figures and data on which I made the statements in Ex. O4 and P4.

Q. How much work was done on your division during the seven months ending May 31st, 1855, and how much was done during the seven months ending May 31st, 1856?

Objected to.

A. The lower sections were all broken into and one of them, section 14, considerably advanced. The upper sections, the light ones, were not commenced up to May 31st, 1855. The whole of the work, May the 31st, 1856, was under way.

Q. What was the relative amount of work done on your division during tne two periods, and during which period was the more work done, the former or the latter?

Objected to.

A. The heavy rock sections were commenced at May, 1855. The work on section 14 was well advanced. I should say from memory that there were five or six times as much work done on the division for the seven months ending May 1856, as there was for the seven months ending May, 1855. The suspension of the work having taken place in the last named period, viz., May, 1855.

Q. Please give the period over which the suspension extended, and state what part of it was an entire suspension and what part was a partial suspension of work?

Objected to.

A. The suspension extended from October, 1854, to May, 1855. The rock sections were abandoned; the clay section, 14, was worked through the winter.

Q. Was there an entire suspension of work on the whole division at any time during the period ending May 31st, 1855, and if so, what part of it?

Objected to.

A. To the best of my recollection there was no excavation done on any of the rock sections. Boarding bosses, the stock with the men to look after them, were left on those sections. The only section that was really prosecuted was sections 14 and part of 15 during the suspension.

Q. What did you do with the part or parts of your force unemployed during the period of suspension?

Objected to.

A. There was nothing for them to do except to tend the stock, take care of the tools, &c.

Q. Why were you obliged to keep them in your employ?

Objected to.

A. Many of them were employed by the year. I had about eighty horses and mules at that time, and they had to be cared for, and it cost as much to care for them as if they had been at work.

At 1 P. M. adjourned until 2 P. M., at which hour the examination was resumed in presence of respective counsel.

John H. Osborne being still upon the stand upon his direct examination, saith :

Q. Where did you get the item $4,504.49 on the 3rd page of P4, and how is that item made up, and why doesn't it agree with the same item on O4 ?

Objected to.

A. In Exhibit P4 on page three there is an amount of $4,504.49 ; there is a memoranda attached to O4, showing that the correct amount is $4,504.49, in place of $5,-093.02.

Q. How did you get the $5,093.02 on page three of Ex. O4, and why was that changed to $4,504.49 ?

A. There was an error on Ex. O4 on the first page, of $1,057.57, which reduced the $6,150.59 to $5,093.02, as is stated on the paper attached to the exhibit.

Q. Why was the $5,093.02 reduced to $4,504.49 ?

A. The corrected list on the second page of Ex. P4 makes $4,504.49, and it was so carried out on page three in the summary of Ex. P4. There was a further clerical error in the sixth item of this second page of P4, which was not noted on the first page of O4.

Q. What does the $4,504.49, the items and basis of which appear on the second page of P4, represent ?

Objected to.

A. The difference between the rate of wages between 1855 and 1856 for each period of seven months.

Q. Does it show the difference in the rate of wages for the two periods, or the difference between what the labor actually cost you, for the seven months ending May 31st, 1856, and what it would have cost you for the same labor for the seven months ending May 31st, 1855 ?

Objected to.

A. It shows the excess paid for labor for the first named period, above that in the last named period, viz: May 31st, 1855.

Q. What was the occasion of this rise in wages ?

Objected to.

A. I can't tell you.

Q. What does the item $3,024 represent, in Ex. P4, page three, excess paid for horse feed on account of in-

creased price, or money paid for feeding mules and horses not in use, or both?

Objected to.

A. It means that the cost per head to feed a given number of horses and mules, in the period ending May, 1856, was in excess of the like cost for the same number of head in the period ending May, 1855.

Q. What was the next charge of $1,581 made for?

Objected to.

A. $1,581.00 was the actual cost of feeding mules and horses during the suspension for the seven months ending May, 1855.

Q. Mules and horses in use or not in use?

Objected to.

A. Mules and horses not in use.

Q. How did you get at this actual cost; was it kept by yourself, or returned to you by your clerks and agents?

Objected to.

A. Returned to me by my clerks and agents, and amounted, as far as I can recollect, to the difference between about twenty-four cents and about forty cents per head per day. I have those figures from an original memoranda.

Q. What bearing or materiality does the difference between twenty-four and forty cents per diem have upon the actual cost of keeping horses and mules not in use, to which the item, $1,581.00, solely relates?

Objected to.

A. It solely relates to the lesser cost.

Q. To what item does the forty cents per diem relate?

Objected to.

A. To the previous one, $3,024.00.

Q. Why have you charged, as an item of loss by this suspension, $924.00, only half of the clerk hire for the seven months in question?

Objected to.

A. Sections 14 and 15 were at work; these parties were partially employed, I should have charged three-fourths instead of half; they did scarcely anything, still I had to keep them. The same force would have subserved to keep five hundred men at work.

Q. Would the $10,033.49, charged here as loss occasioned by the suspension, cover your loss actually sustained thereby?

Objected to.

A. It would not. In this computation no notice has been taken of the increased cost of powder and steel, masons, carpenters, and blacksmiths' wages, that were all enhanced in price at the last named period, viz., May, 1856.

Q. Was the difference in average rate of wages, as ascertained by you on Exhibits O4 and P4, between the two periods in question, ascertained by the difference actually paid for wages during the two periods, or by the difference between the ruling rate of wages in that vicinity for the two periods?

Objected to.

A. By the difference actually paid for wages between the two periods, varying from 10 to something over 20 per cent., I think.

Witness being shown two papers pinned together, now marked Ex. L8 of complainant, and another paper marked M8 of complainant, is asked:

Q. What do the memoranda in these papers contain, where did you get them, and when did you make them up?

Exhibits and all testimony under them objected to.

A. These papers contain the draught of the letter to the president and board of directors of the Lebanon Valley R. R., a memoranda of the sections from 1 to 33, inclusive, with a summary setting forth a loss as contained and referred to in the letter of $105,600, which does not include an amount of $7,000 set opposite to section 8 on the first division. They were made up in 1856. I got the memoranda in part from my clerk, George W. Bowen, so far as appertained to sections 14 to 26; the remainder of the data I got from the office in Reading.

Q. Was the letter of which this is a draught sent to the president and board of directors of the Lebanon Valley Co.?

Objected to.

A. A letter was; I can't say whether this letter was or not.

Witness being shown paper now marked Ex. N8 of complainant, is asked:

Q. What is this paper?

Ex. and all testimony under it objected to.

A. This paper was taken from, and is based on, the two exhibits L8 and M8.

Q. At the time of making L8 and M8 state whether or not a copy was made from them to answer the purposes of an original letter?

Objected to.

A. To the best of my knowledge and belief, yes. I was furnished with a large amount of the data, and which was enlarged upon and arranged in N8.

Q. What became of the letter, if one was written, of which L8 and M8 are the draught, and in whose name was it to have been sent to the president and directors of the Lebanon Valley Co.?

Objected to.

A. I was requested to arrange from the data, which were furnished to me, a statement showing the loss from the suspension and other matters that it might be put into the form of a communication to the board, and I did so.

Q. How long after making L8 and M8 was it before you made N8, and was N8 made for yourself or for some other person?

Objected to.

A. My impression is that M8 and L8 were first made. It was modified and changed in N8, and all the information on pp. 5 and 6 and 7 and 8 and 9 was furnished to me in the Reading office. The memoranda on part of pages 9 and 10 has reference particularly to the second division, and belongs more particularly to Ex. O4. M8 and L8 were made in 1856, and all of the data which I have referred to on N8 up to page 9 at the same period.

Adjourned until Friday, May 15th, 1885, at 11 A.M.

Friday, May 15th, 1885, at 11 A.M., examination resumed in presence of respective counsel.

John H. Osborne being still upon the stand upon his direct examination, saith:

Witness being shown exhibit heretofore marked Ex. K5, is asked:

Q. What is that paper?

Objected to.

A. This is a final estimate of sundry work done by John H. Osborne for the Lebanon Valley R. R. at various points on the second division, and Robesonia station on the first division, amounting to $10,102.10, of which $3,600.10 were paid me by the Lebanon Valley R. R. Co., and $6,502 by Mr. O'Reilly. It was all put into the one final of John H. Osborne to distinguish it from the work of Tarrant & Co.

Witness being shown paper heretofore marked Ex. Y3, is asked:

Q. Who did the work charged in that bill?

Objected to.

A. I did the work.

Q. How much of it has been paid?

Objected to.

A. $1,831.16 has been allowed. $911.10 were returned to Mr. Bowen as chargeable to Mr. P. O'Reilly, and not to the Lebanon Valley R. R. Co.

Q. By whom were the $1,831.16 paid?

Objected to.

A. It was paid by the Lebanon Valley Co.

Q. Why didn't the company pay the $911.10?

Objected to.

A. The engineer stated that the items comprising the $911.10 were included under certain headings in his, P. O'Reilly's, contract with the company, that the work was done for him and not for the company.

Witness being shown paper heretofore marked Ex. W4, and also Z3, is asked whether he is entitled to the $1,250.00 claimed in Z3, and the $750.00, item 8 in W4; that is to say, whether these items are entirely different, or in part duplicate?

Objected to.

A. I am entitled to the $1,099.53 on Ex. W4 in an in-

dividual account between Mr. P. O'Reilly and myself. Every item in this exhibit refers to Greenwood. Ex. Z3 is also an individual account between Mr. P. O'Reilly and myself, amounting to $1,250.00, and has reference to the sill getting, land buying, &c., &c., &c., between Lebanon and Womelsdorf, but principally lying around and about Myerstown, and has no reference whatever to Ex. W4.

Q. Was or was not the sum of $15,000.00, mentioned in W4 as disbursements, the full amount for the disbursements there stated to have been made?

Objected to.

A. My book-keeper, Mr. George W. Bowen, made this return to me. I have no means of verifying it, because he kept all the books and accounts of disbursements, and returned these books, papers and accounts in November, 1857, with vouchers for the expenditures, to Mr. P. O'Reilly.

Q. Was the amount of the disbursements, stated in Z3 to have been $25,000, less or more than the disbursements actually made for woodleave in the Lebanon valley, particularly as there stated?

Objected to.

A. The books, papers and vouchers for this particular work were returned to Mr. P. O'Reilly by Mr. Bowen, my book-keeper. He made out this statement. I have no means of verifying it. I accepted this account in common with all other accounts kept by Mr. Bowen, as correct. It not only included the purchase of the land, the getting out the sills, &c., &c., &c., but the distributing of the same on the line of the Lebanon Valley R. R.

Witness being again referred to Ex. W4, is asked:

Q. What was done with the horse for which you paid $70.00 to Landry, charged in the second item of that bill?

Objected to.

A. I know nothing personally about the horse, beyond the witness' evidence before the Master, at which I was present, when he stated that he traded the horse for a colt, and sent the colt to Mr. O'Reilly?

Q. For what purpose did you go to Greenwood, February 28th, 1857, and charge $10.80 in item 3 of Ex. W4?

Objected to.

A. On Mr. O'Reilly's business.

Q. What was the business?

Objected to.

A. Connected with the Greenwood sills?

Witness being now referred to Exs. O4 and P4, is asked:

Q. State whether or not the $2,500.00 credited on page 3 of those exhibits, was paid you by the Lebanon Valley R. R. Co.

Objected to.

A. On O4 and P4 the $2,500.00, mentioned on p. 3 of each, is the amount allowed to me by Mr. O'Reilly for the suspension for the seven months ending May, 1855.

Witness being shown paper now marked Ex. O8 of complainant, is asked:

Q. Please state what the charges in this bill consist of, cash or services performed.

Ex. and all testimony under it objected to.

A. Cash.

Q. How were the amounts returned to you, and by whom?

Objected to.

A. In a statement of account between Mr. P. O'Reilly and myself, by my clerk and book-keeper, Mr. George W. Bowen.

Q. When did he make this return to you?

Objected to.

A. Before he left my employ, in 1858 or 1859.

Witness being shown a letter now marked Ex. P8 of complainant, is asked:

Q. What is the date of this letter, from whom did you receive it, and in whose handwriting is it?

Ex. and all testimony under it objected to.

A. The date of the letter is March 9th, 1855. I received it from Mr. P. O'Reilly, and it is in his handwriting.

Q. When did you receive it?

Objected to.

A. About the time it was written; within a day or so I suppose.

Q. When was it written?

Objected to.

A. Its date is March 9th, 1855. I can't tell when it was written beyond that.

Witness being shown paper now marked Ex. Q8 of complainant, is asked:

Q. What is that?

Ex. and all testimony under it objected to.

A. It is a letter dated Nov. 29th, 1855, to me from Mr. P. O'Reilly, and in his handwriting.

Witness being shown paper now marked Ex. R8, of complainant, is asked:

Q. Please describe this exhibit?

Ex. and all testimony under it objected to.

A. It is a letter dated June 16th, 1856, from Mr. P. O'Reilly to me, and in his handwriting.

Witness being shown paper now marked Ex. S8 of complainant, is asked:

Q. Please tell what this exhibit is?

Ex. and all testimony under it objected to.

A. This is a letter dated Sept. 29th, 1857, from Mr. P. O'Reilly to me, and in his handwriting.

Witness being shown paper now marked Ex. T8 of complainant, is asked:

Q. What is this exhibit?

Ex. and all testimony under it objected to.

A. This is a letter dated Oct. 19th, 1857, from Mr. P. O'Reilly to me, and in his handwriting.

Witness being shown paper now marked Ex. U8 of complainant, is asked:

Q. What is this exhibit?

Ex. and all testimony under it objected to.

A. This is a letter dated June 25th, 1858, from Mr. P. O'Reilly to me, and in his handwriting.

Q. In whose handwriting is the signature to these six letters?

Objected to.

A. In Mr. P. O'Reilly's.

Q. When were they received by you?

Objected to.

A. Within a day or two after they were written.

Q. How is the time of their writing shown?

Objected to.

A. By their respective dates.

Witness being shown two papers pinned together and now marked Ex. V8 of complainant, is asked:

Q. What are these?

Ex. and all testimony under it objected to.

A. Copies of a letter in my handwriting, dated July 10, 1858, and signed by me, addressed to Mr. P. O'Reilly; one being a readable copy and the other a scratch.

Q. When did you make the scratch and when the legible copy?

Objected to.

A. I made the scratch at the time I wrote the letter, and the other about 1860, for my counsel, Mr. Browning.

Q. When was the letter, of which these are the copies, transmitted, and how and to whom was it directed?

Objected to.

A. At the date of the letter, through the mail and to Mr. P. O'Reilly.

Witness being shown paper now marked Ex. W8 of complainant, is asked:

Q. What is this exhibit?

Exhibit and all testimony under it objected to.

A. A letter dated July 19th, 1858, to me in Mr. P. O'Reilly's handwriting, and signed by me.

Q. When did you receive it?

Objected to.

A. At the date.

Q. What is meant here by the "Dauphin and Susqu. R. R. Co.," and what was P. O'Reilly's business with that road and company?

Objected to.

A. The Dauphin and Susquehanna R. R. It runs through the coal region and is now a branch of the Read-

ing. P. O'Reilly was a contractor on it, and was seeking a settlement with that company for the work he did for them.

Q. What was your work referred to in the postscript, and in whose handwriting is the postscript?

Objected to.

A. In Mr. O'Reilly's handwriting, and it was some work I was doing on the Quakake R. R.

Witness being shown paper now marked Ex. X8 of complainant, is asked:

Q. What is this exhibit?

Ex. and all testimony under it objected to.

A. A copy of a letter from John H. Osborne, and in his handwriting, dated August 5th, 1858, and sent to Mr. P. O'Reilly at that date.

Q. Where does the interlineation on the right hand margin come in?

Objected to.

A. At the termination of the fourth line.

Q. What is the account there referred to as the account in question and as this account?

Objected to.

A. It has reference to one of three patents, I don't know which; I think a car ventilator.

Witness being shown paper now marked Ex. Y8 of complainant, is asked:

Q. What is this exhibit?

Ex. and all testimony objected to.

A. It is a copy of a letter written by me, in my handwriting, to Mr. P. O'Reilly, dated Sept. 6th, 1858. The first one marked "part of Y8," is the original copy; the second, the same note, but more legible.

Adjourned until 2 P. M.

At 2 P. M. examination resumed.

John H. Osborne being still upon the stand, deposeth and saith:

Witness being shown paper now marked Ex. Z8 of complainant, is asked:

Q. What is this exhibit?

Ex. and all testimony under it objected to.

A. It is a copy of a letter to Mr. P. O'Reilly, dated Oct. 2nd, 1858, in my handwriting and with my signature, and sent to him at that date by mail.

Q. What was done with the letter of which Y8 is a copy?

Objected to.

A. It was sent to him at that date by mail.

Q. What do you mean "by mail?"

Objected to.

A. Through the post office, in an envelope, addressed to him.

Q. Postage prepaid or not?

Objected to.

A. It was mailed according to law. I think the law then was that it should be prepaid.

Witness being shown paper now marked Ex. A9 of complainant, is asked:

Q. What is this?

Ex. and all testimony objected to.

A. A letter dated Oct. 5th, 1858, addressed to me, in Mr. P. O'Reilly's writing and under his signature, received by me about the date of the same.

Witness being shown two papers pinned together marked Ex. B9 of complainant.

Q. What is this?

Ex. and all testimony objected to.

A. A letter dated Oct. 18th, 1858, in my handwriting and under my signature, addressed to Mr. P. O'Reilly. The inner one is the original draught, the outer one the same letter written more legibly.

Q. What was done with the letter of which those are a draught and copy?

Objected to.

A. Placed in an envelope, and placed in the post office, addressed to Mr. O'Reilly.

Witness being shown paper now marked Ex. C9 of complainant, is asked:

Q. What is this?

Ex. and all testimony objected to.

A. A letter dated Oct. 20th, 1858, in Mr. P. O'Reilly's handwriting and under his signature, to me, received at that date.

Witness being shown paper now marked Ex. D9 of complainant, is asked:

Q. What is that?

Ex. and all testimony objected to.

A. A letter dated Oct. 28th, 1858, from Mr. P. O'Reilly, in his writing and under his signature, to me, and received by me about that date.

Witness being shown paper now marked Ex. E9 of complainant, is asked:

Q. What is that?

Ex. and all testimony objected to.

A. A copy of a letter in my handwriting, under my signature, addressed to Mr. P. O'Reilly, dated April 22d, 1859, and sent to him in an envelope by me at that date.

Witness being shown paper now marked Ex. F9 of complainant, is asked:

Q. What is this?

Ex. and all testimony objected to.

A. A letter to me from Mr. P. O'Reilly, in his handwriting and under his signature, dated April 27th, 1859, and received by me at that date.

Witness being shown paper now marked Ex. G9 of complainant, is asked:

Q. What is this?

Ex. and all testimony objected to.

A. A copy of a letter dated June 10th, 1859, in my handwriting, under my signature, to Mr. P. O'Reilly, and sent to him in an envelope, through the post office at that date.

Q. When was the copy or draught made?

Objected to.

A. Before the letter was written and sent.

Q. How was the envelope in which the letter was enclosed, addressed?

Objected to.

A. To Mr. P. O'Reilly, Reading, Penna.

Q. To what does the phrase "your note of Ap. 29" refer?

Objected to.

A. It refers to a promise made by Mr. P. O'Reilly to me, contained in a letter I received from him, dated April 29th, 1859, promising me a settlement.

Q. Does it refer to Ex. F9, the date of which was incorrectly endorsed, in your handwriting, as 29 Apl., 1859?

Objected to.

A. It does. I am not sure whether the date is the 27th or 29th in Mr. O'Reilly's letter, but I think it is the 27th, upon looking at it, though I have stated here that it was the 29th.

Q. State whether or not the original, of which E9 is a copy, is referred to in Ex. F9?

Objected to.

A. Ex. F9 is in reply to the note of Ex. E9.

Witness being shown papers pinned together and marked Ex. H9 of complainant.

Q. What are these papers?

Ex. and all testimony objected to.

A. The inside one is the copy of a letter in my handwriting and under my signature, dated December 19th, 1859, addressed to Mr. P. O'Reilly, and sent to him through the post office at the date at which it was written. The outside one is a copy made more legible.

Q. When was the inside one, or draught, drawn by you?

Objected to.

A. Before I mailed the letter; it was the original letter; the letter, in fact, being the copy.

Witness being shown paper now marked Ex. J9 of complainant, is asked:

Q. What is this:

Ex. and all testimony objected to.

A. A letter in Mr. P. O'Reilly's handwriting, under his signature, dated March 21st, 1860, addressed to me, and received by me about that date.

Witness being shown paper now marked Ex. K9 of complainant.

Q. What is this?

Ex. and all testimony objected to,

A. The copy of a letter in my handwriting, dated April 9th, 1860, in reply to Ex. J9, and under my signature, to Mr. P. O'Reilly, and sent to him in an envelope, through the post office, at that date.

Witness being shown paper now marked Ex. L9 of complainant.

Q. What is this ?

Ex. and all testimony objected to.

A. This is a letter in Mr. O'Reilly's writing, dated April 16th, 1860, and under his signature, in reply to my note, Ex. K9, received by me at that date.

Witness shown paper now marked Ex. M9 of complainant.

Q. What is this ?

Ex. and all testimony objected to.

A. This is a letter dated September 17th, 1860, in Mr. O'Reilly's handwriting, under his signature, received by me at that date.

Witness being shown paper heretofore marked Ex. P8, is asked:

Q. To whom do the initials Mr. R. B. O., occurring twice on the second page, refer.

Objected to.

A. They refer to Mr. Richard B. Osborne, the chief engineer of the Lebanon Valley R. R.

Witness being shown paper heretofore marked R8, is asked:

Q. To whom do the initials M. E. L., on the second page of this letter, and M. E., on the third page, refer ?

Objected to.

A. Michael E. Lyons, associate engineer of the Lebanon Valley R. R., on the second page, on the third page, M. E., the same person.

Counsel for complainant gives notice to counsel for defendant of the demand of the complainant upon the defendant that she produce at the next meeting, for the purpose of being offered in evidence, and used as exhibits on the part of the complainant, all letters and statements of

which copies or draughts or originals have been offered in evidence, in connection with testimony in the cause, of the transmission or delivery of the originals of such letters, draughts or statements to Patrick O'Reilly, the decedent, in his lifetime.

Adjourned until Friday, May 22nd, 1885, at 11 A. M.

Friday, May 22nd, 1885, at 11 A. M., examination resumed in presence of Mr. Drake, who gave notice that, owing to the absence of Mr. Voorhees by detention in the Camden Circuit Court, making the examination impossible for this day, he, Mr. Drake, as counsel for the complainant, will make a further demand for the production of the papers to be made at this meeting, of which the defendant had notice, at the next meeting.

Adjourned until Friday, May 29th, 1885, at 11. A. M.

Friday, May 29th, examination resumed in presence of respective counsel.

Counsel for complainant now offers in evidence notice for the production of certain papers, with memoranda of them attached, served on the solicitor of defendant on the 18th instant, with his acknowledgment of service endorsed, said paper being marked Exhibit N9 of complainant, and now asks for the production of the papers, letters and other instruments in writing called for in this notice.

Counsel for defendant objects to the marking of that paper as an exhibit, and states that upon its service he forwarded it to the agent of his agent at Reading, and has since received word that she has caused diligent search to be made for the papers mentioned in the notice, and has been unable to find any of them except papers purported copies of which were marked Ex. G3, V6, G8, X8 and E9 of complainant, and has those now here, and produces them in pursuance of the notice, and holds them subject to the inspection of the complainant and his counsel, and, if desired, copies of the same may be made by the Master, the complainant or his counsel for their use.

Counsel for complainant asks that said papers be marked as exhibits on the part of the complainant, and now offers the same in evidence.

Counsel for defendant makes no objection to the papers being marked as exhibits on the part of the complainant, but objects to their admission in evidence as being irrelevant, illegal, incompetent and inadmissible, and renews the objection made at the time the copies were respectively offered.

Said papers are marked respectively O9, P9, Q9, R9 and S9.

Counsel for complainant now gives notice that on the conclusion of the cross-examination of this witness, he will offer in evidence the private records, letters, statements and memoranda mentioned in the notice Exhibit N9, the originals of which were called for by that notice, in addition to the originals which were produced on call this morning.

John H. Osborne being still upon the stand upon his direct examination, saith:

Q. How could you be on your work on the Lebanon Valley when you were superintendent of the Camden and Atlantic R. R. for two years of the same period?

Objected to.

A. For eight weeks in 1855, I never was on the work on the Lebanon Valley; with that exception, as a rule I spent the week on the second division of the Lebanon Valley R. R. It was my habit to leave my office at Womelsdorf in the afternoon of Saturday, and return there by the first train which left Philadelphia for Reading on Monday morning. After I had reorganized the Camden and Atlantic R. R., and had an assistant superintendent there, for the first six months it required comparatively little of my time and attention. I was usually there on Saturday evening, and nearly always early on Sunday morning. With these exceptions, and a day or two before and including July 4th, 1856, the statement that I made about being on my work on the Lebanon Valley R. R. daily is correct.

Witness being shown papers heretofore marked Ex. E8 and M9, is asked whether the letter M9 was received by him before or after the suit in attachment which was enjoined under the bill filed in this cause.

Objected to.

A. After.

Q. Did you keep a copy of the reply which you made to the letter M9, and if so, will you produce it?

Objected to.

A. To the best of my recollection, no reply was made to the letter of September 17th, 1860, Ex. M9, as the attachment had been issued against me some months before the date of that letter.

Adjourned until Friday, June 12th, 1885.

Friday, June 12th, 1885, adjourned until Friday, June 19th, 1885.

On Friday, June 19th, 1885, examination adjourned until Friday, June 26th, 1885, at 10 A. M.

Friday, June 26th, 1885, adjourned until Friday, July 3rd, 1885, at 10 A. M.

On Friday, July 3rd, 1885, at 10 A. M., adjourned until Friday, July 10th, 1885, at 10 A. M.

On Friday, July 10th, 1885, at 10 A. M., adjourned until Tuesday, July 14th, 1885, at 10½ A. M.

On Tuesday, July 14th, 1885, at 10½ A. M., examination resumed in the presence of respective counsel.

CROSS-EXAMINATION.

John H. Osborne being upon the stand for his cross-examination, saith:

Mr. P. L. Voorhees now states that he renews his objection to the competency of this witness, and to all the tes-

timony that has been given by him, and to all the exhibits marked during his examination, and testimony concerning the same, and make his cross-examination subject to and without waiving any of said objections.

Q. When did you take charge of the construction of the Camden and Atlantic R. R. Co., for Patrick O'Reilly, and how long did you remain in charge of it?

A. About July or August, 1853, and continued actively engaged until July or August, 1854.

Q. What position did Mr. O'Reilly occupy in the construction of the Camden and Atlantic R. R.

A. He was sub-contractor.

Q. What duties were you employed to do, and what did you do, as his agent or superintendent, in the construction of that railroad?

A. Mr. O'Reilly handed over to me the whole of the line between Camden and Cooper's Point, and Atlantic City, and gave over to me the entire control and prosecution of the work between those two points.

Q. Did you employ workmen, and receive moneys and pay wages for the construction of that road?

A. In part I employed workmen, paid wages to them and to to the sub-contractors who were engaged by Mr. O'Reilly before I came there, in the construction, graduation and masonry of the line; received moneys either directly from the sub-contractor or through his clerk and book-keeper, at first J. W. Doyle, and afterwards George W. Bowen.

Q. When did you first agree to commence work, and when first commence work on the Lebanon Valley R. R.?

A. Agreed somewhere about March, 1854, and commenced work somewhere about April or May, 1854.

Q. How many sections did you agree to construct on the Lebanon Valley R. R., and what was the length of each section?

A. To the best of my knowledge, from section 14 to 26; each section being about one mile.

Q. Was the work on the Lebanon Valley R. R. done under a contract, and if so, who were the parties to it?

A. A contract was entered into between P. O'Reilly,

chief contractor, and Charles Tarrant and John H. Osborne, under the style of Tarrant & Co., for the graduation and masonry of these particular sections lying between Womelsdorf and Lebanon.

Q. Was that contract in writing and under seal?

A. That contract was in writing and under seal.

Q. Was it made upon a printed blank, of which Ex. P2 is a printed copy?

A. It was made upon a similar printed form and blank, of the same character and description as P2.

Q. Was that contract approved by the engineer-in-chief of the Lebanon Valley R. R. Co.?

A. I don't know. I have no personal knowledge of the same.

Q. About what time did you or P. O'Reilly commence getting sills, &c., upon the Greenwood tract?

A. In the latter part of 1855. On the 14th of January, 1856, I sent the first team to Greenwood.

Q. How long were you or your teams employed at Greenwood in getting out sills?

A. From about January, 1856, to about August, 1857.

Q. During that time who provided feed and provender for the horses, and provided provisions for and paid the wages of the men?

A. With the exception of a small amount of grain and provision, I furnished none for the teams, and did not pay the wages of the drivers. From the records kept by my clerk, George W. Bowen (Mr. Voorhees objects to any statement as to the records of the clerk), of moneys received by him for payments of hands and other expenses of Greenwood, I have seen statements that disbursements were made by him for wages and grain for the supply of the teams at Greenwood, which moneys were received by him, through me, from Mr. O'Reilly.

Q. Did you pay any part of the consideration for the purchase of the Greenwood tract?

A. I did not.

Q. When did you take charge of the Camden and Atlantic R. R. as superintendent for the company?

A. In June or July, 1855.

Q. How long did you remain as superintendent for the company?

A. Till June or July, 1857.

Q. Did you give the operations of that road your personal supervision?

A. For eight weeks from the time I took the superintendency I was never absent from the road a single day. I then handed it over to R. T. Mason, a civil engineer, and to the best of my knowledge and belief visited it at the close of each week, on Saturday and Sunday, on my return from my work on the Lebanon Valley R. R., and continued to do so, with some few exceptions, till I resigned the superintendency in 1857.

Q. How much cash did you and Mr. O'Reilly advance for the purchase of the Geo. W. Bowen farm, and how much was advanced by each of you?

A. I can't state the amount without looking at the Exhibit E6. (Exhibit produced; the witness answers): I paid in the first instance, on April 1st, 1857, $1,300.00 in cash, and up to the 1st of May, 1858, I paid three notes of $500.00 each, discount and interest added, which contained the endorsement of Mr. P. O'Reilly; altogether some $2,800.00 or $2,900.00, including discount and interest. There was none paid, to my knowledge, by Mr. O'Reilly.

Q. Did you and Mr. O'Reilly, or either of you, have any security for the moneys thus paid for that farm, and if so, what was it?

A. To the best of my knowledge and belief we were to take a second mortgage on the farm for that amount, allowing it to stand some years to enable George W. Bowen to provide the requisite funds for such payment. I believe it is mentioned in the original agreement. I don't remember the time.

Q. Didn't George W. Bowen convey the title of that farm to you and Mr. O'Reilly in or about the month of December, 1856?

A. My impression is that the arrangements for the purchase of the farm were made in 1856, that they were not consummated till April, 1857, and that when Mr. Geo. W. Bowen went south, at the commencement of our civil

troubles, the conveyance of the farm to Mr. P. O'Reilly and myself took place. I may be mistaken as to the dates; the papers will speak for themselves.

Q. Didn't you and Patrick O'Reilly, on or about April 1st, 1857, execute a deed, in the nature of a declaration of trust, reciting that the farm had been conveyed to you on December 8th, 1856, and that you held it as security for the payment of $1,300.00 in cash, and three notes of $500 each, amounting to $1,500.00, to Nicholas Bean?

A. The deed will determine. I have not read it since its execution. My impression was, and still is, that as security we were to have a second mortgage. I know that in 1856 George W. Bowen entered into an agreement based upon what Mr. O'Reilly and John H. Osborne had agreed to do in the purchase of this farm, and that it was not consummated till April, 1857.

Mr. Voorhees objects to the explanation made by the witness.

Q. Subsequent to the 1st of April, 1857, did not you and Patrick O'Reilly convey to George W. Bowen all your right and title in the Bowen farm, mentioned and described in Ex. C6, in satisfaction of that declaration of trust, and after such conveyance did you not receive from George W. Bowen his mortgage and bond for $2,800.00?

The question, so far as it seeks evidence of papers themselves is objected to as not cross-examination, and not the best evidence.

A. I don't remember anything about it. It is not likely that I could remember a little transaction like this, immersed as I was in business thirty years ago.

Q. When was the Bowen farm sold; after he went to the south?

A. I can't remember, but by my memorandum I can show. The farm was sold about April 6th, 1868, as will appear by Ex. J6, that being a letter addressed to George W. Bowen, Milford, Caroline Co., Va., by me.

Q. In what manner and by whom was it sold?

A. By my counsel, Mr. Frazer Smith, of Westchester, and by my direction.

Q. Can you tell to whom it was conveyed?

A. I think it was to a man named Waggoner in the employ of Mr. Bean.

Q. Was the farm sold under proceedings for the collection of the mortgage in the courts?

A. I have no recollection of anything about it except as contained in Mr. P. Frazer Smith's letters to me, which I have not read of late.

Q. Did not Mr. Bowen execute a mortgage to you for the whole sum of $2,800, agreed to be advanced by you and Mr. O'Reilly about the time of the purchase of the farm?

A. That was my impression.

Q. Was not this mortgage executed to you individually, after you and Mr. O'Reilly had conveyed all your interest in the farm to Geo. W. Bowen, in satisfaction or avoidance of the declaration of trust, Ex. C6?

A. I don't remember.

Q. What became of the three notes of $500 each, that were endorsed by you for the purpose of raising a part of this $2,800?

A. I know this fact only, that I took up and paid these three notes and have the record of the same now in my possession.

Q, What security, if any, did you receive for them upon their payment?

A. I acted under the direction and instruction of my counsel, Mr. P. Frazer Smith, the record will show, for I don't remember what security I received for the payment of those notes.

Q. Did you receive any security upon the payment or for the payment of those notes from George W. Bowen, or any one else in his behalf?

A. Not at the time of the payment of these notes. I was compelled to pay them to secure my own interests outside of this farm transaction, having at that period a large amount of railroad plant in horses, mules et cetera, which would have been seized had I not paid them.

Q. Were they paid at or about the time they became due?

A. They were drawn at three, six and nine months, and were not cleared up fully till about May, 1858.

Q. From and to what time did you act as superintendent for Mr. Patrick O'Reilly upon the Lebanon Valley R. R.?

A. From the time that Mr. O'Reilly first considered the proposals for the building of that line, and from that period I think for six months. That is my impression, I haven't figures or dates before me. Somewhere from about the fall of 1853, as far as my memory serves, till about the time I entered upon the construction of my sub-contract.

Q. Did you give the work upon the Lebanon Valley R. R. your personal superintendence?

A. I made a personal examination of all the work which was bid for by sub-contractors to Mr. P. O'Reilly over his forty miles of contract with the Lebanon Valley R. R. Co., with the exception of the bridge over the Schuylkill in Reading, and compared the bids he received with his prices at which he took the work from the company.

RE-DIRECT.

Q. What was your title on the Camden and Atlantic under Patrick O'Reilly?

Objected to.

A. General manager.

Q. Who paid R. T. Mason, yourself or the Camden and Atlantic Co.?

Objected to as irrelevant and not rebuttal.

A. I paid him.

Q. How long did R. T. Mason remain under you as superintendent on the Camden and Atlantic?

Objected to as above.

A. For six months.

At 12.45 P. M., adjourned until 2.30 P. M.

At 2.30 P. M., examination resumed in presence of respective counsel.

John H. Osborne being still upon the stand upon his re-direct examination, saith:

Q. Your attention is directed to that part of your cross-

examination in which you were asked to state the purport of your agreement, C6, which you now hold in your hand, and you are now asked why you couldn't recollect what the purport of that agreement was?

Objected to as irrelevant and inadmissible and as stating as a fact a question which witness was not asked.

A. It has never been my habit to burden my mind with detail of any kind or description when the same is once committed to paper. In connection with this, I wish to say that I have for forty years been in the habit of making copies and keeping them, of all letters and business papers, and hence it is not necessary to tax my mind with their details.

Q. When details of transactions have been committed to writing by you, and preserved accessible to you, has it been your habit to depend for those details upon recollection and memory, or upon the papers and writings?

Objected to as irrelevant.

A. Upon the papers and writings.

Q. You were asked this morning what became of the three notes of $500 each that were endorsed by you for the purpose of raising a part of the $2,800, are these, V4, the notes there referred to?

Objected to as inadmissible.

A. These are three notes in question to which I referred.

Q. Were they endorsed by you or by P. O'Reilly and you?

A. They were endorsed by me and by P. O'Reilly also.

Q. Why couldn't you recollect whether these three notes, or the $2,800 of which they formed a part, were secured by a mortgage, or how or when they were secured?

Objected to as irrelevant and no cross-examination.

A. I don't remember anything about their security except so far as for the $2,800, which was covered, as was my impression, by the second mortgage in favor of Mr. O'Reilly and myself, after the failure of Mr. O'Reilly to pay any portion of them. I have no recollection that on such failure Mr. Bowen gave me any further security.

Q. My question is why you can't recollect distinctly and can only give impressions?

Objected to as above.

A. I have no memoranda or paper which speaks of any other security being given to me except what I have stated.

Sworn and subscribed } JNO. H. OSBORNE.
July 14th, 1885. }

C. V. D. JOLINE, *M. C. C.*

Adjourned until Friday, September 4th, 1885, at 10 A. M.

Friday, September 4th, 1885, at 10 A. M., examination resumed in the presence of respective counsel.

Richard B. Osborne a witness for the complainant being recalled, deposeth and saith:

Mr. Voorhees enters an objection to the re-examination of Mr. Osborne without a special order of the court for that purpose.

Counsel for complainant states that it was understood at the time of the interruption of the examination of this witness that any additional questions which complainant's counsel might desire to put to this witness should not be objected to on that account or because the witness had left the stand on account of defendant's counsel not being ready to cross-examine him.

Mr. Voorhees states that he doesn't admit the statements of counsel.

Q. Please state whether anything was done by you to induce Patrick O'Reilly to sublet a portion of his work on the Lebanon road to John H. Osborne, or to any firm or company in which he was interested?

Objected to as irrelevant and inadmissible.

A. I never made any offers as an inducement to Mr. O'Reilly to sublet his work to any of the parties named; such was not necessary at all.

Q. State, if you please, the circumstances which came under your notice, which led to the subletting of the grad-

uation and masonry of the second division of O'Reilly's Lebanon Valley contract, to Charles Tarrant and John H. Osborne, under the name of Tarrant & Co. ?

Objected to as above.

A. In a conversation with Mr. O'Reilly he expressed a wish to give a good contract to John H. Osborne on the Lebanon Valley R. R.; expressed himself also grateful to John H. Osborne's efficient management in completing the construction of the Camden and Atlantic R. R. He also alluded to the services that he could render him, P. O'Reilly, in subletting his work on the Lebanon Valley. I remarked that it would, I thought, compromise Mr. John H. Osborne and myself because of our relationship, my position being that of chief engineer on the line, and said that if John H. Osborne was made one of a firm of sub-contractors to take the work he had alluded to, I could see no objection. A party of the name of McAdams was mentioned and also Charles Tarrant. The latter I approved of as being an engineer and more likely to accord with the views of John H. Osborne in the management of the work. I was aware that Mr. O'Reilly was very well acquainted with Charles Tarrant.

Q. Who suggested Charles Tarrant ?

Objected to as above.

A. I am not able to say positively. I gave my approval of it.

Q. Was your approval based upon him as a man of capital, or upon his knowledge of the business ?

Objected to as above.

A. Upon his practical knowledge of construction work; not upon the fact of his having sufficient capital, for I knew that his pay in my corps as an engineer, was all the means that he had. Practically his experience was well known to Mr. O'Reilly, for he had just closed, or was then closing, a contract under him as resident engineer on another railroad, which amounted to about $144,000.

Q. State whether or not John H. Osborne was offered the charge of the Camden and Atlantic R. R. construction by Patrick O'Reilly at your solicitation.

Objected to as above.

A. That offer came about just in this way. From the month of March to the beginning of June, 1853, Mr. O'Reilly, as sub-contractor, made very poor progress in the work of construction of the Camden and Atlantic road. The responsibility rested on me as chief engineer and chief contractor, and I insisted upon some steps being taken that would insure the work being pushed, and suggested that he should procure the services of a competent manager who could devote his whole time to the matter. He replied that he would write to Mr. John Osborne and try and induce him to leave his road in Virginia and take charge of the construction work of the Camden and Atlantic road, and asked me if that would be satisfactory. I replied, yes, if you can get him. My letter of June 21, 1853, which is in here as an exhibit, Z5, will show how far I used my influence with Mr. O'Reilly to procure the services of John H. Osborne.

Q. Were the letters of June 15th and 17th, 1853, referred to in Ex. Z5, written in relation to John Osborne's leaving his work in Va., and coming to take charge of the Camden and Atlantic?

Objected to as above.

A. They were written by John H. Osborne to me, with reference to the giving up of his position as superintendent and accepting the offer of P. O'Reilly, and this letter, Ex. Z5, is the answer to them evidently.

Q. Where are those two letters to you?

Objected to as above.

A. I have looked for them among my numerous letters, and failed to find them.

Q. State, if you please, whether or not your experience as a civil engineer and builder of railroads, has been of a character for you to give an opinion upon the relative cost of rock excavation in open, wide spaces, and narrow, confined spaces?

Objected to as above.

A. It certainly has been.

Q. State then, if you please, the relative cost of the excavation of solid rock in open, wide spaces, and in narrow, confined spaces?

Objected to as above.

A. The area of the space to be excavated, combined with the hardness of the rock itself, controls the difference of the cost of the excavation under the two different circumstances. The cost of excavating rock in closely confined spaces, over that in an open cutting of a railroad, will be from four times to even more than twelve times greater.

Q. What would be the difference between rock excavation in an open cutting for a double track railroad, and in a ditch dug down into solid rock?

Objected to as above.

A. It would be, as I have said before, twelve times the cost, at least, per yard.

Q. State, if you please, whether or not your experience in tunnel excavation has given you information sufficient to exemplify the relative cost of the two kinds of rock excavation under consideration, and if so, state the particular kinds of work of which tunnel excavation consists, and the relative cost of each?

Objected to as above.

A. I have been engaged largely in the construction of tunnels, and can testify very fully as to the actual cost of each portion of the same. Tunnel work is composed of four different items. First, the sinking of the shafts, which are bound closely in every direction, similar to the sinking of a well through rock. The cost of that at the lowest price is ten dollars and has gone up to twenty dollars per cubic yard. The next item is the excavation of the heading, or that portion within the arch of the tunnel, the cost of which is six dollars and a quarter, in this particular tunnel that I am alluding to, per cubic yard. The third item consists of the rock from the grade line to the springing of the arch, which is called the breast. The excavation of that rock cost four dollars per cubic yard. The fourth item is the drainage ditch in the base of the tunnel, which is only one-tenth of the area of the shaft. I paid for that twelve dollars per cubic yard. It cost the contractor more than that sum.

Q. Have you any book or drawings exemplifying these different kinds of work, and if so, can you produce them?

Objected to as above.

A. I have a book that contains the profile and cross-section with all the notes of the details of the working of that tunnel made at the time. There it is.

Said book is produced and marked Ex. T9, of complainant.

Said book is entitled "Pulpit Rock Tunnel on the "Philada. & Reading railroad, located July, 1838, at "Schuylkill Gap, below Port Clinton, in the county of "Schuylkill, Pa."

Exhibit and all questions under it objected to as irrelevant and inadmissible.

Q. What is shown opposite to page 39, in Ex. T9?

Objected to.

A. The profile of the hill through which the tunnel is cut, the shafts and the tunnel itself.

Q. What is shown on p. 37?

Objected to as above.

A. The cross-section of the tunnel, the position of the breast and heading before mentioned.

Q. What is shown on p. 13 and 15?

Objected to as above.

A. Two different views of the horse-gin used for raising the material from and through the shafts.

Q. What portion of the material excavated is taken through the shafts?

Objected to as above.

A. About one-eighth of the total material, consisting of the rock contained in the heading and extending from shaft to shaft.

Q. How much of the expense of excavating the shafts and the heading is owing to the difficulty of the removal of material; in other words how much of the decrease of the cost, in the excavation of the breast, is owing to the comparative ease in the removal of material after excavation?

Objected to as above.

A. I should judge that there is but little difference.

The excavation from both points is moved by horse-power The cost of excavation is due to the confined space and the difficult positions in which the men have to work. There is an item of extra cost caused by the smallness of the blasts which have to be used to keep the tunnel to its proper shape.

Q. Where is the ditch mentioned as the fourth item as having one-tenth the capacity of the shaft?

Objected to as above.

A. A single ditch falling each way from the centre of the tunnel was excavated on the north or river side, two and a half feet deep by one and a half feet wide.

Q. To which of the four items does the smallness of the blast chiefly relate, and to which does it least relate?

Objected to as above.

A. It chiefly relates to the excavation of the shafts, heading and ditch, and least to the excavation of the breast-work.

Q. State whether or not the chief engineer could at any time ascertain what the profits of the chief contractor, upon a certain piece of work, were?

Objected to as above.

A. In the contract on the Lebanon Valley road the chief engineer had always in his possession the exact information which would always enable him to know the profits which the chief contractor realized, after paying the estimates of the sub-contractors.

Q. How was the estimate of the chief contractor made up?

Objected to as above.

A. The quantities as classified in all the sub-contractors' estimates supplied the totals which were estimated to the chief contractor at his own prices. The difference between which and the prices of the sub-contractors would clearly define the profits of the chief contractor.

Q. State whether or not your visits to different portions of the work on the second division were sufficient to make you familiar with the different kinds of work there, as the same were in progress?

Objected to as above.

A. They certainly were, as I gave it my undivided time and attention.

Q. Were you or not acquainted with any unusual difficulty of excavation, or hardness of rock on sections 18 and 19?

Objected to as above.

A. I was fully cognizant of that rock proving to be of a very different quality from what was expected, from personal examination, from the complaints of the contractors and from the regular returns of the resident engineers, the quantity of work done, and of the expenses of the contractors. I was at all times thoroughly cognizant of the fact of the difficulty of excavating it.

Q. By whose orders was the extra expense gone to, on sections 18 and 19, in taking out a portion of the cutting to enable the track to be laid through it, and what was the occasion of the haste that brought about this extra expense?

Objected to as above.

A. It was caused by the difficult character of the rock, for those sections it was expected would have been completed in time to have sent the rails and fastenings westward to keep the track layer going. It was done by the orders of myself as chief engineer.

Q. To whom were the contractor and sub-contractor to look for the extra expense thus incurred?

Objected to as above.

A. The chief contractor very properly held the railroad company responsible to him for the extra expense he was obliged to go to. The sub-contractor held the chief contractor responsible for the expenses in carrying out the work ordered by him.

Q. How many sills did the chief contractor supply from the Greenwood lands?

Objected to as above.

A. I have estimated to P. O'Reilly 145,386 sills from all sources. They came from the Catawissa road, from the woodleave on the Lebanon Valley R. R., from several outside parties, a large number from Greenwood on the Susquehanna; all these sills were accepted by me and my

officers only when they were delivered on the line of the Lebanon Valley R. R. The exact points from which the various lots came it was no object for me to know exactly.

Q. Did you know Benjamin Scott?

Objected to as above.

A. I did. He was the managing foreman of Tarrant & Co.

Q. State whether or not you have any knowledge of a record or account of extra work kept by Scott for Tarrant & Co., and by them presented to you as chief engineer, for allowance, and if so, what?

Objected to as above.

A. All the extra work on the second division was done under the direction of Benjamin Scott, returned by him to George W. Bowen, book-keeper, who sent the returns to me in time for the monthly estimate. From the last bill certain items were picked out by me as properly due by the company under the head of extra work. Those items have been allowed to the chief and sub-contractors. Their amount was shown upon the bill sent in, and the balance, as was my custom, was referred for payment to Tarrant & Co. by the chief contractor. That bill is not forthcoming. Benjamin Scott's testimony states that he thinks it was $9,500, or thereabouts. I have picked out from the allowances made to the chief and sub-contractors, which amount to $4,628.75, that taken from the $9,500 would leave $4,871.25, as against $4,827.80, which is the amount now claimed by Tarrant & Co. from P. O'Reilly.

Q. From where did you pick out these items?

Objected to as above.

A. From Ex. E2.

Witness being shown paper now marked Ex. U9 of complainant, is asked:

Q. When was this paper made up, and what does it show?

Ex. and all questions under it objected to.

A. It was made up shortly after the testimony given by Benjamin Scott last here. It refers to the pages where the items above mentioned can be found in Ex. E2.

Q. State whether the items covered by or embraced in

Ex. A4, were put into the estimates of the chief contractor and his subs as extra work, chargeable to the company, or as work referred back to Tarrant & Co., and chargeable by them to the chief contractor, but for which the chief could not be allowed against the company?

Objected to as above.

A. Ex. A4 is a statement of the various items which were not properly chargeable to the R. R. Co., and which Tarrant & Co. had to look to the chief contractor for the payment of, being work done for him.

Q. Why couldn't the chief contractor be allowed for it?

Objected to as above.

A. Because it was the details of work which the chief contractor was paid for under his regular contract prices.

Adjourned until Friday, September 11th, 1885, at 10½ A. M.

Friday, September 11th, 1885, at 10½ A. M., adjourned by consent until Friday, September 18th, 1885, at 10½ A. M.

Friday, September 18th, 1885, at 10½ A. M., parties met.

The counsel for complainant desires the Master to state that at the time Mr. Richard B. Osborne signed his testimony it was understood and agreed between counsel that the counsel for complainant should have the right to ask him further questions, if, upon the perusal of his testimony, he should find the same necessary, and that counsel for defendant should thereafter have the right to cross-examine him. The Master states that such is the fact.

Counsel for defendant states that he is unable to proceed with the cross-examination of Mr. Richard B. Osborne.

It is now agreed between counsel that Mr. Albert Foster, a witness for the complainant, shall be examined on Wednesday, September 23d inst., at 10 A. M., at the Secretary's office of the Philadelphia and Reading Railroad Company, at 227 South Fourth street, Philadelphia, Pennsylvania.

Examination now adjourned upon request of counsel for defendant.

Wednesday, September 23d, 1885, examination resumed in presence of respective counsel.

Albert Foster, a witness for the complainant, being duly sworn, deposeth and saith: I reside in Philadelphia, and am Secretary of the Philadelphia and Reading Railroad Company. The Lebanon Valley Railroad, extending west from Reading to Lebanon, and so on to Harrisburg, is a part of the Reading system. The Lebanon Valley Railroad Company was merged into the Philadelphia and Reading under articles of consolidation and merger dated December 8th, 1857. I am enabled to answer this by reference to a printed copy of the articles of consolidation and merger, which I suppose are on record. I have been Secretary of the Philadelphia and Reading Railroad Company for the past three years, but have been connected with the company for twenty-five years. For nine years prior to my election as Secretary I was Secretary of the Reading Coal and Iron Company, and previous to that I was connected with the company in various departments. As Secretary of the Philadelphia and Reading Railroad Company, I have charge of the minutes and archives of the company. I am unable to answer who has charge of the book of minutes of the Directors of the Lebanon Valley Railroad prior to December 8th, 1857. In obedience to letters and subpœnas from Mr. Drake, I have given directions to have search made for papers and books of the Lebanon Valley Company in connection with matters pertaining to either Patrick O'Reilly or John H. Osborne. I found the general ledger and journal; also certain contractors' estimates in favor of Patrick O'Reilly for the construction of the first, second and third divisions of the Lebanon Valley Railroad, covering a period from May, 1854, to Septemtember, 1857; also some few vouchers in his favor for horse feed; also what appears to be a construction voucher for the Cornwall Branch.

Q. Who would be the proper person to have charge

of the minute books and records of the Lebanon Valley Railroad Company?

A. I suppose that they naturally would have been turned over to some of the officers of the Reading Railroad Company at the time of the merger, but I can't really say whether they were or not.

Q. In the search ordered by you was any minute book of the Lebanon Valley Railroad Company found?

A. Not reported to me to have been found.

Q. Would you think it worth while to look for that minute book anywhere else than in your office?

Objected to.

A. I really couldn't say. It might be possibly found or traced as to its whereabouts in some way, but without any particular certainty as to success.

Counsel for complainant offers in evidence current estimate No. 41, taken on the last day in December, 1857, in favor of Patrick O'Reilly, contractor for the first, second, and third divisions of the Lebanon Valley Railroad, showing "payment $8,500.00," the original, to remain with Mr. Foster, with leave to have copy made if needed. The copy is to be marked Ex. V9, of complainant.

Q. As Secretary of the Reading Railroad Company can you, by reference to the minutes of its board of managers, give us any information about a final award of arbitrators and settlement with Patrick O'Reilly, of a suit brought by him against the Philadelphia and Reading Railroad Company, as the successor of the Lebanon Valley Railroad Company, relative to the construction by O'Reilly of the first, second and third divisions of the Lebanon Valley Railroad Company, and, if so, what?

Objected to as irrelevant and inadmissible.

A. I am unable to answer that question at present.

Q. Will you make search in the minutes of the Reading Company, from December 8th, 1857, down to the end of the year 1864, and give us the result of your search at an adjourned meeting, for the purpose of answering the previous question?

A. I will endeavor to do so.

Counsel for defendant objects to all above testimony and

to exhibit, the objection having been made at the time the same were offered.

Adjourned until Thursday, October 1st, 1885, at 10 A. M., at same place.

Thursday, October 1st, 1885, examination resumed in presence of respective counsel.

Albert Foster, being still on the stand under direct examination, saith:

Q. Have you since the last meeting made search for the minutes as requested?

A. I have.

Q. Please state what is the result of your search, and what you have found in the minutes of the board of managers of the Philadelphia and Reading Railroad Company, about a final award and settlement with Patrick O'Reilly, of a suit brought against the last mentioned company, relative to the construction by him of the first, second and third divisions of the Lebanon Valley Railroad, or of a settlement of any claim by O'Reilly on that account?

Objected to as irrelevant and inadmissible.

A. I find that at a meeting of the board of managers of the Philadelphia and Reading Railroad Company held April 3d, 1861, the following resolution was passed: "The "President stated to the Board that the counsel of the "company, St. George Tucker Campbell, Esq., had pre- "pared the form of an agreement dated March 28th, 1861, "between P. O'Reilly and this company, referring his "(O'Reilly's) claim to the arbitration of Geo. W. Bid- "dle, Esq., as sole referee, whose award thereon in writ- "ing shall be binding upon both parties. The agreement " was here read by the Secretary, whereupon, on motion, " it was *Resolved*, That the President be and he is hereby " authorized to execute the agreement with P. O'Reilly, " and affix thereto the corporate seal of the company."

That is the only minute that I can find in reference to this suit in the minutes referred to.

Paper marked Ex. W9 shown witness. He saith: That is a true copy of the minutes relating to that subject.

Counsel of complainant offers in evidence the said minutes, and asked the Examiner that the extract already marked as W9 be substituted therefor.

Counsel for defendant objects to this exbibit, and to the minutes of which it purports to be a copy, and to all statements relative thereto.

Q. Please state whether you have found among the archives of your company the agreement of submission and the award above referred to?

Objected to as above.

A. I have found a paper dated March 28th, 1861, between the Philadelphia and Reading Railroad Company and Patrick O'Reilly, which I believe is the agreement agreeing to make the reference to Geo. W. Biddle, Esq. I have not been able to find the actual written award which was to be made by Mr. Geo. W. Biddle.

Q. What have you found in reference to that award?

Objected to as above.

A. I have found a paper dated March 17, 1862, which appears to be a receipt and release to indemnify P. O'Reilly and N. A. Felix to the Philadelphia and Reading Railroad Company. It seems to be for the sum of $29,400, being with the payments heretofore made by said company, namely, February 13th, 1862, $3,159.43; February 25, 1862, $5,440.57, making a payment in full by said company of the sum of $38,000.00.

Counsel for the complainant now exhibits to the witness the agreement dated March 28, 1861, purporting to have been made between the Philadelphia and Reading Railroad Company and P. O'Reilly, which is now marked for identification Ex. Y9 of complainant, and asks if this is the agreement above referred to, and has it been executed by O'Reilly and the Railroad Company?

Above exhibit and all testimony under it objected to.

A. I believe it to be the agreement referred to. It is executed by the parties therein named.

Q. Is William L. Hirst, the subscribing witness to O'Reilly's name, alive or dead?

A. He is dead, I believe.

Counsel exhibits to witness receipt and release dated

March 17, 1862, which is now marked for identification Ex. Z9, of complainant, and is asked: Is this the receipt from which you read the payments to P. O'Reilly, or his assignee, aggregating $38,000?

Above exhibit and all questions objected to.

A. It is.

Q. Is it an original or a copy?

Objected to.

A. I assume that it is the original, as the signatures of the parties are of a different character.

Witness being shown agreement dated December 12th, 1861, purporting to have been made between the Philadelphia and Reading Railroad Company, by its President, Charles E. Smith, and Patrick O'Reilly, now marked for identification Ex. A10, of complainant, is asked:

Exhibit and all testimony under it objected to.

Q. Is the subscribing witness, J. C. Kunkel, alive or dead, and is the signature of Charles E. Smith in his own handwriting and made by him?

Objected to.

A. The subscribing witness is dead. The signature of Charles E. Smith is that of his own handwriting, I believe, to the best of my knowledge.

Witness being shown release, Patrick O'Reilly to Philadelphia and Reading Railroad Company, dated December 12th, 1861, and now marked for identification Ex. B10, of complainant, is asked:

Exhibit and all testimony under it objected to.

Q. Is this the same William L. Hirst who you have testified is deceased, and what is the residence of J. Cooke Longstreth, the subscribing witness?

Objected to.

A. I do not know, but assume it is, as the character of the signatures is similar. J. Cooke Longstreth, I understand, resides in Philadelphia.

Witness being shown paper now marked Ex. C10 of complainant, is asked if he found this paper and the other papers, marked respectively, Ex. Z9, Y9, A10, B10, among the archives of his company, and if they are vouchers belonging to the Philadelphia and Reading Railroad Company?

Ex. and all testimony under it objected to.

A. I did. They are.

Q. Do you find any minute relating to the transfer of 1,000 shares of the stock of the Lebanon Valley Railroad Company in the minutes of your company about the time of Ex. W9?

Objected to.

A. I find that at a meeting of the Board of Managers of the Philadelphia and Reading Railroad Company, held July 22d, 1863, a preamble and resolution was adopted, of which I now give you a true copy.

Witness being shown said copy, which is marked Ex. X9, of complainant, saith: That is the copy.

Counsel now offers the minutes in evidence, and asks Examiner that the copy X9 be used in substitution therefor?

The above exhibit and all testimony thereunder objected to.

Q. Since the last meeting have you found any minutes of the Lebanon Valley Railroad Company?

A. I have had search made for the minute book or books of the said company, and have succeeded in finding one only, commencing January 11th, 1858, extending to March 6th, 1858.

Witness being shown book, now marked for identification D10 of complainant, is asked:

Q. Is this the book?

Exhibit and all testimony under it objected to.

A. It is.

Q. Will you please have copied the portions of those minutes referring to O'Reilly's claim against the Lebanon Valley Railroad Company, to be used in substitution for the book?

A. I will.

Q. Have you any knowledge of the letter from P. O'Reilly, referred to in the first minute in the book, relating to this subject?

Objected to.

A. I have not.

Q. Have you made diligent search for the minute book

of the Lebanon Valley Railroad Company preceding this one?

Objected to.

A. I have caused the same to be made without success.

Q. Can you produce the ledger and journal of the Lebanon Valley Railroad Company?

Objected to.

A. I can.

Q. Can you find therein any memoranda of payments made to P. O'Reilly outside of his contract about December 8th or 9th, 1856, and thence on during the ensuing year, and, if so, please state what they are.

Objected to.

A. I find that four Lebanon Valley Railroad Company notes of $5,000 each, dated December 16th, 1856, at ninety days, four, five and six months, were given under resolution of the Board of Directors, adopted December 11th, 1856, to Patrick O'Reilly, aggregating the sum of $20,000, which notes were paid respectively at maturity, but I assume that the payment was made on account of his contract, not knowing anything to the contrary, and the following is the journal entry, under date of December 16th, 1856, relating thereto:

107		Pat. O'Reilly, cont'r Dr. to Sundries.		
	222	Farmers' Bank, for am't of estimate No. 31 for month of November, 1856, ...	$51,241 00	
	20	Notes payable, for Co.'s 4 notes $5,000 each, dated December 16th, '56, 90 d's, 4, 5 and 6 months given under resolution of the Board of Directors of December 11, '56, ...		71,241 00
				$20,000 00

Counsel for complainant now offers in evidence said journal and ledger, and the portions thereof referring to the accounts of Patrick O'Reilly, and the same are marked for identification Exhibit E10 and F10.

Said exhibits are objected to.

Paper marked G10 of complainant being shown witness, he is asked:

Q. Is that the current estimate 31 referred to in the portion of the journal above copied?

Exhibit and all testimony objected to.

A. I should say it was.

Q. What appears to be the amount of the payment made under that estimate?

Objected to.

A. $51,241.

Q. What month does it appear to relate to?

Objected to.

A. The estimate seems to be taken on the last day of November, 1856. I would, therefore, say it was for that month.

Q. Is that one of the vouchers of your company received from the Lebanon Valley Railroad Company?

Objected to.

A. It is one of the vouchers of the Lebanon Valley Railroad Company, now in the possession of the Reading.

CROSS-EXAMINATION.

By agreement dated December 8th, 1857, adopted by the stockholders of the respective companies January 11th, 1858, the Lebanon was merged into the Philadelphia and Reading.

Sworn and subscribed October 1st, 1885. } ALBERT FOSTER.

C. V. D. JOLINE, *M. C. C.*

It is now agreed between counsel that either party shall have the privilege and right to further examine or cross-examine Mr. Albert Foster, at the same place.

On Saturday, October 17th, 1885, pursuant to notice, parties met and adjourned until Saturday, October 24th, 1885, at 10½ A. M., at which time it was adjourned until

Friday, October 30th, 1885, at 10½ A. M., at the request of counsel for defendant, at which time, at the request of the same counsel, it was adjourned until Friday, November 6th, 1885, at 10½ A. M.

On Friday, November 6th, 1865, at 10½ A. M., Mr. George Reynolds appeared for Mr. Peter L. Voorhees, the counsel for defendant, and asks for an adjournment until Monday, November, 9th, 1885, at 10½ A. M.

Mr. Drake states that the witness, Mr. Osborne, has been in attendance three times besides the present time since and including October 17th, and since the order of October 12th, made in open court, in presence of Mr. Voorhees, to cross-examine this witness, and that these continual delays and postponements are an imposition on client, witness and counsel; and now gives notice to counsel of defendant that unless cross-examination of this witness is finished on the adjourned day now stated he will permit this witness to sign his deposition, withdraw him from the stand, and refuse to produce him further for cross-examination, as he has a peremptory order by the court to argue a cause during the remainder of the thirty days allowed, and gives further notice that the excuse offered for the delay, namely, that James A. O'Reilly can't attend to this, is trivial, because James A. O'Reilly is a party in interest in this cause, being one of the executors and devisees in Pennsylvania, under the will of Patrick O'Reilly, deceased, and cannot plead his professional engagements to delay a case already most outrageously delayed.

Adjourned until Monday, November 9th, 1885, at 10½ A. M.

Monday, November 9th, 1885, adjourned until Friday, November 13th, 1885, at 10½ A. M., at request of defendant.

Friday, November 13th, 1885, at 10½ A. M., examination resumed in presence of respective counsel.

Richard B. Osborne being placed upon the stand, he having been heretofore sworn, deposeth and saith:

Q. Were you present at the examination of Albert Foster in Philadelphia?

Objected to.

A. I was there on the 1st of October, 1885.

Q. Among the exhibits which were offered there, but the custody of which was retained by Mr. Foster, as the Secretary of his company, which of any did you recognize as containing the signature of Patrick O'Reilly?

Objected to.

A. To five different documents, viz: Y9, Z9, A10, B10 and C10.

Q. State whether or not these signatures were in the proper handwriting of Patrick O'Reilly and his genuine signature, or were copies thereof, in the handwriting of some other person?

A. They were all signatures of P. O'Reilly in his own proper handwriting.

CROSS-EXAMINATION.

Mr. Voorhees now renews his objections to all the testimony of the above witness, and cross-examines him without in any way waiving or abandoning the same or any of them.

Q. How long was John H. Osborne superintendent of the construction of the Camden and Atlantic Railroad for Patrick O'Reilly, deceased?

A. Sometime in June, 1853; on the 20th, Mr. O'Reilly wrote to John H. Osborne to take charge of the construction work on the Camden and Atlantic. Up to the time of its opening in July, 1854, and subsequently for some time in making up the notes and estimates for him, he continued in charge.

Q. About what time did John H. Osborne, with Tarrant, contract with Mr. O'Reilly to build sections 13 or 14 to 26 of the Lebanon Valley Railroad?

A. I think it was from 13 to 26, both inclusive. He contracted in about two months after Mr. O'Reilly was

awarded the contract, which was March 4th, 1854; about May or June, or somewhere thereabouts.

Q. How long did Tarrant remain with Mr. Osborne in the performance of that contract?

A. Some short time. I think about a few weeks after the contract was made.

Q. Did Mr. John H. Osborne then proceed with and complete the work of construction, &c., of said railroad under that contract?

A. He completed the work contained in that contract.

Mr. Voorhees now objects to the witness proceeding further with his answer, as he says the above is a complete answer.

The witness states that he had not finished his answer, and wishes to complete his answer.

Continuation of answer: According to that contract and subsequent agreements between the parties.

Q. When was the work completed?

Objected to for its lack of definiteness.

A. The final estimate was taken on the 31st of October, 1857, by the resident engineer. It was not made up or returned finally by the chief engineer till the 5th of January, 1858.

Q. Had you supervision of the work done by Tarrant & Co. and John H. Osborne in the construction of those sections of that railroad?

A. It was under the immediate direction of a resident engineer who lived on the second division. He was my assistant, and under my supervision.

Q. What was the character of the rock to be excavated on those sections?

A. It was trap rock of a very hard character.

Q. Was that the character of the rock on all the sections?

A. It was the character of the rock on all the sections after getting down some few feet below the surface.

Q. Was the rock then of the same character through all the sections?

A. In those sections where the rock was of but little depth the hard trap rock was not reached.

Q. Where was the hard trap rock reached; in which sections?

A. On section 14 there were 400 yards of solid rock; on section 16 there were 15,030 yards of solid rock; on section 17 there were 1,441 yards of solid rock; on section 18 there were 27,776 yards of solid rock; on section 19 there were 34,326 yards of solid rock; on section 20 there were 3,016 and 5,221, making 8,237 yards of solid rock; on section 21 there were 30,447 yards of solid rock; on section 22 there were 9,422 yards; on section 23 there were 17,002 yards; on section 24 there were 5,312 yards, making in all 151,085 yards of solid rock, as contained in Ex. V2 of complainant. There was none on section 25 and 26.

Q. Does that then show all the solid rock excavation?

A. It does, with the exception of 3,231, which were in approaches of roads outside of the excavation proper of the railroad?

Q. Was this rock all of the same character throughout these sections?

A. At the same depth below the surface the rock would be of similar character. In some of the sections the depth of the excavation did not reach the hard trap rock.

Q. In which particular sections was the hard trap rock reached?

A. Principally in sections 18 and 19; some also on 20, 21 and 22 and 23.

Q. What proportion of it was the hard trap rock in those sections mentioned by you?

A. As near as could be estimated from time to time, we have based our calculation on about 48 per cent. of the total having been of the hard quality of the trap rock.

Q. Was the hard clay mixed with the stone on the line of that road, on those sections constructed by Tarrant & Co. and John H. Osborne, of an ordinary character?

A. Its character was evidently of a hard nature, as shown by the raising of the price from 22 to 23½ on that very item. Harder than ordinary if you choose, I can't give it in any other tune.

Q. On which of the sections was it found to be harder than ordinary?

A. The increase of price was on the whole of the sections, thus giving that character to all of them.

Q. Do you say, on your oath, that the character of the hard clay, mixed with stone, on all the sections, from 13 to 26, of the Lebanon Valley Railroad, was harder than ordinary hard clay mixed with stone found in the construction of railroads?

Objected to as improper.

A. I say on my oath that the chief contractor treated it as such when he altered the price contained in the contract for that item.

Question repeated.

A. I acquiesced in the views of the chief contractor, under the reports of the resident engineer of the division, to me.

Question repeated.

A. That was the report of the resident engineer to me on which I acted.

Question repeated.

A. The details of that work were in the hands of the resident engineer. It cannot be justifiable for counsel to call upon me to swear (Mr. Voorhees objects to the witness making any statement, as the question admits of a direct answer) to the positive quality of cubic yards excavated when I could not be present, when it was the duty of the resident engineer to attend to such matters and report to me.

Q. In the construction of these sections of the Lebanon Valley Railroad how were the payments made by Mr. O'Reilly, to Tarrant & Co. or John H. Osborne?

A. That was a matter between those parties, and I don't know anything about it.

Q. Was the work estimated at regular periods and, if so, state how they were made and at what periods?

A. The estimates were made on the last of every month by the resident engineer for the sub-contractors, and returned to the chief engineer, from which the chief contractor's estimate was made out at his own proper

prices. The payment by the railroad company to the chief contractor was on the 15th of each month, after which the payment to the sub-contractors was made by the chief contractor.

Q. In estimating for the work done when was the price for hard clay mixed with stones and for solid rock increased in the estimates for Tarrant & Co. in their work on sections 13 to 26 on the Lebanon Valley Railroad?

A. The price of rock was raised from 65 to 70 cents in September, 1856, and in November, 1856, it was again raised to 73 cents. The raising of the price of the hard clay I think was about June, 1856.

Q. In making the estimates, were all the excavations of hard clay, mixed with stone and solid rock, done in the construction of those sections, 13 to 26, of the Lebanon Valley Railroad estimated at the increased prices 23½ cents per cubic yard and 73 cents per cubic yard?

A. The resident engineer returned everything at the prices named in the contract, between the chief and subs, up to the time when the chief contractor altered the contract price by raising it to the prices named; when that was done by the chief contractor the chief engineer made out the estimates for the sums, under the instruction and authority of the chief contractor, over the entire yards contained in the whole work in those two items at the altered prices.

Q. How did you ascertain in making these estimates the amount of payment due to the sub-contractors?

A. The total of the present estimate taken from the total of the last or previous estimate left a remainder, from which 7 per cent. for the subs being taken, the remainder would be the payment for the current month. The first remainder represents the work done during the month, and the last remainder the payment on account of the same.

RE-DIRECT.

Q. You have stated that the first remainder represents the work done during the month, and the last remainder the payment on account of the same; now does the last

remainder represent the payment actually made or what the sub could claim as a payment on account of the same?

A. It represents the payment authorized to be made on account of the work done during the month by the resident engineers, quantities returned and estimated at the stipulated price.

Q. Was the memoranda at the foot of the estimates, showing these remainders, intended to take the place of a running account between the contractor and his subs, or merely as a memoranda by which payments to the sub could be made?

A. It would be in the contractor's account book merely an authorized credit to the sub-contractor; an entry in a current account.

Q. What, if anything, had you, as chief engineer of these estimates, to do with keeping the account between the chief and his subs?

Objected to as irrelevant and not as an examination of anything referred to in the cross-examination.

A. Merely the supplying the information requisite to enable the chief contractor to pay his sub-contractors for the work done, and to supply himself with the data by which he could ascertain what the railroad company should pay to him as chief contractor.

Q. In your enumeration of sections containing trap rock I think you omitted section 16; please state whether this section contained solid rock of the trap rock character?

A. By the statements already made its solid rock was trap rock, and over 7,000 yards of it were of the hard quality of trap rock.

Q. In the increase of price of hard clay, mixed with stone and solid rock, above spoken of, did that increase of price relate back to and cover all previous work on those two items, or to that portion only of such work as was done after such increase of price?

Objected to.

A. The increase was given by the chief contractor to cover the whole of that quality of work done up to that time for the purpose of adding the increase to the sum in the estimate, which it would make and which amounted to

$2,485.00; that, with $7,000 which the chief engineer added to the estimate at that time, would enable the subcontractors to meet their extra expenses, or increased expenses rather.

RE-CROSS-EXAMINATION.

Q. In your examination to-day what papers have you had before you all the time?

A. Notes which I have made of dates, quantities, prices and the general testimony which I gave at various times before the Master, that in my further examination I might state what was only positively correct.

Q. When were these notes made?

A. During the progress of the proceedings in this cause before the Master, written out and arranged definitely after each examination while everything was fresh in my mind.

Sworn and subscribed November 13th, 1885. } RICHARD B. OSBORNE.
C. V. D. JOLINE, *M. C. C.*

Adjourned until Friday, November 20th, 1885, at 10½ A. M.

Friday, November 20th, 1885, at 10½ A. M., examination resumed in presence of respective counsel.

Clayton E. Platt, a witness for the complainant, being duly sworn, deposeth and saith:

I live at 226 State street, Camden, N. J.; I am a clerk in the Philadelphia and Reading Railroad, in the Philadelphia office; I am in the secretary's office, under the secretary; Mr. Albert Foster is the secretary; I recollect Mr. Joline, Mr. Voorhees, Mr. Richard B. Osborne and Mr. Drake being at Mr. Foster's office about a month ago.

Witness being shown paper heretofore marked V9 of complainant, is asked:

Q. In whose handwriting is this?

Exhibit and all testimony objected to as irrelevant.

A. In mine. It is a true copy. I suppose that the or-

iginal is on file in the secretary's office. That is where I left it. I made that copy at Mr. Forster's request.

Witness being now shown papers marked by the Examiner for identification Ex. H10, J10, L10, M10, N10, and O10, is asked:

Q. Who made those copies?

Exhibits and all testimony objected to as irrelevant.

A. I did.

Q. Where did you get the originals from which to make these copies?

Objected to.

A. Mr. Foster handed them to me.

In making these copies I placed upon each of them the mark of the Master that I found endorsed thereon. These marks were Y9, Z9, A10, B10, C10 and D10, with the Master's name or initials in each case, followed by "M. C. C."

Q. What did you do with the originals after you made the copies?

A. I gave them to Mr. Foster or his chief clerk.

Sworn and subscribed } CLAYTON E. PLATT.
November 20th, 1885. }

C. V. D. JOLINE, *M. C. C.*

Complainant now offers in evidence exemplified copy of the records of the case of Patrick O'Reilly vs. The Philadelphia and Reading Railroad Company, No. 44, January Term, 1860, in the Supreme Court of Pennsylvania for the Eastern District, and now marked Ex. P10 of complainant.

Objected to as irrelevant and inadmissible.

Counsel for complainant now declares that, with the exception of proving the execution of Exhibits A10, B10 and C10 by the subscribing witness, J. Cooke Longstreth, and of formally offering in evidence all papers, &c., marked as exhibits, the testimony on the part of the complainant is concluded. Counsel for complainant asks that the counsel for defendant admit the signature of J. Cooke Longstreth to said exhibits, he being a resident of Pennsylvania.

Adjourned until Monday, November 30th, 1885, at 10½ A. M.

Monday, November 30th, 1885, at 10½ A. M., examination resumed in presence of respective counsel.

J. Cooke Longstreth, a witness for the complainant, being duly affirmed, deposeth and saith:

I live in Philadelphia; I am an attorney at law and have been for about thirty-five years; I knew Patrick O'Reilly in his life-time and William L. Hirst also.

Q. What was William L. Hirst's business?

A. He was an attorney at law.

Q. State, if you know, whether William L. Hirst ever represented Patrick O'Reilly in any litigation against the Philadelphia and Reading Railroad Company?

Objected to as irrelevant and inadmissible.

A. He did.

Witness being shown Ex. P10 of complainant, being exemplified copy of suit, is asked:

Q. Is W. L. Hirst, whose name appears on this record, the William L. Hirst of whom you have spoken?

Objected to.

A. Yes, sir.

Q. State whether or not you were associated with Mr. Hirst in that suit as attorney or counsel for Mr. O'Reilly?

Objected to.

A. I was.

Witness being shown paper heretofore marked L10, which is a copy of the original, marked A10, is asked to state whether he has examined the original A10; if so, where and in whose handwriting did he find the signatures thereto of Charles E. Smith, as president of the Reading Railroad Company, and of J. Cooke Longstreth, as one of the subscribing witnesses to the signature of P. O'Reilly?

Objected to.

A. I examined the original, of which the paper in my hand, marked L10, is a true copy, this morning, at the office of the Philadelphia and Reading Railroad Company, in the city of Philadelphia, and find the signatures of

Charles E. Smith to be in his proper handwriting, and my signature, as a witness to the signature P. O'Reilly, is in my handwriting, and the signature of W. L. Hirst, as a subscribing witness, is in his handwriting.

Q. Is Mr. Hirst alive or dead?

Objected to,

A. He is deceased.

Witness being shown paper heretofore marked M10, being a copy of the original marked B10, is asked:

Q. State whether you have examined the original B10; if so, when and where, and in whose handwriting do you find the signatures of J. Cooke Longstreth and W. L. Hirst, as subscribing witnesses to the execution of that paper?

Objected to.

A. I have examined the original, of which M10 is a true copy, this morning, at the office of the Philadelphia and Reading Railroad Company, in Philadelphia, and find the signatures of W. L. Hirst and myself, as subscribing witnesses, to be in our own respective and proper handwritings.

Witness being shown paper heretofore marked N10, being the copy of an original marked C10, is asked:

Q. State whether you have examined the original C10, when and where, and in whose handwriting do you find the signature of J. Cooke Longstreth as a subscribing witness?

Objected to.

A. I have examined the original, of which N10 is a true copy, at the same office of the Philadelphia and Reading Railroad Company, at Philadelphia, this morning, and find my signature as a subscribing witness to be in my own proper handwriting.

Q. Please state if, while you were at the Philadelphia and Reading railroad office this morning, you examined two other papers, the one being "Articles of Agreement," dated March 28th, 1861, between the Philadelphia and Reading Railroad Company of the one part and Patrick O'Reilly of the other, marked "Y9 of complainant, C. V. D. Joline, *M. C. C.*," of which H10 appears to be a copy;

and the other a receipt, dated March 17th, 1862, marked "Z9, C. V. D. J., *M. C. C.*," of which J10 appears to be a copy?

Objected to as irrelevant and inadmissible.

A. Yes, sir.

Q. Could you say in whose handwriting were the marks Y9 and Z9 on the originals?

Objected to.

A. In Mr. Charles Joline's.

Being shown a copy of Y9, witness is asked:

Q. In whose handwriting are the words, "Witness to "P. O'Reilly, W. L. Hirst," at the end of the paper?

Objected to

A. They are in William L. Hirst's handwriting.

Q. In whose handwriting is the name of W. L. Hirst as a subscribing witness to the principal portion of the receipt marked Z9?

Objected to.

A. In William L. Hirst's handwriting.

Q. In whose handwriting is the signature W. L. Hirst and the words following it, viz: for N. A. Felix and P. O'Reilly and H. F. Felix and N. A. Felix, appended or subscribed to the second portion of that receipt?

Objected to.

A. In William L. Hirst's handwriting. The first initial to the last name looked to me like N, but it might have been H.

Q. Please state in whose handwriting is the body of B10, of which M10 is a copy?

Objected to.

A. In my handwriting.

Q. In whose handwriting is the body C10, of which N10 is a copy?

Objected to.

A. In William L. Hirst's handwriting.

Affirmed and subscribed November 30th, 1885. } J. COOKE LONGSTRETH.

C. V. D. JOLINE, *M. C. C.*

The complainant now offers in evidence all papers, writings and exhibits heretofore produced and marked as exhibits, and declares the testimony on his part concluded.

Counsel for defendant now objects to each and all of the exhibits, and renews the objection made to the same at the time they were produced and marked, whether offered in evidence or marked for identification, and does not in any way waive the objections heretofore made to said exhibits, or any or either of them.

Adjourned until Monday, December 7th, 1885, at 10½ A. M.

Monday, December 7th, 1885, adjourned until Saturday, December 12th, 1885, at 10½ A. M.

Saturday, December 12th, 1885, adjourned until Wednesday, December 23d, 1885, at 10½ A. M.

Wednesday, December 23d, 1885, adjourned until Thursday, December 31, 1885, at 10½ A. M.

Thursday, December 31st, 1885, adjourned until Friday, January 8th, 1886, at 10½ A. M.

January 8th, 1886, adjourned until Friday, January 15th, 1886, at 10½ A. M.

January 15th, 1886, adjourned until Friday, January 22d, 1886, at 10½ A. M.

Friday, January 22d, 1886, at 10½ A. M., examination adjourned until Friday, January 29th, 1886, at 10½ A. M.

Friday, January 29th, 1886, at 10½ A. M., examination resumed in presence of H. A. Drake for complainant and James A. O'Reilly for defendant.

TESTIMONY FOR DEFENDANT.

Harry P. Waitneight, a witness for the defendant, being duly sworn, deposeth and saith:

I live in West Chester, Pennsylvania; I am a student at law in the office of Monaghan & Haus; I was requested to examine certain papers.

Paper marked Ex. No. 12 of Defts, being deed from Lewis G. Osborne and Joseph A. Clay, committee, &c., to George W. Bowen, dated Dec. 8th, 185—, being shown witness, he saith:

Exhibit and all testimony under it objected to.

That is a certified copy of this deed on record. I compared it with the record, and it is an exact copy of the records.

Paper marked Ex. No. 13 of Defts, being deed from George W. Bowen to John H. Osborne and Patrick O'Reilly, dated Dec. 8th, 1856, shown witness, he saith:

Exhibit and all testimony under it objected to.

That is a certified copy of said deed. I compared it with the record and it is an exact copy of the record.

Paper now marked Ex. No. 14 of Defts, being mortgage from George W. Bowen to Nicholas Bean, dated Dec. 8, 1856, shown witness, he saith:

Exhibit and all testimony under it objected to.

That is a certified copy of that mortgage on record. I compared it with the record and found it to be an exact copy of the record.

Paper marked Ex. No. 15 of Defts, being deed from John H. Osborne and wife and Patrick O'Reilly and wife to George W. Bowen, dated November 7th, 1859, being shown witness, he saith:

Exhibit and all testimony under it objected to.

That is a certified copy of that deed on record. I compared it with the record. It is an exact copy.

Paper marked Ex. No. 16 of Defts, being a mortgage from George W. Bowen to John H. Osborne, dated Nov. 28, 1859, to secure $2,800, being shown witness, he saith:

Exhibit and all testimony objected to.

That is a certified copy of that mortgage of record. I

compared it with the record. It is an exact copy. Counsel for complainant objects to the testimony of this witness as immaterial and cross examines subject to said objection.

CROSS-EXAMINATION.

Q. When did you compare these exhibits Nos. 12, 13, 14, 15 and 16 of the defendant; before or after they had been certified to?

A. Four of them I compared namely, 12, 13, 14 and 16, after full certification, the other one, namely, 15, had the recorder's certificate on when I compared it, and the prothonotary's certificate was put on afterwards.

Sworn and subscribed } HARRY P. WAITNEIGHT.
January 29, 1886. }

C. V. D. JOLINE, *M. C. C.*

Adjourned until Friday, February 5, 1886, at 10½ A. M.

Friday, February 5, 1886, adjourned until February 12, at 10½ A. M.

Friday, February 12, 1886, adjourned until Friday, February 19, 1886, at 10½ A. M.

Friday, February 19, 1886, at 10½ A. M., adjourned until Friday, March 5, at 10 A. M.

Friday, March 5, 1886, at 10 A. M., adjourned until Friday, March 12, 1886, at 10 A. M.

Friday, March 12, 1886, adjourned until Wednesday, March 17, 1886, at 11 A. M.

Wednesday, March 17, 1886, at 11 A. M., examination resumed in the presence of respective counsel.

Joseph W. Doyle, being duly sworn on behalf of the Defendant, testifies as follows:

By Mr. Voorhees.

Q. Where do you live?
A. In New York City.
Q. What is your business?
A. Auctioneer.
Q. How long have you lived in New York?
A. Four years about, or five.
Q. In what way were you employed from about 1854 to about 1859 or 1860?
A. 1854, I was on the Camden and Atlantic Railroad, and the other road the Lebanon Valley.
Q. In what position were you employed on those two railroads?
A. I was clerk.
Q. For whom?
A. Mr. O'Reilly first, and afterwards for Mr. John H. Osborne, eleven months.
Q. Can you state about what time you commenced to clerk for Mr. Osborne?
A. I don't mind the year; it was after I left here.
Q. After you left the Camden and Atlantic Railroad?
A. Yes, sir.
Q. Then you were only clerk for Mr. Osborne on the Lebanon Valley Railroad for how long?
A. Eleven months.
Q. Did you keep Mr. Osborne's books at the time you were clerking for him?
A. I kept some of them.
Q. What were your duties as clerk, what were you required to do?
A. I did everything pretty much, looked after the men, helped the other clerk to go out to the men and pay them, and with the goods and all that kind of thing.
Q. Do you remember about the time when you left Mr. Osborne's employ on the road?
A. Eleven months after I went to him, you can tell by that how long, I don't remember the year; about twenty years ago, I judge.
Q. Had he completed his contract on the Lebanon Valley Railroad?

A. No, sir.
Q. Did you know a man named Isaac Lake?
A. Yes, sir.
Q. Where does he live?
A. I don't know.
Q. Do you know whether or not he is deceased?
A. I don't know.
The witness being shown a paper now marked Exhibit No. 17 for the defendant, is asked:
Q. Do you know Isaac Lake's handwriting?
A. I think so.
Q. Whose signature is to that paper, Exhibit No. 17 as a subscribing witness?
A. I think it is his, Isaac Lake's.
Q. Do you know any of the other signatures to that paper?
A. That one and this one (indicating) John H. Osborne's, P. O'Reilly's and Richard B. Osborne's.
Q. How does Richard B. Osborne sign?
A. Engineer in chief.
Q. John H. Osborne and P. O'Reilly are parties to the instrument?
A. Yes, sir.
Q. And John H. Osborne signs as engineer?
A. I suppose so.
"Exhibit No. 17" is offered in evidence.
The witness being shown "Exhibit No. 18" is asked:
Q. Look at that paper and state whether you can tell whose handwriting that is in the inside?
A. I think that is my handwriting. It is so long ago I can't tell, and I judge it is my handwriting. Page three is my handwriting; page five is my handwriting; page seven is in my hand, and page nine. Page eleven, that is all mine except that, (indicating).
Q. Except the two lines at the bottom?
A. Yes, sir.
Q. Can you state whose handwriting that is in?
A. I think Edward McDermott's handwriting.
Q. Page 13?
A. That is mine except the word "amount" (indicating

the last line on the bottom of the page); also the figures at the bottom of the page, they are Edward McDermott's.

Q. On page 15?

A. That is my handwriting.

Q. On page 16, whose handwriting is it?

A. Edward McDermott's.

Q. Whose is that with crosses upon it on page 16?

A. That is mine except that (indicating).

Q. Except the two balances is it Edward McDermott's handwriting?

A. Yes, sir.

Q. On page 17?

A. That is all Edward McDermott's handwriting.

Q. On page 19?

A. That is all Edward McDermott's handwriting.

Q. On page 21?

A. That's his.

Q. On page 23?

A. That's mine to that (indicating).

Q. The bottom is all yours except the words "Ballance $3407.12, the amount of the two columns?

A. Yes, sir.

Q. All below that is whose handwriting?

A. Edward McDermott's, the lead pencil is all his.

Q. On Page 25?

A. That's all Edward McDermott's.

Q. Page 27?

A. That's all Edward McDermott's handwriting.

Q. Pages 28 and 29?

A. That's Edward McDermott's handwriting.

Q. On page 29 it is all McDermott's handwriting except the last three lines in lead pencil, and that you do not know?

A. Yes, sir; that I don't know.

Q. Who was Edward McDermott?

A. He was a clerk.

Q. For whom?

A. For Mr. P. O'Reilly, he was the chief clerk for Mr. O'Reilly.

Q. Have you any idea how long he was clerk for Mr. O'Reilly?

A. Yes, sir; I suppose he was for twelve or fifteen years, something like that; when he opened the road first, I think, until it was over and all finished—afterwards for a long time, twelve or thirteen years I suppose, I can't tell how long.

Q. Is he living now?

A. No, sir; he is dead. I have heard so.

Q. What was his character as a clerk or as a man?

A. A first rate man, honest—

Objected to as irrelevant and immaterial.

Q. Was he a careful, painstaking clerk?

Objected to as irrelevant and immaterial.

A. I don't know, he was a good man, a good average man; you know what I mean by a good average man; when he had anything to do he done it.

Papers shown witness marked "Estimates of the Lebanon Valley Railroad," marked "Exhibit 19" on part of defendant and offered in evidence.

Q. Have you examined the papers before?

A. I don't know that I have.

Q. Can you state what they are?

A. Estimates, I judge so, they are marked so.

Q. By whom are they signed and what do they purport to be?

A. "For masonry and so forth on the Lebanon Valley Railroad by John H. Osborne, contractor."

Q. By whom is it signed?

A. R. B. Osborne, engineer (No. 1).

Q. No. 2, John H. Osborne, contractor?

A. Signed by Richard B. Osborne, chief engineer.

Q. What does the paper annexed purport to be?

A. "Estimate for work done on the Lebanon Station track. See previous estimate."

Q. By whom is that signed?

A. R. B. Osborne, engineer; the handwriting I don't know anything about.

Q. By whom was No. 3. signed?

A. Signed by Richard B. Osborne.

Q. Is it an estimate for the same kind of work?

A. I judge so. It was headed so.

By Mr. Drake.

Q. Can you give the months?
A. This was May, 1854.

By Mr. Voorhees.

Q. By whom was that signed?
A. M. E. Lyons, assistant engineer.
Q. For whom was the work done?
A. Charles Tarrantt & Co., appears on the paper No. 4.
Q. His handwriting?
A. Yes, sir.
Q. By whom was estimate No. 2, June, 1854?
A. Charles Tarrantt & Co.
Q. In whose handwriting is that?
A. Mr. M. E. Lyon's handwriting.
Q. No. 3, July, 1854?
A. It is signed by M. E. Lyons.
Q. No. 4, August, 1854?
A. That is also.
Q. It is signed by M. E. Lyons, assistant engineer?
A. I think it is; that is what that is.
Q. No. 5?
A. The same party.
Q. September, 1854, signed by M. E. Lyons?
A. Yes, sir.
Q. No. 6, October, 1854?
A. That is also.
Q. How is it signed?
A. M. E. Lyons, "Asso." associate engineer.
Q. No. 7?
A. The same party, signed the same way.
Q. Signed M. E. Lyons, associate engineer.
A. Yes, sir.
Q. No. 8, December, 1854.
A. The same party.
Q. Signed M. E. Lyons, associate engineer?
Q. No. 9, January, 1855?
A. I don't know anything about that, it is not signed,

the handwriting is all I know—this handwriting; I don't know anything about that (indicating).

Q. Has it any indication by which you know it?

A. No.

Q. It purports to be for Tarrantt & Co., 1855?

A. Yes, sir.

Q. Do you know whose handwriting is annexed on No. 9?

A. No, sir.

Q. No. 10, whose is that in, February, 1855?

A. Tarrantt & Co., it is signed by M. B. Lyons, associate engineer.

Q. No. 11, March, 1855, Tarrant & Co., I suppose?

A. Signed by Mr. Lyons, associate engineer.

Q. No. 12, 1855, that is not signed?

A. No, sir.

Q. That purports to be for Tarrantt & Co.?

A. Yes, sir.

Q. No. 13, that purports to be for Tarrantt & Co.?

A. Yes, sir.

Q. That is not signed?

A. No, sir.

Q. No. 14?

A. Signed by M. B. Lyons.

Q. That is for June, 1855, for Tarrantt & Co.?

A. Yes, sir.

Q. Certified by M. B. Lyons?

A. Yes, sir.

Q. No. 15, July, 1855, is that for the same party?

A. Yes, sir.

Q. By whom is it certified?

A. M. B. Lyons, associate engineer.

Q. No. 16?

A. R. B. Osborne.

Q. That is signed by R. B. Osborne, engineer for Tarrantt & Co.?

A. It looks to be.

Q. For August, 1855. No. 17, September, 1855, Tarrantt & Co., who is it signed by?

A. R. B. Osborne, engineer.

Q. No. 18, October, 1855?
A. R. B. Osborne, engineer, "Richard."
Q. No. 19?
A. Signed by M. B. Lyons, associate engineer, for Tarrantt & Co., November, 1855.
Q. No. 20, December, 1855?
A. M. B. Lyons certified for Richard B. Osborne, engineer.
Q. By whom is 21 certified, January, 1856?
A. M. B. Lyons, associate engineer.
Q. No. 22, February, 1856, Tarrantt & Co., who was that certified by?
A. Nobody.
Q. No. 23, March, 1856, by whom is that certified?
A. M. B. Lyons, associate engineer, for Tarrantt & Co.
Q. It purports to be?
A. Yes, sir.
Q. No. 24, April, 1856, for Tarrantt & Co., sub-contractors?
A. Yes, sir; M. B. Lyons.
Q. No. 25, May 26, by whom is that certified?
A. That is Richard Osborne.
Q. No. 26, June, 1856, for Tarrantt & Co., sub-contractors, who?
A. Richard B. Osborne.
Q. No. 27, July, 1856, Tarrantt & Co., contractors, certified by whom?
A. The same thing.
Q. No. 28, August, 1856?
A. It is certified by Richard B. Osborne, engineer.
Q. No. 29, September, 1856, for Tarrantt & Co.
A. Richard B. Osborne.
Q. No. 30, for October, 1856?
A. Richard B. Osborne.
Q. No. 31, for Tarrantt & Co., November, 1856.
A. Richard B. Osborne.
Q. No. 32, December, 1856, Tarrantt & Co.?
A. Richard B. Osborne.
Q. No. 33?
A. Richard B. Osborne.

Q. For January, 1857?

A. Yes, sir.

Q. No. 34. for 1857, Tarrantt & Co., sub-contractors?

A. Richard B. Osborne.

Q. No. 35, March, 1857?

A. Richard B. Osborne.

Q. No. 36, for April, 1857, Tarrantt & Co., sub-contractors?

A. Richard B. Osborne.

Q. No. 37, May, 1857, Tarrantt & Co., sub-contractors?

A. Richard B. Osborne.

Q. No. 38, June, 1857, for Tarrantt & Co., sub-contractors?

A. Richard B. Osborne.

Q. No. 39, July, 1857, Tarrant & Co., sub-contractors?

A. Richard B. Osborne.

Q. No. 41, September, 1857, Tarrantt & Co.?

A. Richard B. Osborne.

Q. Final estimate taken the 5th of January, 1858, for Tarrantt & Co., sub-contractors, by whom is that certified?

A. Richard B. Osborne, engineer.

Q. Do you know the handwriting in the body of that?

A. It looks like mine. This was long ago and cannot tell what it is; it looks like my handwriting.

Q. Are you acquainted with the handwriting of Mr. Osborne and his signature?

A. I am.

Q. Do you know the signature of Mr. M. B. Lyons?

A. Yes, sir.

Q. These signatures to all these estimates are, in your belief, the proper, the handwriting of Osborne and Lyons?

A. Yes, sir; I think that is my handwriting.

Q. You do not know the handwriting of the body of it?

A. It is my own handwriting, I don't know how I came to do it, but it is.

Q. The witness being shown another paper marked, "Final estimate of construction of sections one to forty inclusive, being the 1st, 2nd and 3rd divisions, Patrick O'Reilly, contractor, taken August 31, 1858, marked "Exhibit 20."

The offer of this exhibit is objected to.

Q. Whose handwriting is that, can you tell me?

A. I cannot; it looks like McDermott's handwriting, but I don't know.

Q. Whose signature?

A. Richard B. Osborne, engineer-in-chief.

By Mr. Voorhees.

Q. At the end of the second page certified by R. B. Osborne, engineer-in-chief, it is in somebody else's handwriting?

A. Yes, sir.

Q. And the engineer-in-chief is the handwriting of R. B. Osborne?

A. Yes, sir.

The witness' attention being called to Exhibit 9.

It is agreed that copies may be marked as an exhibit to be used as shown in book heretofore marked number 9.

Q. The witness' attention being called to receipt No. 6, is asked: Whose signature is that to the receipt for $4,339?

A. John H. Osborne's signature.

Q. How is it signed; Tarrantt & Co.?

A. Yes, sir.

Q. Whose handwriting is it?

A. John H. Osborne's.

Q. No. 19, receipt for $7,740?

A. That looks like—

Q. Signed Tarrantt & Co., whose handwriting is that?

A. It looks like Osborne's handwriting.

Q. Receipt No. 31, $7,440, signed Tarrantt & Co., whose handwriting is that?

A. It looks like Mr. Osborne's.

Q. No. 46, $8,170, signed Tarrantt & Co., whose handwriting is that?

A. It looks like John H. Osborne's.

Q. Receipt No. 60, for $7,900, signed Tarrantt & Co., whose handwriting is that?

A. John H. Osborne's.

Q. No. 69, for $6,000, signed Tarrantt & Co., whose handwriting is that?

A. Mr. J. H. Osborne's.

Q. Receipt No. 82, for $4,000, signed Tarrantt & Co., for George H. Bowen, whose handwriting is that?

A. Mr. Bowen's handwriting.

Q. No. 79, for $7,000, signed Tarrantt & Co., whose handwriting?

A. John H. Osborne's handwriting.

Q. Who was George W. Bowen?

A. He was clerk for Mr. John H. Osborne.

Q. Employed for him about that time, 1854?

A. Yes, sir.

Q. Receipt 83, $244 signed Tarrantt & Co., whose signature is that?

A. It looks like John H. Osborne's.

Q. Receipt No. 103, for $1,943, signed by Tarrantt & Co.?

A. George W. Bowen's handwriting.

Q. Receipt No. 107, signed Tarrantt & Co., from George W. Bowen, whose handwriting is that?

A. George W. Bowen's handwriting.

Q. Receipt No. 119, for $800, signed Tarrantt & Co., whose handwriting is that?

A. John H. Osborne's, it looks like it very much.

Q. Receipt No. 125, for $2,000, signed Tarrantt & Co., whose handwriting is that?

A. It looks like John H. Osborne's handwriting.

Q. Receipt No. 133, for $300, signed Tarrantt & Co., whose handwriting is that?

A. It looks like John H. Osborne's.

Q. Receipt No. 140, for $3,000, signed Tarrantt & Co., whose handwriting is that?

A. John H. Osborne's handwriting.

Q. Receipt No. 145, for $9,000, signed Tarrantt & Co., per John H. Osborne?

A. That is his handwriting.

Q. Receipt No. 162, $10,500, signed Tarrantt & Co., whose handwriting?

A. John H. Osborne's.

Q. Receipt No. 174, for $8,805, signed Tarrantt & Co., per George W. Bowen, whose handwriting is that?

A. George W. Bowen's.

Q. Receipt No. 179, for $2,000, signed Tarrantt & Co., per George W. Bowen?

A. George W. Bowen's handwriting.

Q. Receipt 189, for $13,337, Tarrantt & Co., for G. W. Bowen, whose handwriting is that?

A. George W. Bowen's handwriting.

Q. Receipt No. 203, for $13,923, Tarrantt & Co., Geo. W. Bowen's handwriting?

A. George W. Bowen's.

Q. Receipt No. 215, for $14,487, Tarrantt & Co., whose handwriting is that?

A. J. H. Osborne's handwriting.

Q. Receipt No. 229, for $16,500, Tarrantt & Co., per George W. Bowen, whose handwriting is that?

A. George W. Bowen's handwriting.

Q. Receipt No. 241, for $14,516, signed Tarrantt & Co., whose handwriting is that?

A. It looks like John H. Osborne's signature.

Q. Receipt No. 248, for $1,200, signed Tarrantt & Co., whose handwriting is that?

A. John H. Osborne's handwriting.

Q. Receipt No. 264, for $13,169, signed Tarrantt & Co., whose handwriting is that?

A. John H. Osborne's.

Q. Receipt No. 263, for $500, signed Tarrant & Co.?

A. It looks like John H. Osborne's handwriting.

Q. Receipt No. 270, for $10,480, Tarrant & Co., per George W. Bowen, whose handwriting is that?

A. George W. Bowen's handwriting.

Q. Receipt No. 282, for $8,654, signed Tarrantt & Co., whose handwriting is that?

A. John H. Osborne's.

Q. Receipt No. 293, for $9,940, signed Tarrantt & Co., whose handwriting is that?

A. It looks like John H. Osborne's handwriting.

Q. Receipt No. 298, for $2,000, signed Tarrantt & Co.?

A. That is John H. Osborne's handwriting.

Q. Receipt No. 305, for $14,777, signed Tarrantt & Co., whose handwriting is that?

A. It looks like John H. Osborne's handwriting.

Q. Receipt No. 318, for $13,745, signed Tarrantt & Co., whose handwriting is it?

A. John H. Osborne.

Q. Receipt No. 325, for $2,500, signed Tarrantt & Co., whose handwriting is that signature?

A. John H. Osborne's signature.

Q. Receipt No. 331, for $17,400.20, signed Tarrantt & Co., whose handwriting is that?

A. It looks like John H. Osborne's handwriting.

Q. Receipt No. 344, for $18,300, signed Tarrantt & Co., whose handwriting is that?

A. John H. Osborne's.

Q. Receipt No. 357, for $18,328, signed Tarrantt & Co., per George W. Bowen, whose handwriting is that?

A. That is George W. Bowen's handwriting.

Q. Receipt No. 372, for $17,180, signed Tarrantt & Co., whose handwriting is that?

A. John H. Osborne's.

Q. Receipt No. 381, for $17,500, signed Tarrantt & Co., per George W. Bowen, whose handwriting is that?

A. Bowen's handwriting.

Q. Receipt No. 393, for $10,101, signed Tarrant & Co., whose handwriting is that?

A. John H. Osborne's.

Q. Receipt No. 409, for $16,106, signed Tarrantt & Co., per George W. Bowen, that is his handwriting?

A. That is George W. Bowen's handwriting.

Q. Receipt No. 417, for $12,000, signed Tarrant & Co., per George W. Bowen?

A. That is George W. Bowen's handwriting.

Q. Receipt No. 418, for $10,716, signed Tarrant & Co.?

A. John H. Osborne's.

Q. Receipt No. 434, for $11,900, signed Tarrantt & Co., per George W. Bowen, whose handwriting is that?

A. George W. Bowen's handwriting.

Q. Receipt No. 442, for $11,448, signed Tarrantt & Co., per G. W. Bowen?

A. George W. Bowen's handwriting.

Q. Receipt No. 452, for $7,500, signed Tarrantt & Co., per George W. Bowen?

A. George W. Bowen's.

Q. Check No. 153, for $2,500, signed John H. Osborne, per George W. Bowen?

A. George W. Bowen's handwriting.

Q. Receipt No. 461, for $2,000, signed John H. Osborne, per George W. Bowen?

A. That is Geo. W. Bowen's handwriting.

Q. Receipt No. 470, for $1,000, signed Tarrantt & Co., per George W. Bowen, whose handwriting is that?

A. George W. Bowen's handwriting.

Q. Receipt No. 472, for $500, signed Tarrantt & Co., per George W. Bowen, whose handwriting is that?

A. Bowen's handwriting.

Q. Receipt No. 473, for $1,240, signed Tarrantt & Co., per G. W. Bowen, whose handwriting is that?

A. George W. Bowen's.

Q. Receipt No. 478, for $2,000, signed Tarrantt & Co., per George W. Bowen?

A. George W. Bowen's.

Q. Receipt No. 479, for $2,202, John H. Osborne's, per G. W. Bowen?

A. G. W. Bowen's.

Q. Receipt No. 485, for $1,000, signed Tarrantt & Co., in whose handwriting is that signature?

A. I don't know; I would not swear to that handwriting; I don't know.

Q. Does it resemble John H. Osborne's handwriting?

A. Not very much, it don't.

Q. You are not sure about that signature?

A. I am not; it might have been going through, except the "T," like the balance of them.

Q. Did it look like his handwriting except the "T" being different?

A. Yes, sir.

The witness being shown receipt heretofore marked "A," dated March 24th, 1856, for $4,430, on account of contract with the Lebanon Valley Railroad, signed Tarrantt & Co., he is asked:

Q. Whose handwriting is the signature to that?

A. It looks like John H. Osborne's.

Q. In whose handwriting is the body of the receipt?

A. Mr. McDermott's, I guess, I think it is—no, I don't think it is there (indicating). I can't tell.

Q. Is it Mr. Osborne's handwriting at the bottom of the receipt?

A. It might be; I guess it is. It looks so, I don't know.

Q. It looks so, you are not sure?

A. Yes, sir.

Q. Receipt marked "B" in book dated April 19, 1856, for $1,978.67, being balance of note discounted this day, $2,000, George W. Bowen for Tarrantt & Co?

A. That is Mr. Bowen's handwriting.

Q. Receipt dated December 19th, 1856, for $8,000 signed John H. Osborne marked Exhibit "C." Whose handwriting is that?

A. John H. Osborne's.

Mr. Voorhees, (Reading). "Received, Reading, December 19, 1856, of P. O'Reilly, $8,000 over his estimate on the November payment, John H. Osborne."

Q. The witness being shown receipt dated November 11, 1857, received from P. O'Reilly, Esq., for Tarrantt & Co., $2,500 in two notes at Lebanon at three and four months, on account of contract of second division, J. C. Briscoe. Is that the handwriting of J. C. Briscoe?

A. I guess that is his handwriting.

Q. Did you know Mr. Briscoe?

A. Very well; yes, sir.

Q. What position did he occupy?

A. He was clerk.

Q. For whom?

A. For Richard B. Osborne.

Q. The attention of the witness is directed to receipt dated November 12, 1857, of P. O'Reilly on account of work on the Lebanon Valley Railroad, two notes of the Lebanon Valley, dated November, 1857, at ninety days, four months, $1,250, signed John H. Osborne, in whose handwriting is that?

A. John H. Osborne.

Q. Did he write the body of that receipt?

A. Yes, sir.

Q. Is that a duplicate?

A. I don't know that it is. It looks like his handwriting.

Q. Is that the signature of John H. Osborne?

A. That is his handwriting.

Q. The attention of the witness is called to receipt written in red ink, January 27th, 1856, received of P. O'Reilly, $16,106 on account of work second division, as per receipt signed in receipt book this day by me for Tarrantt & Co., and their orders, signed George W. Bowen?

Q. In whose handwriting is that signature, George W. Bowen?

A. George W. Bowen's handwriting.

Q. That receipt in red ink, who signed that, Tarrantt & Co.?

A. John H. Osborne.

Q. This receipt in red ink is written across the order. Pay to the order of George W. Bowen, $18,500 for amount of estimate of Second Division for month ending December 31st, 1856, Tarrantt & Co., per George W. Bowen. Whose signature is that?

A. John H. Osborne's, the whole writing is. That is his sure (indicating).

Q. The witness being shown a paper marked, "Exhibit No. 21," being a promissory note dated Reading, February 28th, 1855. Ninety days after date I promise to pay to the order of Tarrantt & Co., $800 without defalcation for value received. Signed P. O'Reilly, and endorsed Tarrantt & Co. In whose handwriting is the signature P. O'Reilly?

A. P. O'Reilly's handwriting.

Q. In whose handwriting is the endorsement, Tarrant & Co.?

A. John H. Osborne's

Q. Exhibit No. 22, being shown witness, being a promissory note dated Womelsdorf, January 1st, 1855. Six months after date we promise to pay to order of Smith & Bros., payable at the Farmers' Bank of Reading Pa.,

$438.65, without defalcation, signed Tarrant & Co. Annexed to which is a check dated Reading, Pennsylvania, July 5th, 1855. Farmers' Bank of Reading, pay to Tarrant & Co., or bearer, $438.65. Signed Patrick O'Reilly. Whose signature is Tarrantt & Co., to that note?

A. John H. Osborne.

Q. Whose signature is P. O'Reilly to that check?

A. Patrick O'Reilly.

Q. The witness being shown five promissory notes and a check pinned together and marked "Exhibit No. 23," as follows: Check dated July 20th, 1855, at Reading Pennsylvania. Farmers' Bank of Reading pay five notes of Tarrant & Co., or bearer, $3,094.13, P. O'Reilly, Contractor. Note, Reading, July 23rd, 1855, six months after date we promise to pay to the order of Stichter and McKnight, $1,439.09, without defalcation or discount, Tarrant & Co. Reading, June 19th, 1855. Thirty days after date we promise to pay to the order of Thomas Jackson at the Farmers' Bank, Reading, $250, without defalcation or discount. Tarrant & Co. Reading, June 21st, 1855. Thirty days after date we promise to pay to John C. Seltzer, at the Farmers' Bank of Reading, $602.90, without defalcation or discount, signed Tarrantt & Co., Reading, Pennsylvania, April 16th, 1855. Ninety days after date we promise to pay to the order of John B. Smith, at the Farmers' Bank at Reading, $580.14 for value received, without defalcation or discount, Tarrantt & Co. April 16th, 1855. Ninety days after date we promise to pay to William Hoskins, at the Faamers' Bank of Reading, $222, without defalcation, for value received, signed Tarrantt & Co.

In whose handwriting are the signatures Tarrantt & Co., to those five notes?

A. John H. Osborne's handwriting; I think so.

Q. Whose signature is it to the check for $3,094.13?

A. That is the handwriting of Patrick O'Reilly.

Q. The witness being shown four notes pinned together, marked "Exhibit No. 24," as follows: Womelsdorf, March 29th, 1855, sixty days after date we promise to pay to the order of John B. Smith, at the Farmers' Bank at Read-

ing, $250, without defalcation, signed Tarrantt & Co. Womelsdorf, March 28th, 1855, sixty days after date we promise to pay to the order of Klock, $230.95, without defalcation, for value received, at the Farmers' Bank, signed Tarrantt & Co. Reading, April 26th, 1855, three months after date we promise to pay to the order G. DeB. Keim, Jr., at the Farmers' Bank at Reading, $300, without defalcation, for value received, signed Tarrantt & Co. Womelsdorf, March 29th, 1855, sixty days after date we promise to pay to the order John H. Shoals, at the Farmers' Bank, at Reading, Pennsylvania, $400, without defalcation, for value received, signed Tarrantt & Company.

In whose handwriting are the signatures, Tarrantt & Co., to each of those notes.

A. John H. Osborne's.

Q. The witness being shown paper marked "Exhibit No. 25," being a promissory note dated Reading, Pennsylvania, March 26th, 1856, sixty days after date we promise to pay to the order of Stichter & McKnight, at the Farmers' Bank, at Reading, $480.29, without defalcation, for value received, signed Tarrantt & Co. In whose handwriting is the signature to that note?

A. John H. Osborne's.

The witness being shown paper marked "Exhibit No. 26," on the part of the defendant, being a promissory note, dated Reading, Pennsylvania, February 26th, 1856, ninety days after date we promise to pay to William Hoskin, at the Farmers' Bank, at Reading, $282, without defalcation, for value received, signed Tarrantt & Co.

In whose handwriting is the signature Tarrantt & Co.

A. John H. Osborne's.

Q. The witness is shown paper marked "Exhibit No. 27," being a promissory note, dated Reading, March 27th, 1855, ninety days after date we promise to pay to the order of John A. Shoals, at the Farmers' Bank, of Reading, $1472.72, without defalcation, for value received, signed Tarrantt & Co.

In whose handwriting is the signature to that note?

A. John H. Osborne's.

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Q. The witness being shown paper marked "Exhibit No. 28," for the defendant, being a promissory note, dated Philadelphia, August 2, 1855,, six months after date I promise to pay to the order of George W. Richards $2666.-66, without defalcation for value received, signed John H. Osborne, payable at the Farmers' Bank, at Reading.

Whose signature is that?

A. Mr. John H. Osborne's handwriting.

Q. The attention of the witness being called to receipt in book heretofore marked "Exhibit No. 11" on page 4, at the top, Reading, September 22, 1854. Received of P. O'Reilly the sum of eight hundred dollars, on account of L. V. R. R. D., signed Tarrantt & Co., per William Bowen, Sr. Present E. McDermott, marked letter "H."

Do you know Enoch McDermott's handwriting?

A. Yes, sir.

Q. Is that his handwriting in that signature as a witness?

A. That is his handwriting.

Q. Do you know this other handwriting of Tarrantt & Co., per William Bowen?

A. William Bowen, Sr., I don't know his handwriting.

Q. Is E. McDermott dead or alive?

A. He is dead; I heard he was dead.

Q. In whose handwriting is the body of the receipt?

A. Mr. McDermott's, I guess, I judge so.

Q. The witness being shown book marked "Ledger, Lebanon Valley Railroad," marked "Exhibit No. 29," for the defendant, is asked: Do you know that book?

A. Yes, sir; that is P. O'Reilly's ledger.

Q. To whom did it belong?

A. Patrick O'Reilly.

Q. The attention of the witness being called to the account of Charles Tarrantt & Co., on pages 16 and 15. In whose handwriting are those accounts on pages 15 and 16?

A. Edward McDermott's.

Q. The former clerk of P. O'Reilly?

A. Yes, sir.

Q. The attention of the witness being called to the ac-

New Jersey State Library

count in the ledger of John H. Osborne on page 21, is asked in whose handwriting is that?

A. This is Edward McDermott's.

Q. It is all the account of John H. Osborne?

A. Yes, sir.

The signature of the witness is waived.

Albert R. Hiellig, being duly sworn on behalf of the defendant, testifies as follows:

By Mr. Voorhees.

Q. Witness being shown papers, copies read from receipt book here. from No. 6—

A. I compared them as you read them over. They are all there as the former witness testified to.

Q. From No. 6 to 485, as read in the examination of the other witness, and the others referred to as loose in the front part of the books?

A. These purport to be all the receipts that were read as testified to by the other witness and taken from that book.

The witness' attention is called to a lot of papers tied together, marked "Exhibit No. 30."

Q. Are they copies of the receipts proved by the other witness?

A. As contained in this book (No. 9).

The witness being shown paper marked "Exhibit No. 31," is asked:

Q. What is that paper?

A. This paper is an exact copy of the account of Charles Tarrantt & Co., as contained in P. O'Reilly's ledger (marked Exhibit No. 29) on pages 15 and 16.

Q. Did you make that copy (indicating)?

A. I made that copy; yes, sir.

Q. This lead pencil mark is the lead pencil you found in the ledger?

A. Yes, sir; every mark I found in the book I put in his paper, whether it was intelligent or not.

The witness being shown paper marked "Exhibit No. 32," he is asked:

Q. What is that paper?

A. This is the account of John H. Osborne as contained in the same ledger on page 21, that is, it is a copy of that account as contained on page 15.

No cross-examination.

The signature of the witness is waived.

Joseph W. Doyle, recalled on behalf of the defendant.

By Mr. Voorhees.

Q. The witness is shown a paper, being a note and protest of a note dated, "Reading, October 8th, 1857." Ninety days after date I promise to pay to the order of John H. Osborne, four hundred and eleven dollars and thirty-one cents, without defalcation, for value received, payable at the Farmers' Bank at Reading." (Signed.) "Patrick O'Reilly." Endorsed, "John H. Osborne." Same being marked, "Exhibit No. 33."

Q. In whose handwriting is the signature, Patrick O'Reilly?

A. Patrick O'Reilly's.

Q. In whose handwriting is the endorsement on the back of that?

A. I think that is John H. Osborne's handwriting.

The defendant offers in evidence the note and protest examined upon.

Mr. Voorhees:—We declare our testimony closed for the purposes of the first hearing before the Courts.

THE DEFENDANT RESTS.

On March 29th, 1886, at 11 A. M., pursuant to notice and agreement, the examination is resumed in presence of respective counsel.

COMPLAINANT'S REBUTTAL.

John H. Osborne, being called in rebuttal, he having been heretofore sworn, deposeth and says:

Mr. Voorhees objects to the re-examination of his witness on the ground that he has been heretofore examined; that no order has been granted for his re-examination, and that he is called to testify to transactions between himself and a deceased person.

Counsel for complainant states that this witness is called in rebuttal and not re-called; and that one of the objects of this rebuttal is to contradict the answer of the deceased defendant, especially the non responsive portions of it, and the statements, showings and charges of it, not in direct denial of the complainant's bill, which, it seems to counsel, are now in evidence as the evidence of the deceased defendant, and for which counsel will insist it is competent to call the surviving complainant.

Mr. Voorhees objects to the above statement, and to any evidence offered under the claim therein stated, as such evidence would not be rebuttal in any sense, and would be inadmissible.

Q. Is it true, as stated in the answer of the defendant, Patrick O'Reilly, that you still retain in your possession a great many of the accounts relating to the building and construction of the Camden and Atlantic R. R., and of the moneys received and disbursed by you, of him, for that purpose?

Objected to as above, as inadmissible, irrelevant and not rebuttal.

A. It is not.

Q. Was it, or was it not, true at the time of the death of Patrick O'Reilly, since 1880?

Objected to as above.

A. It was not.

Q. Was it, or was it not, true at the time of the filing of the answer of Patrick O'Reilly in this cause, between 1861 and 1865?

Objected to as above.

A. It was not.

Q. Did you, or did you not, refuse, as stated in the answer of the defendant, to come to any detailed account with Patrick O'Reilly, of and concerning the moneys received and disbursed by you, towards the building and construction of the Camden and Atlantic R. R.?

Objected to as above.

A. I did not at any time refuse to do so.

Q. When, if at any time or times, did you hand over to Patrick O'Reilly your statements, accounts and vouchers of the receipts and disbursements now under consideration?

Objected to as above.

A. I handed over to his clerk, George W. Bowen, all the papers and accounts of my disbursements in 1854, with the exception of a sum of about $6,000, to the best of my knowledge and belief, which I gave personally to Mr. O'Reilly in 1857.

Q. Do those receipts by you greatly exceed the disbursements by you on that account as stated in the answer, or do the settlement and certificate, Ex. Y2, and pp. 5 and 6 of Y5, correctly show the balance due Patrick O'Reilly on this account of receipts and disbursements?

Objected to as above.

A. Pages 5 and 6 of Y5, and Ex. Y2 show in detail a full settlement of my accounts with Mr. O'Reilly at the date, October 7th, 1857. I stated, I wish to correct, in the previous question as about $6,000. I see it is $8,421.72.

Q. Why does the certificate, Y2, state the balance to be $1.096.97, while the Ex. Y5, in the portions referred to, shows the balance to be $1,098.97?

Objected to as above.

A. $1,096.97 on Y2 was a clerical error, and was corrected afterwards to $1,098.97.

Q. State whether or not that, as stated by the defendant's answer, by an error upon the face of said account, the balance, instead of the amount above stated, should be $3,445.76?

Objected to as above.

A. There was an error in the account presented by me

to Mr. O'Reilly which made the balance some $2,300 instead of $1,098.

Q. Is the account as it now stands on pp. 5 and 6 of Y5 correct, or is there an error on the face of it, as stated in the answer of the defendant?

Objected to as above.

A. The account on pp. 5 and 6 of Ex. Y5 is correct; there is no error in it.

Witness being referred to those portions of Ex. No. 19, of defendant, embraced in the first five folio thereof, being current estimates of John H. Osborne, contractor, No. 1 for May, 1857, No. 2 for June, 1857, No. 3 for July, 1857, and final estimate dated January 11th, 1858, is asked whether the $10,102.10 were for extra work and materials done, performed and furnished by him to P. O'Reilly, as stated in the answer, or whether it was upon a contract between him and the company without reference to O'Reilly.

Objected to as above.

A. The $10,102 was not extra work. That sum contained some work done by me for the company. I don't know in what account that work was placed, but it was not extra work, any of it, for Mr. O'Reilly.

Q. Is it true, as stated in the answer, that the defendant has paid you for the whole amount of work and labor done, and materials furnished under the contract, and for the extra work you have done for him; or that he has largely overpaid you therefor?

Objected to as above.

A. It is not true.

Q. Is it true, as stated in the answer, that the defendant has, at all times been ready and anxious to account with you for said work and labor done, and materials furnished, and has repeatedly applied to you to account with him for the work and labor done, and materials furnished, in the building and construction of the Lebanon Valley R. R., including the extra work?

Objected to as above.

A. It is not true. I made very many applications for a settlement of the accounts between us but without success; and could never obtain one.

Q. Is it true or not, as stated in the answer here, that O'Reilly repeatedly applied to you to account with him for, and to pay to him the moneys overpaid to you by him, about the erection and construction of this Lebanon Valley R. R., and your extra work touching it?

Objected to as above.

A. It is not true. He never made such application to me.

Q. Has Patrick O'Reilly paid to you, on account of the work which you did as his sub-contractor on the second division of the Lebanon Valley R. R., or the extra work which you did for him, touching the building and construction of that R. R., $447,000 and over, as he stated.

Objected to as above.

A. He has not.

Q. Did Patrick O'Reilly, at your earnest request, and in order to aid and assist you in your general business, advance and pay to you, on account of the moneys supposed to be remaining due under your contract with him, and in accordance with the provisions thereof, large sums of money amounting to $11,184.40, making the whole amount paid by him to you and Charles Tarrantt, and to you, after Tarrantt gave up his interest in the contract, on account of said contract, to be $447,160.45?

Objected to as above.

A. He did not.

Witness being shown Ex. 31, of Def't, is asked whether the item "1854. Dec. 21. To Bills Payable, | 15 | 1380.00 | ," being the 8th item of that exhibit was paid to him or to Tarrant & Co., on account of work done by him on the Lebanon Valley R. R., or on other accounts?

Objected to as above.

A. It was paid on other accounts.

Witness being referred to the Ex. No. 31, the 11th item on the 2d folio of said Ex., "1856. Dec. 19, to cash, 64, 8,000.00," and to the corresponding receipt forming a part of Ex. 30, is asked whether he received that sum under his estimates, or over and above the estimates on account of loss on rock?

Objected to as above, and as inadmissible, and as an at-

tempt to contradict the statements of the written receipt, part of Ex. No. 30.

A. I received that $8,000.00 over and above the estimate on account of the loss I sustained on rock, as John H. Osborne.

Q. Of the moneys paid to you as Tarrant & Co., as shown by Ex. 31, without admitting that you have received all of those moneys, can you state whether or not any portion of them were repaid to Patrick O'Reilly?

Objected to as irrelevant, inadmissible and not rebuttal.

A. A portion of them was repaid to Mr. O'Reilly.

Q. If Patrick O'Reilly has not paid you $447,000, and over, on account of work done under this contract, or any modifications of it, and the extra work done on this railroad for him, how much has he paid you on those accounts?

Objected to as above.

A. He has paid $420,000, or thereabouts.

Q. More or less than that sum?

Objected to as above.

A. More; I can't charge my mind with the figures now.

Q. After you and Mr. Tarrant had entered into this contract with Mr. O'Reilly were you and Mr. Tarrant wholly unable to obtain the necessary stock and implements to effective prosecute your work under the contract?

Objected to as above.

A. I never experienced any difficulty in doing so.

Q. And did Patrick O'Reilly at the special instance and request of Tarrant and yourself, furnish you and Tarrant with horses, mules, &c., amounting to $9,026.98, for the purpose?

Objected to as above.

A. At the special desire of Mr. O'Reilly, I bought from him some mules and other items of plant which he had on his hands. I also bought some mules at my own instance from Mr. O'Reilly. I don't know anything about the amount of the $9,000 which has been read to me, or the

account. I did buy over $6,000.00 worth of stuff from him, and I did pay him for the same over $5,000. This was a very small portion of the amount I expended for plant on the Lebanon Valley, which exceeded $40,000. I quote these figures from memory.

Witness being referred to pages 1 and 2 of Ex. Y5 is asked to what the account of those pages refers?

Objected to as above.

A. It refers to an account between P. O'Reilly and J. H. Osborne, of sundry matters furnished me by Mr. O'Reilly, and sundry moneys paid by me for the same.

Q. What reference has it, if any, to the horse and mule account, of which you have just been speaking?

Objected to as above.

A. That is the account.

Adjourned at 1 P. M. till 2 P. M.

At 2 P. M. examination resumed.

Q. Is it, or is it not true, as stated by the answer, that at or about the time of suspension, during the latter months of 1854, and the earlier months of 1855, the defendant, Patrick O'Reilly, told you that if you saw fit, under the circumstances, to throw up the contract, he, O'Reilly, would fully pay you for all work done under the contract, and fully compensate you from any loss or damage that might arise by reason of the non-completion of said contract; the circumstances referred to being O'Reilly's statement to you of the possible inability on his part to pay the amount of moneys shown to be coming to you, from time to time, under the estimates as they were taken?

Objected to as above.

A. It is not true. The only intimation I have ever had on the matter was when I read it in defendant's answer.

Q. Were you, or were you not, under these same circumstances, willing and anxions to retain the contract, and did you agree to retain the same subject to the liabil-

ity of the Lebanon Valley Co., and P. O'Reilly, to make default to pay in cash each month for the amount of work that might be done under said contract?

Objected to as above.

A. Anything to the contract of my retention of the contract was never suggested to me, and hence I never bound myself to abide by the short-comings either of the company or the chief contractor.

Q. Did you, under these same circumstances, as the answer states, agree to continue your work, under your contract, with a greatly reduced force of hands; and did you so continue it?

Objected to as above.

A. I did not. I received instructions to cut off all my forces on the 2d division except on section 14, and I obeyed orders.

Q. State whether or not the allowance of $2,500, paid to you by O'Reilly, for, or on account of your damages, expenses, or losses, sustained by reason of this alleged partial suspension of work, was and is a full, ample and complete compensation and allowance therefor.

Objected to as above.

A. It is not; nor is there in the estimate which states the $2,500 paid to me by Mr. O'Reilly, a word about compensation. It was put down under the item allowance for horse feed, to the best of my recollection.

The witness is referred to Ex. P4, and is asked to state whether or not that and the preceding exhibit, O4, contain the statements and computations on which he bases his claim for relief, on account of the suspension.

Objected to as above.

A. Ex. O4 is the original statement in detail, in which there are several errors. Ex. P4 is the corrected statement, on which I based my claim.

Q. Is it true, as stated in the answer, that in consequence of erroneous, current or monthly estimates, made by Richard B. Osborne, the engineer-in-chief of the Lebanon Valley R. R., Patrick O'Reilly had overpaid you $34,164.10, on account of Lebanon Valley work?

Objected to as above.

A. It is not true; so far as I understand the matter, as early as 1855 Mr. O'Reilly had overpaid me my monthly estimates several times, by which I mean that he had advanced to me the percentage due to that time, and in some cases beyond it.

Q. Is it true, as stated in the said answer, that if he, the defendant, adds $10,102.10, stated here as to have been allowed to you by the engineer-in-chief for extra work, that O'Reilly has overpaid you for work done and materials furnished on said Lebanon Valley R. R., including extra work, the sum of $24,465.20, as well as the sum of $9,026.98 for horses, mules, cars, &c.?

Objected to as above.

A. No, sir; it is not true.

Q. Taking into account the work done by you under the Lebanon Valley contract, as modified between yourself and Mr. O'Reilly, and your loss on rock work, accounts of which were rendered to O'Reilly, and correspondence had between you and him during the time; taking also into account the extra work included in Scott's bill, Ex. A4, and the work done and services rendered in relation thereto, relative to getting sills and splice plates along the line of the Lebanon Valley road, have you been largely overpaid, as stated by O'Reilly in his answer, or have you been underpaid?

Objected to as above.

A. I have been underpaid.

Q. Is it true, as stated in the answer, that you repeatedly solicited O'Reilly to let you take part in, or have an interest in, any collateral matter connected with the business of O'Reilly, out of which money could be made?

Objected to as above.

A. It is not true; on the contrary, on several important occasions, at Mr. O'Reilly's request and solicitation, I accompanied him to some two or three roads which he was desirous of bidding for, besides other matters not directly concerned in railroad construction.

Q. Each time on request from you to share in the proceeds of the undertaking, if he should undertake it, or not?

Objected to as above.

A. Never at my request. My attention was called to them by Mr. O'Reilly, and I had no knowledge of them except as I learned from him.

Q. Is it true, as stated in the answer, that O'Reilly, believing that the tract of land called Greenwood, being a tract of land covered by timber useful for sills, would prove a profitable investment, was disposed to assist you and give you an interest in the purchase of the land and timber, if you should desire such interest, after visiting and examining said tract; did he make any statement of this kind to you or not?

Objected to as above.

A. 'Tis not true. The solicitation and urging came from him to me, that I should aid him in getting a supply of sills for his contract from the Greenwood tract; and on my expressing disinclination it was Mr. O'Reilly's own proposition that if I could give such aid in supervision as my work on the Lebanon Valley would admit of, he would, as compensation for the same, give me the one-half interest in the land had been denuded of its timber. The whole matter emanated from him, and I never knew anything about it until he came up to see me and found me on section 19 of the Lebanon Valley R. R.

Q. Did you, or did you not, express to him a belief that the purchase of this land, as a timber tract for the sills that were on it, would prove a profitable investment?

Objected to as above.

A. I did not; so far from it, I controverted his views, and when he took me up to Greenwood I pointed out to him that the expense of cutting the ties, hauling them to Liverpool and boating them by the Penna. and the Union Canals to Lebanon, would prove to be a very costly affair; and further, I urged him not to engage in this sill business, but his being so short of ties for his 40 miles of track on the Lebanon Valley left him no choice.

Q. Was it, or was it not, agreed by and between you and O'Reilly that you should become and be half owner of said Greenwood tract, and have an equal half interest therein, upon your securing to be paid or paying to him one-half

part of $9,000, the purchase money O'Reilly had agreed to pay for the said tract, and that you should take charge thereof, and furnish three six-mule teams, while O'Reilly was to furnish one six-mule team, to work upon said tract, you to assist O'Reilly in procuring railroad sills therefrom?

Objected to as above.

A. There is a shade of truth in this web which, in the main, is entirely untrue; for my inconvenience and loss, as I have stated before, if I would give such management as I could spare from my Lebanon Valley work to the obtaining of ties from this tract of timber land, as an inducement for me to undertake the same, Mr. O'Reilly offered me the one-half interest in the land itself, denuded of its timber. It was expressly stated that I was to be at no expense either in paying for that land, or in the expenses I incurred if I should aid or assist Mr. O'Reilly in said work. The whole of the statement about the mule teams is untrue. Mr. O'Reilly asked me if I had gotten through with hauling stone, brick, &c., for my bridges, and if I could spare him some mules, and I could; he stated explicitly it would save him buying, as the teams which he had in Reading were fully occupied in hauling stone and bricks for the Schuylkill Viaduct, as well as the distribution of ties and iron on the first division. I told him that I would look into the work and if I had the teams I would supply them.

Q. At whose expense?

Objected to as above.

A. At his.

Q. At this time did you represent to O'Reilly that you would be unable to immediately raise and pay to O'Reilly $2,000, being one-half of the cash portion of the purchase money of said tract?

Objected to as above.

A. After I had done his work, and aided him to the best of my ability and knowledge, two years after this time, I was amazed to find that Mr. O'Reilly had falsified his word, and surprised that he asked me for one-half of the mortgage. After remonstrating with him, and as but

a comparatively small amount of the timber had been taken from the land, I stated to him that I was very hard pressed for money, but that I would help him, if I could do so, to bridge over his own difficulties, which he stated to me, at that time were proving very embarrassing.

Q. At the time that you agreed to send up these mule teams for him, and to attend to the getting out of these sills for him, did you represent to him that you couldn't raise and pay to him $2,000, the one-half of the cash portion of the purchase money he had paid for the land; and did he thereupon agree not to require of you the payment of that sum immediately in cash, but that you should have a reasonable credit and time in which to pay that sum?

Objected to as above.

A. Every statement in that particular is untruthful, with the exception of the semblance of truth in the mention of his having paid $4,000 for the land, and even that is untruthful, for it was not paid till he took me with him to Greenwood, when not a word was said upon the subject matter except that upon his handing me the deed, which was about being executed, I remonstrated with him that he had not included my name in the deed as the half owner in the land when stripped of its timber, which he had promised to do some three weeks previous, on section 19.

Q. Was it expected and believed by you, as charged in the answer, that the sills and timber upon the said tract of land would pay the full purchase money thereof of $9,000, beside the expense of procuring and getting out the same, before a mortgage, given by O'Reilly, upon the tract to Benjamin Schatterly, the vendor, for $5,000, the unpaid residue of the purchase money of said tract, should become due and payable?

Objected to as above.

A. I have already stated that the purpose and object which Mr. O'Reilly had in buying the tract was a great mistake, and would never compensate him. In regard to the tract itself, and, outside of that particular, was valuable, and in my judgment well worth $9,000.

Question repeated.

Objected to as above.

A. It was not.

Q. Was it or was it not the express understanding and agreement between you and O'Reilly that if the amount of the purchase money was not realized out of and from the sills and timber on the said tract, above the expense of getting them, that you should pay to O'Reilly the half or moiety of said sum of $9,000, the purchase money of said tract?

Objected to as above.

A. The first intimation I ever had of his expecting me to pay any portion of the purchase money was in 1858, after all the work had been done.

Q. Did you or did you not represent to him that you would, under any circumstances, be able to raise your half of said purchase money before the bonds and mortgage given by him to Schatterly should become due?

Objected to as above.

A. I never did.

Q. Is it true or not that you failed to furnish three mule teams of six mules each as you had agreed to do?

Objected to as above.

A. I never did agree to furnish three mule teams. I did so, nevertheless, by his desire and request.

Q. Is it true or not that the defendant furnished one team of six mules according to the agreement aforesaid?

Objected to as above.

A. It is not true and there was no agreement. He did send up to my work on the Lebanon Valley one wagon and five mules, which he requested me to forward.

Q. Is it or is it not true that on account of your failure to furnish teams as aforesaid the getting out and transporting of these sills was greatly delayed to the great damage of O'Reilly?

Objected to as above.

A. It is not true. All the mules which he, Mr. O'Reilly, or Mr. O'Reilly through his clerk, Mr. McDermott, directed me to supply, were promptly forwarded by me.

Q. Is it true, as stated in the answer, that you had no time, after the commencement of operations on the Green-

wood tract, gave your personal and exclusive attention to operations on said tract of land, and that you did not, with minor exceptions, attempt personally to take charge of or direct those operations?

Objected to as above.

A. It is true; such was not the agreement.

Q. Is it true, as here stated by the defendant, that from the commencement of those operations in 1855, until about February, 1857, they were conducted under the charge of Henry A. Landry, Edward McDermott, Lawrence Devereux, and that the said Landry, McDermott and Devereux were employed by O'Reilly?

Objected to as above.

A. I know nothing about Greenwood till January, 1856. It is not true what defendant states, a very large amount of the disbursements were made by my clerk, George W. Bowen, Mr. O'Reilly requesting me to allow him to keep the accounts and disburse the money, from some misunderstanding between Mr. McDermott and myself, and I did so. They were all paid by Mr. O'Reilly except myself and my clerk.

Q. Is it true as here stated that Landry, Devereux and McDermott received directions as well from O'Reilly as from you?

Objected to as above.

A. Yes, sir; particularly during the time McDermott disbursed the money.

Q. Is it true or not that in February, 1857, you went upon the Greenwood tract with the alleged intention of personally taking charge of the operations thereon, but that you remained thereon directing said operations but a very short time, not exceeding two weeks.

Objected to as as above.

A. It is true that in February, 1857, I went to Greenwood to straighten out a tangle, that I remained there not exceeding two days. It is not true that I ever had any intention of giving the sill cutting my personal supervision.

Q. Is it true that the operations on said tract from February, 1857, till October of that year were nominally

under your direction, but that you did not give personal attention thereto, and were not on the said tract during the time except in February.

Objected to as above.

A. 'Tis true that about that period I gave a more general supervision with my clerk, Mr. George W. Bowen, to Greenwood, nor was I there, as far as my memory serves, after February, 1857.

Q. Is it or is it not true that, although these operations were nominally under your direction, yet that O'Reilly furnished and paid for all the feed, provisions, implements, wages and expenses used, necessary or incurred in carrying on said operations during all that time?

Objected to as above.

A. It is true, and I have understood paid all the expenses with the exception of any expense incurred by me, of which he never paid me one dollar.

Q. Did O'Reilly furnish all the feed and provisions for these Greenwood operations, or was some portion of it furnished by you?

Objected to as above.

A. I furnished a small portion of it.

Q. Is it true, as stated in said answer, that the whole number of sills received from the said tract was only 28,756?

Objected to as above.

A. I don't know anything about the number; the books, papers and accounts were all given in by me through my clerk, George W. Bowen.

Adjourned until Friday, April 2d, 1886, at 10½ A. M.

Friday, April 2d, 1886, at 10½ A. M., examination resumed in presence of respective counsel.

Mr. Drake states that, owing to the absence of John H. Osborne unexpectedly on account of a misunderstanding, counsel for complainant now calls Richard B. Osborne in rebuttal.

Mr. Voorhees objects to the re-examination of this wit-

ness on the ground that he has been heretofore examined in this cause, and no order has been granted by the court for his re-examination, and that his examination at this time, before the examination of John H. Osborne is completed, is made without surrendering any right, or waiving any privilege to object to or accept to the testimony of said John H. Osborne when he shall be produced.

Richard B. Osborne being called by the complainant in rebuttal, he having been heretofore sworn, deposeth and saith.

Q. State whether or not it is true that Patrick O'Reilly wrote to John H. Osborne and made proposals to John H. Osborne to take charge of the building of the Camden and Atlantic Railroad, under O'Reilly as sub-contractor thereof, at a salary of $3,000 a year, at the special instance and request of yourself, you being at that time the chief engineer of said railroad and the chief contractor for constructing the same?

Objeced to as inadmissible, irrelevant, and as not rebuttal.

A. It is true that Mr. O'Reilly wrote to John H. Osborne, asking him to take charge of the work on the Camden and Atlantic Railroad, as will be seen by his letter of June, 1853, among the exhibits. It is not true that such was done at the request or solicitation of myself, as will be seen by letters from me and the reply thereto, which I believe are also among the exhibits.

Witness being shown Ex. Z5 and A6, is asked: How, if at all, his answer refers to those exhibits?

Objected to as above.

A. These are the identical letters to which I refer—A6 and Z5.

Q. State whether it is true or not that it was through and by your persuasion and representation, then chief engineer of the Lebanon Valley Railroad, that Patrick O'Reilly was induced to contract with Charles Tarrant and John H. Osborne for the construction of the second division, including sections 14 to 26 of said railroad?

Objected to as above.

A. It is not true that by my persuasion and solicitation Mr. O'Reilly was induced to give to Charles Tarrant and John H. Osborne the contract in question on the Lebanon Valley Railroad. The inducement with regard to Charles Tarrant was in the fact that P. O'Reilly had been working on an extensive contract under him, as his engineer in charge, for about two years previous, and that in about two months previous to the time he had received the final estimate on that work, which was satisfactory to him (P. O'Reilly), as made by Charles Tarrant, engineer in charge, and which amounted to $144,000; he, therefore, knew as much of Charles Tarrant as I possibly could have known. With reference to John H. Osborne, his own (P. O'Reilly's) acknowledgment of his efficient service rendered in the completion of the works of the Camden and Atlantic Railroad, as well as the services which P. O'Reilly imposed on him, and which John H. Osborne was then rendering to him in the subletting of his work on the Lebanon Valley road, supplied sufficient inducement to give to John H. Osborne an interest in the contract of Tarrant & Co.

Q. State whether or not it is true, as stated in the answer, that the said chief engineer represented that said Tarrant had great experience in railroad work, and had ample means for carrying on and completing the contract for the graduation and masonry of the second division?

Objected to as above.

A. It is not true that any such statements were made by me.

Q. State whether or not it is true that you also represented to O'Reilly that the said Charles Tarrant and the complainant would be abundantly able to carry out and complete the work specified in said contract, in the time and manner therein required?

Objected to as above.

A. It is not true that any such representations were made by me, inasmuch as P. O'Reilly was as intimately acquainted with the means and efficient management which those gentlemen would bring to his work.

Q. State whether or not it is true that O'Reilly, on the request of Tarrant and the complainant, together with your

request, furnished them with horses, mules, railroad cars, and other necessary stock and implements, to effectively prosecute their work under their contract, amounting to the sum of $9,026.98?

Objected to as above.

A. I deny positively that at my request any of the things named were supplied by P. O'Reilly to Tarrant & Co. I further state that I have no information, and never interfered between him and his sub-contractors in any of their business arrangements as stated in the answer.

Q. State whether or not it is true that you, as engineer-in-chief of the Lebanon Valley Railroad, under the provision of the contract, which provides that when work should "be increased by the enlargement of any part of the same, "or by any contingent work which you, as engineer, might "deem necessary to facilitate the execution, or render the "work in any particular point comformable to local circum-"stances, beyond what was contemplated in said contract, "such increase or contingent work should be paid for at "the same rate as similar work therein contracted for; or, "if not similar to work therein contracted for, it should be "paid as an extra item, according to the estimate of the "engineer," estimated the extra work and materials done, performed and furnished by the complainant, John H. Osborne, at the sum of $10,102.10?

Objected to as above, and as contradictory to the terms of the contract and the estimates already in this case.

A. In the contract between P. O'Reilly and Tarrant & Co., those powers were conferred on me, limited by that contract and by the prices upon which that contract was made. In all matters outside of that contract reference had to be made to the original contracting parties under their altered arrangement and agreement. So far as the limited powers conferred upon the chief engineer in the original contract I have fully acted and estimated the extra work done. I did not estimate the extra work done by John H. Osborne for P. O'Reilly, amounting to $10,-102.10. There were $3,600 of that amount not performed by John H. Osborne for P. O'Reilly, but was done under contract with the Lebanon Valley Railroad Company,

and paid for by them. Witness being referred to Ex. K5 in Book E2, (being p. 122 of said book), the same being final estimate of John H. Osborne, is asked whether the $10,102.10, there estimated to John H. Osborne, had any reference whatever to extra work done by John H. Osborne for Patrick O'Reilly, and if so, what?

Objected to as above.

A. The first, second, fifth and sixth items in this estimate represent work done by John H. Osborne for the Lebanon Valley Railroad Company, which amount to $3,600.10. The balance of this statement, amounting to $6,502, was done by John H. Osborne for P. O'Reilly, chiefly to enable him to fulfill the terms of his contract, for which he was paid definitely stated prices by the company.

Q. State whether or not it is true, as averred and charged in the answer of O'Reilly, that the said final estimate, Ex. K5, for the said extra work and materials done, performed and furnished as aforesaid by the complainant, was a large and liberal one?

Objected to as above.

A. The extra work estimated by me as chief engineer, for all that was performed, as properly chargeable to the Lebanon Valley Railroad Company, was full, embraced such work as was performed by his sub-contractors for the railroad company under P. O'Reilly, and on which, as the engineer, I allowed and included for himself a profit of ten per cent. over and above the payment he had to make on the same to the sub-contractors.

Q. State whether or not it is true that in accordance with the provision of the contract, "to prevent disputes the "said engineer should, in all cases, decide every question "which could or might arise, relative to the execution of "said contract, on the part of said contractor, and that his "decision should be final and conclusive, and without "appeal," and with the knowledge and consent, and at the special instance and request of the complainant, you, as engineer-in-chief of said railroad, in your final or last estimate of work done and materials furnished, estimated the amount of damage and loss sustained by the complainant,

for and on account of the partial suspension of the work on the Second division, and allowed to the complainant for horse feed and expenses, &c., during the time of said alleged partial suspension, the sum of $2,500.00?

Objected to as above and as tending to contradict the written statements and estimates.

A. Under the powers stated I allowed to Tarrant & Co., through P. O'Reilly, the sum of $2,500 to pay for horse feed and other expenses attending the keeping of stock, idle during the partial suspension mentioned, which was objected to by all the recipients as being insufficient, and upon which claims were made by the chief contractor against the Lebanon Valley Railroad Company. Said allowance of $2,500 was for the keeping of the stock, as stated, and included no amount estimated for consequential damages arising from said suspension, which was left to the decision of the company if any claims should be made therefor in the future.

Q. State whether or not this $2,500 was paid by O'Reilly, or whether it was estimated to him in his final estimate, and paid by the company to him?

Objected to as above.

A. It was paid by the Lebanon Valley Railroad Company to him, that he might pay the same to Tarrant & Co.

At 1 P. M. adjourned for dinner until 2 P. M.

2 P. M. resumed

Richard B. Osborne still upon the stand on his direct examination in rebuttal.

Q. State whether or not it is true, as averred by the defendant O'Reilly, in his answer, that the allowance of $2,500 made to the complainant by said engineer, and paid by the defendant as aforesaid, was and is a full, ample and complete compensation and allowance for any and all damages, expenses and losses sustained by the said complainant, for or on account of his said alleged partial suspension of the work on said railroad, under said contract?

Objected to as inadmissible, irrelevant and not rebuttal.

A. The $2,500 was my estimate as engineer, solely of the cost of the keeping of the contractor's horses during the partial suspension. Any other question was an open one left for the board of directors. If any claim should be made thereon it was not my duty to decide upon any such question.

Q. State whether or not it is true, as stated in the answer of the defendant, that, by the final estimate of the work done and performed and materials furnished, under said contract, by said complainant and Charles Tarrant, before said Charles Tarrant left said work, and by the complainant after said Charles Tarrant left said work, made in accordance with the provisions of said contract, by you, the brother of the complainant and engineer-in-chief of said Lebanon Valley Railroad, the whole amount of work done and materials furnished, under said contract, was the sum of $412,993.35, including loss on excavation of solid rock, and the whole amount of extra work done and materials furnished was the sum of $10,102.10.

Objected to as above and as an attempt to contradict the written estimates and returns.

A. The final estimate for Tarrant & Co. is stated as $412,993.35. The true total of that amount should have been and is really $413,829.55. It is erroneous to speak of the $10,102.10 as being extra work of Tarrant & Co. for P. O'Reilly. None of it was performed by Tarrant & Co.; a part of it, some $6,000, I don't know the figures exactly, was done by John H. Osborne for P. O'Reilly in completion of works contracted for by the railroad company with P. O'Reilly. The remainder of the sum Mr. O'Reilly had nothing to say to, it being performed by J. H. Osborne for the Lebanon Valley Railroad Company.

Witness being referred to Ex. N5, is asked whether that contains the item and the amount of it, originally omitted from the final estimate, and now included in it, to make the true total of $413,829.55 just given?

Objected to as above.

A. This is a statement of the work and its amount of

$836.20, which, by the error of the engineer, was left out of Tarrant & Co.'s final estimate, and which, added to the final estimate, makes the correct amount of the said estimate $413,829.55.

Q. State whether or not this corrected amount just mentioned includes any part of the complainant's loss, on excavation of solid rock, above his original contract price, and if so, how much?

Objected to as above.

A. It contains the prices which P. O'Reilly added to those stipulated in the original contract with Tarrant & Co. in part payment of those extra expenses which were to be paid to Tarrant & Co. under the modified agreement increasing the original prices. The allowances amounted to an increase from 65 to 73 cents, and from the original price on hard clay to 22½.

Q. State whether or not it is true, as stated here in the answer, that, by and with the consent and approval of yourself, chief engineer of said railroad as aforesaid, Patrick O'Reilly agreed to increase the prices for the excavation of hard clay mixed with gravel and detached stone to 23½ cents per cubic yard, and for excavating solid rock, requiring blasting or sledging, to 73 cents per cubic yard?

Objected to as above.

A. The increase of the prices to 23½ and 73 from their original was approved of by me, as the engineer, as a step on the part of the chief contractor towards complying with the promises to complete the work and meet the necessary extra cost of the same.

Q. State whether or not, under the provision of the contract first quoted this morning on p. 682 of the manuscript, providing that when work should "be increased, by the enlargement of any part of the same, or by any contingent work, which you, as engineer, might deem necessary to facilitate the execution, or render the work in any particular part conformable to local circumstances, beyond what was contemplated in said contract, such increase or contingent work should be paid for, at the same rate, as similar work therein contracted for, or if similar to work therein contracted for, it should be paid for as an extra

"item according to the estimate of the engineer," you could include a sub-contractor's loss on solid rock excavation in the estimate as extra work, or was that a change of quality in the work, provided for in the contract, with which you could deal only upon the consent of your company and of the contractor-in-chief?

Objected to as above, and as contradicting written contract, and as calling for the opinion of the witness upon the contract.

A. The prices set forth in the original contract limited the powers of the engineer, as he had no authority to estimate any work done except by the prices stated in the contract. The change in the quality and character of material involved of necessity a change in the contract made. The extra cost arising from such change of quality and character of material could be met only by a new agreement or agreements between the contracting parties, and by a considerate and fair allowance on the part of the railroad company to the chief contractor.

Q. State whether or not it was under this same clause, just quoted, or partially under it, that a partial excavation was made through the unfinished portions of sections 18 and 19, and how the order was given and how it was carried out, and whether the extra cost of it, as such, was included in the estimates as extra work?

Objected to as above.

A. The work on sections 18 and 19 alluded to, while it embraced cubic quantities contained in the original contract, necessitated an extra price being paid therefor. The increase of those prices to the chief contractor had not been acted on. The chief contractor had increased the price of the sub up to the amount of the same price that he received from the company. It was not in the province of the engineer to increase the price which the chief contractor had ordered to be allowed to the sub-contractor under the new agreement between them. The engineer did, however, on section 19, after this hard rock excavation had been completed, to allow the sub-contractor the sum of $1,980, as extra work, in retrimming and finishing the section, which was also allowed in the estimate of the chief contractor.

Q. How and by whom was the order given to open room for a single track through sections 18 and 19 without reference to the rest of the excavation, and how was it carried out?

Objected to as above.

A. It was given by me, as engineer, to the chief contractor. It was transmitted by him to the sub-contractor, who obeyed the orders, and thereby expedited the track laying.

Q. State whether or not the complainant accepted the appointment and entered upon the duties of general superintendent of the Camden and Atlantic Railroad in the summer of 1855, in opposition to the solicitation and advice of Patrick O'Reilly.

Objected to as above.

A. It was in accordance with the express wishes and urgent request, and under a promise as an inducement that he, O'Reilly, would supply additional locomotive power to work the road profitably, that Mr. John H. Osborne was induced, against his own judgment, to accept the position of superintendent of the Camden and Atlantic Railroad.

Q State whether or not it is true that shortly before the acceptance of said appointment by John H. Osborne, Patrick O'Reilly was informed by you that they were about to appoint your brother as general superintendent of the Camden and Atlantic Railroad, and that O'Reilly then advised and urged your brother to decline the said position, and devote all his time and attention to his contract under O'Reilly on the Lebanon Valley Railroad?

Objected to as above.

A. As far as I am cognizant of the interviews between the two parties named the statement contained in the question is not true, but the contrary, as I have before testified to.

Q. State whether or not it is true that O'Reilly was largely interested in said Camden and Atlantic Railroad Company at the time of John H. Osborne's appointment as superintendent thereof, as above mentioned?

Objected to as above.

A. The denial of P. O'Reilly of his being largely inter-

ested at that time in the Camden and Atlantic Railroad Company is met by the fact that he was then interested in the settlement of certain accounts on that road, on which, October 7th, 1882, I transferred to him, I should say to his heirs, as his interest, $134,877 of stock and sundries.

Mr. Voorhees states now that he can't proceed with the cross-examination of this witness at this time, and asks for an adjournment until Friday, April 16th, 1886.

Mr. Drake objects to an adjournment without the cross-examination of this witness, and asks for an adjournment until Wednesday, April 14th, 1886.

Adjourned until April 16th, 1886, at 10½ A. M., because Mr. Voorhees states he will be engaged in court at May's Landing, Atlantic county, on April 14th, 1886.

Friday, April 16th, 1886, at 10½ A. M., examination resumed in presence of respective counsel.

The complainant now tenders Mr. Richard B. Osborne for cross-examination.

At the request of Mr. P. L. Voorhees the cross-examination is laid over until the next meeting.

John H. Osborne being called for the continuation of his direct examination, upon rebuttal saith:

Q. State whether or not it is true, as stated in the answer, that the defendant paid and advanced for labor and wages, in making, getting out and transporting said railroad sills and other timber, and for provisions, feed, implements and other necessary things, for carrying on the operations on said tract of land, to the complainant and other persons, engaged and employed by the defendant, and by the defendant and yourself, in conducting said operations, nearly $21,000?

Objected to as irrelevant, inadmissible and not in rebuttal.

A. I have no knowledge of the disbursements made by Mr. O'Reilly for the getting out of sills from the Green-

wood tract of land, except so far as the disbursements made by me, through my clerk, George W. Bowen, which vouchers and books were returned by me, through said Bowen, to Mr. O'Reilly. I can state, however, positively, that I never received for any expense incurred by me one dollar from the defendant.

Q. How much, if any, was paid by O'Reilly and yourself in conducting said operations?

Objected to as above.

A. I have no knowledge of the amount paid by Mr. O'Reilly. Of the moneys and expenditures made by me personally, I have stated in detail the amount, and cannot, at this time, recall from memory what that amount was.

Q. State whether or not it is true that the railroad sills and other timber procured upon the Greenwood tract, and received by O'Reilly, did not exceed in value $15,000.

Objected to as above.

A. I cannot say. I never saw a statement of the same.

Q. State whether or not it is true that, instead of the purchase of that tract being a profitable investment to O'Reilly and yourself, the same proved to be a great loss to each of you.

Objected to as above.

A. I have no knowledge of the profit or loss of that tract to Mr. O'Reilly, having had no interest of the getting out of the sills beyond the instructions I received from Mr. O'Reilly to do certain matters connected with the same, and which instructions I carried out to the best of my ability.

Q. State whether or not it is true that, at all times since the books, statements, &c., relating to Greenwood, which you delivered to O'Reilly, have been in his possession, O'Reilly has repeatedly and frequently asked and requested you to come to a settlement with him, and pay to him the expenses paid by him, over and above those he was bound to pay as joint owner of the said tract.

Objected to as above.

A. I have never been asked or requested by Mr. O'Reilly for a settlement upon this or any other account, with the exception of this: Some twenty months after the

work had all been closed up, Mr. O'Reilly asked me to aid him, on account of his embarrassment, to pay a portion of the purchase money of said tract; nor had I any knowledge of the claim set forth in the answer that he looked upon me as jointly interested with him in the getting out of these sills from the Greenwood tract until I saw the same set forth in said answer.

Q. Please state whether O'Reilly ever asked you to pay to him the expenses paid by him in sill-getting on Greenwood over and above those he was bound to pay as joint owner of the said tract.

Objected to as above.

A. He never did; nor was I ever cognizant of the claim till I read it in his answer.

Q. Please state whether or not it is true, as stated in the answer, that sometime in October, 1857, O'Reilly applied to you to raise your half or portion of the mortgage of Benjamin Schatterly, being the sum of $2,500, in accordance with the agreement between you and him.

Objected to as above.

A. There never was an agreement between Mr. O Reilly and myself, that I should pay one dollar upon the purchase of said tract, till after all the work had been completed; Mr. O'Reilly set up a claim that I should pay one-half of the purchase money of said tract, which claim I resisted, as no intimation of the same had ever been received by me till Mr. O'Reilly set forth that the agreement was that I should pay one-half of the purchase money of said tract. In view of the large unsettled account, and many matters there were pending between us, I did say to him that I would aid him in raising the money to bridge him over his embarrassments, which at that time, seemed to be pressing upon Mr. O'Reilly. It is proper that I should state to the court the arrangement entered into between Mr. O'Reilly and myself for the getting out of sills from this tract.

Q. State whether or not that you stated that you were unable to raise the cash, and then offered him, and afterwards sent to him, a note held by you of the Catawissa R. R. Co., requesting him to negotiate the note, and apply the money to the payment of your half of the money due Schatterly on the mortgage.

Objected to as above.

A. I did state to him that I could not raise any money for him at that time; that I had in my possession a Catawissa note, that if that note would aid or assist him he could use it. I did not say how it should be appropriated. It was aid offered by me to help him in his embarrassment.

Q. What, if anything, was said by O'Reilly at this time, or at any time, about conveying to you the equal one-half part or moiety of the Greenwood tract?

Objected to as above.

A. He did say that if I did not pay the one-half of the mortgage he would give my interest in the tract to another party. I reminded him of the arrangement that he had made with me that the one-half of that tract, when denuded of its timber, belonged to me, and that he had no right to take any interest from me.

Q. State whether or not it is true, as stated here, that O'Reilly was, at this particular time, ready and desirous of conveying to you one-half of Greenwood on your paying one-half of the Schatterly mortgage, and so stated himself to be to you.

Objected to as above.

A. He so stated that he was ready and willing, if I would pay the $2,500 and the one-half of the sum he had already paid on the tract, amounting to $4,000, to convey to me the one-half interest in the tract.

Q. State whether or not it is true that you then utterly refused to pay said money or any part of it, and then told the defendant that the purchase had proven to be an unprofitable investment, and that you would not pay any of your money on account of this land, and that you would not hold any interest in it, under your agreement, as stated by O'Reilly, to pay for one-half of it, if O'Reilly would then convey it to you, and that you didn't want to hear any more about it or have anything to do with said land.

Objected to as above.

A. I did refuse to pay any money on said land, as said land, after being denuded of its tune, was already one-half of it mine. I deny in toto that I said to him that the investment had been an unprofitable one for me; that I con-

sidered he had broken faith upon the arrangement made with him for the getting out of these sills, that he could do as he pleased with it.

Q. State whether or not it is true that O'Reilly has always been ready and willing, since he received said books and statements, to account for all matters and things relating to said tract and operations thereon; that he has repeatedly called upon you and requested you to account with you concerning the same.

Objected to as above.

A. It is not true; Mr. O'Reilly has repeatedly and persistently refused to come to any settlement with me upon Greenwood or any other matter, more than a score of applications having been made by me to try and effect a settlement, save and except in the matter of the Sea Gull engine, and in that particular matter to compel me to settle upon a basis which was unjust to me and for which he had no warrant.

Q. State whether or not it is true that you accepted the appointment of general superintendent of the Camden and Atlantic Railroad in the summer of 1855, and entered upon the duties of it, not at the solicitation of O'Reilly, but in opposition to his advice and solicitations, that shortly before the acceptance of that appointment, O'Reilly advised and urged you to decline said position and devote all your time and attention to your contract under him on the Lebanon Valley R. R.

Objected to as above.

A. It is true that I did accept the appointment of Superintendent of the C. and A. R. R. It is not true that I did so in opposition to the advice and solicitation of Mr. O'Reilly. So far from it being true, that two weeks before the election of officers on the Camden and Atlantic R. R. took place, Mr. O'Reilly urged and used all the arguments he could adduce to make me accept that position, and, on my repeatedly objecting to do so, a few days before the election he came to my office at Womelsdorf and made so pressing and pitiable statement of the great interests he had in that road, that very greatly to my prejudice I consented to do so, allowed my name to be

placed before the meeting and was chosen by the new board for that position.

Q. State whether or not it is true that shortly after you entered upon said duties you applied to O'Reilly and urged him to purchase a locomotive engine, for the use of said railroad, and to lease said engine to the Camden and Atlantic R. R. Co., in your name, but that he declined and refused to enter into any such arrangement, or to make such purchase, or to permit or make such lease to or with said Railroad Co., and that you then requested and urged him to purchase a locomotive engine to be used by you on the said railroad, you then agreeing with him to rent the said locomotive for a term of four years at a monthly rent of $166.66\frac{2}{3}$, agreeing to pay said rent punctually to him every month during the term, and you stating and representing that you had the power and ability to make such payments of rent promptly, and that he should have no trouble in the collection thereof.

Objected to as above.

A. The statement as contained in this answer is nearly, in every particular, untruthful. The condition of the rolling stock on this road at this time, July, 1855, was very bad, and of this fact I was cognizant at the time. I was solicited to undertake the superintendency of the road. It was one of the inducements held out to me that if I would take the position Mr. O'Reilly would himself buy an engine for use on this road, and that Mr. George W. Richards, who was to be the new president, would purchase two new engines. On my accepting the position, by the request and desire of these two gentlemen, Mr. O'Reilly and Mr. Richards, I went to Paterson, N. J., and from there to Boston, and at three different establishments I bought three engines in my own name, by the express desire of these gentlemen, and put them on the road. Two of these engines were leased by me in my own name to the company; the third engine, the Sea Gull, I sent a copy of the draft, the same in every particular as the other two engines, to Mr. O'Reilly, at Reading. He wrote me in reply that he wished to have his own name inserted in the place of mine and sent me the draft of an agreement leasing the

engine to the company on an entirely different basis to that upon which the other two engines were leased. I pointed out to Mr. O'Reilly that the lease which he sent me would not be signed by the company, and gave him my reason for so stating, that the rent of the engine for the year was excessive. It would have involved an expenditure on the part of the company for the year's use of the locomotive of the cost of the engine, whilst he would have still owned the machine, that, however, I would submit it to the secretary, which I did. After reading it he handed it back to me, and, with a smile, shook his he d. I went out of the office with the improved lease in my pocket, and so matters remained till a seizure was made by the sheriff of one of the company's engines. On learning the fact and fearing that this engine might be seized, there being no written evidence to show that she was not owned by the company, and to save Mr. O'Reilly's property, I went into the office and had the original agreement which I sent Mr. O'Reilly executed and signed by the secretary and myself in my own name, upon the same terms that the other two machines were leased to the company. I never had the power and ability to make the rent payments for any of these engines, the moneys handed to me by the treasurer for disbursements were on requisition for the payment of the hands. All of the supplies of every kind and description were purchased, outside of these expenditures, by the secretary, and I never promised to pay this defendant for the rent of this engine.

Q. Did the defendant, after the said alleged agreement with you, purchase a locomotive engine called the Sea Gull and rent and deliver it to you, in accordance with that agreement, or did he not?

Objected to as above.

A. I purchased the locomotive by defendant's orders and put the same on the Camden and Atlantic Railroad.

Q. State whether or not, at or after that time, he rented you that engine for $166.66\frac{2}{3}$ per month.

Objected to as above.

A. He did not.

Q. State whether or not you afterwards used said engine

on the Camden and Atlantic Railroad, with his knowledge, and continued to use it upon said railroad until about July 1st, 1857, when it was returned to O'Reilly by you and accepted by him.

Objected to as above.

A. I did.

Q. Was this use by you for yourself and in your own behalf, or for the Camden and Atlantic Company and subject to its orders.

Objected to as above.

A. It was used solely and exclusively for the benefit of the Camden and Atlantic Railroad.

Q. State whether or not it is true that you did not, during the time you used said engine, Sea Gull, upon said railroad, or at any time since, make to the defendant any of the monthly payments of rent for said Sea Gull, and that you are still indebted to him for the whole rent of said engine from on or about July, 1855, to on or about July, 1857.

Objected to as above.

A. I did not; I am indebted to him for the rent of the engine the amount paid to me by the company for said rent.

Q. State whether or not it is true that, after you had resigned your said position, you mentioned to the defendant that the railroad company owed you large amounts of money for the rent of the engines you had used on said railroad, and that you intended or thought of bringing suits against the company for the recovery of said rents.

Objected to as above.

A. That is true.

Q. Did you speak of this rent as due to you personally, or as trustee for the owners of the engines?

Objected to as above and as leading.

A. To the best of my knowledge and belief the engines were rented in my name. The company was not cognizant that I was only the agent for these engines. The suit was instituted by me against the company as far as I can remember now, by me, in my own name, for these gentlemen. I can't possibly remember now how I spoke of the rent.

Q. Upon your speaking of commencing these suits for the rent, did O'Reilly then advise you not to bring said suits, he stating and representing to you that he believed the railroad company to be insolvent, or nearly so, and that to incur costs by bringing suits would be a waste of money?

Objected to as above.

A. He did not. He did say that I might have gone to a less expensive man than William M. Meredith.

Q. Did O'Reilly then tell you that if he was acting for himself he would not institute any suit, but as he, O'Reilly, had no interest in the matter, you should do as you thought best in the premises?

Objected to as above.

A. He did not; and until I saw his answer, I was not cognizant that he looked to any one but the president, Geo. W. Richards, for the rent of his engine.

Q. Is it true or not, as stated here, that after the judgments had been obtained by you, about March, 1860, you informed O'Reilly that one of said judgments included an amount due from the railroad company to you, for the rent of the Sea Gull, equal to the amount due from you to him for rent of said engine?

Objected to as above.

A. It is true.

Q. And it is also true that you should treat and regard said amount as directly owing to him, and so stated to him?

Objected to as above.

A. It is true.

Q. State whether or not it is true that the defendant wrote to you in March, 1860, requesting you to assign to him said interest in said judgment, or an acknowledgment of the amount of rent owing by the railroad company to you, so he could use it as collateral, but that you refused and wholly refused further to acknowledge his right in said judgment, and that you subsequently settled and compromised the same without his knowledge or consent.

Objected to as above.

A. It is true that the defendant wrote me asking for

the amount of the engine rent. It is not true that I ever refused to hand it over to him at that time. My books and papers were in transit to Morrisville, and before I could get hold of them he laid the attachment on the stock, and that was the commencement of the suit. I had bound myself to receive stock as one of the creditors of the company for this engine rent; the record will show, for I do not remember whether the agreement was consummated at that time or not. He never objected to my action in regard to the suit nor to any arrangement I made until I saw it in his answer.

Q. State whether or not it is true that, upon a just and fair account of all matters between you and him at that time, you would not only be shown to be indebted to him in the sum of $6,000, specified in the affidavit of attachment, but in a much greater sum.

Objected to as above.

A. It is not true.

Q. Is Exhibit U7 the agreement of lease which you sent to P. O'Reilly for his approval?

Objected to as above.

A. It is.

Q. Is S7 the one that P. O'Reilly sent back to you to be executed?

Objected to as above.

A. It is.

Adjourned until Monday, April 26th, 1886, at 10½ A. M.

Monday, April 26th, 1886, examination resumed in presence of respective counsel.

John H. Osborne being still upon the stand and being cross-examined, saith:

Counsel for defendant now reviews his objection to all the testimony of this witness taken since he has been upon the stand, made at the time he was recalled for examina-

tion and during said examination and waives all cross-examination.

Sworn and subscribed } JNO. H. OSBORNE.
April 26th, 1886. }

C. V. D. JOLINE, *M. C. C.*

Richard B. Osborne being now called for cross-examination of his testimony in rebuttal.

Counsel for defendant renews the objection to the re-examination of this witness made when he was produced for re-examination, and to all objections to his testimony made during the course of said re examination and cross-examines subject to and without in any way waiving the same.

Witness being shown paper marked Ex. 34 of deft. being a letter from Richard B. Osborne to Patrick O'Reilly, dated April 4th, 1854, is asked:

Q. Is that letter in your handwriting, and was it sent by you as chief engineer to Patrick O'Reilly, contractor?

Objected to as irrelevant.

A. It is not in my handwriting. It was sent by the writer, under my approval, to Mr. O'Reilly.

Q. Whose signature is it?

A. The signature is mine; in my writing.

Being shown paper purporting to be a letter from Richard B. Osborne to Patrick O'Reilly, contractor, dated April 4th, 1854, and marked Ex. 35 of def'ts, is asked:

Q. Is that a letter signed by you and sent by you to Patrick O'Reilly, contractor on the Lebanon Valley Railroad?

Objected to as irrelevant.

A. It is a letter written and signed by me as the engineer and sent by my order to Mr. P. O'Reilly.

Being shown a paper now marked Ex. No. 36, purporting to be a letter of M. E. Lyons, associate engineer of the

Lebanon Valley Railroad to P. O'Reilly, contractor, dated September 6th, 1854.

Q. Is that in the handwriting or signed by M. E. Lyons, associate engineer, and was it sent to Mr. O'Reilly?

Objected to as above.

A. It was written and signed by M. E. Lyons under my instructions. I presume it was sent.

Being shown paper now marked Ex. 37 of def'ts purporting to be a letter from Richard B. Osborne, engineer, to P. O'Reilly, contractor, dated September 5th, 1855.

Q. Is that in your handwriting or signed by you, and was it sent under your directions to Mr. O'Reilly?

Objected to as above.

A. It was written, signed and sent by me to Mr. O'Reilly.

Q. In making the estimates for the work done by the sub-contractors on the Lebanon Valley Railroad, was there any advance made in those estimates, upon the contract prices of the sub-contractors, for masonry and for rock, and was there any complaint made of such advance by Mr. O'Reilly?

Objected to as not cross-examination and as not the best evidence.

A. In all the prices stipulated in the contracts between Patrick O'Reilly, as chief contractor, and his subs, there never was a change in any of the prices of the sub-contractors unless authorized to be so changed by the chief contractor, allowances in some special cases, of which there were very few, if any, may have been made, upon the judgment of the engineer, to the sub-contractor, but all such allowances were added also to the prices of the contract between the chief contractor and the company. This remark has special reference to the final, which would be the ultimate correction of all matters with reference to the estimates.

Witness being shown a letter purporting to be a letter from Patrick O'Reilly to Richard B. Osborne, chief engineer of L. V. R. R., dated June 16, 1856, and marked Ex. 38 of def'ts.

Q. Did you receive a letter, of which this purports to be a copy, and if so, will you produce the original?

Objected to as irrelevant.

A. This is written by P. O'Reilly to me on my return from England, complaining of things that took place during my absence, of which he had good cause to complain, and which were corrected by me on my return, as stated in my evidence. I will produce the original if I can find it.

Witness being shown a letter purporting to be a letter from John H. Osborne to Patrick O'Reilly, contractor, dated Nov. 6, 1855, and now marked Ex. 39 of def'ts, is asked:

Q. In whose handwriting is that?

Objected to as not cross-examination.

A. It is in the handwriting of John H. Osborne, and is signed by him.

Q. Who was the contractor for the building of the Camden and Atlantic R. R.?

Objected to as not cross-examination.

A. Richard B. Osborne.

Q. Was the road constructed by you, or by sub-contractors under you; and if so, who was the sub-contractor?

A. The road was constructed under my orders by the sub-contractors, the first of those being Patrick O'Reilly, who again sub-let the work to other sub-contractors.

Q. Did you or did Mr. O'Reilly sub-let the work?

Objected to as not cross-examination.

A. I have stated that Mr. O'Reilly re-sub-let it.

Q. When did you settle with the company for the construction of that road?

Objected to as above.

A. I believe it to be before the attachment in 1860.

Q. When did you finally settle with Patrick O'Reilly, or his representatives, with regard to the work done by him as sub-contractor on the Camden and Atlantic R. R.?

Objected to as not cross-examination.

A. That date is stated in my last testimony in this case, and I now refer to that both as to the date and the amount.

Q. Were the prices allowed to the chief contractor for the excavations, embankments of all kinds, and masonry of every class, paid by the Lebanon Valley R. R. Co. to the chief contractor, full, fair and most liberal prices for such work?

Objected to and counsel calls for the original agreement between the company and Patrick O'Reilly, chief contractor, or a copy thereof.

A. They were so deemed by me, as engineer, according to the classification and character upon which they were stated at the time of making the contract; which prices were afterwards revised upon the more full and complete knowledge of the character of certain of the excavations and were so reported on to R. D. Cullen, the president of the Philadelphia and Reading R. R., with a recommendation that extra allowance should be made to the chief contractor over and above the prices stipulated in his contract with the company.

Sworn and subscribed April 26th, 1886. } RICHARD B. OSBORNE.

C. V. D. JOLINE, *M. C. C.*

Counsel for compl't wants it stated that the endorsements "No. 14, Geo. W. B., June 6, '61, on Ex. 34, of deft's; "No. 71, Geo. W. B.," on Ex. No. 35 of deft's and "No. 73, Geo. W. B.," on Ex. 37 of deft's, are supposed to be in the handwriting of George W. Biddle, attorney-at-law, of Philadelphia. It is so admitted by counsel of defendants. Counsel for compl't now withdraws his objection to the foregoing testimony of Richard B. Osborne on cross-examination, except those to questions relative to the Camden and Atlantic R. R. construction and settlements, and offers in evidence the record of a certain cause in this court in which Richard B. Osborne is complainant, and Patrick O'Reilly, during his lifetime, was defendant, and also the copy of the agreement between the Lebanon Valley R. R. Co., and Patrick O'Reilly, contractor, which James A. O'Reilly, now here, and acting as counsel for the defendant, says he can produce.

Counsel for defendant now objects to both of the above offers, to the record as well as to the copy of the agreement, as being irrelevant an inadmissible; the original of said agreement being in the hands of the Lebanon Valley R. R., or its successor, the Philadelphia and Reading R. R. Co., or its engineer.

Counsel for complainant now declares his testimony in rebuttal concluded, subject to the marking of said record and agreement when produced.

Counsel for defendant declares his testimony closed.

COMPLAINANT'S EXHIBITS.

EXHIBIT A.

L. DEVEREUX,

In a'c with P. O'REILLY.

To am't sundries as per book, ...		$1,941.55
Balance, ...		1,057.48
		$2,999.03

CR.

By am't sundries as per book, .	2,159.03	
By am't wages, as per book . .	840.00	
		2,999.03
By balance due L. D., ...		1,057.48

E. & O. E.

GEO. W. BOWEN,

November 3rd, 1857.

EXHIBIT B.

Extract from Lawrence Devereux: Jan. 14th, 1856, left Womelsdorf, arrived at Greenwood on 19th with two teams —one of them J. H. Osborne's team—the 2nd team was P. O'Reilly, with 5 of his mules, and one by J. H. O., from Elech, making 6th. I also furnished; I also put on a bed and a guide pole and did sundry repairs to P. O. R. waggon. We also had the harness repaired and fixed, as it wanted much. He also took Grey Billy, the spring waggon, two carts, all in good condition, and 2 picks and 4 shovels, new, also a lot of iron.

June 12th, of same year, J. H. O. sent up the other mule team (green mules, every one).

Oct. 17th, of the same year, L. Devereux sent back this team from Greenwood.

Oct. 1st, J. H. O. sent up two horses, Old Peet and Black Billy.

March 8th, 1857, J. H. O. sent up a team (the day they arrived) Old Charlie, Big George, Farmer Horse and the Jim Horse, and 4 mules, and got back two, Alick and Dolly, used up, which were returned, J. H. O.

Aug't 3rd, 1857, the whole of J. H. O.'s stock left Greenwood for Womelsdorf except the Charlie horse and George.

There is now at Greenwood, furnished by J. H. O., 2 horses, 1 cart and harness, the harness for the two horses, the spring waggon and harness. J. H. O. sent four waggons and P. O'R. two, one of his was on old worn-out waggon and did nothing for long time. Devereux thinks I should have from 3.50 to 4.00 per day for each horse snaking, 3 in No., $7 per day, less the feed, say 30c. each.

EXHIBIT C.

PHILA., Mar., 28th, 1876.

MR. J. H. OSBURN, ESQ.

Dier Sur

I received your note with a list of the stock which belonged to you on the Greenwood farem which is a correct list with one exsyption that is the mate of the Allick mules name was Dolphin instid of dolly I am very glad that you sent me that list not on account of not noeing the horses and mules for them I never wold forget But on account of dates The buck whch you tuck that list from I cannot finde I hav serched for it all over and cannot find it

yours

L. R. DEVEREUX

No. 858 Carlisle St.

EXHIBIT D.

(Notice).

Late B. Shetterlys,
Glendowel Farm,
Greenwood Township,
August 26th, 1856.

To Mr. Strauser,
Supervisor of Roads,

Dear Sir:—

I have to call your attention to the very bad state of the roads in your charge over which my teams pass, in addition to the very great delay occasioned thereby. I also consider them quite unsafe, and I have, therefore, to request your immediate attention to them, otherwise I shall be compelled to return the matter to court.

L. DEVEREUX,

For P. O'REILLY.

P. S. The roads particularly referred to lay between here and Mohontongo, in your district.

L. D.

EXHIBIT E.

Reading, July 5th, 1856.

Mr. L. Devereux.

Dear Sir:—

For the last few days I have been expecting to hear from you, as you promised to send me your board bills and the time for the month of June. Send also all other information with regard to the business. I hope you have continued to make the two trips a day. Another teamster, Dan. Murphy's brother, I think, will go to you next week. Mr. Osborne sent the wagons soon after my return; they went by canal and I expect you have got them before this. I learn from Mr. Landry that the blocks that the surveyor wanted are in his room at the foot of his bed; Mr. O'Reilly wishes you to go in and get

them, and take particular care of them until he goes up. I expect he will go up and see you in the course of next week. Let me hear from you as soon as possible, and tell me also if Mr. Beaver's boat commenced hauling away sills yet.

Yours, &c.,
EDWARD McDERMOTT.

EXHIBIT F.

READING, July 7th, 1856.

MR. DEVEREUX:—

I send you Murphy, as teamster; give him one of the old teams, which he will be well able to manage; give the green team to one of the old teamsters. The sill makers should be well watched in getting them to make their sills nice; *and be particular*, do not allow them to run all over the woods and pick out the best of the timber. I would make them cut down all the the timber clean, except what would make saw logs. I have made arrangements to have the sills boated as fast as they will be hauled. Go and see the lock-man and make arrangements with him to hire boats to take the sills to Lebanon. This will be a double assurance of getting the sills to Lebanon. All he will have to do is to take the name of the boats, and captain, and give him a bill of lading to Lebanon. I will pay 15 cents for each sill delivered at Lebanon. He will be compensated if he exert himself and get the sills away as soon as delivered in the landing. Let me know at once if you can make such arrangement with the lock-tender at Cox's store, at alevence you can get him to get 9 or 10 boatloades taken away. I will do what is right for him.

Get the chips that is under Landry's bead and have them sent to the surveyor; they are the chips that was cut from the line tree; be very careful of them.

I hope you are making two trips a day. Let me hear from you, how you are getting on with everything.

Yours in haste,
P. O'REILLY.

EXHIBIT G.

READING, August 8th, 1856.

MR. L. DEVEREUX.

Dear Sir:—

I have been expecting to hear from you every day since Flaherty went up, to let me know how things are going on, and how you like the man I sent you as teamster; I should like to know, also, if any sill-makers have gone into the woods again, and how many, and how things are going on generally. I have not yet succeeded in finding a blacksmith for you, but hope by the time I am going on myself to have one with me. You must try and send a few lines here every week, informing us how things are going on; you can do so by sending one of the boys with a letter to McKees ½ falls.

Yours truly,

(Over.) EDWARD McDERMOTT.

Mr. O'Reilly wishes me to tell you to see that the sill-makers do not run over the woods; they must be limited to such sections as you may give them, otherwise they will be stopped and no account taken of their sills; this must be particularly attended to to prevent confusion in settling with the men.

Write to me immediately.

Yours truly,

EDWARD McDERMOTT.

I can send you plenty of teamsters if you want them. Are you making the two trips? if not insist upon it.

E. McD.

EXHIBIT H.

READING, October 24th, 1856.

MR. L. DEVEREUX.

Dear Sir :—

I have received your letter with bills, &c. I am glad to hear that you can spare a team, and I am requested by Mr. O'Reilly to write to you to send on his team (that is the one Dan Murphy used to drive) to Reading without a moment's delay. Lose no time in sending it, for the track laying has commenced, and every team that can be had in this neighborhood will be wanted. You can select whoever you think best fitted to take charge of it to bring it on here. Any of the wagons out of repair that is best able to come on send also with the mules. I will send you the things you want by the first opportunity. The boots were sent yesterday. It is Mr. O'Reilly's wish that you put some men in the disputed part of the farm immediately, and I am glad to see by your letter that you are doing so. Write to me as soon as you start the team, which I hope you will do on Monday or Tuesday next. Please attend to this, it is most important.

Y'rs, &c.

EDWARD McDERMOTT.

EXHIBIT J.

READING, June 8th, '57.

MR. L. DEVEREUX.

Dear Sir :

Yours of June the 5th just been rec'd. I cannot exactly understand your letter ; you say since the opening of navigation you have sent over 3000 sills; you say that their is 2000 now on the landing, and they are included in the above. This is certainly a mistake, because there is delivered at Lebanon this spring nearly 4000 sills. However I want to know how many sills you have on the landing. I do not want

to know how many sill you have sent this spring. Let me know how many you have on the landing, and how many you can get over the 6000. Get the parties to deliver all their sills at the landing if you can, as our teams will not, I think, be able to haul them all in time; however, you know how many you can haul. I presume you are badly off for money. I will soon be up and make all right; and what time can you have the 6000 sill ready to send, or have you to haul them with our own teams? If I understand you right you have 2000 ready,
and contracted for 6000

8000

Now, besides the eight thousand, how many more can you get and deliver in two months. If I could get 10,000 sill in all delivered at Lebanon in three months I will take them. I will be up some time this month. Let me hear from you by return mail. Yours, &c.,

P. O'REILLY.

Do not fail to *write me at once* stating how you are getting on.

EXHIBIT K.

READING, August 24th, 1857.

MR. L. DEVEREUX,

Dear Sir:—

Please send down as soon as you possibly can an account of the outstanding debts due by Mr. O'Reilly about Greenwood for sills and feed, &c., including everything you know of except the men who are now here; their accounts we have. See also how many sills there are along the canal that you purchased; Mr. O'Reilly desires me say he will take them all. These matters you will attend to in the intervals in the land case, but see to that and the other suits first, and above all things.

Stir Mr. Parker up, and let us know whether Donn

and the other surveyor have yet gone on the ground to re-run the lines. *No time to be lost.*

Yours truly,

EDWARD McDERMOTT.

EXHIBIT L.

READING, Dec. 30th, 1857.

MR. L. DEVEREUX:—

Let me know, if you can do so, how many sills were sent from Mr. O'Reilly's land in Greenwood since the close of navigation last year; and also, if you can, how many we received from it altogether. I have only an account of twenty-eight thousand six hundred and thirty-four in all, but having nothing to do with the sills this year, I think the account falls short as returned from Lebanon. We always looked for over 30,000, and I think they must have come down. I am only speaking of the tract itself without referring to any of the outsiders, such as Markley, Marks, Rine and others whose accounts I have. It is is important that I should have this immediately. Don't take the trouble to write a long letter, but just say the number as near as you can. Write by return mail.

Yours, &c.,

EDWARD McDERMOTT.

EXHIBIT M.

LEBANON VALLEY RAILROAD.

Final Estimate, No. . Taken on the 5th day of January, 1858.

TARRANT & Co., Sub-contractors.

Nos. of Items in Estimate.	NATURE OF WORK PERFORMED.	QUANTITIES. Up to Last Estimate.	QUANTITIES. During the month.	QUANTITIES. Total.	Price.	AMOUNT. Dollars.	AMOUNT. Cents.
1	Clearing and grubbing timber	....	....	485	50.	242	50
2	Excavating earth and other light materials	....	....	81382	.16	13021	12
3	do hard clay, mixed with stone, &c	....	....	166150	.23½	39045	25
4	do loose rock, shale, &c	....	....	14143	.31	4384	33
5	do solid rock	....	....	154316	.73	112650	68
6	do borrowed materials	....	....	122653	.18	22077	54
7	Hauling into embankments	....	....	492423	.21½	105870	94
8	Pier masonry	....	....	891	9.00	8019	00
9	Bridge masonry, 1st class	....	....	2321	6.75	15666	75
10	Bridge masonry, 2d class	....	....	3375	5.50	18562	50
11	Bridge arching, 2d class	....	....	842	6.25	5262	50
12	Masonry of Skew bridge	....	....	813	9.00	7317	00
13	Culvert arching	....	....	374	4.00	1496	00
14	Ranged rubble masonry	....	....	2956	4.50	13302	00
15	Dry stone drains, with hammered faces	....	....	1784	2.50	4460	00
16	Puddle	....	....	89	1.00	89	00
17	Slope walls	....	....	30	1.10	33	00
18	Paving	....	....	512	1.10	563	20
19	Hauling stone and sand	....	....			1500	00
20	Brick work in piers and culverts in cement	....	....	108	6.00	648	00
21	Brick work in arches in cement	....	....	95	7.00	665	00
22	Pointing in cement	..	..	1785	.35	624	75
23	String courses, cut coping	....	....	8994	.50	4497	00
24	Ballast	....	....	26773 tons	.60	16063	80
25	Hauling iron	....	....	350	2.50	875	00
26	Retrimming sections 14 and 15	....	....	.....	.....	100	00
27	Embankment and masonry on Womelsdorf station ground as per former estimates	....	....	.....	.....	7246	50
28	Extra work on bridges and culverts as former	....	....	.....	.....	2504	31
	Removing service mould, soiling, &c	....	....	.....	.....	.....	..
29	White pine in bridge superstructure	....	....	H.B. M .5675	.35	451	75
30	White oak in do do	....	....	4991	.38	189	65
31	White oak plank in do do	....	....	7490	.35	262	15
32	Cast iron in place in the work	....	....	.....	.....	.....	..
33	Wrought iron do do measuring 1120	....	....	149	.07	10	43
34	Painting three coats best while lead	....	....	.....	.....	.....	..
35	do do and sanding zinc paint	....	....	.....	.....	.....	..
36	Laying down track, including furnishing of sills	....	....	.....	.....	.....	..
37	Loading, hauling and distributing R. R. Bars at nearest point of delivery by team	....	....	.....	.....	.....	..
38	Loading and unloading do, at points to be designated, the company supplying cars and power	....	....	.....	.....	.....	..
	Amount carried over	....	..	.....	.....	407701	55

EXHIBIT M. (Continued.)

Nos. of Items in Estimate.	NATURE OF WORK PERFORMED.	QUANTITIES. Up to Last Estimate.	During the month.	Total.	Price.	AMOUNT. Dollars,	Cents.
	Amount brought forward	....	....	.....	.....	407701	55
39	Howe truss, 20 high with arches, as per plan	....	....	.....	.....	.....	..
40	Horse feed & expenses during suspension of 1854	....	....	.....	.....	2500	00
				C. yds			
41	Hauling to embankment after opening of road	....	....	2668	.21½	573	00
42	Aid given contractor to return and finish sec. 19 after opening of road, viz: 2200 days work @ .90 ..	....	....	.....	.90	1980	00
43	Caping of bridges on sections 17 & 18	...	....	263lb	.50	131	50
44	Painting " " 16	....	....	.....	.....	30	00
45	Dry Masonry " " 20	....	....	20	2.50	50	00
46	Completing drain under public road and widening road over it	....	....	.....	.....	26	40
	Total	....	....	.....	.....	412993	35
	Amount of last estimate	....	....	.....	.....	.....	..
	Deduct per cent.			Payment.			

EXHIBIT N.

READING, Nov. 3rd, '65.

JNO. H. OSBORNE,

Dear Sir:—

Yours of the first came to hand. I am well aware that the rock on some of the sections on the second division is very hard and cannot be excavated at the contract price, therefore I will assist you on those sect. and on some of the brick bridges which I perceive require an advance.

Yours &c.,

P. O'REILLY.

EXHIBIT O.

Page 62 of Book of final estimates, marked Exhibit E2, being final estimate of Tarrant & Co. for sections 14 to 26 inclusive.

EXHIBIT P.

Page 63, of same book, Exhibit E2, being same work as estimated to P. O'Reilly.

EXHIBIT Q.

LEBANON VALLEY RAILROAD.

Current Estimate, No. 41. Taken on the last day of
2d Division. September, 1857.
Messrs. TARRANT & Co., Sub-Contractors.

NATURE OF WORK PERFORMED.		QUANTITIES. Up to Last Estimate.	During Month.	Total.	Price.	AMOUNT. $	Cts.
Clearing and Grubbing Timber	1	.....	....	485	50.0	242	50
Excavating Earth and other light materials.	2	.....	....	80557	.16	12,889	12
" Hard Clay mixed with Stone....	3	.....	....	165538	.23½	38,901	43
" Loose Rock, Shale, &c.....	4	.....	....	13685	.31	4,242	35
" Solid Rock.....	5	.....	....	153412	.73	111,990	76
" Borrowed Material.....	6	.....	....	122653	.18	22,077	54
Hauling ifto Embankments.....	7	.....	....	492423	.21⅓	105,870	94
White Oak Scantling.....	30	.....	....	4991	36.00	179	67
Pier Masonry.....	8	.....	....	890	9.00	8,019	00
Bridge do 1st class.....	9	.....	....	2321	6.75	15,666	75
do do 2d do.....	10	.....	....	3375	5.50	18,562	50
White Oak Plank.....	31	.....	....	7490	30.00	224	70
Bridge Arching, 2d class.....	11	.....	...	842	6.25	5,262	50
Culvert do	13	.. ..	....	374	4.00	1,496	00
Ranged Rubble Masonry.....	14	.....	....	2956	4.50	13,302	00
Dry Stone Drains, with hammered faces.....	15	.....	....	1784	2.50	4,460	00
Sundry unestimated work & percentage.....		.....	....	.....	.....	20,500	00
Hauling Stone, Sand, Rails, &c.....	25 & 19	.....	....	.....	.....	2,820	00
Slope Walls.....		.....	....	30	1.10	33	00
Paving.....	17	.....	....	512	1.10	563	20
Puddle	18	....	....	89	1.00	89	00
Brick work in Piers and Culverts in cement.	16	.....	....	108	6.00	648	00
Brick work in Arches in cement.....	20	.....	....	95	7.00	665	00
Pointing in cement.....	21	.....	....	1785	.35	624	75
String courses, cut coping.....	22	.....	....	8934	.50	4,497	00
Ballast.....	23	.....	....	26500	.60	15,900	00
do delivered.....	24	24000	1500	.....	.....	1,000	00
White Pine Scantling.....	29	.....	....	13645	33 00	450	28
Masonry of Skew Bridge.....	12	.. ..	....	813	8.25	6,707	25
Work on Womelsdorf Sta. as detailed in Est. for July, 1856	27	....	....	.....	.....	6,126	50
" " " " " " " "		.....	....	.....	.....	1,120	00
Other Extra work on Bridge & Culverts.....	28	.....	....	.....	.....	2,504	31
Horse feed, $700; Plant, $2000.....	40	.....	....	.....	.....	2,700	00
Excavation in Rock & Sundry graduation since opening the road.....	41	.....	....	.....	.....	4,400	00
Amt. paid Hands at Lebanon.....	42	.....	....	.....	.....	200	00
Total.....		.....	....	.....	.....	$435976	05
Payment.....		.....	....	.....	.....	433476	05
						$2500	00

November 11, 1857.
Signed,
RICHARD B. OSBORNE,
Engr.
A true copy.
M. E. LYONS,
March 23, 1860.

EXHIBIT R.

Pages 26 & 27 of Exhibit E2, Book of final estimate of P. O'Reilly, contractor, taken Jan'y 11th, 1858, for the first forty sections of Lebanon Valley R. R.

EXHIBIT S.

M. E. Lyons, copy of final estimate of Tarrant & Co., copy dated March 23, 1860. Estimate dated January 5, 1858.

EXHIBIT T.

Current estimates for Jan'y, 1856:	
Payment on Tarrant & Co. estimate, . .	$10,480.00
Payment to O'Reilly, ...	39,551.94

EXHIBIT U.

Current estimates for Feb'y, 1856:	
Payment on Tarrant & Co., current, .	$ 8,654.00
Payment to O'Reilly, ...	34,668.00

EXHIBIT V.

Current estimates for March, 1856:	
Payment to Tarrant & Co., ...	$9,940.00
Payment to O'Reilly, ...	4,038.00

EXHIBIT W.

Current estimates for April, 1856:	
Payment to Tarrant & Co., ...	$14,777.00
Payment to O'Reilly, ...	13,443.74
Error by underestimating O'Reilly, . .	29,000.00
True payment, ...	42,443.74
Total payment to subs., ...	41,343.39

EXHIBIT X.

Current estimate for May, 1856:

Payment to Tarrant & Co.,	$13,745.00
Payment to P. O'Reilly,	60,389.00

EXHIBIT Y.

Current estimate for July, 1856:

Payment to Tarrant & Co.,	18,300.00
Payment to P. O'Reilly,	56,930.00

EXHIBIT Z.

Current estimate for Jan'y, 1857:

Payment to Tarrant & Co.,	12,000.00
Payment to O'Reilly,	26,044.00

EXHIBIT A2.

Current estimate for March, 1857:

Payment to Tarrant & Co.,	11,900.00
Payment to P. O'Reilly,	27,880.64

EXHIBIT B2.

Current estimate for April, 1857:

Payment to Tarrant & Co.,	11,440.00
Payment to P. O'Reilly,	28,435.00

EXHIBIT C2.

Current estimate for July, 1857:

Payment to Tarrant & Co.,	
Payment to P. O'Reilly,	11,100.00

EXHIBIT D2.

Comparative statement of quanities estimated on current estimate No. 41, of Sept. 30, 1857, with final estimate Jan'y 5, 1858. This exhibit shows the true total of current estimate No. 41 to be, . . . 434,976.05
And a total of final estimate as returned of . 412,993.35
Showing an apparent difference in favor of No. 41 of 21,982.70
The difference is explained as follows:

Sundry unestimated work and percentage, ...	20,500.00	
Temporary allowance for stone afterwards estimated as masonry, .	700.00	
Item transferred to another account,	200.00	
1393.67 yd's ballast omitted from the the final, ...	836.20	
Making altogether, . . .		22,236.20
Showing that the final exceeds current No. 41 by		253.50
To which add the omitted ballast of		836.20
And the true excess of the Final over current No. 41 is in work done, ...		1089.70

For particulars see Exhibit D2.

EXHIBIT E2.

Book of final estimate.

EXHIBIT F2.

Statement showing that the work estimated to Tarrant & Co., sub-contractors, on the second division, is included in the final estimate of P. O'Reilly. This statement is tabulated.

EXHIBIT G2.

Current estimate of Tarrant & Co. for July, 1857:
Payment to Tarrant & Co., . . . $2,000.00

EXHIBIT H2.

Current estimate of Tarrant & Co. for Sept., 1857:
Payment to Tarrant & Co., . . . $2500.00

Note in pencil in R. B. O.'s handwriting: The average cost of solid rock from June 1855 to Feb'y, 1857, 1.24 per cub. yard on 73659 cub. yards, varying from 89 cents to $1.69 as per expenses.

EXHIBIT J2.

Current estimate No. 41 of P. O'Reilly, contractor, for Sept., 1857:
Payment to O'Reilly, ... 8500.00

EXHIBIT K2.

Current estimate No. 26 for Aug., 1856:
Payment to Tarrant & Co., ... 18,328.00
Payment to P. O'Reilly, ... 56,025.00

EXHIBIT L2.

Current estimate No. 27, or 29, for Sept., 1856:
Payment to Tarrant & Co., ... $17,180.00
Payment to O'Reilly, ... 58,900.00

EXHIBIT M2.

Current estimate No. 30 for October, 1856:
Payment to Tarrant & Co., ... 17,500.00
Payment to O'Reilly, ... 55,350.00

EXHIBIT N2.

Current estimate No. 31 for November, 1856:
Payment to Tarrant & Co., ... 10,101.00
Payment to O'Reilly, ... 51,241.00

EXHIBIT O2.

Current estimate No. 32 for December, 1856:
Payment to Tarrant & Co., ... 16,106.00
Payment to O'Reilly, ... 44,131.00

EXHIBIT P2.

Contract between George Campbell and Tarrant & Co. for work on Lebanon Valley R. R. in form similar to the contract between O'Reilly aud Tarrant & Co.

EXHIBIT Q2.

READING, 27th Mar., 1854.

MEMO.

The object of preparing the Force returns is to ascertain as as nearly as possible the actual nett cost of the work to the contractor.

A faithful, steady man shall be appointed to take the time on each division; he shall pass over the division in an easterly direction one day and in a westerly direction

the next day, and on the evening of every second day he shall submit his time book to the engineer in charge for inspection and transference to the report of Force book in the division office. At the end of each week a return shall be prepared showing the labor expended by the contractor on each section of his contract, according to the subjoined form.

M. E. LYONS,
Ass't Eng.

Form appended as an illustration in conformity with the form upon which Exhibit R2 is framed and reported.

EXHIBIT R2.

LEBANON VALLEY RAILROAD.

Report of force employed by Messrs. TARRANT & Co., sub-contractors, during the month ending 31st day of July, 1856.

SECTION.	Overseers.	Laborers.	Boys.	Masons.	Stone Cutters.	Smiths.	Carpenters.	Cooks, Drivers.	Attendants on horses.	Clerks.	Sick.	Absent.	HORSES. And Carts.	HORSES. In Stable.	HORSES. Hauling Provisions.	REMARKS.
	1.75	1.12½	.25	1.75	1.75	1.50	1.50	1.00	1.00	..	..	..	1.50	0.37½	....	Cost of labor, 3-100 added for tools.
14	27	663	77	....	....	10	...	26	23	..	..	..	99	4	....	$1057.16
16	27	960	184	3	27	27	25	145	27	..	..	..	334	16	....	2042.23
17	16	224	39	66	4	3	1	5	....	..	..	..	51	.....	....	514.75
18	27	650	54	3	15	27	15	26	27	..	..	..	74	5	....	1083.95
19	54	1938	86	....	....	27	27	156	27	..	..	..	360	12	....	3197.89
20	27	138	....	50	79	....	12	....	....	..	..	..	4	.....	....	465.81
21	54	1100	115	....	....	67	117	139	52	..	..	..	251	48	....	2288.92
22	54	489	51	58	32	27	1	73	27	..	..	..	163	20	....	1245.14
23	27	1016	125	48	127	25	4	88	27	..	..	..	376	25	....	2327.42
24	42	518	27	22	27	27	....	134	27	..	..	..	309	33	..	1468.91
Total.	355	7696	758	250	311	240	202	792	237	..	..	..	2021	163	....	$15692.18

To R. B. OSBORNE, ESQ.,
Engineer in Chief.

R. F. STACK,
Assistant Engineer.

EXHIBIT S2.

Report of force for August, 1856, on sections 14 to 24 inclusive of Tarrant & Co., sub-contractors:

Expense reported, ... $14,772.13

EXHIBIT T2.

Report of force for September 18, 1856, on sections 14 to 26 inclusive of Tarrant & Co., sub-contractors:

Expense reported, ... $16,199.32

EXHIBIT U2.

Report of force for January, 1857, on sections 14 to 24 inclusive of Tarrant & Co., sub-contractors:

Expense reported, ... $10,049.58

EXHIBIT V2.

Profile, second division, Lebanon Valley Railroad, showing rock surface and quantities.

Total cubic yards solid rock, . . . 151,085

EXHIBIT W2.

WOMELSDORF, June 23rd, 1856.

R. B. OSBORNE, ESQ.,
Eng'r-in-chief,
L. V. R. R.,

Dear Sir:—

It has been reported that we have not pushed our work with the dispatch that we might have done, and that we would delay the road; we therefore beg to lay before you a few statements showing that it has always been our wish to push the work to completion at as early a moment as possible, and you will see by the enclosed statements that if we had been furnished by the engineers with iron and borrowing pits when asked for that the work would have been in a much more forward state, and that we should have been saved the expense of taking up and relaying track on several of our sections.

We beg to call your attention to a statement sent you October 24, 1855, saying that we required 11,100 ft. iron to complete our work; taking from that 6000 ft. on section 14, still left 5100 ft. and that we should want 1400 ft. before 1st Jan'y, '56.

We were promised all of Kupp's iron by 1st of April, and to this time we have only received the 2 loads referred to (ab't 40 bars) and in fact we have been so much in want of iron that we have found it almost impossible to get along, and have been compelled to lay a large quantity of wooden rails (both in main track and sidings) at considerable expenses.

Not wishing to enter any further in the details would say that we have letters which will show that it has always been our wish to push the work, and that if any impediment has been thrown in the way it has not come from us; and we are

Very respectfully
Y'r ob't s'ts.,
TARRANT & CO.
PER GEO. W. BOWEN.

EXHIBIT X2.

READING, Penna., June 18th, 1857.

We, the undersigned, directors of the Lebanon Valley Railroad, have the pleasure of testifying to the faithful and energetic prosecution and satisfactory completion of the sub-contract for grading the Second Division of the Road by J. H. Osborne, including the fourteen miles between Womelsdorf and Lebanon.

A considerable portion of the work was of a very difficult character, comprising heavy embankments made from borrowing pits and long cuts of solid rock unusually hard and almost impossible to blast.

By persevering energy, good management and the employment of day and night gangs of workmen, without regard to cost, Mr. Osborne succeeded in completing his Division without any delay to the track layers in opening the Road, a result as creditable to himself as satisfactory to the Directors.

SIMON CAMERON,
Pres.
ISAAC ECKERT,
G. A. NICOLLS,
J. W. KILLINGER,
SAML. BELL,
JOS. HENRY.

EXHIBIT Y2.

READING, Pa.,
Oct. 7, 1857.

This is to certify that I approve the account presented to me this day by Jno. H. Osborne, showing himself indebted to me on a private acc't, and the disbursement of the Camden and Atl. monies in the sum of ten hundred and ninety-six dollars and ninety-seven cents.

$1096.97. P. O'REILLY.

EXHIBIT Z2.

PHILADELPHIA, Oct. 4th, 1855.

P. O'REILLY, ESQ.,
Contractor,

DEAR SIR—

I was in hopes you would have come up to Womelsdorf and I waited for you, as I understood you to say that I might expect you. I wished you to see my work and give me your views and experience on some of the rock sections. I am sorry that the several letters, of which this is, I think, the fourth, remain unnoticed by you. The suggestions you made relative to the size of the bits, viz: 2¾ "& 3," has been tried and in some cases at a positive loss, as it is clear that such large drills are applicable only to rock of the average hardness. I am as much behind this month as I was last, and on one section more. I have still to excavate abt 170,000 C. Y. of rock and it is idle for me to expect get through unless I am assisted. I believe I have some rock which cannot be taken out for 1.25. I do not, of course mean to say that the larger portion is of this quality, but it is all harder than the average of limestone. I have therefore concluded that I am not doing myself justice with the prospect before me of high wages, high feed, and the increased cost of powder to go on further without some understanding from you. The least price that will enable me to prosecute the work to completion will be an average of twenty cents per yard. For less than this I would not undertake it. I have expected that you would promptly have met me and gone into the matter in a business way and satisfy yourself thoroughly, if you are not already, that I am not exaggerating my difficulties. You must be aware that for the last 4 mos ⅞ of the parties on my divisions have been working on rock with nearly 4-5 of the laborers and about 45 horses. How, then, when men with only a portion of a single section are complaining of their small estimates, can you expect me to wade through. My estimates have never yet met my payments; I have been compelled to keep back money from the boarding masters and as much as I could from

my men from month to month to meet my notes and bills for powder, steel, feed, coal, lumber, &c. I am indebted several thousand dollars to yourself and others for horses, carts, &c., &c. You will observe that you have already paid me some $4,000 of my percentage, and what remains in your hands would not meet one-half of my obligations. My losses by the fire, which I have previously stated, am't to some $3,000, and this too the result of a policy over which I had no control—under these circumstances you must not be surprised if I think that your not having even noticed my previous letters appears to me hard, and I trust that you will not allow this to pass without giving me your views.

I am,
Dear Sir,
Truly yours,
signed J. H. OSBORNE.
for TARRANT & Co.

CORRECTIONS :

On the eighth line, first page, the word work was altered to Rock, and on the 14th line the word *it* inserted between but and is.

I certify this to be a true copy.
JAS. CLENDINING.
Oct. 6, '55.

EXHIBIT A3.

READING, Oct. 9th, '55.

JOHN H. OSBORNE, ESQ.,
Dear Sir :—

Yours of the 4 claim duly to hand; when last in Reading I had certainly intended to meet you at Wamelsderf, but other pressing business prevented me on the day I promised, which I much regret. I have

written you an answer to your last, and am somewhat surprised at you not rec'd'g it. When you come up on the 15 I will then go over the work with you, and look into the nature of your Rock carefully. You are well aware I am disposed to do all I can for you and others. Were I to give you my prices, this would not bring you and others out; therefore this matter cannot be gone into harshly but must be managed with a good deal of tact. I am working at this matter for the last six weeks. The chief is not aware of my proceeding in this matter.

I am yours truly,

P. O'REILLY.

EXHIBIT B3.

Statement showing amount of Rock, &c., excavated on Sections 18, 19, 20, 21, 22 for the 5 months ending October 31, 1855.

	JUNE.				JULY.				AUGT.				SEPT.				OCTOBER.			
	Solid Rock.	Loose Rock.	Hard Clay.	Earth.	Solid R.	Loose R.	Hard Clay.	Earth.	Solid R.	Loose R.	Hard Clay.	Earth.	Solid R.	Loose R.	Hard Clay.	Earth.	Solid R.	Loose R.	Hard Clay.	Earth.
Section 18	1700	....	500	500	1400	....	622	551	2285	185	267	199	1850	....	25	25	1710	....	80	80
" 19	1080	....	200	200	1500	...	230	350	550	....	365	365	730	....	595	396	3:0	....	731	731
" 20	470	....	400	450	1030	....	850	850	1720	....	610	610	1708	....	600	600	100	....	743	744
" 21	300	....	50	50	300	....	700	650	450	....	927	675	900	....	....	....	930	....	955	955
" 22	....	....	100	100	20	....	80	70	460	....	440	440	743	....	110	110	950	....	200	200
	3550	....	1250	1300	4250	....	2482	2471	5465	185	2609	2289	5923	....	1105	1106	3610	....	2709	2710

Expenses for five (5) sections June..... 4,663.39
July 6,264.03
August 6,936.04
Sept..... 6,483.69
Octob 7,276.23

Total.....31,623.38
Horse Expenses for 18, 19, 20, 21, 22 sections during the five months.. 3,778.00

which deducted.....27,845.38
gives as Total Est.....18,688.46

Actual Loss..... 9,156.92

3778.00 31,623.38
3869.76 7,647.76

7647.76 23.975.62—:-22798=1.05 per cub. yard.

Total yds....	Solid Rock.	Loose Rock.	Hard Clay.	Earth.
	22,798	18.5	10155	9876
	$14,818.70	$55.50	$2234.10	$1580.16

Total Estimate, $18,688.46.

PART OF EX. B3.

P. O'Reilly, Esq., Womelsdorf, Nov. 6, 1855.

Contractor,

Dear Sir:—

Enclosed I send you a statement showing the estimated amount of material moved by me on 5 of my rock sections for the 5 mos. ending Oct. 31, 1855. You will observe from an examination of this statement that I have lost in this period and in these sections an amt. of $9156.92. The expenses are taken from my Books and made out as I represented when I placed this matter before you. They are not full and therefore give a more favorable view than is really the case. Things have changed since the work was taken by me, and it is idle to expect that the prices which I bid will carry me out. Whatever advantages I possessed have been in a very great degree rendered void by you not permitting to work to progress last winter when powder was 100 per cent. less than it is now, and labor could be had for 25 per cent. less than it is likely to be this winter. Feed, too, has advanced and I have been paying for some time as high as $24.00 per ton for hay, or about $9 over what was paid last year. Apart, therefore, form the obligation which I conceive rests on you to aid and assist me in pushing through this work, it is not in my power to continue the heavy expeditions which I have been doing for the last six (6) months.

I am

Dear Sir,

Resp. yours,

Signed,

J. H. OSBORNE.

PART OF EX. B3.

The expenses for June, July, Augt., Sept., Oct., 1885, are as follows:

June . . .	3963.
July . . .	5452.
Augt . . .	6059.
Sept . . .	5625.
Oct. . . .	6446.
Total Est,	$27545.00

Total expenses . .	$27,545.
" est	18,447.
	9,098.
Amt. sent P. O'R. Nov. 6, '55,	9,156.92
	58.92
	58.92
	90.98.
	9156.92

The estimate for the same months of the same year are:

June . . .	2790.
July . . .	3733.
Augt . . .	4510.
Sept . . .	4276.
Oct . . .	3138.
Tot. est .	$18447.00

The loss for the same months of the same year are:

June . . .	1173.
July . . .	1719.
Aug . . .	1549.
Sep . . .	1249.
Oct . . .	3308.
	$9098.00

Note the Statement No. 7, showing amt. of loss on Rock on Secs. 18, 19, 20, 21 & 22 for 5 mos., ending Oct. 31, 1855, is the copy of the original statement made by me & sent Mr. P. O'Reilly No. 6, 1855, showing a loss for that period of $9156.92, & which he promises in his letter of Dec. 14, 1855, to allow me. This was made at an early date, while at the Stat! marked No. 11; was made by my clerk, from the revise statement entered in the Expense Book, and is $58.92 less than that sent O'Reilly. In the one case the cents appear to have been taken in. In the revised ent'd. the Expense Book they were omitted.

J. H. OSBORNE.

MORRISVILLE,
Jan. 21, 1876.

EXHIBIT C3.

WOMELSDORF, Nov. 7, 1855.

P. O'REILLY, ESQ.,

Dear Sir: I am in receipt of yours of 6th stating you wished to see me as I passed through Reading. On my arrival there I found you had gone to the Susquehanna. You will permit me again to request an explicit reply to my letters.

It is now more than two months since I first addressed you, and it does really seem to me that you have had sufficient time to make up your mind, to say nothing of the usual obligation which is entailed on the party receiving such communication.

Though personally indebted to you and desires of repaying a portion of this indebtedness, I never contemplated the position of a suppliant, and yet I hold that this is the position your indecision would impose on me by withholding the aid which I have a right to expect, and which you have repeatedly stated I ought to have. I cannot consent, therefore, that this matter should be longer deferred, and before the 15th I shall thank you to give me a definite answer. Besides my obligations, which are not small, I am in advance some $13,000 in my ests and payments, and this, too, in the face of an increased consumption of steel and powder and an advance of nearly 100 per cent. on the price of the last named article. One Sect. 18 al ne, $500.00 will not cover the powder and fuse bills for the past month.

The Rock on Sect. 18 has cost me by actual expenses, which are rather under than over the mark, as follows:

In June, .89; July, 1.23; Aug. 1.23; Sept., 1.39; Oct., 1.54, on account of the increased cost of powder and a large consumption for that month making an average of $1.25 per yard for the last 5 months. On several of the other rock sections the same or equally bad results could be shown if desired. From the present appearance, there is but little hope of an improvement. We have struck some large masses of white flint, which it is almost impossible to get a drill through. I state these facts for your information. Truly yours,

JNO. H. OSBORNE.

EXHIBIT D3.

WOLMELSDORF, Nov. 28, 1855.

Letter Book, page 144.
Ex. M3. P. O'REILLY,
Contractor,

Dear Sir:—

I have not received your reply to my letter of 6th inst., though I was led to expect one, containing the assurance that you would make my losses right on the rock, which I stated was what I required at your hand, and which you told me you were willing to give me.

Yours truly,
JNO. H. OSBORNE.

———

EXHIBIT E3.

PHILADA., Nov. 10, 1855.

Reilly,	4000.
McAdams,	1000.
Cars,	1000.
Stock,	1300.

P. O. REILLY, ESQ.,

Dear Sir:—

I am in receipt of yours of the 3rd Nov., this day they were handed me by Mr. Osborne. I regret it did not come to hand before, as it would have relieved me of some anxiety respecty my condt. on the Second Divn. Your 2nd letter, dated 6th, and addressed to Summer St., I also found on my return. These facts will explain the reason of my letter of the 7th from Womelsdorf.

In regard to my payments this month, they will be, I think, some thousand dollars in advance of my Est. proper. When I obtained the advance I propose to apply it to

the payt. of my engagements for cars, &c. This will be far better for me, and I should, of course, include you amongst those to whom I would disperse it; it would be personally your gain.

I shall be up next week.

Yours truly,

J. H OSBORNE.

EXHIBIT F3.

READING, Decr. 14th, 1855.

JNO. H. OSBORNE, ESQ.:—

In answer to yours of Nov. the 6th ultimo, I would state: I am aware that your prices for hard rock will not carry you through. I am also aware that my prices will not pay for taking out the hard rock on some of your sections; therefore, in order to enable you for the present to carry out the work, I will allow for hard rock seventy-three cents, that being my price; I regret I cannot do any better for you at present. However, I trust to be enabled to carry you through without sustaining any loss. From my experience in rock excavation, I know that the rock on some of your sections cannot be excavt. for less than 80 to 85 cents per cubic yard. I will make good to you the deficiency, $9156, as per statement.

Yours truly,

P. O'REILLY.

EXHIBIT G3.

WOMELSDORF, Feby. 29, 1856.

Copy Extract—J. H. O. to P. O'Reilly.

P. O'REILLY, ESQ.,

Contractor,

DEAR SIR:—

Mr. Stack estimated Sect. 18, 19, 20, 21, 22 and 23 $25,125, my expenses $39,015, showing a loss of $13,890 = to 55.3 per cent. Mr. Stack estimates are from Oct. to Dec. 31, 1855.

Signed J. H. OSBORNE.

Letter book page 175, Ex. M3.

EXHIBIT H3.

WOMELSDORF, Nov. 6, 1855.

P. O'REILLY, ESQ.,
Contractor,
D. Sir:—

Enclosed I send you a statement showing the estimated amt. of material used by me on 5 of my rock sections for the 5 mos. ending Oct. 31st, 1855.

You will observe from an examination of this statement that I have lost on this period and on these sections an amt. of $9,152.92. The expenses are taken from my books and made out as I represented when I placed this matter before you. They are not full and therefore give a more favorable view than is really the case. Things have changed since the work was taken by me, and it is idle to expect that the prices which I bid will carry me out. Whatever advantages I possessed have been in a very great degree, rendered void by your not permitting the work to progress last winter when powder was 100 per cent. less than it is now, and labor could be had for 25 per cent. less than it is likely to be this winter. Feed, too, has advanced, and I have been paying for some time as high as $24 a ton for hay, or about $9 over what we paid last year. Apart, therefore, from the obligation which I conceive rests on on you to aid and assist in pushing thro this work it is not in my power to continue the heavy expenditures which I have been doing for the last six (6) months. That I have hitherto done so is explained by taking and having the money which a profitably sect. has thrown into my hands and applying it to these rock sections, leaving all the indebtedness incurred for the car sections to accumulate. You must be aware, too, that one of these sections has not been as profitable as it should have been to cover the large outlay required, and this section, tho clay, was the only one driven last winter, whilst those containing rock were lying idle, but you are as sensible of these facts as I am and therefore I need not occupy your time with a recital of them. What I expect you to do under these circumstances is to make me such an advance as will cover the

loss I have up to 3rd Oct. sustained, and advance my price on the Rock to 85c. per yard for the future. By doing this I shall be enabled to pay for my 70 or 80 cars and to prosecute my work to completion. I shall take no action till I hear from you. I have written and spoken so much, and have heretofore received so little satisfaction that self-defence obliges me to insist upon your giving me a positive answer, and I shall therefore wait your reply.

I am, D. Sir, Respt. yours,

J. H. OSBORNE.

EXHIBIT J3.

Statement showing amount of loss on Sections 18, 19, 20, 21, 22 & 23 for 7 mos., ending Dec'r. 31, 1855.

SECTIONS.	JUNE.					JULY.					AUGUST.					SEPTEMBER.					OCTOBER.					NOVEMBER.					DECEMBER.				
	Solid Rock.	Hard Clay.	Earth.	Estimate.	Expenses.	Solid Rock.	Hard Clay.	Earth.	Estimate.	Expenses.	Solid Rock.	Hard Clay.	Earth.	Estimate.	Expenses.	Solid Rock.	Hard Clay.	Earth.	Estimate.	Expenses.	Solid Rock.	Hard Clay.	Earth.	Estimate.	Expenses.	Solid Rock.	Hard Clay.	Earth.	Estimate.	Expenses.	Solid Rock.	Hard Clay.	Farth.	Estimate.	Expenses.
Eighteen.....	1700	500	500	$1295	$1505	1400	622	551	$1135	$1765	2285	267	199	$1575	$2593	1850	25	25	$1212	$2337	1710	80	80	$970	$2812	2050	240	240	$1424	$2699	890	250	250	$673	1707
Nineteen.....	1080	200	200	778	965	1500	230	350	1081	1399	580	365	365	516	750	730	395	396	624	678	320	731	731	486	694	320	850	850	531	1470	800	1151	350	829	803
Twenty.....	470	400	450	465	982	1030	850	850	992	1426	1720	610	610	1350	1651	1700	600	600	1331	1454	100	743	744	347	1613	....	55	500	92	1616	....	....	....	.....	.....
Twenty-One.	300	50	50	214	437	300	700	650	453	540	450	927	675	603	642	900	....	....	585	629	930	955	955	967	693	1640	440	440	1233	.....	1320	275	275	962	1476
Twenty-Two.	....	100	100	38	74	20	80	70	72	321	460	440	440	466	423	743	110	110	524	527	450	200	200	368	634	400	220	220	355	626	450	100	100	330	556
Twenty-three	....	....	....	.....	.....	....	....	....	.....	.....	....	....	....	.....	.....	....	....	....	.....	.....	....	....	....	.....	.....	....	....	....	.....	....	150	400	400	249	517
	....	....	....	$2790	$3963	....	....	....	$3733	$5452	....	....	....	$4510	$6059	....	....	....	$4276	$5625	....	....	....	$3138	$6446	....	....	....	$3635	$6411	....	....	....	$3043	$5059

SUMMARY.

I certify the

SUMMARY.

	EXPENSE.	ESTIMATE.	LOSS.
June	$3963	$2790	$1173
July	5452	3733	1719
August . . .	6059	4510	1549
September . .	5625	4276	1349
October . . .	6446	3138	3308
November . .	6411	3635	2776
December . .	5059	3043	2016
Total . . .	$39015	$25125	$13890

Aggregate Loss for the 7 months ending Dec'r. 31st, 1855, ... $13,890.00.

I certify the above statement to be correct.

GEO. W. BOWEN.

The above is a statement of the amount of the Engs. Estimates on the above sections exclusive of the haul. The Expense are the total expenses except for horses. There being no way in which the am'ts allowed for haul could be got at, I thought it advisable to take out the horse expenses.

Yours, &c.,

J. H. OSBORNE.

per GEO. W. BOWEN.

Expenses on Sec. as above, $15,500
do from Powder Book, 12,536.12½

EXHIBIT K3.

Powder used for 7 months ending Dec. 31, '55.

	Sec.	18	19	20	21	22	23
	In June, 1855,	165.	30.	21.	9.		
	July	255.	102.	15.	24.		
10	Aug.	252.50	37.50	22.50	25.	7.50	
	Sep.	285.	36.	61.	30.	15.	
	Oct.	467.50	21.25	42.50	51.	42.50	
	Nov.	292.50	45.		45.	36.	
	Dec.	85.50	45.		54.	27.	27.
	(18)	1803.00	316.75	162.00	238.	128.00	27.
	(19)	316.75					
	(20)	162.					
	(21)	238.					
	(22)	128.					
20	(23)	27.					
		2674.75					

C. Y. Solid R.

	18	1700,	1400,	2285,	1850,	1710,	2050,	890	= 11,885
	19	1080,	1500,	580,	730,	320,	320,	320	= 5,330
	20	470,	1030,	1720,	1700,	100,			= 5,020
	21	300,	300,	450,	900,	930,	1640,	1320	= 5,840
30	22	20,	460,	743,	450,	400,	450,		= 2,523
	23	150							= 150
									30,748

30748)267475(.0869
30748

59995
30748

40

29247 nearly .087 c.

EXHIBIT L3.

Statement showing Loss on Sections 14 to 23 inclusive for 5 months ending May 31st, 1856.

SECTIONS.	JANUARY.						FEBRUARY.						MARCH.						APRIL.						MAY.					
	Solid Rock.	Loose Rock.	Hard Clay.	Earth.	Amount Estimate.	Amount Expenses.	Solid Rock.	Loose Rock.	Hard Clay.	Earth.	Amount Estimate.	Amount Expenses.	Solid Rock.	Loose Rock.	Hard Clay.	Earth.	Amount Estimate.	Amount Expenses.	Solid Rock.	Loose Rock.	Hard Clay.	Earth.	Amount Estimate.	Amount Expenses.	Solid Rock.	Loose Rock.	Hard Clay.	Earth.	Amount Estimate.	Amount Expenses.
Fourteen	....	..	4300	....	$946	$862	200	...	1750	....	$420	$717	....	..	1900	....	$418	$671	...	...	1500	....	$330	$806	....	.....	2000	....	$760	$706
Fifteen	....	30	112	....	34	—	....	....	....	....	—	—	....	..	....	....	—	—	....	....	....	....	—	—	....	.....	....	....	—	—
Sixteen	400		1480	1400	909	915	400	250	1150	1150	819	717	600	..	1700	1700	1036	747	800	...	1390	1390	1051	1128	489	.....	1809	1809	1005	977
Seventeen	....	..	....	....	—	—	....	....	....	....	—	—	....	..	....	....	—	—	....	....	170	....	34	—	....	.....	....	....	—	—
Eighteen	748	..	17	....	490	1438	1630	...	300	300	1154	1420	980	..	130	130	686	1474	757	...	....	....	492	1728	500	.....	....	....	325	1055
Nineteen	530	..	267	280	448	839	540	...	255	255	448	1016	1165	..	40	40	773	1050	1425	...	325	300	1046	1767	1153	.....	245	245	842	1192
Twenty	....	..	....	....	—	—	....	....	....	....	—	—	....	..	190	....	42	—	....	...	120	....	26	—	....	.....	33		7	—
Twenty-one	1496	..	....	....	972	1558	1530	...	75	75	1023	1480	2340	..	55	50	1541	1700	2070	...	210	210	1425	1779	1459	.....	400	400	1094	1574
Twenty-two	504	..	10	....	330	535	440	...	....	....	286	471	500	..	....	....	325	426	635	...	....	....	412	659	400	Bor'w'd 150	....	....	287	380
Twenty-three	455	..	....	....	295	438	370	...	....	....	240	527	715	..	....	....	465	411	823	100	487	244	711	905	777	50	80	80		740
Total					$4424	$6585					$4390	$6348					$5286	$6439					$5527	$8774					$4870	$6632
Loss each month					2161						1958						1153						3247						1762	
					$6585	$6585					$6348	$6348					$6439	$6439					$8774	$8774					$6632	$6632

Aggregate loss for the 5 months, $10,281, equal to 41.2 per cent.

Add to the loss $7230 for Powder and Tools not entered in Expenses, making the total loss for 12 months $31,401.$^{00}_{100}$.

I certify the above statement is correct,

GEO. W. BOWEN.

EXHIBIT M3.

Letter Book of Jno. H. Osborne.

EXHIBIT N3.

The aggregate loss for the 7 months on Sections 18, 19, 20, 21, 22 and 23, from June 1st to December 31st, 1855, was $13,890.00, being 55¼ per cent. loss.

The expenses being, . . .	$39,015 00
The estimates being, . . .	25,125 00

See Statement No. 1.

The aggregate loss for the 5 months on Sections 14, 15, 16, 17, 18, 19, 20, 21, 22 and 23, from Jany. 1st to May 31, '56, was $10,281.00, being 41 1-5 per cent loss.

The expenses being, . . .	$34,778 00
The estimates being, . . .	24,497 00

See Statement No. 2.

The total loss for 12 months, ending May 31st, 1856, being $24,171.00, being 48.7 per cent. loss.

The expenses being, . . .	$73,793 00
The estimates being, . . .	49,622 00

To be added to the above total $7230 for powder and tools, not included in expenses, making $31,401.00, the actual loss to May 31st, 1856.

E. & O. E.

WOMELSDORF, June 25, 1856.

GEORGE W. BOWEN,
Clerk.

EXHIBIT O3.

Statement showing loss on rock from June to October, inclusive, 1856, Sections 18, 19, 20, 21, 22 and 23.

1856.	Cub. Yds. Solid Rock.	Total Expenses.
June, . . .	5309	$7,350.68
July, . . .	5591	9,031.06
Aug., . . .	5218	8,850.84
Sept., . . .	5336	9,982.56
Oct., . . .	6229	10,489.47
Total No. Yds., .	27683	45,704.61
	Loss, H. Ex.	6,736.82
	Total expenses,	38,967.79

Horse Expenses.

June, 1152.37		
July, 1267.39	Total Exp.,	38,967.79
Aug., 1397.32	Total Est.,	22,736.93
Sept., 1282.99	Loss for 5 mos.,	$16,230.86
Oct., 1636.75		
6736.82		

27683 cub. yds. S. R. at 73c., . .	$20,208.59
all other material, .	2,528.34
	$22,736.93

Earth 5550, at .16, . .	$888.
Hard clay 5818, at .23½, .	1367.23
Loose R. 881, at .31, . .	273.11
	$2,528.34

EXHIBIT P3.

Total expenses on Section 19, from Nov. 1, 1856, to Mar. 31, 1857—Four months, Feb. 28, 1857.

Nov., 1856.,	. . . . .	3,955 02
Dec., "	. . . . .	4,267 87
Jan., "	. . . . .	2,962 83
Feb., "	. . . . .	3,152 27
		$14,337.99 ———

	Earth.	H. Clay.	Solid R.	
Nov. '56....	625	810	2505	6613.09
Dec. "	750	900	2584	401.85
Jan. '57....			2670	220.
Feb. '57....			1300	
	1375	1710	9059	$7,234.94
				14,337.99
	@16c.	23½	.73	$7,103.05
	$220	40185	6613.07	

Loss on 4 months.

EXHIBIT Q3.

STATEMENT 8.

From which the loss of the Rock on Section "18," from June to Oct., inclusive, was taken and reported to P. O'Reilly in my letter of Nov. 7th, 1855, marked (9).

YEAR 1855.	Expenses.	Deficiency.	Yds. Rock	A	Cost per Yard.
June "	$1685.00	400	1700	24c.	89
July "	1936.50	807	1400	58c.	1.23
Aug. "	2954.73	1328	2285	58c.	1.23
Sept. "	2569.66	1361	1850	74c.	1.39
Oct. "	3079.49	1873.49	1810	1.04	1.69
				318	6.43
Average.....	.....	.....	.....	.636	$1,286

The *actual* cost in per cub. yard for

Deficiency.

June,	.2351c
July,	.5761c
Aug.,	.581
Sep.,	.735
Oct.,	1.034

These 3 mos. includes some horse work, stripping rock and hauling into schutes.

NOTE.—Putting the expenses at 15c more for Powder in Oct., the $1.54 = for 5 months to the ave. of 1.25 per cub. yard.

N. B.—The actual figures, .087c for C. Y. for Powder.

1855.		Deficit.	Yds. Rock.			
June,	Exp. $1685.	$4005	1700	per yard	65 24c.	= 89
July,	1936.50	807	1400		58c. 65	= 1.23
Aug.,	2954.73	1328	2285	includes some H. W.	58c. 65	= 1.23
Sept.,	2569.66	1361	1850	" H. W.	65 74c.	= 1.39
					214	
					535	
Oct.,	3079.49	1873.49	1810	includes some H. W.	104	
			9045		65	
					1.69	1.69
						6.43
						$1.28

Putting the expenses at 15c more for powder in Oct. the cost per yd. wd. be abt. 1.54 = for 5 months to the average of $1.25.

EXHIBIT R3.

Yds. of Rock Est'd from Jan. 1, 1856 to Apl. 31, 1856.

	JANUARY.						FEBRUARY.						MARCH.						MAY.					
	Solid.	Loose.	H. C.	Earth.	Est.	Exps.	Solid.	Loose.	H. C.	Earth.	Est.	Exps.	Solid.	Loose.	H. C.	Ear.	Est.	Exps.	Solid.	Loose.	H. C.	Earth.	Est.	Exp.
14			4300	1400	946	862	200		1750		420	717			1900		418	671			2000		760	706
15		30	112		34														489		1809	1809	1005	
16	400		1480		909	915	400	250	1150	1150	819	717	600		1700	1700	1036	747						977
17																								
18	748		177		490	1438	1600		300	300	1154	1420	980		130	130	686	1474	500				325	1055
19	530		267	280	448	839	540		255	255	448	1016	1165		40	40	773	1050	1153		245	245	842	1192
20															190		42				33		7	
21	1496				972	1558	1530		75	75	1023	1480	2340		55	50	1541	1700	1450		400	400	1094	1574
22	504		10		330	535	440				286	471	500				325	426	400	Bo r'ed	150		287	380
23	455				295	438	370				240	527	715				465	471	777	50	80	80	550	748
	4033				4404	6585	5080				4390	6348	5300				5286	6439					4870	6652

	Estimates.	Expenses.	Deficit.	200 yd Rock.
Jan.	4424	6585	2161	4033
Feb.	4390	6348	1958	5080
Mar.	5286	6439	1153	5300
May.	4870	6132	1762	4769
April,	5527	8774	3247	6510
	$24497	$34778	$10.281	25692

10

EXHIBIT S3.

Statement showing the cost of powder on Second Division used in Graduation:

Cost to May 31, 1855, ...	$1,236.77
7 mos. ending Dec. 31, 1885, June to Dec. inc.,	2,674.75
Month Jan. 31, 1856, ...	470.00
	$4,381.52

20

Yds excavated to May 31, 1855, C. Y. 27.232= per yard, ...	.045c
Yds 7 mos ending Dec. 31, 1855, 30.748,= per yard, ...	.0869c
Yds 1 mo Jan. 1856, 4503,= per yd., .	.104c

Total Yds on Division, ...	62,483
" Cost of Powder, ...	4,381,52
" " per Yard, ...	.071

30

The cost of Fuse is not included except in Jany, 1856.

(Signed.)

JNO. H. O.

February 21, 1856.

Abt. 1044 Kegs of Powder.

40

EXHIBIT T3.

Quanity of Rock, &c., on Sec. for. 18 to 23 incusive for Jan., Feb., Mar., Apr., May, June, July, Aug., Sept. & Oct., 1856, and for June, July, Aug., Sept., Oct., Nov. & Dec., 1855.

	Rock.		Earth.	H. C.	S. R.
Jan'y,	3733		280	294	
Feb.,	4480		630	630	
Mar.,	5700		410	415	
Apr.,	5710		754	1142	100
May,	4280	23903	725	758	750
June,	5309		1620	1776	57
July,	5591		607	608	94
Aug.,	5218		457	468	15
Sept.,	5336		997	998	500
Oct.,	6229	27.683	1869	1968	205
	51,586		8349	9057	1721
			16	22	31
			50094	18114	1721
			8349	18114	5163
			1335.84	1992.54	533.51

1855			
June,	3550	1250	1250
July,	4250	2471	2482
Aug.,	5495	2289	2609
Sep.,	5923	1130	1130
Oct.,	3510	2710	2709
Nov.,	4410	2250	1850
Dec.,	3610	1375	2176
	30748	13475	14206
		16	22
		80850	28412
		13475	28412
		215600	3125.32

Aggregate.

1856.

533.51 S. R.
1992.54 H. C.
1335.84 Earth.

3861.89

1855.

2156.00 Earth.
3125.32 H. C.

5281.32

EXHIBIT U3.

P. O'REILLY

To JNO. H. OSBORNE.

1857.			
April.	To amount expended for labor, Horse work, Powder, &c., on Sections 18 and 19, L. V. R. R.,	1404.60	
May.	" " " " " " " "	2183.07	
June,	" " " " " " " "	1187.34	
July,	" " " " " " " "	588.80	
Aug., Sept. & Oct.	" " " " " " " "	1530.33	10
		$6894.14	

I certify that the above acct is correct.

GEO. W. BOWEN.

EXHIBIT V3.

P. O'REILLY, ESQ.,

Dear Sir:—

I have directed Mr. Bowen to try and start the force on 18 and 19. I have instructed him to keep an accurate account of the same, as I would not undertake it unless the expenses would be met, and I have not the means to do so; only on these terms would I go on, as you are aware the price you give me for the Rock will never take it out. 20

Truly yours,

(Signed)

J. H. OSBORNE.

WOMELSDORF,
23rd April, 1857.

32

EXHIBIT W3.

P. O'Reilly.

To Jno. H. Osborne, Dr.

				$	c.
1856					
Dec.	To 13 days	snaking out Sills	$2 @ .	26	
1857	" 16 "	hauling with 6 mule teams	$6.50@ .	104	
Jan.	" 29 "	6 mule team hauling	$6.5 @ .	188	50
"	" 22 "	snaking Sills	$2 @ .	44	
Feb.	" 31 "	6 mule team hauling	$6.50@ .	201	50
"	" 23¼ "	snaking	$2. @ .	46	50
Mar.	" 35 "	6 mule team hauling	$6.50@ .	227	50
"	" 15¼ "	snaking	@ $2 .	30	50
"	" 20¾ "	men loading	@1. $.	20	75
"	" 3 "	6 mule team hauling Sills to Lebanon	$6.50@	19	50
"	"	Tools		1	37
April.	" 30 days	6 mule team hauling	$6.50@ .	195	
"	" 5 "	snaking	$2. @ .	10	
May.	" 28½ "	6 mule team	$6.50@ .	185	25
"	" 7 "	4 " "	$5.00@ .	35	00
June.	" 25½ "	6 " "		165	75
				$1501	12

GEO. W. BOWEN.

EXHIBIT X3.

P. O'Reilly

To J. H. Osborne.

To Sundry work done for P. O'Reilly and about Lebanon.

				$	c.
1857					
June.	To 18½ dys	work on culvert in Station Ground at Lebanon	$1.25@ .	23	12
"		Removing Sills & Lumber $1.25@	= 22 at .	10	
		To make Road for Horses & at Canal	1.25 .		
		Landing, 14 dys $1.25	27.50 .	17	50
"		Carry material and fixing up			
		Y Track, 32 days	$1.25 .	40	
		To loading plates for Cornwall Branch, 4@	$1.25 .	5	
		Amount carried forward		$95	62

1857		$	c.
	Amount brought forward.....	95	62
June	Repairing trucks drawing do & passing hands, 30 dys.....	37	50
July	To work on Y Track, surfacing, &c.....8, $1.25 .	10	
	" moving Sills at Canal.....6, $1.25 .	7	50
	To work on Y Track, raising and surfacing.....7, $1.25 .	8	75
	To extra wheeling & ramming underneath platform of Freight House.....24, $1.25 .	30	
	To removing Lumber Sills & piling same at end of track.....10, $1.25 .	12	50
	Getting Engine & Cars on Track.....20. $1.25 .	25	
	To smith work on Bridges 21 & 22, furnished in April omitted.....	10	50
	To services of Foreman, 15 dys @ $2.....	30	
		$267	37

GEO. W. BOWEN.

EXHIBIT Y3.

THE LEBANON VALLEY R. R. Co.

TO JOHN H. OSBORNE, DR.

1857		$	c.
April	To 46 days of Foreman & teams at Canal propg bridges to get Engine "Engineer".....	57	50
"	" 46 dys work abt. engine asstg Mr. Spotts & engineer & getting same on track.....$1.25	57	50
"	" 10 days work of foreman attending on same.....@$2.00	20	00
"	" 5 days 6 mule team haulg materials @$6.50	32	50
"	" 2200 ft. B. M. of Lumber for propg Bridge.....3c.	66	00
"	Paid for coupling chains in Lebanon.....	1	42
"	To $30\frac{3}{4}$ dys work of J. Fearon, as conductor.$1.50	46	12
"	" 9 " discharging Boat load of Mats for R.R.....$1.25	11	25
"	" Hauling Iron to 19..... .2 dys, "	2	50
"	" 18 dys Repg track on 24 Sect.....$1.25	22	50
"	" 24 " hauling sills on Sect. 21..... "	30	00
"	" 2 " horse " " " " $1.50	3	00
May	" Jas. Fitzmaurice, boss, delg Iron for siding for Mr. Robinson in 19 Sect 6 dys, 2.00	12	00
	Amount carried forward.....	$362	29

			$	c.
	1857	Amount brought forward	362	29
	May	To 33 dys of men	41	25
	"	" Th. Horan, loss repg & surfag.....7 dys, 2.00	14	06
	"	" 111½ dys men " " " 1.25	139	37
	"	" Thos. Horan, delg Iron for sidg...30 dys, "	37	25
	"	" Unloading boats for mat'l.....6 " "	7	50
	"	" Boss " " " " .....3 " $2.00	6	00
	"	" 22 dys cutg wood for engine.....$1.25	27	50
10	June	" hauling Sills on Sect. 19.....45 dys, $1.37½	61	87
	"	" horse " " " ....10 " $1.75	17	50
	"	" Laying track to reach sills for distribg.....22 dys, $1.25	27	50
	"	" 40 dys work pushing through track on 18.$1.37½	54	80
	"	" 6 dys cutg rails.....$1.50	9	00
	"	" 15 " work put 9 cropings.....$1.50	22	50
	"	" Loading & hauling mats from canal.....34 dys, "	51	00
	"	" " " " by mule team 15 dys, 3.50	52	50
20	"	" Repg & surfacing Track on 18 & 20 sect .....22 " $1.50	33	00
	"	" Sawing wood & tend'g on Eng....50 dys, $1.25	62	50
	July	" 88 dys repg track per Thos. Horan's men,$ "	110	00
	"	" 10 " " " " " " Boss,$2.00	20	00
	"	" 14 day haulg. Iron to Robosonia $1.25	17	50
	"	" 15 dys halg. mats. for siding on Sect. 21, $ "	18	75
	"	" 14 " " sills to Sect. 21 for Lebanon "	17	50
	"	" 29½ " delg telegraph poles..... "	36	87
	"	To 48 dys sawg wood for engine.....$1.25	60	00
30	"	" 15 " haulg Iron for Lebanon..... "	18	75
	"	" 10 " loadg lumber..... "	12	50
	"	" 10 " time of boss at same.....$2.00	20	00
	"	" 51½ " " bosses repg track..... "	103	00
	"	" 231½ " " " men.....$1.37½	316	81
	"	" 1¾ " smith work, Myerstown switch.....	6	13
	"	" 57 " men distribg sills on Sect. 19....$1.25	71	25
	"	" 21 " horses " " " ".....$1.50	31	50
	"	" distribg 1000 sills on Sect. 21.....	35	00
	"	" 29 dys Boss attending above.....$2.00	58	00
40	"	" 27½ " distribg sills & delivg Iron to Connor's Bridge, 19, for Robinson.....	34	37
	"	" to cordwood burnt by Engine..... .....$3.00	180	00
		" 38 dys boss loading Sills & Iron by Kavanagh at Lebanon, Apl to July.....$2.00	76	00
		" 297½ dys men Leb., Apl to July.....$1.25	371	87
		" 18 dys loading sills & logs. by M. Reynold's men.....$1.25	22	50
		" 2 dys 4 mule team haulg lumber to Bridge on 21.....	10	00
50		Amount carried forward.....	$2675	63

1857			$	
	Amount brought forward		2675	63
	To 35½ dys loadg logs & sills in woods . . .	$1.25	44	13
	" 18 " haulg sills to road fr woods, Section 22 . . . . . "		22	50
			$2742	26
	Allowed by engineers		1831	16
	E. E.		911.10	

GEO. W. BOWEN,
Clerk.

Total $2742.26
Amt. not allowed, $ 911.10 Charge O'Reilly.
Balance . . $1831 16

EXHIBIT Z3.

P. O'REILLY

To JNO. H. OSBORNE:—

To disbursing moneys for buying wood leave and having about 13000 sills, 2000 saw logs and 500 cords wood cut, paying for hauling same to railroad and saw mills, having logs cut into plank, splice plate, &c., and paying for distributing same along line of R. R. in 1856 and 1857, say $25,000.00 @ 5 per cent., $1250.00

E. E.

GEO. W. BOWEN.

EXHIBIT A4.

P. O'REILLY

To TARRANT & Co:—

PAGE			$	c.
4-5	1	To sundry work on Missimer's Road from Oct., 17, '55 to April 26, 1856	1252	85
			129	
6	2	Mandebach's Road, 4 Oct., '55	366	37
3	3	" Bridge, Sept., '55 & Sept., '56	83	70
10	4	Water Trunk at Mandebach	291	37
10	5	at Sta., 1173, Sept., '56	57	
11	6	Bridge at Sta., 958, July, '55	300	01
11	7	Trestling " 1030, Aug., '56, 266.76.33.25	258	03
12	8	" " 1047, Oct., '55	87	89
12	9	" " 1143, Nov., '55 to Mar., '56	314	99
14	10	Bridge 903, Feb., '56	465	99
15	11	" 1142, Sept., '56	342	03
16	12	Timber foundation 832, Sept., '56		
23	13	(23) Extra work on Sect'n 15, Nov., '56, 2.91.75	284	25
			108	
26	14	(26) Road 912, Oct., '56	64	76
14	15	Bridge 919, Dec., '55 & Aug., '56	123	
			203	82
22	16	" 1030, Feb., '56		
	17	Bridge 943, Sept., '55	90	50
28	18	" 1173, Sept., '56 28.50	102	50
29	19	" 1047, Sept., '56 $76		
24			$4911	06
		By error	51	00
			4860	06
			32	26
			$4827	80

E. E.

J. H. OSBORNE.

Extra work on Lebanon Valley R. R.

EXHIBIT B4.

READING, Sept. 6, 1856.

DEAR SIR :—

Send Ham in on Monday morning and the money will be ready for him. I thought to get it in Mr. O'R's absence, but could not without his checque. Let him also take with him a Bridle and Saddle, and Mr. O'R will send you the young colt. He desires me to say that he will go to Wormelsdorf on Tuesday.

Yours, &c., 10

E. McDERMOTT.

P. S.—I hope the men and Horses have gone to Deverox.

E. M. D.

J. H. OSBORNE, ESQ.

EXHIBIT C4.

MOHONTONGO, August 25, 1856.

JOHN H. OSBORNE, ESQ.,

Dear Sir :—

L. Devercoux is much in want of two horses for 20 snaking ties out of the woods. I think I understand you to say that you could let him have them, if so, it is of importance that you send them at once ; the hauling is now going on much faster than the snaking out, and the tie making still faster. The harvesting being now over the the men are returning to the wood ; at present there are Eleven men making ties constantly, and immediate prospect of several more, so arrangements must be made to have the snaking out keep pace with the making and hauling. Please send the horses at once ; also lead gears 30 and a boy with them.

Yours Resptly,

EDWARD McDERMOTT.

P. S.—The places to pull through being rather rugged, you should send pretty stout old horses, fit for Rough work.

EXHIBIT D4.

Dear Sir:—

I recd this day from Greenwood Devexeox came down, and I suppose has seen you ere this. They were not ready to move, not having any place to go to, but there is still room enough for all in the . I got the other party fixed as comfortably as possible under the circumstances. I write Mr. O'R. to-day that I will be down on Monday per train to get money to settle with the men who have come down. Will you please see him and have the arrangements all made, as I will bring the Books and settle with the men in Reading; there are 8 of them, and some $600 to pay them off. I will I hope I see you on Monday, and remain

Yours Respy,

J. H. O., Esq. G. W. BOWEN.

Aug. 14, "57.

EXHIBIT E4.

Reading, May 1st, 56.

Jno. H. Osborne, Esq.

Dear Sir:—

I regret very much the accident that happened you, but hope ere this you are entirely restored, and trust soon to have the pleasure of seeing you. Please let me know if you will be up on Monday. I want to see you before I leave on Monday. I have visited nearly all your work three times this week, and in general the work is progressing well. I have contracted for Ten thousand sill, delivered at the half-way house and at Lebanon. I I have got no sill from above owing to a brake in the Union Canal, about 15 miles from Lebanon. I have four tracts of timber land in view—two tracts of one hundred acres each, and the other two forty acres, all of which lays along side of the Union canal, and about 17 miles from Lebanon. One of the 100 acres is about ten miles from Lebanon. I have been told it is well timbered; price 100 dollars per acre

for land and wood. I have been all round the country for 14 miles from Lebanon, and without success. I leave tomorrow morning for Cattawissa. I regret to state that the stable and all its contents was burned. Poor Morgan, how he must have suffered. I have been told that it was set on fire by the Locomotive about four o'clock Monday morning; this is the rumor, I do not believe it. I have written to our assoc. a very polite letter, calling his attention to some things on the line that require immediate attention.

In his answer I have got particular Jessy, and I presume must be rowed up salt river, as I am universally hated.

I hope soon to see you.

I am yours truly,

P. O'REILLY.

EXHIBIT F4.

DEAR SIR:----

I write to say that I shall start from here on Monday next, and will be with you on that day if possible. Should anything happen to prevent, will write you, and you had better go to the office on Saturday.

Yours in haste,

G. W. BOWEN.

W. S. DEVEREOX. April 30, '57.

EXHIBIT G4.

READING, Jany 4th, 1856.

JNO. H. OSBORNE, ESQ.,

Dear Sir:----

Yours just came to hand. Mr. McDermott is going up to-day to pay Campbell hands; the moment he returns I will give you a statement in full. I hope you will get Mr. Devereox to go. I think he would an excellent man

to take charge of the place. We cannot get on with the work until we get a good man & wife to take charge of the whole concern. Come down early to-morrow, I want to have a talk with you.

Yours truly, P. O'REILLY.

EXHIBIT H4.

READING, May 3rd, 1856.

JNO. H. OSBORNE.

Dear Sir:—

I am in receipt of yours of the second and was glad to learn that you are so far recovered that you will be up on Tuesday. I hope Mr. O. will have a pleasant passage, and trust he will not defer his return any longer. I regret that your note for $2700 was not done at the Farmers Bank. From what I could learn they have discounted very little paper this week. The land is all surveyed, and holds out thirteen hundred acres; and the beauty of it is that all the old lines has been established, which strikes a great blow at the land sharks. Could you manage to send Mr. Devereox one barrell of sugar, one of hams, two bags of salt for the stable. You will please inclosed find two hundred and thirty-four dollars; it is all I could raise at present. Hoping to see you soon I remain. Yours truly,

P. O'REILLY.

EXHIBIT J4.

READING, Feby. 22nd, '55.

JNO. H. OSBORNE, ESQ.,

Dear Sir:—

Your favor has been received. I am glad to hear that their is some little show of a prospect to get the Camden matter arranged. Indeed, I can assure you it has give me a great deal of uneasiness, and prevented me from many

a good night's rest; but I find it does no good, therefore I have made up my mind, let the result be what it may, to keep up a good spirit. But I trust and hope that the last proposition will be successful; but I fear there will be a great deal of difficulty thrown in the way by some of the crusty directors. However, I think it will be finally carried, and I have no hesitation in saying that there is still good look before us; let it result from the Camden or not. I have had a talk with some of our directors since I saw you last, and they seem to be in good cheer, and I have no hesitation in saying that there will be some money raised to enable us to go on some what stronger with the heavy work, and I believe this will be done before the first of March; but in the mean time, as soon as Mr. Osborne come to Reading, I think he will be enable to get on for the present. This will enable us to raise some money, as he has promised.

By the by, I had two letters from Gettsburg this week; they have put back the meeting of the 22 until the 6 of March, and wants me to attend the meeting of stockholders on that day. Thad. Stevens, of Lancaster, is one of the new directors, and is to address the meeting. I am, after returning from the Bridge. Considering the great draw back, the work is going on well. I am not very well to-day, but I hope I will feel better to-morrow. Mrs. P. O'Reilly is about and pretty well.

Campbell was here to-day, and I reasoned with him how matters were, and he went of satisfied for the present.

Yours very Truly,

P. O'REILLY.

EXHIBIT K4.

READING, April 10th, '57.

JNO. H. OSBORNE, ESQ.,

Dear Sir:---

Yours of the 8th just been recd. The teams will continue to take the splices from Deppins mill on there return trip, since they got orders to do so. If they have returned without back loading, please let me

know. The splices are count careful and placed to Mr. Bowen credit so as to keep them separate from other parties splices. The mill will be ready next week. I have sent for the sawyer to be in Reading on Monday. I will make inquiry for a boss at one; I had several applicants, but not of the right stamp.

I sent you some good men, whom I think are very steady, sober and industry's men. The mail is h'bout closing.

Yours very truly,

P. O'REILLY.

EXHIBIT L4.

The total amount of Estimates of J. Nicholls, Esq., to March 30th, 1855, from Section 14 to 26, inclusive, was, ...	$22,655.54
Total Expenses for same time, . .	23,161.54
Excess of Expenses, ...	506.00

but this includes the expense of hauling 4691 C. Y. into embankment on 17, and 1144 C. Y. hauled into embkt. on 15. The expenses of which could not be separated.

The total amount of estimate of R. F. Stack, Esq., from April 1st, '55, to Dec. 31, 1855, for Sections 14 to 17, inclusive, was, .	14,467.37
Total Expenses for same time, . .	16,664.37
Excess of expenses.	$2,197.00

The one, Mr. Nicholls' est. being a loss of 2¼ per cent.
The other, Mr. Stack, " " " " 14½ "

34,276 C. Y. on 14 with Mr. Nicholls' cost 23.7c per yard.
35,724 " " " " Mr. Stack " 25.1 " "

The total yards rock on the Divn estimated by Mr. Nicholls to March 31st, '55, was 20,020, on which there was a profit, viz:

Expenses being, . . . 14,135.00
Estimate " . . . 15,288.00

$1.153 being 7½ per cent.

The total yards Rock on the Divn. estimated by Mr. Stack, to December 31, '55, was 42,813, on which there was a loss, viz:

Expenses being, . . . $55,679.37
Estimate " . . . 39,592.37

$16,087.00 being 40½ per cent.

The loss since December, 1855, is as follows:

See estimate No. 2

January, 1856, ...	$2161.00
February, "	1958.00
March, "	1153.00
April, "	3247.00
May, "	1762.00
	$10,281.00

The Estimate for the 5 months being, . .	$24,497.00
" expenses " 5 " " . .	34,778.00
The yards of rock for the 5 months . . .	25.692
Previously by Mr. Stack, ...	42,813
" Mr. Nicholls, ...	20,020
Total, . .	88,525 C Y

Sections 24 to 26, inclusive, is not included in the above.

E. & O. E.

Womelsdorf, June 25th, 1856.

GEORGE W. BOWEN,
Clerk.

EXHIBIT M4.

READING, Oct. 1st, 1857.

D SIR:---

I came down to-day to see McDermott in reference to some charges in Devereux acc, and now have it, I believe, as straight as it can be without your seeing it. I shall return to-night to make arrangements to commence 26 on Monday. Mr. Stack says there is only 4 or 500 yards in that cut, and it will take 4 times that quantity to complete it. Shall I do anything more than clear the cut? If it does not rain, I think we shall complete the West cut on 19th, this week. Devereox will go back to Danville, where he is staying, in the morning, and there will be no necessity for his coming again until He can be settled with in full. There will be a large sum due him, say $840.00 wages besides some 300 or 400$ on acc board. Hoping to see you soon, I remain

Yours in haste,

G. W. BOWEN.

EXHIBIT N4.

LEBANON, March 9, '59.

MR. G. W. BOWEN, ESQ.

I received Mr. Osborne letter of the 7th inst., and contents noted.

I will deliver your sills from Liverpool to Lebanon, or any other point between Lebanon and Palmyra (2 Boat Loads a week, about 1400 pieces) at 14 cents per piece, payable every 30 days from the opening of the navigation. This will be the lowest figure that I could take, and if you will contract for the same let me know by return mail.

Respectfully Yours,

H. T. HOFFMAN.

EXHIBIT O4.

From Folio 211 L. Book Ex M3.

WOMELSDORF, June 26, 1856.

To P. O'REILLY,

Reading,

Dear Sir:—

Mr. Osborne requests me to send you the two letters & to say that he will forward The 2 waggons at once per canal.

In reference to the last team sent on in the harness cost about $1150 & is as good a team as can be got here without paying $225 for the mules; in fact can not get them just not at any price. He considers the team sent perfectly able to do all that is required of it if properly managed. The driver we sent was the best we had on the line & the only one we could get. We've had great difficulty in getting drivers for our own teams. You will observe that they will be compelled to stop if the sills are not boated away, so as to give them room to unload the teams. If you wish Mr. Osborne to buy another team, & a heavy one, let him know without fail by Friday's mail.

Yours, &c.,

Signed, GEO. W. BOWEN.

See Letter Book Folio 211.

EXHIBIT O4. (b)

Original statement of loss by suspension, .	$11,679.59
Less sum allowed by P. O. R., ...	2,500
Bal due by P. O'Reilly, ...	9,179.59

EXHIBIT P4.

Statement showing the losses sustained by Tarrant and Co. on their sub-contract with P. O'Reilly for the graduation and masonry of sections 14 to 26, inclusive, of the Lebanon Valley Railroad, owing to the stoppage of the work for seven months ending May, 1855, of which following is an abstract.

Excess in wages, ...	4,504.49
Excess for horse feed from increased price of do., ...	3,024.
Amt. expended for mules and horses not in use the 7 mos., ending May 31, 1855, . .	1,581.
Half-salary for 6 clerks and agents for same period, ...	924.
	10,033.49
Less sum allowed by O'R., ...	2,500.
	7,533.49

Being the preceding exhibit revised with clerical errors corrected. For further particulars see exhibits.

EXHIBIT Q4.

Inventory of harness destroyed on Section 16 May 3, 1855.

EXHIBIT R4.

Value of Harness in Q4, etc., destroyed by same fire, ...	$2472.75

EXHIBIT S4.

Itemized and corrected statement and acc of items in the two preceding, . . .	2612.75

EXHIBIT T4.

READING, Oct. 2, '57.

G. W. BOWEN, ESQ.,

Dear Sir:---

Your favor just have rec'd, and in answer I regret to say that I am not in a position to send you the small amount you ask for. This may appear strange to you, but such is the fact. Mr. Bean certainly knows how they are at the present time, and the best men in the country have to get their paper renewed. I hope Mr. B. will renew and not press the matter at this time.

Truly yours,

P. O'REILLY.

EXHIBIT U4.

SUMMIT, Oct. 17, 1857.

D Sir:---

Yours of yesterday to hand and noticed. I wrote you from Tamaqua yesterday, which I hope you received. I have settled with a good many men to-day in same way as I wrote you, and I do not think there are many about, although there are a good many names on the p. s. not settled. If you could send us up some meat, sugar, coffee and tea it would be well, as all the foremen and some of the married men are going to remain. Shepp & Althouse should have something; if no money, a note, either of your own or the Co.'s for about $500.00, as I am afraid we cannot get any flour or feed from them without something is done. [I am sorry Mr. O'Reilly should complain about the accs, but I can do nothing for them at this time. I have been engaged day and night since Monday, and besides I left the of. in Womelsdorf thinking I should be back on last Monday, as I contemplated when I left, and had intended to fixing them up when over there; as soon as I can will make out what I can with them, but fear that even then he will not know much more than he does now.]

Everything is quiet around Quakaka and looks very desolate. I will send Belle to Reading on Tuesday.

Charles went over with the mules, but will be back on Monday, and he will take her down. I think you had better not come up for some days, without you bring money, as there are a good many men about Tamaqua yet, and might give trouble if you were here. Mr. Biddle will remain until after I come back from L. V., when he is going home. Mr. Bay will leave when his month is up, if you wish it, and I see no use of his staying, as there will be plenty around to look after things, and I shall put Mike Reynolds in that shanty. If you can possible arrange to let Dalton go, as it will be a good thing, as he can finish the bridge and have it all ready for track in the spring, if we should not go on before. Also, if you have no fears about the Co. and can manage to get provisions, I can have a good deal done and for a little money this winter. Dalton's estimate amounts to only 400, and his men wages 500$, but he has a large quantity of stone ready, which will soon run over his expenses if allowed to set it. Halcoman went down to see you, I believe.

I wrote Bean as you requested, and he says he will endorse another note for 60 days, but the bank requires 25 per cent reduction. I have not written him since, and did not like to trouble you about it. Will you write him to Schuylkill P. O., Chester Co., what you can do by Monday's mail, as I shall be over on L. V. R. R., and will not be able to write him for several days, and he should have an answer. What shall I do with L. V. R. R. men? Write me to Womelsdorf, if possible, by mail of Monday. Mr. Fisher will give you all particulars, and must close, as he is soon to start.

Yrs, &c.,

GEO. W. BOWEN.

Andrew went down this morning.

EXHIBIT V4.

Three Prom. note relating to Bowen Farm.

$500.$\frac{0}{100}$ April 1st, 1857.

Six months after date I promise to pay to the order of Jno. H. Osborne Five hundred $\frac{0}{100}$ dollars without defalcation for value received

Payable at Farmers' Bank. GEO. W. BOWEN.
READING, PENNA.

Endorsed:
JNO. H. OSBORNE,
P. O'REILLY,
NICHOLAS BEAN.

Pay H. H. Muhlenberg, Esq., Cash or order.
W. TOWNSEND,
Cash.

Protest, dated Oct. 3, 1857. Wm. M. Baird, Notary Public
Fees, $3.07.

May 1st, 1858, paid by J. H. Osborne.
Geo. W. Bowen.

$500.$\frac{0}{100}$ April 1st, 1857.

Three months after date I promise to pay to the order of P. O'Reilly Five Hundred dollars $\frac{0}{100}$ dollars without defalcation for value received.

GEO. W. BOWEN.

Payable at Farmers' Bank, Reading.

Endorsed:
P. OREILLY,
JNO. H. OSBORNE,
NICHOLAS BEAN.

Pay to H. H. Muhlenberg, Esq., Cash or order.
W. TOWNSEND,
Cash.

$500.\frac{0}{100}$ April 1st, 1857.

Nine months after date I promise to pay to the order of P. O'Reilly five hundred dollars without defalcation for value received

GEO. W. BOWEN.

Endorsed:

P. O'Reilly. Jno. H. Osborne.

May 1st, 1858, paid by J. H. Osborne.

Geo. W. Bowen.

EXHIBIT W4.

P. O'Reilly

To Jno. H. Osborne.

Dec. 27, 1855.	To amt. of Expenses to Dec. 21,	23.73 (1)
	To amt. cash to Landry for horse,	70. (2)
Feb. 28, 1857.	To Expenses of self to and from Greenwood,	10.80 (3)
Sept. 21, 1857.	To amt. sent Devereux, . .	40.— (4)
Dec. 8, 1857.	To amt. paid drawing lease to Clendinning,	5.00 (5)
" " "	To amount paid Clendinning for dam, ...	75.00 (6)
	To amt. paid Clendinning as care-taker, ($100 year) two years, ...	200.00 (7)
	To allowance for disbursements on payment of sill getters, teamsters, teams, &c., hauling sills to canal, $15,000 @ 5 per ct., ...	750.00 (8)
	Nov., 1857, These books returned to P. O'Reilly with all the voucher for the expenditures, ...	
		1174.53
	By error charged twice, repairs on dam, ...	75.00
		$1099.53

EXHIBIT X4.

P. O'Reilly.

To Jno. H. Osborne.

1st Team	To hire of 6 mule team from June 14, 1856, to Aug. 7th, 1857, 488 days @ $4	1952		
2d Team	To hire of 6 mule team from June 9th, 1856, to Oct. 20th, 1856, 112 days @ $4	448		
3d Team	To hire of 6 mule team from Mar. 5th, 1857, to Aug. 17th, 1857,145 days @ $4	580		
4	To hire of horse from Jan. 14th, 1856, to Aug. 7, 1857, 488 days @ 70c . . .	341	60	
5	To hire of two horses from Sept. 27, 1856, to Aug. 7, 1857, 269 days @ 70c. x 2 = 588 days	376	60	
7	To 1 mule furnished P. O'R.'s team, 170.0-100 & harness, 23 25-100 . .	193	25	
8	To 1 cart and harness	45		
9	To use of cart and harness from Jan. 14, 1856, to Aug. 7, '59	20		
6	To spring waggon & harness . . .	55		
10	To sundry articles furnished . . .	139	99	
11	To " " " . . .	17	56	
12	To " " " . . .	10	86	
13	To two wheelbarrow, $6.50; Sills bds. & Stanchions, $7.50	14		
14	To window sash and lights, $25; 50 bushs. of oats, $22.50	47	50	
15	To wheat for seed, $10.87; Repairing dam, $75.00	85	87	
16	To use of 2 horses on farm for 300 dys	150	00	
17	To salary as Genl. Manager from Jan. '56, to Aug., '57	875		
	To blankets	20		
				$5372 23

EXHIBIT Y4.

List of balances due on Greenwood as per Book.

W. Chubb	folio 25	2	15
Danl. Murphy	" 43	37	24
Bernard Kellett	" 45	2	06
Jno. Gemby	" 57	2	00

I. Castrater	"	61	88	
N. Miller	"	76	9 40	
Geo. Stroup	"	77	18 16	
Casper Dreesler	"	78	15 63	
Henry Comfort	"	79	7 24	
Jno. Klinger	"	80	16 40	
Andrew Cartretter	"	81	65 60	
Dennis Dooling	"	82	7 49	
Peter Feeney	"	"	21 67	
David Mighin	"	23	23 15	
Jas. Nowlan	"	84	105 25	
Michl. Nowlan	"	"	73 70	
Owen Murphy	"	85	89 13	
Michael Meaney	"	86	45 63	
Matthew Fox	"	"	117 07	
Chas. Goodling	"	88	1 00	
Edward Cartrella	"	"	21 37	
Jno. Gelnett, (sills Bot)	"	91	71 56	
Conrad Markley	"	92	112 24	
Richd. Jander	"	"	1 25	
Aaron Haas	"	"	14 37	
E. W. Eshelman, (Feed, &c.)	"	93	233 80	
Jos. Marks	"	"	1 30	
B. Castrella	"	"	3 05	
D. P. Burbaker, (sills Bot)	"	94	64 32	
J. M. Rine " "	"	"	60 91	
Luke Marx " "	"	"	327 48	
Hillbish & Thompson, (sills 123.75)	page	95	129 53	
Graybile & Shoners	"	"	13	
Jno. H. Osborne	"	97	73 02	
L. Devereux	"	100	1070 10	
				$2858 15

EXHIBIT Z4.

P. O'Reilly

1856. To Tarrant & Co.

Nov. To extra work on section, retrimming section 15 and 16 ..... $291 75

EXHIBIT A5.

Time book for April, May and June, 1854.

———

EXHIBIT B5.

Time and pay sheets from April, 1854, to May 31, 1855.

———

EXHIBIT C5.

Time and pay sheets from June, 1855, to November 30, 1856.

———

EXHIBIT D5.

Time and pay sheets from December, 1856, to October 20, 1857.

———

EXHIBIT E5.

Day book of Tarrant & Co. from May 24, 1854, to November 15, 1858.

———

EXHIBIT F5.

Account Book of the Storekeeper O'Brien from June 28, 1854, to December 30, 1857.

EXHIBIT G5.

Letter from Geo. W. Bowen to Richard B. Osborne, relating applications to O'Reilly for settlement with Jno. H. Osborne, etc.

QUAKAKA, R. R., Jany. 14, 1858.

R. B. OSBORNE, ESQ.,
Phila.,

Dr. Sir:—

I was not able to get the amount from Mr. O'Reilly. After leaving you I went to his office, and McDermott refused to give it. I then saw O'Reilly, and he promised to have it made out by 5 o'clk, and when I called McD. said O'Reilly had not said anything to him. I afterwards saw O'R, and he said they were so busy just now that he could not have it done, all of which is merely an excuse, as I do not believe he intends to give it, altho he has promised to send it up in a few days.

EXHIBIT H5.

WOMELSDORF,
January 23rd, '56.

M. E. LYONS, ESQ.,
Associate Eng.
Lebr. V. R. R.,

Dear Sir:—

Enclosed please find a statement showing the quantities estimated on the several sections from 16 to 23, inclusive, for the 7 mos. ending Dec. 31st, 1855. There was no way on which I could get at the haul, so I deducted the horse expenses for each of these months.

I have refrained from laying this matter before you in the hope that each succeeding estimate would bring me out. The rock, no doubt, costs more than I receive for it, but from the estimates of some of the sections a hundred per cent. advance would not cover the loss. I have expended large sums of money to afford facilities

for doing the work. Have changed the foreman several times, and have left nothing undone to obtain different results. I can, therefore, only leave the matter with you, and solicit such aid as you feel you can afford me.

I am,
Dear Sir,
Very Respy yours,
JNO. H. OSBORNE.

EXHIBIT J5.

Copy of letter rec'd and read by secretary at board meeting L. V. R. R., Dec. 29, 1856.

READING, Dec. 10, 1856.

To the Pres. and Directors of
the Lebanon Val. R. R. Co.

Gentlemen :—

As no action has yet been taken upon representation of the necessity of some assistance from your company on the difficult position of my contract, now rapidly approaching completion, I beg to lay before you the following facts which I feel confident will convince of the justice of my claims.

From the increased cost of labor, powder and horse feed, as also from unexpected difficulties encountered in meeting rock of extraordinary hardness in many places, I have been compelled to advance the following sums over and above the original contract on the division stated.

On the 1st Division,	$35,447.15	as per table	A.	Accompanying the letter and filed therewith.
" " 2nd "	37,212.59	" " "	B.	
" " 3rd "	12,881.06	" " "	C.	
	$85,540.80			

The large quantity of sills about, 120,000 in all, which

I am now finishing have also caused a heavy loss to me of some twenty cents more on each sill than I had actually been on the point of contracting for when stopped by your orders two years since, and thus compelling me to lose some $24,000.

The large sums the payment of my $50,000 stock in full and the purchase of cars, horses, mules, and large tracts of wood land for sills and lumber, joined to the vigorous prosecution of the work without regard to cost, and the hard quality of rock on many heavy rock sections, have together exhausted my means and crippled my credit to such a degree that I cannot longer bear up under it unless relieved immediately.

I appeal to those of your board who have visited my work during its progress to express their opinion as to its vigorous prosecution in the face of unusual difficulties, and whether I shall not be as well entitled to assistance as those of the 4th division.

I would remind your whole board of the fact of my having stopped by them for nearly a year, at a period when labor, powder and provisions were much lower than at any other time since, during the construction of your road, notwithstanding I have labored faithfully at my contract and am building you forty miles of a road that, I am proud to say, has never been equalled in this country, and I ask you to deal justly and fairly by me who have done my duty to you and the great enterprise you represent.

Your immediate attention to the above is respectfully and earnestly solicited by gentlemen.

Your ob't ser't.,

(Signed). P. O'REILLY, Cont'r.

June 7, 1865.

a true copy,

RICH. B. OSBORNE.

Dec. 11, '56.

Treasr. ordered to issue Co's notes for $20,000 at 90, 4, 5, and 6 months, in sums of $5000.00 each, as relief for said O'Reilly, to be accounted for by him.

Dec. 16, '56, action confirmed.

EXHIBIT K5.

Page 122 of Book of Estimates, being final estimate of John H. Osborne, contractor, with the Leb. Valley R. R. Co. amounting to $10,102.10
O'Reilly part, ... 6,502.00
J. H. Osborne part 3,600.10

EXHIBIT L5.

READING, Sept. 1, '58.

JOHN H. OSBORNE, ESQ.,
Tamaqua,

Dear Sir:

Enclosed please find your final estimate for work on Y track at Lebanon, &c., showing payment of $2,435.06, which I herewith forward you as follows, viz:

Draft No.	273	on S Bradford	Treasr.	@ 90	dys fr.	$500.00
"	277	"	"	"	" "	300.00
"	280	"	"	"	" "	500.00
"	284	"	"	" 60	"	1100.00
Cash						35.06
						$2435.06

Your former estimate contained in P. O'Reilly's final amount to $10,102.10
On which P. O'Reilly paid 6502.00

Leaving a balance of 3600.10
From this must be deducted amount allowed in former estimate fr. him of mules on Sect. 45 and 46, the same having been paid on pay sheet 175.00

Amt of est. within 4 cents 3425.10

Yours Truly,
J. C. BRISCOE.

EXHIBIT M5.

Statement showing that the sum of $6502.00 the part of the final estimate of Jno. H. Osborne (exhibit), done for the chief contractor is contained in the final estimate of P. O'Reilly, and that the sum of $3600.10, the remainder of that final estimate, has been paid to John H. Osborne by the Leb. Val. R. R. Co. for work done for that company. For detail see exhibit.

EXHIBIT N5.

P. O'Reilly,

To Tarrant and Co.

To 139367 cub. yds. of ballast at 60c. 836 20

The above was left out of Tarrant & Co. final Este by engineer.

EXHIBIT O5.

Myerstown
6th February, 1857.

R. B. Osborne, Esqre.,
Chief Engineer.

Dear Sir: I forward by this day's stage my current estimate for January, also report of Force and Progress Profiles. The past month I need scarcely remark has been a most disadvantageous one for the contractor. I have done all that I could to make the estimate meet the expenses, perhaps, more than the quantities quite warrant. I cannot change them to meet a contingency of this nature, but I shall be glad to learn that I am allowed to give some compensation for the extra cost of keeping the work going after the late snows, and I submit to you that something of that sort might justly be done.

I am, truly yours,
R. F. STACK.

EXHIBIT P5 & Q5.

Progress profile of the second division, sections, 14 to 26 incls. & case. For contents see exhibits.

EXHIBIT R5.

Table showing the number of cub. yds. of solid rock excavated on sections 18 and 19 of the second division of the Lebanon Valley Rail Road from May 1st, 1855, to Feb. 28, 1857, being a period of twenty-two months, as shown by the returns made by Richard F. Stack, resident engineer to Tarrant and Co., at the termination of each months' work, and on making up the progress profile, showing the different quantity of material on these sections after the upper layers of magnesian limestone had been removed, as exhibited in the small number of yards excavated, owing to the extreme hardness of the rock.

No. of sections and amount excavated each month:

Date.	Of Solid Rock.	
	18	19
1855		
May 31	8200 cub. yds.	4419 cub. yds.
June 30	9950 " "	5495 " "
July 31	11350 " "	6945 " "
Aug. 31	2285 " "	550 " "
Sept. 30	1857 " "	731 " "
Oct. 31	1710 " "	320 " "
Nov. 30	2050 " "	320 " "
Dec. 31	890 " "	800 " "
1856		
Jan. 31	748 " "	530 " "
Feb. 28	1600 " "	840 " "
Mar. 31	980 " "	1165 " "
Apl. 30	757 " "	1425 " "
May 31	500 " "	1153 " "
June 30	500 " "	2041 " "
July 31	450 " "	1806 " "
Aug. 31	358 " "	1540 " "
Sept. 30	350 " "	1690 " "
Oct. 31	700 " "	2300 " "
Nov. 30	305 " "	2200 " "
Dec. 31	84 " "	2500 " "
1857		
Jan. 31		2670 " "
Feb. 28		1300 " "

EXHIBIT S5.

Sept. 30th,	1534.20		
	594.20		
	———	2128.40	Exps.
Aug. 31st,	857.30		Sept., 2569.66
	1814.75	2672.05	Aug., 2954.73
			July, 1936.50
			June, 1685.45
			———
July 31st,	1635.71	1635.71	$9146.34
10 June 30th,	1451.45	1451.45	
		———	
		$7887.61	

	Aug.	Sep.	July	June
Earth,	199		550	500
H. C.,	267		622	500
L. Rk.,	185			
Solid R.,	2285	1850	1400	1700
2285				
40	32	8	88	80
———	54		150	100
91400	55		911	1105
			———	———
20	1485	1200	$1129	$1285
	———	———		
	$1626	1208		
	$2672	2128	$1635	$1451
	———	———	———	———

Handed Mr. O'Reilly
Oct. 17, 1855.

			Oct., 1855.		40	9146.34	
1626	2672	S.R.	earth	H. C.		5248.00	
1208	2128	1170					
1129	1635	540.	80	80		3898.	
1285	1451	———				1873 Oct.	
———	———	1810				———	
5248	7886	65				5771	
	5248	———	$12	17.60		4232	on other sectn, fr. June to Oct.
	2638	9050				———	
		10860				$10.003	10
		———					
		1176.50					
		12					
		17.60					
		———					
		1206.10					

EXHIBIT T5.

			S. R.	H. Clay.	Hr. Ac. Sec. 22.	L. R.	Earth.		Horse Ac.	
	Sect. 22,			100	82		100	June.		74.91
	Sect. 21,		300	50	178		50	"	72	509.65
		20,	470	400	163		450	"	224	1,206.31
		19,	1,080	200	163		200	"	222	1,187.07
	Sect. 22,		20	230	—		350	July.	82	403.57
		21,	306	850	586		850	"	93	632.41
10		20,	1,030	700			650	"	201	1,627.95
		19,	1,500	80			70	"	264	1,663.60
	Sect. 22,		460	365			365	Aug.	178	601.99
		21,	450	610			610	"	93	735.71
		20,	1,720	927			675	"	155	1,806.20
		19,	550	440			440	"	177	837.47
	Sect. 19,		550	215			215	Sept.	105	783.98
			180	180			181	"		
		21,	900						90	719.41
		20,	1,700	600			600	"	265	1,719.77
20		22,	743	110			110	"	163	690 87
	Sect. 22,		450	200		$368	200	Oct.	163	797.43
		R.	334	825		$530	825			
		21,	930	955			955	"	93	783.51
		C.	600	130		$438	130			
		20,	100	743		$346	744	"	155	1,768.23
		19,	320	731		$584	731	"	153	847.57
			13,753	8,686			8,546			8,039.45
			65	22			16			1,910.92
										1,367.79
30			68765	17372			51276			
			82518	17372			8546			12,217.73
			893,945	191,092		$136,736			2,948	19,397.61
										128
										19397 61

Total for June, July, Aug., Sep. and Oct.,

on Section 19, 20, 21 and 22..... 16449 — 16449.61

12217 — 2948

$4232 — 19397

Exps. total, $16449.61. Est. $12207. Deft. . . 4232
2948

13758)718000(5v
68790

3010

7322		320	731	13753)423200(308x	Deficient.	
	184	65	16	41259		
1462						
1462		1600	4386	106100		
		1920	731	110004		
16082						
		30800	11696			10
		160				

EXHIBIT U5.

Belongs to B4.

From Expense Book.

1854.

June, 3,650, C. Y. S. Rock to May 31, 1856. should be May 31, 1855.

	SEC.			
				20
July, 104.50	(16)	3471		
Aug. 176.90	(17)	1317		
Sept. 94.25	(18)	8200		
Oct. 138.00	(19)	4419		
Nov. 124.60	(20)	2334		
Dec. 62.40	(21)	1958		
1855.				
Jan. 52.31	(21)	1187		
Feb. 50.31	(23)	2254		
Mar. 62.50		25140	123677(0454x	30
		2092	108928	
Apr. 115.50	(14)	27232	147490	
May, 219.00			136160	
			113300	

1856,	1236.77	053c. per cub yd. from June '54, to May 31, '55.
June 31,	470	In January, 1856, total yds, exc. of solid rock by Engr. Detail was 4503.
	1706.77	

4503)47000(1045
4503 119
19700 223
18002
1115

Total yds.

For 7 mos. fr. June to Dec. 31, 1855,	30748	
In January,	4503	
From Comt. to May 31, '55.	27232	
	62483	by Engr. Detail.
The Dec. Estr. of Eng. was	61681	
Add Jan'y.	4503	
	66184	
In Nov. 100	62583	
Dec. 370	823	on sects 24 & 25.
Jan. 350	63406	
820		

There is some rock all'd. for cut'g road and excavations of foundations.

EXHIBIT V5.

1856.					
January.	To 100 lb. of mule shoes,			6.50	
	" 50 " Griffen's horse nails,	@	24	12.00	
	" 4 shovels,	"	75	3.00	
	" 2 picks,	"	84	1.68	
	" 543 lb. Ref'd. Iron,	"	3¾	20.37	
	" 58 " Slet Rods,	"	5	2.90	
	" 1 Socket Chisel, 1 in.,			45	
	" 1 " " 1¼			56	10
	" 1 " " 1½			68	
	" 1 Hand Saw,			1.75	
	" 1 Hatchet,			70	
	" 1 pr. Long Traces,			1.75	
	" 3 Cans white grease,		50	1.50	
	" 6 Curry Combs,		12½	75	
	" 3 Horse Brushes,		75	4.50	
	" 3 Manure forks,		75	4.50	
	" 2 Gallons Linseed Oil,		1.00	2.	
	" 2 Boxes Glass, 8x10,		2.00	4.	20
	" 20 lb. putty,		5	1.	
	" 6 Case Thumb Latches,			75	
	" 6 Padlocks		25	1.50	
	" 1 Circular saw, 28 in.,			12.	
	" 1 Saw Mandril,			13.	
	" 1 Large Wrench,			3.	
	" 1 Small "			1.6?	
	" 3 Oil Lanterns,		75	2.25	30
	" 1 doz. mill saw files,			4.37	
	" Jar for oil,			50	
	" 131 lb. Coil chain,		11	14.41	
	" 1 doz. Collins axes,			11.	
	" 1 Mill Saw,			5.	
				$139.99	
	Bt. forward.			139.99	

pd. & chd. To 3 Bedsteads & Mattresses, 3 pillows,
" 10 window sashes, 6 lighted,

" 22 lb Coffee, 7 lb. starch from store, 3.96
" 3 " pepper, 12 " soap, " " 1.38
" 9 " tea, 30 " sugar, " " 7.74
" 5 " soda & 4 " tobacco " " 1.90
" 4 bags (100) salt, 15 lb. ginger from store, $17.56, 2.58

" 8 lb. Rosin, 48
" 1 saw set, 75
" one 1 inch auger one 1½ inch of 2.00
" Iron furnished for hooks and rings, for chains and workmanship, 5.45
" Crab for waggon, $10.86 2.18

" one 6 mule team, 8 harness complete,
" one double waggon,
" Two carts $60, 2 Harness $20 80.00
" 2 wheelbarrows 3.25, 6.50
" 1 covered waggon,
" 1 horse,
J. V. Craig's bill.
Use of Cart and harness fr.

Summary
139.99
10.86

150.85
6.50

157.35 B waggon bill.

EXHIBIT W5.

Account of stock sent to Greenwood farm March 9th, 1857.

2 Gray mules from Sec. 19.
1 do do out of sill team.
1 Bay mule do feed Barney.
1 Horse (Farmer) from sect. 18.
1 do (Ballface) out of sill team.
6 setts of Harness complete with halters and chains.
1 waggon in full Riggins with sill bed.
1 horse (Charley Dump) from sec 16.
1 do (large Bay Seltzer).
2 Collars and Hames, 2 briddles, 2 Halters and chains
50 bushels of oats.
1 Whip, 1 Bucket, 1 Bucket.

EXHIBIT X5.

Womelsdorf, Bucks Co., Pa.

Mr. Lawrence Devereux,

A team of 6 horses and 2 extra will leave here on Thursday next, for Greenwood. Be ready to receive them.

yours &c.,

J. H. OSBORNE.

March 5th, 1856.

EXHIBIT Y5.

P. O'REILLY, IN ACCOUNT.

J. H. Osborne charges P. O'Reilly with the following amounts:

1854.				
July 25.	To cash for carts and harness		650	
Oct. 23.	" " returned amt. to C. Tarrant		600	
Nov. 27.	" " fr mules and horses (note paid this day)		686	80
1855.				
Mar. 29.	" " paid J. O. Shurtz for P. O'R. for pasturage		5	60
Aug. 27.	" " " S. Kernan, order for work C. & A. R. R		39	
Nov. 5.	" " " wharfage on lumber		7	
1856.				
Jan. 31.	" " " " to E. Fedler		7	31
Feb. 22.	" " " Smith & Bro. bill, lumber		16	50
	" " per check, Jany. 22		3000	
Sept. 29.	" " paid D. Laiser for wood leaf		305	31
Dec. 4.	" " " B. Scott for services		50	00
1857.				
May 21.	" " " J. H. Miller for wagon		50	00
	" " " North keeping horse		5	00
Aug. 7.	" " " discount on note		38	50
Sept. 1.	" " " Lacy & Phillips, Phila., for sundries		38	
Oct. 8.	" " " Decker & Pottenger, keep of horse		32	
1858.	" " " G. W. Bowen for sleigh		40	
Jan. 18.	" " expenses of G.W. Bowen while attending to getting out sills, &c		96	47
	" " to A. Killean		5	
28.	" " " D. Steach for costs sent Hope		1	19
	" " " Good, feeding mules		12	15
	" " " " hauling at Lebanon		5	00
	Balance		1001	62
			6692	45

EXHIBIT Y5.

WITH JOHN H. OSBORNE.

J. H. Osborne charges himself with the following amounts:

1854.			
July 15.	By 6 horses, carts and harness (paid for this day), but received previously to this date....	650	
Sept. 23.	By 6 horses and mules bought of P. O'Reilly...	686	80
"	" amount received of Foley.....	140	
Oct. 24.	" " paid C. Tarrant.....	600	
" 31.	" " " received 29th June (note).....	500	
"	" " " note, 19th Sept.....	1380	
"	" 13 mules and 1 horse, abt 23rd Sept.	1752	50
"	" 4 mules 575.00 ; wagon, 70.00; repairs, 15.02..	660	02
"	" amount to pay D. Laiser.....	300	00
"	" " of lumber used from P. O'R land...	23	13
		6692	45
	By balance due P. O'Reilly.....	1001	62

I certify the above account to be correct.

GEO. W. BOWEN.

P. O'REILLY, (SUSQUEHANNAH) Dr.

J. H. Osborne charges P. O'Reilly with the following articles, &c., they having been sent to Greenwood farm for acct P. O'Reilly.

1856.				
June 18.	To paid C. T. Wilson & Co. for goods sent to L. Devereux at Greenwood	.....	45	03
25.	To cash paid for beds	.....	13	53
Aug. 19.	" " " expenses team to Greenwood	....	27	33
Oct. 22.	" " " " horses, &c., "	....	14	23
1857.				
Jan. 20.	" " " Craig for beds sent "	....	15	75
Apl. 23.	" " " McDay for expenses, &c"	....	22	30
			138	17
	To balance due J. H. O	.....	138	17

I certify the above account to be correct.

GEO. W. BOWEN.

TO JOHN H. OSBORNE.

By balance due J. H. O..... .....138 17

138 17

P. O'REILLY IN ACCOUNT.

J. H. Osborne charges P. O'Reilly with the following amts.:

1854.			
April 7.	To services rendered on Camden & Atlanti R. R. from August 7, 1853, to date, 8 mos., at $250.00	2000	00
	To cash paid expenses for same period	346	79
Aug. 7.	" services on Lebanon Valley from April 7 to date, 4 mos., @ 250	1000	
	To cash paid expenses same time	14	
Nov. 1.	" " " Wm. Stack	50	
1855.			
Mar. 26.	" " pr draft, $227	350	
July 3.	" " " expenses on Sea Gull	22	35
Aug. 10.	" " " H. A. Landry	30	
Dec. 27.	" " " Van Chert	38	
1856.			
Jan. 8.	" " " expenses Briscoe	2	10
" "	" " " Geo. Woodhull (Lawyer)	20	00
" "	" " " McNeillis balance board to date	30	00
Jun. 27.	" " " G. W. Richards	145	
Oct. 31.	" " " McNeillis	10	
1857.			
Sept. 21.	" " " expenses moving Sea Gull Eng	65	74
	" " " Hemenian for watches	71	
	" " " note P. O'Reilly to Harding	86	
	" " " for Brady	32	64
	" " " note P. O'Reilly to Bun	92	
	" " " " " " " Drexel & Co.	570	34
	" amt credited P. O'R. time, as per note on opposite page, said amount being entered in previous account of J. H. O. as "salary and expenses"	2346	79
	To balance due P. O'Reilly	1098	97
		8421	72

I certify the above account to be correct.

GEO. W. BOWEN.

WITH JOHN H. OSBORNE.

J. H. Osborne charges himself with the following amt:

1853.				
Dec. 12.	By cash		501 48	
1854.				
June 7.	" "		2233 31	
Sept. 15.	" "		889	
1855.				
Mar. 15.	" "		500	
Dec. 27.	" "	to pay for Sea Gull Engine.....8000 00		10
		Less amt. paid on same.....7896 00		
			4193 93	
	By balance due on settlement with G. W. Bowen, Mar. 24, 1854, accs on Camden & Atlantic R. R.		104	

"NOTE."

In the item of 4193 $\frac{93}{100}$ which sum was the total amount with which J. H. Osborne stood charged (and for which he had not returned vouchers to me as bookkeeper and disbursing agent for P. O'Reilly) at the time of my closing the accounts for the construction of the Camden and Atlantic R. R., there is included the item of June 7, 1854, of 2233 $\frac{31}{100}$ and also the sum of 113 $\frac{48}{100}$ of the item of Dec. 12, 1853, (of 501 $\frac{48}{100}$) which amounts 2233.31 and 113.48 make the sum of 2346.79, as charged to P. O'Reilly on opposite page as having been entered twice to his credit. 20

GEO. W. BOWEN. 30

8421 72

By balance due P. O'Reilly..... 1098 97

P. O'REILLY, IN ACCOUNT.

Jno. H. Osborne charges P. O'Reilly with the following accounts.

No. 1.	To Bill No. 1, being for hire teams hauling sills, horses, snaking sills from woods, paid men for loading sills, &c., &c., from wood lands and on the line of the L. V. R. R.	1501	12
No. 2.	To Bill No. 2, being for sundry work done for P. O'Reilly about Lebanon & at other points on Lebanon V. R. R.	267	37
No. 3.	To Bill No. 3, being for work done for P. O'Reilly, Loading sills & hauling same from canal to L. V. R. R., Laying track to reach sills and for distributing sills, &c., &c	911	10
No. 4.	To Bill No. 4, for disbursing monies for buying wood leaf, having sills, logs & wood cut and hauled, & for distributing same along line L. V. R. R	1250	
No. 5.	To Bill No. 5, being for sundry work done on Lebanon Valley R. R. as per return of B. Scott, manager	4827	80
No. 6.	To Bill No. 6, being for work done on Sections 14 & 15 for P. O'Reilly	291	75
No. 7.	To Bill No. 7, being for expenses at Greenwood & disbursements to men for getting & hauling sills, &c., &c	1099	53
No. 8.	To Bill No. 8, being for hire of teams & wagons, for mule, &c., furnished services as Genl. Manager, &c., &c., at Greenwood	5372	23
		15,520	90
	To Balance due J. H. Osborne	15520	90

WITH JNO. H. OSBORNE.

By Balance due J. H. Osborne..... 155 20 90

15520 90

I certify the above account to be correct.

GEO. W. BOWEN.

EXHIBIT Z5.

Phila.
June 21st, 1853.

Dearest John,

I am in receipt of yours of the 15th and 17th. With regard to the matter of giving up your present position, I am scarcely able to advise you, but it seems to me you will have to wait too long for the benefits to be derived from the Rd., when in full operation. Now, as to the other view of the case, as far as the C. & Atlantic is concerned, you wd be in no awkward position as acting for O. Reilly, for I am now Engr. & contractor myself—on other work it wd perhaps have to be arranged differently and you wd have to appear as an officer of mine. This would be arranged so far as wd be necessary to remove unpleasant remarks—O'Reilly told me he wd guarantee you $3,000 per an. for 2 years at all events, and there will be other opportunities in the mean time, I should think. Mr. Tucker will do anything for you and the D. & S. Supt. can be got if you think it worth having under such circumstances, you can not, I think, be under much risk in leaving, and I wd not hesitate myself; but still I would be far from urging you, much as I wish to have you near me. I would prefer your judging for yourself and acting as you think best. With O'Reilly there may be matters that will not be as agreeable to you as you wd wish and yr position as it now is, will tend perhaps to make you feel this the more. I have no object as you can well understand but to benefit you. I can do, and have done, much for O'Reilly and I believe you can benefit by it also by giving him the benefit of brains, which he wants, and which must compel me to keep him in work suited to his caliber, or he will break me and himself down—at present he is far behind on every work and as far as he is concerned, I have failed. He knows my views and unless he has power to get a manager with business capabilities, I cannot give him any more big jobs.

I have much to say to you on some matters (C. & B.) which I do not wish to put on paper, and, indeed, indepen-

dent of all other matters, I wish for your chicks' sake you were here. I write in great haste. The sooner you could come, if you do so at all, the better. Love to all. I am your affectionate bro.,

RICHARD.

At present I cannot do anything for Mr. James' son, but keep him on your list and may do so yet.

EXHIBIT A6.

Reading, June 20th, '53.

Jno. H. Osborne, Esqr.

My dear Sir,

I requested your brother Richd. to write to you, to ascertain whether you would not come and assist me to complete the Camden and Atlantic R. R. He recd. your answer which he read to me. I will endeavor to answer your objections briefly. In the first place, your Brother has a right to put any person on the road, and it cannot place possibly him in any critical position with the company, because he is independent of them. They pay no salary to any of his officers. They pay a certain amount for the completion of the road. In the second place, I would be very sorry to ask any one, and especially you, one of my best friends, to give a certainty for an uncertainty. Circumstances are in such a condition that I feel certain you can be kept employed for the next two years, on the terms you stated in your letter to your brother. If these meet your approbation you will please drop a line stating what time you could come. I am very much in need of your valuable assistance. I am almost used up trying to manage all the business on the Camden & At., the Dauphin and the Lebanon Valley. In the hope of soon hearing from you,

I remain,

Yours truly,

P. O'REILLY.

The Lebanon Valley R. R. Co.

To Tarrant & Co.

1857	To sundries paid for land, &c.,		117	30	
Sept.	" cash pd. Kentzer, hauling load iron to Wernerville fr. Neamanstown fr. siding,		5	00	
	To paid for rails and posts and putting up fence at Messimer's Station,		22	70	
10	To paid Moyer expenses going to Phœnixville for iron, per order G. A. Nicolls, and ret'g without a load (1854),		15	00	
	To 10 per ct. attend's to above and paying same,		16	00	
	To 1 set car harness sent to E. A. Richards at Lebanon,		10	00	
		$186	00		
	By amt. ret'd of R. B. Osborne,				
20	chf. eng.,	117	30	68	70

I certify that the above account is correct.

GEO. W. BOWEN,
Clerk.

October 12, 1858.

EXHIBIT C6.

Memorandum of an agreement made and entered into this First day of April A. D one thousand eight hundred and fifty-seven. Between J. H. Osborne of the city of Philadelphia and state of Pennsylvania and Patrick O'Reilly of the city of Reading in the county of Berks and state of Penna. of the one part and George W. Bowen of the borough of Womelsdorf in the county of Berks aforesaid of the other part. Whereas the said George W. Bowen by his Indenture bearing date the eighth day of December A. D. one thousand eight hundred and fifty-six for the consideration therein mentioned did grant and convey unto the said J. H. Osborne and Patrick O'Reilly their heirs and assigns all that tract of land situated in the township of Schuylkill county of Chester and state of Pennsylvania, Bounded and described as follows viz: Beginning at a Limestone corner of lands of Nicholas Snowden and in a line of Matthias Pennypacker's land north sixty-six degrees east twelve and four-tenth perches to a Limestone corner of Joseph E. Anderson's land thence along the same south seventy-nine and a half degrees east fifteen and one-tenth perches to a corner of Jacob Hawke's land thence along the same south three and a half degrees west twenty-nine and three-tenth perches to a post thence by the same land south eighty-five degrees east fifty perches to a corner in line of said Joseph E. Anderson's land thence along the same south twenty-nine and a half degrees east forty perches to a corner in the Paulding Bridge and and Paoli Road thence along the same and lands of Jacob Rennard and John Morgan south nineteen and three-fourths degrees west sixty-one and three-tenth perches to a corner of land late of Elizabeth Rennard dec'd thence along the same and land of George Bloomhart north eighty-one degrees west sixty-five and three-tenth perches to a stone in the public road leading from Paoli to Pickering Creek thence along the same and lands of John Clift (now Snowden) north sixteen and one-half degrees west twenty-five and one-tenth perches to a rock thence along the same lands

35

north nine degrees west forty-two perches to a stone thence north seven degrees east forty-eight and eight-tenth perches to the place of beginning. Containing fifty-two acres and one hundred and four perches of land be the same more or less. It being the same land which John Clift and his wife by their deed granted and conveyed to Nicholas Bean as in and by said in part recited deed recorded in the office for the recording of deeds in and for Chester county in Deed Book M5 Volume 109 pages 485 reference being thereto had as more fully and at large appears and which Nicholas Bean and Mary his wife by their indenture bearing date the 26th day of March A. D. 1856, granted and confirmed unto Alexander Osboarn as in and by said in part recited indenture recorded in the recorder's office of Chester county in Deed Book A6 Vol. 123 page 411 more fully and at large appears reference being thereto had and which the committee of Alexander Osboarn granted and confirmed to Geo. W. Bowen aforesaid.

Now these presents witness that notwithstanding the said in part recited deed from the said Geo. W. Bowen to the said J. H. Osborne and Patrick O'Reilly purports on its face to be an absolute conveyance in fee simple to us the said J. H. Osborne and Patrick O'Reilly yet nevertheless we do hereby acknowledge and agree that said conveyance was not absolute but only conditional, being made to secure us in the repayment of thirteen hundred dollars in cash advanced to the said Bowen by us as also for the payment of three promissory notes of $500 each dated April 1st A. D. 1857 payable at three, six and nine months respectively endorsed by us (the said Osborne and O'Reilly) and given to Nicholas Bean and we for ourselves and each of us our heirs and every of them do hereby further agree that if the said George W. Bowen his heirs executors, administrators or assigns do well and truly pay or cause to be paid to us our heirs, executors, administrators or assigns the just and full sum of twenty-eight hundred dollars (advanced as aforesaid) with lawful interest for the same at or before the expiration of ten years from the first day of April A. D. one thousand eight hundred and fifty-seven, then without other consideration we do hereby bind our-

selves our heirs executors, administrators and assigns, and every of them to recovery the the hereinbefore described premises with all the appurtenances unto the said George W. Bowen his heirs, executors, administrators or assigns in fee simple forever.

In witness whereof we have hereunto set our hands and seals this first day of April A. D. one thousand eight hundred and fifty-seven.

Signed, sealed and delivered in presence of
Wm. B. Schoener,
Josh. Kendall.

[SEAL.]

[SEAL.]

Berks County ss.

Before me, the subscriber, one of the Aldermen of the city of Reading, personally came the above named Patrick O'Reilly and J. H. Osborne, who in due form of law acknowledged the foregoing indenture to be their act and deed to the end that the same might be recorded according to law.

In testimony whereof I have hereunto set my hand and seal this first day of April A. D., one thousand eight hundred and fifty-seven.

WM. B. SCHOENER, Ald. [SEAL.]

Recorded in the recorder's office of Chester County in Miscellaneous Deed Book, No. 9, page 367.

SEAL.

Witness my hand and the seal of said office at W. Chester, Nov. 24th, 1857.
ROBT. F. HOOPES,
Recdr.

EXHIBIT D6.

Copy of Ex. C6 excepting certificate of record.

EXHIBIT E6.

Mr. Fraser Smith has recorded the deed of G. W. Bowen to Jno. H. Osborne and P. O'Reilly at West Chester.

Due by G. W. B.	Int on Geo. W. Bowen's note fav. of P. O'Reilly, dated Apl. 1st, 1857, for 9 mos. $500., Jan. 1st, '58.		22 50
	In. on G. W. Bowen's note fav. of Jno. H. Osborne for $500, at 6 mos. dated Apl. 1st., Oct. 1st. '57.		15 00
	Int. on G. W. Bowen's note of J—— dated Apl. 1st. 1857 at 3 mos. due July 1st, '57.		7 50
			$45 00
	Cash paid by J. H. Osborne, Apl. 1st, 1857.		1300 00
	" " " " " July 1st, 1857.		500 00
	Cash paid " " " Apl. 1st, 1858.		250 00
	2 checks " " "		
			2845 00

	J. H. O. Dr. to G. W. B.		
	By agt.	45 00	
	Int. on note due Jan. 1st, and note paid is from Jan. 1, to Apl 1st.	7 50	
	Int. on note due Oct. 1st, and not paid is from Oct. 1st, to Apl 1, 1858.	15 00	
	Int. on checks from Apl. 1 to time the chks were payd May 15 and June 15.	9 46	
	Protest.	3 40	
	This amt. paid to G. W. Bowen.	35 36	
	For expenses and int. on notes not met.	45 00	
		80 36	

G. W. Bowen to J. H. O.
To 1 yr. int. on $1300 to Apl 1st, 1858, @ 6 per cent. $78.00
To 9 mos. int. on 500 to Apl 1st, 1858, at 6 per cent. 22.50
$100.50

Int. due Apl 1st, 1859 } $85.35
Int. due Oct. 1st, 1858 } 85.35
Mortgage on Farm fr. 1st Apl, 1857,
4 years, due Apl 1st, 1861.

EXHIBIT F6.

Letter dated West Chester, Oct. 13th, 1856.

From P. Frazer Smith to Jno. H. Osborne relative to Bowen Farm and containing an inquiry whether the design was to have an absolute conveyance of said farm to Jno. H. Osborne and P. O'Reilly or only a mortgage.

EXHIBIT G6.

West Chester, Dec. 8th, 1856.

Dear Sir: We concluded to-day the purchase by Mr. Geoge W. Bowen of Alexander Osborne's real est. in Schuylkill tp. in this county. I made careful examination of the title of Osborne and found it good.

The proceedings authorizing the sale have all been conducted under my supervision and have been accurately done. The sale by the Committee of Osborne was this day confirmed by the court and the deed to Mr. Bowen acknowledged in open court as provided by law.

Mr. Bowen gave a mortgage to Mr. Bean for $2000, payable on the 1st April 1861 with interest payable annually and with the privilege to Mr. Bowen to pay the whole or any part of the $2000. before it became due. He gave also to Mr. Bean a judgment bond for $1500. payable on the 1st day of Jan. 1858 as collateral security for the three notes of $500. Mr. Bean furnished him at the same time with a certificate showing that bond was as collateral security. Mr. Bowen executed and delivered to me a deed to yourself and P. O'Keilly for the land. This deed I have had recorded.

On behalf of yourself and Mr. O'Reilly I signed a certificate that the conveyance to you was to secure your advances to Mr. Bowen. This paper can be cancelled and a mere formal one executed by yourselves, can be delivered to Mr. Bowen. It will be desirable that this change should be made at your earliest convenience as such a paper will be more valuable to Mr. Bowen than that which he now has. Mr. Bowen paid me on your account $20, my fee. He also paid me $6. being the price for drawing the deed to you and the bond and mortgage to Mr. Bean, and $2. for recording the deed, the recording fees were however $1.87.

Truly Yrs.,

P. FRAZER SMITH.

Jno. H. Osborne, Esq.

EXHIBIT H6.

No. 66. PHILADELPHIA, March 26, 1861.

FARMERS & MECHANIC'S BANK

order

Pay to P. Fraser Smith or bearer one hundred and thirteen $\frac{62}{100}$ dollars.

$113 $\frac{62}{100}$ JNO. H. OSBORNE.

Pay W. W. Jefferis, Esq.
Cash or order.

P. FRAZER SMITH.

Pay to the order of Farmers & Mech's. Bank.

WM. W. JEFFRIS.

Cas.

EXHIBIT J6.

Copy. MORRISVILLE, Bucks Co., Pa., Ap. 6, 1868.

GEO. W. BOWEN, ESQ.

D. Sir:

I have just consummated the sale of your farm.

The following statement will show how it stands:

Original purchase		4800
Of which I lent you 2800		
Amt. rec'd for farm on sale Ap. 2d, 1868		3685 50
Deficiency on sale		1114 50
7 yrs. int. on 2800 from Apl. 1, 1861, to Apl. 1, 1868		1176
Expenses and fees attending sale		67 19
		2357 69
Loss to J. H. Osborne		

You can either send me your obligation for this amt. without bearing interest, or fix it in ———————— any way you think proper, and you can return it in such sums as you see fit.

Truly Yours,
J. H. OSBORNE.

Envelope containing above and forming part thereof contains the following memoranda:

Copy of this sent to Geo. W. Bowen Apl. 6th, 1868, Mulford, Caroline Co., Va.

EXHIBIT K6.

Statement of Bowen & Osborne Business.

Original purchase, ...	4800 00
Sold to Wagonner at	3685 50
Deficit, ...	1114 50
Interest paid from Apr. 1, 1861, to Apr. 1, 1868,	840 00
	$1954 50

Apr. 2, 1868.

P. F. & G. F. SMITH.

EXHIBIT L6.

Received, West Chester, April 2, 1868 of John H. Osborne, one hundred and thirty-seven 34-100 dollars in full, of interest due to this date on a mortgage from George W. Bowen to Nicholas Bean, dated December 8th, 1856, given to secure the payment of two thousand dollars.

$137.34-100 NICHOLAS BEAN.

2c. 2c.
U. S.
Internal
Revenue.
2c. 2c.

EXHIBIT M6.

Geo. W. Bowen
In acct. with Jno. H. Osborne.

To furnishing house,	$175.
To 1 horse,	25.
To 1 cart,	20.
To harness,	5.
	$325.

EXHIBIT N6.

Receipt for annual payment for insurance in the Mutual Fire Insurance Co. of Chester Co., dated Feb'y 25, 1861, for 1.75.

EXHIBIT O6.

Policy of Insurance No. 14108, $1000, in the above-named company, on Buildings on Bowen farm.

Premium,	$21.50
Dec. 26, 1857, $925, additional insurance on same buildings and contents,	
Additional premium,	$22.25
Old "	43.75

EXHIBIT P6.

Note dated Nov. 1, 1860, at 23 mos., $41.88, from Geo. W. Bowen to Jno. H. Osborne.

EXHIBIT Q6.

TAMAQUA, 20, '58.

D. Sir:

The note for $225.31, due Kolb & Hammer, will come to the bank here for payment, and is due on 24th March.

There is interest due on the farm as follows:

Int. on 2000 for 12 mos. to Apl. 1, '58,	120.00
" " 500 " " " " " " "	30.00
" " 500 " 6 " " " " "	15
	$165.00

The 2000 is amt. mortgage, first $500 is note that was due 1st January, '58, and not paid, and the other $500 note that was due 1 Oct. and not paid please send me a check for this amount and oblige

Yours Resp'y,
G. W. BOWEN.

R. B. OSBORNE, ESQ.

EXHIBIT R6.

Copy { From Page 228 of Letter Book.

WOMELSDORF,
Oct. 9th, 1856.

MY DEAR ROBERT:

I send you the particulars relative to the property about which I spoke with you. I cannot vouch for its correctness, but Mr. Bowen was so informed. Nicholas Bean is the holder of the mortgage, Alexander Osborne purchased from him and is now a lunatic. The persons said to be appointed by the Orphans' Court to sell by private sale are said Alexander Osborne's brother, —— Osborne, and a lawyer in the city by the name of Jno. B. Clay, lately returned from Europe. The agent selected by the Trustees for the sale of this property is Collins

Shee, 65 S. 4th St. The name of the lawyer engaged by Mr. Bowen is Joseph Hemphill, Westchester. The property was in Schuylkill Township, Chester county. The terms required are $1,300 cash, and $3,500 mortgage. Alexander Osborne paid $1,300 cash, leaving the $3,500 on mortgage. The deed to Alexander Osborne was not recorded. The terms on which Mr. Bowen will take the property are as follows:

$1,300 cash to Alexander Osborne's trustees.

$100 cash to Nicholas Bean.

400 at 3 months,
500 " 6 months, } In't added dated Ap. 1st, 1857.
500 " 9 months,

i. e.---3 notes of G. W. Bowen, endorsed by P. O'Reilly. I will send these $1,400 to my lawyer, and the three notes to be used by him if he is satisfied that all is right. The deeds to be made out in the name of George Bowen, and my lawyer to get W. Bowen to transfer the property subject to the $2,000 mortgage to P. O'Reilly, of Reading, and Jno. H. Osborne, Phila. This, I believe, contains all that we wish done. It was intended that this thing should be closed between the 15th and 20th of this mo. at Westchester.

Truly yours,

JNO. H. OSBORNE.

Oct. 9th, 1856.

This letter was to Robert Fraser, Esq., Phila.

EXHIBIT S6.

Lease of Greenwood Farm Jno. H. Osborne and P. O'Reilly to Chas. Clendinning not signed by P. O'Reilly because of following covenant "and for which care and attention to the said premises the said parties of the first part agree to pay to the said Clendinning the sum of one hundred dollars yearly at the end of the year."

EXHIBIT T6.

READING, Oct. 10th, 1857.

JNO. H. OSBORNE, ESQ.,

Dear Sir:

I return the agreement without my signature Because I will not agree to give one hundred dollars. Therefore you will please have that clause stricken out and a new one written and returned to me which I will sign.

Yours Truly,
P. O'REILLY.

EXHIBIT U6.

Copy of lease of Greenwood farm dated Oct. 1st, 1857 by O'Reilly and Osborne to Clendinning which lease did not contain the covenant in S6 as quoted and was signed by P. O'Reilly.

EXHIBIT V6.

PHILA., Oct. 10, 1857.

P. O'REILLY, ESQ.

Dear Sir.

On your table you will find the original draft of the lease containing what you now object signing. You will also remember before any lease was drawn I made an offer to Clendinning, having previously had a conversation with you that part of the terms of his taking the farm shd be a salary of $100 per an. as care taker of the place. I consider, therefore, that both the rough draft of the lease and the conversation bound you to accept these terms, but

lest after this explanation you should not feel obligatory, I return you the lease & give you an opportunity to strike out the objectionable clause if you feel still disposed to do so, & will thank you to send it back to me, in either case executed, as should you not accept it in its present form I will pay the $100.$^{0}_{100}$ to Clendenning. I will thank you also to return me the original lease.

Yours truly,

J. H. OSBORNE.

EXHIBIT W6.

COOPER'S POINT,
October 2d, 1857.

JNO. H. OSBORNE, ESQ.,

Dear Sir:

Enclosed you will please find the copy of lease which my father has signed, the county has not been filled in as the land which he is to hold lays in the counties of Juniata and Snyder, he left yesterday morning for Millerstown, I called at Adams Express office and got the money intended for Mr. Deveruex transferred to my father which he can get if not delivered to Deveruex he will write me if he receives it, and I will credit it to your account. I called upon Mrs. Donnelly according to your request and find her to be placed in rather distressing circumstances, she has no means except what little was coming to Mr. Donnelly for wages earned and this will all be swallowed up in funeral expenses, &c. The house which she occupies and which Mr. Donnelly had built has several claims entered against it which she has no means or way of paying off. She has 3 small children and seems likely soon to be confined by child-birth. She does not know she says what to do but expects so relief from the company.

Yours Very Respectfully,

JAS. CLENDINNING.

P. S.—You will please be kind enough to send me the other copy of lease as soon as it is ready and much oblige. J. C.

EXHIBIT X6.

Proposal for work on farm at Greenwood.

Cross cutting, hauling to mill, sawing and hauling to canal white pine boards and 3x4, 4x7 and 6x8 hemlock scantling, per 1,000 feet.	7 50
Staunching dam and making it perfectly water tight.	150 00

CHAS. CLENDINNING.

EXHIBIT Y6.

Greenwood, December 31, 1857.

John H. Osborne, Esq.,

Dr Sir: I have finished the dam, and if you would be so kind as to give us work, as all I want is to be profitably employed during the winter, as I will require no cash to spring.

I remain yours most respectfully,

CHARLES CLENDINNING.

EXHIBIT, Z6.

Greenwood,
May 22nd, 1858.

John H. Osborne, Esq.,

Dear Sir: I received from James your check for 75 dollars for the same. I am much obliged to you for remembering me so soon after your arrival; he also told me you would send me some stock as I am in want of a milk cow at present. We are getting along with our farming very fair, only for the great rain we have had this time back we would have had all our corn planted. There was the greatest flood in our creek some days back that has been here this many years; it overflowed the mill

dam from the mill to the bridge and done no harm to the embankment, only taking off some gravel. In some parts pretty deep there came down some floating logs which broke the mill gate, but not to do any severe damage. Mr. O'Reilly called here on his way up to Mifflin and he said he was pleased with all he seen. The tax collectors is very much displeased about the non payment of the taxes. I hope you will write to me and give me such directions about the farm as you think useful to me. I am clearing some of the hill between the new stable and the meadow. I have made some little improvements about the house. I hope all I have done will meet your approbation.

I remain yours truly,

CHARLES CLENDINNING.

PART OF Z6.

Rec'd Atlantic City April 27th, 1858 of Jno. H. Osborne, seventy-five dollars on amount of labor done —— dam at Greenwood.

CHARLES CLENDINNING.

PER JAMES CLENDINNING.

EXHIBIT A7.

Letter dated August 6, 1858 from James Clendenning to John H. Osborne containing the following: I have just received a letter from father at Greenwood which shows a bad state of affairs, likely very soon to be up there if Mr. O'Reilly does not hurry up and keep his promises. What I am to do in such a position as I am, I really do not know. This very likely that the crops and whatever stock can be found on the farm will be sold to pay taxes.

EXHIBIT B7.

Letter dated August 25, 1858, from James Clendining to John H. Osborne apprising Osborne of the death of Charles Clendining a few days previous and contains the following: "I learned when up there that Mr. O'Reilly has made an assignment and as the family up there are much troubled by parties having claims for work done against Mr. O'Reilly, I would like to know if they can disturb them in any way by seizing on their grain &c., and if there is any means of getting Mr. O'Reilly to do what he has agreed to do.

EXHIBIT C7.

Letter dated October 5, 1858, from James Clendining to John H. Osborne asking advices about Greenwood and making complaint about Patrick O'Reilly.

EXHIBIT D7.

Received Aug't. 6th, 1858 of Jno. H. Osborne, Esq. one hundred dollars for caretaking of farm at Greenwood, Snyder Co., Pa. One year as per agreement.

CHAS. CLENDINING,
Per JAS. CLENDINING.

$100.

Received Philada. May 25th 1859 of Jno. H. Osborne, Esq. One hundred dollars which with monies before received makes in all Two hundred dollars in full for two years care of Greenwood farm Juniata and Snyder Counties Pa. and hereby releasing him from any further payments for care of said farm.

JAMES CLENDINING,
Administrator of Estate of
CHAS. CLENDINING, deceased.

$200.

EXHIBIT E7.

Letter from James Clendining to John H. Osborne dated June 5, 1859, complaining of Patrick O'Reilly asking for Mr. Osbornes influence, and relates to Greenwood.

EXHIBIT F7.

Letter dated May 23, 1859, from James Clendining to John H. Osborne asking for money and soliciting advices and speaking of suits commenced against O'Reilly relative to Greenwood.

EXHIBIT G7.

Letter dated Greenwood, September 19, 1857 from Charles Clendining to John H. Osborne speaking of ties and boards missing from Greenwood tracks.

EXHIBIT H7.

Letter dated Camden N. J. May 2, 1861, from James Clendining to John H. Osborne giving date of his father Charles Clendining arrival at Greenwood in August 1857.

EXHIBIT J7.

Letter dated August 10, 1859 from James Clendining to John H. Osborne enclosing and speaking of release to John H. Osborne from further claims for Greenwood.

EXHIBIT K7.

Copy of summons issued out of the District Court of the city and County of Philadelphia, tested May 17, 1859, returnable the first Monday of June then next, in case of James Clendining, Administrator of Charles Clendining, against Patrick O'Reilly and John H. Osborne. In covenant. Being copy served on John H. Osborne at 1605 Summer Street, Philadelphia.

EXHIBIT L7.

Copy of declaration in the same case also served on John H. Osborne at 1605 Summer Street, Philadelphia, containing the following endorsement: "Enter rule to plead in eight days or judgment sec. reg.

F. CARROLL BREWSTER,
JUNE 7, '59. Pltffs Atty."

DEAR SIR :
Please take notice of above.

F. CARROLL BREWSTER,
JUNE 4, 1859. per J. M. P.

EXHIBIT M7.

Copy of bill of discovery filed in the same court by the same plaintiff against the same defendants as above stated.

EXHIBIT N7.

John H. Osborne's answers to the interrogatories contained in the bill of discovery, Exhibit M7.

EXHIBIT O7.

GREENWOOD.

JNO. H. OSBORNE, ESQ.,
In ac. with Jas. Clendining, Dr.

Aug. 1857	To cash for one cow & calf.....	$30.00
Sept.	" " wheat.....	10.87
		$40.87
	Less by.....	29.68
	Balance.....	$11.19

P. O'Reilly to J. H. Osborne.

1856.		
Dec. 27th	Exps. to Greenwood & back.....	$23.73
1857		
Feb. 28th	Exps. to Greenwood & back.....	10.80
Aug. 29	To amt. sent Clendining for purchase of cow.....	40.00
1858	To amt. of check to Clendining, payt of Dam.....	75.00
	Amt. obligation to J. C. Clendining for taking care of land for 2 years...	200.00
		$349.53

EXHIBIT P7.

Abstracts of estimates on the two divisions of the Lebanon Valley Railroad made by R. F. Stack, Division Engineer, for the following months, namely, May, 1855, to February, 1857, both inclusive.

EXHIBIT Q7.

Abstract of Cub. Yds. Solid Rock excavated on Sect'ns 18 & 19 for twenty months ending Feb. 28th, 1857, from returns of Resident Engr. Richard Stack.

		Cub. Yds.
Total amt. excavated on sections 18 & 19 inclusive to May 31, 1855		12,619
Cub. Yds. " " 18 & 19 in	June 1855	2,826
	July "	2,450
	Aug "	707
	Sep "	2,431
	Oct "	2,030
	Nov "	2,370
	Dec "	1,690
	Jan 1856	1,278
	Feb "	2,140
	Mar "	2,145
	Apl "	2,182
	May "	1,653
	June "	2,541
	July "	3,121
	Aug "	1,898
	Sep "	2,040
	Oct "	3,000
	Nov "	2,505
	Dec "	2,584
	Jan 1857	2,670
	Feb "	1,300
	Cub. Yds	45,561

EXHIBIT R7.

Abstract showing number Cub. Yards of Solid Rock excavated on Sections 14 to 23 inclusive for twenty months from May 1st, 1855, to Feb. 28th, 1857, as reported by Resident Engr. R. Stack.

Total to May 31, 1855		27,232 Cub. Yds
" " June 30, 1855		32,864 " "
Amt. of Yds Exc'd on July	1855	5,030
Aug	"	9,697
Sep	"	5,374
Oct	"	3,709
Nov	"	4,530
Dec	"	3,610
Jan	1856	4,133
Feb	"	5,080
Mar	"	6,300
Apl	"	6,500
May	"	4,769
June	"	5,828
July	"	6,370
Aug	"	5,981
Sep	"	5,786
Oct	"	6,735
Nov	"	6,460
Dec	"	5,987
Jann	1857	5,758
Feb	"	5,223
		112,860 Cub. Yards.

EXHIBIT S7.

Being an unexecuted lease of the Sea Gull engine from Patrick O'Reilly to the Camden and Atlantic Railroad Company and being Exhibit 152 in the Richard Osborne Case.

EXHIBIT T7.

Letters and telegrams to John H. Osborne from Holmes Hinckley and others and copies of replies thereto by John H. Osborne all relating to the Sea Gull engine; also letters from John T. Morton to John H. Osborne.

EXHIBIT U7.

Being Exhibit 151 in the Richard Osborne case and an unexecuted agreement of lease between John H. Osborne, and the Camden and Atlantic Railroad Company for the Sea Gull locomotive engine.

EXHIBIT V7.

Reading, July 18th, 1855.

Rich. B. Osborne, Esq.,

My Dear Sir,

I had a few words with Mr. John yesterday and I believe we can be able to pay for the Engine which he has ordered. In case the company give us the property security or make it safe for us I desired Mr. O to do nothing further in the matter until Thursday. when I will be in the city. If no pay for the Engine the company ought to allow for her use per day $22.00. This I presume would be right. However I will see you on Thursday. I left my account with Mr. Mackin and he stated he could do nothing in the matter until you returned. I claim $16,461.36. If Mr. Mackin cannot give the amount I would prefer not to have it settled.

Yours truly,

P. O'REILLY.

EXHIBIT W7.

Letter dated October 17, 1857, from Patrick O'Reilly to John H. Osborne printed in full as Exhibit 141 Richard Osborne case.

EXHIBIT X7.

James Clendining in account with John H. Osborne, relates to the Sea Gull engine and states a balance of $108.42.

EXHIBIT Y7.

Letter dated Reading July 6, 1857, from James Mullholland to G. A. Nickols—relates to the Sea Gull engine.

EXHIBIT Z7.

Copy of letter dated Reading June 20, 1857, John H. Osborne to R. D. Kellum, President of the Philadelphia and Reading Railroad Company—relates to the Sea Gull and other engines.

EXHIBIT A8.

Copy of letter dated October 14, 1857, from John H. Osborne to P. O'Reilly relates to the Sea Gull engine and shows amount expended by John H. Osborne therefor to be $7,818.35.

EXHIBIT B8.

Letter dated September 28, 1857, from William M. Meredith to John H. Osborne, and copies of letters from John H. Osborne to William M. Meredith, all relating to the Sea Gull and other engines.

EXHIBIT C8.

Fi. fa. in debt in the case of John H. Osborne, against the Camden and Atlantic Railroad Company in the Supreme Court, Camden County, tested March 17, 1858, for $6243.06 debt damages and costs.

EXHIBIT D8.

Fi. fa. in debt in case of John H. Osborne against the Camden and Atlantic Railroad Company in the Supreme Court, Atlantic County, tested March 17, 1858, for $640.53 debt damages and costs.

EXHIBIT E8.

Memoranda September 1, 1860, partly in the handwriting of the late Thomas P. Carpenter of the Attachment of Patrick O'Reilly against John H. Osborne issued out of the Circuit Court of Camden County in April, 1860, attachment tested April 2, 1860, also copy of Sheriff's inventory to which is attached an account or apportionment of the amounts recovered on the judgments for which the two last above named executions were issued to and among engine rents, salary of John H. Osborne, costs, expenses &c., showing proportion of engine rent and interest due Patrick O'Reilly to amount to $4,419.95, subject however to certain reductions for payment of expenses &c. thereout.

EXHIBIT F8.

Copy of letter dated November 18, 1857, from John H. Osborne to Owen O'Reilly, being Exhibit 140 in the Richard B. Osborne case.

EXHIBIT G8.

Being extract of letter dated June 18, 1857, from John H. Osborne to Patrick O'Reilly printed in full as exhibit 153 in the Richard B. Osborne case.

EXHIBIT H8.

Exemplified copy of deed from Patrick O'Reilly to Henry F. Felix for lands in Pennsylvania offered as Exhibit 129 in the Richard B. Osborne case.

EXHIBIT J8.

Certified copy of deed Patrick O'Reilly and wife to Henry F. Felix for lands in Atlantic County, New Jersey, dated January 14, 1861, offered as Exhibit 115 in the Richard B. Osborne case.

EXHIBIT K8.

Copy of letter to Henry F. Felix offered as Exhibit 113 in the Richard B. Osborne case.

EXHIBIT L8.

1 Sections and No. Stopped.
2 From diff. wages Labor.
3 Int. cost of Powder and other articles used on railway work.

The Pres. & Board of Directors of Leb. V. R. R.,

GENTLEMEN:

I beg leave to call your attention to the application which I made on the 13 inst. soliciting aid in the prosecution of my work that I may be enabled to comply with the Instructions I have received to meet the lay expenditures. It is proper I should lay before you the principal points where such aid is required. They are as follows. I have been compelled to make in pushing forward your Rock to completion:

60—Cuttawissa, 76.000					30.000
60—Men		H 14.			40.000
		10.			
55—On Side		10.			40.000
48—Other		4			5.000
		38			
		10			65c Sills
		48	48c		
Section 1 ..		On Rock		20c	9.000
1 ..		Brick			3.000
2 ..	Rock			15c	
3	Rock				300
4		5c			
8	Rock				3.600
9					
12	Rock				1.800
28.000 18	Rock				20.000
23.000 19	Rock				14.000

24.000	21	Rock					6.000
5000	22	Rock					1.500
12077	23	Rock					4.300
28 to 30	"						1.000
31	"						
32	"						1.000
33							3.000
				73			
Track—875		3500		—			65.500
34.36.38				80			35.000
			40	10 c		7	4.600
						50	500
						—	
						57	105.600
				Sectn 8			7.000

EXHIBIT M8 2,000,000

5661			500
15172 Dec 31. 55		SECTION 1.	358
			450
4585 Jan to May			350
2258 June to Oct.			700
27676			2258

A stop for 7 mos. by Eng. Incd. cost powder, provision, &c., from 9 to 50 per cent., an increase of 20 c.

$1.50 per M. on Brick in Viaduct being diffd. which I paid in 1855, 1856 over what I contracted for in 1854.

Sec.	2									
"	3	for		same		reason	3	c	on	Rock
"	4									
"	8	"		"		"	25	"	"	"
"	9						8			
"	12	"	81	"		"	8	"	"	"
"	18	"	150	"	140	"	77	"	"	"
"	19	"	150	"	140	"	77	"	"	"
"	21	"	98	"	90	"	25	"	"	"
"	22	"	103	"	95	"	30	"	"	"
"	23	"	108	"		"	35	"	"	"
"	28 to 30	"		"		"	6	"	"	"
	31 to 32			"		"	10	"	"	"
	33						20	"	"	"

Advantageous offers for the supply of sills—unable to accept these offers from the monitary difficulties of the Company which early manifested themselves. I have at a great advance been compelled to go into the market for this article—I will be glad to append to this the loss I have sustained on the several Sectn. above named together with the advance I shall require for the track. I am most anxious to meet the views of the company and I think have manifested this desire in asking only for the increase on such points as will enable me to meet my engagements. These points have from the nature of the material cost me in some cases as much as $1 or 200 per yard owing to the increase cost of labor and powder when the work was recommenced. The first of these Items having advanced about 50 per cent for a large portion of this time and the powder more than 100 per cent. It is proper also I should state that the active prosecution of the heavy sections has entailed on me a very heavy expense from the work having to be broken in at a number of points, thereby causing a much larger quantity of bottom to be taken up than what not have been done had it been worked from a face—involving consequently a large extra force of Horses. I may add here a most important element in the expenses incurred by me has arisen from the competition of the Canal.

I shall be prepared to enter minutely into these details whenever you see fit to call upon me. I would however most earnestly solicit a reply to this communication as the closing up of my work is pressing at this time heavily on me and I am unable to meet the demands which are being made to enable me to give you your road in May next.

There is one other point to which I invite your attention. In 1854 I had prepared recd.

EXHIBIT N8

Copy. Memorandum of the basis of the following letter.
1st Section Mos. stopped.
2nd " from difference of wages.
3rd " Increase cost of powder and other articles used in Railway work.

Copy of a letter drawn up at Readg. by Complt. at Deft. desire.

The President & Board of Directors of the Lebanon Valley Railroad.

Gentlemen,

I beg leave to call your attention to an application which I made on the 13th inst. soliciting *aid* in the prosecution of my work that I may be enabled to comply with the instructions I have received and meet the large expenditures I have been compelled to make in pushing forward your work to completion. It is proper I should lay before you the principal points where such work is required. They are as follows:

Section 1. A stop for 9 months by Engineer, increased cost of powder, provision, &c., from 9 to 50 per cent., an increase of 20c (on Rock).

Section 2.			
"	3	for same reason,	3c on Rock
"	4	"	
"	8	"	.25 "
"	9	"	. 8 "
"	12	"	. 8 "
"	18	"	.77 "
"	19	" All these Sections	.77 "
"	21	" of 1 mile each were	.25 "
"	22	" on complts. con-	.30 "
"	23	" tract with deft.	.35 "
28 to	30	"	. 6 "
31 &	32	"	.10 "
	33	"	.20 "
	37	"	

Advantageous offer for the supply of sills. Unable to accept these offers from the monetary difficulties of the Company which early manifested themselves. I have at a great advance been compelled to go into the market for this article.

I beg leave to append to this the losses I have sustained on the several sections above named, together with the advance I shall require for the track. I am most desirous to meet the views of the Company and I think have manifested this desire in asking only for the increase on such points as will enable me to meet my engagements. These points have from the nature of the material cost me as much as $2 per yard, owing to the increased cost of labor and powder when the work was recommenced, the first of these items having advanced about 50 per cent. for a large portion of this time and the powder more than 100 per cent.

It is proper also I should state that the active prosecution of the heavy sections has entailed on me a very heavy expense from the work having to be broken in at a number of points thereby causing a much larger quantity of bottom to be taken up than what would have been done had it been worked from a face—Involving consequently a large extra force of horses. I may add here a most important element incurred by me has arisen from the competition of the Canal. I shall be prepared to enter minutely into these details whenever you see fit to call upon me. I would however most earnestly solicit a reply to this communication as the closing up of my work is pressing at this time heavily on me and I am unable to meet the demands which are being made to enable me to give you your Road in May next.

Copy of letter to Board of Directors of Lebanon Valley R. Road asking an increase of price to cover loss sustained from suspension of work.

Note.—The following letter signed by Deft. was to be sent to the Board of the L. V. R. R. Co.

Here follows another matter which P. O'R. brings to the notice of the Board in these words: There is

another point to which I invite your attention." In 1854 I had prepared and received "(and the addition was either written by P. O'R. or if written by me the memoranda copy has been lost. The following is the basis made out by P. O'R. direction and dictation of the data on which this application was based.

Statement from which the data in the preceeding letter was taken.

1st. The powder has cost me an average of 9c. per cubic yard of Rock excavated instead of 4¼ cents which was the average when the work was commenced being an increase of from 9c per ℔ to 20c the increase of this item on

304,537 Cub. yds. Rock	$15,226.25
The difference in wages for laborers between August 1854 and May 1855 and between that period and the present amount to 11 c per day which for 203,500 days labor expended during the time wages were high in place of 1854 when wages were low amounted to for 10 months ending May 1855	22,275
There has been an increase in the wages of skilled laborers average of 44c per day Cub. yards of all masonry 37,296. The wages having risen from 1.62½ to 2.12½ costing about $290,000 of this amt. The labor is $116,000 the difference in wages is nearly 30 per cent but calling it only 20 per cent I have paid additional for my masonry	23,000
The price of corn in the same period valued from	50 to 60c
Oats	33 to 40c
Hay from (per ton)	$12 to $14
rose in the last named period as high as (for corn)	95c
Oats	55c
Hay	$22 per T

During the time last horses were fed for 27c per day.

Since it has cost 39c per day allowing to the lost period the same number of days of Horse

work that has been expended in the 10 months following there will be found to be 87,000 days work of Horses which all the diffe. say 12½c wd. be equal to $10,875

In my calculation of Freight on sills I expected to pay the Reading Rail Road and its branches 8c per sill. You will be surprised to learn that instead of that I have been charged 21c. My proposal to the Company is entirely to low to admit of any such price being paid by me. I beg respectfully therefore to charge the Company with the difference being 13c on 122,000 sills.

The immediate cause of this statement and letter being prepared was that the Contractor on the 4th Division had been paid or it was so reported by the Board several thousand Dollars Beyond his estimate as an allowance, & Mr. O'Reilly felt that he to had claims, thence his application to aid him in putting in such as he could present for there consideration.

This application is valid thou. it will not in every case hold water. I have no doubt however of the correctness of the General basis on which it was made. Observe the days work of men and horses could not be furnished by me off of my divn and it extends over the 3 divn, viz.

No. 1 from 1 to 13 inclusive.
" 2 " 14 to 26 " Tarrant & Co., Defts.
" 3 " 27 to 36 " (I think, 36.)

Much of the data was taken from the time tables of expenses kept by the Engs.

Here terminates the explanation

The Letter to the Board of Directors
and
The statement on which the letter was based.

Observe the chief item on which this claim of P. O'R. is based, the increased cost of rock, and yet P. O'R. does

not hesitate to swear that there was nothing materially more difficult in the rock than that was anticipated when the contract was made with complainant.

Here commences ground work for the data on which the letter for Deft. was written for compit., the following showing exactly how the results of the loss sustained by Comp. are made up.

Here commences J. H. O. statement and ground on which he claims Loss from suspension of work.

The amt. of Expenses for the seven months ending May, 1855, was.....$9,070.79

The Amt. of Expenses for the seven months ending May, 1856, was.....48.220.08

As follows:

	Ending May, '55.	Ending May, '56.
Nov.	2.366.22	7.214.94
Dec.	686.60	5.776.53
Jan.	383.97	5.724.20
Feb.	423.50	5.934.65
Mar.	783.69	9.464.74
Apl.	1.677.12	8.041.14
May	2.749.69	6.063.88
	$9.070.79	$48.220.08

EXHIBIT O8.

P. O'Reilly

To Tarrant & Co.

1855 June	15	To Cash Amt. returned to him.....	$ 250
Dec.	12	" to him.....	1.500
"		" returned him (Cr. Nov. 29)....	1.200
1856 July	15	To Cash to him.....	3.500
Aug.	15	" "	1.000
			$7.450

EXHIBIT P8.

READING, March 9th, '55.

JNO. H. OSBORNE, ESQ.

My Dear Sir:

I drop a line to let you know of our progress at Washington from what I have seen of the car and Brick Models Patented at Washington, there is nothing in them to interfear with us in obtaining a patent for ours, which I think we will get in course of three or four week. I expect to see you up on Monday. I presume you are aware of the result of the meeting of the Lebanon V. R. R. Directors, there is some prospect that they will do something very soon with regard to starting the heavy work which I trust will be done very soon, your teems has been in for Iron and cars, there is only one load more of Iron and I think it is high time for Mr. R. B. O. to make some arrangements to get iron for you.

How is Mr. R. B. O. getting on with the Camden?

Yours faithfully,

P. O'REILLY.

EXHIBIT Q8.

READING, Nov. 29th, '55.

JNO. H. OSBORNE, ESQ.,

Dear Sir:—

I regret I cannot send you only one thousand dollars, this I have got from the Deposit Bank and all they had. Can you manage to get along with this until Estimate day I have done nothing in Phild. and I am going down to-morrow morning. I do not like to ask any more favors of the Farmers B. until I get my act. paid up. I have bought a good yoke of oxen for to send to the Susquehanna and I presume we will want another pair after Estimate day.

I wish you could make it suit to come over with me on Monday. Please not let this lay about.

Yours Very Truly,

P. O'REILLY.

EXHIBIT R8.

READING, June 10, '56.

JOHN H. OSBORNE, ESQ.,

Dear Sir:—

Mr. McDermott has returned from Greenwood Farm, before leaving everything was going on well. The teams was making two trips a day. The teamster you sent up would not stay, he left on his own accord and said he would not risk his life with the team. At present I would not buy any more teams we can get along with what we have at present I have made provisions to have the sills boated at once and in the course of three weeks there will very few on the wharf. I saw the chief before he left for the city, he will be up on Saturday. M. E. S. begins to show his teeth and looks as if he was determined to fight. However I have the assurance that he will be appointed to-day on the Reading and Allentown, which will close his mouth what a dangerous man. The whole affair is working well and all we have to do is to keep quiet—and in two or three months from this time we will see where we are.

Yours Truly,

P. O'REILLY.

P. S.—I wrote you that my Bro. can give you 4 cars, they want fixing, will I get it done in Reading?

Yrs,

P. O'R.

EXHIBIT S8.

READING, Sept. 29th, '57.

JNO. H. OSBORNE, ESQ.,

Dr. Sir:—

I will be at home on next Monday and would be glad if you can make it convenient to come to Reading and let us have a clear understanding about all matters. I was expecting to see you on last Friday in Reading. However, I presume more important business

has prevented you from coming up. I will be in the city on the first. Hoping you are all well,

Yours truly,

P. O'REILLY.

EXHIBIT T8.

READING, Oct. 19th, '57.

JNO. H. OSBORNE, ESQ.,

Dear Sir:—

I have to attend vendue to-morrow therefore I cannot be in the city as stated in a former letter. I will have all my act. posted up next week and would like to have the accounts of Greenwood and Myerstown in full, together with the vouchers. In yours of the 10th asked me if I would join in a speculation. I gave you my view on this subject before and also to our chief in a conversation I had with him on a variety of matters. That I did not feel safe in embarking in any new project until I got my business at least in such a manner that I could see my way clear. I have four surveyors waiting on me to come up to run the disputed line. But cannot go until I can raise at least some money to pay a portion of what is due at Greenwood. Times here do not look very bright.

Yours truly,

P. O'REILLY.

EXHIBIT U8.

READING, JUNE 25th, 1858.

JNO. H. OSBORNE, ESQ.,

Dear Sir:—

I will be all next week engaged; should I get time, in the latter part of the week I will write you at Tamaqua.

Yours truly,

P. O'REILLY.

EXHIBIT V8.

TAMAQUA, July 10, 1858.

P. O'REILLY, ESQ.,

Dear Sir,

I have yours of the 2nd stating you would write me when you could settle my accounts. I write a line to say I am ready at any time to meet you for this purpose. I am very anxious we should bring our various matters to a close.

I am
Dear Sir,
Yours truly,
Signed, J. H. OSBORNE.

EXHIBIT W8.

READING, JULY 19th, 1858.

JNO. H. OSBORNE, ESQ.,

Dear Sir,

Yours of the 10th was handed to me by Mr. Briscoe, since I have last written you I have been nearly every day engaged with the Dauphin Susq. R. R. Co. in trying to settle with them. Therefore I could not name a day for you to come to Reading. I am going to the city to-morrow morning in hopes I may close the matter with them. The moment I can spare you a few days I will let you know—as I am anxious to have the matter closed.

Yours truly,
P. O'REILLY.

P. S. I hope you are getting along with your work.

EXHIBIT X8.

PHILA., Aug. 5th.

P. O'REILLY, ESQ.,

Dear Sir,

I am in receipt of your favor of 31st ult.

I wish you would send me the account in question. I was not aware I was in Yr. debt on this account. I have been for some time desirous of a settlement of all my open accounts with you. Will you find a day to go into them with me.

I drop this on my way up to Tamaqua.

Yours truly,

J. H. OSBORNE.

P. S. I understood nearly two mos. since the ventilator was to be tried on the Penna. R. R. what is the cause of the delay?

PHILA. Sept. 6, '58.

P. O'REILLY, ESQ.

Dear Sir:

I am waiting to hear from you. Why not let us try and have a settlement of our accounts? You cannot but be sensible of the great inconvenience this delay is to me. It is my desire that we should promptly and openly communicate with one another. I require nothing but what is right, and you, I feel, desire to act in the same spirit towards me. Will you then appoint a time that I may meet you for the settlement of our affairs?

I am, dear Sir,

Truly Yours,

J. H. OSBORNE.

EXHIBIT Z8.

PHILA., Oct. 2, 1858.

P. O'REILLY, ESQ.

Dear Sir:

This is, I believe, the 4th or 5th letter I have written requesting you to appoint a time to arrange our affairs. I am now compelled to close my books, and before doing so I desire to have a specific reply whether or not you will come to a settlement. Your not having taken any notice of my previous communications has induced the belief that you desire to have these a'c. settled by a third party, and should you treat this with the indifferenae you have hitherto manifested I shall endeavor to meet your views on this point.

I am, Dear Sir,
Truly Yours,
J. H. OSBORNE.

EXHIBIT A9.

Reading, Oct. 5th, '58.

JNO. H. OSBORNE, ESQ.

Dear Sir,

I was yesterday in Phila. trying to settle with the Dauphin Co. I did not do much, Capt. Taylor stand in the way. The engineers has not done justice to the company. This is his story and from what I could learn the Co.'s engineer are re-measuring the work. This is all judge.

I leave for New York to-morrow where I trust the matter will be finally arranged. On my return I will name a day for you to come to Reading to settle all our matters.

Yours truly,
P. O'REILLY.

EXHIBIT B9.

Phila. 18th Oct. 1858.

Mr. P. O'Reilly,
Dear Sir,

I have your favor of 5th, stating you would appoint a day to settle all our affairs. Will you be good enough to let me know what I am to understand by this promise, a fortnight has nearly elapsed since you made it.

I am dear Sir,
Truly yours,
J. H. OSBORNE.

EXHIBIT C9.

Reading, Oct. 20th, '58.

Jno. H. Osborne, Esq.
Dear Sir,

Come up on Friday to settle up all our matters. If this day suit you, let me know by return mail.

Yours truly,
P. O'REILLY.

EXHIBIT D9.

PHILA., Oct. 28, '58.

JNO. H. OSBORNE, ESQ.,
DEAR SIR:

On my leaving home I desired Mr. McDermott to write you to come to Reading on next Tuesday. I will be absent all next week. Therefore you had better make your arrangements to come to Reading on next Monday week. Yours truly,

P. O'REILLY.

EXHIBIT E9.

PHILA., 22 Apl., 1859.

MR. P. O'REILLY,
SIR:

I wish to know whether you intend to settle my account; you have for more than 18 months been putting me off with fair promises. I am no longer satisfied with these, and desire an explicit reply.

I am yours, &c.,
J. H. OSBORNE.

10

EXHIBIT F9.

JNO. H. OSBORNE, ESQ.,
DEAR SIR:

I am in receipt of your letter of the 22d inst., and in reply have to say that I am very much occupied now in trying to settle my account with the Lebanon Valley R. R. Co., but so soon as that is disposed of will take up your account and settle it.

20 You owe me eleven hundred dollars with interest on the Camden and Atlantic R. R. account. Would you please send it at your earliest convenience. You certainly cannot complain at paying the above amount, because you have had the use of it for five years, at the same time I have been forced to pay 1½ to 2 per cent. for moneys that you have had.

Yours truly,
P. O'REILLY.

Reading, April 27th, '59.

EXHIBIT G9.

PHILA., June 10th, 1859.

P. O'REILLY, ESQ.,

DEAR SIR:

I have your note of Ap 29, and owing to my absence from the city and other causes, I have deferred replying to it.

It will not suit me to wait till you settle your a'c. with the Leb. Valley Railroad Co. You have promised and put me off for nearly 18 months. I only request a settlement of all of our accounts, and it does seem to me, if you are disposed to meet me amicably and in an honest and straightforward manner, such as I expect from you, there can be no further delay. If you will let me know when you are in the city, I will meet and talk the matter over with you. I wait your reply.

J. H. OSBORNE.

EXHIBIT H9.

Copy.

PHILA., Dec. 19, 1859.

P. O'REILLY, ESQ.,

MY DEAR SIR:

I have this day received a letter from Mr. Tarrant's lawyer, calling on me for a settlement and insisting on legal measures being taken to compel it. I do, therefore, request that you will not place me in so unpleasant a position as to permit him to bring me into a court of law. This can be avoided by you and I having a settlement. I have, as you know, solicited it many times at your hands, and I am at a loss to understand why it is that a person in whom I placed the most implicit confidence, with whom my associations were so agreeable, should deny me what is

only reasonable and right. I take occasion to say that any collision which should arise between us, either on this or on any other point, will be directly opposed to my views, my wishes and my feelings. I disclaim all intentions or desire of acting in any way to embarrass or annoy. I have not only taken no part, but on several occasions expressed decidedly my dissent from those whose aim was to injure you. What your course has been towards me for the last two years, or whether you have done anything to incite or provoke hostility on my part, you can best determine; but now ask simply as a favor that you will do what I have always thought I could claim as a right. I will be at my office every day, or, as I would prefer, at my house, when I will be glad to see you and fix up my open a'cs.

I am, dear sir,

Truly yours,

JNO. H. OSBORNE.

EXHIBIT J9.

Phila. March 21st, 1860.

JNO. H. OSBORNE, ESQ.

Dear Sir,

The amount of rent standing on the books of the Camden and Atlantic Rail Road Company for the use of the Sea Gull engine and held by you in a judgment against the company amounting to $6,895.34 For my portion you will please send me your acknowledgment which I can deposit as collaterals. By so doing you will confer a favor on your

Obedientst.,

P. O'REILLY.

EXHIBIT K9.

Phila, Apl. 9th, 1860.

P. O'Reilly, Esq.

Dear Sir,

I have your favor of March 21, now before me and wd. have replied to it earlier, but I have been very much occupied. I will give it my attention as soon as I can do so.

I understand Mr. Bowen and yourself have had some difference. If I could arrange it I should be glad to do so. I have had no conversation with him, but a misunderstanding if it be such, could be I suppose and hope set to rights.

Yours Resp'y,

JNO. H. OSBORNE.

EXHIBIT L9.

Phila. April 16th, '60.

Jno. H. Osborne, Esq.,

Dear Sir:—

I have yours of the 9th inst. and would say in answer that it is very unsatisfactory and you are well aware that the treatment I have received is beyond endurance, further I cannot conceive why Geo. W. Bowen has commenced legal proceedings against me.

I am yours,

Respt'y,

P. O'REILLY.

EXHIBIT M9.

READING, Sept. 17th, 1860.

JNO. H. OSBORNE, ESQ.,

Dear Sir:—

I will meet you on Thursday morning at 9 o'clock at Peter Voorhees' office in Camden, N. J., to try and settle our matters.

Yours Resp't'y,

P. O'REILLY.

EXHIBIT N9.

In Chancery of New Jersey.

Between John H. Osborne, Compl't. and Catharine C. O'Reilly, Executrix of Patrick O'Reilly, Def't.	On Bill &c. —— Notice.

Sir:—Please take notice that the complainant demands of the defendant that she produce at the next adjourned meeting of the examination of witnesses in this cause, namely May 22, 1885, any letters, statements, copies or originals of which the following exhibits on the part of the complainant, viz:

Exhibit	Z2	Exhibit	Q3
"	B3		R3
"	C3		S3
"	D3		T3
"	E3		U3
"	G3		V3
"	J3		R5
"	K3		S5
"	L3		T5
"	N3		U5
"	O3		V6

Exhibit	P3	Exhibit	A8
	E8		Y8
	G8		Z8
	L8		B9
	M8		E9
	N8		G9
	V8		H9
	X8		K9

are either copies, drafts, memoranda or originals, now in the possession of the defendant, or received by the said Patrick O'Reilly in his life time and in his possession at the time of his death for the purpose of having the same offered in evidence and used as exhibits on the part of the complainant in this cause, and that the same time she produce, for the same purpose, a letter from George W. Bowen to said Patrick O'Reilly dated June 26, 1856, also any draft or copy of a letter from Patrick O'Reilly to the President and Board of Directors of the Lebanon Valley Railroad Company, of which Exhibit J3 of complainant is a copy dated December 10, 1856, and also the estimates and agreements and other papers in writing, the production of which has heretofore been repeatedly demanded and called for.

Dated May 15, 1885.

Your obedient servant,
H. A. DRAKE,
Sol'r of Complt.

To PETER L. VOORHEES,
Sol'r. of Deft.

NOTE. The annexed schedule contains a partial description of the exhibits mentioned in the foregoing notice.
May 15, 1885.

H. A. DRAKE,
Solr. of Complt.

Service of within notice and annexed schedule acknowledged this 18th day of May, A. D. 1885.

P. L. VOORHEES,
Solr. of Deft.

No	Date.	General Character.	Special Character.	Remarks.	Amt.
Z2	1855, Oct. 4	Rock 2d Div.	Copy of Letter.	J. H. O. to O'R., already advanced	4000.00
B3	" Nov. 6	Rock work.	Letter and Statement	of loss, etc., June to Oct. 1885	9156.92
C3	" " 7	"	Copy of Letter.	J. H. O. to P. O'R., insisting on reply	
D3	" " 28	"	"	" " " Letter Book, p. 144	
E3	" " 10	"	"	" " "	
G3	1856, Feb. 29	"	"	" " " Letter Book, p. 175, Loss	13890.00
J3	1855, Dec. 31	"	Statement.	of loss on rock work, 7 months	13890.00
K3	" "	"	"	showing cost of powder	2674.75
L3	1856, May 31	"	"	of loss on rock work preceding 5 mos	10281.00
N3	" "	"	"	showing cost of powder for 7 mos	7230.00
A3	" Oct. 31	"	"	" loss on rock for 5 mos	16230.86
P3	1857, Feb. 28	"	"	" " " " " 4 "	7103.00
Q3	1855, Nov. 7	"	"	Cost of Rock sent O'Reilly per yard	1.28
R3	1856, May 31	"	"	Loss on rock 5 mos. vid L3	10281.00
S3	" Jan. 31	"	"	Cost of powder from 5 31, 55, to 1 31, 56	4381.52
T3	" Oct. "	"	"	Cost of rock per yard	
U3	1857, " "	Fin'h'g 18 & 19	Certif. of Bowen.	Cost of finishing 18 & 19 by O'R's orders	6894.14
V3	" Apr. 23	"	Copy of Letter.	J. H. O. to O'R., Refers, to M3, p. 288 of M3 Letter Book	
R5	" Feb. 28	Sects. 18 & 19	Statement.	Showing hardness of rock	
S5	1855, Oct. 31	Loss on Rock.	"	Expenses for 4 mos. to Sept. 30, 1855, and for 5 mos. to Oct. 31, 1855, copy to O'R.	10003.00
T5	" " "	"	"	expenses, etc., for 5 mos. to date, except on sec. 18	
U5	1856, Jan. 31	"	"	showing cost of powder	
V5	1857, Oct. 10	Greenwood.	Letter.	J. H. O. to P. O'R.	7996.
A8	" " 14	Sea Gull.	"	Cost of Sea Gull, J. H. O. to O'R	4419.95
E8	1860, Sept. 1	"	Memo.	Statement of engine rent	
G8	1857, June 18	"	Letter.	J. H. O. to P. O'R	
L8	1856,	L. V. R. R.	Memo.	Draft letter, P. O'R. to L. V. R. R. Board	
M8	1856,	"	"	Draft letter, P. O'R to L. V. R. R. Board	
N8	"	"	"	Two foregoing an extenso	
V8	1858, July 10	Settlement.	Letter.	J. H. O. to P. O'R	
X8	" Aug. 5	"	"	" " "	
Y8	" Sept. 6	"	"	" " "	
Z8	" Oct. 2	"	"	" " "	
B9	" " 18	"	"	" " "	
E9	1859, Apr. 22	"	"	" " "	
G9	" June 10	"	"	" " "	
H9	" Dec. 19	"	"	" " "	
K9	1860, Apr. 9	"	"	" " "	

EXHIBIT O9.

Womelsdorf, February 29, 1856.

P. O'Reilly, Esq.,
Contractor,
Dr. Sir.

I have frequently stated to you that the losses which appeared from month to mo. on my work was inexplicable. The engs. are pleased to complain of my management. This is not borne out by facts and were it not that I have your assurance that you wd. see me righted it wd. be useless attempting to push my work thro. From the engineers ests. I glean this fact, and I conceive it to be an important one, as based entirely on the engs. figures as returned to you.

Mr. Nicholls of Mar. 31st, 1855. Estimated work to me on sections 18, 19, 20, 21 & 22 & 23, amtg. to $15,285 on which my expenses were 14,135=to $1,152 *profits*, or nearly 7½ per cent.

PART OF O9.

Mr. Stack has estimated me on the same sections, viz. 18, 19, 20, 21, 22 & 23—$25.125, my expenses $39,015, showing a loss of $13,890$\frac{0}{100}$ to 53.3 per cent. The haul in both cases is thrown out as also horse expenses. Mr. Stack's ests. are from Apl, 1st to Dec. 31st, 1855. Under these circumstances I think I may be excusable in saying the wrong does not lie altogether in my management. I am happy to inform you that the work is progressing and will be prosecuted with renewed vigor as soon as the spring opens.

I am
Dr. Sir,
Yrs. Respy.,
J. H. OSBORNE.

EXHIBIT P9.

P. O'Reilly, Esq., Phila.,
Dear Sir:— 10th Oct., 1857.

On your table you will find the original draft of the lease containing what you now object signing. You will also remember that before any lease was drawn I made an offer to Clendinning have previously had a conversation with you that part of the terms of his taking the farm should be a salary of $100 per annum as care-taker of the place. I consider therefore that both the rough draft of the lease and the conversation bind you to accept these terms, but lest after this explanation you should not feel it obligatory I return you the lease and give you an opportunity to strike out the objectionable clause if you feel still disposed to do so. I will thank you to send it back to me in either case executed as should you not accept it in its present form I will—the price $100\frac{0}{100}$ to Clendenning. I will thank you also to return me the original lease.

Yours truly,
J. H. OSBORNE.

There is some light in Cam. and Atl. affairs a proposition having been made by Brodhead to make the 2nd mort'ge bond-holders take a first preferred stock for all their 2 mortge Bonds Prin. & Int. and all the other creditors the present preferred stock. This if done will save the Road & as it becomes developed will make a return to any shareholder leaving only 1st mort'ge Bonds 500,000 on the Road.

I hope Mrs. O'R. is quite restored.

The $150 is all right. Mrs. O. remembers I bo'd it of you to go into a speculation in Arkansas Lead Quicksilver mines!!

EXHIBIT Q9.

PHILA., Sep. 6, 1858.

P. O'REILLY, ESQ.

Dr. Sir:

I am waiting to hear from you, why not let us try and have a settlement of our a'cs. you cannot but be sensible of the great inconvenience this delay is to me. It is my desire that we should promptly and openly communicate with one another. I require nothing but what is right and you, I feel, desire to act in the same spirit towards me. Will you then appoint a time that I may meet you for the settlement of our affairs.

I am,
Dear Sir,
Truly yours,
JNO. H. OSBORNE.

EXHIBIT R9.

PHILA., Aug. 5th, 1858.

P. O'REILLY, ESQ.,

Dear Sir,

I am in receipt of your favor of 31st ulto.

I wish you would send me the a'c. in question. I was not aware I was in your debt on this a'c.

I have been for some time desirous for a settlement of all my open a'cs. with you, will you fix a day to go over them with me.

I understood that nearly two mos. since the ventilator was to be tried on the Penna. R. R., what is the cause of the delay. I pd. Mr. Richards what he then demanded of me. I drop this on my way to Tamaqua.

Truly yours,
J. H. OSBORNE.

EXHIBIT S9.

PHILA., 22d April, 1859.

MR. P. O'REILLY,

Dear Sir:

I wish to know whether you intend to settle my account. You have for more than 18 months been putting me off with promises. I am no longer satisfied with these and desire an explicit answer.

I am yours res.,

J. H. OSBORNE.

EXHIBIT T9.

Drawings, details, costs, &c., of Pulpit Rock Tunnel on P. & R. R. R., used in evidence to illustrate cost and various kinds of solid rock excavations, especially where bound in on the sides in closely confined spaces of tunnel excavation as compared with working from an open face or open cutting of a railroad.

EXHIBIT U9.

This shows that my testimony and Scott's as to his bill and my allowances on it leave the charge of J. H. O. correct.

A. B. Scott's bill was for 9500.

The following items in it allowed to T. & Co. and P. O'Reilly would leave, viz: $4871.25 due on it.

Hauling stone, sand, &c., on p. 62, 17th item from bottom, and p. 27 in 7 item from top of 9058.84 ..... $1500

Pointing in cement on p. 62, 14th item from bottom and on p. 40 the 1st item 624.75

Extra work on bridges and culverts, on p. 62, 8th item from bottom and on p. 40—5th item fr. top 2504

Scott's extra work about
say $9500
4628 75

4871 25 would leave chargeable to chief contractor as against 4827.80.

EXHIBIT V9.

Current estimate No. 21 of P. O'Reilly, contractor, taken Sep. 30, 1857, showing total amount of work estimated to said contractor on the Leb. Val. R. R. to that date to be $1,513,825.67.

EXHIBIT W9.

Extract from minutes of meeting of board of managers of The Philadelphia and Reading Railroad Company held April 3rd, 1861:

"The president stated to the board that the counsel of "the company, St. Geo. Tucker Campbell, Esqr., had pre- "pared the form of an agreement dated March 28th, 1861, "between P. O'Reilly and this company, referring his "(O'Reilly's) claim to the arbitration of Geo. W. Biddle, "Esqr., as sole Referee, whose award thereon in writing "shall be binding upon both parties."

"The agreement was here read by the secretary, where- "upon on motion, it was:"

"Resolved that the president be and he is hereby "authorized to execute the agreement with P. O'Reilly "and affix thereto the corporate seal of the company."

EXHIBIT X9.

Extract from minutes of Board of Managers of The Philadelphia and Reading R. R. Co., held July 22nd, 1863:

"The subject of the ownership of the stock standing in "the name of P. O'Reilly on the Lebanon Valley stock "ledger was introduced, and on motion the following pre- "amble and resolution as approved by counsel, was adopted, "viz:"

"Whereas, in accordance with the accounts of the Leba- "anon Valley Railroad Company with Patrick O'Reilly, "there was due to him one thousand shares of the capital "stock of that company and as by the settlement with him "the same became vested in and belongs to this company.

"Therefore, Resolved, that the said thousand shares "with the dividend thereon be transferred to the presi- "dent of this company."

EXHIBIT Y9.

Original agreement between Phila. & Reading R. R. Co. and P. O'Reilly, dated Mch. 28, 1861, and of which H10 is a copy.

EXHIBIT Z9.

Receipt dated March 16, 1862, of N. A. Felix and P. O'Reilly to the Phila. & Reading R. R. Co., for $38,000.-00, &c., & of which J10 is a copy.

EXHIBIT A10.

Agreement with P. O'Reilly and Phila & Reading R. R. Co., Dec. 12, 1861, of which L10 is a copy.

EXHIBIT B10.

Release P. O'Reilly to Phila. & Reading R. R. Co., Dec. 12, 1861, of which M10 is a copy.

EXHIBIT C10.

Assignment O'Reilly to Felix, Dec. 12, 1861, of which N10 is a copy.

EXHIBIT D10.

Book of minutes of Leb. Valley R. R. Co., Jan. 11, 1858, to March 6, 1858, now in Reading R. R. office.

EXHIBIT E10.

Journal of the Leb. Valley R. R. Co., in Philadelphia and Reading R. R. office.

EXHIBIT F10.

Ledger of same railroad in same office.

EXHIBIT G10.

Current estimate No. 31 of P. O'Reilly, contractor for Nov. 1856, in Reading R. R. office.

EXHIBIT H10. (Copy.)

Articles of agreement entered into this twenty-eighth day of March, A. D. 1861, between the Philada & Reading Railroad Comp'y of the one part and Patrick O'Reilly of the city of Reading of the other part.

Whereas divers differences exist between said parties and the said Patrick O'Reilly has also brought a suit against the said Railroad Company in the Supreme Court of Pennsylvania of January Term, 1860, No. 44, which is now pending and undetermined thereon, but which it is agreed, as hereinafter mentioned, shall be discontinued. Now. These presents witness, and it is hereby agreed between said parties:

1. That in consideration of the agreement herein of the said Railroad Company, the said O'Reilly will forthwith discontinue said suit; and it is hereby agreed between said parties, that all actions, causes of actions, disputes, differences, duties, contracts, claims and demands, which now exist between said parties, or which either has against or is under or owing to the other, or whether they are in dispute or otherwise, shall be and the same are hereby referred to the arbitration of George W. Biddle, esquire, as sole referee, whose award thereon in writing shall be binding upon and final and conclusive between said parties and their, and each of their, legal representatives. And, in consideration of the discontinuance of said suit and of the premises aforesaid, the said Reading Railroad Company hereby further agree with said O'Reilly that they will not revoke this submission. And the said O'Reilly, for himself and his legal representatives in consideration of the premises, covenants with said Reading Railroad Company that he will not revoke this submission, and that in case of his death it shall not be thereby revoked, but that on notice of said Arbitrator to his executors or administrator, the said arbitration shall proceed and be determined with the like effect as if he were living; and the said parties further agree that they will not, nor will their legal representatives, institute any suit or proceeding in law or equity against the other for or in relation to any matter or thing therein submitted and referred as aforesaid, and that in any case of any such suit or proceeding, then the party instituting said suit or proceeding doth covenant and agree to release the said other party and their representatives from all and every such claim and demand, and that the party so proceeded against

may plead this agreement as and the same shall be an absolute bar thereto.

The said parties further covenant with each other well and truly to abide by and perform the same award according to the true intent and meaning thereof: and that all costs and charges of said arbitrator and attending such arbitration shall be in the diserction of the said arbitrator and shall be paid and satisfied pursuant to his award.

In witness whereof, The said The Philadelphia and Reading Rail Road Company has caused its corporate seal to be hereunto affixed, duly attested, and the said Patrick O'Reilly, has hereunto set his hand and seal the day and year herein before written.

Witness
to P. O'Reilly,
W. L. HURST.

P. O'REILLY, [SEAL.]
A. WHITNEY, PRES'T.
[SEAL P. & R. R. R.]

Attest,
W. H. McILHANNY,
Secy.

Copy.

EXHIBIT J10.

Received Philadelphia, March 17th, 1862, of the Philadelphia and Reading Railroad Company the further sum of twenty-nine thousand and four hundred dollars ($29,400), being with the payments heretofore made by said company, viz:

February 13th, 1862..... $3,159.43
February 25th, 1862..... 5,440.57

payment in full by said company of the sum of thirty-eight thousand dollars, being the consideration to be paid by said company to P. O'Reilly (mentioned in the agreement between them dated December 12, 1861), for the release on that day executed by him to them of all demands, as in said agreement set forth: And which sum of thirty-eight thousand dollars was by said O'Reilly on the same day transferred to the undersigned Nicholas A. Felix.

The said sum of thirty-eight thousand dollars has been and is received as aforesaid in full payment of all claims and demands of every nature of the undersigned upon the Philadelphia and Reading Railroad Company and the Lebanon Valley Railroad Company.

And in further consideration of the payment thereof we, the undersigned, covenant and agree to indemnify and save harmless The Philadelphia and Reading Railroad Company from all loss or damage that they may have sustained or may hereafter sustain for or by reason of the payment of said sum of thirty-eight thousand dollars as aforesaid.

Witness our hands and seals this seventeenth day of March A. D., 1862.

Sealed and delivered in presence of us. W. L. HIRST.

N. A. FELIX, [SEAL.]
P. O'REILLY, [SEAL.]

The foregoing sum of thirty-eight thousand dollars has been and is paid to Patrick O'Reilly's assignee (N. A. Felix) in full of all claims and demands of every nature of said P. O'Reilly, upon the Philadelphia and Reading Railroad Company and of all claims and demands of N. A. Felix upon them arising by reason of the transfer to him within mentioned.

March 17th, 1862.

W. L. HIRST,
for N. A. FELIX and P. O'REILLY
and H. F. FELIX.

EXHIBIT L10.

Copy.

Patrick O'Reilly has this day executed and delivered to the Philadelphia and Reading Railroad Company a Release of all demands for the consideration therein expressed of thirty-eight thousand dollars.

Now it is agreed, as follows, viz:—

First. That the said Release shall apply to and the said sum is in compromise and settlement of all claims and demands against the late Lebanon Valley Railroad Company as well as the Philadelphia and Reading Railroad Company of every matter whatever the one thousand shares of stock claimed by O'Reilly to belong to and if needful, to be transferred by him to the Philadelphia and Reading Railroad Company.

Second. That the said sum of thirty-eight thousand dollars is to be paid by the said Philadelphia and Reading Railroad Company without interest when they are freed from all liabilities by attachment or otherwise, however, on account of said O'Reilly or said indebtedness and so that they are released from all liability on account of the contract with said O'Reilly and from all and every matter or thing arising in anywise therefrom against either the Philadelphia and Reading Railroad Company or the Lebanon Valley Railroad Company.

Third. An award is to be made by the referee accordingly upon the payment of the said sum, if desired by said Philadelphia and Reading Railroad Company and a further Release given, if required.

Witness our hands this 12th day of December, 1861.

Witness to the signature
of C. E. Smith,
J. C. Kunxel.

CHARLES E. SMITH,
Prest. Reading R. R.

Witness to the signature
of P. O'Reilly,
J. Cooke Longstreth.
W. L. Hirst.

P. O'REILLY.

EXHIBIT M10.

Copy.

Whereas certain disputes have arisen between Patrick O'Reilly of the City of Reading, Berks County and State of Pennsylvania, and the Philadelphia and Reading Railroad Company, which still remain unsettled, and whereas the said Patrick O'Reilly hath assigned all his claim against the said The Philadelphia and Reading Railroad Company to Drexel & Co., of the city of Philadelphia, and the said Drexel & Co., have reassigned the same to the said Patrick O'Reilly.

Now know all men by these presents that I, Patrick O'Reilly, for and in consideration of thirty-eight thousand dollars, to me in hand paid by the Philadelphia and Reading Railroad Company, the receipt whereof is hereby acknowledged, have remised, released and quit claimed and by these Presents do remise, release and forever quit claimed unto the said The Philadelphia and Reading Railroad Com- and their successors all and all manner of actions or causes of action, variances, damages, claims and demands whatsoever in law, equity or otherwise, howsoever which, I, the said Patrick O'Reilly, or either of my heirs, executors, administrators against the said the Philadelphia and Reading Railroad Company, ever had, now had or hereafter can, shall or may have for upon or by reason of any matter, cause or thing whatsoever from the beginning of the world to the date of these presents.

Witness my hand and seal December 12th, A. D. 1861.

Sealed and delivered in presence of W. L. Hirst, J. Cooke Longstreth. } P. O'REILLY, (L. S.)

EXHIBIT N10.

Copy.

Whereas the disputes heretofore existing between The Philadelphia and Reading Railroad Company and myself have been compromised, and the said Company have agreed to pay me, in compromise and settlement thereof, the sum of thirty-eight thousand dollars upon the terms and conditions agreed upon between said company and myself.

Now know all men by these presents, that I, Patrick O'Reilly, for value received do hereby assign, transfer and set over unto Nicholas A. Felix, of the city of Reading, Brewer, all my right, title and interest of in and to the said debt, claim or sum of thirty-eight thousand dollars, due to me, the said Patrick O'Reilly, by the said The Philadelphia and Reading Railroad Company and payable as aforesaid, and all my rights, claims and demands against the said company and every part thereof, absolutely forever; to have and to hold the said debt, claim and demand of thirty-eight thousand dollars, due me as aforesaid, and all my rights, claims and demands, as aforesaid, to the said Nicholas A. Felix, his heirs, executors, administrators and assigns to and for his and their only proper use, benefit and behoof forever.

Witness my hand and seal this twelfth day of December, A. D., one thousand eight hundred and sixty-one.

Witness present,
J. Cooke Longstreth,
Wm. Saylor.

P. O'REILLY. [SEAL]

EXHIBIT O10.

Extracts from minutes of meetings of Board of Directors of the Lebanon Valley Railroad Company held as follows, viz—Reading, January 11th, 1858.

"A letter from P. O'Reilly, Esq., was read, asking the "board for aid, which in connection with the final estimate "from the engineer was referred to a committee consisting "of Messrs. Killinger, Henry and Eckert."

READING, January 29th, 1858.

"The committee appointed to examine and report upon "the final estimate of P. O'Reilly, contractor, made verbal "report and was continued."

READING, February 22nd, 1858.

"The committee on O'Reilly's case submitted their re- "port which was read, considered and discussed, and on "motion Messrs. Bank, Nicolls and Millholland, were "added to the Com't., with instructions to consult further "with Mr. O'Reilly, contr. examine his claims and if pos- "sible fix upon a definite sum to be paid him for final set- "tlement of all claims; and in order to relieve somewhat "his pressing claims, the Treasurer be directed to issue to "him, company's notes at six months, to the amount of "twenty thousand ($20,000) dollars first to have the ap- "proval of President Cullen of the Philada. & Reading "R. R. Co."

READING, March 5th, 1858.

"Resolved, that believing that there is due Mr. O'Reilly "on a final settlement of his accounts with the company, "the amount drawn in favor of H. H. Muhlenberg, "Cashier, &c., to wit, $25,000, also in favor of the "Cashier of the bank of Middletown for $9,742.00 at the "close of last year, and required by him in order to com- "plete the contract with assurance that it should be pro- "tected. We earnestly and unanimously recommend that "amt. to be secured by the Reading R. R. Co., as soon as "practicable to the Farmers Bank and Bank of Middle- "town."

READING, March 6th, 1858.

"Resolved, that this board regret that the want of full "reports, and final estimates, in due time, has compelled "them, lacking the proper information to delay the settle- "ment of the outstanding claims made against this com- "pany by the contractors until now, when Mr. Cullen's "request, as Prest. of the Phila. & Reading R. R. Co., "that no such settlement should be made, imposes the "necessity of such settlement upon that company."

EXHIBIT P10.

In the Supreme Court of Pennsylvania in and for the Eastern District it is thus contained.

(Docket Entry.)

W. L. Hirst.	Patrick O'Reilly	No. 44 January Term
	vs	1860. Summons Cove-
	The Philadelphia and	nant, ret'ble. the first
W. Geo. T.	Reading Rail Road	Monday Sept. 1859.
Campbell	Company	Exet Sept. 1, 1859.
		"Served."

March 1,	1860.	Narr filed.
" "	"	By writing filed the Deft craves oyer of the writing obligatory declared on
" 8	"	Defts crave oyer & demurrer filed.
June 2	"	Amendment to Narr & additional counts filed.
June 16	1860.	Demurrer argued. Demurrer overruled.
July 2	"	Pleas filed.
September 10	"	Rule entered to take the depositions of witnesses on the part of the Plaintiff at the office of Wm. B. Scheener, Esq., Alderman in the City of Reading, on fifteen days' notice to Defts.

Oct. 10,	'60	Amendment to Narr filed.
" "	"	Replication filed.
Oct. 10,	'60	Additional (4th count to Narr filed.
Oct. 12,	1860	Rule to plead in eight days on Judgt sec. reg.
Oct. 25,	"	On motion of Longstreth for Plff the court grant leave to file amendments to Narr and additional counts as heretofore filed in the office of the Prothonotary under date of Oct. 10, 1860.
Novem. 2,	1860.	On motion of W. Geo. T. Campbell Esq. for defts. Rule on the Plff. to show cause why the order of court allowing the fourth count of the declaration to be filed shall not be vacated, and said count stricken off.
Novem. 2,	1860.	Demurrer filed subject to the foregoing motion.
May 28,	1861.	By order of Plff. and Plffs. Atty in writing filed this case is discontinued. Proth'ys. costs paid.

(Copy of Rule.)

O'Reilly
vs.
P. & R. R. R. Co. } S. C.
January T, 1860, No 44.

Enter rule to take depositions of witnesses on the part of the Plaintiff at the office of William B. Schœner, Esq., Alderman in the city of Reading, on fifteen days notice to defendant.

J. Cooke Longstreth, } Atties.
W. L. Hirst, } for Plff.

(Copy of endorsement.)

O'Reilly
vs.
P. & R. R. R. Co. } S. C.

Rule to take depositions Filed Septem. 10th, 1860.

(Copy of Motion.)

O'Reilly
vs.
The Railroad Co. } Sup. Court.
Jan. 7, '60, No. 44.

On motion of St. George T. Campbell for defendant's rule on the plaintiff to show cause why the order of court allowing the fourth count of the declaration to be filed shall not be vacated and said count stricken off.

ST. GEO. T. CAMPBELL.

(Copy of Endorsement.)

44 Jany. T., 60.

O'Reilly
vs.
Phila. & Readg. R. R. Co.

Motion filed Novem. 2, 1860.

(Copy of Demurrer.)

O'Reilly	}	S. C.
vs.	}	Jany., 1860.
The Reading Railroad Company.	}	No. 44.

Subject to a motion made by the defendants to strike off the fourth count, the said defendants by said St. Geo. T. Campbell, their attorney, say that the said count as amended, and the said fourth count, are not sufficient in law, and the defendants show to the court the following causes of demurrer to the said courts respectively, that is to say:

To the said third count.

1. The averments in said court are inconsistent and contradictory in this, viz: That it is there averred that the chief engineer of the Lebanon Valley Railroad Company never did certify that the said contract had been wholly complied with on the part of the said contractor, the plaintiff, and it is therein afterwards averred that said Osborne, the said chief engineer of said company and of the defendants, did certify in writing that the said contract had been duly complied with by the plaintiff.

2. The averrments therein are ambiguous and uncertain in this, viz: It does not appear whether the plaintiff denies, avers or admits that said Osborne was the chief engineer of the Lebanon Valley Railroad Company after said merger, it is averred he had before that time been such engineer and that he only pretended to be so afterwards this, by implication denying that he actually was, and yet it is afterwards averred that after said merger he wrongfully refused to certify, &c., thus impliedly averring that he was then such engineer.

3. Said averments are also immaterial in this, viz: That they aver and offer to put in issue whether or not said Osborne pretended and assumed to be and act as the chief engineer of said Lebanon Valley Railroad Company and of the defendants.

And as causes of demurrer to the said fourth count the defendants (subject to said motion) show:

1. It is not averred whether said agreement to allow the plaintiff extra compensation was made before or after the said merger of said companies.

2. It is not shown what was the consideration, or that there was any consideration for said agreement.

3. If said agreement was made it is shown to have been by parol and a count for its alleged breach cannot be joined in this action of covenant with the other count filed.

4. Said count is also double in this, viz: That it puts in issue two distinct agreements and the breach thereof.

5. That an action of covenant cannot be maintained for the breach of said agreement set forth in said count for extra compensation.

ST. GEORGE T. CAMPBELL,
Nov. 2, 1860.

(Copy of Endorsement.)

44 Jan'y T., 1860.
P. OReilly
vs.
Reading R. R. Co. } S. C.

Demurer.
(Subject to motion to strike off 4th count.)
Filed Novem. 2d, 1860.

(Copy of order for discontinuance.)

O'Reilly
vs.
The P. & R. Road Co. } S. C.
Jany., T. 1860, No. 44.
Discontinue the above.
Case.
P. O'REILLY,
W. L. HIRST,
For Plff.

(Copy of Endorsement.)

44 Jany, T. 1860.
O'Reilly
vs.
The P. & R. Rail Road.

Order to enter discontinuance.
Filed May 28, 1861.

STATE OF PENNSYLVANIA,
EASTERN DISTRICT, } ss.

I, Charles S. Greene, Prothonotary of the Supreme Court of Pennsylvania, in and for the Eastern district, do hereby certify that the above and foregoing is a true copy of the docket entries, rule, motion, demurrer and order for discontinuance in the above entitled case as filed of record in said court.

SEAL

In testimony whereof I have hereunto set my hand and official seal of said court, at Philadelphia, the seventh day of November, A. D. 1885.

CHAS. S. GREENE,
Prothonotary.

I, Ulysses Mercur, Chief Justice of the Supreme Court of Pennsylvania, do hereby certify that Charles S. Greene was, at the time of signing the annexed attestation, and now is, Prothonotary of the said Supreme Court of Pennsylvania, in and for the Eastern District, to whose acts, as such, full faith and credit are and ought to be given, and that the said attestation is in due form.

In witness whereof I have hereunto subscribed my name this 17th day of November, one thousand eight hundred and eighty-five.

ULYSSES MERCUR.

I, Charles S. Greene, Prothonotary of the Supreme Court of Pennsylvania, in and for the Eastern District, do certify that the Honorable Ulysses Mercur, by whom the foregoing certificate was made and given, was, at the time of making and giving the same and is now Chief Justice of the Supreme Court of Pennsylvania: to whose acts, as such, full faith and credit are and ought to be given, as well in Courts of Judicature as elsewhere, and that his signature thereto subscribed is genuine.

In testimony whereof I have hereunto set my hand and affixed the seal of the said Supreme Court of Pennsylvania, in and for the Eastern District at Philadelphia, this 17th day of November, one thousand eight hundred and eighty-five.

SEAL

CHAS. S. GREENE,
Prothonotary.

Exhibit 31 of Defendant.

Dr. CHARLES TARRANT & CO.

	1854					
	June	15	To cash		1	4339 00
	July	15	" "		2	7740 00
	Augt.	15	" "		4	7440 00
	Sept.	15	" "		5	8170 00
	*Oct.	16	" "		7	7900 00
	Nov.	15	" "		8	6000 00
	"	24	" "		14	4000 00
10	Dec.	21	" Bills Payable		15	1380 00
	*Sep.	22	" Cash		6	800 00
	Dec.	15	" Cash		12	7000 00
	"	"	" "		12	244 00
	1855					
	Jan.	15	" "		16	1943 00
	Feb.	15	" "		17	1200 00
	"	28	" Bills Payable		18	800 00
	March	15	" Cash		19	2000 00
	Apl.	3	" "		21	300 00
		16	" "		21	3000 00
	May	1	" Plant & Tools		22	108 00
20		15	" Cash		23	9000 00
	*June	15	" "		25	10500 00
	July	16	" "		27	8805 00
	July	23	" "		"	2000 00
	June	4	" Plant & Tools		24	24 00
		7	" " "		24	24 00
	May	31	" Cash		24	1180 95
	July	4	" "		25	438 65
		25	" "		28	3094 13
	Augt.	15	" "		29	13337 00
	Sep.	15	" "		31	13923 00
30	Oct.	15	" "		33	14487 00
	Novr.	16	" "		34	16500 00
	Dec.	17	" "		35	14516 00
	"	"	" "		"	1200 00
	1856					
	Jan.	15	" "		36	13169 00
	"	"	" "		"	500 00
	"	"	" "		38	10480 00
	Feb.	15	" "		40	8654 00
	March	17	" "		42	9940 00
40	*April	15	" "		"	2000 00
	*	"	" "		41	4430 00
	March	24	" "		43	1978 67
	April	19	" "		"	14777 00
	May	15	" "		45	13745 00
	June	16	" "		"	2500 00
		"	" "		48	17400 20⅓
	July	15	" "			272967 60½

Forward to page 16

Exhibit 31 of Defendant.

CHARLES TARRANT & CO. Cr.

1854						
June	15	By P. O'Reilly		9	4339 00	
July	15	" "		9	7740 00	
Augt.	15	" "		10	7440 00	
Sep.	15	" "		10	8170 00	
Oct.	16	" "		11	14100 00	
Nov.	15	" "		11	5660 00	
Dec'r	9	" "		12	6849 00	
1855						
Jan.	12	" "		16	1943 00	10
Feb.	10	" "		17	2874 00	
March	10	" "		19	3150 00	
April	11	" "		21	2210 00	
May	14	" "		23	14103 00	
June	9	" "		24	5616 00	
July	12	" "		26	8805 00	
Augt.	15	" "		29	13337 00	
Sept.	13	" "		31	13923 00	
Oct.	12	" "		32	14487 00	
Novr.	15	" "		34	12422 00	
Dec.	13	" "		35	14516 00	20
1856						
Jan.	12	" "		36	10669 00	
Feb.	12	" "		39	10480 00	
March	13	" "		40	8654 00	
April	14	" "		42	9940 00	
May	15	" "		43	14777 00	
June	14	" "		44	13745 00	
July	14	" "		47	17400 20½	
Augt.	14	" "		49	18300 00	
Sept.	12	" "		52	18328 00	30

Forward to page 16..... 283977 20½

EXHIBIT 31 (Continued).

DR. TARRANT & CO.

1856.		Amt. forward	15	272967	60½
Augt.	15	To Cash	50	17300	00
Sept.	15	" "	52	18328	00
"	24	" "	53	1593	66
Oct.	15	" "	56	17180	00
Nov.	15	" "	61	17500	00
Dec.	19	" "	64	10101	00
1857.					
Jan.	19	" "	67	16106	00
				372076	26½
				15212	06
Feb.	14	To Balance	70	12000	00
"	"	Cash	75	2000	00
	26	" "			
1856.					
Dec.	19	" "	64	8000	00
1857.					
Mar.	18	" Cash	93	10716	00
"	"	ditto	81	400	00
April	21	" "	105	11900	00
May	21	" "	114	11440	00
June	22	" "	122	7500	00
July	31	" "	133	1000	00
Aug.	31	" "	134	500	00
"	"	" "	135	500	00
"	"	" "	"	1240	00
"	"	Bills Payable	137	2000	00
"	"	Cash	141	153	18
Sept.	11	" Phila. & R. Rd. Co	147	1000	00
Oct.	7	" Bills payable	160	2500	00
Nov.	13	" " "			
1858.					
Mar.	20	" Cash	199	3000	00

[NOTE.—Last item of $3000 struck out in pencil.]

EXHIBIT 31 (Continued.)

TARRANT & CO. CR.

1856					
		Amt. forward	15	283977	20⅓
Oct.	15	By P. O'Reilly	56	17180	00
Nov.	15	" "	60	17500	00
Dec.	15	" "	63	10101	00
1857					
Jan.	15	" "	67	16106	00
Feb.	14	" "	69	12000	00
				356864	20⅓
		Balance forwarded		15212	06
				372076	26½
Mar.	14	By P. O'Reilly	92	10716	00
April	18	" "	105	11900	00
Mar.	19	" "	113	11440	00
June	22	" "	122	7500	00
July	31	" "	132	3240	00
Aug.	12	" "	137	2000	00
Jan.	12	" Sills' account	185	37	47
	"	" P. O'Reilly	"	2500	00

Exhibit 32.

Dr. JOHN H. OSBORNE.

1854					
June		To Edward McDermott	1		130 00
July		" " "	3		250 00
Augt.		" " "	4		250 00
Sept.		" " "	6		250 00
					889 00
	4	To Cash	87		1000 00
	22	" "	122		2500 00
	31	" "	133		2000 00
	31	" "	137		2202 00
1859					
	17	" "	217		25 00
		" Balance			3473 12
					11200 12

EXHIBIT 32.

JOHN H. OSBORNE. CR.

1854				
Sept.	15	By expenses acct.		889 00
				889 00
June	22	By P. O'Reilly (Est.)	122	2500 00
July	31	" " (")	132	2000 00
Augt.	31	" " (")	137	2202 00
Feb.	17	"Sills acct.	217	1098 02
	"	"P. O'Reilly	218	3400 10
				4200 11
		By Balance		3473 12

IN CHANCERY.

Between	
JNO. H. OSBORNE, Comp'lt,	
and	ON BILL, &c.
CATHARINE C. O'REILLY, Executrix, &c., Def't.	

SUPPLEMENTAL EXHIBITS.

10 Copies of letters from letter book, Exhibit M3, giving the page of the book, referring to Lebanon Valley Sills account:

Page 183. WOMELSDORF, March 4th, 1856.

JONATHAN ELICK, ESQ.,

Dear Sir:—I have been making some calculations relative to the land, and will give you my views. For the fifty acres I think $85 an acre would be enough, and in-

deed as much as I can well afford, but rather than not have it I would give as a maximum $95 an acre. For the seven acres I think $45 should be sufficient, but I will give as a maximum $50—in each case to be allowed two years to take and clear it off. Make the terms the best you can. Draw up in your own name and then transfer to me. Try and get from five to twenty acres of the land you spoke of and an agreement with a right to purchase. If you can do anything I will see you when I come up next week.

Very truly,
JOHN H. OSBORNE.

Page 217. WOMELSDORF, July 24, 1856.
P. O'REILLY,

Dear Sir:—Mr. Scott can buy, besides the ten acres which he spoke of to you, a lot of six at 70, and another lot he was to look at at 70, making a total of twenty, not more than one and a half miles from the road. You had better write to him at once to purchase and secure them.

Truly yours,
JOHN H. OSBORNE.

Page 223. WOMELSDORF, September 24, 1856.
P. O'REILLY,

Dear Sir:—Please send me a bill of plank for crossings and the number of splice plates you wish to furnish. I will get all to advantage off the land we have here. They will help out the sills. Don't forget this.

Yours truly,
JOHN H. OSBORNE,

Page 223. September 24, 1856.
BENJAMIN SCOTT,

Dear Sir:—I give you the bill for long sills for sidings and also for splice plates. This please file and in a month or two give me a statement of how many you can get of each. I will send you a bill of the plank, that bill I spoke of I gave you some time about the first of August.

Yours truly,
JOHN H. OSBORNE.

P. S. You better see Seybert. He will be glad to get a large bill and it is more convenient to some of the land than the Meyerstown steam mill.

Page 230. WOMELSDORF, October 10, 1856.

MR. BENJAMIN SCOTT,

Dear Sir:—The 6 feet 10 inch stuff 4x6, and the 2 3-4x5 must be all white oak. Please keep a detail account of all expenses incurred by me for labor, hauling, &c., &c., connected with the sills or timber, and make out monthly estimates of the sills with accuracy, that we may be able to verify, when the engineers come to make them up and return to George W. Bowen. Let the man who has the four-mule team keep it as long as he attends to his business. The other drivers want to come back and we can gain nothing by having him.

Truly yours,

J. H. OSBORNE.

Page 231. WOMELSDORF, October 10th, 1856.

P. O'REILLY,

Dear Sir:—I ordered to-day 5,280 pieces of 4x6, 5,280 pieces of 2 3-4x5, all 6 feet 10 inches long, and 50,000 feet of all lengths, from 12 to 24 feet long. Twenty men commenced getting out sills on Tuesday.

Truly yours,

J. H. OSBORNE.

Page 238. WOMELSDORF, October 23, 1856.

P. O'REILLY,

Dear Sir:—I enclose you a note to have discounted for me for $1,000. Please send it, and also $500, to Mr. Bowen, this week or next Monday. The $500 is to pay for wood leave, and must be paid. There is another man who wants your note, endorsed by Mr. Echert, for wood leave, payable I think in March or April. Mr. Bowen will send you particulars.

Yours truly,

JOHN H. OSBORNE.

P. S.—O'Connell reduces to $1 on the first of November. Great numbers of our hands are leaving for the West and South.

Yours truly,
JOHN H. OSBORNE.

WOMELSDORF, 31st October, 1856.

P. O'REILLY,

Dear Sir:—I enclose note, which, when endorsed or signed, return to George W. Bowen. I expect to purchase the following land:

6 acres, $90.
50 acres, 50.
20 acres, 90.
20 acres, 80.
5 acres, 90.

101

When I do so I will notify you of the same.

Yours truly,
JOHN H. OSBORNE.

P. S.—Send receipt for $504.43 paid George Kapp, per check, left with George W. Bowen.

Yours truly,
JOHN H. OSBORNE.

Page 246. WOMELSDORF, October 7th, 1856.

P. O'REILLY,

Dear Sir:—I was in Lebanon to-day. The temporary track will be completed to-morrow. Mr. Meyers has been in Lebanon since Tuesday last, at which time he states he proposed to meet him. He is anxious to commence work on Monday and has arranged for the force. He wants you to send him up, before he can do so, his tools and tool box—two little cars, one of yours and one of his, and he wishes arrangements made to supply him with materials. I have taken the liberty to direct him to get good brakes on the cars, which he will do. They cannot be used unless this be done. There appears to have been a want of management in not sorting, and he is sorting the sills. In

front of these Mr. Hoffman has hauled so there are some ——only seven feet long. I should think when they are being unloaded they should be sorted. It will come very expensive for Meyers to handle them properly and notching. I have got three lots and expect the fourth. Three acres are let out. Sills eight cents, and forty cents for the cord wood, besides the other lot. I think it would be as well for you to come up next week and make some positive arrangement about getting on choppers.

Very truly,

J. H. OSBORNE.

Page 254. WOMELSDORF, November 26th, 1856.

ANDREW KILLYON,

Dear Sir:—It is necessary that the work you have undertaken should be prosecuted with the utmost dispatch and energy. You will look to me only for instructions as to * * * * and to take hands from no one else unless they are * * * I ordered you to put the sills out at ten cents to the cutters; so far you have paid for them eight and ten cents, being an average of nine cents. I want the orders I gave you, namely, ten cents, all to be observed and not departed from.

Yours truly,

J. H. OSBORNE.

Page 257. WOMELSDORF, December 10, 1856.

MR. P. O'REILLY,

Dear Sir :—Enclosed please find receipts for money, and notes received from you to pay for the wood leave. First receipt of Leonard Strickler, for note dated October 31, 1856, for five months. Endorsed by Isaac Eckert for $1,259, for 15 118-160 acres, at $80 per acre. A receipt from B. Krettzer and Seltzer, dated the 2nd of December, 1856, for $673.31, of which some $250 in cash, and note endorsed by H. F. Felix for $431.33, at four months, from December 1st, 1856, for balance.

Being in full for wood leave of 7 14-160 acres. Receipt of G. W. Bowen for $619.44, of which some $200 is

cash and note for $419.44, payable to Joseph Matthews as the balance in full for 746 acres of wood leave. And lastly the receipt of Christian Staake, dated November 15, 1856, for $100 in cash and note at four months, and endorsed by H. F. Felix, dated November 25th, 1856, for $354.16, making $504.16 in full for 5 149-160 acres of wood leave. Cash paid, $250, $200 and $150, making the sum of $600, being the amount received from you, with notes, on December 1st, 1858, all of which I hope may be found correct and satisfactory.

I am very truly,

G. W. BOWEN.

Page 259. WOMELSDORF, December 13, 1856.

G. B. DEPPIN,

Dear Sir:—Will you be good enough to state what your understanding with Mr. Scott was for sawing the three-inch oak plank for the splice plates, taking it all by the foot, board measure, or the superficial foot, and O. B. &c.

Yours truly,

J. H. OSBORNE,

P. S.—The stuff will be three-inch plank and scantling three by four and four by six, an equal number of pieces of each.

Page 257. WOMELSDORF, December 20, 1856.

MR. A. KILLYON,

Dear Sir:—You limit in the contract to hauling the logs to Deppin's mill for seventy-five cents each, but do not send any down that will not square 12 inches at the small end. Also send an equal number of 14 feet and 21 feet long. Attend to this at once. Send me a written contract as soon as made. Until further notice you will not have any walnut, black oak, or hickory made into sills. You will make a contract with the man near Kapp's land to haul the sills for eight cents each and no more. If he will not do it let them stand.

Yours, &c.

G. W. BOWEN.

Page 260. WOMELSDORF, December 19, 1856.

G. B. DEPPIN,

Dear Sir:—I am in receipt of your favor of 17th inst., stating the proposal made by you for sawing the lumber, being as follows: For three-inch oak plank, ninety cents per hundred lineal feet. For scantling 4x6, 6 feet 10 inches long, ninety cents per hundred lineal feet; and also for scantling 2 3-4x5 and 6 feet 10 inches long, sixty cents per hundred lineal feet. The proposals I hereby accept and will endeavor to have the logs hauled immediately to your mill.

I am, dear sir, respectfully yours,

JOHN H. OSBORNE.

Page 261. WOMELSDORF, December 26, 1856.

P. O'REILLY, Reading.

Dear Sir:—Enclosed please find receipt of Samuel Krouse for three notes given him this day for $22,471.75. He was well satisfied with the letter that he got of Mr. J. Eckert.

Yours, &c.,

GEORGE W. BOWEN.

Page 270. WOMELSDORF, February 4, 1857.

MR. CHRISTIAN STAAKE,

Dear Sir:—Your letter of the 16th of January to hand, and in reply would say that we shall hold you to your contract for the hauling of the sills, logs, &c., from your land. You should have made a calculation what it would have cost before you signed the contract. Your not doing so was your own fault. We will make no payment until the work is done, and we shall hold you for any loss for non-performance of the contract.

Yours, &c.,

J. H. OSBORNE,
Per G. W. Bowen.

Page 286. WOMELSDORF, April 8, 1857.

MR. P. O'REILLY.

There are about ten lots now of splice plates at Dep-

pin's mill, Meyerstown, and it would be advisable to have your return teams take them to Reading. I am waiting for the bill. I hope you were particular in having the splice plates accurately counted. I find that all the quiet men left 18 and 19 to-day, afraid to remain, and that the drunken rascals remain, owing to one of my bosses siding with them. I have got rid of some forty men. The quiet men will return with bosses. The boating master I expect to get to work. I am in need of a boss if I could get one.

Truly yours,

JOHN H. OSBORNE.

Letters from Letter Book, Exhibit M3, giving page; being letters relative to Greenwood, No. 4:

Page 140. WOMELSDORF, November 22, 1855.

P. O'REILLY,

Dear Sir:—In conversation with you relative to the land which you purchased upon the Susquehanna, there are some things which have since struck me, which did not occur to me when we conversed. We should see that the title is good and that there is no mortgage entered upon against the land in question. We should then make an estimate of the number of sills which can be cut from it to prevent the waste timber which will be the case unless this be done. The effect of this in saw should not be cut, which would not furnish sills without using the saw. I am satisfied that your views relative to the sawing of sills are erroneous and that a great waste of money will be the result unless this branch be gone into with care. I have seen a good deal of the use of the saw in portable mills and you will find that you cannot saw them, including the cost of the mill and hauling and attendance, for much less than from six to eight dollars per thousand feet board measure. I would by all means sell your present portable mill. It is worthless for sawing purposes. It would not run a twenty inch saw and we should not think of using less than thirty inch. If we conclude to go into the saw mill let us go and get one at once. It can be had for from

$1,500 to $1,800. I should like to go to the Susquehanna with you and see the attorney.

Truly yours,

J. H. OSBORNE.

Page 153. WOMELSDORF, January 4, 1853.

H. A. LANDRY.

Dear Sir:—Owing to the severe weather, we have been unable to start out the teams and the few which now go I think will be found efficient. Mr. Devereaux goes on to board the hands. He will charge $2.25. This is low I suppose as we can do it. He will take charge, too, of the teams and stables and teamsters, and see that they are constantly and properly attended to, etc., etc., etc. You will find the feed of all kinds such as he will need and I would suggest that you continue to buy hay, grain, oats, etc., and get as much straw as you can obtain. The carpenters leave, I believe, on Monday. About Scott, he got favorably settled. Would it not be possible to avoid hauling our hay and grain; it will impede our team work a good deal if you should be forced to do so. There is a man who comes up with Devereaux to get sills. I think he will draw others if he can find a place to board. He is a good hand and may prove an acquisition to your force of choppers. If you find you require anything more drop me a line and I will have it got ready. Don't allow your carpenters to allow pine in knocking up your bedsteads. Make them of oak and you will have no trouble with bugs. Devereaux asks you to put up your bedsteads of good warm plank.

Yours truly,

J. H. OSBORNE.

I send you a box of the best axes, which you can sell at not less than $125.

Page 165. WOMELSDORF, February 14, 1856.

WILLIAM HOSKIN,

Dear Sir:—The wagons reached me last week. You forgot to put the derricks on them. I will take two

more to have wooden axles, the pole to be twelve inches longer and the hind hounds to lay over on the coupling so that the wagon may be shortened. You can go on with the wheels and I see you about them. I do not think they ought to be much lighter.

I am, respectfully,
JOHN H. OSBORNE.

Page 277. WOMELSDORF, March 6, 1856.
MR. P. O'REILLY,

Dear Sir:—On Monday I sent a team to Greenwood. I expect to get fifteen thousand sills from here in place of 10,000. I sent after the wheels to-day, ten days after you promised to send them up. I have not heard about the dry oak plank for the saw-mill. If the saw-mill is not ready by the 18th of March you will be in a bad way for supplies. The telegraph poles are being delivered on this division. Section 18 is going on very slow and worse than ever. Don't forget to send me within ten days all the Greenwood account. You will ruin all my plans if I cannot carry out what I have proposed. Make no more entries in your book about Greenwood. Charge all the Greenwood money to me. Send me a statement of the exact number of sills received from Greenwood. Also a statement of the number from Susquehanna and other parts. Turn your attention to sills, oak planks and splices. You will be sorry and be in a bad way. Send me up the two-horse wagon if you are not using it to deliver telegraph poles. I am afraid the ground is so wet we shall lose from the tract of 16 acres, which must be cleared by the first of April. Got your note. Send your other wagon with driver for a week.

Yours truly,
JOHN H. OSBORNE.

Page 278.
MR. H. T. HOFFMAN,

Dear Sir:—I have some ten thousand or fifteen thousand sills which I wish to bring from Liverpool. Some will be delivered at Lebanon and some between Pelmira

and Lebanon. Send me the proposal addressed G. W. Bowen at once. You will deliver all them, too. At what time will you engage to have all on hand?

Yours, &c.,

JOHN H. OSBORNE.

Note: This letter is referred to on page 264 of the testimony of George W. Bowen. The reply to Hoffman is Exhibit N4 and is printed among the exhibits.

The letter is copied on page 280 of letter book from Bowen to Hoffman, accepting his proposal.

The letters on page 279 from John H. Osborne to O'Reilly, reporting to O'Reilly Hoffman's acceptance, are printed in full on pages 163 and 164 of the testimony of George W. Bowen.

Page 282. WOMELSDORF, March 20, 1857.

MR. J. MEYER, Meyerstown,

Dear Sir:—Your letter was received, and in reply would say, that I will accept your proposal for hauling cord wood, say at $1 per cord delivered at any point on the railroad, or level, or upon a cut. The wood to be piled well so as to be measured. You can commence as soon as you please hauling from Strickler's wood.

Yours truly,

GEORGE W. BOWEN.

NOTE:—This letter relates to Lebanon Valley sills account.

Page 289. WOMELSDORF, May 18, 1857.

MR. L. DEVEREAUX,

Dear Sir:—I enclose a bill for single switch sills and you will have sawed eight sets. Send them down by the last boat when it comes from your place. Nine sills 10 feet 7x8, ten sills 11 feet long 7x8. Seven sills 7x8. Fourteen 7x8. Another sill 16 feet long 8x16. Do not

fail to let me know by the 27th inst. how many sills there will be to settle for when I come up.

Yours, etc.

GEORGE W. BOWEN.

The following letters refer to rock excavation, and construction.

Page 84. WOMELSDORF, April 19th, 1855.

MR. P. O'REILLY,

My Dear Sir:—No iron has made its appearance yet. The land I wrote you about yesterday I will not get. I will take the chain if it answers. Send it out. I am getting things into shape. Start on building two more shanties and shall start another by next week on the 20th. I hope you will not disappoint me on Monday morning with the money. I have promised to meet some demands on that day. What am I to do about cars? It is idle for me to engage to buy any more. $25,000 would not see me clear of my present engagements and my ability to meet these claims has been, I may say, destroyed by not using the stock and tools I have on hand. Instead of clearing off my debts by degrees I have been adding to them. Will I go on with full force? Until I go on with full force this must be the case. I should like to work the following force: Fifty men on 14; fifty on 16; sixty-five on 18; forty on 19; fifty-two on 20; twenty on 31; thirty on 22; thirty on 23, and one hundred on masonry, making total say of four hundred and forty men. To do this I should want thirty-five more cars and ten more horses. But of course, unless the work should be pushed to completion, they never would pay for themselves and after doing two hundred and fifty thousand dollars worth of work I should be thousands worse than nothing. I have enough work for three hundred and fifty men, stabling for one hundred horses. You can well understand no work under the arrangement can extirpate me from my difficulties if we do not go on, and that soon. I have paid for the land

and shall soon have sixteen hundred sills from my tracts. They will be all ready within a week. I mean this; it is to impress on you the necessity of doing something. I think after my past labors and those which are perspective, I think it would be hard if I were driven to the wall.

I am, my dear sir, truly yours,

JOHN H. OSBORNE,

P. S.—Tell McDermott not to forget the sheaves for the derrick. You send them out, too, at once.

Page 144. WOMELSDORF, November 24, 1855.

P. O'REILLY, Contractor,

Dear Sir:—I have not received your reply to my letter of the 6th, though I was led to expect one containing the assurance that you would make my losses right on the rock, which I stated was what I required at your hands, and which you told me you were willing to give me.

Truly yours,

J. H. OSBORNE.

WOMELSDORF, Oct. 23, 1856.

P. O'REILLY, ESQ.

Contractor,

Dear Sir: After an examination of the line this day I find there were 270 laborers and 79 horses at work on the grading (earth and rock) of this Division. To complete the work in February will require an average force of 370 men or about 100 more than we have now. I have advertised in the Pottsville and Philadelphia papers for a 100 and hope to be able to reach that number by the 1st of the month. I am still paying 1.12½ per day but I shall spare no expense to prosecute the work to completion, expecting and relying on you to aid me whilst paying such high wages to carry out your views. I need not tell you, it is idle to expect that I can go through without this aid, or that I shall be able to pay 20 per cent. advance of wages from the price at which I took the work. If you will examine the several sections, you will find that it is at the very points where the greatest delay was occasioned, that the work is now so far behind.

The last 18 or 20 months was a season of high prices and great scarcity of the staples which enter largely in the cost of railroad making. I have had occasion to point out for some time past the necessity of your doing something to aid me, and I have given you my reasons how I have been enabled to work through the summer without the increase on my rock prices, which I think you should have considered, and which I conceive is only my due. At the risk of wearying you with a recital of the difficulties which are now, and have been for some time, pressing on me, I send you a statement of my expenses and the engineer's estimate for September, 1856, on the following rock sections, 18 19, 20 and 23.

	TOTAL EXPENSES.	ESTIMATE.
18.	$1,155 96	$303 00
19.	3,047 34	1,166 00
21.	2,933 56	2,264 00
23.	1,911 46	1,199 00
	$8,948 32	$4,932 00

Estimate $4,932; haul $1,359, equal to $6,281. Total estimate of engineer, $6,281, being $2,667 under my expenses.

If you will examine the expenses kept by me you will find my expenses are nearly 10 per cent. less than their's are as I kept only the net cost, not allowing for wear and tear. I wish, too, you would be a little more frequent in your visits to my work. You will then see at a glance that to work rock sections, as I am compelled to do, cannot be done at less than $1.25 per yard. The deficit must be met by some one. I think whilst the work is in progress it would be more satisfactory to you and certainly far more so for me that these matters should be examined and controverted if necessary now, instead of the final closing of the contract.

I am yours truly,

JOHN H. OSBORNE.

EXHIBIT P.

(Being page 63 of Exhibit E2.)

Final estimate of Sections 14 to 26, inclusive.

PATRICK O'REILLY, Contractor.

Quantity.	Description of Work.	Price.	Amount.
	4.85 acres of clearing and grubbing at	$50 00	$242 50
	81,282 cubic yards earth excavation at	18½	15,055 67
10	166,150 cubic yards hard clay excavation at	25	41,537 50
	14,143 cubic yards loose rock exvation at	38	$5,374 34
	154,316 cubic yards solid rock excavation at	73	112,650 68
	122,653 cubic yards borrowed material	21	25,757 13
	492,423 cubic yards hauled to embankment, 3,071 feet at 9 mills.	27.639	136,100 79
20	891 cubic yards pier masonry at	10 00	8,910 00
	2,321 cubic yards bridge masonry, 1st class at	7 50	17,407 50
	3,375 cubic yards bridge masonry, 2d cla-s at	6 30	21,262 50
	842 cubic yards bridge arching, 2d class at	7 25	6,104 50
	813 cubic yards masonry of askew bridge at	9 80	7,967 40
	374 cubic yards culvert arching at	4 50	1,683 00
30	2,956 cubic yards ranged rubble masonry at	4 75	14,041 00
	1,784 cubic yards dry stone drains at	3 00	5,352 00
	Puddle on arches		97 00
	30 cubic yards of slope wall at	1 50	45 00

Quantity.	Description of Work.	Price.	Amount.
512 cubic yards paving at		1 40	716 80
Hauling stone and sand			1,500 00
180 cubic yards of hard brick in piers at		6 50	702 00
95 cubic yards of hard brick in arches at		7 50	712 50
1,750 square yards of pointing in cement			687 00
8,994 square feet of cut stone coping at		55	4,946 70
26,773 cubic yards of ballast at		60	15,063 80
350 tons hauling iron at		2 50	875 00
Retrimming Sections 14 and 15			110 00
Embankment and masonry at Womelsdorf station			7,971 00
Extra work on bridges and culverts			2,754 00
Bridges at Messimers, Station 832, and on Section 14, see statement No. 2			1,003 43
Horse feed during suspension			2,500 00
2,668 cubic yards hauled to embankment after opening of road			737 40
Retrimming and finishing Section 19			1,980 00
263 square feet coping of bridges on Sections 17 and 18 at		55	144 65
Pointing in cement Section 16			33 00
20 cubic yards of dry masonry on Section 20 at $3, $60; completing drain under public road at $29			89 00
			$463,114 79

EXHIBIT R.

(Being pages 26 and 27 of Ex. E2, of final estimates.)

Final estimate of Sections 1 to 40 inclusive.

PATRICK O'REILLY, Contractor.

Taken Jan. 11, 1858.

Quantity.	Description of Work.	Price.	Amount.
18 5-1,000	acres of clearing and grubbing at	$50 00	$900 25
179,982	cubic yards of earth excavation at	18½	33,296 67
583,740	cubic yards of hard clay excavation at	25	145,935 00
61,109	cubic yards of loose rock excavation at	38	23,221 42
12,108	cubic yards of loose rock borrowed at	38	4,601 04
475,056	cubic yards of solid rock excavation at	73	346,790 88
269,251	cubic yards of borrowed material at	21	56,542 71
982,417	cubic yards hauled to embankment, average haul, 2,269.28 feet at 9 mills per 100 feet = .2042352 per cubic yard		200,644 13
250,436	cubic yards hauled to embankment, average haul, 1,337.90 feet at 8 mills per 100 feet = .107032 per cubic yard		26,804 66
4,735 2-10	cubic yards of pier masonry at	10 00	47,352 00
6,654	cubic yards of bridge masonry 1st class at	7 50	49,905 00
10,414	cubic yards of bridge masonry 2d class at	6 30	65,608 20
2,116 7-10	cubic yards of masonry of spring creek bridge at	6 90	14,605 23

Quantity.	Description of Work.	Price.	Amount.
393	cubic yards of chamford masonry at	13 00	5,109 00
508	cubic feet of cut stone arch at	75	381 00
661 5-10	cubic feet of cut sand stone arching at	67	443 20
839	cubic yards of bridge arching 1st class at	9 75	8,180 75
1,325 3-10	cubic yards of bridge arching 2d class at	7 25	9,608 42 10
869 1-10	cubic yards of askew bridge with brick in the interior at	9 80	8,517 18
1,860	cubic yards of askew bridge with fine cut stone arches at	14 00	26,040 00
587	cubic yards of culvert arching at	4 50	2,641 50
8,318	cubic yards of ranged rubble masonry at	4 75	39,510 50
6,174	cubic yards of dry drain masonry at	$3 00	$18,522 00 20
899	cubic yards of vertical wall masonry at	3 12½	2,809 37
441	cubic yards of slope wall masonry at	1 50	661 50
1,570 5-10	cubic yards of paving at	1 40	2,198 70
100	cubic yards of common rubble masonry at	2 00	200 00
888	cubic yards of face brick in piers laid in cement at	11 00	9,768 00 30
2,959	cubic yards of hard brick in piers laid in cement at	6 50	19,233 50
455	cubic yards of face brick in arches laid in cement at	11 00	5,005 00
1,439 3-10	cubic yards of hard brick in arches laid in cement at	7 50	10,794 75
	Carried forward		$1,185,831 56

Quantity.	Description of Work.	Price.	Amount.
	Amount brought forward..		$1,185,831 56
	49 2-10 cubic yards of rip rap masonry at.....	1 00	49 20
	101 cubic yards of dry abutments at	4 00	404 00
	99,724 cubic yards of ballast at..	60	59,834 40
	59,055 square feet of cut stone coping at.....	55	32,480 25
	6,600 square yards of soiling and sowing slope at.....	07	462 00
	Hauling stone and sand.....		9,058 84
	64,097 feet board measure of rough plank in foundations, including putting the same in place, per M.	24 00	1,538 32
	Horse feed and expenses of the work in 1854–5 during suspension.....		9,294 00
	450,733 feet B. M. white pine timin superstructure of Schuylkill bridge at.....	36 00	16,226 39
	15,542 feet B. M. white oak timber timber in superstructure of Schuylkill bridge at.....	40 00	501 68
	18,000 feet B. M. white hemlock timber in superstructure of Schuylkill bridge at.....	22 00	396 00
	52,168 feet B. M. oak plank for level crossings at.....	28 00	1,460 70
	202,389 lbs. of cast iron blocks, washers, &c., in Schuylkill bridge at.....	04	8,095 56
	211,499 lbs. of wrought iron bolts, rods, &c., in Schuylkill bridge at	07½	15.862 42
	116,038 of sills delivered, exclusive of those allowed for in track at	50	$58,019 00
	26 44-100 miles of track laid from Reading to the Cornwall Branch as per Statement No. 1.....		25,719 58

Quantity.	Description of Work.	Price.	Amount.	
	Superstructure of road bridges and 2 joist bridges on Section 13 and at Wensichs as per Statement No. 2		13,233 24	
65,155	feet B. M. switch sills per M	$14 00	912 17	
3,600	feet B. M. white oak in cattle guards per M	20 00	72 00	
1,072	cubic yards of excavation in ditch for Lebanon water station at	2 00	2,144 00	10
928	square feet cut stone caps for water columns at	55	510 40	
	Passenger and freight stations as per statement No. 3		6,953 10	
	Extra work of all kinds at Reading and over the 40 miles of road as per Statement No. 4		69,883 94	
76,348	feet B. M. white oak splices for track per M	26 00	1,985 04	20
			$1,520,927 79	

IN CHANCERY OF NEW JERSEY.

Between

JOHN H. OSBORNE,

Complainant,

and

CATHARINE C. O'REILLY, Executrix, &c.,

Defendant.

} ON BILL, &c.

EXHIBITS OF DEFENDANT.

EXHIBIT No. 1.

GREENWOOD, SEPTEMBER 4th, '57.

MR. O'REILLY,

Deer Sir: I Have just Received a letter from Mr. OsBurne, Stateing that I Must Lave Hier this week now sir I will Move right away. I Have Been putting things true in the Best Manner for the intrest of this plase. Yo need not Exsept me to do any more.

Yours Truly, L. DEVEREUX.

Be Tween Boath of yous I Have Been Served Purtey Hard.

the man that is hier Come from the post With a letter, he said from Mr. OsBurn, and orderd me to go out in the morning and drou my Cart out of the field, he says he have a liece from Mr. O'Reilly and from Mr. OsBurne for Sevin Yers.

EXHIBIT NO. 2.

P. O'Reilly in ac. with Jno. H. Osborne:

		Dr.		
		To services ren'd on C. & At. R. R. from August 1853, to June, 1854.	$2,734	79
		To Exps. on do	298	79
		To services on Leb. V. R. R.	875	00
		To Exps	14	00
1885.				
Mar.	26.	To Dft. No. 227	350	00
July	3.	To Exps. purchase of Sea Gull	22	35
Aug.	10.	To Landing	30	00
Dec.	27.	To Van Cleest	38	00
1857.				
Jan.	8.	To Briscoe	2	10
"	"	To Geo. Woodhull	20	00
"	"	To McNeliis	30	00
		To Geo. W. Richards	145	00
		To McNellis	10	00
			$4,570	03

Cr.

	By Cash for ser's. ren'd. & Exps. on C. & A. R. R.....	$3,033 58
	By Cash Leb. V. R. R.....	$875 06
1855.		
Mar. 15.	By Loan.....	500 00
Dec. 27.	By am't. ball. on hand purchase of "Sea Gull".....	104 00
		4,512 58
	By cash to bal.....	57 45
		$4,570 03

EXHIBIT No. 3.

Womelsdorf, Dec. 10th, 1856.

Mr. P. O'Reilly,

Dear Sir:—Enclosed please find receipts for Money & Notes received from you to pay for wood leaf—first—Receipt of Leonard Strickler for Note, dated October 31st, '86, at 5 mos, & endorsed by Isaac Eckert, for twelve hundred & fifty-nine dollars, $15\frac{118}{160}$ Acres at $80.00 per Acre, receipt of Krutzer & Seltzer, dated 2nd Dec. '56 for $673\frac{31}{100}$, of which sum $250.00 in cash & note endorsed by H. T. Felix for $423\frac{31}{100}$ at 4 mos. from Dec. 1st, '56 for balance, being in full for Wood leaf of $7\frac{14}{100}$ Acres, receipt of Jacob Baney for $619\frac{44}{100}$, of which sum $200.00 Cash & note for $419\frac{44}{100}$ payable to Joseph Matthews is the balance in full for $7\frac{46}{100}$ Acres of Wood leaf & lastly receipt of Christian Strack dated Nov. 25, 1856, for $150.00 in Cash & a note at 4 mos, endorsed by H. F. Felix & dated Nov. 25, '56 for $354\frac{16}{100}$, making Five hundred & four $\frac{16}{100}$ Dollars in full for $5\frac{149}{160}$ Acres of Wood leaf. Cash paid $250.00, $200.00 & $150.00 making the sum of Six hundred Dollars, being amount received from you

with Notes on December 1st, '56, all of which I hope may be found correct & satisfactory, and I am

Your truly,

GEO. W. BOWEN.

Send me the Notes for Crouse. Mr. Osborne say, don't forget the iron for C. & Atlantic Road.

G. W. B.

EXHIBIT No. 4.

P. O'Reilly, Esq., in account with Jno. H. Osborne:

1857.		DR.			
March 21.	To pd. L. Souder, pr. ac.....			$419 63	10
Ap'l 29.	" " "			106 68	
Mar. 17.	" Sam'l Lape, "			150 00	
Dec'r 23.	" G. Michael, "			13 08	
Feb'y 27.	" F. Dehart, "			84 90	
Aug. 28.	" Amt. expenses, "			329 46	
Ap'l 30.	" P. Forrey, "			102 72	
Mar. 28.	" B.McDonough, "			102 59	
July 30.	" Do., "			158 00	
Ap'l 7.	" H. Dehart, "			133 98	20
July 1.	" " "			7 12	
Ap'l 28.	" Wm. Laws, "			52 52	
Mar. 4.	" I. Bechtold, "			89 75	
Ap'l 9.	" " "			139 69	
May 13.	" A. Killian, "			255 00	
Mar. 16.	" F. Kritzman, "			72 40	
Ap'l 13.	" H. Getz, "			17 00	
Aug. 7.	" H.W.Duringer, "			348 04	
Mar. 28.	" I. Connelly, "			51 90	
" "	" Wm. Smith, "			32 62	30
Feb'y 25.	" L. W. Berkley, "			98 11	
Mar. 25.	To pd. L. Weiser, pr. ac.....			94 40	
Feb'y 25.	" E. Weinhold, "			78 46	

Mar.	4.	To pd. C. Strast,	per. ac.	.....	$212 82
"	28.	"	"	"	.....	150 00
"	7.	"	Sam'l Crouse,	"	.....	155 44
"	28.	"	"	"	.....	28 73
Oct.	2.	"	"	"	.....	70 40
June	30.	"	Sam'l Frim,	"	.....	255 00
Mar.	31.	"	L. Leininger,	"	.....	27 06
"	23.	"	Jr. Scott,	"	.....	25 08
"	23.	"	J. W. White,	"	.....	45 00
"	"	"	W. Reed,	"	.....	11 30
Mar.	28.	"	L. Kapp,	"	.....	44 20
May	13.	"	"	"	.....	125 80
June	29.	"	H. Rummels,	"	.....	148 62
Oct.	2.	"	D. Laiser,	"	.....	45 00
Mar.	7.	"	S. Crouse note,		.....	913 75
						$5,196 25
			Sh'd be		.....	$4,296 25

1857.			Cr.		
Jan'y	19.	By	Cash	.....	$800 00
Mar.	4.	"	(to pay note)	.....	900 00
"	5.	"		.....	1,000 00
"	21.	"		.....	400 00
"	26.	"		.....	300 00
"	27.	"		.....	300 00
Apl.	25.	"	(wood)	.....	180 00
"	28.	"	(chips)	.....	2 00
"	30.	"		.....	500 00
		By balance due		.....	814 25
					$5,196 25
			Sh'd be	.....	$4,296 25

$814.25. October 7th, 1857.

Received of P. O'Reilly, the sum of eight hundred and fourteen $\frac{25}{100}$ dollars, being balance due on above statement of sills account, &c.

Jno. H. Osborne.

$411 31 by note.
402 94 to balance.

$814 25

NOTE.—There are $900 charged on both sides of this acc't by Mr. Bowen, being am't handed to him to pay Sam'l Crouse's note—this am't is to be deducted from this balance sheet as I have it in Sam'l Crouse's own acc't and bills payable acc't, which see.

E. MCDERMOTT.

EXHIBIT NO. 5.

LAWRENCE DEVEREUX.

DR.

To sundry payments per page 100, Greenwood Ledger	$1,275	48
	$1,275	48
To balance	26	43

CR.

By sundry services, board bills of hands, &c., &c., per page 100, Greenwood Ledger	$1,057	48
" Am't to David Forrey	12	62
" " To James Nowlan, per 84 Greenwood Ledger	105	25
By Amt. To Michael Nowlan, per 84 Greenwood Ledger	$73	70
" Balance	26	43
	$1,275	48

August, 1861.

EXHIBIT NO. 6.

I hereby certify that I forwarded from Mr. O'Reilly's tract of land in Greenwood township, Juniata county, for the use of the Lebanon Valley Railroad, between January, 1856, and September, 1857, thirty-five thousand sills.

L. DEVEREUX,
Agent.

LEBANON, January 8th, 1858.

EXHIBIT NO. 7.

Books containing account of sills, &c., from Greenwood.

EXHIBIT NO. 8

GREENWOOD.

Account of ties hauled by our teams. See Tie Book.

Page 1	Page 2	Page 3	Page 4	Page 5	Page 6	Page 7	Page 8	Page 9	Page13	Page 14
33	102	1619	232	1748	1337	60	30	210	1053	79
38	32	30	16	1538	967	60	30	136	72	218
33	49	91	12	108		60	30	245	40	173
35	45	60	30			30	30	230	75	60
33	30	30	30			15	60	66	25	25
37	28	30	10			15	60	50	20	29
38	25	60	18			30		75	940	22
40	50	90	30			30		37	113	19
40	52	60	29			30		2	665	22
36	52	31	28			30		30		50
20	50	90	21			60		764		362
40	54	180	8			60		29		128
38	52	90	30			60				4
38	48	60	15			60				21
38	27	30	5			120				21
37	27	29	26			60				4
41	56	60	28			60				*1805
39	56	48	30			60				
38	57	42	28			60				
38	2095	60	29			30				
38	....	30	30			90				
38	2987	14	28							
32	1010	14	27							
27		120	26							
51		60	30							
50		60	2053							
7		60								
37		30								
		60								
		30								
		56								
		28								
		60								
		60								
		30								
		28								
1010	3997	3530	2849	3394	2304	1080	240	1874	3003	3042

NOTE...979½ lineal feet, say=108 sills of 9 feet long.

*Conrad Markles' ties got from his own land and hauled by Greenwood teams of Reilly & Osborne.

Total number sills hauled by our teams,	25,313
	1,805
Hauled by 3 teams,	23,508
⅔ hauled by Osborne's two teams,	15,672
⅔ of *1,805 sills,	1,204
Total sills hauled,	16,876

EXHIBIT NO. 9.

Receipt Book of P. O'Reilly.

EXHIBIT NO. 10.

$500. READING, Pa., July 6th, 1856.

Six months after date I promise to pay to the order of Jno. Tucker, Esq., five hundred dollars, without defalcation. Value received.

No. 34. Due Aug. 6. JNO. H. OSBORNE.

[Endorsed.]
JOHN TUCKER.

[Telegram.]
Dated PHILA., Aug. 5, 1856.

To P. O'REILLY.

Please pay Mr. Osborne's note for five hundred dollars due to-morrow.

JOHN TUCKER.

EXHIBIT No. 11.

Small receipt book of P. O'Reilly. On p. 4 is receipt as follows, viz:

READING, Sept. 22nd, 1854.

Received of P. O'Reilly, the sum of eight hundred dollars on acct. of L. V. R. Rd.

(Signed) TARRANT & Co.
per Wm. Bowen, Sen'r.

Present,
E. MCDERMOTT.

EXHIBIT No. 12.

Deed, Lewis G. Osborne and Joseph A. Clay, Committee, &c., to Geo. W. Bowen, dated December 8, 1856, (for premises in Chester county, Pa.)

EXHIBIT No. 13.

Deed, Geo. W. Bowen to John H. Osborne and Patrick O'Reilly, dated December 8, 1856, (for same premises.)

EXHIBIT No. 14.

Mortgage, George W. Bowen to Nicholas Bean, dated December 8, 1856, (for same premises.)

EXHIBIT NO. 15.

THIS INDENTURE, made the seventh day of November, in the year of our Lord one thousand eight hundred and fifty-nine, *fifty-nine* (1859,) between John H. Osborne, of the city of Philadelphia and State of Pennsylvania, and his wife, and Patrick O'Reilly, now or late of the county of Berks and State aforesaid, and Catharine C., his wife, of the one part, and George W. Bowen of the said county of Berks and the State aforesaid, of the other part;

Witnesseth, that the said John H. Osborne and Lydia C., his wife, and the said Patrick O'Reilly and Catharine C., his wife, for and in consideration of the sum of four thousand eight hundred dollars, lawful money of the United States of America, unto them well and truly paid by the said George W. Bowen, at and before the sealing and delivery of these presents, the receipt whereof is hereby acknowledged, have granted, bargained, sold, aliened, enfeoffed, released and confirmed, and by these presents do grant, bargain, sell, alien, enfeoff, release and confirm unto the said George W. Bowen, his heirs and assigns, all that messuage and tract of land, situate in the township of Schuylkill, county of Chester, and State aforesaid: Beginning at a limestone, corner of land of John Clift, now or late Nicholas Sowden's, and in a line of Mathias Pennypacker's land; thence north sixty-six degrees east, twelve and four-tenths perches to a limestone, corner of Joseph E. Anderson's land; thence along the same south seventy-nine and a half degrees east, fifteen and one-tenth perches to a corner of Jacob Hawk's land; thence along the same south three and a half degrees west, twenty-nine and three-tenths perches to a post, and by the same south eighty-five degrees east, fifty perches to a corner in a line of said Joseph E. Anderson's land; thence along the same south twenty-nine and a half degrees east forty perches to a corner in Paulding's bridge and Paoli road; thence along the same and lands of Jacob Rennard and John Morgan south nineteen and three-fourths degrees west, sixty-one and three-tenths perches to a corner of land late of Elizabeth Rennard, deceased; thence along the same and land

of George Bloomhart, north eighty-one degrees west, sixty-five and three-tenths perches to a stone in a public road leading from Paoli to Pickering creek; thence along the same and lands of John Clift, now Sowden's, north sixteen and a half degrees west, twenty-five and one-tenth perches to a rock; thence along the same north nine degrees west, forty-two perches to a stone, and north seven degrees east forty-eight and eight-tenths perches to the place of beginning. Containing fifty-two acres and one hundred and four perches of land, be the same more or less. (Being the same premises which George W. Bowen, by deed bearing date eighth day of December, Anno Domini one thousand eight hundred and fifty-six, and recorded in the Recorder's Office of Chester county, in Deed Book D6, Vol. 126, page 307, &c., did grant and convey unto the said John H. Osborne and Patrick O'Reilly in fee.) Together with all and singular the houses, buildings, woods, ways, waters, water courses, rights, liberties, privileges, hereditaments and appurtenances whatsoever thereunto belonging, or in any wise appertaining, and the reversions and remainders, rents, issues and profits thereof, and all the estate, right, title, interest, property, claim and demand whatsoever of the said John H. Osborne and his wife, and Patrick O'Reilly and Catharine C., his wife, in law, equity or otherwise howsoever, of, in and to the same, and every part thereof, to have and to hold the said messuage and tract of land, hereditaments and premises hereby granted, or mentioned and intended so to be with the appurtenances, unto the said George W. Bowen, his heirs and assigns, to and for the only proper use and behoof of the said George W. Bowen, his heirs and assigns, forever; and the said John H. Osborne and Patrick O'Reilly, for themselves, their respective heirs, executors and administrators, do by these presents covenant, grant and agree, to and with the said George W. Bowen, his heirs and assigns, that they, the said John H. Osborne and Patrick O'Reilly, their respective heirs, all and singular the hereditaments and premises hereinabove described and granted, or mentioned and intended so to be, with the appurtenances, unto the said George W. Bowen, his heirs

and assigns against them, the said John H. Osborne and Patrick O'Reilly, and their respective heirs and against all and every other person or persons whomsoever lawfully claiming or to claim the same, or any part thereof, by, from, or under them, or any of them, shall and will warrant and forever defend. In Witness Whereof, the said parties to these presents have hereunto interchangeably set their hands and seals, dated the day and year first above written.

JOHN H. OSBORNE. [L. S.]
LYDIA C. OSBORNE. [L. S.]
P. O'REILLY. [L. S.]
C. C. O'REILLY. [L. S.]

Sealed and delivered in the presence of us.
The words "seventy-nine" being first written over an erasure on the tenth line, and the name "Anderson" also being written over an erasure on the twelfth line.
WM. KEEN,
GEORGE PRINTZ,

Witnesses to John H., and Lydia C. Osborne.
CHAS. F. HELFFNICHT.
ALFRED CHRIST.

Received the day of the date of the above indenture of the above named George W. Bowen, the sum of four thousand eight hundred dollars, the full consideration money above mentioned.

JOHN H. OSBORNE.
P. O'REILLY.

Witnesses.
WM. KEEN.
GEORGE PRINTZ.
Witnesses to John H. Osborne,
CHAS. F. HELFFNICHT.
ALFRED CHRIST.

City of Reading, } ss.
Berks County, }

The seventh day of November, Anno Domini 1859, before me, one of the aldermen for the city of Reading, in and for said county of Berks, personally came the above named P. O'Reilly and Catharine C., his wife, and in due form of law acknowledged the above indenture to be their act and deed, and desired the same might be recorded as such, the said Catharine C., being of full age, separate and apart from her said husband, by me examined, declared that she did voluntarily and of her own free will and accord seal, and as her act and deed deliver, the said indenture, without any coercion or compulsion of her said husband, the contents thereof having first been by me fully made known unto. Witness my hand and seal the day and year above said.

GEORGE PRINTZ, [L. S.]
Alderman.

The twenty-sixth day of November, A. D. 1859, before me, one of the aldermen in and for the city of Philadelphia, personally came the above named John H. Osborne and Lydia C., his wife, and in due form of law acknowledged the above indenture to be their act and deed and desired that the same might be recorded as such, the said Lydia C., being of full age, and separate and apart from her said husband, by me examined, declared that she did voluntarily, and of her own free will and accord, seal, and as her act and deed deliver, the said indenture, without any coercion or compulsion of her said husband, the contents thereof having first been by me fully made known to her. Witness my hand and seal the day and year above said.

CHAS. F. HELFFNICHT, [L. S.]
Ald.

Recorded Nov. 29, 1859.

STATE OF PENNSYLVANIA, }
COUNTY OF CHESTER. } ss.

I, Richard H. Plank, Recorder of Deeds, &c., in and for said county and State, do hereby certify that the within, with the alterations, erasures and interlineations, is a true copy of a deed left for record in my office November 29, 1859, and recorded in Deed Book L6, Vol. 133, page 529.

Witness my hand and official seal January 28th, A. D. 1886.

R. H. PLANK,
Recorder.

Recorder's Seal. Com'n Pleas Seal.

I, J. Smith Futhey, President Judge of the fifteenth Judicial District of the commonwealth of Pennsylvania, composed of the county of Chester, do certify that the foregoing attestation is in due form and by the proper officer.

Witness my hand at West Chester, this 28th day of January, A. D. 1886.

J. SMITH FUTHEY,

COMMONWEALTH OF PENNSYLVANIA, }
CHESTER COUNTY. } ss.

Com'n Pleas Seal.

I, J. T. Carpenter, Prothonotary of the Court of Common Pleas of Chester county, certify that the Hon. J. Smith Futhey, whose name is signed to the foregoing certificate, was at the time the same bears date, and now is, President Judge of the Fifteenth Judicial District of the Commonwealth of Pennsylvania, composed of the county of Chester, duly commissioned and qualified, and that full faith and confidence should be given to all his official acts and attestations.

Witness my hand and official seal, at West Chester, the 28th day of January, A. D. 1886.

J. T. CARPENTER,
Prothonotary.

EXHIBIT No. 16.

THIS INDENTURE, made the twenty-eighth day of November, in the year of our Lord one thousand eight hundred and fifty-nine (A. D. 1859) between George W. Bowen, of the city of Philadelphia and State of Pennsylvania, of the one part, and John H. Osborne, of the same place, of the other part; whereas, the said George W. Bowen, in and by his certain obligation or writing obligatory, under his hand and seal duly executed, bearing even date herewith, stands bound unto the said John H. Osborne, in the sum of five thousand six hundred dollars, lawful money of the United States of America, conditioned for the payment of the just sum of twenty-eight hundred dollars, within eight years from the first day of April, A. D. 1859, together with lawful interest for the interest for the same, payable yearly, the first yearly payment of interest to be made on the first day of April, A. D. 1860, without any fraud or further delay; Provided, however, that if at any time default shall be made in payment of interest on the said principal sum for the space of one month after any annual payment thereof shall fall due, then and in such case the whole principal debt aforesaid shall, at the option of the said obligee, or his legal representatives, become forthwith due and recoverable at law, anything therein contained to the contrary thereof notwithstanding, without any fraud or further delay, as in and by the said herein before recited obligation and the condition therof, relation being thereunto had, may more fully and at large appear. Now this Indenture Witnesseth, that the said George W. Bowen, as well for and in consideration of the aforesaid debt or principal sum of twenty-eight hundred dollars, and for the better securing the payment of the same, with interest, unto the said John H. Osborne, his executors, administrators and assigns, in the discharge of the said hereinbefore recited obligation as for and in consideration of the further sum of one dollar unto him in hand well and truly paid by the said John H. Osborne, at and before the ensealing and delivery hereof, the receipt whereof is hereby acknowledged, hath

granted, bargained, sold, aliened, enfeoffed, released and confirmed, and by these presents doth grant, bargain, sell, alien, enfeoff, release and confirm unto the said John H. Osborne, his heirs and assigns, all that certain messuage or tract of land, situate in the township of Schuylkill, county of Chester, State of Pennsylvania aforesaid, bounded and described as follows: Beginning at a limestone corner of land of John Clift, (now Nicholas Sowden's,) and in a line of Matthias Pennypacker's land; thence north sixty-six degrees east, twelve and four tenths perches to a limestone corner of Joseph E. Anderson's land; thence along the same south seventy-nine and a half degrees east, fifteen and one-tenth perches to a corner of Jacob Hawk's land; thence along the same south three and a half degrees west twenty-nine and three-tenths perches to a post, and by the same south eighty-five degrees east fifty perches to a corner in a line of said Joseph D. Anderson's land; thence along the same south twenty-nine and a half degrees east forty perches to a corner in Paulding's bridge and Paoli road; thence along the same and lands of Jacob Rennard and John Morgan south nineteen and three fourths degrees west sixty-one and three tenths perches to a corner of land late of Elizabeth Rennard, deceased; thence along the same and lands of George Bloomhart north eighty-one degrees west, sixty-five and three-tenths perches to a stone in a public road leading from Paoli to Pickering's creek; thence along the same and lands of John Clift (now Sowden's) north sixteen and one-half degrees west, twenty-five and one-tenth perches to a rock; thence along the same north nine degrees west, forty-two perches to a stone, and north seven degrees east forty-eight and eight-tenths perches to the place of beginning. Containing fifty-two acres and one hundred and four perches of land, be the same more or less. Being the same premises which John H. Osborne and wife, and Patrick O'Reilly and wife, by indenture dated the 7th day of November, A. D. 1859, and intended forthwith to be recorded for the consideration money therein mentioned, a part whereof is intended hereby to be secured, granted and conveyed unto

the said George W. Bowen in fee, whereby a certain trust created by reason of the indenture of conveyance of the aforementioned tract to the said John H. Osborne and Patrick O'Reilly, dated December 8th, A. D. 1846, and recorded in the Recorder's Office of Chester county, in D6, Vol. 126, page 307, &c., became and was forever terminated and discharged. Together with all and singular the buildings, improvements, ways, waters, watercourses, rights, liberties, privileges, hereditaments and appurtenances whatsoever thereunto belonging or in any wise appertaining, and the reversions and remainders, rents, issues and profits thereof. To have and to hold the said messuage and tract of land above described, hereditaments and premises hereby granted or mentioned or intended so to be, with the appurtenances, unto the said John H. Osborne, his heirs and assigns, to the only proper use and behoof of the said John H. Osborne, his heirs and assigns, forever. Provided always, nevertheless, that if the said George W. Bowen, his heirs, exectors, administrators or assigns, do and shall well and truly pay or caused to be paid unto the said John H. Osborne, his executors, administrators or assigns, the aforesaid debt or principal sum of twenty-eight hundred dollars on the respective days and times herein before mentioned and appointed for payment of the same, together with lawful interest as aforesaid, without any fraud or further delay, and without any deduction, defalcation or abatement to be made of anything for or in respect of any taxes, charges, or assessments whatsoever, that then and from thence forth as well this present indenture, and the estate hereby granted, as the said hereinbefore recited obligation shall cease, determine and become void, anything hereinbefore contained to the contrary thereof in any wise notwithstanding. Provided further, in case of default in the payment of the interest as aforesaid, or any part thereof, that thereupon it shall be lawful for the said mortgagee, or his legal representatives, to sue out forthwith a writ or writs of scire facias upon this present indenture of mortgage, with the same force and effect as if twelve months next ensuing the last day whereon the principal moneys hereby secured ought

to be paid, according to the condition of the above recited obligation, had fully run out and expired, any law, usage or practice to the contrary notwithstanding.

In witness whereof, the said parties to these presents have interchangeably set their hands and seals hereunto, dated the day and year first above written.

GEO. W. BOWEN. [L. S.]

Sealed and delivered in the presence of us.

The words "one month" written over "thirty days" in eleventh line.

ROBERT D. COXE,
CHAS. F. HELFFNICHT.

On the twenty-eighth day of November, A. D. 1859, before me, an alderman in and for the city and county of Philadelphia, personally appeared the above named George W. Bowen, and in due form of law acknowledged the above indenture of mortgage to be his act and deed, in order that it might be recorded as such, according to law. Witness my hand and seal the day and year aforesaid.

CHAS. F. HELFFNICHT, [L. S.]

Recorded November 29, A. D. 1859, at 10 o'clock A. M.

STATE OF PENNSYLVANIA,
COUNTY OF CHESTER. } ss.

I, Richard H. Plank, Recorder of Deeds, &c., in and for said county and State, do hereby certify that the within, with the alterations, erasures and interlineations, is a true copy of a deed left for record in my office November 29th, A. D. 1859, and recorded in Mortgage Book M 2, Vol. 36, page 496; that said alterations, erasure and interlineations as they appear in the foregoing copy were made when the comparison between the original record and this copy was made. Witness my hand and official seal, January sixth (6th) A. D. 1886.

R. H. PLANK,
Recorder.

Recorder's Seal. Com'n Pleas Seal.

I, J. Smith Futhey, President Judge of the Fifteenth Judicial District of the Commonwealth of Pennsylvania, composed of the county of Chester, do certify that the foregoing attestation is in due form and by the proper officer.

Witness my hand at West Chester, this sixth day of January, A. D. 1886.

J. SMITH FUTHEY.

COMMONWEALTH OF PENNSYLVANIA, }
CHESTER COUNTY. } ss.

{Com'n Pleas Seal.} I, J. T. Carpenter, Prothonotary of the Court of Common Pleas of Chester county, certify that the Hon. J. Smith Futhey, whose name is signed to the foregoing certificate, was at the time the same bears date, and now is, President Judge of the Fifteenth Judicial District of the Commonwealth of Pennsylvania, composed of the county of Chester, duly commissioned and qualified, and that full faith and confidence should be given to all his official acts and attestations.

Witness my hand and official seal, at West Chester, the sixth day of January, A. D. 1886.

J. T. CARPENTER,
Prothonotary.

EXHIBIT No. 17.

LEBANON VALLEY RAILROAD.

CONTRACT FOR GRADING, MASONRY, TIMBER AND IRON WORK.

Articles of agreement made and concluded the twenty-fourth day of April, in the year of our Lord one thousand eight hundred and fifty-four, between Charles Tarrant and John H. Osborne of the first part, and Patrick O'Reilly of the second part, whereby it is covenanted and agreed,

TO-WIT:
42

The said Charles Tarrant and Jno. H. Osborne, of the first part, hereby covenant and agree, that they will furnish all the materials required, find at their own expense all the implements, and to do and perform all the labor necessary to construct and finish, in the most substantial and workmanlike manner, and to the entire satisfaction of the engineer in chief of said company, and according to his instructions transmitted from time to time through his assistants, the grading and masonry of Sections 14 to 26, both inclusive, of said railroad, and to complete the same by the first day of August, in the year of our Lord one thousand eight hundred and fifty-five, in all respects according to the following specification:

CLEARING AND GRUBBING, GRADUATION MASONRY, BRICK WORK, TIMBER AND IRON WORK, &c.

CLEARING AND GRUBBING:

From the space to be occupied by the Railway, and for a distance on either side of twelve feet beyond the side slopes, all trees and brushwood shall be cut, and, together with all perishable matter, shall be removed therefrom, and so disposed of as to do no unnecessary damage to the adjoining lands. Where the natural surface of the ground is more than four feet below the grade level, the trees are to be cut close to the ground, but when less than four feet, the roots and stumps are to be grubbed up and removed, as before specified.

GRADUATION.

On the regular formation of the Railway, in all its cuttings and embankments, also includes the excavations of foundations of all structures, formations of side drains, water channels, road approaches, side roads, sidings, branches, depot grounds, and all other excavations and embankments, which may be required in the construction of said Railway, and the same shall be performed in all re-

spects as may be directed by the engineer and his assistants, and when deemed necessary by said engineer, all vegetable matter, or swampy, unstable ground, shall be excavated, or otherwise prepared, so that a secure foundation for the road bed and works shall be procured. Previous to opening the cuttings, the vegetable mould, to a depth of four inches, shall be removed, and deposited beyond the slope stakes, to be afterwards spread on the finished slopes, and sown with grass seed, as the said engineer may direct.

The earth cuttings are to be formed true and even, with a slope of six inches from the center to the side, and to a base of thirty feet at the grade level, and with side slopes of one to one, unless otherwise ordered by the engineer.

The rock cuttings are to be twenty-eight feet at the base, excavated to a slope of one-fourth to one, and to slope from centre to the side ditches, so as to prevent pools of water from being formed on the road bed.

In all cuttings, side ditches shall be formed to such a depth as may be required, and these shall be opened as the work advances, to afford the proper drainage.

When the natural soil or earth immediately below the grade level is not suitable for the road bed, it shall be excavated to such additional depth as the engineer may direct.

All materials excavated from the cuttings shall be used in the formation of the embankments, unless orders to the contrary be given in writing by the engineer; and said engineer shall have full power to reserve from such materials, for the company's use, stone suitable for masonry, rip rap walling, or ballast, and all timber that shall be cut, as before specified, and the contractor shall remove the same to such point of deposit as may be ordered by the engineer. The price for hauling and depositing these materials shall be equal to the allowance for hauling a like quantity, the same distance, into the embankments.

When the excavations afford surplus material, and the engineer shall permit the same to be wasted, it shall be deposited adjacent to the railway in spoil banks, of not less than six feet in height, the slopes of which shall not

approach within ten feet of the crest of the excavation slope, or such spoil banks shall be made in the form and manner presented by the said engineer, as circumstances may require. The price for hauling from the cuttings each cubic yard per hundred feet into the embankment, in the line of the road, shall be full compensation for all embankments thus formed, the distance to be hauled being always regulated by the said engineer.

The embankments shall be formed of an uniform width of twenty-six feet on the grade line, with slopes of one-and-a-half to one. They shall be made in all cases as the engineer in charge may direct, (where practicable in layers,) and shall be raised above the grade level with such additions on the side slopes as said engineer shall see fit to order, and this allowance for shrinkage shall not be considered as adding to the number of cubic yards estimated in the embankments, but as necessary to make up such quantities to the true amount and will not therefore entitle the contractor to any additional payment for the same. Side cuttings (where it is required) shall be made under the express orders of the engineer in charge, and he will designate by suitable stakes, the position, to what extent, and how, the same shall be worked so that the least possible injury to property may result. All borrowing pits must be brought on the boundary lines to the ordinary earth slopes, and to be excavated in such manner as to avoid the possibility of stagnant water. The price bid for side cutting to include all expenses of depositing the same in the embankments of the railway or its appurtenances, as no allowance for hauling, either in this item, or in depositing of surplus material in spoil banks, will be made.

ROCK CUTTING.

Stratified Rock requiring sledging or blasting, shall be paid for as solid rock.

Rock which can be removed with a pick and the boulders not weighing more than half a ton, shall be paid for as loose rock.

Clay mixed with shingle, hard pan, gravel, shale or other hard material, excepting solid or loose rock, as above specified, shall be paid for as hard clay.

MASONRY.

Masonry shall be divided into the following classes:

1. Bridge Masonry.
2. Pier Masonry.
3. Bridge Arching.
4. Range Rubble Masonry.
5. Culvert Arching.
6. Brick work laid in Cement in Piers and Culverts.
7. Brick work laid in Cement in Arches.
8. Dry Stone Drains.
9. Vertical Walls.
10. Slope Walls.
11. Common Rubble Random Masonry.
12. Paving.

Bridge Masonry—Shall include all abuttments, Piers, and wing walls, over twelve feet, and not exceeding thirty feet in height.

Pier Masonry—Shall include all pier work, and all bridge masonry over thirty feet in height, if cut on beds and joints, and agreeable to the specification hereinafter mentioned.

Bridge Arching—Shall include all arching over twelve feet span in the clear.

Ranged Rubble Masonry—Shall include all abuttments, piers, and wing walls up to twelve feet in height to the rests or skew-backs, whether for cattle passes, culverts, farm bridge drains, backings, parapets, and spandrill walls for same.

Culvert Arching—Shall include all arches up to twelve feet span in the clear.

Plain Brick Work—Shall include all work laid in cement in piers and circular drains.

Brick Work in Arches—Shall include brick work laid in cement in pier arches, and brick arches of more than twelve feet span.

Dry Stone Drains—With opes of two feet at top, flagged with twelve inch flags, shall include all drains not arched.

Vertical Walling—Shall include all walls built to support the roadway and its appurtenances.

Slope Walling—Shall include all walls laid on the slope of embankments as protection against wash from floods.

FOUNDATIONS.

All foundations shall be subject to the inspection and approval of the engineer, and without this the masonry shall not be proceeded with. In cases where, in the opinion of the engineer, it will be expedient to use bearing piles for a foundation, the piles will be furnished, and the driving and the capping of the same will be done under a separate contract, or in such a manner as the said engineer may direct, and shall be excepted from this contract, when piles are used; after they have been driven and capped, the spaces around them shall be filled with loose stone, or as may be directed by said engineer. A floor of white oak plank shall be laid on the top timbers, and well treenailed to them. On this floor the masonry is to be commenced. In cases where bearing piles will not be used, a proper base shall be formed as said engineer may direct, on which pine or oak timbers shall be laid, and any spaces between them filled with gravel and well rammed down; on these timbers a floor of white oak plank shall be laid, and well secured by treenails to the same; for the part under the walls, spikes may be used instead of nails. To secure the foundations, if requisite, courses of sheet piling shall be driven and secured to the foundation timber, as said engineer may direct; and if, in his opinion, timber may be dispensed with, then the foundation shall be made in such manner as he may direct.

CULVERT DRAINS.

Shall in all cases have a good and substantial paving of stone, set on end, nine inches in depth, with cross walls

every fifteen feet, formed of curbstone 12x12 and three feet in length, bonded with the masonry of the abutment, the paving to be closely laid. The interstices between the larger stones to be filled with smaller stones, and the whole well rammed. The ends of culverts shall be secured from undermining in such manner as the engineer shall designate.

BRIDGE MASONRY.

Shall consist of either rock ashlar ranged work, rock ashlar broken ranged, or hammer dressed work, as the engineer may direct. The first shall be laid with stone of uniform thickness throughout each course; the second shall have uniform courses, the stretchers of which may be composed of one or two stones, to make up the required height of the courses; in either case the stones at their top and bottom face lines shall be chisel-drafted to a width of from one to two inches, allowing the remainder of the face of each stone to project roughly as it came from the quarry. The courses shall not be less than one foot in thickness, and shall decrease from the plinth course upwards; all the stones shall lie upon their natural beds, and shall be dressed when requisite to afford solidity and evenness in setting. The joints shall be vertical; the stretchers shall not be less than fifteen inches in the bed and they shall be laid in the proportion of two stretchers to one header. The headers shall not be less than four feet and shall retain their uniformity of thickness throughout this length. Bonding stones shall be laid connecting at least two headers in each course with the corresponding headers on the back of the work, and the spaces between these and the front stones shall be laid with solid well bedded rubble work, to an equal height with the face stones, which will receive from the engineer in charge the closest inspection, and the headers and stretchers before mentioned must be fully up to this specification.

PIER MASONRY.

Shall consist of rock, ashlar, or cut stone work, finely

dressed on the beds and joints, neatly and compactly set in ranged courses, with hearting wrought to their beds full and even with the hammer; the headers from the opposite faces to be so arranged as in the opinion of the engineer to form a perfect bond, and where practicable to lap, and to be at least two in every course on each face.

The headers and stretchers shall not be less than three feet long, and similar in other dimensions to those specified in Bridge Masonry, and as the engineer shall direct. Coping stone of twelve inches in thickness will in all cases be adopted, having a superficial area on beds of not less than eight feet. The engineer shall have power to use brick in any portion of the piers, or to unite the two materials in the construction of same, as he may deem expedient.

BRIDGE ARCHING.

Shall consist of two kinds; the first shall consist of hammer dressed sheeting not less than nine inches on soffitte, two feet in depth, and stretching at least two feet so as to form a perfect bond. The ring stones shall not be less than two feet and three and a quarter feet alternately in length, and to be cut to the pattern furnished by the engineers and champhered to a width of one and a half inches wide on face by one and a half inches deep, and to be set out three inches from the face of the abutments. The coping to be not less than eight, or more than twelve inches thick, and dressed on all sides.

The second quality of bridge arching shall consist of sheeting selected from the quarry, and laid with care, with soffitte of not less than six inches, and a depth of not less than eighteen inches, and to have no stone of less length than depth; all other materials to be similar to the preceding specification.

ALL CUT STONE.

For string courses, coping, and such like, will be measured only on the surfaces finished with the chisel.

RANGED RUBBLE WORK.

This masonry shall be laid in uniform courses, of not less than twelve inches. The face stones shall not in any case be less than six inches in thickness. There shall be at least two headers in each course, about four feet long, and not less than two-thirds of the height of the course in depth. All stones to be laid on their natural beds, and to have no more height than bed. The hearting to be formed of such proportions of large stones as the engineer may direct, and no rubbish or small stuff shall be used except for spalls, or filling up the interstices between the large stones.

N. B. It will be at the option of the engineer to adopt and combine in the same structure any of the foregoing classes of masonry, to be paid for at the contract prices for same, and the engineer shall decide as the work progresses to which class the work truly belongs, and the estimate shall be made according to such decision.

CULVERT ARCHING.

Shall be composed of sheeting taken from the most suitable quarries adjacent, and to be of such depth as to lay the full thickness of the arch. The work shall be well bonded, and the general dimension, which shall govern the sizes of the stone used, shall be given by the engineer to suit the circumstances. The ring stone shall not project as in other arches, except the keystone, which will project at least three inches, with a rock ashlar face, and drafted edges. The coping will be hammer dressed, and eight inches thick, unless otherwise ordered. The contractor shall include in the price bid the erection and subsequent removal of all centering and scaffolding required in the construction of all walls and arches of every description whatever.

BRICK WORK.

All bricks used shall be of the best quality, hard, well burned, evenly made, and of uniform size and others will

positively be rejected, and the contractor will be required to remove the same forthwith from the works. Brick shall not be laid until they have been inspected, and they shall be always set in best hydraulic cement. When required, hoop iron bonds will be used, and the iron shall be paid for at the engineer's estimate. It shall be optional with the engineer to use brick instead of stone, as a building material, in such places as he may consider expedient. In pier work, recesses and hollows, whenever worked in brick, will be deducted from the total quantities of such pier; and all piers built of brick shall be coped with twelve inches of cut stone coping, projecting six inches from the face of the wall, laid in cement, and clamped with iron. The arches shall be formed in concentric rings of half a brick thick, or in such other manner, as the engineer may direct, and he shall have power to order the string courses, coping, skew-backs, ring stones or quoins, of cut stone; and the same or as much as shall be done of them shall be paid for at the prices hereinafter mentioned.

RETAINING WALL.

Shall be of good rubble work, formed of stone of large size, well bonded throughout the entire thickness of the wall, and laid in lime mortar, with a twelve inch scabbled coping projecting six inches from the face. Care shall be taken to keep the due proportions, and to carry out the batter laid down on the plans furnished by the engineer. In walls of magnitude, the faces shall be strengthened by pilasters, of a width equal to about one-eighth of the height, and projecting eight to fifteen inches from the rest of the wall.

SLOPE WALLS

Will be used only on the slopes of embankments or cutting, as a protection against wash. The stone shall be rubble, laid on edge, at right angles to the face of the slope, and of such depth as may be required. This work resembles more a paving than a wall, and a handy laborer

can place it without difficulty into position; the stone used shall not be less in depth than the thickness of the wall and when of greater depth they shall be driven into the face of the slope till they correspond with the rest of the wall. In all fillings around the masonry, care shall be taken to use, as far as possible, small stones, spalls, quarry chips, gravel, and such other materials as shall be approved of by said engineer, and so to arrange them as to lessen or equalize the pressure of the earth against the walls, and also to facilitate the escape of water that might otherwise be retained to the prejudice of the masonry. Where necessary in the opinion of the engineer, said filling shall be consolidated with heavy rammers, as the work progresses.

All masonry to be carried up in a regular manner, and levelled off in each course, before the next is commenced.

MORTAR FOR MASONRY.

Mortar may be of two kinds, which will be designated as hydraulic cement and hydraulic lime mortar. Hydraulic cement mortar will be prepared with one part by measurement of best hydraulic cement and two parts of sharp clear sand, free from dirt, vegetable matter or clay; it must be thoroughly mixed and used within one hour after mixing.

Hydraulic lime mortar shall be made from one part by measurement of best hydraulic cement and one part from fresh unslacked lime well mixed, with four parts of clean sand, and must be used within four hours after mixing.

Hydraulic cement mortar shall be used in all cases where the masonry is much exposed to the action of running water, for wet foundations, and for pointing. Hydraulic lime mortar shall be used only on such work, or part of work, as may be designated by said engineer.

TIMBER.

All timber used in the construction of the bridge superstructure to be of the very best quality, straight grained, free from sap, knots, and windshakes.

IRON.

The cast iron in the bridges to be of the best grey metal, neatly finished and made to pattern, which will be included in the price bid. The wrought iron to be of the best cable refined, and to be provided and forged according to the direction of the engineer, and subject to his approval, and also to be included in the price bid.

TRACKLAYING.

The track shall be laid on twelve inches of ballast, with two thousand six hundred and forty sills per mile. The sills to be of white oak and rock oak, nine feet long and seven inches deep, with eight inches face. The workmanship will be performed by consolidating the sills with heavy hammers, according to the levels given before the iron is put in place, and a firm and uniform bearing thus secured. No earthy material will be permitted to be thrown upon the track from the ditches.

BALLAST.

Ballast will be composed either of durable stone broken so as to pass in any direction through a three inch ring, or of clean gravel approved of by the engineer before being used, and the contractor shall cause the gravel to be screened whenever the engineer shall direct. Cinders from the furnaces, if approved of, will be admitted, but no ballast will be allowed on the road until the road bed shall have been neatly trimmed and brought true to line and level, to the entire satisfaction of the engineer.

The gradation, masonry, bridge superstructure of the portion of the line contained in this contract shall be fully and finally completed and ready for track on the first day of August, 1855, under the penalty of forfeiting such moneys as may at that time remain due by the said Patrick O'Reilly, to said Charles Tarrant and John H. Osborne.

GENERAL REMARKS.

For a more full explanation of the form and dimensions of material and parts, and of the manner of constructing the work in all its details, plans, and (when necessary) bills of timber, iron and other materials will be furnished by said engineer, who will also give such directions from time to time, during the progress of the work, as may appear to him necessary and proper, in order to make the work perfect in all respects as contemplated in the foregoing specification, and such plans, bills and directions shall in every case be strictly complied with, or the same will be made good by the engineer, at the expense of said Charles Tarrant and John H. Osborne.

It is understood that the right of way over the said sections of railway shall be furnished, and further, that the right conferred by law on said railway company to enter adjacent lands for the purpose of obtaining materials therefrom, required for the construction of the railway, whether timber, earth or stone, shall be exercised whenever necessary for the benefit of said Charles Tarrant and John H. Osborne, with this condition, that any unnecessary damage done by said Charles Tarrant or John H. Osborne, or their men, will be assessed by the engineer and be deducted from the moneys due said Charles Tarrant or John H. Osborne under this contract; and said engineer shall not give a final estimate or certificate until the claims under this clause of the contract have been liquidated or provided for to his satisfaction.

It is agreed that no public or private road that crosses or intersects the line of said railway, or its appurtenant works, shall be obstructed by excavations, or other work, until directions shall be given by said engineer to complete the railroad across said road or highway, nor shall any crops of grain, grass or vegetables, nor fruit trees, nor dwelling houses, nor other buildings on said line of railroad be disturbed, unless by direction of said engineer. The said contractor shall be responsible for all damage done to premises through which the line of said sections of railroad runs, in consequence of leaving gates or fences

open, and also for all depredation on wood, fences, or other property by workmen in his employ, or by blasting rocks, so as to do damage to buildings and other property and no estimate of work shall be furnished by said engineer, until all damages of these descriptions are settled and provided for to his satisfaction.

And it is further agreed by said contractor, that the work hereby contracted to be done shall, as far as may be required by said engineer, be prosecuted so as to facilitate and not to incommode, the prosecution of contracts for adjoining or contiguous works, and the manner of terminating the work at the end of the section, herein contracted for, shall be according to the direction of said engineer.

It is further agreed, that this contract in every respect shall be prosecuted in such order, and at such places, and parts of the work, and at such time and seasons, as said engineer may direct, also in reference to a proper and economical use of materials for the work, and any unnecessary waste of materials shall be made good by said contractor.

It is hereby further agreed, that the work during its progress, and the material delivered for the same, shall be subject to the inspection of said engineer and his assistants, and also of any inspector or overseer who may be appointed by said engineer for that purpose.

It is further agreed, that if any materials brought on for the use of the work shall be condemned by said engineer as unsuitable for the same, the said contractor shall forthwith remove the said materials entirely away from the line of the work, as said engineer may direct, so as to effectually guard against their introduction into the same.

And the said contractor hereby further agrees to perform the several stipulations of this contract by themselves and workmen under their immediate superintendence, and that no sub-contract shall be made without the written approbation of said engineer, under penalty of forfeit of the work so sublet.

And it is further agreed, that if at any time, any overseer or workmen employed by said contractor shall be un-

faithful or incompetent, or shall have made exertions to produce disturbance, on this or any contract on said railroad, the said contractor, on being required by said engineer, shall forthwith discharge such person and not employ him on the work; nor shall the said contractor employ any other person who may have been dismissed for a similar cause, on any part of the line of said road.

And the said contractor hereby agrees, that he will perform the work under this contract as before specified, and will carry out the orders at all times, of the engineer, whether such orders relate to the general management of the work, or the increasing of the forces, as he may deem requisite; and further, that any alternations in the form or materials of said work, which may be directed in writing by said engineer, shall be made by said contractor as directed.

It is further agreed that if in the opinion of said engineer it shall be expedient to make alteration in the location of the line of road on said sections, the contractor shall conform to such alterations, but if the work should be thereby rendered more expensive in kind, he shall be entitled to such extra compensation as said engineer shall estimate to be just and equitable, and if in the opinion of said engineer it will be expedient to dispense with the whole or any part of the work hereby contracted for, the contractor on receiving instructions, shall discontinue any arrangements or progress on the work so directed to be dispensed with. The contractor shall be entitled to such extra compensation as said engineer may estimate to be just and reasonable for any outlay or progress he may have made for the work so dispensed with, but no allowance or claim shall be made for anticipated profits on work that may be so dispensed with.

To prevent all disputes it is hereby mutually agreed that the said engineer shall in all cases determine the amount or quantity of the several kinds of work which are to be paid for under this contract, and the amount of compensation at the rates herein provided for; and also that the said engineer shall in all cases decide every question which can or may arise, relative to the execution of this contract on the

part of said contractor, and his decision shall be final and conclusive and without appeal.

It is further agreed, that when the work shall be increased by the enlargement of any part of the same, or by any contingent work, which said engineer may deem necessary to facilitate the execution, or render the work in any particular point conformable to local circumstances, beyond what is contemplated in this contract, such increase or contingent work shall be paid for at the same rate as similar work herein contracted for, or if not similar to work herein contracted for, it shall be paid for as an extra item, according to the estimate of the engineer.

It is further agreed, that the said engineer shall have power to let all the bridges, culverts and viaducts, whether of stone, brick, iron or timber, apart and separate from the graduation contracts, and to allot the same to such persons as he may see fit to select.

It is further agreed, that the standard of measurement for graduation, masonry and brickwork, shall be the cubic yard.

It is further agreed, that in calculating the quantities of masonry, walling and excavation, the most rigid geometrical rules are to be applied thereto, any custom to the contrary notwithstanding.

And the said Patrick O'Reilly do hereby engage that, whenever this contract shall be wholly completed on the part of the said contractors, and the said engineer shall have certified the same, he will pay for said work as follows:

For grubbing and clearing timber, fifty dollars per acre.

For removing surface mould and soiling and sowing slopes, six cents per square yard.

For earth and other light materials excavated, sixteen cents per cubic yard.

For hard clay mixed with gravel and detached stone, twenty-two cents per cubic yard.

For excavation of solid rock requiring blasting or sledging, sixty-five cents per cubic yard.

For excavation of loose rock, shale or rotten rock, thirty-one cents per cubic yard.

For each cubic yard of the excavation hauled one hundred feet into the embankment of the railroad proper, approaches, &c., seven mills per one hundred feet haul.

For side cutting for embankments, eighteen cents per cubic yard.

For broken stone, gravel, or cinder, for ballast,. sixty cents per cubic yard.

For bridge masonry of rock ashlar ranged work, six and seventy-five one-hundredths dollars per cubic yard.

For bridge masonry hammer dressed and ashlar broken ranged, five and fifty one-hundredths dollars per cubic yard.

For pier masonry.

For bridge arching with hammer dressed sheeting, eight and twenty-five one-hundredths dollars per cubic yard.

For bridge arching with sheeting selected from quarry six and twenty-five one-hundredths dollars per cubic yard.

For ranged rubble masonry, three and fifty one-hundredths per cubic yard.

For culvert arching, four dollars per cubic yard.

For brick work in small culverts laid in cement, six dollars per cubic yard.

For brick work in arches.

For dry stone drains with hammered faces, two and fifty one-hundredths dollars per cubic yard.

For vertical walls.

For slope walls, one and ten one-hundredths dollars per cubic yard.

For common rubble random masonry, two dollars per cubic yard.

For paving, one and ten one-hundredths dollars per cubic yard.

For rip rap on embankments, eighty one-hundredths dollars per cubic yard.

For string courses, cut coping, fifty one-hundredths dollars per superficial foot.

For white pine in bridge superstructure dollars per M. feet, B. M.

For white oak in bridge superstructure, dollars per M. feet, B. M.

For white oak plank in bridge superstructure, dollars per M. feet, B. M.

For rough plank used in foundations, twenty-two dollars per M. feet, B. M.

For cast iron in place in the work, per lb.

For wrought iron in place in the work, per lb.

For painting, three coats best white lead,

For painting three coats, and sanding three coats, zinc paint,

For laying down track, including the furnishing of sills, dollars per mile.

For loading, hauling and distributing railroad bars and fastenings at nearest point of delivery, by teams, per ton per mile.

For loading and unloading ditto, at points to be designated, the company supplying power, per ton.

For all other work not specified, at the engineer's estimate.

The prices above specified are to be full compensation for all the materials and labor required to put the same into the work herein contracted for, and to complete the same in all respects as provided for in this contract.

In order to enable the contractor to prosecute the work advantageously, the said engineer shall make an estimate once per month, as the work progresses, of the work done; the said estimate shall not be required to be made by strict measurement, on unfinished work, but by measurement and estimating, so as to obtain an approximate result of the work done, and its value under this contract, as compared with the whole contract; but it shall not be required of said engineer to measure at all for work that is in an irregular form, but may estimate on his judgment of the value of same; and it is expressly understood, that an estimate shall be made only when the work is prosecuted agreeably to the provisions of this contract, and with such progress as is satisfactory to the said engineer; and in no case for a less sum than five hundred dollars, except at the discretion of the said engineer.

If, under the provisions of this contract, the said party of the first part shall, in the estimation of said engineer, be entitled to a payment for work done, prior to the end of any month, he shall, on or before the fifteenth day of the following month, certify to said Patrick O'Reilly the amount due under this contract, which shall be ninety-three per cent. of the amount of said estimated value of work performed. The remaining seven per cent. shall be retained by said Patrick O'Reilly as a guarantee for the faithful performance of all the stipulations and conditions herein contained. And it is further agreed, that said Patrick O'Reilly will pay the amount of said certificate, on presentation, as herein stipulated.

And it is further agreed, that if in the opinion of said engineer the said contractors shall neglect or refuse to prosecute the work, embraced in this contract, with sufficient energy to insure its completion within the time specified in the same, or violate any of the provisions, or perform the work in an improper manner, the said engineer may certify the same to the Board of Directors of the aforesaid company, and thereupon the said directors may declare the said contract abandoned and may proceed to contract for the work with any other person. On the abandonment of this contract as aforesaid, the contractors shall forfeit to said Patrick O'Reilly any moneys that may remain due and unpaid at the time, and also any amount of damages beyond said moneys that may be sustained by said Patrick O'Reilly for failure to commence the work; or having commenced, for failure to prosecute the same.

And the said contractors agree that the work herein contracted for shall be commenced within two weeks after being required by the company or their engineer, and that this contract shall be fully completed on their part by the first day of August, in the year of our Lord one thousand eight hundred and fifty-five.

And it is further agreed, that this contract shall be considered duly complied with when the said engineer has certified in writing to the same; and then, and not until then, will the said Patrick O'Reilly be liable for the payment

of the final balance and the percentage due on account of said contract.

And it is further agreed, that in the absence of the chief engineer aforesaid, the resident engineer having charge of the work embraced in this contract shall have full power, hereinbefore given to the chief engineer, and said resident engineer's orders shall be as implicitly obeyed as if they had emanated directly from the chief engineer.

This contract shall not be binding upon either party until signed by all parties thereto and attested by the signature of said chief engineer and affixing of the seals of said contracting parties.

In witness whereof, the parties to these presents have hereunto set their seals the day and year first above written.

CHARLES TARRANT, [s. l.]
JNO. H. OSBORNE, [s. l.]

P. O'REILLY.

Signed, sealed and delivered in the presence of
ISAAC LAKE.

RICH. B. OSBORNE,
Engineer in Chief.

EXHIBIT No. 18.

Statement of accounts between Patrick O'Keilly and John H. Osborne and Tarrant & Co.

EXHIBIT No. 19.

Current and final estimates of work on the L. V. R. Rd., by John Osborne and Tarrant & Co.

EXHIBIT No. 20.

Copy of final estimate of P. O'Reilly for work on L. V. R. Rd.

EXHIBIT No. 21.

$800. READING, Feb. 28th, 1855.

Ninety days after date I promise to pay to the order of Messrs. Tarrant & Co. eight hundred dollars, without defalcation for value received.

May 29, June 1. P. O'REILLY,
Contractor.

[Endorsed.]

Tarrant & Co.

EXHIBIT No. 20.

READING, PA., July 5, 1855.

Farmers' Bank of Reading, pay to Tarrant note or bearer, four hundred and thirty-eight and sixty-five one hundreths dollars.

P. O'REILLY.

$438.65. WOMELSDORF, January 1st, 1855.

Six months after date we promise to pay to the order of Smith & Brother, payable at the Farmers' Bank, of Reading, Pa., four hundred and thirty-eight and sixty-five one-hundreths dollars, without defalcation. Value received.

TARRANT & Co.

[Endorsed.]

SMITH & BRO.

EXHIBIT No. 23.

Five promissory notes of Tarrant & Co., paid by P. O'Reilly, amounting together to $3,094.13.

EXHIBIT No. 24.

Four promissory notes of Tarrant & Co., paid by P. O'Reilly, amounting together to $1,180.95.

EXHIBIT No. 25.

$480.29. READING, Pa., March 26th, 1856.

Sixty days after date we promise to pay to the order of Stichter & McKnight, at The Farmers Bank of Reading, four hundred and eighty dollars and twenty-nine cents, without defalcation, for value received.

TARRANT & Co.

[Endorsed.]

STICHTER & MCKNIGHT.

EXHIBIT NO. 26.

$282. READING, PA., Feby. 26th, 1856.

Ninety days after date, we promise to pay to the order of William Hoskins at the Farmers' Bank of Reading, two hundred and eighty-two dollars, without defalcation, for value received.

TARRANT & Co.

[Endorsed.]

WILLIAM HOSKINS.

EXHIBIT No. 27.

$1,472.72. READING, PA., March 27th, 1855.

Ninety days after date, we promise to pay to the order of P. O'Reilly, at The Farmers' Bank of Reading, fourteen hundred and seventy-two dollars and seventy-two cents without defalcation, for value received.

TARRANT & Co.

[Endorsed.]

P. O'REILLY.

EXHIBIT No. 28.

$2,666.66. PHILADA., August 2d, 1855.

Six months after date I promise to pay to the order of George W. Richards twenty-six hundred and sixty-six dollars and sixty-six cents, without defalcation, for value received.

Feby. 5. JNO. H. OSBORNE.

Payable at The Farmers' Bank of Reading.

[Endorsed.]

GEO. W. RICHARDS.

EXHIBIT No. 29.

Ledger of P. O'Reilly, marked L. V. R. Rd.

EXHIBIT No. 30.

Copies of sixty receipts from Receipt Book, Exhibit No. 9.

EXHIBIT No. 31.

Copy of C. Tarrant & Co's. account, from Ledger, Exhibit No. 29.

EXHIBIT No. 32.

Copy of account of John H. Osborne, from Ledger, Exhibit No. 29.

EXHIBIT No. 33.

Note of P. O'Reilly to J. H. Osborne, dated Oct. 8, 1857, for $411.31, at ninety days.

EXHIBIT No. 34.

LEBANON VALLEY RAILROAD.
Engineer's Office, Reading, 4 April, 1854.

MR. P. O'REILLY,
Contractor,

Sir: The duty devolving upon me as an officer of the company will oblige me to see that the prices generally upon which sub-contracts are made are full and sufficient to carry them through to completion. The sub-contracts must be made on forms to be supplied by the company, and the sub-contractors will be required to obey all orders emanating from this office without it being necessary for them to refer the same to you for your approval.

I desire that shanties may be built and arrangements immediately made for the commencement of the graduation on Sections 6, 8 and 12; 14 to 21 inclusive; 38 to 40 inclusive.

Contracts will be filled ready for signature of the sub-contractors before the first estimate day, the original proposal being lodged in this office for the purpose.

I approve of the following parties as sub-contractors for the sections herein mentioned, viz:

Owen O'Reilly & Co., for Sections 1 and 2, inclusive.

Matthew Reilly & Francis McCully, for Section 4.

E. and J. Kerns & Co., for Sections 7, 8, 9 and 10 inclusive.

Robert Merrigan, for Sections 11 and 12, inclusive.

Chas. Tarrant & Co., for Sections 14 to 26, inclusive.

P. McAdams & Co., for Sections 35 to 40, inclusive.

Barr & McGovern, for Sections 27, 28 and 29.

From what you have stated to me of the capability and energy of your brother, Mr. Owen O'Reilly, I am induced to entrust him with the contract of the Schuylkill Bridge. You will remember that nothing but the most persevering efforts, combined with good management, will enable you to have this work done in time, and immediate steps should be taken to prepare the requisite stone and other materials for its construction, so that all the masonry shall be well advanced by next November.

I am, sir, your ob' serv.,

RICHARD B. OSBORNE,

Eng'r.

EXHIBIT NO. 35.

LEBANON VALLEY RAILROAD,

ENGINEER'S OFFICE, READING, April 4th, 1854.

To MR. P. O'REILLY,

Contractor.

Sir:—At a meeting of the Board on the 3d instant, a resolution was passed approving of most of the contractors, whose names you submitted, and authorizing you to accept bids from the same and to let such portions, in such quantities as will meet my approval. You will therefore, without further notice, attend at my office, as I am prepared to act in the matter at once. There has been too much delay already in starting the heaviest sections, which with steady forces will occupy at least sixty weeks of working time to grade.

I am, sir, your obedient servant,

RICHARD B. OSBORNE.

EXHIBIT NO. 36.

ENGINEER'S DEPARTMENT,
LEBANON VALLEY R. R.,
READING, Sept. 6, 1854.

P. O'REILLY, ESQ.,
Contractor.

Dear Sir:—You are hereby directed to cut down the expenses of yonr sub-contractors for the present month and until further orders, as follows, viz:

Owen O'Reilly	$2,000 00
F. M. Cullagh	175 00
Mr. Collins	175 00
Mr. Kupp	1,100 00
Mr. Kearns	1,100 00
Mr. Merrigan	450 00
Mr. Crumlish	750 00
Mr. Barr	750 00
Mr. Young (not at work)	
Mr. Adams & Co	1,100 00
Messrs. Tarrant & Co	6,000 00
Total	13,600 00

Respectfully, &c.
M. E. LYONS,
Asst. Engineer,
L. V. R. R.

EXHIBIT No. 37.

LEBANON VALLEY RAIL ROAD.
ENGINEER'S OFFICE, READING, Sep. 5, 1855.

MR. P. O'REILLY,
Contractor.

Dear Sir:—My associate, Mr. Lyons, has informed me that his instructions, given thro' the Supt. of masonry, in reference to the foundations of the pier No. 2. in the Schl. river, have been set aside by you; that you conceived the

responsibility rested on you. From your respect for the orders of your engineers, as usually evinced, I am free to believe that the erroneous idea of your responsibility has been the cause of this want of proper discipline. When the engineers appear personally, or by their agents or assistants, on work, and order and control the whole operations, they at once effectually relieve the contractor from all responsibility as to the results of such operations. More particularly if the contractor gives contrary opinion, but his duty is to obey the orders which I need not tell you is the only way the work can progress properly. Mr. Lyons' orders are my orders, and while I am sure Mr. L. will exact nothing that is unreasonable you can see that unless his instructions are carried out, I cannot look to him for the proper discharge of the responsible duties which devolve on him.

I expect for the future you will understand the relative positions occupied by the engineers and the contractors on this line. We shall always be glad to get your views and to follow them as far as we deem them correct.

Yours truly,

RICHARD B. OSBORNE,
Engineer.

EXHIBIT No. 38.

READING, June 15th, 1856.

RICH. B. OSBORNE, ESQ.,

Chief Engr. L. V. R. R.

Dear Sir:—I would beg leave to call your attention to the increase of price on H. S. Kupp, contractor, and also the advance of price to several of the sub-contractors on masonry. I have refused to pay any advances on the contract price for rock, therefore I hope you will not persist in giving it, as I do not think it right there should be any interference between sub-contractors and myself. I regret

to be compelled to call your attention to this matter, but it has been a source of great annoyance to me during your absence.

Your Obt. St.,

P. O'Reilly.

EXHIBIT No. 39.

Womelsdorf, Nov. 6th, 1855.

P. O'Reilly, Esq.,

Contractor.

Dear Sir: Enclosed I send you a statement showing the estimated amount of material moved by me on five of my rock sections for the 5 months ending Oct. 31st, 1855. You will observe by an examination of this statement that I have lost in this period and on these sections $9,156.92. The expenses are taken from my books made out as I represented when I placed this matter before you. They are not full and therefore give a more favorable view than is really the case. Things have changed since the work was taken by me and it is idle to expect that the prices which I bid will carry me out. Whatever advantages I possessed have been in a very great degree rendered void by you not permitting the work to progress last winter, when powder was 100 per cent. less than it is now and labor could be had for 25 per cent. less than it is likely to be this winter. Feed too has advanced and I have been paying for some time as high as $24 a ton for Hay or about $9 over what we paid last year. Apart, therefore, from the obligation which I conceive rests on you to aid and assist in pushing through the work, it is not in my power to continue the heavy expenditures which I have been doing for the last 6 months. That I have hitherto done so is explained by my having taken the money which a profitable section has thrown into my hands. I applied it to these rock sections, leaving all the indebtedness incurred for the car sections to accumulate. You must be aware, too, that one of these sections has not been as profitable as it

should have been to cover the large outlay required—and this section thro' clay was the only one driven last winter, whilst those containing rock were lying idle. But you are as sensible of these facts as I am, therefore I need not occupy your time with a recital of them. What I expect you to do under these circumstances is to make me such an allowance as will cover the loss I have up to 31st Oct. sustained and advance my prices on the Rock to 85c. per yard for the future. By doing this I shall be enabled to pay for my 70 or 80 cars and to prosecute my work to completion. I shall take no action till I hear from you, but I have written and spoken so much and have heretofore received so little satisfaction that self defence obliges me to insist on your giving me a positive answer, and I shall therefore await your reply.

I am, dear sir, yours truly,

J. H. OSBORNE.

EXHIBIT No. 40.

CONTRACT FOR GRADING, MASONRY, TIMBER AND IRON WORK.

Articles of agreement made and concluded the first day of April, in the year of our Lord one thousand eight hundred and fifty-four, Patrick O'Reilly, of the city of Reading, Berks county, State of Pennsylvania, of the first part, and the Lebanon Valley Railroad Company of the second part, whereby it is covenanted and agreed, TO-WIT:

The said Patrick O'Reilly, of the first part, hereby convenants and agrees that he will furnish all the materials required, find at his own expense all the implements, and to do and perform all the labor necessary to construct and finish, in the most substantial and workmanlike manner, and to the entire satisfaction of the engineer in chief of said company, and according to his instructions transmttted from time to time through his assistants, the grading, masonry, bridge superstructure and track laying, and other appurtenant work, of Sections one to forty, inclusive, of said railroad, and to complete the same

by the first day of January, in the year of our Lord one thousand eight hundred and fifty-seven, or failing therein he, the said Patrick O'Reilly, of Reading, binds himself in a bond at even date with this instrument, to pay unto the said party of the second part the penal sum of one hundred thousand dollars, the work to be in all respects according to the following specification:

CLEARING AND GRUBBING, GRADUATION MASONRY, BRICK WORK, TIMBER AND IRON WORK, &c.

CLEARING AND GRUBBING:

From the space to be occupied by the Railway, and for a distance on either side of twelve feet beyond the side slopes, all trees and brushwood shall be cut, and, together with all perishable matter, shall be removed therefrom, and so disposed of as to do no unnecessary damage to the adjoining lands. Where the natural surface of the ground is more than four feet below the grade level, the trees are to be cut close to the ground, but when less than four feet, the roots and stumps are to be grubbed up and removed, as before specified.

GRADUATION:

Or the regular formation of the Railway, in all its cuttings and embankments, also includes the excavations of foundations of all structures, formations of side drains, water channels, road approaches, side roads, sidings, branches, depot grounds, and all other excavations and embankments, which may be required in the construction of said Railway, and the same shall be performed in all respects as may be directed by the engineer and his assistants, and when deemed necessary by said engineer, all vegetable matter, or swampy, unstable ground, shall be excavated, or otherwise prepared, so that a secure foundation for the road bed and works shall be procured. Previous to opening the cuttings, the vegetable mould, to a depth of four inches, shall be removed, and deposited be-

yond the slope stakes, to be afterwards spread on the finished slopes, and sown with grass seed, as the said engineer may direct.

The earth cuttings are to be formed true and even with a slope of six inches from the center to the side, and to a base of thirty feet at the grade level, and with side slopes af one to one, unless otherwise ordered by the engineer.

The rock cuttings are to be twenty-eight feet at the base, excavated to a slope of one-fourth to one, and to slope from center to the side ditches, so as to prevent pools of water from being formed on the road bed.

In all cuttings, side ditches shall be formed to such a depth as may be required, and these shall be opened as the work advances, to afford the proper drainage.

When the natural soil or earth immediately below the grade level is not suitable for the road bed, it shall be excavated to such additional depth as the engineer may direct.

All materials excavated from the cuttings shall be used in the formation of the embankments, unless orders to the contrary be given in writing by the engineer; and said engineer shall have full power to reserve from such materials, for the company's use, stone suitable for masonry, rip rap walling, or ballast, and all timber that shall be cut, as before specified, and the contractor shall remove the same to such point of deposit as may be ordered by the engineer. The price for hauling and depositing these materials shall be equal to the allowance for hauling a like quantity, the same distance, into the embankments.

When the excavations afford surplus material, and the engineer shall permit the same to be wasted, it shall be deposited adjacent to the railway in spoil banks, of not less than six feet in height, the slopes of which shall not approach within ten feet of the crest of the excavation slope, or such spoil banks shall be made in the form and manner presented by the said engineer, as circumstances may require. The price for hauling from the cuttings each cubic yard per hundred feet into the embankment, in the line of the

road, shall be full compensation for all embankments thus formed, the distance to be hauled being always regulated by the said engineer.

The embankments shall be formed of an uniform width of twenty-six feet on the grade line, with slopes of one-and-a-half to one. They shall be made in all cases as the engineer in charge may direct, (where practicable in layers,) and shall be raised above the grade level with such additions on the side slopes as said engineer shall see fit to order, and this allowance for shrinkage shall not be considered as adding to the number of cubic yards estimated in the embankments, but as necessary to make up such quantities to the true amount and will not therefore entitle the contractor to any additional payment for the same. Side cuttings (where it is required) shall be made under the express orders of the engineer in charge, and he will designate by suitable stakes, the position, to what extent, and how, the same shall be worked so that the least possible injury to property may result. All borrowing pits must be brought on the boundary lines to the ordinary earth slopes, and to be excavated in such manner as to avoid the possibility of stagnant water. The price bid for side cutting to include all expenses of depositing the same in the embankments of the railway, or its appurtenances, as no allowance for hauling, either in this item, or in depositing of surplus material in spoil banks, will be made.

ROCK CUTTING.

Stratified Rock requiring sledging or blasting, shall be paid for as solid rock.

Rock which can be removed with a pick and the boulders not weighing more than half a ton, shall be paid for as loose rock.

Clay mixed with shingle, hard pan, gravel, shale or other hard material, excepting solid or loose rock, as above specified, shall be paid for as hard clay.

MASONRY.

Masonry shall be divided into the following classes :

1. Bridge Masonry.
2. Pier Masonry.
3. Bridge Arching.
4. Range Rubble Masonry.
5. Culvert Arching.
6. Brick work laid in Cement in Piers and Culverts.
7. Brick work laid in Cement in Arches.
8. Dry Stone Drains.
9. Vertical Walls.
10. Slope Walls.
11. Common Rubble Random Masonry.
12. Paving.

Bridge Masonry—Shall include all abutments, piers, and wing walls, over twelve feet, and not exceeding thirty feet in height.

Pier Masonry—Shall include all pier work, and all bridge masonry over thirty feet in height, if cut on beds and joints, and agreeable to the specification hereinafter mentioned.

Bridge Arching—Shall include all arching over twelve feet span in the clear.

Ranged Rubble Masonry—Shall include all abutments, piers, and wing walls up to twelve feet in height, to the rests or skew-backs, whether for cattle passes, culverts, farm bridge drains, backings, parapets, and spandrill walls for same.

Culvert Arching—Shall include all arches up to twelve feet span in the clear.

Plain Brick Work—Shall include all work laid in cement in piers and circular drains.

Brick Work in Arches—Shall include brick work laid in cement in pier arches, and brick arches of more than twelve feet span.

Dry Stone Drains—With opes of two feet at top, flagged with twelve inch flags, shall include all drains not arched.

Vertical Walling—Shall include all walls built to support the roadway and its appurtenances.

Slope Walling—Shall include all walls laid on the slope of embankments as protection against wash from floods.

FOUNDATIONS.

All foundations shall be subject to the inspection and approval of the engineer, and without this the masonry shall not be proceeded with. In cases where, in the opinion of the engineer, it will be expedient to use bearing piles for a foundation, the piles will be furnished, and the driving and the capping of the same will be done under a separate contract, or in such a manner as the said engineer may direct, and shall be excepted from this contract, when piles are used; after they have been driven and capped, the spaces around them shall be filled with loose stone, or as may be directed by said engineer. A floor of white oak plank shall be laid on the top timbers, and well treenailed to them. On this floor the masonry is to be commenced. In cases where bearing piles will not be used, a proper base shall be formed as said engineer may direct, on which pine or oak timbers shall be laid, and any spaces between them filled with gravel and well rammed down; on these timbers a floor of white oak plank shall be laid, and well secured by treenails to the same; for the part under the walls, spikes may be used instead of nails. To secure the foundations, if requisite, courses of sheet piling shall be driven and secured to the foundation timber, as said engineer may direct; and if, in his opinion, timber may be dispensed with, then the foundation shall be made in such manner as he may direct.

CULVERT DRAINS.

Shall in all cases have a good and substantial paving of stone, set on end, nine inches in depth, with cross walls every fifteen feet, formed of curbstone 12x12 and three feet in length, bonded with the masonry of the abutment, the paving to be closely laid. The interstices between the larger stones to be filled with smaller stones, and the whole well rammed. The ends of culverts shall be secured

from undermining, in such a manner as the engineer shall designate.

BRIDGE MASONRY.

Shall consist of either rock ashlar ranged work, rock ashlar broken ranged, or hammer dressed work, as the engineer may direct. The first shall be laid with stone of uniform thickness throughout each course; the second shall have uniform courses, the stretchers of which may be composed of one or two stones, to make up the required height of the courses; in either case the stones at their top and bottom face lines shall be chisel-drafted to a width of one to two inches, allowing the remainder of the face of each stone to project roughly, as it came from the quarry. The courses shall not be less than one foot in thickness, and shall decrease from the plinth course upwards; all the stones shall lie upon their natural beds, and shall be dressed when requisite to afford solidity and evenness in setting. The joints shall be vertical; the stretchers shall not be less than fifteen inches in the bed and they shall be laid in the proportion of two stretchers to one header. The headers shall not be less than four feet, and shall retain their uniformity of thickness throughout this length. Bonding stones shall be laid connecting at least two headers in each course with the corresponding headers on the back of the work, and the spaces between these and the front stones shall be laid with solid well bedded rubble work, to an equal height with the face stones, which will receive from the engineer in charge the closest inspection, and the headers and stretchers before mentioned must be fully up to this specification.

PIER MASONRY.

Shall consist of rock, ashlar, or cut stone work, finely dressed on the beds and joints, neatly and compactly set in ranged courses, with hearting wrought to their beds full and even with the hammer; the headers from the opposite faces to be so arranged as in the opinion of the en-

gineer to form a perfect bond, and where practicable to lap, and to be at least two in every course on each face.

The headers and stretchers shall not be less than three feet long, and similar in other dimensions to those specified in Bridge Masonry, and as the engineer shall direct. Coping stone of twelve inches in thickness will in all cases be adopted, having a superficial area on beds of not less than eight feet. The engineer shall have power to use brick in any portion of the piers, or to unite the two materials in the construction of same, as he may deem expedient.

BRIDGE ARCHING.

Shall consist of two kinds; the first shall consist of hammer dressed sheeting not less than nine inches on soffitte, two feet in depth, and stretching at least two feet so as to form a perfect bond. The ring stones shall not be less than two feet and three and a quarter feet alternately in length, and to be cut to the pattern furnished by the engineers and champhered to a width of one and a half inches wide on face by one and a half inches deep, and to be set out three inches from the face of the abutments. The coping to be not less than eight, or more than twelve inches thick, and dressed on all sides.

The second quality of bridge arching shall consist of sheeting selected from the quarry, and laid with care, with soffitte of not less than six inches, and a depth of not less than eighteen inches, and to have no stone of less length than depth; all other materials to be similar to the preceding specifications.

ALL CUT STONE

For string courses, coping and such like, will be measured only on the surfaces finished with the chisel.

RANGED RUBBLE WORK.

This masonry shall be laid in uniform courses, of not less than twelve inches. The face stones shall not in any case be less than six inches in thickness. There shall be

at least two headers in each course, about four feet long, and not less than two-thirds of the height of the course in depth. All stones to be laid on their natural beds, and to have no more height than bed. The hearting to be formed of such proportions of large stones as the engineer may direct, and no rubbish or small stuff shall be used except for spalls, or for filling up the interstices between the large stones.

N. B. It will be at the option of the engineer to adopt and combine in the same structure any of the foregoing classes of masonry, to be paid for at the contract prices for same, and the engineer shall decide as the work progresses to which class the work truly belongs, and the estimate shall be made according to such decision.

CULVERT ARCHING

Shall be composed of sheeting taken from the most suitable quarries adjacent, and to be of such depth as to lay the full thickness of the arch. The work shall be well bonded, and the general dimension, which shall govern the sizes of the stone used, shall be given by the engineer to suit the circumstances. The ring stone shall not project as in other arches, except the keystone, which will project at least three inches, with a rock ashlar face, and drafted edges. The coping will be hammer dressed, and eight inches thick, unless otherwise ordered. The contractor shall include in the price bid the erection and subsequent removal of all centering and scaffolding required in the construction of all walls and arches of every description whatever.

BRICK WORK.

All bricks used shall be of the best quality, hard, well burned, evenly made, and of uniform size; all others will positively be rejected, and the contractor will be required to remove the same forthwith from the works. Brick shall not be laid until they have been inspected, and they shall be always set in best hydraulic cement. When required, hoop iron bonds will be used, and the iron shall be

paid for at the engineer's estimate. It shall be optional with the engineer to use brick instead of stone, as a building material, in such places as he may consider expedient. In pier work, recesses and hollows, whenever worked in brick, will be deducted from the total quantities of such pier; and all piers built of brick shall be coped with twelve inches of cut stone coping, projecting six inches from the face of the wall, laid in cement, and clamped with iron. The arches shall be formed in concentric rings of half a brick thick, or in such other manner as the engineer may direct, and he shall have power to order the string courses, coping, skew-backs, ring stones or quoins, of cut stone; and the same or as much as shall be done of them shall be paid for at the prices hereinafter mentioned.

RETAINING WALL.

Shall be of good rubble work, formed of stone of large size, well bonded throughout the entire thickness of the wall, and laid in lime mortar, with a twelve-inch scabbled coping projecting six inches from the face. Care shall be taken to keep the due proportions, and to carry out the batter laid down on the plans furnished by the engineer. In walls of magnitude, the faces shall be strengthened by pilasters, of a width equal to about one-eighth of the height, and projecting eight to fifteen inches from the rest of the wall.

SLOPE WALLS

Will be used only on the slopes of embankments or cutting, as a protection against wash. The stone shall be rubble, laid on edge, at right angles to the face of the slope, and of such depth as may be required. This work resembles more a paving than a wall, and a handy laborer can place it without difficulty in position; the stone used shall not be less in depth than the thickness of the wall and when of greater depth they shall be driven into the face of the slope till they correspond with the rest of the wall. In all fillings around the masonry, care shall be

taken to use, as far as possible, small stones, spalls, quarry chips, gravel, and such other materials as shall be approved of by said engineer, and so to arrange them as to lessen or equalize the pressure of the earth against the walls, and also to facilitate the escape of water that might otherwise be retained to the prejudice of the masonry. When necessary in the opinion of the engineer, said filling shall be consolidated with heavy rammers, as the work progresses.

All masonry to be carried up in a regular manner, and levelled off in each course, before the next is commenced.

MORTAR FOR MASONRY.

Mortar may be of two kinds which will be designated as hydraulic cement and hydraulic lime mortar. Hydraulic cement mortar will be prepared with one part by measurement of best hydraulic cement and two parts of sharp clear sand, free from dirt, vegetable matter or clay; it must be thoroughly mixed and used within one hour after mixing.

Hydraulic lime mortar shall be made from one part by measurement of best hydraulic cement and one part from fresh unslacked lime well mixed, with four parts of clean sand, and must be used within four hours after mixing.

Hydraulic cement water shall be used in all cases where the masonry is much exposed to the action of running water, for wet foundations and for pointing. Hydraulic lime mortar shall be used only on such work, or part of work, as may be designated by said engineer.

TIMBER.

All timber used in the construction of the bridge superstructure to be of the very best quality, straight grained, free from sap, knots, and windshakes.

IRON.

The cast iron in the bridges to be of the best grey

metal, neatly finished and made to pattern, which will be included in the price bid. The wrought iron to be of the best cable refined, and to be provided and forged according to the direction of the engineer, and subject to his approval, and also to be included in the price bid.

TRACKLAYING.

The track shall be laid on twelve inches of ballast, with two thousand six hundred and forty sills per mile. The sills to be of white oak and rock oak, nine feet long and seven inches deep, with eight inches face. The workmanship will be performed by consolidating the sills with heavy rammers, according to the levels given before the iron is put in place, and a firm and uniform bearing thus secured. No earthy material will be permitted to be thrown upon the track from the ditches.

BALLAST.

Ballast will be composed either of durable stone broken so as to pass in any direction through a three inch ring, or of clean gravel approved of by the engineer before being used, and the contractor shall cause the gravel to be screened whenever the engineer shall direct. Cinders from the furnaces, if approved of, will be admitted, but no ballast will be allowed on the road until the road bed shall have been neatly trimmed and brought true to line and level, to the entire satisfaction of the engineer.

The gradation, masonry, bridge superstructure of the portion of the line contained in this contract shall be fully and finally completed and ready for public travel on

under the penalty of forfeiting such moneys as may at that time remain due by the said
to said

GENERAL REMARKS.

For a more full explanation of the form and dimensions of material and parts, and of the manner of constructing the work in all its details, plans, and (when necessary) bills of timber, iron and other materials will be furnished by said engineer, who will also give such directions from time to time, during the progress of the work, as may appear to him necessary and proper, in order to make the work perfect in all respects, as contemplated in the foregoing specification, and such plans, bills and directions shall in every case be strictly complied with, or the same will be made good by the engineer, at the expense of said contractor.

It is understood that the right of way over the said sections of railway shall be furnished, and further, that the right conferred by law on said railway company to enter adjacent lands for the purpose of obtaining materials therefrom, required for the construction of the railway, whether timber, earth or stone, shall be exercised whenever necessary for the benefit of said contractor, with this condition, that any unnecessary damage done by said contractor, or his men, will be assessed by the engineer and be deducted from the moneys due said contractor, under this contract; and said engineer shall not give a final estimate or certificate until the claims under this clause of the contract have been liquidated or provided for to his satisfaction.

It is agreed that no public or private road that crosses or intersects the line of said railway, or its appurtenant works, shall be obstructed by excavations, or other work, until directions shall be given by said engineer to complete the railroad across said road or highway, nor shall any crops of grain, grass or vegetables, nor fruit trees, nor dwelling houses, nor other buildings on said line of railroad be disturbed, unless by direction of said engineer. The said contractor shall be responsible for all damage done to premises through which the line of said sections of railroad runs, in consequence of leaving gates or fences open, and also for all depredations on wood,

fences, or other property by workmen in his employ, or by blasting rocks, so as to do damage to buildings and other property and no estimate of work shall be furnished by said engineer, until all damages of these descriptions are settled and provided for to his satisfaction.

And it is further agreed by said contractor, that the work hereby contracted to be done shall, as far as may be required by said engineer, be prosecuted so as to facilitate, and not to incommode, the prosecution of contracts for adjoining or contiguous works, and the manner of terminating the work at the end of the section, herein contracted for, shall be according to the direction of said engineer.

It is further agreed, that this contract in every respect shall be prosecuted in such order, and at such places, and parts of the work, and at such time and seasons, as said engineer may direct, also in reference to a proper and economical use of materials for the work, and any unnecessary waste of materials shall be made good by said contractor.

It is hereby further agreed, that the work during its progress, and the material delivered for the same, shall be subject to the inspection of said engineer and his assistants, and also of any inspector or overseer who may be appointed by said engineer for that purpose.

It is further agreed, that if any materials brought on for the use of the work shall be condemned by said engineer as unsuitable for the same, the said contractor shall forthwith remove the said materials entirely away from the line of the work, as said engineer may direct, so as to effectually guard against their introduction into the same.

And the said contractor hereby further agrees to perform the several stipulations of this contract by themselves and workmen under their immediate superintendence, and that no sub-contract shall be made without the written approbation of said engineer, under penalty of forfeit of the work so sublet.

And it is further agreed, that if at any time, any overseer or, workmen employed by said contractor shall be unfaithful or incompetent, or shall have made exertions to produce disturbance, on this or any contract on said rail-

road, the said contractor, on being required by said engineer, shall forthwith discharge such person and not employ him on the work; nor shall the said contractor employ any other person who may have been dismissed for a similar cause, on any part of the line of said road.

And the said contractor hereby agrees that he will perform the work under this contract as before specified, and will carry out the orders, at all times, of the engineer, whether such orders relate to the general management of the work, or the increasing of the forces, as he may deem requisite; and further, that any alterations in the form or materials of said work, which may be directed in writing by said engineer, shall be made by said contractor as directed.

It is further agreed, that if in the opinion of said engineer it shall be expedient to make alteration in the location of the line of road on said sections, the contractor shall conform to such alterations, but if the work should be thereby rendered more expensive in kind, he shall be entitled to such extra compensation as said engineer shall estimate to be just and equitable, and if in the opinion of said engineer it will be expedient to dispense with the whole or any part of the work hereby contracted for, the contractor, on receiving instructions, shall discontinue any arrangements or progress on the work so directed to be dispensed with. The contractor shall be entitled to such extra compensation as said engineer may estimate to be just and reasonable for any outlay or progress he may have made for the work so dispensed with, but no allowance or claim shall be made for anticipated profits on work that may be so dispensed with.

To prevent all disputes, it is hereby mutually agreed, that the said engineer shall in all cases determine the amount or quantity of the several kinds of work which are to be paid for under this contract, and the amount of compensation at the rates herein provided for; and also that the said engineer shall in all cases decide every question which can or may arise, relative to the execution of this contract on the part of said contractor, and his decision shall be final and conclusive and without appeal.

It is further agreed, that when the work shall be increased by the enlargement of any part of the same, or by any contingent work, which said engineer may deem necessary to facilitate the execution, or render the work in any particular point comformable to local circumstances, beyond what is contemplated in this contract, such increase or contingent work shall be paid for at the same rate as similar work herein contracted for, or if not similar to work herein contracted for, it shall be paid for as an extra item, according to the estimate of the engineer.

It is further agreed, that the said engineer shall have power to let all the bridges, culverts and viaducts, whether of stone, brick, iron or timber, apart and separate from the graduation contracts, and to allot the same to such persons as he may see fit to select.

It is further agreed that the standard of measurement for graduation, masonry, and brickwork, shall be the cubic yard.

It is further agreed, that in calculating the quantities of masonry, walling, and excavation, the most rigid geometrical rules are to be applied thereto, any custom to the contrary notwithstanding.

And the said company do hereby engage that whenever this contract shall be wholly completed on the part of the said contractors, and the said engineer shall have certified the same, they will pay for said work as follows:

For grubbing and clearing timber fifty dollars per acre.

For removing surface mould and soiling and sowing slopes, seven cents per square yard.

For earth and other light materials excavated, eighteen and a half cents per cubic yard.

For hard clay mixed with gravel and detached stone, twenty-five cents per cubic yard.

For excavation of solid rock requiring blasting or sledging, seventy-three cents per cubic yard.

For excavation of loose rock, shale or rotten rock thirty-eight cents per cubic yard.

For each cubic yard of the excavation hauled one hundred feet into the embankment of the railroad proper, approaches, &c., eight and a half mills per cubic yard.

For side cuttings for embankments, twenty-one cents per cubic yard.

For broken stone, gravel or cinder, for ballast, sixty cents per cubic yard.

For bridge masonry of rock ashlar ranged work, seven and a half dollars per cubic yard.

For bridge masonry hammer dressed and ashlar broken ranged, six and thirty one-hundredths dollars per cubic yard.

For pier masonry.

For bridge arching with hammer dressed sheeting, nine and three-quarters dollars per cubic yard.

For bridge arching with sheeting selected from quarry, seven and a quarter dollars per cubic yard.

For ranged rubble masonry, three and three-quarters dollars per cubic yard.

For culvert arching, four and a half dollars per cubic yard.

For brick work in piers and culverts laid in cement, six and a half dollars per cubic yard.

For brick work in arches, seven and a half dollars per cubic yard.

For dry stone drains with hammered faces, three dollars per cubic yard.

For vertical walls, three and an eighth dollars per cubic yard.

For slope walls, one and a half dollars per cubic yard.

For common rubble random masonry, two dollars per cubic yard.

For paving, one and forty one-hundredths dollars per cubic yard.

For rip rap on embankments, one dollar per cubic yard.

For string courses, cut coping, fifty-five cents per superficial foot.

For white pine in bridge superstructures, thirty-six dollars per M. feet, B. M.

For white oak in bridge superstructure, forty dollars per M. feet, B. M.

For white oak plank in bridge superstructure, twenty-eight dollars per M. feet, B. M.

For rough plank used in foundations, twenty-five dollars per M. feet, B. M.

For cast iron in place in the work, four cents per lb.

For wrought iron in place in the work, seven and a half cents per lb.

For painting, three coats best white lead, twenty cents per square yard.

For painting three coats, and sanding three coats, zinc paint, thirty-two cents per square yard.

For laying down track, including the furnishing of sills, seventeen hundred and twenty-five dollars per mile.

For loading, hauling and distributing railroad bars and fastenings at nearest point of delivery, by teams, thirty cents per ton per mile.

For loading and unloading ditto, at points to be designated, the company supplying cars and power, forty-five cents per ton.

For all other work not specified, at the engineer's estimate.

The prices above specified are to be full compensation for all the materials and labor required to put the same into the work herein contracted for, and to complete the same in all respects as provided for in this contract.

In order to enable the contractor to prosecute the work advantageously, the said engineer shall make an estimate once per month, as the work progresses, of the work done; the said estimate shall not be required to be made by strict measurement, on unfinished work, but by measurement, estimating, so as to obtain an approximate result of the work done, and its value under this contract, as compared with the whole contract; but it shall not be required of said engineer to measure at all for work that is in an irregular form, but may estimate on his judgment of the value of same; and it is expressly understood, that an estimate shall be made only when the work is prosecuted agreeably to the provisions of this contract, and with such progress as is satisfactory to the said engineer; and in no case for a less sum than five hundred dollars, except at the discretion of the said engineer.

If, under the provisions of this contract, the said party

of the first part shall, in the estimation of said engineer, be entitled to a payment for work done, prior to the end of any month, he shall, on or before the fifteenth day of the following month, certify to the Secretary of said company the amount due under this contract, which shall be ninety per cent. of the amount of said estimated value of work performed. The remaining ten per cent. shall be retained by the company as a guarantee for the faithful performance of all the stipulations and conditions herein contained. And it is further agreed, that said railway company will pay the amount of said certificate, on presentation as herein stipulated.

And it is further agreed, that if in the opinion of said engineer, the said contractors shall neglect or refuse to prosecute the work embraced in this contract, with sufficient energy to insure its completion within the time specified in the same, or violate any of the provisions, or perform the work in an improper manner, the said engineer may certify the same to the Board of Directors of the aforesaid company, and thereupon the said directors may declare the said contract abandoned by said contractor and may proceed to contract for the work with any other person. On the abandonment of this contract as aforesaid, the contractor shall forfeit to said company any moneys that may remain due and unpaid at the time, and also any amount of damages beyond said moneys that may be sustained by the company for failure to commence the work; or having commenced, for failure to prosecute the same.

And the said contractor agrees that the work herein contracted for shall be commenced within two weeks after being required by the company or their engineer, and that this contract shall be fully completed on his part by the first day of January, in the year of our Lord one thousand eight hundred and fifty-seven.

And it is further agreed, that this contract shall be considered duly complied with when the said engineer has certified in writing to the same; and then, and not until then, will the said company be liable for the payment of the final balance and the percentage due on account of said contract.

And it is further agreed that in the absence of the chief engineer aforesaid, the resident engineer having charge of the work embraced in this contract shall have full power hereinbefore given to the chief engineer, and said resident engineer's orders shall be as implicitly obeyed as if they had emanated directly from the chief engineer.

This contract shall not be binding upon either party until signed by all parties thereto and attested by the signature of the secretary of said company and affixing of the seals of said contracting parties.

In witness whereof, the parties to these presents have hereunto set their seals the day and year first above written.

[Signed] P. O'REILLY, [L. S.]
[Signed] H. H. MUHLENBERG, [L. S.]
Sec'y.

Signed, sealed and delivered in the presence of
M. S. LYONS,
(Signed) I. W. LAKE.

Whereas a considerable portion of the work to be done in the construction of the Lebanon Valley Railroad has been allotted to Patrick O'Reilly.

And whereas, the said Patrick O'Reilly is about to enter into contract with the Lebanon Valley Railroad company to do the said work in the construction of said road; Now, know all men by these presents, that Patrick O'Reilly held and firmly bound unto the Lebanon Valley Railroad Company in the sum of one hundred and fifty thousand dollars lawful money of the United States of America, to be paid to the Lebanon Valley Railroad Company, their certain attorney or assigns, to which payment well and truly to be made we and each of us do bind ourselves, our heirs, executors and administrators, jointly and severally by these presents. Sealed with our seals, dated the 21st day of April, in the year of our Lord one thousand eight hundred fifty-four.

The condition of this obligation is such, that if the above bounden Patrick O'Reilly shall faithfully and truly do and perform at that the said contract to be entered by him as aforesaid with the Lebanon Valley Railroad shall bind him to do, and shall in all respects comply with his engagements therein to be assumed, then this obligation to be null and void, otherwise of force.

(Signed,) P. O'REILLY, [L. S.]
(Signed,) HENRY F. FELIX, [L. S.]
(Signed,) ANTHONY S. FELIX, [L. S.]
(Signed,) NICHOLAS A. FELIX, [L. S.]

Sealed and delivered in the presence of us.

M. E. LYONS,
(Signed,) I. W. LAKE.

OCTOBER TERM, 1886.

JOHN H. OSBORNE,

vs.

CATHARINE C. O'REILLY, Ex., &c., of PATRICK O'REILLY, Deceased.

Bill for injunction and account. On final hearing on pleadings and proofs.

MR. H. A. DRAKE, for Complainant.
MR. P. L. VOORHEES, for Defendant.

The Chancellor. The bill was filed against Patrick O'Reilly (he has since died) and the object was to stay proceedings in an attachment suit brought in Camden Circuit Court by O'Reilly against the complainant, and to get an account of certain transactions and dealings between the complainant and him. One of those transactions is in reference to a locomotive engine, called the "Sea Gull," which the complainant says he purchased for O'Reilly, and at his request and with his money, and at the like request took the title thereto in his, the complainant's name, and leased the engine to the Camden and Atlantic Railroad Company. The complainant alleges and insists that such leasing was in behalf and on account of O'Reilly; while on the other hand, the defendant insists that O'Reilly leased the engine to the com-

plainant, who in turn leased it to the railroad company. Another matter in reference to which the complainant claims an account is, extra work which he insists was done by him for O'Reilly both under and outside of the complainant's contract with O'Reilly hereinafter mentioned for graduation, &c., of certain sections of the Lebanon Valley Railroad. In April, 1854, O'Reilly had the contract for the construction of about forty miles of that road, and the complainant and one Charles Tarrant, under the firm name of Tarrant & Co., then entered into a sub-contract with him for the construction by them of thirteen sections of one mile each. They entered upon the work, and in October following the partnership was dissolved by the withdrawal of Tarrant, whose interest under the contract passed to the complainant who completed the work. The complainant insists that the terms of that contract were changed in respect to the price of excavating solid rock and hard clay; and he claims that consequently in the account he is entitled to a higher price therefor than that fixed by the contract. The work was partially suspended for several months from about the first of October, 1854, and during that period there was what is called a "strike" of the complainant's workmen, during which some of his property was destroyed.

He claims that O'Reilly's estate is liable to him for the damages he so sustained, and he prays an account thereof accordingly. He also makes claim for damages which he sustained by that suspension of the work, in the rise of wages and price of materials which he had to purchase, &c. Another matter is the purchase and sale of a tract of wood land in Pennsylvania, called in the case Greenwood, and another is the purchase of a farm for George W. Bowen. The answer admits that there should be an account, but it makes counter claims against the complainant, among which is a claim for the price of certain personal property sold and delivered by O'Reilly to the complainant, and a claim that a balance is due to the defendant on account of moneys of O'Reilly's, which came to the complainant's hands as agent and superintendent for O'Reilly under the contract of the latter for the construction of the Camden and Atlantic Railroad.

As to the claim in connection with the locomotive engine "Sea Gull:" The complainant claims, as before stated, that the engine, which it is admitted was bought by O'Reilly, to be used upon the road of the Camden and Atlantic Railroad Company (the company was in embarrassed circumstances), of which road the complainant was superintendent, and in which O'Reilly was interested, was leased by him in his own name but as O'Reilly's agent to the Camden and Atlantic Railroad Company. To recover arrears of rent he took legal proceedings at some expense for counsel fees, &c. He received from the company in settlement and composition, satisfaction for his expenditures, and took some of its preferred stock for the money due for the unpaid rent. He claims that he made the settlement with O'Reilly's consent and by his authority. While the defendant, on the other hand, insists that O'Reilly let the engine to the complainant, and that the latter, and not the company, was responsible to him for the rent. As already stated, the complainant alleges that he bought the engine at O'Reilly's request, and by his direction and for him, and with his money, and at O'Reilly's request took the engine, in his, the complainant's name. The answer denies that the complainant bought the engine or took title to it. But it states that he urged O'Reilly to buy it and let it to the company, which O'Reilly refused to do, and that then the complainant requested O'Reilly to buy an engine for use upon the road and let it to him, to which proposition O'Reilly acceeded, and bought the engine accordingly, and let it to the complainant. In an account rendered to O'Reilly by the complainant of money placed in the complainant's hands for a special purpose, as stated in the bill, the complainant charges O'Reilly with $22.35 for expenses incurred in July, 1855, in furnishing the engine, and with expenses ($65.74) paid in September, 1857, consequent upon moving it, and he credits O'Reilly under date of December 27th, 1855, with $104, for "surplus of purchase money of 'Sea Gull' engine, in July, 1855." O'Reilly did not object to those charges or to that credit, so that it seems clear that the complainant's statement that he bought the engine for O'Reilly, and with

O'Reilly's money, is true. The complainant leased the engine to the company in his own name, but there is no evidence, except the statement in the answer, that O'Reilly ever leased or transferred the engine to him. There is evidence in O'Reilly's letters that the complainant's statements upon this head are truthful. His claim to an account is valid.

To consider the claim in reference to "Greenwood," the bill states that in or about October, 1855, O'Reilly, who had purchased a tract of land of about 1300 acres in Pennsylvania, called Greenwood, said to the defendant that the timber upon the land would be of great advantage to him, O'Reilly, for furnishing railroad ties for the Lebanon Valley Railroad, for the construction of about 40 miles of which he had, as before stated, a contract; that the ties would in value be more than sufficient to pay the purchase money of the property, and that in view of his numerous obligations for kindness to the complainant, he would let him have an interest of one-half in the tract if he would take charge of the property, and assist him in obtaining ties therefrom, and in sending them to the railroad. It further states that the complainant agreed to this and accordingly rendered the service, and made expenditures contemplated by the agreement, but that O'Reilly did not convey the promised interest in the land to him, nor any interest whatever, but sold the property to another person. The answer denies that such was the agreement, and alleges that in fact the agreement was for a partnership between the complainant and O'Reilly; the former to pay half of the purchase money of the property which he subsequently refused to do. What the agreement really was does not appear. O'Reilly died in 1881. He filed his answer in 1864. The bill was filed in January, 1861. From the time of filing the answer to his death, a period of 17 years, no step was taken in the cause. O'Reilly was dead when the complainant gave his testimony in the suit; the complainant is therefore not competent to testify to any transaction with or statement by O'Reilly. *P. L.*, 1880, *p.* 52; *Lanning vs. Lanning*, 2 *C. E. G.*, 228. There is no other direct evidence upon the subject. Nor

does the evidence in the case support the claim of the answer that there was a co-partnership. The complainant is entitled to compensation for his services and expenditures in the matter and to an account accordingly.

The transaction in regard to the Bowen Farm was as follows: In 1857 O'Reilly and the complainant proposed to assist Bowen in the purchase of the farm by advancing him money to aid him in the payment of the purchase money, $4800. The complainant paid $1300 in cash and he and O'Reilly endorsed Bowen's notes for $1500. For the rest ($2000) of the price Bowen gave a first mortgage to Bean, the vendor upon the property. To secure the $2800 to the complainant and O'Reilly, Bowen conveyed the property to them by deed dated December 8th, 1856, and they executed and delivered to him a defeasance dated April 1st, 1857, declaring that the conveyance was made to secure the payment of that money. Afterwards they re-conveyed the farm to him and he mortgaged it to the complainant alone, to secure the $2800. The complainant paid the notes and the property was sold. After applying the proceeds of the sale there remained a deficiency of $1114.50. The complainant claims that there is due to him from O'Reilly's estate upon this Bowen matter over $1773. The bill says nothing of this claim. The sale appears to have taken place in the spring of 1868. From that time to the death of O'Reilly, in January, 1881, was a period of about 13 years. It was not until the death of O'Reilly that this matter was introduced into the case, and then it was brought in not by the pleadings, but by the evidence. Not to speak of the bar of the statute of limitations it would be unjust to the estate of O'Reilly to require an account upon this claim under the circumstances. The complainant might have set it up by supplemental bill, but he did not see fit to do so. Common justice, no less than the demands of correct practice, required him to set up his claim in that way, and so notify the defendant that he intended to hold him liable thereon. He having made no claim in any way in respect of that matter for more than six years (it was in fact more than 13) after the alleged liability accrued, cannot be permitted to set it up.

The complainant proves, and the defendant does not deny, that the former did extra work and furnished extra materials under the beforementioned sub-contract for railroad construction and did work and found materials outside of the contract, among other things obtaining what are called "wood leaves" (the right to cut down and remove and use standing timber) for O'Reilly and hauled ties for him to the railroad, and distributed them there, and did other work for O'Reilly. There should be an account between the parties as to all those matters. No particular directions are necessary in reference to them.

The claim which the complainant makes upon the estate of O'Reilly for damages sustained by him in the destruction of property of his (horses, wagons, harness, &c.,) by (as it is alleged) his own workmen in a riot in what is known as a "strike" by them for the immediate payment of their wages, or for an increase of pay instead thereof, cannot be allowed. The work was suspended about the first of October, 1854. In the latter part of the winter or early in the spring following the complainant's workmen being idle Mr. Bowen, who was the complainant's cashier and book-keeper, and, during his absence, his general manager, spoke to Mr. O'Reilly upon this subject, saying that it would be a good thing if they could be set at work. To which O'Reilly replied that they would probably be willing to go to work under an agreement to wait for their pay until the 15th of May. Bowen acted upon the suggestion, and the men went to work under that arrangement. On the 1st of May they demanded their pay (although it was not yet due according to their agreement) or an increase of wages. The complainant could not pay them and refused to increase their wages. They then "turned out upon a strike," as it is termed, and during the strike the complainant's property, for which his claim is made, was destroyed by fire. There is obviously no ground upon which this claim can be supported. Nor can the claim of the complainant to damages for suspension of the work be sustained. The work was suspended (but only partially, however,) by order of the chief engineer from about the 1st of October, 1854, until May following.

As appears in the preceding remarks on the subject of the claim for damages for the destruction of property in the riot, in the latter part of the winter or early in the spring, the work was resumed and proceeded until the 1st of May. The complainant says that work in rock was suspended but not work in the clay. Bowen testifies that the work was resumed sometime in April or May; that there were some forces put at work in some of the rock sections in March or April. The company awarded to the complainant $2500 damages (which he received) for the injury done him by the suspension. Being dissatisfied with the award, he looks to the estate of O'Reilly for such additional compensation (claiming that his damages were about $7500 more) as will indemnify him. This is a mere question of damages, and as such is not within the jurisdiction of this court. *Ralys v. Jewett*, 5 *Stew., Eq.* 302. And the fact that it is introduced in connection with a claim for an account, makes no difference. 1 *Pom., Eq. par.* 178. The company on account of a temporary lack of funds wherewith to meet the expenses of the work in full, caused it to be partially suspended for a while by directing that the amounts to be paid to O'Reilly's sub-contractors be limited to $6000 a month until further orders to the contrary. The complainant appears to have acquiesced. He might have gone on with the work with his full force at his own cost, taking the risk of getting his pay from O'Reilly, or if he was not bound under the contract to submit to the suspension, he might have rescinded the contract, but he did neither. The contract provided that the work should in every respect be prosecuted in such order and at such places and parts thereof, and at such times and seasons as the engineer might direct. In *Monongahela Navigation Co. v. Fenlon*, 4 *W. & S.*, 205, where the company had for a like reason wholly suspended the work for a time, it was held that in view of such a provision in the contract, such suspension was within the contemplation of the parties, and also that an award of damages by the engineer made under a provision in the contract for submission to the final arbitrament of the engineer of all disputes arising between

the contractor and the company, was conclusive and bound the parties. The contract in the case in hand provides that to prevent all disputes the engineer shall in all cases determine the amount or quantity of the several kinds of work which are to be paid for under the contract and the amount of compensation at the rates therein provided for, and also that he shall in all cases decide every question which can or may arise relative to the execution of the contract, on the part of the contractors, and that his decision shall be final and conclusive and without appeal. It does not appear that in this case any application was ever made to the engineer upon the subject of damages for the suspension, or that he ever passed upon the matter.

It remains to consider the claim of the complainant to compensation for the removal of solid rock. The contract provides that the complainant shall receive for the excavation of solid rock, requiring blasting or sledging, 65 cents per cubic yard. It also provides that stratified rock, requiring sledging or blasting, shall be paid for as solid rock. When the contract was taken, the company represented that the rock to be excavated in the sections mentioned in the complainant's contract was limestone. It proved to be, in fact, as represented, in its general character, but in one or two of the sections there was found an intervening stratum of trap rock exceedingly hard, not stratified, with hidden fissues and openings through it, and which it was very difficult and expensive to blast, and which could not be broken by sledging. When broken it broke up into small fragments unfit for bridge building, and of no use except in making embankment. There appear to have been in some places large masses of white flint through which it was almost impossible to drill for blasting. The engineer of the company testifies that it was stated to the contractors, for their information and guidance in making their bids, that the rock was the ordinary magnesian limestone, easily drilled and affording good building stone which the contractors could use in the erection of their structures—bridges and culverts, &c. He says that when cut into for the purposes of excavation, a large part of it

was found to be trap rock, in which hornblende, quartz, feldspar, and minute imbedded crystals and iron were all combined, and which afforded good barriers against a steel drill, and did not give a building stone, the blast producing irregular and small stones. He says that this rock was found, in a great measure, through the second division, which was covered by the complainant's contract; that the whole of the rock in the second division partook of the character of trap rock, but the upper portion of that rock, down to perhaps half of the depth, was not so hard as the lower; that somewhat more than half of that rock embracing the upper portion, was excavated by the contractor about the middle of 1855, and although it was not so hard as the portion underneath, yet at that date there had been a loss to the contractor, and that subsequently to that time it became evident to the engineer and to the contractor in chief that the prices in the contract for that work were inadequate. In view of the unexpected character of the rock, the engineer was authorized by O'Reilly to allow the complainant the same price (73 cents per cubic yard) which he received from the company for excavating solid rock. In his letter to the complainant, dated November 3rd, 1855, O'Reilly said that he was well aware that the rock in some of the sections of the second division was very hard, and could not be excavated at the price (65 cents per cubic yard) fixed in the complainant's contract, and that, therefore, he would assist him on those sections, and on some of the brick bridges which he said he perceived required an advance. In a subsequent letter to the complainant, of December 14th, 1855, he said that he was aware that the complainant's prices for hard rock would not carry him through, and that he was also aware that his, O'Reilly's, prices would not pay for taking out that rock in some of the complainant's sections, and that therefore in order to enable him for the present to carry out the work, he would allow for hard rock 73 cents, that being his own price, and that he regretted that he could not do any better for him at that time, and he added: "However I trust to be enabled to carry you through without sustaining any loss. From my

experience in rock excavation I know that the rock on some of your sections cannot he excavated for less than 80 to 85 cents per cubic yard. I will make good the deficiency (loss) $9156, as per statement." When that letter was written the complainant had refused to proceed with the work until a sati-factory arrangement as to price should have been made. In a letter of November 7th, 1855, to O'Reilly, he said that he could not consent that the matter should be longer deferred, and that he would thank O'Reilly to give him an answer before the 15th of the month. It is clear from the testimony that he refused to proceed with the work unless he should receive a satisfactory assurance as to increased and remunerative pay for so doing, and that O'Reilly was anxious that he should go on with the work, and in order to induce him to do so, promised that he should receive such pay. It appears that in December, 1856, O'Reilly received from the company $20,000 on its promissory notes, to reimburse him for his loss on his contract by reason of its extra payments to his sub-contractors in respect to the solid rock, of which sum he then paid $8000 to the complainant on account of his extra compensation. In November, 1859, O'Reilly brought suit against The Philadelphia and Reading Railroad Company, into which the Lebanon Valley Railroad Company had been merged, to recover further compensation upon the same account, and in December, 1861, he tried to bring about a compromise of the suit, and to that end applied to Richard B. Osborne, who was chief engineer of the new company, as he had been of the old, to assist him therein. From the testimony of Mr. Osborne it appears that in March, 1857, O'Reilly was constrained to raise the complainant's compensation for excavating hard clay from 22 cents per cubic yard, the contract price, to 23½ cents, but that this was not sufficient to enable the complainant to pay expenses upon the work, and that the work would therefore have stopped unless the chief engineer (himself) would supply the funds necessary to keep it going, relying for his protection in so doing upon the promise of O'Reilly, and the application of the latter to the company for an extra allowance on account of the rock.

O'Reilly then got a promise from the chief engineer to endorse and favor his application for such extra allowance. In December, 1861, O'Reilly called upon Osborne at the office of the company and, reminding him of his promise, urged him to assist him in getting a settlement of the claim for which he had brought the pending suit. Osborne says that O'Reilly then made verbal statements to him of his claim, of which he made notes at the time, and that he, Osborne, selected such items as he thought he would be justified in including in his application to the president of the company; that he then left O'Reilly in his office and went down stairs to the president and laid before him the items upon which he as engineer deemed it proper that the president should make an allowance; Osborne stating at the same time that the board of the Lebanon Valley Railroad Company had already (in December, 1856,) given to O'Reilly $20,000 on account of his claims upon that (the complainant's) and other sections. He says that the result placed before the president appealed to him for an additional allowance of $40,000, to O'Reilly, that the president acquiesced in it, and authorized him to offer that sum to close the matter; that he returned to his office and found O'Reilly there; that he, Osborne, made a memorandum showing upon what he had based his statement to the president for the allowance, at that time of $40,000, after deducting the $8,000 which had been paid to the complainant in 1856. He says that he based the application upon his knowledge of the work during its progress, that he took 48 per cent. of the solid rock as the portion upon excavating which the loss had occurred; that the total amount of solid rock estimated to the complainant was 154,316 cubic yards, 48 per cent. of which amounted to 74,071 cubic yards, that he put that at $1.38 per cubic yard, which was 65 cents per cubic yard in addition to the price, 73 cents, allowed to and paid by O'Reilly. This produced the sum of $102,217 from which he substracted the amount, $53,999, allowed in the estimates for the work, and the balance was $48,218, from which he took the $8000 paid to the complainant on account of extra pay, and the balance was $40,218, in view of which the offer of

$40,000 was made. Osborne says that O'Reilly made claim upon other grounds, but they were not recognized as valid by him and were not included in his, Osborne's, statement to the president. He says that there was a very great number of items upon which O'Reilly claimed additional compensation from the company, all of which were provided for by prices contained in the contract, but there was nothing in the character of that work which he deemed sufficient to justify him in making any claim for O'Reilly or interfering with the contract; that O'Reilly complained that those items had been omitted by Osborne in his statement, and the latter reminded him that it was only upon those sections where O'Reilly had given his sub-contractors the price which he himself was to receive, to enable them to complete work which he was forced by the chief engineer to finish at whatever cost, within a stated time; that the engineer was justified in calling upon the company to pay him the additional price which he had been compelled to pay his sub-contractors. The offer of $40,000 dollars was rejected. Afterwards the suit was settled on the 12th of the same month of December, 1861, by O'Reilly for a smaller sum $38,000. It appears by the release given by him upon the settlement; that, as part of the consideration of the payment of that sum, he was to relinquish to the company his claim to 1000 shares of the capital stock of the Lebanon Valley Railroad Company, and, if necessary, transfer the stock to the Philadelphia and Reading Railroad Company. It would seem from the facts above stated to be quite clear that the claim to extra compensation for the rock excavation done by the complainant, not only entered into the settlement, but formed a very considerable part of the consideration for which the $38,000 were paid. My conclusion in this matter, however, is not based upon the assumption that O'Reilly did in fact receive such allowance of extra compensation from the railroad company, but upon his promise to pay the complainant such additional compensation for excavating the rock as would protect him from loss. It is urged by the defendant's counsel that, in view of the fact that the complainant was bound by the

contract to excavate the rock at a price therein named, any promise made to him by O'Reilly under the circumstances stated in this case, to pay him more than that price was wholly voluntary and without consideration, and will not support a claim for further compensation, either at law or in equity. But it is quite evident that great and unexpected difficulty in the work was encountered after the contract had been entered into, and that that difficulty was not only unforseen, but the contractor was in effect informed when he entered into the contract, that it did not exist. He was informed that the solid rock which he was to excavate was limestone. The representation, though innocently made, misled O'Reilly and the complainant. The complainant finding it impossible to do the work at the price fixed in the contract, because of the character of the rock, refused to proceed with it, and in fact rescinded the contractor on the ground of the false representation. In a letter to O'Reilly dated October 4th, 1855, the complainant says: "I have concluded that I am not doing myself justice with the prospect before one of high wages, high feed, and the increased cost of powder, to go on further without some understanding from you. The least price that will enable me to prosecute the work to completion, will be an average of 20 cents per yard. For less than this I would not undertake it." The complainant thus refused to go on unless he should receive 85 cents instead of 65 cents, the contract price. O'Reilly did not insist upon the performance of the contract, as to the rock, but on the other hand, acknowledged the justice of the complaint, and induced the complainant to proceed with the work by promising to give him all of the price, (73 cents per cubic yard) which he himself was to receive for the work, and at the same time saying that from his experience in rock excavation, he knew that the rock in some of the sections could not be excavated for less than 80 to 85 cents per cubic yard, and promising to indemnify him. Bowen testifies that O'Reilly was notified of the hardness of the rock, and of the inability of the complainant to complete the work at the price fixed, inasmuch as the estimates for several months did not pay for the powder, and

he says O'Reilly gave assurance that the price would be increased. Richard B. Osborne says that O'Reilly urged the complainant to finish the work and make good his, O'Reilly's, contract with the company, and said that he would see that the work was paid for, including the extra cost. In his letter of December 14th, 1855, to the complainant, O'Reilly says that he trusts he will be enabled to carry the complainant through without loss. That there was ground to claim a right to abandon the work and rescind the contract for the reasons already given is manifest; and it is evident that the complainant went on with the work only in consideration of O'Reilly's promise to indemnify him against loss. By his agreement to protect the complainant from loss in the excavation of rock, if he would proceed with the work and not abandon it, O'Reilly waived performance of the contract as originally made in regard to the excavation of rock, and the parties substituted a new one in its place.

The defendant's counsel insists that if the new agreement was binding and the complainant was entitled to compensation beyond that which was stipulated for in the contract, the claim should, under the provisions of the contract, have been passed upon by the chief engineer, and that inasmuch as the complainant did not present the claim for allowance to the chief engineer he cannot maintain any action or suit for it. But the provision to which he refers has reference to questions as to the quantity or quality of work to be paid for, under the contract, and the amount of compensation at the rates provided for in the contract, and to questions relative to the execution of the contract. The question whether the complainant is entitled to an extra allowance or price beyond that provided for by the contract, does not arise under the contract and is not a question relative to the execution of the contract within the meaning of the provision under consideration. The provision therefore is not applicable to it. The complainant is entitled to an account of the work of excavating solid rock at a fair and reasonable price therefor.

As to the defendant's claim to an account in reference to the money received by the complainant as agent and su-

perintendent for O'Reilly; if there be doubt under the evidence as to whether the settlement which was made between the parties was not made under a mistake, or to state it differently, if it be doubtful upon the case as it appears at the hearing, whether the account stated does not contain a mistake, the party who impeaches it is entitled to a review of the matter by way of an accounting in respect to it. It is admitted that the complainant charged O'Reilly twice in the same account (which is in two parts) with the sum of $2346.79; once (in the first part) with $2000 for salary and $346.79 for expenses, and again (in the second part) with $2346.79 in one item, as "Salary and expenses included in the above account," referring to the former two charges of $2346.79. The explanation given of this double charge and the excuse for it are that a credit or $3753 06 in the second part of the account includes $2346.79 credited in the first part in two items, one of $501.48 which embraced, it is alleged, $113.48 of the amount and the other of $2233.31, and that therefore it was necessary to charge the $2346.79 twice to correct the error. That there was no fraud or attempt to deceive, is manifest from the circumstances that the second charge states that it is for what had already been charged in the first part of the account. But the charge for salary is for salary from Aug. 7, 1853, to April 7, 1854, and the credit of $3753.06 is under date of March 24th, 1854, a period prior to the time when the term or service for which the salary was claimed expired. It may be that the salary was in part credited in advance. But the charge for expenses in the first part of the account, is under date of August 7th, 1854, and is for expenses incurred from August, 1853, to August, 1854. As before stated, the credit of $3753.06, is under the previous date of March 24th, 1854. It is urged on behalf of the complainant that Bowen who made up the account, was O'Reilly's clerk, and not the complainant's, and that O'Reilly acquiesced in the statement of the account. But neither fact is entitled to much weight, in view of the circumstances that the error, if error there be, is manifest upon the face of the account.

The defendant is entitled to a further investigation of the matter to establish, if she can, the alleged mistake.

IN CHANCERY OF NEW JERSEY.

Between	
JOHN H. OSBORNE,	
Comp'lt,	On Bill for Injunction and Relief.
and	
CATHARINE C. O'REILLY, Executrix, of the last Will and Testament of Patrick O'Reilly, deceased.	Interlocutory Decree.
Defendant.	

This cause being opened to the Court by Herbert A. Drake, solicitor for and of counsel with the complainant, John H. Osborne, in the presence of Peter L. Voorhees, solicitor for and of counsel with the defendant, Catharine C. O'Reilly, executrix, &c., as aforesaid, and it appearing to the Court by an inspection

of the pleadings in this cause that the bill of complaint was exhibited by the complainant against the said Patrick O'Reilly, deceased, in his life time for the purpose of restraining, by injunction, proceedings in a certain action at law, then lately commenced by the said Patrick against the complainant in the Circuit Court of the County of Camden, and for the purpose of obtaining an account of certain transactions and dealings between the complainant and the said Patrick, forming subject matters of dispute between them; and it further appearing to the Court by an order made and filed in this cause on the sixteenth day of December, Anno Domini eighteen hundred and eighty-two, that the said Patrick O'Reilly had died at Reading, in the County of Berks, and State of Pennsylvania, on the sixteenth day of January, Anno Domini eighteen hundred and eighty-one, where he then resided, having first made and published his last will and testament, which was proved at Reading aforesaid by Catharine C. O'Reilly, James A. O'Reilly and Francis P. O'Reilly, the executors therein named, to whom letters testamentary were issued thereon, and at Mays Landing, in the county of Atlantic, in this State, as a foreign will, on the fifth day of July, 1881, and letters testamentary issued thereon to the said Catharine C. O'Reilly, as the executrix, in this State, and that by an order made on the 18th day of December, 1883, it was ordered that this cause stand revived and continued in the name of the said Catharine C. O'Reilly, as executrix of the said Patrick O'Reilly, deceased, and that the answer of the said Patrick theretofore filed be taken as the answer of the said executrix, and this cause coming regularly on to be heard before the Chancellor, upon the bill, answer, replication and testimony taken therein and the other pleadings, orders and proofs therein, at the Chancellor's chambers, in the city of Newark, on the eighth day of July, Anno Domini eighteen hundred and eighty-six, as yet of the May term of this Court for that year, in the presence of Herbert A. Drake, of counsel with the complainant, and of Peter L.

Voorhees, of counsel with defendant, and the said pleadings and proofs having been read and the arguments of said counsel having been heard and continued thereon by brief until about the twentieth of September, eighteen hundred and eighty-six, and the Chancellor having taken the intervening time for consideration, and he having now carefully inspected and considered the pleadings and the evidence in this cause, and the allegations and arguments of said counsel thereon, and in respect of that one of the said transactions between the complainant and the said Patrick, which related to an account, then already settled, of certain moneys received by the complainant of the said Patrick as the agent and superintendent of the said Patrick, in the construction of the Camden and Atlantic Railroad, and in which said account, as settled, the defendant claims there is a mistake, the Chancellor being of opinion that the defendant is entitled to the further investigation to establish, if she can, the alleged mistake; and in respect of that one of the said transactions relating to the locomotive engine called the "Sea Gull," which the complainant claims and insists he purchased with the moneys of and for the said Patrick, and at the request of the said Patrick took title the said engine in the name of the complainant and thereafter also at the request of the said Patrick leased it in behalf of and on account of the said Patrick to the Camden and Atlantic Railroad Company of this state, while the defendant claims that the said O'Reilly leased it to the complainant, who afterwards leased it to the said company, and is therefore liable to the defendant for the rent of it, the Chancellor having found that the said engine was not leased by the said O'Reilly to the complainant and that it was leased to the said company by the complainant as the agent of the said O'Reilly, and being of opinion that the complainant should account for the said rent, and that his claim to an account is valid, and in respect of that one of the said transactions forming subject matters of dispute in this cause which related to a tract of about thirteen hundred acres of woodland in the state of Pennsylvania called "Greenwood," in which the bill

states that the said O'Reilly offered and promised to let the complainant have a one-half interest after the same had been denuded of its timber if the complainant would take charge of it and assist the said O'Reilly in obtaining railroad sills or cross-ties therefrom, and in sending them to that portion of the Lebanon Valley Railroad then in course of construction by said O'Reilly as hereinafter stated, and that the complainant accepted said offer and accordingly rendered the service and made the expenditures contemplated by the agreement and that the said O'Reilly did not convey the promised interest nor any interest whatever to the complainant, and concerning which the said answer claims that the complainant was a partner with the said O'Reilly and covenanted to pay half of the purchase money of the said tract and subsequently refused to do so, the Chancellor having found that the evidence in the case does not support the claim of the said answer, that there was a co-partnership between complainant and the said Patrick O'Reilly, and being of opinion that the complainant is entitled to compensation for his services and expenditures in the matter and to an account accordingly; and in respect to that one of the said transactions touching and concerning a farm in Chester county, Pennsylvania, and the purchase thereof by the said O'Reilly and complainant for George W. Bowen, called and known as the "Bowen Farm," and the subsequent payment by the complainant of all the unsecured purchase money thereof and the conveyance thereof to the said Bowen, who gave the complainant a mortgage for the amount of purchase money paid by the complainant and the loss of the complainant thereupon, and to which no reference is made in the said pleadings, the Chancellor being of the opinion that the complainant is not entitled to any account therefor or relief thereupon; and in respect to those of the said dealings and transactions forming subject matters of dispute between the complainant and the said Patrick O'Reilly, which related to the building, construction, graduation and masonry of the Lebanon Valley Railroad from Reading aforesaid, westward, through the

Lebanon Valley, in the said State of Pennsylvania, it appearing to the Court by the said pleadings and proofs that on or about the first day of April, Anno Domini eighteen hundred and fifty-four, by articles of agreement entered into on that day, the said Patrick O'Reilly covenanted and agreed with the Lebanon Valley Railroad Company to furnish all the materials required, find at his own expense all the implements and do and perform all the labor necessary to construct and finish the grading, masonry, bridge superstructure and track-laying and other appurtenant work of forty sections of said railroad of one mile each in accordance with a specification thereto annexed, that on or about the 24th day of April, A. D. 1854, by articles of agreement dated on that day the complainant and one Charles Tarrant, under the name and style of Tarrant & Co., covenanted and agreed that they would furnish all the materials required, find at their own expense all the implements, and do and perform all the labor necessary to construct and finish the grading and masonry of Sections 14 to 26, both inclusive, of said railroad, also in accordance with a specification thereto annexed, that it was specified in the said specification annexed to each of said two contracts, that stratified rock, requiring sledging or blasting, should be paid for as solid rock at the rate of seventy three cents per cubic yard in the said chief contract of the said O'Reilly, and at the rate of sixty-five cents per cubic yard in said sub-contract of the complainant and said Tarrant; that in the month of October, eighteen hundred and fifty-four, the said Tarrant withdrew from the said agreement and his interest in the said sub-contract passed to the complainant, who still, under the style of Tarrant & Co., completed the work therein specified to be done, and that the complainant did extra work and furnished extra materials under the said sub-contract, and did work and furnished materials outside of the said sub-contract, among other things in obtaining "wood leave" for the said O'Reilly, consisting of the right to cut down and remove and use standing timber, and that complainant procured the said timber to be cut

up into railroad sills or ties and other timber for use by the said O'Reilly in the superstructure of the said Lebanon Valley Railroad, and distributed the same, also for use by the said O'Reilly, along the line of the said railroad, besides other extra work of and concerning which said extra work in the opinion of the Chancellor there should be an account between the complainant and defendant; and it also appearing to the Court that the work on the construction of the complainant's said thirteen sections of the said railroad was partially suspended by the order of the engineer of the said company from the early part of October, in the year 1854, until the month of March or April, in the year 1855, during which time the complainant, as stated in his bill, was obliged to keep a large part of his plant for the said work not only idle and useless but expensive on his hands, and that the said suspension damaged the said work and postponed the time of its performance to a subsequent period when wages and prices of material became and were higher than during the period of said partial suspension, and that there was allowed to the complainant in his final estimate "for horses, feed and expenses," during the said suspension, the sum of twenty-five hundred dollars, and that the complainant claims such additional compensation (about $7500) as will indemnify him, and the Chancellor being of opinion that the same is a question of damages and for that and other reasons stated in the opinion of the Court filed in the cause and that the complainant is not entitled to an account thereof against the defendant, and it also appearing to the Court by the said bill that in the latter part of April or first part of May of the year 1855, during a strike among the employees of the complainant, a riot occurred, and the said employees, or some of them while rioting set fire to and destroyed the buildings of the complainant and shut up and consumed therein horses, mules, harness, and other property of the complainant for which the complainant, upon the grounds and statements contained in the said bill, insists that he is entitled to have the defendant come to an account with him, but to which

account in the opinion of the Court he is not entitled; and it further appearing to the Court by the pleadings and proofs that a large amount of the excavation required to be made by the complainant in the grading of the said thirteen sections embraced in the said sub-contract was the materials therein called "solid rock requiring blasting or sledging," and the Chancellor being of opinion that the said sub-contract was modified relative to the solid rock excavation therein specified, and that the said Patrick O'Reilly, deceased, agreed to pay the complainant such additional compensation for excavating the said rock as would protect the complainant from loss, and that the complainant is entitled to an account of the work of excavating the said solid rock at a fair and reasonable price therefor.

Whereupon for good and sufficient reasons unto the Court appearing in part as above set forth it is on this fourth day of April, Anno Domini eighteen hundred and eighty-seven, by the Honorable Theodore Runyon, Chancellor of the State of New Jersey, ordered, adjudged and decreed, and the Chancellor, by virtue of the power and authority of this Court, doth hereby order, adjudge and decree that an account be stated between the said complainant and defendant touching and concerning the grading and masonry by the complainant as Tarrant & Co., of said thirteen sections of the Lebanon Valley Railroad, numbered from 14 to 26, both inclusive, under the aforesaid sub-contract, so modified as ascertained and determined by the Chancellor, and that it be referred to Howard M. Cooper, Esq., one of the special Masters of this Court, to take and state an account between the said complainant and defendant of all the payments made by the said O'Reilly to the complainant under the said sub-contract on the one hand, and all the allowances to which the complainant is entitled under the said sub-contract, modified as aforesaid, on the other hand, that the said Master in stating the said account shall allow the complainant for such extra work as was performed by him, making all proper allowances to either party on the said account or accounts, and that the

said Master shall not include in the said account or accounts, but shall exclude therefrom, any allowances to the complainant for or on account of the said "suspension," except the sum of twenty-five hundred dollars already allowed to him therefor in the final estimate of the complainant as Tarrant & Co. under the said sub-contract or for or on account of any of the property of the complainant destroyed by or during the said fire and riot, or for or on account of the said "Bowen Farm;" that the said Master shall allow the complainant for his services and expenditures touching and concerning the said tract of woodland of thirteen hundred acres, situate in Pennsylvania aforesaid, called "Greenwood," and in taking charge of and assisting the said O'Reilly in obtaining railroad sills or cross ties therefrom, and in sending them to and distributing them along the line of the said Lebanon Valley Railroad.

And it is hereby further ordered that said complainant do account to the defendant for the rent of the said locomotive engine called the " Sea Gull," with fair and reasonable allowances to the complainant for his services and expenses touching and concerning the same, and that the complainant shall account to the defendant for a balance (1098.97) of the moneys received by the complainant as agent and superintendent for the said O'Reilly in the construction of the Camden and Atlantic Railroad, as shown on an account of the said moneys made by a clerk of the said O'Reilly, together with any additional money that may be due from the complainant on said account arising from the alleged mistake therein, if the defendant can establish such mistake.

And it is further ordered that the said Master take and state an account between the said parties of and concerning any personal property sold and delivered by the said O'Reilly to the complainant for use by him, as plant, in the grading or construction of the said second division of the Lebanon Valley Railroad, and of and concerning any payments of money or other valuable things made, delivered or returned to the said O'Reilly by the complainant on account thereof.

And it is hereby further ordered that the said Master in the taking and stating of said account or accounts do take and use as competent evidence the testimony of the parties in this cause with the exhibits and proofs heretofore taken and marked so far as the same may be relevant, competent and applicable to the matters hereby referred to him and such other competent evidence as the parties, or either of them, may produce, and also such further and other evidence as the said Master may deem necessary or desirable for the making of a proper and accurate statement of the said account or accounts, and said parties upon request of the said Master shall produce before him all books, papers, accounts, exhibits, vouchers and other writings as the said parties, or either of them, shall or may have within their, or either of their, possession or control and which the said Master may deem proper for the full and intelligent discharge of his duties in the premises.

And it is further ordered that the said Master and the parties have liberty in the taking and stating of the said account or accounts, from time to time, as they or any of them may think proper, to apply to the Chancellor for further or other instructions, and advice touching the matters hereby referred to the said Master, and that all further and other equity and matters in this cause be reserved until the coming in of the said report.

THEODORE RUNYON,
C.

IN CHANCERY OF NEW JERSEY.

Between

JOHN H. OSBORNE,

Compl't,

and

CATHARINE C. O'REILLY,

Executrix, &c.

Def't.

On Bill, &c.

Notice of Appeal.

The defendant in the above stated cause hereby appeals from all and every part of the interlocutory decree made in this Court in said cause as orders, directs and declares that an account shall be had, taken or stated, and the manner and form in which such an account shall be had or stated to the Court of Errors and Appeals in the last resort in all causes.

Dated April 14, 1887.

P. L. VOORHEES,
Sol'r of Deft.

I conceive there is good cause for appeal in above stated cause.

P. V. VOORHEES,
of Counsel with Deft.

Filed April 14, 1887.

Service of copy of within notice hereby acknowledged this 21st day of April, A. D. 1887.

H. A. DRAKE,
Sol'r of Compl't.

New Jersey Court of Errors and Appeals.

CATHARINE C. O'REILLY, Executrix, &c., Appellant, and JOHN H. OSBORNE, Appellee.	On Appeal from Interlocutory Decree.

To the Honorable the Court of Errors and Appeals in the last resort in all causes:

The humble petition of Catharine C. O'Reilly, executrix, &c., the appellant in the above stated cause, respectfully shows that your petitioner finds herself aggrieved by an interlocutory decree, made in the Court of Chancery by his Honor, Theodore Runyon, then Chancellor of New Jersey, bearing date the fourth day of April,

eighteen hundred and eighty-seven, wherein the said John H. Osborne was complainant, and Catharine C. O'Reilly, executrix, &c., was defendant, in this respect, to wit: that the said decree orders and adjudges, that an account should be taken or stated, and directs the manner and form of taking the same, and your petitioner humbly appeals from the whole and every part of the said decree of the Chancellor, which decrees, as aforesaid, upon the ground that the same is erroneous, for that the said decree directs that an account should be taken, and the manner of taking the same, whereas it ought to have decreed that no account should be taken.

Your petitioner, therefore, prays that the said decree of the said Chancellor may be, in the particulars aforesaid, reversed, set aside and for nothing holden; and that your petitioner may have such relief in the premises as to this Honorable Court shall seem meet.

P. L. VOORHEES,
Sol. for, and of Counsel with Appellant.

Service of a copy of within Petition of Appeal hereby acknowledged this 30th day of June, A. D. 1887.

H. A. DRAKE,
Sol. for, and of Counsel with Appellee.

No Answer Filed.