

New Jersey Court of Errors and Appeals.

Between

JOHN BLACK, JOSEPH SMITH, and BENJAMIN JONES, complainants,

and

ELIZABETH SHREVE, ROSTERE S. LAMB, JOHN CHAMBERS, et al., defendants,

} Appeal from decree of the Chancellor.

STATE OF THE CASE.

BILL OF COMPLAINT.

To His Honor, Oliver Spencer Halsted, Chancellor of the State of New Jersey, and Ordinary and Surrogate General in the same.

Humbly complaining, shew unto your Honor, your orators, John Black and Joseph Smith, of the county of Burlington, in the state aforesaid, and Benjamin Jones, of the city and county of Philadelphia, in the state of Pennsylvania.

That on the eleventh day of February, in the year of our Lord one thousand eight hundred and thirty-three, the Legislature of the State of New Jersey passed an act entitled "An act to incorporate the Delaware and Jobstown Rail or McAdamized Road Company," by the first section of which said act it was enacted and declared that the said corporation should be a body corporate and politic, by the said name of the Delaware and Jobstown Rail or McAdamized Road Company, and by that name should be known in law, and have power to sue and be sued, to defend and be defended, in all courts, whether at law or in equity, and by that name should be capable of purchasing, or of otherwise receiving and becoming possessed of, and holding or conveying any real or personal estate; should have perpetual succession, and might also have a common seal, and alter and renew the same at pleasure, and should have, enjoy, and exercise all the rights, powers, and privileges pertaining to corporate bodies, 10
and necessary for the purposes of said act. 20

That by the second section of said act it was, among other things, enacted, that the capital stock of said corporation should be sixty thousand dollars, with liberty to the said company to increase the same to two hundred thousand dollars,

and should be divided into shares of fifty dollars each; that by the fifth section of said act it was, among other things, enacted, that five directors of said corporation should form a board, and they or a majority of them should be competent to transact the business of the said corporation, to make and prescribe such by-laws, rules, and regulations as to them should appear proper, touching the management and regulations of the stock, property, estate, and effects of the said corporation, and generally to do all other acts which they
 10 might deem expedient for effecting the objects contemplated by the said act.

That by the sixth section of the said act it was, among other things, enacted that the President and Directors of the said corporation should be, and they were thereby invested with all the rights, powers, and privileges necessary to survey, lay out, construct and repair a Rail or McAdamized road from the river Delaware, at the mouth of Craft's creek to the vicinity of New Lisbon, following the route, courses, and direction in said act designated, with liberty nevertheless,
 20 given by the seventeenth section of said act to said company, to alter such parts of said route in such manner as they might deem proper, subject, however, in the said alterations, to such limitations, provisos, and restrictions as in the said last mentioned section are enacted and contained.

That by the fifteenth section of said act it was enacted, among other things, that the said act should be deemed and taken as a public act, and should at all times be recognised as such in all courts and places whatsoever; and by virtue thereof your orators crave leave to refer to the said act, and
 30 take all benefit therefrom as fully and particularly as they might or could do, if they should repeat herein all the provisions and enactments of the same.

And your orators further shew unto your Honor, that the capital stock of the said company having been subscribed for and apportioned, on the third day of June, in the year of our Lord one thousand eight hundred and thirty-three, the first election was held, directors were chosen, and the said company duly organized in conformity to the said act, and proceeded to effect the object of its incorporation, by surveying,
 40 laying out, and constructing a railroad under the authority and in accordance with the provisions of said act.

And your orators further shew unto your Honor, that on or about the twenty-first day of January, one thousand eight hundred and thirty-four, the legislature of the said state of New Jersey passed a supplement to said act, by the fifth sec-

tion of which said supplement it was enacted that the said company should thereafter be known by the name, style, and title of the Delaware and Atlantic Railroad Company.

And your orators further shew unto your Honor, that numerous difficulties and embarrassments impeded and oppressed the said company in the construction of their said railroad, the most important of which was the inadequacy of its funds, and the deficiency of means within its control for the prosecution of such a work. These embarrassments and difficulties continued to increase and thicken around the said company, until, on or about the ninth day of January, in the year of our Lord one thousand eight hundred and thirty-five, when a general meeting of the directors and stockholders of said company was held, upon due notice personally given to all the stockholders of said company, for the purpose of examining into the affairs of the said company, and the state of the said road, and of devising means to extricate the former from his embarrassment, and to complete the latter; that at the said meeting, which was numerously attended, and at which your orators, John Black and Joseph Smith were present, but from which your orator, Benjamin Jones, was absent, a statement of the affairs and finances of said company was submitted to the said meeting, by which it appeared that on the thirtieth day of December, in the year of our Lord one thousand eight hundred and thirty-four, the debts and liabilities of the said company, including the sum nine thousand seven hundred and seventy-two dollars and six cents, being the sum estimated by the engineers of the said company to be necessary to complete its said road, amounted to the sum of fifty-two thousand eight hundred and twenty-two dollars and thirteen cents, which debts and liabilities consisted of money borrowed and loans made of and from various banks, among which said loans was the sum of four thousand dollars, borrowed from the Philadelphia Bank, in the city of Philadelphia aforesaid, the sum of two thousand dollars, borrowed from Bucks County Bank, in the state of Pennsylvania, and the sum of five hundred dollars, borrowed from the Farmers Bank of New Jersey, and consisted also of a large sum of money, due to various individuals, for lands conveyed, materials furnished, work and labor bestowed, and money loaned by them respectively to the said company, among which said individuals to whom debts were due from the said company were Andrew M. Jones, to whom was due the sum of twelve hundred and forty dollars and nine cents; Messrs. A. & G. Ralston, to whom was due the sum of twelve thousand four

hundred and seventeen dollars and seventy-five cents; R. S. Johnson, to whom was due the sum of one thousand seven hundred dollars and twenty-four cents, and Daniel White, to whom was due ninety-six dollars and seventy-five cents, together with large sums of money due and owing to each of your orators; and that at the same meeting, an examination of the state and condition of the said road was made, by which it appeared that the same was embanked, excavated, and graded, from the river Delaware, at the mouth of Craft's creek aforesaid, to the head of New Lisbon pond, in the vicinity of New Lisbon aforesaid, and that the iron and other rails were laid upon the said road a part of the distance between the points and places last aforesaid, but that a considerable portion of the said road between the said points was still without iron rails, and that none were in the possession of the said company to lay upon it; and that the sum of nine thousand seven hundred and seventy-two dollars would be required for the purchase of the said rails and for the other expenditures necessary to complete the said road so as to enable it to fulfil the objects for which its construction had been undertaken, and to enable the said company to derive from it a revenue.

And your orators further shew unto your Honor, that from the statement of the affairs and finances of the said company, so submitted as aforesaid, it further appeared that the receipts of the said company up to the said thirtieth day of December, amounted, as your orators have been informed, and believe, to the sum of fifty-eight thousand eight hundred and twenty-three dollars and eighty cents, including therein the proceeds of sundry loans made on the credit and in the behalf of the said company from banks and individuals, a part of which were still unpaid by said company, as above stated; and including also therein the sum of forty-four thousand and fifteen dollars, being the whole amount realized up to the date last aforesaid from the capital stock of said company, subscribed for and taken, for although the subscriptions to the said capital stock reached the sum of sixty thousand and fifty dollars, and although all the instalments had been called for and required, yet a number of the stockholders had failed and neglected to pay in whole or in part the sums due from them for stock by them subscribed for and taken, and at the said last mentioned date the sum of sixteen thousand and thirty-five dollars due to said company from said stockholders for their subscriptions to the stock of said company was in arrear and unpaid, and that in and by the said statement it further

appeared that out of the said sum of fifty-eight thousand eight hundred and twenty-three dollars and eighty cents so received by the said company as aforesaid, disbursements had been made up to the said last mentioned date, for and on account of the said company, and for and on account of said road, to the amount of fifty-six thousand five hundred and sixty-nine dollars and fifty-nine cents, leaving in the the treasury of the said company, at the said last mentioned date, the sum of two thousand two hundred and fifty-four dollars and twenty cents.

And your orators further shew unto your Honor, that all the money received by the said company from the subscriptions to its capital stock, and from the numerous loans made by it, except the small sum of two thousand two hundred and fifty-four dollars and twenty cents, was expended while its road was unfinished, and the said company embarrassed with numerous and heavy debts. That payments to the amount of fifty-two thousand eight hundred and twenty-two dollars and thirteen cents must be made by the said company before the said road could be completed and the said company relieved from its debts and liabilities, and that the only means and funds which the said company had at its disposal, and to which it could resort for the payment of the said sum of fifty-two thousand eight hundred and twenty-two dollars and thirteen cents, was the aforesaid balance of cash, amounting to two thousand two hundred and fifty-four dollars and twenty cents, and the further sum of sixteen thousand and thirty-five dollars, due and payable from the stockholders, as aforesaid, so that even if the last mentioned sum were promptly paid, there would still remain a deficiency of thirty-four thousand five hundred and thirty-two dollars in the funds within the control of the said company for the payment of its said debts and liabilities, and for the completion of its said road.

And your orators further shew unto your Honor, that from the aforesaid statement of the finances of the said company, and of the condition of its said road, it became apparent to the said directors and stockholders attending the said meeting, that a new loan must be made, or that the said road must be left in its unfinished state, and the money already paid by the said stockholders for the stock of said company must be sunk; urged by these motives and considerations, it was resolved and determined by the directors of said company, and by the stockholders assembled at said meeting, that the said company should borrow and procure as a loan thirty-five thousand dollars, which sum, as appeared by the statement aforesaid, was requisite and necessary to pay off and discharge

the debts and liabilities of the said company, and complete its said road, and that a committee, consisting of Chalkley Atkinson and your orators, John Black and Benjamin Jones, were named and appointed to negotiate the said loan for and on the credit of the said company.

- And your orators further show unto your Honor that a knowledge of the embarrassments of the said company and of the unfinished state of the said road generally existed and in consequence thereof the efforts of the said committee to borrow the said sum of thirty five thousand dollars upon the credit of the said company and a pledge of their said road were utterly unavailing, and that the said committee so reported to a second general meeting of the directors and stockholders of said company held on the twenty third day of the same month of January. That numerous attempts were afterwards made, by and on behalf of the said company, to procure the said loan but without success, and the situation of the said company became more and more gloomy and the prospects of extrication from its difficulties more remote. The stock-
- 20 holders in arrears, as aforesaid either from inability or disinclination, failed to pay up their arrearages, the small amount of money remaining in the treasury, as aforesaid was rapidly diminishing under the current expenditures of the said company, and the times of payment for several of the heaviest loans, already procured by the said company were rapidly approaching, and if not paid at maturity, it was apparent that the credit of the said company, already shaken, would be entirely prostrated: thus with numerous debts and liabilities oppressing the said company, its funds and means were almost
- 30 entirely exhausted, while its said road upon which alone it could depend for ultimate extrication from its difficulties, was unfinished and incapable alike of fulfilling the purposes for which its construction had been commenced, and of yielding any adequate revenue, profit or income to the said company. Materials and labor were necessary for its completion, but before these could be obtained upon credit, the said company must find means to satisfy the demands of creditors for materials previously supplied, and services already rendered

- And your orators further show that at this crisis in the
- 40 affairs of the company, your orators were induced by an offer of the securities hereinafter stated, and more especially by the offer of the covenant or agreement hereinafter set out, to borrow upon their own credit and responsibility the said sum of thirty-five thousand dollars, and to lend and advance the same as a loan to and for the use of the said company,

and that the said sum was actually borrowed and raised by your orators, and upon the faith of the said securities was actually and *bona fide* lent, advanced, paid, and delivered as a loan by your orators, to and for the use of the said company.

And your orators further shew, that in order to secure to your orators the repayment of the said sum of thirty-five thousand dollars, with the interest that might accrue and become due thereon, the said company did make, execute, and deliver unto your orators a certain bond or obligation by order of the said company and of the directors thereof, sealed with the seal of the said company, and signed by Thomas Haines, then being Secretary of said company, bearing date the second day of February, in the year of our Lord one thousand eight hundred and thirty-five, in the penal sum of seventy thousand dollars, lawful money of the United States of America, with a condition therein under written, that if the said Delaware and Atlantic Railroad Company, their successors or assigns, should well and truly pay, or cause to be paid unto your orators, their certain attorney, executor, administrators, or assigns, the just and full sum of thirty-five thousand dollars of money above mentioned; at the expiration of five years from the date of the said obligation, together with lawful interest of the State of New Jersey for the same, from the said last mentioned date, at the rate of six per cent. per annum, to be paid semi-annually, without any fraud or further delay; that then the said obligation should be void and of non-effect, or else should be and remain in full force and virtue, as in and by the said obligation, now in the custody of your orators, and ready to be produced when and where this Honorable Court may direct, reference being thereunto had, will more fully appear, and to which, when produced, your orators, for greater certainty, pray leave to refer. 10 20 30

And your orators further shew unto your Honor, that the said the Delaware and Atlantic Railroad Company, (in execution of the agreement hereinafter set forth, and) in order to secure to your orators the payment of the said sum of thirty-five thousand dollars, with the interest that should accrue and become due thereon, did make, execute, and deliver unto your orators a certain indenture of mortgage, by order of the said company and of the board of directors thereof, sealed with the seal of the said the Delaware and Atlantic Railroad Company, and signed by the said Thomas Haines, then the Secretary of the said company, and bearing date the same day and year last aforesaid, in and by which said indenture of mortgage the said the Delaware and Atlantic Railroad Company, 40

in execution of the said agreement, and as well for and in consideration of the aforesaid sum of thirty-five thousand dollars, and for the better securing the payment thereof, with its interest, unto your orators, their executors, administrators, or assigns, in discharge of the said recited obligation, as for and in consideration of one dollar to the said company, paid by your orators, at or immediately before the ensealing and delivery of the said indenture of mortgage, the receipt whereof was thereby acknowledged, did give, grant, bargain and sell,

10 alien and enfeoff, convey, confirm, assign, transfer, and set over unto your orators, their heirs, executors, administrators, and assigns, all the lands contained within the bounds of their said railroad, as at the said last mentioned date actually located, graded, excavated, and embanked, from the Delaware river, at the mouth of Craft's creek aforesaid, to the head of New Lisbon pond, in the vicinity of New Lisbon aforesaid, and all the materials of which the said railroad was constructed, and the appendages thereof, and all dividends, proceeds, and profits which might thereafter be declared, grow

20 due, or become payable from the use of the said road, together with all and singular, the hereditaments and appurtenances thereunto belonging or in any wise appertaining, or therewithal used, occupied, or enjoyed, or accepted, reputed, deemed, or taken as part, parcel, or member thereof; and also all the estate, right, title, interest, property, claim, and demand whatsoever of the said company, of, in, or to the same, to have and to hold, receive and take, all and singular the hereditaments and appurtenances thereunto belonging, unto your orators, their heirs, executors, administrators, and

30 assigns, to the only proper use, benefit, and behoof of your orators, their heirs, executors, administrators, and assigns forever; provided always, and the said indenture of mortgage was therein declared to be upon the express condition that if the said company, their successors or assigns, did and should well and truly pay or cause to be paid unto your orators, their executors, administrators, or assigns, the aforesaid debt or sum of thirty-five thousand dollars, on the day and time in the said indenture of mortgage mentioned and appointed for the payment thereof, together with lawful interest for the

40 same, to be paid semi-annually, as was thereinbefore stated, 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 thenceforth as well the said indenture of mortgage and the estate thereby granted as the said recited

obligation should cease, determine and become void, anything therein contained to the contrary thereof in any wise notwithstanding.

And the said the Delaware and Atlantic Railroad Company in and by the said indenture of mortgage, for themselves, their successors and assigns, did covenant, promise, grant, and agree to and with your orators, their executors, administrators, and assigns, that the proceeds and profits arising from the said railroad should be applied in the first place, at the end of each half year from the date of the said indenture of mortgage, to the payment of the half year's interest which should be then due upon the said sum of thirty-five thousand dollars, before any dividend of such proceeds and profits should be made among the stockholders of the said company ; and that no dividends of such proceeds and profits should at any time thereafter be made before the said debt of thirty-five thousand dollars should be fully paid off and discharged,—until all interest due upon the said sum or loan of thirty-five thousand dollars at the time of declaring such dividends should be satisfied ; and that then a dividend of such part of the said proceeds and profits only as might remain after the payment of all interest then accrued upon the said debt of thirty-five thousand dollars should be declared among the said stockholders, as in and by the said indenture of mortgage, now in the custody of your orators, and ready to be produced when and where this Honorable Court may direct, reference being thereunto had will more fully appear, and to which, when produced, your orators, for greater certainty, pray leave to refer.

And your orators further shew unto your Honor, that after the execution of the said indenture of mortgage, the same was duly and lawfully acknowledged before Thomas Swain, Esq., then one of the Judges of the Inferior Court of Common Pleas of the county of Burlington aforesaid, on the third day of February, in the year last aforesaid, and duly recorded in the office of the clerk of the county of Burlington aforesaid, on the third day of February, in the year last aforesaid, in Book L of Mortgages, pages fifty-three, &c., as by the acknowledgment before the said Judge, and the certificate of registry of the said Clerk, endorsed on the said indenture of mortgage, more fully appears, and to which said acknowledgment and certificate of registry your orators, for greater certainty, pray leave to refer.

And your orators further shew, that in order to indemnify your orators against more than a proportionate part of any

loss that might arise in consequence of the corporate property so as aforesaid mortgaged to your orators proving insufficient to pay and satisfy the said sum of money so loaned by your orators to the said company as aforesaid, and in consequence of an agreement to that effect made and entered into between the parties hereinafter next mentioned, previous to the consent of your orators to loan the said sum of money to the said company, and upon the faith and security of which said agreement your orators were mainly induced to make the said
 10 loan, James Shreve, Clayton G. Atkinson, Chalkley Atkinson, Jonathan Smith, Timothy Field, Thomas Haines, Jonathan Scattergood, Richard Jones, Philip R. Dakin, Thomas Black, Jacob Ridgway, Restore S. Lamb, James Newbold, John B. Bispham, John Chambers, Joseph Burr, Nathan Atkinson, and Amzi B. Wood, together with your orators all being stockholders of the said company, did make, execute, enter into, and deliver a certain covenant or agreement, bearing date the second day of February, in the year of our Lord one thousand eight hundred and thirty-five, in the words and figures,
 20 or to the purport and effect following, that is to say :

To all to whom these presents shall come or may concern, we, John Black, Joseph Smith, James Shreve, Clayton G. Atkinson, Chalkley Atkinson, Jonathan Smith, Timothy Field, Thomas Haines, Jonathan Scattergood, Richard Jones, Philip R. Dakin, Thomas Black, Jacob Ridgway, Restore S. Lamb, James Newbold, Benjamin Jones, John B. Bispham, John Chambers, Joseph Burr, Nathan Atkinson, Amzi B. Wood, stockholders in the Delaware and Atlantic Railroad Company, send greeting : Whereas the Delaware and Atlantic Railroad
 30 Company have borrowed of John Black, Joseph Smith, and Benjamin Jones, who are also stockholders in said company, the sum of thirty-five thousand dollars, to be applied towards the completion of the said railroad and its appendages, and in order to secure the repayment thereof, with its interest, the said Delaware and Atlantic Railroad Company have given their bond or obligation and their indenture of mortgage upon all the lands contained within the bounds of the said railroad, as now actually located, graded, excavated, and embanked, from the river Delaware, at the mouth of Craft's creek, to the
 40 head of New Lisbon pond, in the vicinity of New Lisbon, and all the materials of which the said road is constructed, and the appendages thereof, and all dividends, proceeds and profits which may hereafter be declared, grow due, or become payable from the use of the said road, to the said John Black, Joseph Smith, and Benjamin Jones, their heirs, executors, ad-

ministrators, and assigns, as by the said bond or obligation and indenture of mortgage, both bearing even date with these presents, reference being thereunto had will more fully and at large appear.

And whereas we whose names are hereunto subscribed and seals affixed have agreed with the said John Black, Joseph Smith, and Benjamin Jones, that in case the corporate property so as aforesaid mortgaged to the said John Black, Joseph Smith, and Benjamin Jones, should prove insufficient to pay the said sum of money so loaned by them, and its interest, so that a loss or deficiency should happen, that in such event each of us, and each of them, the said John Black, Joseph Smith, and Benjamin Jones, shall bear and sustain an equal portion of such loss or deficiency. And in the event that any of the said parties, that is, of us who have signed these presents, should, before or at the time when such loss or deficiency shall be ascertained, become or be unable to pay his proportion of such loss or deficiency, that in such case such of us as remain solvent and able shall bear and sustain such loss equally with the said John Black, Joseph Smith, and Benjamin Jones—that is to say, each of us who remain solvent to bear an equal part thereof with each of them, the said John Black, Joseph Smith, and Benjamin Jones. Now know all men by these presents, that in order to confirm the said agreement and give it legal operation, we whose names are hereunto subscribed and seals affixed do hereby covenant, promise, grant, and agree to and with the said John Black, Joseph Smith, and Benjamin Jones that in case the said corporate property so as aforesaid mortgaged to the said John Black, Joseph Smith, and Benjamin Jones should prove insufficient to pay the said sum of money so loaned by them, and its interest, so that a loss or deficiency should happen, that in such case we, our heirs, executors, or administrators shall and will forthwith pay such sum of money to the said John Black, Joseph Smith, and Benjamin Jones, their executors, administrators, or assigns as will divide the said loss or deficiency equally between such of us as remain solvent at the time such loss or deficiency is ascertained; and the said John Black, Joseph Smith, and Benjamin Jones, that is to say, each of the said individuals, to bear an equal part of such loss, as in and by the said covenant, now in the custody of your orators, and ready to be produced when and where this Honorable Court may direct, reference being thereunto had will more fully and at large appear, and to which, when produced, your orators, for greater certainty, pray leave to refer.

And your orators further shew, that it was upon the faith and security of the said covenant they were induced to make the said loan of thirty-five thousand dollars to the said company, and without it that the said loan could not have been obtained from them; that as anxious as your orators were to secure from loss their own investments in the said company, yet those very investments would have prevented them from exposing any more of their property to the risk of loss, and no proposition to make the said loan to the said company solely
 10 upon the security afforded by the hereinbefore recited obligations and indenture of mortgage of the said company, or by any other obligation or mortgage that could have been executed by the said company would have been accepted by your orators, for neither their fortunes nor situations in life were such as to warrant them in exposing so large a sum of money to even a chance of loss, however remote; and as the other stockholders of said company were interested as well as your orators in the procuring the said loan for the use of the said company, if any risk was to be encountered in making the
 20 same your orators did not think it was just or equitable that they should be called upon alone to meet it, while others of the said stockholders; without any risk or chance of loss would be benefitted by the said loan, and by the sacrifices made and the risk encountered by your orators.

And your orators further shew that the said sum of thirty-five thousand dollars, so as aforesaid lent and advanced by your orators to and for the use of the said company, afforded to the said company but temporary relief, and that on or about the twenty-eighth day of May, in the year of our Lord
 30 one thousand eight hundred and thirty-six, as your orators have been informed and believe to be true, the said company executed and delivered a certain other mortgage on the said railroad premises and property, as well as upon other premises and property not so mortgaged, to the said Thomas Black, James Newbold, and Jonathan Smith, to secure the sum of fourteen thousand one hundred and sixty-four dollars and four cents, or some other sum, and that numerous judgments were recovered by different individuals against the said company, in the supreme court of judicature of the state of
 40 New Jersey, and in the inferior court of common pleas of the county of Burlington aforesaid; but your orators expressly charged that all the mortgages ever executed by the said company, except the one executed by the said company to your orators, as aforesaid, and all the judgments ever recovered against the said company were respectively executed

and recovered after the day of the date and after the delivery to your orators of the said obligation and indenture of mortgage held by your orators as aforesaid, and before the day of payment thereof, and of the money secured thereby, had arrived.

And your orators further shew, that after the obligation and indenture of mortgage, so held by your orators as aforesaid, had become due and payable, they besought the said company to pay off and satisfy the same, but the said company wholly failed and neglected so to do, and the said obligation and indenture of mortgage, and the whole of the principal sum of thirty-five thousand dollars remained unpaid and unsatisfied to your orators, with large arrearages of interest, no portion of the said principal sum having been paid by the said company or received by your orators, and no portion of the said interest money having been paid by the said company or received by your orators, saving and excepting the sum of one thousand and sixty-seven dollars and fifty cents, which was paid to your orators in the year of our Lord one thousand eight hundred and thirty-five, for and on account of the said interest, and which constituted the sole and only money or credits of any kind ever received by your orators, or any or either of them, for or on account of the said obligation and indenture of mortgage, or for or on account of the said loan of thirty-five thousand dollars, or for or on account of the interest then due, or since accruing upon the same, excepting only the amount received as hereinafter mentioned, from the sale of the mortgaged premises and corporate property and effects so mortgaged to your orators as aforesaid. The said company having failed to comply with the reasonable request of your orators, made as aforesaid, and your orators finding every effort unavailing to induce the said company to make to your orators the payment and satisfaction aforesaid, on or about the twenty-third day of January, in the year of our Lord one thousand eight hundred and forty-four, exhibited their bill of complaints in this honorable court against the said company, and against Caleb Newbold, junior, and Richard C. Shreve, as administrators of the said James Newbold, deceased, Thomas Black, Jonathan Smith, Joseph Sykes, Caleb Gaskill, Israel Biddle, Isaac N. Carpenter, and Adam Manwaring, defendants in the said bill named, the said Caleb Newbold, jr., and Richard C. Shreve as administrators as aforesaid, Thomas Black, Jonathan Smith, Joseph Sykes, Caleb Gaskill, Israel Biddle, Isaac N. Carpenter, and Adam Manwaring being the sole and only judgment and mortgage

- creditors of the said company besides your orators, stating such several matters and things as are therein for that purpose stated and set forth, and particularly stating and setting forth the hereinbefore recited bond or obligation and indenture of mortgage held by your orators, the payment and receipt by your orators of the said sum of one thousand and sixty-seven dollars and fifty cents for and on account of interest as aforesaid, and praying that the said defendants might be decreed to pay and satisfy unto your orators by a
- 10 short day to be appointed by this honorable court, the amount that might be found due unto your orators upon the said bond or obligation and indenture of mortgage hereinbefore recited together with the costs and charges of your orators in that behalf expended and sustained; and that on failure thereof the said defendants, and all persons claiming or to claim, by, from, or under them, or any of them, might be forever barred and foreclosed of and from all right, title, and claim, and equity of redemption of, in, and to the said railroad and premises, lands and materials so mortgaged to your orators as
- 20 aforesaid, and every part, and from all and singular the appendages, appurtenances, and hereditaments thereunto belonging or in any wise appertaining, and might deliver possession of the same, and all deeds, evidences, and muniments of title thereunto relating to your orators, or if this honorable court should deem it more equitable and just that the said railroad and premises, lands, and materials so mortgaged to your orators as aforesaid, with all and singular the appendages, appurtenances, and hereditaments to the same belonging or in any wise appertaining, might be sold, to pay unto
- 30 your orators the money due and owing to them upon the said hereinbefore recited bond or obligation and indenture of mortgage given to your orators as aforesaid, together with your orators said costs and charges; and that your orators might have such further and other relief as the nature of their case might require, and as might be agreeable to equity and good conscience, and that a writ or writs of subpoena might issue to the said defendants in said bill named.

- Whereupon such proceedings were had in this honorable court, that afterwards and on or about the twelfth day of
- 40 July, in the year of our Lord one thousand eight hundred and forty-four, at a term of this honorable court, holden at Trenton on the day and year last aforesaid, by Daniel Haines, esquire, then being Governor and Chancellor of the state of New Jersey, the said Chancellor did then and there order, adjudge, and decree that the master's report filed in this hon-

orable court, in said cause, on the day and year last aforesaid, by which it appeared, among other things, that after deducting the said sum of one thousand and sixty-seven dollars and fifty cents so received by your orators as aforesaid, there was due to your orators for principal and interest upon the said recited obligation and indenture of mortgage so given to your orators as aforesaid, the sum of fifty-three thousand seven hundred and sixty-five dollars and eighty-three cents, should stand ratified and confirmed; and that the railroad, lands, and premises mentioned in your orators said mortgage hereinbefore set forth, and all the materials of which the said railroad was constructed, and the appendages thereof, and appurtenances thereunto, and all dividends, proceeds, and profits of the said road, with all and singular the hereditaments and appurtenances thereunto belonging or in any wise appertaining, or therewithal used, occupied, or enjoyed, or accepted, deemed, reputed, or taken as part, parcel or member thereof, should be sold to raise and satisfy the said sum of fifty-three thousand seven hundred and sixty-five dollars and eighty-three cents, together with the lawful interest thereon, to be computed from the day and year last aforesaid, with your orators' costs in the said cause to be taxed, and that a writ of fieri facias should issue for that purpose out of this honorable court, directed to the sheriff of the county of Burlington, commanding him to make sale, according to law, of the said railroad, lands, materials, and premises, dividends, proceeds, and profits, in your orators hereinbefore recited mortgage mentioned and set out, with the appendages and appurtenances, and that out of the money arising from such sale the said sheriff should pay to your orators, or to their solicitor, the said debt, interest, and costs, and in case more money should be raised by the said sale than would be sufficient to make and answer such payment, that such further surplus should be brought into this honorable court, to abide the further order thereof, unless previously disposed of by the order of this honorable court, and that the said sheriff should make return without delay of his proceedings by virtue of said writ.

Whereupon, by virtue of said decree, your orators sued out of this honorable court a writ of fieri facias, directed to the sheriff of the county aforesaid, tested the first day of February, in the year of our Lord one thousand eight hundred and forty-five, and returnable to the first Tuesday of April then next, in the April term of this honorable court, wherein, after a recital of the decree aforesaid, the sheriff was commanded

- that he should cause to be made of the railroad, lands, premises, materials, dividends, proceeds, and profits aforesaid, by selling the same, the said sum of fifty-three thousand seven hundred and sixty-five dollars and eighty-three cents, together with lawful interest from the said twelfth day of July, and also the sum of ninety-four dollars and forty-five cents, being the costs and charges of your orators in the said suit expended, and that the said sheriff should have the said last mentioned moneys in this honorable court, at Trenton aforesaid,
- 10 said, on the first Tuesday of April aforesaid, to render unto your orators, and also the surplus money, if any there should be, to abide the further order of this honorable court, according to the decree aforesaid, and that the said sheriff should make return to this honorable court, at the time and place last aforesaid, by certificate under in hand of the manner in which he should have executed the said writ, which said writ was duly entered and recorded in the clerk's office of this honorable court, as in and by the said bill, report, decree, and writ now as of record in this honorable court, and to which
- 20 for greater certainty your orators pray leave to refer, may and will more fully and at large appear.

- And your orators further show that the said sheriff, after having duly advertised according to law the sale of the said railroad, lands and premises, materials, dividends, proceeds and profits, with the appendages and all and singular the hereditaments and appurtenances thereunto belonging or in any wise appertaining, and after having made one adjournment for the space of one month, which said adjournment was also duly advertised, proceeded to sell at public sale to the highest
- 30 bidder, on the second day of June in the year of our Lord one thousand eight hundred and forty-five, between the hours of twelve and five o'clock of that day, at Columbus in the county of Burlington aforesaid, where the office of the said company was kept, the said rail road, lands, premises, materials, dividends, proceeds and profits, with the appendages, and all and singular the hereditaments and appurtenances thereunto belonging or in any wise appertaining. That the said sheriff did then and there in the first place set up and expose to sale the dividends, proceeds and profits, above mentioned and the said
- 40 Richard Jones, a defendant hereto having bid for the same the sum of one hundred and seventeen dollars, and thirty one and a quarter cents, and no person bidding as much or more, the said dividends, proceeds and profits, after considerable delay for the purpose of procuring other and higher bids were struck off and sold by the said sheriff to the said Richard

Jones, for the said sum of one hundred and seventeen dollars
 and thirty one and a quarter cents; and that the said sheriff
 did then and there in the second place, set up and expose to
 sale the said rail road, lands, premises and materials with the
 appendages and all and singular the hereditaments and appur-
 tenances thereunto belonging or in any wise appertaining,
 and after considerable bidding the said Richard Jones having
 bid for the same the sum of one thousand dollars and no per-
 son bidding as much or more, the said rail road, lands, prem-
 ises and materials with the appendages and all and singular 10
 the hereditaments and appurtenances thereunto belonging, or
 in any wise appertaining, after a long delay in order to pro-
 cure other and higher bids, were then and there, just before
 the hour of five o'clock in the afternoon struck off and sold
 to the said Richard Jones, for the said sum of one thousand
 dollars; that the said sales amounted to the sum of one thou-
 sand one hundred and seventeen dollars and thirty-one and a
 quarter cents and after deducting therefrom the sum of thirty
 seven dollars and seventy cents, being the amount of fees due
 the said sheriff for and on the account of the said sale; there 20
 remained the sum of one thousand and seventy nine dollars
 and sixty one and a quarter cents as the full amount of the
 proceeds of sale realized by your orators from the said rail-
 road lands and premises so mortgaged to your orators as
 aforesaid, and from all the materials of which said rail road
 was constructed, and the appendages thereof and the appur-
 tenances thereto, and all the dividends, proceeds and profits
 of the said road with all and singular the hereditaments and
 appurtenances thereunto belonging or in any wise appertain-
 ing, so mortgaged to your orators as aforesaid and from all 30
 the corporate property of said company so mortgaged to
 your orators as aforesaid and mentioned and referred to in
 the said covenant herein before recited and set forth, that
 there was due to your orators from the said company on the
 said second day of June, after deducting and allowing the said
 sum of one thousand and sixty seven dollars and fifty cents,
 the sum of fifty four thousand five hundred and fifty two dol-
 lars and eighty nine cents, for principal and interest due and
 payable to your orators upon the said sum of thirty five thou-
 sand dollars, so borrowed by the said company of your ora- 40
 tors as aforesaid, while the sum realized from the sale of the
 corporate property of the said company so mortgaged to your
 orators as aforesaid amounted only to one thousand and sev-
 enty nine dollars and sixty one and a quarter cents, leaving a
 heavy loss and deficiency.

And your orators further shew that the said corporate property of the said company so mortgaged to your orators as aforesaid and mentioned and referred to in the said covenant proved insufficient to pay to your orators the said sum of thirty five thousand dollars so loaned by them as aforesaid to the said company with its interest, and that a large and heavy loss and deficiency happened, and that the said loss and deficiency and the amount thereof were ascertained on the second day of June in the year of our Lord, one thousand
 10 eight hundred and forty five.

And your orators further shew, that on or about the first day of January in the year of our Lord one thousand eight hundred and thirty nine, the said James Newbold, another party to the said covenant departed this life intestate; and that on the sixteenth day of January in the year last aforesaid, letters of administration of all and singular the goods and chattels, rights and credits, monies and effects which were the said James Newbold deceased, were duly granted
 20 by Charles M. Harker, Esq., Surrogate of the said county of Burlington, to Caleb Newbold, Jr., and Richard C. Shreve, defendants hereto, who have taken upon themselves the burden thereof.

And your orators further shew, that on or about the sixteenth day of November, in the year of our Lord one thousand eight hundred and forty-five, and after the said second day of June, Jonathan Smith, another one of the parties to the said covenant, departed this life, having first duly made, executed, and published his last will and testament in writing, in due form of law, and therein and thereby did, among other things,
 30 nominate, constitute, and appoint your orator, Joseph Smith, together with the said James Shreve and Barclay White, executors thereof, and that the said last will and testament was afterwards, to wit, on the second day of January, in the year of our Lord one thousand eight hundred and forty-six, duly proved by your orator, Joseph Smith, and by the said James Shreve and Barclay White, the executors therein named, before the surrogate of the said county of Burlington, as by a certified copy of the same and probate thereof now in the custody of your orators, and ready to be produced when and
 40 where this Honorable Court may direct, or the record thereof, now remaining in the said surrogate's office, may more fully appear.

And your orators further shew, that as all the other parties to, and signers of, the said covenant, were interested as well as your orators in aiding the said company to procure the

said loan of thirty-five thousand dollars, so the understanding and agreement between and among all the parties thereto was that all should be responsible for, and share equally, any loss or deficiency that might happen or arise in consequence of the same having been made to or procured for the said company, and as it was foreseen that before the said loss or deficiency, if any should happen or arise, could be ascertained, one or more of the said parties might become or be unable to pay his or their equal share or shares of such loss or deficiency, it was further agreed that such of the said parties to the said covenant as should remain solvent and able so to do, should bear and sustain such loss or deficiency equally with your orators, that is to say, that each of the said other parties who remained solvent and able as aforesaid, should bear and sustain an equal part of the said loss or deficiency with each of your orators, the fundamental principle being that any loss or deficiency arising or happening in consequence of the said loan of thirty-five thousand dollars, should be divided amongst and borne by your orators and such of the other parties to the said covenant as remained able to pay and bear their respective shares thereof, whenever the same should be ascertained, in equal portions, share and share alike; upon this agreement and understanding, and in order to give to it legal operation and effect, the said covenant was executed by the several parties thereto, and upon the faith of the said agreement and covenant your orators loaned to the said company their money. 10

And your orators further shew, that on the said second day of June, when the said loss and deficiency were ascertained, the parties to the said covenant other than your orators who then remained and were solvent and able as in the said covenant hereinbefore set out, is particularly mentioned and expressed, and the estates of such of the said other parties who had died previous thereto, which remained solvent and able as aforesaid, became and were, and from thence next hitherto have been and still are liable and bound to bear and sustain the said loss and deficiency equally with your orators—that is to say, that each of the said other parties, and each of the said estates, at the said last mentioned date remaining and being solvent and able as aforesaid, became and were, and from thence next hitherto have been and still are liable and bound to bear and sustain an equal part and proportion of the said loss and deficiency with each of your orators. And that on the said second day of June, such of the said other parties, and such of the said estates as then remained and were solvent and able as aforesaid, became and were, and from thence 30 40

next hitherto have been and still are liable and bound to pay to your orators such a sum of money as would divide the said loss and deficiency equally between such of the said other parties and such of the said estates as at the said last mentioned date remained and were solvent and able as aforesaid and your orators, each of the said other parties and estates last mentioned being bound and liable to pay to your orators such a part and proportion of the said last mentioned sum of money as would cause an equal part and proportion of the

10 said loss and deficiency to fall upon and be borne by each of the said last mentioned other parties and estates remaining and being solvent and able as aforesaid and each of your orators.

And your orators further shew, that upon the solvency and ability of the said other parties to the said covenant, who were living and of the estates of those who were deceased at the time; in the manner and to the extent aforesaid, depend their liability to your orators on the said covenant, and their obligation to pay to your orators their several and respective parts

20 and proportions of the said loss and deficiency while upon the number of the said other parties and of the said estates remaining solvent and able as aforesaid, depends the amount of the parts and proportions of the said loss and deficiency to be borne and sustained by each of your orators, and to be paid to your orators, and to be borne and sustained by each of the said other parties and of the said estates remaining and being solvent and able as aforesaid. That the solvency and ability of a party or an estate to pay a specified sum of money at any particular or stated time, except in extreme and notorious

30 cases, is a fact exclusively in the knowledge of the party himself, or of the executor or executors, administrator or administrators of the said estate, and is not capable of proof by another party; that the solvency and ability of the said other parties to the said covenant, or of some of them, and of the said estates, or some of them, to pay their several and respective parts and proportions of the said loss and deficiency to your orators, are facts exclusively within the knowledge of the said other parties themselves, severally and respectively, and of the executors and administrators of the said estates,

40 severally and respectively, and cannot be proved by your orators, except in the extreme and notorious cases hereinafter mentioned, without a discovery from the said other parties themselves, severally and respectively, and from the said executors and administrators, respectively. And your orators expressly charge, that on the said second day of June, and for

a long time previous thereto, of the said other parties to the said covenant, the said Thomas Haines, Timothy Field, Jonathan Scattergood, Clayton G. Atkinson, Chalkley Atkinson, and John B. Bispham had severally become and were notoriously unable to pay their several and respective parts and proportions of the said loss and deficiency; and that the said Philip R. Dakin, Jacob Ridgway, Joseph Burr, and Amzi B. Wood had departed this life previous to the said second day of June, and that on the said day their several and respective estates were notoriously unable to pay the parts and proportions of the said loss and deficiency severally and respectively to be paid and borne by the said Philip R. Dakin, Jacob Ridgway, Joseph Burr, and Amzi B. Wood. 10

And your orators further shew, that they have been informed, and believe, and therefore charge the fact to be, and that the same will appear by a discovery from the defendants hereto, that on the said second day of June the said James Shreve, Restore S. Lamb, John Chambers, Richard Jones, Nathan Atkinson and Thomas Black, other parties to the said covenant, and other defendants hereto, and the said Jonathan Smith, another party to the said covenant, and whose executors hereinbefore named, or some of them, are other parties hereto, remained and were solvent and able to pay their several and respective parts and proportions of the said loss and deficiency; and that the estate of the said James Newbold, deceased, and the said Caleb Newbold, junior and Richard G. Shreve as administrators thereof, remained and were able to pay the part and proportion of the said loss and deficiency to be borne by the said James Newbold, and that on the said second day of June the said James Shreve, Restore S. Lamb, John Chambers, Richard Jones, Nathan Atkinson, Thomas Black, and Jonathan Smith, as well as the estate of the said James Newbold, deceased, and the said Caleb Newbold, jun., and Richard C. Shreve, as administrators thereof, remained and were solvent and able to pay to your orators such a sum of money as would divide the said loss and deficiency equally between the said other parties to the said covenant, and the said estates that remained solvent and able as aforesaid at the said last mentioned date, and your orators, each of them, the said James Shreve, Restore S. Lamb, John Chambers, Richard Jones, Nathan Atkinson, Thomas Black, and Jonathan Smith, as well as the estate of the said James Newbold, deceased, and the said Caleb Newbold, junior, and Richard C. Shreve together, as administrators thereof, being able to pay such a part and proportion of the said sum of money last mentioned 40

- as would cause an equal part and proportion of the said loss and deficiency to fall upon and be borne by each of them, the said James Shreve, Restore S. Lamb, John Chambers, Richard Jones, Nathan Atkinson, Thomas Black, and Jonathan Smith as well as upon the estate of the said James Newbold, deceased, and the said Caleb Newbold, junior and Richard C. Shreve together, as administrators thereof, and each of your orators, and that each of them, the said James Shreve, Restore S. Lamb, John Chambers, Richard Jones, Nathan Atkinson,
- 10 Thomas Black, and Jonathan Smith, as well as the estate of the said James Newbold, deceased, and the said Caleb Newbold, junior and Richard C. Shreve together, as administrators thereof, remained and were at the said last mentioned date solvent and able to bear and sustain an equal part of the said loss and deficiency with each of your orators.

- And your orators further shew, that on the said second day of June, each of them, the said James Shreve, Restore S. Lamb, John Chambers, Richard Jones, Nathan Atkinson, Thomas Black and Jonathan Smith, and the estate of the said
- 20 James Newbold, deceased, and the said Caleb Newbold, jun., and Richard C. Shreve together, as administrators thereof, became and were bound and liable to bear and sustain an equal part and proportion of the said loss and deficiency with each of your orators; and that on the said second day of June the said James Shreve, Restore S. Lamb, John Chambers, Richard Jones, Nathan Atkinson, Thomas Black, and Jonathan Smith, and the estate of the said James Newbold, deceased, and the said Caleb Newbold, junior, and Richard C. Shreve together, as administrators thereof, became and
- 30 were bound and liable to pay to your orators such a sum of money as would divide the said loss and deficiency equally between such of the said other parties to the said covenant, and such of the said estates as remained solvent and able as aforesaid, and your orators; each of them, the said James Shreve, Restore S. Lamb, John Chambers, Richard Jones, Nathan Atkinson, Thomas Black, and Jonathan Smith, as well as the estate of the said James Newbold, deceased, and the said Caleb Newbold, junior and Richard C. Shreve together, as administrators thereof, being bound and liable to
- 40 pay to your orators such a part and proportion of the said last mentioned sum of money as would cause an equal part and proportion of the said loss and deficiency to fall upon and be borne by each of the said other parties to the said covenant, and each of the said estates remaining and being solvent and able as aforesaid, and each of your orators.

And your orators further shew, and expressly charge, that on the said second day of June the said James Shreve, Restore S. Lamb, John Chambers, Richard Jones, Nathan Atkinson, Thomas Black, and Jonathan Smith were the sole and only parties to the said covenant, other than your orators, then living, that remained and were solvent and able as aforesaid, and that the estate of the said James Newbold, deceased, was the sole and only one of the estates of the parties thereto who were dead, that then remained and was solvent and able as aforesaid.

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And your orators further shew unto your Honor, and expressly charge, that on the said second day of June, each of these, the said James Shreve, Restore S. Lamb, John Chambers, Richard Jones, Nathan Atkinson, Thomas Black, and Jonathan Smith, and the estate of the said James Newbold, deceased, became and were liable and bound to bear and sustain an equal part and proportion of the said loss and deficiency with each of your orators, and that on the said second day of June, the said James Shreve, Restore S. Lamb, John Chambers, Richard Jones, Nathan Atkinson, Thomas Black, 20 and Jonathan Smith, and the estate of the said James Newbold, deceased, became and were liable and bound to pay your orators such a sum of money as would divide the said loss and deficiency equally between the said James Shreve, Restore S. Lamb, John Chambers, Richard Jones, Nathan Atkinson, Thomas Black, Jonathan Smith, the estate of the said James Newbold, deceased, and your orators, each of them, the said James Shreve, Restore S. Lamb, John Chambers, Richard Jones, Nathan Atkinson, Thomas Black, Jonathan Smith, and the estate of the said James Newbold, deceased, being bound 30 and liable to pay to your orators such a part and proportion of the said last mentioned sum of money as would cause an equal part and proportion of the said loss and deficiency to fall upon and be borne by each of them and each of your orators.

And your orators further shew and expressly charge, that each of them, the said James Smith, Restore S. Lamb, John Chambers, Richard Jones, Nathan Atkinson, Thomas Black, and the said Caleb Newbold, junior, and Richard C. Shreve, together as administrators as aforesaid, and the said James 40 Shreve and Barclay White, together as executors as aforesaid, are at the time of the filing of this bill of complaint, bound and liable to bear and sustain an equal part and proportion of the said loss and deficiency with each of your orators; and that at the time of the filing of this bill, the said

- James Shreve, Restore S. Lamb, John Chambers, Richard Jones, Nathan Atkinson, Thomas Black, and the said Caleb Newbold, junior, and Richard C. Shreve, as administrators of the said James Newbold, deceased, and the said James Shreve and Barclay White, as executors of the said Jonathan Smith, deceased, are bound and liable to pay to your orators such a sum of money as will divide the said loss and deficiency equally between such of the said other parties to the said covenant, and such of the said estates as remained solvent and able as aforesaid on the said second day of June, and your orators, each of them, the said James Shreve, Restore S. Lamb, John Chambers, Richard Jones, Nathan Atkinson, and Thomas Black, as well as the said Caleb Newbold, junior, and Richard C. Shreve, administrators as aforesaid, and the said James Shreve and Barclay White, as executors as aforesaid, being bound and liable to pay such a part and proportion of the said last mentioned sum of money as will cause an equal part and proportion of the said loss and deficiency to fall upon and be borne by each of the said other parties to the said covenant, and each of the said estates remaining and being solvent and able as aforesaid, and each of your orators, the said Caleb Newbold, junior, and Richard C. Shreve, as administrators as aforesaid, paying the part and proportion thereof to be borne and sustained by the said James Newbold, and the said James Shreve and Barclay White, as executors as aforesaid, paying the part and proportion thereof to be borne and sustained by the said Jonathan Smith.

- And your orators further shew and expressly charge, that each of them, the said James Shreve, Restore S. Lamb, John Chambers, Richard Jones, Nathan Atkinson, and Thomas Black, and the said Caleb Newbold, junior, and Richard C. Shreve, together as administrators of the said James Newbold, deceased, and the said James Shreve and Barclay White, together as executors of the said Jonathan Smith, deceased, are, at the time of filing this bill of complaint, bound and liable to bear and sustain an equal part and proportion of said loss and deficiency with each of your orators, and that, at the time of filing this bill, the said James Shreve, Restore S. Lamb, John Chambers, Richard Jones, Nathan Atkinson, and Thomas Black, and the said Caleb Newbold, junior, and Richard C. Shreve, as administrators as aforesaid, and the said James Shreve and Barclay White, as executors as aforesaid, are bound and liable to pay to your orators such a sum of money as will divide the said loss and deficiency equally between them, the said James Shreve, Restore S.

Lamb, John Chambers, Richard Jones, Nathan Atkinson, Thomas Black, the estate of the said James Newbold, deceased, the estate of the said Jonathan Smith, deceased, and your orators, each of them, the said James Shreve, Restore S. Lamb, John Chambers, Richard Jones, Nathan Atkinson, and Thomas Black, and the said Caleb Newbold, junior, and Richard C. Shreve, together as administrators of the said James Newbold, deceased, and the said James Shreve and Barclay White, together as executors of the said Jonathan Smith, deceased, being bound and liable to pay such a part 10 and proportion of the said last mentioned sum of money as will cause an equal part and proportion of the said loss and deficiency to fall upon and be borne by each of them, the said James Shreve, Restore S. Lamb, John Chambers, Richard Jones, Nathan Atkinson, Thomas Black, the estate of the said James Newbold, deceased, the estate of the said Jonathan Smith, deceased, and each of your orators.

And your orators further shew, that no part of the said principal sum of thirty-five thousand dollars, so loaned by your orators to the said company as aforesaid, and mentioned 20 in the conditions of the said obligation, and in the proviso of redemption of the said indenture of mortgage, and in the said covenant so given to your orators as aforesaid, has been paid by the said company, or by any other person or persons whatsoever for the said company, to your orators, or to any or either of them, or to any other person or persons for their, or any, or either of their use; and that no part of the interest money accruing upon the said loan of thirty-five thousand dollars, has been paid to your orators, or to any or either of them, or to any other person or persons for their, or any, or 30 either of their use, except the sum of one thousand and sixty-seven dollars and fifty cents, paid in the year of our Lord eighteen hundred and thirty five, as is in hereinbefore stated. And that your orators have not, nor has any or either of them, or any other person or persons for their, or either, or any of their use, received from the said railroad, lands, premises, materials, dividends, proceeds, profits, and corporate property of the said company, so mortgaged to your orators as aforesaid, or from any or either of them, or from any other source whatever, for or on account of said loan of thirty-five 40 thousand dollars, and the interest accruing thereon, any further or other sum of money than the said sum of one thousand and seventy-nine dollars and sixty-one and a quarter cents, received from the said corporate property of the said company so sold as aforesaid, and that your orators have not, nor

- has any or either of them, or any other person or persons for their, or any or either of their use, ever received from the said James Shreve, Restore S. Lamb, John Chambers, Richard Jones, Nathan Atkinson, and Thomas Black, or from any or either of them, or from the said Jonathan Smith in his lifetime, or since his decease from his estate, or from your orator Joseph Smith, and the said James Shreve and Barclay White, as executors thereof, or from the said James Newbold, deceased, in his lifetime, or from the estate of the said James
- 10 Newbold since his decease, or from the said Caleb Newbold, junior, and Richard C. Shreve, as administrators thereof, or from any or either of them, or from any other person or persons whomsoever, any payment, or sum or sums of money, or any other matter or thing whatsoever, for or on account of the said loan of thirty-five thousand dollars, or for or on account of the interest accruing thereon, except as is hereinbefore stated, or for or on account of the said loss and deficiency, or for or on account of the said sum of money so due and owing to your orators as aforesaid by reason thereof.
- 20 But on the contrary, your orators expressly charge that the whole of the said loss and deficiency, amounting on the said second day of June, as aforesaid, to the sum of fifty-four thousand five hundred and fifty-two dollars and eighty-nine cents, remains wholly unpaid and unsatisfied, and after deducting therefrom the sum of fourteen thousand eight hundred and seventy-seven dollars and ninety-five cents, the part and proportion thereof to be borne and sustained by your orators, there remains a balance of thirty nine thousand six hundred and seventy-four dollars and ninety-four cents, which, with
- 30 the interest thereupon from the said second day of June, is now due and payable to your orators from and by the said James Shreve, Restore S. Lamb, John Chambers, Richard Jones, Nathan Atkinson, and Thomas Black, and from the estate of the said James Newbold, and the said Caleb Newbold, junior, and Richard C. Shreve, as administrators thereof, and from the estate of the said Jonathan Smith, and the said James Shreve and Barclay White, as executors thereof, and that each of them, the said James Shreve, Restore S. Lamb, John Chambers, Richard Jones, Nathan Atkinson, and Thomas
- 40 Black, as well as the said Caleb Newbold, junior, and Richard C. Shreve, as administrators as aforesaid, and the said James Shreve and Barclay White, as executors as aforesaid, are bound and liable to pay to your orators an equal part and proportion of the said balance of the said loss and deficiency, with a proportionate share or part of the said interest; the

said Caleb Newbold, junior, and Richard C. Shreve, administrators as aforesaid, paying the part and proportion of the said balance and interest to be paid by the said James Newbold, deceased, and the said James Shreve and Barclay White, executors as aforesaid, paying the part and proportion to be paid by the said Jonathan Smith, deceased.

And your orators further shew, that whether on the said second day of June, the said James Shreve, Restore S. Lamb, John Chambers, Richard Jones, Nathan Atkinson, Thomas Black, and Jonathan Smith, and the estate of the said James Newbold, deceased, were able to pay their said several and
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respective parts and proportions of the said loss and deficiency, and whether, on the said second day of June, each of them, the said James Shreve, Restore S. Lamb, John Chambers, Richard Jones, Nathan Atkinson, Thomas Black, and Jonathan Smith, and the estate of the said James Newbold, deceased, remained and were solvent and able to bear and sustain an equal part and proportion of the said loss and deficiency with each of your orators, and whether, on the said
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second day of June, the said James Shreve, Restore S. Lamb, John Chambers, Richard Jones, Nathan Atkinson, Thomas Black, Jonathan Smith, and the estate of the said James Newbold, deceased, were solvent, and able to pay to your orators such a sum of money as would divide the said loss and deficiency equally between the said other parties to the said covenant and the said estates remaining solvent and able to pay as aforesaid at the said last mentioned date and your orators; and whether, on the said second day of June, each
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of them, the said James Shreve, Restore S. Lamb, John Chambers, Richard Jones, Nathan Atkinson, Thomas Black, Jonathan Smith, and the estate of the said James Newbold, deceased, were solvent and able to pay such a part and proportion of the said last mentioned sum as would cause an equal part and proportion of the said loss and deficiency to fall upon and be borne by each of them, the said James Shreve, Restore S. Lamb, John Chambers, Richard Jones, Nathan Atkinson, Thomas Black, Jonathan Smith, the estate of the said James Newbold, deceased, and each of your orators, and whether, on the said second day of June, the said James
40
Shreve, Restore S. Lamb, John Chambers, Richard Jones, Nathan Atkinson, Thomas Black, Jonathan Smith, and the estate of the said James Newbold, deceased, were solvent and able to pay to your orators the said balance of the said loss and deficiency, and whether each of them, the said James Shreve, Restore S. Lamb, John Chambers, Richard Jones,

- Nathan Atkinson, Thomas Black, Jonathan Smith, and the estate of the said James Newbold, deceased, were solvent and able, on the said second day of June, to pay an equal part and proportion of the said balance, are facts exclusively within the knowledge of the said James Shreve, Restore S. Lamb, John Chambers, Richard Jones, Nathan Atkinson, and Thomas Black, severally and respectively, and of the said Caleb Newbold, junior, and Richard C. Shreve, as administrators of the said James Newbold, deceased, and of the said James Shreve and Barclay White, as executors of the said Jonathan Smith, deceased, respectively, of which proof cannot be made by your orators; and your orators are advised, and believe, and charge, that they cannot safely proceed in any action, either at law or in equity, to recover the moneys due to them upon and by reason of the said covenant, and for and on account of the said loss and deficiency, without a discovery from the said James Shreve, Restore S. Lamb, John Chambers, Richard Jones, Nathan Atkinson, and Thomas Black, severally and respectively, and from the said Caleb Newbold, junior, and Richard C. Shreve, as administrators of the said James Newbold, deceased, and from the said James Shreve and Barclay White, as executors of the said Jonathan Smith, deceased, respectively, whether, on the said second day of June, the said James Shreve, Restore S. Lamb, John Chambers, Thomas Black, Richard Jones, Nathan Atkinson, Jonathan Smith, and the estate of the said James Newbold, deceased, were able to pay their several and respective parts and proportions of the said loss and deficiency, and also whether, on the said second day of June, the said James Shreve, Restore S. Lamb, John Chambers, Richard Jones, Nathan Atkinson, Thomas Black, Jonathan Smith, and the estate of the said James Newbold, deceased, remained and were solvent, and able to pay to your orators such a sum of money as would divide the said loss and deficiency equally between the said other parties to the said covenant and the said estates remaining solvent and able to pay as aforesaid at the said last mentioned date and your orators, and also whether each of them, the said James Shreve, Restore S. Lamb, John Chambers, Richard Jones, Nathan Atkinson, Thomas Black, Jonathan Smith, and the estate of the said James Newbold, deceased, were solvent and able to pay such a part and proportion of the said last mentioned sum of money as would cause an equal part and proportion of the said loss and deficiency to fall upon and be borne by each of them, the said James Shreve, Restore S. Lamb, John Chambers, Richard Jones, Nathan

Atkinson, Thomas Black, Jonathan Smith, and the estate of the said James Newbold, deceased, and each of your orators, and also whether each of them, the said James Shreve, Restore S. Lamb, John Chambers, Richard Jones, Nathan Atkinson, Thomas Black, Jonathan Smith, and the estate of the said James Newbold, deceased, on the said second day of June, were solvent, and able to pay to your orators their several and respective equal parts and proportions of the said loss and deficiency, and their equal part and proportion of the said balance. And your orators further shew, that they have frequently and in a friendly manner, applied to the said James Shreve, Restore S. Lamb, John Chambers, Richard Jones, Nathan Atkinson, and Thomas Black, defendants hereto, and to the said Jonathan Smith, in his lifetime, and since his decease to the said James Shreve and Barclay White, his executors and other defendants hereto, and to the said Caleb Newbold, junior, and Richard C. Shreve, administrators of the said James Newbold, deceased, and the remaining defendants hereto, to bear and sustain the said loss and deficiency equally with your orators, and to pay to your orators such a sum of money as would divide the said loss and deficiency equally between them, the said James Shreve, Restore S. Lamb, John Chambers, Richard Jones, Nathan Atkinson, Thomas Black, the estate of the said Jonathan Smith, deceased, the estate of the said James Newbold, deceased, and your orators, and upon each of them, the said James Shreve, Restore S. Lamb, John Chambers, Richard Jones, Nathan Atkinson, and Thomas Black, and upon the said James Shreve and Barclay White, together as executors of the said Jonathan Smith, deceased, and upon the said Caleb Newbold, junior, and Richard C. Shreve, together as administrators of the said James Newbold, deceased, to pay to your orators such a part and proportion of the said last mentioned sum of money as would cause an equal portion of the said loss and deficiency to fall upon and be borne by each of them, the said James Shreve, Restore S. Lamb, John Chambers, Richard Jones, Nathan Atkinson, and Thomas Black, the estate of the said Jonathan Smith, deceased, the estate of the said James Newbold, deceased, and each of your orators, and upon the said James Shreve, Restore S. Lamb, John Chambers, Richard Jones, Nathan Atkinson, Thomas Black, and upon the said James Shreve and Barclay White, as executors as aforesaid, and upon the said Caleb Newbold, junior, and Richard C. Shreve, administrators as aforesaid, to pay to your orators the said balance of the said loss and deficiency, with interest as afore-

- said; and upon each of them, the said James Shreve, Restore S. Lamb, John Chambers, Richard Jones, Nathan Atkinson, and Thomas Black, and upon the said James Shreve and Barclay White, together as executors of the said Jonathan Smith, deceased, and upon the said Caleb Newbold, junior, and Richard C. Shreve, together as administrators of the said James Newbold, deceased, to pay to your orators an equal part and proportion of the said balance of the said loss and deficiency, with a proportionable part of the said interest as
- 10 aforesaid, your orators offering, on their parts, to bear and sustain the said loss and deficiency equally with the said James Shreve, Restore S. Lamb, John Chambers, Richard Jones, Nathan Atkinson, Thomas Black, the estate of the said Jonathan Smith, deceased, and the estate of the said James Newbold, deceased, each of your orators offering to bear and sustain a part and proportion of said loss and deficiency equal to the part and proportion borne and sustained by each of them, the said James Shreve, Restore S. Lamb, John Chambers, Richard Jones, Nathan Atkinson, and Thomas
- 20 Black, and by the said James Shreve and Barclay White, together as executors as aforesaid, and by the said Caleb Newbold, junior, and Richard C. Shreve, together as administrators as aforesaid, and to make to the said defendants all just, reasonable, and proper allowances, and your orators well hoped that such their reasonable request would have been complied with, as in justice and equity they ought to have done.

- But now so it is, may it please your Honor that the said defendants, James Shreve, Restore S. Lamb, John Chambers,
- 30 Richard Jones, Nathan Atkinson, Thomas Black, and the said James Shreve and Barclay White executors as aforesaid, and the said Caleb Newbold, Jr., and Richard C. Shreve administrators as aforesaid combining and confederating with divers other persons at present unknown to your orators, but whose names when discovered, your orators pray, may be inserted in this their bill of complaint, with appropriate and proper words to charge them as defendants, hereto to injure and aggrieve your orators in the premises, not only refuse to pay to your orators the amount of principal and interest, monies so
- 40 as aforesaid due and payable to your orators or in any other manner to comply with such reasonable request of your orators before mentioned, but the said confederates, some time pretend and give out that the said Delaware and Atlantic Rail Road Company did not execute and deliver to your orators the bond or obligation hereinbefore mentioned, or any

other bond or obligation; and that the said company did not execute and deliver to your orators the hereinbefore recited indenture of mortgage or any other indenture of mortgage. Whereas your orators expressly charge the contrary thereof to be true; and at other times they pretend that your orators did not pay advance and deliver as a loan to the said company the said sum of thirty-five thousand dollars or any other sum of money; whereas your orators expressly charge that the contrary thereof is true; and that the same is made manifest by the admission of the parties to the said covenant under their hands and seals in the recital to the said covenant; and sometimes they pretend and give out that neither the said covenant hereinbefore set out nor any other covenant was ever executed and entered into by your orators, and the said several persons who are hereinbefore stated to have been parties thereto, the contrary whereof your orators expressly charge and sometimes admitting that the said covenant was executed and entered into as aforesaid, they deny the same was ever delivered to your orators; and sometimes admitting that the said covenant was executed and entered into by and between your orators and some of the persons hereinbefore stated as parties thereto, and that the same was delivered to your orators. They deny that the same was ever signed, sealed, executed and delivered by the said James Shreve, Restore S. Lamb, John Chambers, Richard Jones, Nathan Atkinson, Thomas Black, James Newbold and Jonathan Smith, or by any or either of them. The contrary of which said several last mentioned pretences and denials, your orators expressly charge to be true. And sometimes they pretend that the sale made by the sheriff as aforesaid, was not a fair and just sale; and that all the corporate property and effects of the said company, so mortgaged to your orators as aforesaid and mentioned in said covenant, were not sold by the said sheriff; the contrary whereof your orators expressly charge to be true; and sometimes they pretend that a larger sum than one thousand and seventy-nine dollars and sixty-four cents was realized from the said sales and received by your orators, or by some one of them or by some other person or persons, for their or some of their use; and sometimes they pretend that some other sale or sales of the said corporate property was or were made and the proceeds thereof received by your orators, or by some one of them, or by some other person or persons for their or some of their use, on account of the said loan of thirty-five thousand dollars made by your orators, to the said company as aforesaid, and of its interest,

- and that no loss or deficiency has happened, the contrary whereof your orators expressly charge to be true; and at other times admitting that there has been some loss and deficiency; they give out and pretend that the said loss and deficiency was not on the said second day of June and is not now so large and so great as is hereinbefore charged, stated, and alleged; the contrary whereof your orators expressly charge to be true; and at other times they give out and pretend that on the said second day of June, when the said loss
- 10 and deficiency was ascertained, the said Timothy Field, Thomas Haines, Jonathan Scattergood, Clayton G. Atkinson, Chalkely Atkinson and John B. Bispham or that some or one of them were not or was not notoriously unable to pay their several and respective parts and proportions or his part or proportion of the said loss and deficiency; the contrary whereof your orators expressly charge to be true; and at other times they give out and pretend that the said Phillip R. Dakin, Jacob Ridgway, Joseph Burr and Amzi B. Wood, had not or that some or one of them had not departed this life previous
- 20 to the said second day of June, and at other times admitting that the said Phillip R. Dakin, Jacob Ridgway, Joseph Burr, and Amzi B. Wood, had severally departed this life on the said second day of June; they pretend and give out that the estates of the said Phillip R. Dakin, Jacob Ridgway, Joseph Burr, and Amzi B. Wood, or the estates or estate of some or of one of them and their respective executors or administrators of the said several last named persons or of some or of one of them, were not, or was not, and are not, or is not unable to pay the parts, and proportions of the said loss and deficiency to be paid and borne by the said Phillip R. Dakin,
- 30 Jacob Ridgway, Joseph Burr, and Amzi B. Wood; the contrary of which said several last mentioned pretences, and each of them your orators expressly charge to be true. And at other times the said confederates, or some, or one of them pretend or pretends that on the said second day of June, the said James Shreve, Restore S. Lamb, John Chambers, Richard Jones, Nathan Atkinson, Thomas Black, and Jonathan Smith, or that some one of them were not or was not solvent and able to pay their several and respective parts and proportions of the said loss and deficiency, and that the estate of
- 40 the said James Newbold, deceased, and the said Caleb Newbold, junior, and Richard C. Shreve, as Administrators thereof was not and were not able to pay the part and proportion of the said loss and deficiency to be borne by the said James Newbold, deceased; and that on the said second day of June,

the said James Shreve, Restore S. Lamb, John Chambers, Richard Jones, Nathan Atkinson, Thomas Black, Jonathan Smith, and the estate of the said James Newbold, deceased, and the said Caleb Newbold, junior, and Richard C. Shreve, as administrators thereof, were not solvent and able to pay to your orators such a sum of money as would divide the said loss and deficiency equally between such of the other parties to the said covenant, and the said estates that remained and were solvent and able as aforesaid at the said last mentioned date and your orators, and that each of them, the said James Shreve, Restore S. Lamb, John Chambers, Richard Jones, Nathan Atkinson, Thomas Black, Jonathan Smith, and the estate of the said James Newbold, deceased, or that some one or more of them, were not and was not severally solvent and able to pay to your orators such a part and proportion of the said last mentioned sum of money as would cause an equal part and proportion of the said loss and deficiency to fall upon and be borne by each of them, the said first named persons, and the said estate of the said James Newbold, deceased, and each of your orators, and that each of the persons last named, and the said estate, were not solvent and able, on the said second day of June, to bear and sustain an equal part and proportion of the said loss and deficiency with each of your orators, whereas your orators have been informed and believe, and therefore charge, the contrary of the said several last mentioned pretences, and each of them, to be true; and that so the truth would appear to be, if the said defendants would set forth and discover the matters and particulars aforesaid, and the discovery which is hereinafter prayed for, but which they refuse to do.

And your orators further charge, that unless the said defendants shall set forth and discover the several matters and particulars, of which the discovery is hereinbefore stated to be necessary to your orators, and which is hereby prayed, your orators will fail and be unable to prove that on the said second day of June, the said James Shreve, Restore S. Lamb, John Chambers, Richard Jones, Nathan Atkinson, Thomas Black, Jonathan Smith, and the estate of the said James Newbold, deceased, or that some of them, were severally solvent and able to pay their respective equal parts and proportions of the said loss and deficiency, and at other times they give out and pretend, that the whole of the said sum of thirty-five thousand dollars, so loaned by your orators to the said company, with the interest accruing thereon, has been paid to your orators, whereas your orators expressly charge that the

- said sum of thirty-five thousand dollars, or any part thereof, has not been paid or in anywise satisfied to your orators, and that the said interest accruing thereon, or any part thereof, has not been paid or in any wise satisfied to your orators, except the said sum of one thousand and sixty-seven dollars and fifty cents, hereinbefore particularly stated, and the said sum of one thousand and seventy-nine dollars and sixty-one cents, received by your orators from the said sheriff as aforesaid; and sometimes they pretend and give out that the whole
- 10 or some part of the said loss and deficiency has been paid, or in some way satisfied to your orators, the contrary whereof your orators expressly charge to be true.

- And at other times they pretend and give out that your orators, or some, or one of them, have or has received from the profits and receipts of the said railroad, and from other sources, divers large sums of money, in full or part payment and satisfaction of the said sum of thirty-five thousand dollars so loaned as aforesaid, and of the interest accruing thereon, or in full or part payment of the said loss and deficiency,
- 20 whereas your orators expressly charge the contrary thereof to be true. All which actings and pretences of the said defendants are contrary to equity and good conscience, and tend to the manifest wrong and injury of your orators. In tender consideration whereof, and forasmuch as your orators are remediless in the premises by the strict rules of the common law, and cannot have adequate remedy except in this Honorable Court, where matters of this nature are properly cognizable and relievable.

- To the end, therefore, that the said defendants and their
- 30 confederates, when discovered, may full, true, and perfect answer make to the premises upon their several and respective corporal oath, according to the best of their knowledge, information, and belief, as if the same were herein again set forth, and they, and each and every of them, distinctly and specially interrogated thereto; and more especially that the said defendants, and each and every of them, may set forth and discover whether, on the said second day of June, the said Jas. Shreve, Restore S. Lamb, John Chambers, Richard Jones, Nathan Atkinson, Thomas Black, and Jonathan Smith, were
- 40 solvent, and able to pay their several and respective equal parts and proportions of the said loss and deficiency, or how much of their said parts and proportions they were severally and respectively able to pay, and whether any, or either of them, and which of them, were solvent and able to pay as last aforesaid: and whether the estate of the said James Newbold,

deceased, at the said last mentioned date, remained and was solvent and able to pay the part and proportion of the said loss and deficiency to be paid and borne by the said James Newbold, or how much thereof; and whether on the said second day of June the said James Shreve, Restore S. Lamb, John Chambers, Richard Jones, Nathan Atkinson, Thomas Black, Jonathan Smith, and the estate of the said James Newbold, deceased, remained, and were solvent and able to pay unto your orators such a sum of money as would divide the said loss and deficiency equally between the parties to the said 10 covenant, other than your orators, then living, and remaining and being solvent and able as in the said covenant is mentioned, and the estates of such of the said other parties who have died previous thereto, and which remained solvent and able as last aforesaid, and your orators; and whether any, or either of them, and which of them, remained, and were solvent and able to pay as last aforesaid.

And whether each of them, the said James Shreve, Restore S. Lamb, John Chambers, Richard Jones, Nathan Atkinson, Thomas Black, Jonathan Smith, and the estate of the said 20 James Newbold, deceased, or any of them, and which of them, remained, and were solvent and able to pay such a part and proportion of the said last mentioned sum of money as would cause an equal part and proportion of the said loss and deficiency to fall upon and be borne by each of the said last mentioned persons and the said last mentioned estate and each of your orators.

And whether each of them, the said last mentioned persons and the said last mentioned estate, and which of them, on the said second day of June remained and were solvent and able 30 to bear and sustain an equal part and proportion of the said loss and deficiency with each of your orators, or how much and what sum of the said loss and deficiency each of them was able to bear and sustain.

And whether on the said second day of June the said James Shreve, Restore S. Lamb, John Chambers, Richard Jones, Nathan Atkinson, Thomas Black, Jonathan Smith, and the estate of the said James Newbold, deceased, were solvent and able to pay to your orators the said balance of the said loss and deficiency, amounting, as aforesaid, to the sum of thirty- 40 nine thousand six hundred and seventy-four dollars and ninety-four cents; and whether on the said second day of June, each of them, the said James Shreve, Restore S. Lamb, John Chambers, Richard Jones, Nathan Atkinson, Thomas Black, Jonathan Smith, and the estate of the said James Newbold, de-

ceased, or some of them, and which of them were solvent and able to pay to your orators an equal part and proportion of the said balance, or how much and what part thereof each of them was able to pay.

- And that the said defendants, and each and every of them, may make a full and true discovery of all and every of the matters and particulars hereinbefore stated and inquired after, and that each of the said defendants, James Shreve, Restore S. Lamb, John Chambers, Richard Jones, Nathan Atkinson,
- 10 Thomas Black, and the said James Shreve and Barclay White together, as executors of the said Jonathan Smith, deceased, and the said Caleb Newbold, junior, and Richard C. Shreve together, as the administrators of the said James Newbold, deceased, may be decreed to bear and sustain the said loss and deficiency with each of your orators; and that an account may be taken by and under the direction and decree of this Honorable Court, of what is justly due and owing to your orators for principal and interest, upon the said covenant, and that the said defendants may be decreed to pay unto
- 20 your orators, by a short day, to be appointed by this Honorable Court, the amount found due to your orators on the said covenant as aforesaid; and that each of the said defendants, James Shreve, Restore S. Lamb, John Chambers, Richard Jones, Nathan Atkinson, and Thomas Black, and the said defendants, James Shreve and Barclay White together, as executors of the said Jonathan Smith, deceased, and the said defendants, Caleb Newbold, junior, and Richard C. Shreve together, as administrators of the said James Newbold, deceased, may be decreed to pay to your orators, as aforesaid, an
- 30 equal part and proportion of the amount that may be found due and owing to your orators for principal and interest on the said covenant as aforesaid; or in case it shall appear by the said discovery, or otherwise, that on the said second day of June any, or either, of the said defendants, James Shreve, Restore S. Lamb, John Chambers, Richard Jones, Nathan Atkinson, and Thomas Black, or the said Jonathan Smith, now deceased, or the estate of the said James Newbold, deceased, were unable to pay their, his, or its several and respective equal parts and proportions of the said loss and deficiency, that then such of the said defendants, James Shreve,
- 40 Restore S. Lamb, John Chambers, Richard Jones, Nathan Atkinson, and Thomas Black, and the executors or administrators of such of the said estates as then remained solvent and able to pay as last aforesaid, may be decreed to pay to your orators the amount that may be found due and owing to your

orators for principal and interest on the said covenant as aforesaid; and that each of the said defendants, James Shreve, Restore S. Lamb, John Chambers, Richard Jones, Nathan Atkinson, and Thomas Black, who shall appear by the said discovery, or otherwise, to have been solvent and able to pay as last aforesaid, on the said second day of June, and the said James Shreve and Barclay White together, as executors of the said Jonathan Smith, deceased, if the estate of the said Jonathan Smith, deceased, shall appear, as aforesaid, to have been solvent and able to pay, as last aforesaid, on the said 10 second day of June, and the said Caleb Newbold, junior, and Richard C. Shreve together, as administrators of the said James Newbold, deceased, if the estate of the said James Newbold, deceased, shall appear, as aforesaid, to have been solvent and able to pay, as last aforesaid, on the said second day of June, may be decreed to pay to your orators an equal part and proportion of the amount that may be found due and payable to your orators for principal and interest upon the said covenant as aforesaid, together with the costs and charges of your orators in this behalf expended. And that your orators may have such further or other relief in the premises as the circumstances and nature of the case may require, and as may be agreeable to equity and good conscience. 20

May it please your Honor, the premises considered, to grant unto your orators a writ or writs of subpœna of the State of New Jersey, to be directed to the said James Shreve, Restore S. Lamb, John Chambers, Richard Jones, Nathan Atkinson, and Thomas Black, and to the said James Shreve and Barclay White, executors of the last will and testament of the said Jonathan Smith, deceased; and to the said Caleb Newbold, junior, and Richard C. Shreve, administrators of all and singular the goods and chattels, rights and credits which were of the said James Newbold, deceased, and their confederates, when discovered, therein and thereby commanding them and every of them, at a certain day, and under a certain penalty therein to be expressed, to be and appear before your Honor in this Honorable Court, and then and there full, true, and perfect answer make to all and singular the premises, and to stand, to abide, and perform such decree as to your Honor shall seem meet. 30

And your orators will ever pray, &c. 40

ROBT. D. SPENCER, *Solicitor.*

IN CHANCERY OF NEW JERSEY.

AMENDED BILL.

Amendments to the Bill of Complaint in this cause, made by order of the Chancellor.

Strike out from the original bill of complaint all that follows after the words "one thousand eight hundred and forty-five," in the line of the twenty-third page, and in lieu of the part stricken out, insert the words following; to wit:

And your orators further shew, that after the execution
 10 and delivery of the said covenant, and prior to the said second day of June, in the year of our Lord one thousand eight hundred and forty-five, but at what precise time they are not informed and cannot state, the said Philip R. Dakin, another party to the said covenant, departed this life intestate, residing at the time of his death, as your orators have been informed, and believe to be true and charge, at Wilmington, in the state of Ohio, and that administration of all and singular the goods, chattels, and credits which were of the said Philip R. Dakin, deceased, was granted, in due form of law, to Perry Dakin,
 20 of said state, who took upon himself the burthen thereof, and afterwards died, leaving some part of the said goods, chattels and credits unadministered and not fully disposed of, whereupon administration of all and singular the goods, chattels, and credits of the said Philip Dakin, deceased, left unadministered and undisposed of as aforesaid, was committed and granted, in due form of law, to George Dakin, a defendant hereto, who hath taken upon himself the burthen thereof.

And your orators further shew unto your Honor, that on or about the first day of August, in the year of our Lord one
 30 thousand eight hundred and thirty-eight, the said Jacob Ridgway, another party to the said covenant, departed this life intestate, and that on the thirteenth day of August, in the year last aforesaid, administration of all and singular the goods, chattels, and credits which were of the said Jacob Ridgway, deceased, were duly granted by Charles M. Harker, Surrogate of the said county of Burlington, to Richard Wilkins and Lydia H. Ridgway, other defendants hereto, who have taken upon themselves the burthen thereof.

And your orators further shew unto your Honor, that on or

about the first day of March, in the year of our Lord one thousand eight hundred and thirty-nine, the said Amzi B. Wood, another party to the said covenant, departed this life intestate, residing at the time of his death, as your orators have been informed, and believe to be true and charge, at Grand Gulf, in the state of Mississippi, and that his father, Jonathan Wood, has acted as administrator and collected debts due to the said Amzi B. Wood in his lifetime, and claims to have a right to collect the same—but whether letters of administration have been granted to the said Jonathan Wood, or to any other person or persons, upon the estate of the said Amzi B. Wood, your orators are ignorant. 10

And your orators further shew, that on or about the first day of April, in the year of our Lord one thousand eight hundred and forty-five, the said Joseph Burr, another party to this covenant, departed this life intestate, residing at the time of his death, as your orators have been informed and believe to be true, in the city of Philadelphia, in the state of Pennsylvania, and that on the fourteenth day of April, in the year last aforesaid, administration of all and singular the goods, chattels, and credits which were of the said Joseph Burr, was granted, in due form of law, to Marmaduke Burr, another defendant hereto, who has taken upon himself the burthen thereof. 20

And your orators further shew, that on or about the first day of January, in the year of our Lord one thousand eight hundred and thirty-nine, the said James Newbold, another party to the said covenant, departed this life intestate, and that on the sixteenth day of January, in the year last above mentioned, letters of administration of all and singular the goods, chattels, rights, and credits which were of the said James Newbold, deceased, were duly granted by Charles M. Harker, Esquire, Surrogate of the county of Burlington, to Caleb Newbold, junior, and Richard C. Shreve, other defendants hereto, who have taken upon themselves the burthen thereof. 30

And your orators further shew, that on or about the sixteenth day of November, in the year of our Lord one thousand eight hundred and forty-five, and after the said second day of June, the said Jonathan Smith, another party to the said covenant, departed this life, having first duly made, executed and published his last will and testament, in writing, in due form of law, and therein and thereby did, among other things, nominate, constitute, and appoint your orator, Joseph Smith, together with the said James Shreve and Barclay White, ex- 40

cutors thereof; and that the said last will and testament was afterwards, to wit, on the second day of January, in the year of our Lord one thousand eight hundred and forty-six, duly proved by your orator, Joseph Smith, and the said James Shreve and Barclay White, the executors therein named, before the Surrogate of the said county of Burlington, as by a certified copy of the same, and probate thereof, now in the custody of your orators, and ready to be produced when and where this Honorable Court may direct, or the record thereof, 10 now remaining in the said Surrogate's office, may more fully appear.

And your orators further shew, that all the other parties to, and signers of, the said covenant, were interested as well as your orators in aiding the said company to procure the said loan of thirty-five thousand dollars. So the understanding and agreement between and among all the parties thereto was that all should be responsible for and share equally any loss or deficiency that might happen or arise in consequence of the same having been made to or procured for the said company; 20 and as it was foreseen that before the said loss or deficiency, if any should happen or arise, could be ascertained, one or more of the said parties might become or be unable to pay his or their equal share or shares of such loss or deficiency, it was further agreed that such of the said parties to the said covenant as should remain solvent and able so to do, should bear and sustain such loss and deficiency equally with your orators, or such part or proportion thereof as they may be enabled to pay—that is to say, each of the said other parties who remained solvent and able as aforesaid, should bear and 30 sustain an equal part of the said loss or deficiency, or such part or proportion thereof as he or they might be able to pay, with each of your orators.

And your orators further shew, that on the said second day of June, when the said loss and deficiency were ascertained, the parties to the said covenant, other than your orators, who then remained and were solvent and able, as in the said covenant hereinbefore set out is particularly mentioned and expressed, and the estates of such of the said other parties who had died previous thereto, which remained solvent 40 and able as aforesaid, became and were, and from thence next hitherto have been, and still are, liable and bound to bear and sustain the said loss and deficiency equally with your orators, that is to say, that each of the said other parties, and each of the said estates, at the said last mentioned date remaining and being solvent and able as aforesaid, became and

were, and from thence next hitherto have been, and still are, liable and bound to bear and sustain an equal part and proportion of the said loss and deficiency with each of your orators, or some part thereof; and that on the said second day of June, such of the said other parties, and such of the said estates, as then remained and were solvent and able as aforesaid, became and were, and from thence next hitherto have been, and still are, liable and bound to pay to your orators such a sum of money as would divide the said loss and deficiency equally between such of the said other parties, and 10 such of the said estates, as at the said last mentioned date remained and were solvent and able as aforesaid, and your orators, each of the said other parties and estates last mentioned being bound and liable to pay to your orators such a part and proportion of the said last mentioned sum of money as would cause an equal part and proportion of the said loss and deficiency to fall upon and be borne by each of the said last mentioned other parties and estates remaining and being solvent and able as aforesaid, with each of your orators, or some part thereof. And your orators further show, that upon the 20 solvency and ability of the said other parties to the said covenant, who were living, and of the estates of those who were deceased, at the time, in the manner, and to the extent aforesaid, depend their liability to your orators on the said covenant, and their obligation to pay to your orators their several and respective parts and proportions of the said loss and deficiency, while upon the number of the said other parties, and of the said estates remaining solvent and able as aforesaid, depends the amount of the parts and proportions of the said loss and deficiency to be borne and sustained by each of your 30 orators, and to be paid to your orators, and to be borne and sustained by each of the said other parties, and of the said estates remaining and being solvent and able as aforesaid; that the solvency and ability of a party, or any estate, to pay a specified sum of money at any particular or stated time, except in extreme and notorious cases, is a fact exclusively in the knowledge of the party himself, or of the executor or executors, administrator or administrators, of the said estate, and is not capable of proof by another party; that the solvency and ability of the said other parties to the said covenant, or 40 of some of them, and of the said estates, or some of them, to pay their several and respective parts and proportions of the said loss and deficiency to your orators, are facts exclusively within the knowledge of the said other parties themselves, severally and respectively, and of the executors and adminis-

trators of the said estates, severally and respectively, and cannot be proved by your orators, except in the extreme and notorious cases hereinafter mentioned, without a discovery from the said other parties themselves, severally and respectively, and from the said executors and administrators respectively.

And your orators further shew unto your Honor, that they have been informed and believe, and therefore charge the fact to be, and that the same will appear by a discovery from
 10 the defendants here, and that on the said second day of June, the said James Shreve, Restore S. Lamb, John Chambers, Richard Jones, Nathan Atkinson, Thomas Black, Chalkley Atkinson, Clayton G. Atkinson, Timothy Field, Thomas Haines, Jonathan Scattergood, and John P. Bispham, and the estates of Philip Dakin, Joseph Burr, Amzi B. Wood, Jacob Ridgway, and James Newbold, respectively, were solvent, and able to pay their several and respective parts and proportions of the said loss and deficiency, or some part or proportion thereof.

20 And your orators further shew unto your Honor, that at the time of the filing of this bill, they are informed and believe, and therefore charge, that each of them, the said James Shreve, Restore S. Lamb, John Chambers, Richard Jones, Nathan Atkinson, Thomas Black, Chalkley Atkinson, Clayton G. Atkinson, Timothy Field, Thomas Haines, Jonathan Scattergood, and John P. Bispham, and the estates of each of them, the said Philip Dakin, deceased, Joseph Burr, deceased, Jacob Ridgeway, deceased, Amzi B. Wood and James Newbold, respectively, were bound and liable to bear and sustain
 30 an equal part and proportion of the said loss and deficiency with each of your orators.

And your orators further shew unto your Honor that no part of the said principal sum of thirty-five thousand dollars so loaned by your orators to the said company, as expressed and mentioned in the condition of the said obligation, and in the proviso of redemption of the said indenture of mortgage, and in the said covenant so given to your orators as aforesaid, has been paid by the said company, or by any other person or persons for said company to your orators or either of them, or to any other person for their or either of their use.
 40 And that no part of the interest money accruing upon said loan of thirty-five thousand dollars has been paid to your orators, or to any or either of them, or to any other person or persons for their or either of their use, except the sum of one thousand and sixty-seven dollars and fifty cents, paid in the

year of our Lord one thousand eight hundred and thirty-five, as herein before stated. And that your orators have not, nor has any or either of them, or any other person or persons for their or either of their use, received from the said railroad lands, premises, materials, dividends, proceeds, profits and corporate property of the said company so mortgaged to your orators as aforesaid, or from any or either of them, or from any other source whatever, for or on account of the said loan of thirty-five thousand dollars and the interest accruing thereon, any further or other sum of money than the said sum 10 of one thousand and seventy-nine dollars and sixty-one and a quarter cents, received from the said corporate property of the said company so sold as aforesaid. But, on the contrary, your orators expressly charge that the whole of the said loss and deficiency, amounting, on the said second day of June aforesaid, to the sum of fifty-four thousand five hundred and fifty-five dollars and eighty-nine cents, remains wholly unpaid and unsatisfied, which said sum or loss and deficiency is to be borne ratably or equally by the said defendants and the complainants according to the time, true intent and meaning 20 of the said agreement herein before recited and set forth.

And your orators further shew unto your Honor that whether, on the said second day of June, the said James Shreve, Restore S. Lamb, John Chambers, Richard Jones, Nathan Atkinson, Thomas Black, Chalkley Atkinson, Clayton G. Atkinson, Timothy Field, Thomas Haines, Jonathan Scattergood and John Bispham, and the estates of the said Philip Dakin, Joseph Burr, Amzi B. Wood, Jacob Ridgway and James Newbold, respectively, remained and were solvent and able to bear and sustain an equal part or proportion, or any 30 part or proportion of the said loss and deficiency with your orators, are facts exclusively within the knowledge of the defendants to this bill. And your orators are advised that they cannot safely proceed in any action, either at law or in equity, to recover the monies due to them upon and by reason of said deed of covenant, and for and on account of the said loss and deficiency, without a discovery from the said James Shreve, Restore S. Lamb, John Chambers, Richard Jones, Nathan Atkinson, Thomas Black, Chalkley Atkinson, Clayton G. Atkinson, Timothy Field, Thomas Haines, Jonathan Scattergood and John Bispham, respectively; and from Caleb 40 Newbold, junior, and Richard C. Shreve, as administrators of the said James Newbold, deceased, and from James Shreve and Barclay White, as executors of the said Jonathan Smith, deceased, and from George Dakin, administrator, de bonis

non, of all and singular, the rights, credits and effects which were of the said Philip R. Dakin, deceased, and from Richard Wilkins and Lydia H. Ridgway, administrator and administratrix of all and singular, the goods and chattels, rights, credits and effects which were of Jacob Ridgway, deceased, and from Marmaduke Burr, administrator of all and singular, the rights, credits and effects which were of the said Joseph Burr, deceased.

- And your orators further shew unto your Honor that they
 10 have applied to the said defendants to pay their equal proportion of said loss and deficiency, or such part or proportion thereof as they are respectively liable or able to pay to your orators. But more so, it is, may it please your Honor, that the said defendants, combining and confederating to and with divers other persons, at present unknown to your orators, whose names, when discovered, your orators pray may be inserted in this, their bill, with proper and apt words to charge them, sometimes give out and pretend that the whole of the said sum of thirty-five thousand dollars so loaned by your
 20 orators to the said company, with the interest accruing thereon, has been paid to your orators; the contrary whereof your orators charge to be true. And sometimes the said defendants give out and pretend that the whole or some part of the said deficiency has been paid or satisfied to your orators; the contrary whereof your orators charge to be true.

All which actings and doings and pretences of the said defendants are contrary to equity and good conscience, and tend to the manifest wrong and injury of your orator.

- In tender consideration whereof and forasmuch as your orators are altogether remediless in the premises and cannot have
 30 adequate relief save in this Honorable Court, where matters of this kind are cognizable and relievable.

To the end, therefore, that the said defendants and their confederates, when discovered, may full, true, and perfect answer make to all and singular the premises, upon their several and respective corporeal oaths, as fully and particularly as if the same were herein again repeated, and they interrogated thereto paragraph by paragraph; and more particularly
 40 whether on the second day of June, in the year of our Lord one thousand eight hundred and forty-five, the said James Shreve, Restore S. Lamb, John Chambers, Richard Jones, Nathan Atkinson, Thomas Black, Chalkley Atkinson, Clayton G. Atkinson, Timothy Field, Thomas Haines, Jonathan Scatergood, and John Bispham, and Caleb Newbold and Richard C. Shreve as administrators of said James Newbold, deceased,

and James Shreve and Barclay White as executors of said Jonathan Smith, deceased, and George Dakin, administrator de bonis non, of all and singular the rights, credits, and effects which were of said Philip Dakin, deceased, Richard Wilkins and Lydia H. Ridgway, administrator and administratrix, all and singular the goods and chattels, rights, credits and effects which were of Jacob Ridgway, deceased, and Marmaduke Burr, administrator of all and singular the goods and chattels, rights, credits, and effects which were of Joseph Burr, deceased, Jonathan Wood, administrator of all and singular the goods and chattels, rights, credits, and effects which were of Amzi B. Wood, deceased, remained and were solvent and able to pay unto your orators such a sum of money as would divide the said loss and deficiency equally between the parties to the said covenant other than your orators then living and remaining solvent and able as in the said covenant is mentioned, and the estate of such of the said other parties who had died previous thereto, and which remained solvent and able as aforesaid, and your orators; and whether any or either of them, and which of them, remained and were solvent and able to pay as last aforesaid; and whether the said James Shreve, Restore S. Lamb, John Chambers, Richard Jones, Nathan Atkinson, Thomas Black, Chalkley Atkinson, Clayton G. Atkinson, Timothy Field, Thomas Haines, Jonathan Scattergood, and John Bispham, and the estate of James Newbold, deceased, and of Jonathan Smith, deceased, and of Philip R. Dakin, deceased, and of Jacob Ridgway, deceased, and of Joseph Burr, deceased, and of Amzi B. Wood, deceased, remained and were solvent and able to pay such a part and proportion of the said last mentioned sum of money as would cause an equal part and proportion of the said loss and deficiency to fall upon and be borne by each of the said last mentioned persons and the said last mentioned estates and each of your orators, and if not which of them became insolvent, and when.

And that each of the said defendants may be decreed to pay their respective proportions of the said loss or deficiency which, according to the true intent and meaning of the said covenant and article of agreement they may be liable to pay, and which, according to equity and good conscience, they ought to pay, or for which, by the decree of this Honorable Court, they may be found liable to pay.

And that an account may be taken, under the direction of this Honorable Court, of what is justly due and owing to your orators for principal and interest upon the said covenant; and

that the said defendants may be decreed to pay to your orators, by a short day to be appointed by this Honorable Court, the amount found due to your orators in said covenant and article of agreement, and that your orators may have such other and further relief in the premises as your Honor shall deem meet, and as shall be agreeable to equity and good conscience.

- May it please your Honor to grant unto your orators the State's writ of subpœna, to be directed to James Shreve, Restore S. Lamb, John Chambers, Richard Jones, Nathan Atkinson, Thomas Black, Chalkley Atkinson, Clayton G. Atkinson, Timothy Field, Thomas Haines, Jonathan Scattergood, John Bispham, Jonathan Wood, administrator of Amzi B. Wood, deceased, and to Caleb S. Newbold, junior, and Richard C. Shreve, administrators of James Newbold, deceased, and to James Shreve and Barclay White, executors of Jonathan Smith, deceased, and to George Dakin, administrator of Philip Dakin, deceased, and to Richard Wilkins and Lydia H. Ridgway, administrators of Jacob Ridgway, deceased, and to Marmaduke Burr, administrator of Joseph Burr, deceased, commanding them, and each of them, under a certain penalty, to be and appear in this Honorable Court on a certain day therein to be named, and to stand to and abide such decree in the premises as to your Honor shall seem equitable and just.
- And as in duty bound, your orators will ever pray, &c.

R. D. SPENCER,

Solicitor and Counsel with Complainant.

A N S W E R .

IN CHANCERY OF NEW JERSEY.

- 30 *The Answer of James Shreve, Restore S. Lamb, John Chambers, Nathan Atkinson, Thomas Black, James Shreve and Barclay White, executors of Jonathan Smith, deceased, Caleb Newbold and Richard C. Shreve, administrators of James Newbold, deceased, to the Bill of Complaint of John Black and others, complainants.*

These defendants, now and at all times hereafter saving and reserving to themselves all manner of benefit and advan-

tage of exception to the many errors and insufficiencies in the said bill of complaint contained, for answer thereunto, or unto so much and such parts thereof as they are advised is material for them to answer unto, they answer and say:—They admit the passage of the said several acts of the Legislature, and supplements, with the sections therein contained, as set out in said bill, but for greater certainty as to the contents thereof, beg to refer to the same when they shall be severally produced in court; that the said “The Delaware and Jobstown Rail or McAdamized Road Company,” was duly organized, and went into operation under and by virtue of said act; that said company became much embarrassed for want of funds, and that on or about the time named in the bill, a meeting of a number of the stockholders was holden, (but whether upon legal notice to all of said stockholders is to them unknown,) for the purpose of devising means to relieve said company from its difficulties; at which said meeting these defendants admit that a number of said stockholders were present, as is entered in the book of minutes of the said company, but who, and how many, these defendants are ignorant. 10
 They further admit, that at said meeting the financial affairs of said company, with the then condition of said work were examined and considered; that these defendants cannot now, from memory, say whether the precise sums mentioned in the bill as the debts and liabilities of the company, with the estimate for its completion, are correctly set out, but beg to refer to the books and papers, when produced, for greater certainty on these points. That they believe that the road and works were, at or about the time in said bill mentioned, in the condition substantially as in said bill is described. That they 20
 cannot answer, from memory, as to the exact amount of receipts and disbursements at that date, of said company, but beg to refer, and reference to all these matters, to the books and other papers, when the same shall be produced in court, and likewise to a further statement on this subject hereinafter contained. They in like manner admit generally that the amount, within a comparatively small balance in the treasury, had been expended and the road and works not completed, but when and how expended, and of the details, they cannot answer with accuracy, but refer to the books, papers, and 40
 vouchers, when the same shall be produced in court. And these defendants further admit, that the said company, with a view to the completion of said road, resolved that a loan of money must be made, to the amount of thirty-five thousand dollars, and that a committee was named to negotiate said

- loan on the credit of said company; that said committee afterwards reported that said loan could not be made on the security of said road; that thereupon, to wit, on the twenty-third day of January, in the year of our Lord one thousand eight hundred and thirty-five, it was resolved, and so entered in the minutes, that it was agreed "by the stockholders, that John Black, Joseph Smith, and Benjamin Jones do, by their joint obligation, get the sum of thirty-five thousand dollars, and that they have a mortgage on said road delivered to them, and that the remaining stockholders execute a joint bond to the said persons so loaning the money, as security to them in case of any losses sustained by said loan, each one to bear his proportion of the loss," and Thomas Haines, secretary, was appointed to have the necessary papers drawn and ready for examination at the next meeting; at which said next meeting, to wit, on the second of February, in the year of our Lord one thousand eight hundred and thirty-five, the said mortgage, bond, and covenant were reported for examination, and the same were sanctioned and adopted; and thereupon the said
- 10 and mortgage were then and there executed and delivered by said company, as set out in the bill of complaint, and pursuant to the resolution of said company hereinbefore recited and set forth; but the said covenant to indemnify was not then and there executed and delivered by the stockholders of said company, a part only of whom were present at said meeting. That a covenant or agreement, bearing the same date, February second, eighteen hundred and thirty-five, was executed at a subsequent day or days by the persons named in the bill, of the general tenor and effect set out in the bill,
- 20 but for greater certainty as to the contents of these papers, respectively, these defendants refer to the same when they shall be produced in court.
- 30

And these defendants further answering, say, that the said resolution hereinbefore recited was the only resolution passed by said company or stockholders as to the mode of indemnity to be given to said complainants, and that each of said complainants were not only bound to know but did know thereof. And these defendants severally answering, each for himself, Barclay White as executor, and Caleb Newbold, junior, and

40 Richard C. Shreve, administrator, as to the best of their knowledge, information, and belief, avers that as well at the time of the passage and entry in the minutes of the above resolution for the execution of said covenant and agreement as aforesaid, as at the time of the execution thereof it was expressly understood and agreed by and between the parties

thereto that the same was to be executed by all the stockholders of said company, and that the same was not to be obligatory and binding on such as did execute, until it was so executed by the other stockholders; that the said complainants were cognizant of and parties to this agreement, and these defendants aver that said covenant to indemnify never was and never could have been delivered as a binding agreement until the other stockholders executed the same. That in point of fact only twenty-one out of thirty-seven stockholders executed the same, and these, not at one and the same time, but at different times. That many of those who did sign, as well as those who refused to sign, were urged to execute on the special ground that the same was to be binding only on those who did execute, in the event of its execution by all. 10

And the said John Chambers, one of these defendants, answering for himself, says that he especially objected to executing said covenant, and that he utterly refused to execute the same until he was informed by the said John Black that all were to execute said paper, and that he, the said John Chambers, was the only stockholder who refused to execute it, and that the whole matter was little more than a form, inasmuch as the corporate property, which was the primary fund, was amply sufficient to secure the debt, and that he never would have executed said paper but for such representations. 20

And these defendants further answering, say, that they believe the original covenant or agreement, (to which they refer themselves,) when produced in court, will show upon its face that blank space was left in said agreement for insertion of the names of the other stockholders. And these defendants insist that the attempt on the part of said complainants to enforce said agreement against them, being a part only of said stockholders, is unjust and fraudulent, and that said agreement is not, under the circumstances, binding either in law or equity against these defendants, or either of them, but the same, as to them and each of them, is utterly void and of no effect. And these defendants claim the same benefit hereof as if they had pleaded the same. 30

And the said defendants further answering, say, that although the said agreement purports to be given to secure a loan then actually made by the complainants to the said incorporated company, yet in point of fact no loan had at the date or at the execution thereof, been made; and it was not until the ninth of March, in the year of our Lord one thousand eight hundred and thirty-five, that the said John Black report- 40

ed said loan as made, and the moneys ready for said company.

And the said Thomas Black, one of these defendants, (the then treasurer of said company, and none other having at any time since been appointed in his stead,) answering for himself, positively, and the other defendants according to the best of their knowledge, information, and belief, say, that out of the said sum of thirty-five thousand dollars reported as ready by said committee, and alleged to have been advanced by said
 10 complainants to said company, only about eleven thousand two hundred dollars came into the hands or possession and control of said Thomas Black, treasurer as aforesaid, where by the rules and by-laws of said company it should have come. And these defendants submit that the said complainants, and neither of them, had any right themselves to appropriate and apply said moneys, if they did so appropriate and apply the same; and as the moneys were not advanced at the date or execution of said bond, they are bound to account in detail as
 20 to when and how said advance was made and if the same were disbursed by them, or either of them, how such disbursement was made, if pretended to be made, for and in behalf of the company, and upon what authority, if any, and which said authority is expressly denied.

And the said defendants further answering, humbly insist, that at the time of the execution of said covenant it was represented by the said John Black, president of said company, and so understood by these defendants, or such of them as were privy thereto, that the said mortgage before referred to was a lien, and was meant and intended to be a lien not only
 30 on the lands and real estate, but on the materials of said road and all its chartered rights and privileges, without which the lands and materials were comparatively valueless; that it was with this view that he, the said Black, in behalf of himself and co-complainants, insisted that the corporate property would pay the loan, although he and his associates would not advance any more money unless the other stockholders would come in with them. That the said John Black is a man of much intelligence and business experience, and these defendants, or such of them as executed said agreement, believed
 40 that his representations as to the lien of the mortgage as aforesaid, were true, and in that confidence executed said agreement, under the full impression and belief that the said corporate property, franchises, &c., were all bound for the repayment of said loan before they could be called upon for any deficiency. And these defendants insist that if they have been

led into error and mistake on this subject, the said complainants have no right to call upon them to respond on said covenant.

And these defendants further answering, say, that they believe the said company did mean and intend to mortgage their entire corporate property, franchises, &c., (although the said John Black may have known that such was not, per se, the legal operation of said mortgage,) and these defendants now insist, that if said agreement has, under the circumstances, any validity against them, then that the said complainants are first bound to show that they have exhausted the said mortgaged premises—the primary fund—as meant and intended as well by said company as by these defendants. That this could only be done by a decree to sell the real estate outside of the road, and to sequester the road itself, with its appurtenances, its revenues and profits, if the same were making revenues and profits; or if the same were not, by proceeding against the same as creditors against an insolvent corporation, or by application to the legislature for a special act, as in other cases, to sell and transfer the same; that no such proceeding or proceedings have at any time been instituted, but the said company is yet, as these defendants are advised and believe, an existing body corporate, yet legally in the possession and ownership of said road and franchises; and that no attempt has been made to sell or otherwise dispose of said franchises, with a view to a credit on said loan, and that the road itself, with the materials thereupon, being a public highway, was not and could not, as these defendants are advised and believe, nor could any dividends, tolls, and profits be levied upon or sold by the sheriff under and by virtue of the execution referred to in the complainants' said bill of complaint; that the whole proceeding thereupon for all purposes meant and intended by the parties to said covenant, were absolutely void, and no part of said primary fund was fairly applied to the settlement and payment of said loan. 10 30

And these defendants further answering, say, that one of the covenants in said indenture of mortgage was that the proceeds and profits of said railroad should be first applied to the interest of said loan semi-annually from the date of said indenture of mortgage, and that no dividends should be made, or other profits, until all the interest due on said loan at the time of said dividend should be satisfied, meaning and intending thereby to make the interest on said loan a prior lien on the profits of said road, and to have the proceeds thereof, after payment of the current debts and expenses, entirely appropri- 40

ated, if necessary, thereunto. And these defendants aver that the performance of this covenant in said indenture of mortgage was a condition precedent to any right of said complainants to call on these defendants to answer upon said covenants. And the said defendants aver that such condition precedent never was performed, but that on the contrary the said company, by and with the express approbation, consent, and agreement of the said complainants, and without authority from the several defendants, did appropriate large sums of

10 money, the proceeds and profits of said road, after payment of its current expenses, to the extension thereof, and to the building of wharves, and for other purposes, in the nature of dividends and profits, not contemplated in said covenant to indemnify, and against the express agreement and stipulations in said mortgage contained; and did likewise offset tolls against debts accrued subsequent to said alleged loan, and pay off old outstanding debts and obligations to other persons not contemplated by said parties, and in direct violation of said condition precedent. And these defendants, with a view to

20 specifying to some extent the general nature of these objections with more accuracy, show to the court that the receipts of said company for tolls from April, eighteen hundred and thirty-five to the twenty-eighth of February, eighteen hundred and forty-five, both inclusive, (including twenty-six dollars and twenty-five cents, rent, &c.,) were twenty-nine thousand nine hundred and forty-four dollars and twenty-seven and three-quarter cents, as nearly as they can at present specify the same, but for greater certainty they refer to the books and papers. That the disbursements of the company during the

30 same time were nineteen thousand eight hundred and thirty-five dollars and sixty-seven cents only, leaving the clear nett proceeds of said ten years ten thousand one hundred and eight dollars and sixty and a quarter cents, to be credited on said loan. That the receipts of said company for tolls through the months of March, April and May, in the year of our Lord one thousand eight hundred and forty-five, were five hundred and fifty-seven dollars and eight and a half cents, and its charge for disbursements during the same time were four hundred and thirty-nine dollars and seventy-seven and a quarter

40 cents, leaving a balance of one hundred and eighteen dollars and thirty-one and a quarter cents only to be credited on said loan. But these defendants further show that the above is the statement and claim of the company only, and they aver, and expect to be able to prove, that the tolls, &c., were larger than above stated, and that in the disbursements are included large

sums of money which should not have been so disbursed, but credited on said loan as aforesaid.

And these defendants further answering, say, that these and other large sums of money from like and other sources, were applied by said company, with the approbation, consent and agreement of said complainants, and without authority of law, to the extension of said road from the mouth of Craft's creek, the terminating point named in the charter, to a point on the Delaware river, entirely beyond the limits of the charter of said company, and beyond the limits designated in said mortgage as the terminating point of said road; that instead of appropriating the fund for the completion of the road designated in the mortgage, they appropriated the same, or a large part thereof, if appropriated at all, to the building and completing a road outside of, and not covered by said mortgage security; and with the like approbation, agreement and consent of said complainants, and without the authority of the defendants respectively, the said company paid off a large amount of old debts, constructed wharves beyond the limits of said charter, and did other matters and things without right, and in violation of the conditions precedent in said covenant and mortgage herein before referred to. And these defendants further answering, say, that a majority of them had comparatively small interests, and therefore little control in the affairs and direction of said company; that the said John Black, one of said complainants, held a larger amount of the stock of said company than the aggregate stock of all these defendants; that he, the said Black, was the president of said company, and the largest stockholder therein. That the business of said company was generally transacted by the said president and a board of directors, and such of these defendants as were stockholders merely had little or no concern therewith; and these defendants, each and every of them, insist that the said covenant on their part, if binding at all under the circumstances, was a personal contract to indemnify the complainants, collateral to and in aid of the mortgaged premises, and the several covenants in said mortgage contained; and that neither the said company, nor the said complainants could, by any conduct or agreement between them subsequent to the execution of said covenant to indemnify, vary the rights or obligations of the parties thereto. That the said complainants, and more especially the said John Black, one of them, were the principal conductors of the business of said company, and had heavy interests therein, and in the extension thereof, and objects to answer in which

the other stockholders and signers of said covenant did not equally participate; and these defendants answering, severally, insist that the failure upon the part of said company, by and with the consent and agreement of said complainants, to appropriate the proceeds of said principal or primary fund, and to keep the said covenants in said mortgage contained, is a bar against any and all claim against these defendants or either of them, upon the collateral agreements before referred to, as well in a court of equity as in a court of law.

- 10 And these defendants further answering say, that if this honorable court shall consider that the said matters, as before stated, are not a bar against said complainants' suit, then they respectfully submit and insist that the said complainants are bound to show the amount of said alleged loan which actually came into the hands of said company, or its agents lawfully authorized; likewise the amounts which were received, or might have been received by said company, for tolls and profits, and which were misapplied as aforesaid with the consent and by the agreement of the above complainants,
- 20 and that the said sums, as well as other sums which upon a full accounting may seem right, be credited upon said loan to said company, before these defendants, or either of them, are called upon to respond for any deficiency.

- And these defendants further answering, admit, that the said complainants, under pretence of a foreclosure of said mortgage, as referred to in the bill, did attempt to sell, as they are informed and believe, said mortgaged premises; that the same were struck off to one Richard Jones, a son of Benjamin Jones, deceased, which said Benjamin was one of these
- 30 complainants; that said Richard Jones purchased, as these defendants believe, in behalf of himself and the complainants, or one of them, or upon an understanding to be consummated at some day or time after said purchase; that the decree upon which said sale and purchase was made, was a "decree pro confesso" against said company, and to which these defendants were not parties, excepting only the said Thomas Black, and the administrators of James Newbold and Jonathan Smith, who were named therein and summoned merely as subsequent creditors, but did not appear and defend said suit;
- 40 that the said decree, and the said sale, so far as respects said road and the materials thereupon, or the dividends, rents, and profits thereof, or as respects the rights and interests of these defendants therein, are, as these defendants insist, wholly inoperative and void, and these defendants further answering, show unto the court that the said complainants, and the said

Richard Jones, prior to said pretended sale and purchase, were distinctly informed, as these defendants charge and believe, that the said proceedings and sale would give no title to said road, or dividends, or authorise the removal or interference with the iron or other materials of which the same was constructed, and the opinions of counsel learned in the law to that effect were shown, but that the said complainants and the said Richard Jones, with full knowledge of all the facts connected with said mortgage, decree, and sale, persisted, in defiance of the rights of these defendants, and of the opinions of counsel as aforesaid, to make such sale and pretended purchase as aforesaid; that owing to the understood facts, as these defendants believe, that the said sale would give no legal right in said property, the same was bid off for the small sum of one thousand and fifty dollars, as named in the bill, when the iron and timber alone were worth, as these defendants believe and charge, the sum of at least ten thousand dollars; and these defendants are further informed and believe, that the said Richard Jones, and those associated with him, or holding under him, have, subsequent to said sale, and wholly without right, assumed to remove and take away the iron and timber of which said road is composed, and to appropriate the same to his and their own use; and these defendants submit that the complainants, who were associated with and took part in the wrongful acts aforesaid, by the making of said sale, should account for the difference between the actual value of said property and the amount received for it, and that the same, with all damages growing thereout, and by reason of their improper conduct, should be carried as a credit to said bond or loan before these defendants, or either, should be called upon to respond for any deficiency. 10 20 30

And these defendants likewise charge, and hope to be able to prove, if it shall become necessary for them to do so, that the said complainants, or one of them, have collected and realised other moneys, not credited on said bond, from the sale of said company's lands, and the collection of instalments on the capital stock, and the revenues and tolls of said company, which should be credited on said bond; and these defendants severally answering, expressly deny that they, or either of them, are at all bound by the amount decreed to be due from said company to said complainants on the decree of foreclosure referred to in the bill of complaint, and to which they and neither of them were parties, (except as aforesaid,) and were not summoned or heard in reference thereunto, 40

either in court or before one of the masters thereof, and they expressly deny that they are concluded by the action of the court between other parties, or by the amount ascertained, as is alleged, to be due on the second day of June, in the year of our Lord one thousand eight hundred and forty-five, all which alleged ascertainment was, as before said, *ex parte*, and without the assent or concurrence of these defendants; and these defendants submit to the court, that their rights, under and in virtue of the said covenant to indemnify, are entirely distinct from, and in many respects antagonistical to, the rights and interests of said complainants and company.

And these defendants admit that the said company, after the execution of the mortgage first above named, executed another mortgage, as they are informed and believe, to Thomas Black, James Newbold, and Jonathan Smith, but for the precise date thereof, as well as the amount secured thereby, and what the same covers, they refer to the same, when it shall be produced in court; they likewise admit the recovery of sundry judgments against said company, as stated in the bill of complaint.

And these defendants further answering admit, the deaths of the several persons named in the bill, to wit. James Newbold, Jonathan Smith, Philip R. Dakin, Jacob Ridgway, Amzi B. Wood, and Joseph Burr, but whether their several executors and administrators (excepting such as are defendants hereto) are correctly set out in said bill, they are ignorant, and leave the same to be proved, if need be, according to the rules and practice of this court.

And these defendants further answering, admit, that the subscribers to said covenant were interested with said complainants to procure said loan, but not equally interested, inasmuch as some of said parties were owners of a few shares of said stock, while others were owners of many; that the said John Black owned, for instance, three hundred shares thereof, at the par value of fifteen thousand dollars; that Benjamin Jones, another complainant, owned one hundred shares thereof, par value five thousand dollars, and the remaining complainant, Joseph Smith, owned seventy shares of said stock, par value three thousand five hundred dollars; that these complainants were interested to the full amount of this stock, while three others of the subscribers to said covenant to indemnify, owned only five shares of said stock, each at par value two hundred and fifty dollars, and the defendants generally held interests minor to said complainants, and variant generally from each other; that the pretence, therefore,

that they were equally interested, if such be the pretence, is against the fact, and the attempt to hold them severally liable each for a full proportion of the losses, and not in reference to his extent of interest, is against the equity of the case.

And these defendants severally answering, each for himself, and the estates he and they represent, admit, that they believe themselves able to answer to the said complainants for their several shares of all just claims and demands the complainants may have against them, or the estates represented by them, under and by virtue of said covenant, and that they 10 charge and believe that the estates of the several other parties named in the bill are likewise able to satisfy their shares severally of all such just claims and demands, and are bound to contribute thereto, but they submit to the court that the only mode of settling such question of solvency is by execution or process of the decree out of this honorable court, if the same shall become necessary; that the ability of a party or an estate to respond, must ever remain uncertain, until the amount for which they are to respond is fixed and ascertained, which, as before said, has not in this case been done, 20 either on the said second day of June, one thousand eight hundred and forty-five, or at any other time before or since.

And these defendants further answering, deny all unlawful confederacy and combination charged in said bill; without that, that any other matter or thing material for them to answer unto, and not herein and hereby well and sufficiently answered unto, confessed, or avoided, traversed, or denied, is true, to the knowledge or belief of these defendants, all which matters and things these defendants are ready to aver, maintain, and prove, as this honorable court shall direct, and 30 humbly pray to be hence dismissed with their reasonable costs in this behalf wrongfully sustained, &c.

WM. L. DAYTON,

Solicitor and of Counsel with Defendants.

New Jersey, Burlington county, ss.—James Shreve, John Chambers, Restore S. Lamb, Thomas Black, James Shreve and Barclay White, executors of Jonathan Smith, deceased, Caleb Newbold, junior, and Richard C. Shreve, administra- 40 tors of James Newbold, deceased, severally alleging themselves to be conscientiously scrupulous of taking an oath, and being by me severally duly affirmed according to law, severally say, that the matters and things set forth in the within answer, so far as they relate to their own acts and deeds are

true, and that so far as the same relate to the acts and deeds of any other person or persons, they believe them to be true, &c.

JAMES SHREVE,

JOHN CHAMBERS,

RESTORE S. LAMB,

THOMAS BLACK,

JAMES SHREVE,

BARCLAY WHITE,

CALEB NEWBOLD, jr.

RICH. C. SHREVE,

} Executors of Jonathan Smith, dec'd.

} Admrs. of James Newbold, dec'd.

Affirmed and subscribed before me, one of the masters, &c.,
10 this thirteenth day of February, in the year of our Lord one thousand eight hundred and fifty-two.

JOS. B. OLIPHANT, *M. C. C.*

AMENDED ANSWER.

IN CHANCERY OF NEW JERSEY.

The further answer of Restore S. Lamb, Thomas Black, John Chambers, Nathan Atkinson, Barclay White, executor of Jonathan Smith, deceased, Caleb Newbold, junior, and Richard C. Shreve, administrators of James Newbold, deceased, and Barclay White, Sarah B. Shreve, and Elizabeth
20 S. Shreve, executor and executrixes of James Shreve, deceased, to the bill of complaint of John Black, Joseph Smith, and Benjamin Jones, complainants.

These defendants saving and reserving to themselves the same benefit and advantage of exception as is prayed in their original answer, for a further answer unto said amended bill, and the matters contained in the exceptions filed to their said answer, they answer and say:—They admit, as heretofore, that at the meeting of the directors and stockholders of the said Delaware and Jobstown Rail or McAdamized Road
30 Company, on the ninth of January, in the year of our Lord one thousand eight hundred and thirty-five, referred to in said bill, that a statement of the affairs and finances of said company were submitted to said meeting, and an entry made in the minutes in this form: "An exhibit of the state of the company's finances was presented, for which see the papers," and which is the only entry on the subject of that statement. But these defendants were not present at said meeting, nor have they any of the papers in their possession to which reference

is made in the book of minutes, all of which, as they believe, are in the hands of the complainants, or one of them, and to which these defendants have had no access: and whether the amounts set out in said bill are a true and correct statement of the debts, liabilities, and estimates, these defendants are wholly ignorant, and have no means of answering more fully and specifically than they have already answered in the premises.

And in further answering, these defendants admit that at said meeting last above referred to, there was present, as appears by an entry in the minutes, "John Black, James Shreve, Joseph Smith, Jonathan Scattergood, Chalkley Atkinson, Clayton G. Atkinson, and Thomas Haines, directors, and a number of the stockholders;" at which meeting it was resolved as follows, to wit: "That a loan of thirty-five thousand dollars be made for the company, and John Black, Benjamin Jones, and Chalkley Atkinson were appointed a committee to make such loan." That the resolution is so entered in the minutes, and it is the only resolution passed upon that subject by the meeting. Now these defendants believe, and therefore admit, that this loan was intended to discharge debts and liabilities of the company, and to complete its road; now whether these debts and liabilities were due and owing, in whole or in part, to the individual and banking companies named in the bill, they have not, at this distance of time, any knowledge. If either of them ever knew, and if so, due and owing, whether the amounts therein stated are the true amounts so due and owing, or whether there are other and additional debts and liabilities of the company, these defendants are ignorant. But although from lapse of time these defendants have forgotten, if they ever knew, these details, they submit that the complainants, by the production of papers in their possession, or the possession of some of them, may and should prove the same, according to the practice of the court.

And for a further answer, these defendants admit, they were informed and believed, that the said John Black, Joseph Smith, and Benjamin Jones did borrow for the company, and on their personal responsibility, the said sum of thirty-five thousand dollars, and that to secure the amount, (after a report by the said John Black to the company that it was ready for them,) they did execute the bond and mortgage referred to, acting upon the matter as if the said thirty-five thousand dollars had been directly paid over and advanced to them as contemplated, but that in point of fact only part of the money was paid over, and the balance appropriated without right, as

in said original answer is set forth. Now these defendants admit that the money so lent and advanced and appropriated was upon the faith of said bond and mortgage, but they deny that it was done in the covenant of indemnity in said amended bill referred to, unless they should procure the same to be executed by all the stockholders, the said complainants knowing that it was understood by the defendants, and so agreed that they were not to be bound upon said covenant unless it was executed by all the stockholders, and knowing that in advancing the money before it was so executed, they incurred the hazard consequent thereupon.

And these defendants further answering, admit that on or about the twelfth of July, eighteen hundred and forty-four, such decree was made in this Honorable Court, and such fieri facias did issue as in said bill is set forth; but for greater certainty they refer to the same, when produced in evidence.

And these defendants further answering, admit that the sheriff of the county of Burlington did, on the said second of June, eighteen hundred and forty-five, sell the said railroad on said execution, and the lands, tenements, appendages, and appurtenances, and the materials, dividends, proceeds, and profits, &c., these defendants insisting, as heretofore, that the said sale was inoperative and void, &c.

And these defendants further answering, admit that the amount realised on said sale, over and above costs, was only one thousand and seventy-nine dollars and sixty-one and a quarter cents, to be credited upon said bond and mortgage, but they deny that said sale covered all the corporate property of said company under mortgage, which consisted, as they are advised and believe, of an interest in the franchises as well as of the other estate.

And defendants further answering, admit that the said sum of fifty-four thousand five hundred and fifty-two dollars and eighty-nine cents was the amount found due the complainants (on the foreclosure bill against said company, but not against these defendants,) on the second of June, eighteen hundred and forty-five, but they do not believe, and therefore do not admit, such amount was legally and justly due. They do admit, however, that a large sum (the amount of which they do not know, and can learn only by a careful and full accounting between the parties,) was justly due and owing to said complainants at that date from said company, and that after crediting the amount of said sale upon said debt, there would yet remain a heavy loss and deficiency to fall upon said complainants, of the amount of which they are ignorant; and that

they have no knowledge or access to any papers from which to answer as to the matters and things charged in this respect, further than as they now and heretofore have answered.

And the defendants further answering, say, that although they believe that other sums over and above those named in the bill, to wit: one thousand and sixty-seven dollars and ninety cents, and one thousand and seventy-nine dollars and sixty-one and a quarter cents, were received, and are yet to be credited by said complainants upon their said bond, that they are ignorant of the sources and details thereof, to wit: 10
of the time when, of the persons from whom, and of the several amounts, and consequently cannot at present specify the same further than as in their original answer; but so believing, they cannot admit that said sums mentioned in said bill are all that the complainants have received or are bound to credit upon their said bond—and if they are all they are bound to credit as against the company, they are not all they are bound to credit in favor of these defendants.

And in further answering, the defendants, Restore S. Lamb, Nathan Atkinson, Thomas Black, John Chambers, Barclay 20
White, surviving executor of Jonathan Smith, deceased, Caleb Newbold, junior, and Richard C. Shreve, administrators of James Newbold, deceased, Barclay White, executor, and Sarah B. Shreve and Elizabeth S. Shreve, executrixes of James Shreve, deceased, each answering for himself and for the estates they severally represent, say, that according to the best of their knowledge and belief, they and the estates they severally represent were solvent and able, on the day named, and likewise that Clayton G. Atkinson, another of said subscribers, 30
remained and were solvent and able to pay to the complainants upon the said second day of June, eighteen hundred and forty-five, such sum of money as would divide the loss and deficiency, although the same should amount to the full sum named in the complainants' bill, equally between the parties to the said covenant (other than the complainants,) then being and remaining solvent and able, and the estates of the other parties who had died previous thereto, and which remained solvent and able, and the complainants, and that they all, as they believe, at the time named remained solvent and able to pay as aforesaid. 40

And the said defendants further answering, say, that they believe the several persons and estates named in the preceding paragraph were solvent and able on the day named to pay as aforesaid, and that with the exception of the said Clayton G. Atkinson they so continue; and that according to the best of

- their knowledge and belief the said Clayton G. Atkinson, Thomas Haines, and Jonathan Scattergood were then, and are now, able to pay a part of their share of the loss; that Amzi B. Wood was a stranger, and they knew nothing of his estate or his administrator; that the estates of Philip R. Dakin, Jacob Ridgway, and John B. Bispham, deceased, and likewise Chalkley Atkinson, Joseph Burr, and Timothy Field were not, at the day named, and are not now, solvent and able to pay such part or proportion of the loss or deficiency
- 10 as would cause an equal part or proportion of the loss and deficiency to fall upon and be borne by each of the said last mentioned estates and persons and each of the complainants, though they are not aware that any of them have been declared insolvent; and that those who are named as able to bear a part of their said portion of the loss are not, as these defendants believe, insolvent, though they cannot, of course, state how much they are able to pay; and that as to this question of solvency and ability to pay, they have no certain knowledge or information. And they respectfully submit that
- 20 the said complainants are bound, under the said covenant, to hold them all liable to the extent of their present capacity, (if any are so holden liable,) and to prove satisfactorily that such as are not now able were not able on the said second of June, eighteen hundred and forty-five, if that be the day when the court shall consider such loss and deficiency to have been ascertained, or upon such other day as the said loss and deficiency may be ascertained by the court.

WILLIAM L. DAYTON,

Solicitor and of Counsel with Defendants.

30

- The State of New Jersey, Burlington County, ss.—Restore S. Lamb, John Chambers, Thomas Black, Barclay White, executor of Jonathan Smith, deceased, and one of the executors of James Shreve, deceased, Caleb Newbold and Richard C. Shreve, administrators of James Newbold, deceased, defendants above named, severally alleging themselves to be conscientiously scrupulous of taking an oath, and being severally duly affirmed according to law, upon their affirmations say, that the matters and things set forth in the above amended
- 40 answer, so far as they relate to their own acts, are true, and so far as relates to the acts of others, they believe them to be true.

RESTORE S. LAMB,
THOMAS BLACK,
CALEB NEWBOLD,

JOHN CHAMBERS,
BARCLAY WHITE,
RICH'D C. SHREVE.

Affirmed and subscribed this ninth day of September, in the year of our Lord one thousand eight hundred and fifty-four, before me.

JOS. B. OLIPHANT, *Master in Chancery.*

Replication in usual form.

DEPOSITION.

Examination of witnesses, &c., in a cause depending in the Court of Chancery of the State of New Jersey, wherein John Black, Joseph Smith and others are complainants, and John Chambers, Restore S. Lamb, Nathan Atkinson, Thomas Black, Chalkley Atkinson and others are defendants; taken at the City Hotel, in the city of Burlington, on Saturday, December thirtieth, one thousand eight hundred and fifty-four, before John Rodgers, one of the Masters and Examiners of said Court, in the presence of Robert D. Spencer, esquire, Solicitor for and of counsel with the complainants, and William L. Dayton, esquire, Solicitor for and of counsel with the defendants.

The defendants produced "Book of Minutes of the Delaware and Atlantic Railroad Company," admitted to be such by the complainants, and marked, exhibit (A) ex parte defendants. 10

The defendants produced a book of account called "The Treasurer's Book of the Delaware and Atlantic Railroad Company," and admitted to be such by the complainants, and marked, exhibit (B) ex parte defendants.

John Gibbs, a witness produced on the part of the defendants, alleging himself to be conscientiously scrupulous of taking an oath, and being duly affirmed, saith—I was present at a meeting of the stockholders of the Delaware and Atlantic Railroad Company, at Jobstown, in February, one thousand eight hundred and thirty-five; I did not know the object of the meeting at the time I was applied to to go, I was not in the habit of attending; when I got there I found that it was on account of a bond presented by John Black, Benjamin Jones and Joseph Smith; the purport of the bond, as I understood it, was to indemnify them to borrow thirty-five 30

thousand dollars; the bond was partly executed, there were several names to it at the time; it was lying on the table when I went in, and some person asked me to look at it; I read the bond, and made some objections to it, and said I could not sign it, giving as my objections, I was a very small stockholder, and I thought it bound me as much as if I were a heavy stockholder; another objection was, that I did not believe that the road ever would pay; I was urged to sign it, I think, by Dr. Dakin.

- 10 Question. What reason or inducement^t was urged upon you to sign this bond? (Objected to by the complainants.)

Answer. No inducement was offered that day.

Question. Was it or was it not stated at the time that this bond was to be executed by all the stockholders, or not to be binding? (Objected to.)

Answer. It was so stated at that meeting.

Question. Was it so generally understood from what you saw and heard? (Objected to.)

- Answer. It was. Mr. John Black and Mr. Joseph Smith
20 were present at the meeting; I did not know Jones; neither of them expressed any dissent, when it was stated that the bond was to be signed by all the stockholders; I do not recollect that they or either of them assented to the statement; I saw Mr. John Chambers at the meeting, one of the defendants; he was urged to sign this bond, I do not recollect by whom, I know that he hesitated to sign it, and John Black told him that he would guarantee him that he would not be called upon to pay—that the road would be sufficient; I was afterwards called upon to sign the bond, a short time after, at my store,
30 in Columbus, by Dr. Dakin, at that time a stockholder, and I think one of the directors, but am not positive.

Question. What conversation took place between you and Dr. Dakin at that time? (Objected to.)

Answer. My answer to him was that I did not think it was my duty, or that I ought to sign it, and my objections were the same as those I stated at Jobstown.

Question. Did he give you to understand that the bond was to be executed by all the stockholders? (Objected to.)

- Answer. He did; he asked me if I did not know that
40 there were two bonds, the one having been a little informal, and a new one drawn; I told him that I had heard something of that; he said, "this is the one that will be signed by them all," and he thought that I had better sign it. Mr. John Black was president of the company at that time, before and afterwards, and I always understood that he was a large stockholder.

Question. Do you know that Mr. John Black was the owner of a large tract of woodland at the end of this railroad? (Objected to.)

Answer. I understood that he was.

Question. Did this road afford great facilities for getting their wood to market? (Objected to.)

Answer. Yes.

Question. Did he or did he not take an active part in the management of the road at this time? (Objected to.)

Answer. He did.

Question. Do you know whether Mr. Jones, one of the complainants, also had a large tract of woodland near the head of the road, and an iron furnace there? (Objected to.)

Answer. He had.

Question. Were they or not doing a large business at that furnace? (Objected to.)

Answer. They were.

Question. Did he or not do a large amount of carting between the furnace and the Delaware river? (Objected to.)

Answer. He did.

Question. Did or did not this railroad afford him great facilities in his business? (Objected to.)

Answer. It did. Mr. Smith also owned woodland near the head of the road. (A map being shown to the witness, marked as a profile map of the Delaware and Atlantic Railroad, marked exhibit C., ex parte defendants,) says—There was an extension of the road from the creek, the name I do not recollect, to the Delaware and down it, being about half a mile long, I think, as shown upon the map; I do not know how long after the execution of the paper this extension was made, perhaps six months, I cannot speak with certainty; I do not know from what source the expense of the extension was paid, but suppose it was done by the same company; I think the tolls and profits were expended in this extension; I do not know that I ever knew the expense of that extension; it must have been pretty heavy, as it required a good deal of work to make it.

Cross-examined—At the meeting, when it was stated that all the stockholders were to sign, there were present, Chalkley Atkinson, Dr. Dakin, John Chambers, Jonathan Scattergood, John Black, Joseph Smith, James Newbold, (I think,) Restore Lamb, (I think,) and I guess there were more there, but I do not recollect them; it was at the house of Francis D. Warner; it was after dinner, I think; I think the meetings were generally held in the afternoon; I believe tha the board

- of directors were then in session, I am not positive about that; I do not recollect who presided at the meeting; I do not know how many persons had signed the bond when I saw it lying on the table, there were several names to it; all that I recollect hearing Mr. John Black say was that which I have stated as said to Mr. John Chambers; I don't know that I have any recollection of hearing Mr. Smith say anything; I do not recollect who it was who said at that meeting that the bond was to be signed by all or not to be binding; it was a
- 10 short time after that meeting that Dr. Dakin called upon me to sign the bond; I think that Dr. Dakin had the same bond which I saw lying upon the table, when he called upon me, I do not know, but Dr. Dakin said it was, and I have no doubt of it. (Complainants objected to what Dr. Dakin said.) I know the same names were on the bond that came to me; I cannot tell how many names were on the bond when it came to me, there were a good many though; I do not recollect how many names were on the bond when I saw it on the table, there were several, however; I do not think that there
- 20 were as many names on the bond when I saw it on the table as when it was brought to me; Nathan Atkinson, Chalkley Atkinson, Jonathan Smith, Jonathan Scattergood, John Chambers, James Newbold, and a number of other names were on it when it came to me; I had it in my hand and examined it; I do not recollect whether there was any subscribing witness to it; this was the one which I heard was the right bond, the one which they were all signing; I do not know what was the informality in the other bond, I do not know that I saw the other bond, or know what was the informality in it; I
- 30 have understood that Mr. Chambers had a large tract of woodland near the road, and that he sent wood down on the railroad; I do not recollect how long after the thirty-five thousand dollars was borrowed that the extension was made; I do not know that any part of the thirty-five thousand dollars went to the extension of the road, nor do I know, of my own knowledge, how it was applied; I do not know, of my own knowledge, from what sources the money was derived which went to pay for the extension of the road; I never heard any of the complainants say from what source the
- 40 money was derived which went to pay for the extension of the road; I was a contractor on the main road, a small one; I think I attended another meeting a little while afterwards, but I am not certain; I have no positive recollection about it.
- Examination in chief resumed*—I do not know that I ever heard that Mr. Chambers owned any land on or near the rail-

road, I inferred it from the fact of his having wood upon the road; Dr. Dakin is dead; he went to the west and died there, I think.

Cross-examination resumed—I do not know, of my own knowledge, that the tolls and profits were applied to the extension of the road,
JOHN GIBES.

Affirmed and subscribed this thirtieth day of December, in the year of our Lord one thousand eight hundred and fifty-four, before me.

JOHN RODGERS, M. C. C. 10

Chalkley Atkinson, a witness produced on the part of the defendants, alleging himself to be conscientiously scrupulous of taking an oath, being duly affirmed, (witness objected to by complainants as a defendant—defendants' counsel produced an order for the examination of Mr. Chalkley Atkinson) said: I was a stockholder in and director of the Delaware and Atlantic Railroad Company. At the time of the foreclosure of the mortgage given to secure the payment of the thirty-five thousand dollars, and when the deficiency was ascertained, I was insolvent, and was subsequently discharged as a bankrupt under the bankrupt act of the United States. I was present at the meetings of the company in January and February, eighteen hundred and thirty-five. I recollect this covenant or agreement which was to be entered into by the stockholders, which was to indemnify Mr. Black and others for the loan of the thirty-five thousand dollars. 20

Question. By whom was that agreement to be signed?
(Objected to)

Answer. It was to be signed by the stockholders.

Question. All or part. (Objected to.) 30

Answer. It was to be signed by the stockholders; there was no mention made of no part; I am to be understood as saying that there was no particular individuals, one, two, or three; it was to be signed by the stockholders.

Question. What was the understanding—was it to be signed by the whole or a part? (Objected to.)

Answer. By the whole; I thought that I gave that at the first outset; I think I was one of the committee to make such loan in the first instance. (A resolution marked D in the margin of the Book of Minutes being read) witness says— 40
that is the resolution under which the loan was effected; after the covenant was prepared and executed by some, (objected to) I carried it around to get it executed; Dr. Dakin and I

were appointed, by the meeting at Jobstown, for that purpose; I made application and got several to sign it; Joseph Burr, Nathan Atkinson, signed it; Dr. Dakin and I went over to Bristol to get Anthony Taylor to sign it; he was not there, and we did not get his name.

Question. Were these stockholders to whom you applied to sign, informed that it was to be signed by all the stockholders? (Objected to.)

- Answer. All that I went to were so informed; I think that
- 10 Dr. Dakin took the paper from me; I think I did not myself hand it to Mr. Black; I know about the extension to the road from the mouth of Craft's creek; I think that it was paid for out of part of that borrowed money; there was an understanding that the profits and tolls of the road were to be appropriated to the extension; the length of the extension is between three-quarters and a mile. (The map being shown) he said, "that is a correct representation;" the costs of the extension, wharves, docks, and everything, was within a trifle of twenty-five thousand dollars; the papers showing the cost of this
- 20 extension are in the possession of John Black; I say so because I helped put up the papers in reference to the extension and the whole of the length of the road; the collector asked me (when the road was about to be wound up) who was the proper person to have the papers relative to that railroad; I told him John Black; the papers were done up and given to him to be carried to John Black; the most of these papers were at the office in Columbus; some few were at the collector's house; Luke Stansbie was the collector; he now lives at Hoboken, opposite New York; I was in the office very frequently.
- 30

Question. Do you know of Mr. Black's owning extensive tracts of woodland at the head of this road? (Objected to.)

Answer. Oh yes.

Question. Was or was not this road used more extensively by Mr. Black than anybody else? (Objected to.)

- Answer. As much by him as by anybody else; I do not know but that Hanover Furnace used it as much; Hanover Furnace was owned by Benjamin Jones, another of the complainants in this case. Joseph Smith and his brother owned
- 40 extensive tracts of woodland at the head of the road. There was a tract of land belonging to the company, of about fifty-six acres, below Columbus, adjoining the road, which was sold to me for forty dollars an acre. John Black got part of the money and I got the other. John Black got about two thousand dollars. He sold some other lands about Jobstown

which I do not so distinctly recollect about. (The preceding testimony in reference to lands and the sales thereof, objected to by complainants.)

Question: When was Isaac Hilliard's stock paid for? (Objected to.)

Answer: I think it was after the covenant was executed; the balance which he paid was nine hundred dollars.

Question: When was Anthony Earl's stock paid for?

Answer: After the covenant was executed; I think the balance was in the neighborhood of two thousand dollars; I do not think I can tell what became of this money. 10

Cross-Examined.—This fifty-six acres were not struck off to me; I bought it, I paid for it; I paid the money to John Black; I lived on the money I made out of it for two or three years. The fee of the land I sold was in John Black; he was trustee for the company. (Paper offered by complainants, marked Exhibit 1, ex parte complainants.) That is a copy of a paper which I gave to John Black, and that is the only receipt which I had from John Black, and is the paper to which I alluded when I said that I had a receipt from John Black. Upon reflection, I recollect that I sold the land for seventy-five dollars an acre on an average, to different persons. The whole sales of that fifty-six acres was in the neighborhood of four thousand dollars; I think I got fourteen hundred dollars, and John Black got the balance. I think John Black had advanced money for the company; I cannot tell whether the money I paid John Black was sufficient to pay him the indebtedness of the company to him at that time. John Black was in the habit of advancing money for the company, and he gave his note several times for the company, John Black and others; he once gave me his individual note for five hundred dollars; John Black, with others, James Newbold and Joseph Smith, gave their joint notes for the company. I never knew of but that one instance of his individual note. The five hundred dollar note was given to me for building a bridge, and for filling up a wharf for the extension; the notes of John Black, James Newbold, and Joseph Smith were one of them given to me for that work; it was in the neighborhood of thirteen hundred dollars; the other notes were for about four or five hundred dollars, and were given for that work too. All that I can say as to the appropriation of tolls and profits to the extension of the road, is what the collector told me. I do not think that I ever saw the papers in the hands of John Black after they were put up. The sale of the land took place in the neighborhood of one thousand eight hundred and thirty-six, I think; I cannot tell the time 20 30 40

exactly. The deeds for one-half of the lands were given on the first day of May, one thousand eight hundred and thirty-six; it was all sold in one year, and the rest of the deeds were given in the fall. I do not know who received the money for Isaac Hilliard's stock; I always understood that Joseph Smith did, I do not know of my own knowledge. I never knew positive who received the money for Anthony Earl's stock. The mortgage for the thirty-five thousand dollars was not upon the land which I sold. Thomas Black and William

- 10 McKnight owned tracts of woodland along the road. William McKnight sent down considerable wood upon the road; I do not recollect of Thomas Black sending down any, although he might. I knew Philip R. Dakin; he was not solvent at the time of his death; he was never worth anything much; I considered him insolvent on the second of June, eighteen hundred and forty-five. On the second of June, eighteen hundred and forty-five, Joseph Burr was not considered solvent by me; he has been dead about ten years. Timothy Field was not solvent at that time; he was about
- 20 square with the world. Amzi B. Wood or brother went off to the eastward somewhere; one is dead and the other is wealthy; I do not know anything about his circumstances in eighteen hundred and forty-five. John B. Bispham was reported to be insolvent on June second, one thousand eight hundred and forty-five. Clayton G. Atkinson—I do not know anything of his circumstances; I do not know that he had property; his wife had considerable property in June of eighteen hundred and forty-five; he was sold out by the sheriff prior to June second, eighteen hundred and forty-five.
- 30 Thomas Haines took the benefit of the bankrupt law, and I presume that he was insolvent on the second of June, eighteen hundred and forty-five.

- Examination in chief resumed*—(Paper shown to witness, marked Exhibit E, ex parte defendants.)—That is Joseph Smith's handwriting and signature. When the covenant was entered into the road was pretty much completed from New Lisbon to the river—it was not all paid for though; the iron was bought in Philadelphia; John Black, Joseph Smith, Benjamin Jones, and I gave a note for it; for that we were indi-
- 40 vidually liable; Mr. Black, I, and others were individually liable for iron in Philadelphia to an amount not far from twenty thousand dollars; part of this borrowed money—thirty-five thousand dollars—went to pay part of the debts in Philadelphia for the iron; it relieved Mr. Black, myself, and others who had given the note to that extent from our personal responsibility; the persons who sold the iron had no other se-

curity; the debt for the iron must have occurred a year previous to the borrowing of the money. Thomas Black, the treasurer of the company, got about twelve or fourteen thousand dollars of the thirty-five thousand dollars. I had a good deal to do with the road and its concerns at that time; that part of the road above Lisbon pond, beyond the bridge, was made before the money was borrowed; it was about four hundred yards in extent. (The whole of the re-examination objected to.)

Cross-examined again.—I do not think that I gave my note endorsed by John Black and others, for the iron, in Philadelphia—I think it was a joint note; we bought the iron of A. & G. Ralston; it was at a credit of ninety days or six months, I don't know which; the notes, I think, were generally paid at maturity; the iron was not bought at one time; the iron for the road from Craft's creek down to the wharf was not bought for some time after the iron was bought for the main body of the road; it was bought about six months after, and was brought to Kinkora, and laid there for six or eight months before the company took possession of it; I bought it; no note was given for that, and it never was paid for anyhow; the lot of iron which was used on the road beyond Lisbon pond was bought at the same time as the iron for the main part of the road; it so strikes me; and I thought it was paid for; Jonathan Scattergood, I think, was worth seven or eight hundred dollars in eighteen hundred and forty-five; he is now worth fifteen hundred or two thousand dollars over and above what he owes. I do not know of my own knowledge that any part of the thirty-five thousand dollars was applied to the payment of the extension, except from hearsay. 10 20 30

Examination in chief resumed.—I have talked with Richard Jones and Joseph Smith a hundred times about the application of the money to the extension from Craft's creek, or parts of it—not so much in presence of Richard Jones as others.

Cross-examined again.—I cannot tell the particular words I heard said about it in presence of Joseph Smith; this was in the office of the company, at Columbus; Luke Stansbie was present, and Joseph Smith. I do not know that the whole of the thirty-five thousand dollars was expended before the commencement of the extension; I do not know that the company was indebted to the amount of thirty-five thousand dollars before the extension was commenced; I presume that I reported that the money could not be raised upon the credit of the company. At the time I bought the iron the company 40

were well out of funds. I do not think that all the contractors were paid off at the time the iron was bought. I do not know that the company owed Jonathan Scattergood and myself anything at the time the money was bought; I suppose that the company owed from ten to twelve thousand dollars, but it is all supposition—I do not know.

Examination in chief resumed.—Richard Jones was the son of Benjamin Jones; I do not know about his being an agent; he lived here, his father in Philadelphia.

10

CHALKLEY ATKINSON.

Affirmed and subscribed this thirtieth day of December, in the year of our Lord one thousand eight hundred and fifty-four, before me.

JOHN RODGERS, M. C. C.

Thomas Haines, a witness produced on the part of the defendants,—(objected to by the complainants, and an order produced by the counsel for the defendants for his examination,)—alleging himself conscientiously scrupulous of taking an oath, being duly affirmed, saith:—I was a stockholder in, and secretary of, the Delaware and Atlantic Railroad Company. I signed the bond and mortgage as secretary of the company; I do not recollect by whom the covenant or agreement which was to be given to Mr. Black and others as collateral of the payment of the thirty-five thousand dollars, was to be signed; I thought you were speaking of the bond and mortgage; I recollect about the covenant; I understood that it was to be signed by the stockholders.

Question. By all or part? (Objected to.)

Answer. I understood that it was to be signed by the stockholders; it was to be handed to the stockholders for signature; so far as the signing part, I know that a number of the stockholders signed it then, myself among the rest; that is pretty much all I know about it. The resolution (D) is the one under which the covenant to indemnify was executed; I was discharged under the bankrupt law shortly after this—prior to the second of June, in the year of our Lord one thousand eight hundred and forty-five.

Cross-examined.—Amzi B. Wood is dead; he took stock to the amount of three thousand dollars for the work he did on the road; he was the principal contractor on the road.

THOMAS HAINES.

Affirmed and subscribed on the thirtieth day of December,

in the year of our Lord one thousand eight hundred and fifty-four, before me.

JOHN RODGERS, M. C. C.

Examination of witnesses, &c., in a cause depending in the Court of Chancery of the State of New Jersey, wherein John Black, Joseph Smith and others are complainants, and Restore S. Lamb, Thomas Black, and others, are defendants; taken at the City Hotel, in the city of Burlington, on Saturday, the third day of February, one thousand eight hundred and fifty-five, before John Rodgers, one of the Masters and Examiners of said Court, in the presence of Robert D. Spencer, esquire, Solicitor for and of counsel with the complainants, and William L. Dayton, esquire, Solicitor for and of counsel with the defendants. 10

John L. McKnight, a witness produced on the part of the defendants, being duly sworn according to law, deposeth and saith—I am the brother of William McKnight, deceased; I was his executor and residuary devisee and legatee.

Defendants produced a deed from Joseph Kirkbride, sheriff, &c., to Richard Jones, marked Exhibit F, ex parte defendants. 20

Defendants also produced a deed from Richard Jones and wife to William McKnight, marked Exhibit G, ex parte defendants.

Defendants also produced another deed from Richard Jones and wife to William McKnight, marked Exhibit H, ex parte defendants.

The defendants also produced a deed from Samuel H. Jones to William McKnight, marked Exhibit I, ex parte defendants. 30

In answer to a question that these deeds do not convey the entire interest in the railroad, the witness says—The contents of the deeds I did not know until this morning, and I understand that there are other deeds referring to the same subject matter in the office of Mr. Cannon, the contents of which I do not know. The sales of the railroad iron and materials of the Jobstown railroad, sold by my brother and partly by myself, amounted to nine thousand one hundred and ten dollars and thirteen cents, the charges against that being twelve hundred

and twenty-nine dollars and forty-eight cents, leaving the net proceeds seven thousand eight hundred and eighty dollars and sixty-five cents. There are still some payments to be made, amounting to two or three hundred dollars. I suppose the charges were for labor, teaming, and freight in taking up the iron, as the iron had to be carted to the Delaware; the two or three hundred dollars yet to be paid are law expenses.

The defendants produced a letter from John Black to William McKnight, dated January fifteenth, one thousand eight hundred and forty-nine, marked Exhibit K, ex parte defendants.

Witness says:—That letter is in the handwriting of Mr. John Black, and came into my possession with the rest of my brother's papers; I cannot give the dates of the sales of iron; part was sold in eighteen hundred and forty-nine, and the balance in eighteen hundred and fifty and eighteen hundred and fifty-one; I think that part of the iron was taken up in the winter or spring of eighteen hundred and forty-nine—(objected to); I had notes, dated about that time, found in my brother's papers, for iron sold at four and six months.

Cross-examined.—This iron was on the track of what was known as the Delaware and Hanover railroad; I do not know under which charter this iron was taken up; I am not aware that a new company was chartered, of which my brother was the main stockholder; this iron was taken up publicly and openly as far as I was concerned, and I never heard anything to the contrary in regard to the other; I was not interrupted in any way while taking up the iron, and I am not aware that my brother was. My brother died July fifteenth, eighteen hundred and forty-nine, at Bordentown, where he and I both lived.

Chief resumed.—The road is the same known as the Delaware and Atlantic Railroad, and which I had known as the Jobstown road.

Cross-examined.—The people, in speaking of the road, sometimes called it the Delaware and Hanover, sometimes the Delaware and Atlantic, and I generally called it the Jobstown road, and I believe others did.

Chief resumed.—This road commenced at Kinkora, at the mouth of some creek—I think Craft's creek, on the Delaware. (Objected to.) I took up no part of the iron from the mouth of Craft's creek down the river, nor did my brother as I know of; I cannot say that I know that any of the iron was taken up on that part by any person.

Cross-examined.—I think the first of this iron was taken up

by my brother in the winter or spring of eighteen hundred and forty-nine; I cannot say whether that was or was not the first iron taken up on the road.

Chief resumed.—I should think that there was a little of that iron taken up in eighteen hundred and forty-eight, by my brother, I presume. No iron was taken up by any person but myself or brother.

J. L. McKNIGHT.

Sworn and subscribed this third day of February, in the year of our Lord one thousand eight hundred and fifty-five, before me.

10

JOHN RODGERS, M. C. C.

Elisha Crowell, a witness produced on the part of the defendants, being duly sworn according to law, deposeth and saith:—I reside in the city of Philadelphia; I am one of the aldermen of that city, in commission, at present, and have been for ten years; I am acquainted with John Gibbs, a resident of that city, and formerly of New Jersey as I have understood; I have known him since August, eighteen hundred and fifty-two; when I first knew him he was one of the “day police;” I think he is one of the supervisors of the streets at present; I knew him well, from his being located in my ward; his general reputation for truth and veracity, in the city of Philadelphia, where he lives, is very good; I would believe him under oath, certainly.

20

Cross-examination.—I know nothing of Mr. Gibbs’ antecedents prior to the year eighteen hundred and fifty-two; I cannot say, except from report, from what place he moved to Philadelphia; I do not know what reputation for truth and veracity he bore prior to eighteen hundred and fifty-two; I have never heard him spoken of prior to eighteen hundred and fifty-two, and since then I have always heard him spoken of with esteem; he was considered better than the ordinary men of the day police.

30

ELISHA CROWELL.

Sworn and subscribed this third day of February, in the year of our Lord one thousand eight hundred and fifty-five, before me.

JOHN RODGERS, M. C. C.

John L. McKnight again called.—Defendants produced a letter from L. Stansbie to William McKnight, dated June eleventh, eighteen hundred and forty-five, marked Exhibit L, ex parte defendants. Witness says—I am acquainted with

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the handwriting of L. Stansbie; that letter is in his handwriting.

Cross-examined.—I have seen him write.

J. L. McKNIGHT.

Subscribed before me this third day of February, in the year of our Lord one thousand eight hundred and fifty-five.

JOHN RODGERS, M. C. C.

John L. McKnight, a witness produced on the part of the complainants, having been before sworn, says:—Not one single cent of the proceeds of the sales of the iron and other materials referred to, went into the hands of Benjamin Jones, John Black or Joseph Smith, to my knowledge; it might have been so previous to the matter coming into my hands; the proceeds of the sales went into the account of the estate of William McKnight, deceased.

J. L. McKNIGHT.

Subscribed before me this third day of February, in the year of our Lord one thousand eight hundred and fifty-five.

JOHN RODGERS, M. C. C.

Charles D. Freeman, of Philadelphia, a witness produced on the part of the defendants, being duly sworn, deposeth and saith:—I reside in the city of Philadelphia, and have lived there the most of my life; I am a practising attorney, and by office an alderman of the city of Philadelphia; I am acquainted with John Gibbs, now of the city of Philadelphia, formerly of New Jersey, as I have been informed; I have known him positively between three and four years, and probably longer than that; his general reputation for truth and veracity and other matters, in the city of Philadelphia, is good—I believe unexceptionable; I would believe him as a witness, under oath, without any hesitation.

Cross-examined.—I know nothing of Gibbs' past life previous to his going to Philadelphia; I have not known him intimately, but I have known him thoroughly. I have been an alderman nearly five years, and a practising attorney twelve years. I do not know what reputation for truth and veracity Gibbs had in New Jersey; I do not know how long he has lived in Philadelphia, but during all the time I have known him, I believe.

CHARLES D. FREEMAN.

Sworn and subscribed this third day of February, in the year of our Lord one thousand eight hundred and fifty-five, before me.

JOHN RODGERS, M. C. C.

Robert W. Jones, a witness produced on the part of the defendants, being duly sworn according to law, deposeth and saith:—I reside in the city of Philadelphia, and have lived there fifteen years, I think; I know John Gibbs, of that city; he lives in the fifth ward, I believe.

Question. What office does he hold in the fifth ward? (Objected to.)

Answer. He is supervisor of highways of the fifth ward of the city of Philadelphia. I have never heard his reputation for truth and veracity doubted, nor do I believe there is any better in the city of Philadelphia. (This was in answer to the general question, "What is his general reputation for truth and veracity in the neighborhood where he lives?") I would have no hesitation in believing him as a witness, under oath, for he is a truth telling man. 10

Cross-examined.—I do not know when Mr. Gibbs moved to Philadelphia; I have known him for three or four years perhaps longer; I do not know what reputation he bore previous to his going to Philadelphia; I had no knowledge of the man previous to his going to the city. 20

Question. Have you ever heard his general reputation for truth and veracity talked about in the neighborhood where he lives?

Answer. I have never heard his character for truth and veracity discussed or talked about at all. I have never heard it questioned. (Objected to, as irrelevant to the question.) I have no relations whatever with Mr. Gibbs.

Chief resumed.—I reside in the fifth ward of Philadelphia, in the same ward with Mr. Gibbs.

ROBERT W. JONES. 30

Sworn and subscribed this third day of February, in the year of our Lord one thousand eight hundred and fifty-five, before me.

JOHN RODGERS, M. C. C.

Examination of witnesses, &c., in a cause depending in the Court of Chancery of the State of New Jersey, wherein John Black, Joseph Smith, and others are complainants, and John Chambers, Restore S. Lamb, and others, are defendants, taken before me, Charles H. Hollinshead, one of the Masters and Examiners of the said Court, at the house of Stacy B. Campion, in Mount Holly, in the county of Burlington, and state aforesaid, the seventeenth day of January, in the year of our Lord one thousand eight hundred and fifty-five, in the presence of Robert D. Spencer, esquire, solicitor of the complainants, and of Wood, esquire, of counsel for the defendants.

The counsel for the defendants admitted the due and legal service of notice of this examination, a copy of which notice is hereunto annexed.

*Luke Stansbie, of Hoboken, in the county of Hudson, and state of New Jersey, a witness produced on the part of the complainants, being duly sworn, deposeth and saith:—*I reside at Weehawken, near Hoboken, New Jersey; resided there between five and six years since I left Columbus, in the state of New Jersey, county of Burlington; I know very well the company of the Delaware and Atlantic Railroad Company; my information with that company commenced as rodman with Mr. Charles Loss, the engineer, in eighteen hundred and thirty-two; after my service as rodman ceased, I was appointed clerk by the board of directors of the company; whilst acting as clerk, I became perfectly acquainted with the affairs of the company; the vouchers were presented to me for examination; the company had not a set of books at that time, that is, there was no regular set of books; the new books were opened by myself from the vouchers and papers handed me by the secretary; these books were opened somewhere in the neighborhood of eighteen hundred and thirty-three, somewhere in the neighborhood of June, thirty-three; this is the day-book of the expenses of the road (which book is marked Exhibit No. 2 on the part of complainants,) and is the day-book of the Delaware and Atlantic Road, the book of original entries; I have also two ledgers, which correspond with the day-book, (which books are marked Exhibits Nos. 3 and 4 on the part of complainants;) the entries in these books are made by myself and nobody else; these books contain a correct account of the affairs of the company during the time they run. On the thirtieth day of December, in

the year of our Lord one thousand eight hundred and thirty-four, the liabilities of the company were fifty-two thousand eight hundred and twenty-two dollars and thirteen cents; the items of this were as follows: the balance of loans was twelve thousand six hundred and fifty-six dollars and fifty-three cents; in this sum was included the estimates of the engineers for completing the road; the balance of cash on hand December thirtieth, eighteen hundred and thirty-four, was two thousand two hundred and fifty-four dollars and twenty cents; the road was unfinished at that time; to pay off these liabilities the company had the balance of stock, amounting 10 to sixteen thousand and thirty-five dollars; the amount of stock subscribed was sixty thousand and fifty dollars, and the amount which was paid in was forty-four thousand and fifteen dollars; this sixteen thousand and thirty-five dollars was all due from the stockholders and unpaid; to have paid off all the liabilities of the company at that time, it would have required thirty-four thousand five hundred and thirty-two dollars and ninety-two cents, besides the amount of stock due. Among the debts due by the company, was a debt to R. S. 20 Johnson, of seventeen hundred dollars and twenty-four cents; to Daniel White, ninety-six dollars and seventy-five cents; to A. & G. Ralston, eleven thousand three hundred and ninety-two dollars and fourteen cents; to Benjamin Jones, four hundred and eighty-five dollars and seventy-five cents; to Andrew M. Jones, twelve hundred and forty dollars and nine cents; to the Philadelphia Bank, four thousand dollars; to the Bucks County Bank, four thousand dollars, two notes of two thousand each; to the Farmers' Bank of New Jersey, twelve hundred and forty dollars. These loans from the banks were 30 not all due at that time, December thirtieth, eighteen hundred and thirty-five, and were paid subsequently. On the thirtieth day of December, eighteen hundred and thirty-four, the company was largely in debt. There was a loan of thirty-five thousand dollars effected from the Bank of the United States; it was effected for the company by the joint notes of John Black, Joseph Smith, and Benjamin Jones. (A paper shown to witness, marked Exhibit No. 5 on the part of the complainant,) witness says: that is the note on which the money was raised; it is in the handwriting of John Black; I am 40 acquainted with the handwriting of John Black; have seen him write; I am perfectly well acquainted with the signature of John Black; seen him write many a time; the first signature to the note is John Black, the second Joseph Smith, and the third Benjamin Jones; I am perfectly well acquainted

with the whole of them; I am perfectly well acquainted with the signature of Charles Loss, a witness to this paper. (Paper being shown to witness, and marked Exhibit No. 6 on the part of complainants,) he says: I am perfectly well acquainted with the signature of Charles Loss; have frequently seen him write; he is dead; has been dead some years; the first signature to this paper is John Black, then Joseph Smith's; I know all the signatures of the parties to this paper, except that of John B. Bispham; have seen them all write, and they are all the signatures of the parties whom they profess to be—are all genuine signatures. I was connected with this company about fifteen or sixteen years before I went to Hoboken; the signers of paper (Exhibit No. 6) were all connected with that company; from my situation with company, being the collector of the company, I was brought more or less in connection with them all; my acquaintance with their signatures arises from my connection with them for a period of fifteen or sixteen years. On the twelfth of March, eighteen hundred and thirty-five, Benjamin Jones paid the following debts of the company: R. S. Johnson, seventeen hundred dollars and twenty-four cents; David White, ninety-six dollars and seventy-five cents; A. & G. Ralston, twelve thousand four hundred and seventeen dollars and seventy five cents; Benjamin Jones, one hundred dollars ninety-six cents; A. M. Jones, twelve hundred and forty dollars and nine cents; note in Philadelphia Bank, four thousand dollars—making a total of nineteen thousand five hundred and fifty-five dollars and seventy-five cents. These were the debts of the Delaware and Atlantic Railroad Company; these debts were paid out of the net receipts from the Bank of the United States, received on the note of Mr. Black, Mr. Smith, and Mr. Jones, discounted; the amount of the note was thirty-five thousand dollars, and the amount received by Benjamin Jones, after the discount was taken out, was thirty-three thousand nine hundred and fifty dollars; the balance in Mr. Jones' hands, after paying those liabilities, was fourteen thousand three hundred and ninety-four dollars and twenty-one cents, subject to the order of the company. Out of this balance in Mr. Jones' hands, he paid Mr. Thomas Black, March eighteenth, eighteen hundred and thirty-five, eleven thousand two hundred and thirty-eight dollars and twenty-one cents; also, out of this balance was paid two thousand dollars to the Bucks County Bank; also, a balance on John Black's note in the Bucks County Bank, of six hundred and fifty-six dollars and fifty-three cents, and to the Farmers' Bank, Mount Holly, five hundred dollars. The

amounts of these payments, including the discount, is thirty-five thousand dollars and fifty-three cents. At the time of the negotiation of the loan of thirty-five thousand dollars from the United States Bank, Thomas Black was treasurer of this company. I am perfectly well acquainted with the handwriting of Mr. Thomas Black; have seen him write often. (A paper shown witness, marked Exhibit No. 7 on part of the complainants,) says: that is in the handwriting of Thomas Black, treasurer. The piece of paper attached, (marked Exhibit No. 8 on part of complainant,) is in my handwriting. 10 This paper (Exhibit No. 7) is a statement by Mr. Black, as treasurer of the company; it came into my possession August tenth, eighteen hundred and thirty-five; I put it among the vouchers of the company; it is voucher No. seventy-five; I next saw it a few days ago, at your (Mr. Spencer's) office; I found it among the books and papers of the Delaware and Atlantic Railroad Company. I know about the extension of this road from Brown's point to Craft's creek; this extension was made after the money received on this loan had been expended; the books will show that fact. (Paper shown witness, 20 marked Exhibit No. 9 on the part of complainants,) he says: that is the handwriting of Charles Loss, the engineer of the company; it bears date December thirtieth, eighteen hundred and thirty-five; it is an estimate of funds required to complete the extension from Brown's point to Craft's creek; the amount is seven thousand eight hundred and ten dollars; no part of this thirty-five thousand dollar loan went to make this extension from Craft's creek to Brown's point—not a dollar of it. John Black, through his agent, Chalkley Atkinson, did sell real estate belonging to the company; the books of the com- 30 pany will show that transaction; book ledger No. 3, page seventy-five; the amount of sales received by Mr. John Black is two thousand six hundred and ninety-eight dollars; there was six hundred dollars for the sale of the Adair house, the company's house at Columbus making a total of three thousand two hundred and ninety-eight dollars; at the time these moneys were coming into the hands of John Black, there was due him on his private account, besides the thirty-five thousand dollar loan, the sum of three thousand three hundred and fifty-six dollars and seventy-one cents; this account runs from 40 February fourth, eighteen hundred and thirty-five, to March ninth, eighteen hundred and thirty-seven; the present indebtedness of that company to John Black, over and above the thirty-five thousand dollar loan, is two thousand seven hundred and ten dollars and twenty-eight cents. (To this last

question and answer, the counsel on the part of the defendants object.) In October, eighteen hundred and thirty-eight, the company was indebted to Joseph Smith, over and above his interest in the thirty-five thousand dollar loan, three thousand and seventy-seven dollars and fourteen cents. (To this last question and answer the counsel on the part of the defendants makes objections.) The present indebtedness of the company to Joseph Smith is three thousand and seventy-eight dollars and thirty cents, over and above the thirty-five thousand dollar loan. (The last question and answer is objected to by counsel on the part of defendants.) This road was extended from Lisbon creek or bridge to Mount Misery road; this extension was built on John Black's land, but for the accommodation of the company, and for the benefit of the company.

Question. Was this land upon which the extension was ever paid for by the company?

Answer. No. (To this question and answer the counsel for defendants objects.) I was well acquainted with James Shreve, one of the signers to paper marked, Exhibit No. 6; I understand he is deceased; when I was acquainted with him he was accounted a wealthy man; it was in the neighborhood of June forty-five when I saw him last; his circumstances were very good, I believe, I never heard anything to the contrary; at that time he was considered a man of wealth; in June eighteen hundred and forty-five the circumstances of Clayton G. Atkinson were very good; at the same time the circumstances of Chalkley Atkinson were very different, he was a poor man; I couldn't call him insolvent, but he wasn't a rich man by any means; the circumstances of Jonathan Smith at this time were very good, he was reputed as a very wealthy man; I knew Timothy Field very well; I do not know particularly about his property at that time; in June eighteen hundred and forty-five Thomas Haines was indifferent; at that time Jonathan Scattergood had considerable property, but was not considered a very wealthy man; at that time the circumstances of Richard Jones were very well, in very good circumstances, considered to be worth money; Philip R. Dakin was poor when this paper (Exhibit No. 6,) was signed; I think he died before June eighteen hundred and forty-five; Thomas Black at this time was a rich man; Jacob Ridgway at this time was reputed to be solvent; is dead now, I believe; I do not know when he died; I can't tell whether his estate was solvent or insolvent, think insolvent; at this time Restore S. Lamb was in good circum-

stances, very good; James Newbold was in good circumstances, very wealthy; Benjamin Jones also in very good circumstances; I didn't know much about John B. Bispham's circumstances, whether wealthy or not; John Chambers' circumstances were very good; Joseph Burr's circumstances were very poor; I don't recollect whether he was solvent or insolvent; in June eighteen hundred and forty-five Nathan Atkinson's circumstances were very good; A. B. Wood's circumstances were very poor at that time; after this thirty-five thousand dollar loan was expended, funds were raised by John Black and others, the friends of the company giving their individual notes; there was also moneys received for instalments on stock in the company; there was received of James Shreve a loan of two thousand dollars; a portion of loans raised by individuals, the friends of the company, on notes since the thirty-five thousand dollar loan, is twelve thousand five hundred and twenty-one dollars and thirty-one cents, and is found on page fifty-seven of the day-book; there was not a note of Thomas Black in this sum; there was a note of Thomas Black discounted for the use of the company for two thousand dollars; this loan was repaid to him by the company. (A paper shown witness marked Exhibit No. 10, on the part of complainants,) says the whole of the first page of this paper and the superscription is in the hand writing of Benjamin Jones; I am acquainted with signature and hand writing of Andrew M. Jones; have seen him write often; (paper marked Exhibit No. 11, on the part of complainants shown witness,) says this is the hand writing of Andrew M. Jones; this is a bill for railroad iron; the amount of the bill, after deducting some credits, is one hundred dollars and ninety-six cents; on the back of the bill is a receipt in the hand writing of Andrew M. Jones for Benjamin Jones, for that amount; the entries on the third page of paper marked Exhibit No. 10 is in my hand writing; these papers, Nos. 10 and 11, were left at my office a few days after the twelfth of March, eighteen hundred and thirty-five, to make entries in my book; was left by Thomas Haines, or John Black, and after I made my entries I filed it away with my other vouchers and papers; these are the same original papers. (To the admission of these papers marked Exhibits Nos. 10 and 11, and all testimony relative thereto, the counsel of the defendants object.)

And being cross-examined by counsel of the defendants, he says—I made my entries from those vouchers, (Exhibits Nos. 10 and 11;) I considered that a sufficient voucher; I had no

other means of ascertaining that the money had been paid by Mr. Jones; I expect I received the information from Thomas Haines that the balance of two thousand dollars to the Bucks County Bank, and six hundred and fifty-six dollars and fifty-three cents balance of John Black's note, and five hundred dollars to the Farmers' Bank, on No. 10, was paid; I think it was from the information of Thomas Haines, secretary of the company, alone, that I made those entries in the books; I think the extension from Lisbon bridge was made by the company on John Black's land, for the use of the company; that was part of the original route as surveyed; this extension from Lisbon bridge was finished after the road was completed to Lisbon bridge, some time after, I think, twelve months at least, I should think; there was no landing at all at Lisbon bridge until the road was extended; until this extension was made they did not do any business on this road; this road ran across Mr. Black's land; I believe there was wood standing on it at the time; his lands lie on the other side of the creek; I don't recollect whether Mr. Black sent down wood over the road before this extension was completed; he did send down afterwards, he sent a good deal down afterwards, for several years after the completion of the road; he continued to send wood down on the road until the road was entirely closed by sale; he did not do any other business of any consequence on the road, beside sending down wood; Mr. Black's toll was very large in proportion to others for sending down wood; he paid the largest amount of tolls for a considerable time; I cannot form any idea of the amount of tolls paid yearly by him; he sent down a vast amount of wood; he sent down from twelve to fifteen hundred cords of wood a year for one or two years; the average quantity he sent down yearly after the road was extended from Lisbon bridge till the road was closed, I think was about twelve hundred cords a year, I cannot speak with any accuracy; the first payments on account of the extension of the road from Craft's creek was made June eighth, eighteen hundred and thirty-three; it was completed in eighteen hundred and thirty-seven and eight; the whole amount of costs of extension, including road, wharf, and guard wharf and bridge, was sixteen thousand one hundred and sixty-six dollars and fifty cents; the amount actually paid was fourteen thousand one hundred and sixty dollars and eighty-two cents, and liabilities unpaid two thousand and five dollars and sixty-eight cents; (papers shown to witness and marked Exhibits AA, BB, and CC, on the part of defendants,) says they

are in my hand writing; were all made out at one time. (To the admission of these papers marked Exhibits AA, BB, and CC, and all testimony in relation thereto, the counsel on the part of the complainants make objection.) I made out this paper, (Exhibit AA,) April twenty-sixth, eighteen hundred and forty-five; I made it out from the books of the company; it contains a correct statement of the summary of the tolls received from April, eighteen hundred and thirty-five, to February, eighteen hundred and forty-five; the amount received between those years was twenty-nine thousand nine hundred and ninety-four dollars and twenty-seven cents, and the amount expended as disbursements during that time was nineteen thousand eight hundred and thirty-five dollars and sixty-seven cents; there was paid for repairs to road, from April eighteen hundred and thirty-seven to February eighteen hundred and forty-five, fourteen thousand seven hundred and sixteen dollars and twenty-six cents; from April first, eighteen thirty-five, to February twenty-eighth, eighteen forty-five, collectors' salaries, &c., was five thousand and thirty-two dollars and one cent, and charged to profit and loss accounts was eighty-seven dollars and thirty-nine cents, sundry expenses, means, small bills, which I can't recollect; this item of fourteen thousand seven hundred and sixteen dollars and twenty-six cents was for the express purpose of repairs to the roads; I can't tell on what part of the road this was expended; it was on the old road; had nothing to do with the extension at all; the net proceeds of toll, deducting amount of expenditures, was ten thousand one hundred and eight dollars and sixty cents, which was appropriated as follows:— paid old debts due on the old road, four thousand three hundred and sixty-nine dollars and twenty-one cents; I cannot tell when these old debts were contracted; they were contracted from eighteen hundred and thirty-five to eighteen forty-five; I cannot tell whether they were contracted prior to eighteen hundred and thirty-five or not; I could tell by referring to my other books; these books are well secured in Mr. Spencer's office, the solicitor of the complainants; of the residue of the ten thousand one hundred and eighty dollars, there was paid for the railroad wharf from Craft's creek two thousand two hundred eighty-eight dollars and forty-nine cents; this was on the extension, and must have been from eighteen hundred forty-two to forty-five, or somewhere thereabouts; and paid to Smith and Jones three thousand two hundred and thirty-eight dollars and thirty cents; I don't recollect what it was paid to them for; I could tell by refer-

ence to the books ; I don't know whether for iron or not.— Upon reading the testimony over to witness, he says he now recollects that it was paid to them (Smith and Jones,) for moneys advanced by Smith and Jones to build the extension from Craft's creek to Brown's point. (Exhibit CC, being shown to witness,) he says the net proceeds of tolls from March thirty-first, eighteen forty-five, to May thirty-first, eighteen forty-five, was one hundred and eighteen dollars and thirty-one cents.

- 10 *And being again examined in chief*, he says:—Before this extension was made there was no means of getting to the river ; in getting to the river it was necessary to build a bridge over Craft's creek. (To the evidence relative to the necessity of this extension of the road to the river, the counsel upon the part of defendants enters his objection.) The road was extended from Craft's creek to Brown's point, to give greater facilities of transportation ; there were not sufficient facilities to do the business of the company by approaching the river according to the original route of the road. I have no distinct
- 20 recollection of the amount of tolls received and disbursements made independent of the papers just shown to me ; (papers marked Exhibits AA, BB, and CC,) ; no distinct recollection, except from those papers. I received the one hundred and eighteen dollars and thirty-one cents received from March thirty-one, eighteen hundred and forty-five to May thirty-one, eighteen hundred and forty-five, whilst the road was in the hands of sheriff Kirkbride ; no part of the item of three thousand two hundred and thirty-eight dollars and thirty cents paid to Smith and Jones was paid them on account of the loan
- 30 of thirty-five thousand dollars ; I do not know of any payments being made to the complainants on account of this thirty-five thousand dollar loan ; it is still credited to them on the books of the company ; Thomas Black has sent wood down on the railroad, but not in such quantity as his brother John ; John Chambers sent some sometimes, but not a great deal ; I believe Restore Lamb and Mr. Chambers both sent wood over the road, but not a great deal ; the wood was cut somewhere in the neighborhood of the road between Lisbon and Barnegat ; Thomas Black had wood cut on his own land ;
- 40 this was brought over the railroad to the Camden and Amboy railroad, generally. (Book shown to witness, and marked Exhibit No. 12, on the part of complainants)—says, this is a book of bills payable of the Delaware and Atlantic Railroad Company. (Book shown to witness, and marked Exhibit No. 13, on the part of the complainants,) he says, this is the book

of Thomas Haines, the secretary of the Delaware and Atlantic Railroad Company—most in Thomas Haines' handwriting, some in mine; it appears to be kept as a book of memorandums of receipts and payments of the company, a regular book of the company.

And being again cross-examined, he says:

Question. Have you any recollection, independent of any memorandum made by you, of the company's having received a large amount of tolls between eighteen hundred and thirty-five and eighteen hundred and forty-five?

Answer. No.

Question. Do you recollect, independent of the books, whether they received any amount of tolls during those years?

Answer. No.

The witness being *re-examined on this cross-examination*, says, that what I meant by saying I had no knowledge of any amount of tolls received by the company between eighteen hundred and thirty-five and eighteen hundred and forty-five, independent of the books or memorandum, was that they received none except what was upon my books.

Question. Do you remember, apart from the books and statements shown you, that this company received a large amount of tolls from eighteen hundred and thirty-five to eighteen hundred and forty-five?

Answer. I recollect that they received a large amount of tolls between eighteen hundred and thirty-five and eighteen hundred and thirty-seven, after that they were received by Smith and Jones, and not by the company.

LUKE STANSBIE.

Sworn and subscribed this seventeenth day of January, in the year of our Lord one thousand eight hundred and fifty-five, before me.

C. H. HOLLINSHEAD, M. C. C.

Jacob T. Bunting, a witness produced on the part of the complainants, alleging himself to be conscientiously scrupulous of taking an oath, and being duly affirmed, declareth and saith:—I was acquainted with Samuel Newbold in his lifetime; he resided at No. 14 Pine street, in the city of Philadelphia; in the summer time he resided on his farm near Mount Meeting; he is deceased—has been dead three years last July I think; I am acquainted with his handwriting and signature; think I know his signature; have seen him write frequently.

(Paper marked Exhibit No. 6 being shown to witness,) says, I think the name Samuel Newbold, signed to this paper, is without doubt the signature of Samuel Newbold.

JACOB T. BUNTING.

Affirmed and subscribed this seventeenth day of January, in the year of our Lord one thousand eight hundred and fifty-five, before me.

C. H. HOLLINSHEAD, M. C. C.

Charles Bispham, a witness produced on the part of complainants, being duly sworn according to law, declareth and saith:—That I was acquainted with John B. Bispham well and intimately; he was a nephew of mine; I have seen him write frequently; I do know his signature, I think. (Paper marked Exhibit No. 6, on the part of complainant, shown to witness,) he says: The name of John B. Bispham to this paper is his signature; in June, eighteen hundred and forty-five, John B. Bispham was insolvent; he is dead; he died in San Francisco, California; at the time of his death he was insolvent; I am not aware that he left any executors; I think I can say he left no executors; I think there was no administrator appointed to his estate; he, John B. Bispham, was insolvent on the second day of June, eighteen hundred and forty-five.

And being cross-examined on the part of the defendant.—The means I have of knowing that he was insolvent in June, eighteen hundred and forty-five is that he was in no business, and I had supplied him with money to pay his expenses; he had no property at that time. I do not know the precise time he went to California; he has been dead about three years; he had been there about two years, I think; he did not acquire any property there, I think; he was a clerk.

CHAS. BISPHAM.

Sworn and subscribed this twentieth day of January, in the year of our Lord one thousand eight hundred and fifty-five, before me.

C. H. HOLLINSHEAD, M. C. C.

James A. Fentwick, a witness produced on the part of complainants, being duly sworn according to law, declareth and saith:—I am acquainted with Samuel H. Jones; he is living; he resides out of the state; he is now out of the state; I have known him since we were children; I have seen him write frequently; I have corresponded with him; I think I had cor-

respondence with him in eighteen hundred and thirty-five and eighteen hundred and thirty-seven—I know I had; corresponded by letter. (Exhibit No. 6, on the part of complainants, being shown to witness,) he says: The name of the fifth witness to this paper is the signature of Samuel H. Jones.

JAMES A. FENWICK.

Sworn and subscribed this twentieth day of January, in the year of our Lord one thousand eight hundred and fifty-five, before me.

C. H. HOLLINSHEAD, M. C. C.

Thomas Haines, a witness produced on the part of the complainants, alleging himself to be conscientiously scrupulous of taking an oath, and being duly affirmed according to law, declareth and saith:—I knew the Delaware and Atlantic Railroad Company in the year eighteen hundred and thirty-five; I held the situation of secretary to the company, about that time—I don't remember exactly—the book of minutes will show.

Question. Have you been examined before in this case?

Answer. I have been, on the part of the defendants.

Question. Were you present at the house of Francis B. Warner, in Jobstown, at a general meeting of the stockholders and directors of the Delaware and Atlantic Railroad Company, in February, eighteen hundred and thirty-five?

Answer. I was at a meeting in February, eighteen hundred and thirty-five, the day the bond and mortgage was executed. I don't recollect whether the paper containing the covenant or guarantee was there at that time or not. (A paper shown to witness, and marked Exhibit No. 14, on the part of complainants,) he says: The seal attached to this paper is the seal of the Delaware and Atlantic Railroad Company; the name Thomas Haines, secretary, to it, is in my handwriting. I expect the signature and seal were placed to it by authority of the company—the book of minutes will show; I have no doubt they were placed there by the authority of the company. I am not very well acquainted with the handwriting of Stacy B. Shreve; have seen him write; know his signature; the name of Stacy B. Shreve, a witness to this paper is his signature; he is dead. (Mortgage marked Exhibit No. 15, on the part of complainants, being shown to witness,) he says: The seal attached to this paper is the seal of the same company, the Delaware and Atlantic Railroad Company; the signature Thomas Haines, secretary, to it, is my handwriting, placed there by myself; the signature of Stacy B. Shreve, one of the witnesses to this paper, is the genuine signature of Stacy B.

Shreve, I should think; I do not recollect who procured the draft of these papers, (Exhibits Nos. 14 and 15); I have no doubt I was authorized to put my name to these papers by the company; I should not have put it there if I had not been. (Exhibit No. 6 on the part of complainants, being shown to witness,) he says: I should think the signature James Shreve to this paper is his signature. I don't know how much he was worth; I suppose he was worth ten thousand dollars; he was reputed to be a wealthy man. I think that the signature

10 of Clayton G. Atkinson to that paper is his signature; I don't know anything about his circumstances in June, eighteen hundred and forty-five. I believe that signature to the paper is Chalkley Atkinson's signature; I don't know what his circumstances were in eighteen hundred and forty-five. On the second day of June, eighteen hundred and forty-five, I was not worth much. I don't know but one person whose names are to that paper (Exhibit No. 6,) who was insolvent in June, eighteen hundred and forty-five—Jacob Ridgway, he was insolvent at that time. I knew Jonathan Smith; he is dead;

20 he was reputed to be a wealthy man; Jacob Ridgway is dead; Thomas Black, in June, eighteen hundred and forty-five, was reputed to be a wealthy man; I can't say about Richard Jones; at that time Restore S. Lamb was reputed to be wealthy; John Chambers, at that time, was reputed to be worth money—a wealthy man. This paper (Exhibit No. 6,) was present at a general meeting which we had, but the time I don't remember. (Book of minutes of the Delaware and Atlantic Railroad Company, marked Exhibit A, on the part of defendants, shown to witness,) he says: That is the book of

30 minutes of the Delaware and Atlantic Railroad Company; they are in my handwriting; they are all my minutes. (The witness' attention was then called to a portion of the minutes as recorded under date of February second, eighteen hundred and thirty-five, and marked S in the margin.) He says: That entry is correct, and the meeting therein mentioned did take place; I do not know who gave the notice there mentioned; I was in the practice of giving notice; it was part of my duty as secretary to give the notice. (On the following page, also marked S in the margin,) the witness says: The covenant,

40 bond and mortgage (marked Exhibits Nos. 6, 14 and 15,) above I expect are the papers therein referred to. (Entry in the aforesaid minutes, under date of August nineteenth, eighteen hundred and thirty-five, marked S in the margin, being shown to witness,) he says: That entry is correct, or else it would not have been put there. (This refers to the extension of the road from Craft's creek to Brown's point.) I don't re-

collect that anything had been done to that extension before this entry in the minutes was made. It is so said that John Black, Joseph Smith, and Benjamin Jones did lend thirty-five thousand dollars to the Delaware and Atlantic Railroad Company; I believe they did; I do not know that this loan of thirty-five thousand dollars has been repaid to them by the company. (Being shown Exhibit No. 13 on the part of complainants,) he says: It is part in my handwriting, and part in the handwriting of Luke Stansbie. The entries in this book of the names and notes as discounted, with their dates, are correct, or they would not have been put there; the moneys received on those notes were applied to the use of the Delaware and Atlantic Railroad Company. 10

And being cross-examined by counsel on the part of the defendants, he says:—I was well acquainted with Stacy B. Shreve; seen him write a great many times; also seen James Shreve write many times; also Chalkley Atkinson. The meeting referred to in the minutes, and marked S in the margin, refers to a meeting of the directors and stockholders; it is just as it is in the minutes. I suppose it was convened for a special purpose to take into consideration the affairs of the road; I don't recollect whether there was any special business transacted at that meeting; nothing more than appears on the minutes; the minutes say the mortgage bond and covenant was presented by me, the secretary, to that meeting; the bond and mortgage were executed; I believe the covenant was executed at that meeting. I do not recollect that I gave notice of this meeting, but from my habit of giving notice, I think I gave notice of this meeting; I don't think the notice given of this meeting was so special as to say that the bond, mortgage, and covenant were to be executed; I was not in the habit of giving notice of the special business which was to be done; generally that a meeting of the stockholders would be held. I do not know whether this meeting was a large one or not; I do not recollect whether a majority of the stockholders were present at this meeting; I can't say whether, generally, at the meetings of the stockholders, a majority attended or not. (Paper marked Exhibit No. 6 on part of complainants shown witness,) he says:—I seen a number sign it at this meeting, I do not know how many; I cannot tell whether all the persons whose names are to it signed it there or not. 30 40

THOMAS HAINES.

Affirmed and subscribed this twentieth day of January, in the year of our Lord one thousand eight hundred and fifty-five, before me.

C. H. HOLLINSHEAD, M. C. C.

John Beatty, a witness produced on the part of the complainants, being duly sworn according to law, deposeth and saith:—I am cashier of the Farmers' Bank of New Jersey; held this situation since it was established in eighteen hundred and fourteen; have seen Daniel D. Smith the fourth witness to this paper, (Exhibit No. 6) write; he is now deceased; I believe this name to be his signature. On the second of June, eighteen hundred and forty-five James Shreve had the reputation of being a man of wealth; Jonathan Smith
 10 was reputed to be a wealthy farmer; so far as I have any knowledge of him he was reputed to be a man of wealth; at that time Thomas Black was reputed to be a wealthy farmer; I believe that Restore S. Lamb was also at that time generally considered a man of wealth; I think John Chambers was considered a man of wealth at that time. (Exhibit No. 14 on part of complainants being shown to witness,) says:—the signature of Richard C. Shreve to this paper I believe to be his; I have no doubt of it; I have seen him write. (Exhibit No. 15 on part of complainants being shown to witness)
 20 he says:—I believe the name of Richard C. Shreve, a witness to this paper, to be his handwriting; I have no doubt about it. I knew a man who resided in this place named John Gibbs; previously to residing here I believe he resided in Columbus; he resided several years in Mount Holly; his character in reference to truth and veracity had suffered previously to his leaving here; from what I know of him I would not believe him on oath if he were interested and there were not other circumstances to corroborate him.

And being cross-examined.—John Gibbs resided here from
 30 three to five or six years; I do not know the year he left here; I should think it must be five or six years since he left here; I have never seen him but once since he left here that I recollect of; I believe he now resides in Philadelphia; I do not know what his reputation for truth and veracity in Philadelphia is; I have heard of him very seldom since he left here; I have heard occasionally said of him on the subject since he left here; not in regard to his present reputation; I do not know what his occupation is in Philadelphia; I have heard he was engaged as a police officer; whether he is now
 40 or not I do not know; I had private dealings with Mr. Gibbs whilst he resided in Mount Holly—most of them consisted of my renting a house and store to him; I think he occupied it two or three years—perhaps three; I had no personal difficulty with him in regard to the renting; I had a little trouble in getting the rent; never had the slightest altercation with

him ; part of the time of his living here, from my business with him, I had reason to suspect him to be wanting in truth and veracity ; this did not arise out of the troubles of getting rent ; I might have heard rumors of him, but what I speak of came under my own knowledge ; part of it was from the general reputation of the man, and partly from what came under my own knowledge.

And being again examined in chief, says:—I have seen Joseph Kirkbride, former sheriff of this county, write ; know his signature. (Paper, conditions of sale, shown witness, and 10 marked Exhibit No. 16 on the part of complainants,) he says : —I should think that was his signature. I think I have seen Richard Jones write ; papers have passed through the bank purporting to be his signature, and no doubt they were ; agreeably to my recollection, and from what I have supposed was his, I believe the signature of Richard Jones, twice appearing on this paper, to be his signature.

J. BEATTY.

Sworn and subscribed this twentieth day of January, in the year of our Lord one thousand eight hundred and fifty-five, 20 before me.

C. H. HOLLINSHEAD, M. C. C.

Matthew McHenry, a witness produced on the part of the complainants, and being duly sworn according to law, deposeth and saith:—I reside in Mount Holly ; am in my seventy-third year since December ; I was acquainted with a man named John Gibbs ; he did reside in Mount Holly ; I was not acquainted with him before he came here ; he told me he came from Columbus ; have had dealings with him ; I am not aware of more than one John Gibbs who removed from Co- 30 lumbus to Mount Holly ; the man I referred to married Isaiah Atkinson's daughter, I believe ; sometime before he went away from Mount Holly, his general reputation for truth and veracity was rather bad ; from what I know of him in some instances, I would not believe him under oath, from what I experienced myself.

And being cross-examined by counsel on part of defendants. —I believe he left Mount Holly in eighteen hundred and forty-seven ; I think he went from here to the inclined plane, towards Lancaster, a little outside of Philadelphia ; I have un- 40 derstood from hearsay that he lives in Philadelphia ; I do not know what his reputation for truth and veracity is in Philadelphia at this time ; I never had any personal altercation

with him whilst he resided here; I had a great deal of difficulty with him in regard to pecuniary matters whilst he resided here; those difficulties were not all settled and adjusted before he left here; they remain unadjusted still, some of them.

And being again examined in chief.

Question. What was the difficulty to which you have alluded in relation to pecuniary matters? (To this question the counsel on the part of defendants objects.)

- Answer. There was a difficulty about a note of five or
 10 six hundred dollars; Mr. Beatty sent for me to come round to the bank, and showed me this note of five or six hundred dollars, and asked me if I knew anything about it; the note, I think, purported to be drawn by John Gibbs & Co., John Gibbs was one, in favor of some merchant in Philadelphia; the note purported to be endorsed by me; the endorsement was not by me; I denied it at once, and told them I had never seen it before; the note was protested and went back to Philadelphia; I still say the endorsement was not my signature; I was never called upon to pay all of this note; John
 20 Gibbs went away, and left his clerk to take up the note, and he had not money enough and came to me, and I lent him my check for a hundred dollars, and I have never heard of the note since. I had a conversation with John Gibbs about the endorsement being a forgery; he came to me and asked me if I had said it was a forgery, and I said, yes, and you know it is, and he never said anything more to me about it.

And being again cross-examined.—I had heard a great deal of complaint in regard to his truth and veracity before the time of this note.

MATTHEW McHENRY.

- 30 Sworn and subscribed this twentieth day of January, in the year of our Lord one thousand eight hundred and fifty-five, before me.

C. H. HOLLINSHEAD, M. C. C.

- Thomas B. Bullock*, a witness produced on the part of complainants, alleging himself to be conscientiously scrupulous of taking an oath, and being affirmed according to law, declareth and saith:—I was acquainted with John Gibbs; he resided at Mount Holly; I understood before he came to Mount Holly he lived in Columbus; I had a business connection with him; employed by him as a clerk; the latter part of
 40 the time he lived in Mount Holly his general character for truth and veracity was bad; I think I was clerk for him about four years—it might have been more; from what I

know of him and his general reputation, I would not believe him under oath where he had any interest; I wouldn't like to take his word under oath on any occasion.

And being cross-examined.—I think he left here in eighteen hundred and forty-seven, as near as I can tell; I have not seen him since he left here; I have understood that he resided in Philadelphia; I have not heard anything about him, as to character, since he left here; I have frequently heard persons say they have seen him at Philadelphia; I have heard nothing in relation to his character for truth and veracity there, since he left here. 10

THOS. B. BULLOCK.

Affirmed and subscribed this twentieth day of January, in the year of our Lord one thousand eight hundred and fifty-five, before me.

C. H. HOLLINSHEAD, M. C. C.

Eayre Oliphant, of the county of Burlington, a witness produced on the part of the defendants, alleging himself to be conscientiously scrupulous of taking an oath, and being duly affirmed, declareth and saith:—I reside in the neighborhood of the Delaware and Atlantic Railroad, near the head of it; 20 I have resided there twenty-three years and ten months; I am acquainted with the woodland of John Black up there. (The counsel of the complainants objects to all testimony in relation to the woodland of John Black.) This land lies on the north branch of Rancocas; he owned quite a large tract there, which he showed me—different tracts; the end of this road lands on his, (John Black's,) as I have been told by himself and others; it lands on him six hundred yards, I call it; this land was timbered with small timber, when this road was made, not heavily timbered; that timber was cut and taken 30 away by John Black, after the road was made; such land, with the timber off, at the time the road was made, was worth two dollars an acre, I suppose; John Black cut off considerable wood up there to be transmitted over the road; John Black had an agent up there; I was employed by him as his agent to cut and cart wood to the road, and car it down; I commenced as his agent about the first of the road doing any business; I cut the first of John Black, taking down wood of any amount; I do not know how long I acted as his agent, but until the road was pretty much down; he cut some after- 40 wards by other persons, but the most of the wood I cut and carred down—nine-tenths of it; I cut from five hundred to four thousand cords a year, on an average; I cut and carred

down for him from a thousand to fifteen hundred cords a year—how many years, I cannot tell; there was quite a deal of others' wood sent down during the time; I cut off about a thousand cords myself of my own and others; cut and sent down; the principal part of the wood that was sent down from that end of the road was John Black's; there was wood sent down from other places further down the road, which I knew nothing about; the toll was two cents a mile a cord, I think.

- 10 Question. What would it cost to cart wood from that end of the road to the nearest landing on the Delaware, by any other way than the railroad? (To this question the counsel for the complainants object.)

Answer. It would cost all it was worth, I think; could go but one load a day. During all the time while the railroad could go, Benjamin Jones, at Hanover furnace, done all their business over this road—quite a good deal of it; carred their ore and iron and store goods.

- 20 Question. Do you suppose that Benjamin Jones did as much upon the road as John Black? (Objected to by counsel on the part of complainants.)

Answer. I suppose he did; in value, perhaps more.

- And being cross-examined by counsel on the part of complainants*, he says:—Other persons besides John Black and Benjamin Jones used this road; I don't recollect that Thomas Black had any wood at one end of the road; after some years he and McKnight bought a large tract further down the road two or three miles, and had considerable taken down; I think there was about six hundred acres, but maybe I'm mistaken;
- 30 I think I understood that Restore Lamb and John Chambers had some wood taken down, don't know how much; it was brought to the head of the road; I can't tell the amount, whether one cord or a thousand; they owned some land at the head of the road, or near the head of the road. Lamb and Chambers own a tract near the head of the road, but it aint got much timber on, and never had; they didn't cut much off of that tract, but whether they brought the wood off that or another tract, I don't know; they (Chambers and Lamb) own a deal of wood about there, but I don't know how much;
- 40 Restore Lamb bought some lots off of the Thomas Earl tract, and cut it off, but whether it was brought to the road or not I don't know, but I think it was; this was beyond the extension, on the south side of the creek. I know of another large tract that Lamb and Chambers bought of Dr. Stratton and wife, but none of the wood came to the road, but perhaps they

brought their boards and saw stuff; there were a good many brought there; John Black brought a good many of his boards there, and I think it likely Lamb and Chambers brought their boards there; there was quite a large tract sold off in lots, and the persons who bought brought their wood to the road; Jonathan Smith used the road to take wood over it; Jonathan Smith had quite a considerable there; this wood was brought from lands on the south side of the creek beyond the extension of the road; Jonathan Smith and Joseph Smith owned about twelve hundred acres, as they said, and the principal part of 10 the wood which came off it went down over the road; Jonathan and Joseph Smith and the people they sold to took down a great deal of wood, quite as much some years as John Black himself; John Smith's part—four hundred acres—was sold off in small lots to other people, and they cut and got it off as soon as possible; were two or three years about it; I don't know that James Newbold ever used the road; he never did to my knowledge; it was said Caleb Newbold's land adjoins John Black on the east; I cut up to the line; I think I cut pretty near a half a mile along Caleb Newbold's line. James 20 Newbold was said to be a son of this Caleb Newbold; James Newbold left children, Caleb, Michael, and James, the girls' names I don't know. Restore S. Lamb, John Chambers, Jonathan Smith, and Caleb Newbold owned considerable tracts of woodland on the south side of the creek; I never heard Caleb Newbold say anything about owning it, but it was called Caleb Newbold's tract; I don't know that James Shreve owned a foot of land there; John Black always paid me for my services.

And being again re-examined.—I don't know that John 30 Chambers cut any wood off this eight or nine hundred acre tract; there was wood there taken over the road said to be Lamb and Chambers' wood, or Chambers and Lamb's, but I can't tell whether it was one cord or a thousand; I can't tell anything about it.

EATRE OLIPHANT.

Affirmed and subscribed this twenty-third day of January, in the year of our Lord one thousand eight hundred and fifty-five, before me.

C. H. HOLLINSHEAD, M. C. C.

Richard Butterworth, a witness produced on the part of the 40 defendants, being duly sworn according to law, deposeth and saith:—I knew the situation of the Delaware and Atlantic railroad above the branch of the Rancocas.

Question. Was you ever employed by John Black to do any work there on the road? (Objected to by counsel on the part of complainants.)

Answer. Yes.

Question. What was you employed to do? (Objected to by counsel on the part of complainants.)

Answer. I was employed to take up the iron off the road; I think this was in eighteen hundred and fifty-two; I took up all the iron I could find; I carted it all down to his son John's, called the Newbold place; I don't know whether that place belongs to John Black; I was paid by John Black for doing this; he paid me for it by coal and timber; the bridge fell down when I was taking up the iron; I took some bolts out of the bridge, and it fell down; I believe the principal part of the timber of the bridge lays there in the pond, within a few feet of where it fell down; some of it floated down to Lisbon and they pulled it out to pile lumber on, I believe.

And being cross-examined by counsel on the part of complainants, he says:—There was six loads, or I took it at six times; it was flat bar iron and some spikes; I should call it very poor iron indeed; I would have been willing to have given three-quarters of a cent a pound for it; I should not think there was more than five tons and a half of it at the outside; the bridge was burnt pretty near the time I took the iron off—a little after, I think; it was set on fire; it was a very dry day; I went up there to put it out and took out some bolts, and it fell in the creek; there was quite a good deal of the iron had been stolen and taken away, and that is the reason Mr. Black set me to work to take it away, to keep the whole from going; it was after Mr. McKnight had taken up the road on the north side of the creek that Mr. Black told me to take up this iron; the road on the north side of the creek had all been taken up, and some of it fenced in; I suppose this iron was upon Mr. Black's land.

And being again re-examined by counsel on the part of defendants, he says:—The teams used to cart this iron were two-horse teams, and I loaded it and carted it myself; I think I took a ton at a load, except the load of spikes and short iron, which I took on bottoms and sides, which I supposed was about a half a ton; I just guessed at it, and took what there was.

Question. Did anybody give you the timber of this bridge? (Question objected to by counsel on the part of the complainants.)

Answer. I believe Mr. Black said to me I might have it if there was anything there would do me any good; but I found

it was good for nothing, and did not take any part of it; I did not take any iron off the bridge; I don't think there was any iron on the bridge—I think it had all been taken off clear to the south abutment.

RICHARD ^{his}  BUTTERWORTH.
mark.

Sworn and subscribed this twentythird day of January, in the year of our Lord one thousand eight hundred and fifty-five, before me.

C. H. HOLLINSHEAD, M. C. C.

Samuel Shearman, a witness produced on the part of the defendants, alleging himself to be conscientiously scrupulous of taking an oath and being duly affirmed, declareth and saith:—I am acquainted with Joseph Smith, one of the complainants in this suit. 10

Question. Do you know of Joseph Smith having taken up any of the iron off the Delaware and Atlantic railroad? (Question objected to by counsel on part of complainants.)

Answer. I and another man, employed by him, took up a turnout on the Fox farm; was done by order of Mr. Smith.

And being cross-examined by counsel on the part of the complainants, he says:—It was in the spring of eighteen hundred and forty-nine; the Fox farm is where Joseph Smith's son George now lives; it was a turnout which run from the road toward the barn; I do not know who put the turnout there or whose iron it was; it was Joseph Smith's land—I believe he owned the farm; we took the iron home in two loads; there might have been a ton of it; the turnout was seventy-five, or it might have been a hundred, yards long; it was flat bar iron; I don't know the value of it; I don't suppose anything about it, but I suppose it was worth ten dollars; I suppose there was all of a ton, but I can't tell whether there was a ton and a half or not; I don't know who put this iron down; it was a track laid down from the railroad over towards Mr. Smith's barn; it came within thirty or forty feet of the barn; Mr. Smith said when he put it there it was to be handy to put his calves on. 30

And being re-examined by counsel on the part of the defendants, he says:—This iron was the same as the rest of the iron on the railroad, I believe; the road itself, as well as this turnout, ran across the Fox farm. SAMUEL SHEARMAN.

Affirmed and subscribed this twenty-third day of January, 40

in the year of our Lord one thousand eight hundred and fifty-five, before me.

C. H. HOLLINSHEAD, *M. C. C.*

Chalkley Atkinson, a witness called upon the part of the defendants, to whose examination the counsel on the part of complainants object, (he having been once examined by the defendants,) without an order of the court for that purpose, alleging himself to be conscientiously scrupulous of taking an oath, and being duly affirmed, declareth and saith:—I was
10 present at Columbus at the sale, or pretended sale, of the Delaware and Atlantic railroad; it was sold at sheriff's sale, by Joseph Kirkbride.

Question. Were there many persons at the sale?

Answer. Yes, there were several persons there. I think John Black was; I don't remember whether Joseph Smith was there; I think there was not a great deal of bidding for the road; I have forgotten whether it was struck off to William McKnight or Richard Jones; it was to one or the other; it was struck off for a thousand dollars. Yes, I think John
20 Black was there when it was struck off.

Question. Did the person to whom it was struck off claim to be the purchaser?

Answer. Yes.

Question. What did he say? (Question objected to by counsel on part of complainants.)

Answer. I don't recollect what he said.

Question. Did any one else claim to be the purchaser? (Objected to by counsel on the part of complainants.)

Answer. Yes.

30 Question. Who? (Objected to by counsel on the part of complainants.)

Answer. William McKnight.

Question. Did he claim to be the purchaser immediately after it was struck off?

Answer. Yes. (Objected to by counsel on the part of complainants.)

Question. Did he do it openly, and in the hearing of all present? (Objected to by counsel on the part of complainants.)

40 Answer. Yes.

Question. What did he say? (Objected to by counsel on the part of complainants.)

Answer. He said John Black, Richard Jones and himself were the purchasers.

Question. Did they, John Black and Richard Jones, take any exception to that remark of his? (Objected to by counsel on the part of complainants.)

Answer. I don't remember that they did.

Question. What was the worth of the iron per ton on the road at that time?

Answer. I can't answer that; the most of it was sold for old iron afterwards; the larger part of it, I think, was sold for thirty-three dollars and a half per ton; there was upon the whole road about two hundred and ten tons; I weighed 10 ten miles of it; there was about a ton to the mile more to be put to it, of plates, spikes, &c.; with the turn outs there were about fifteen miles.

And being cross-examined by counsel on the part of complainants, he says:—I can't tell what time the sale took place—in the neighborhood of two or three o'clock, perhaps as early as two o'clock, pretty soon after dinner; it was kept open a very considerable length of time; I can't say it was kept open from two till nearly five o'clock; everybody had an opportunity to bid who wished to; I can't say what the 20 sheriff set up first; I can't say whether he first put up the proceeds, dividends and profits of the road; I can't say when the sale was; I can't say whether it was the second of June forty-five; (paper shown witness marked Exhibit No. 16 on the part of complainants,) says, I have seen Richard Jones write frequently; from my knowledge of it, I should think the two signatures are Richard Jones' handwriting; I think Thomas Black was at the sale; I don't remember whether Caleb Newbold, junior, was there; I don't think Nathan Atkinson was there. 30

Question. Have you heard any of the defendants say after the sale that they had consulted counsel, and that the sheriff could not convey any title to the road by sale? (Objected to by counsel on the part of defendants.)

Answer. No, I believe I never have; I have never heard either of the defendants, or either of the executors or administrators of the deceased ones who signed the bond and covenant, (Exhibit No. 6,) say that they had consulted counsel, and that the sheriff could not convey any title to the road by sale; I did tell John Black that Governor Vroom had given 40 an opinion that the sheriff could not give any title to the road; I don't know any one else saying so; George Black told me; George Black is a son-in-law of Clayton G. Atkinson, one of the signers of this covenant; I can't tell who was present when McKnight made the remark about his being one of the

purchasers—the bar room was full of persons ; I don't think either John Black or Richard Jones heard it ; they had stepped out into the entry, I think ; William McKnight had the iron on the road taken up ; I can't say that the proceeds of the sale of the iron, when taken off the road by McKnight, went into the pockets of John Black, Joseph Smith or Benjamin Jones ; it was run one or two years after the sale of the road before the iron was taken up ; I think it was re-chartered as the Delaware and Hanover Road before the iron was taken up ; Richard Jones signed that bond, I believe.

And being re-examined by counsel on the part of defendants, says :—Richard Jones is a son of Benjamin Jones ; Benjamin Jones is dead ; Richard has succeeded his father in part of the Hanover furnace property ; Richard has carried on the business there since the death of his father, and carries it on now.

CHALKLEY ATKINSON.

Affirmed and subscribed this twenty-third day of January, in the year of our Lord one thousand eight hundred and fifty-five, before me.

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C. H. HOLLINSHEAD, M. C. C.

Jacob Merritt, a witness produced on the part of defendants, alleging himself to be conscientiously scrupulous of taking an oath, and being duly affirmed, declareth and saith :—I heard a conversation at the Mount between Barclay White and Joseph Smith, one of the complainants ; I think it was last fifth day ; there was a conversation in reference to the signing of the bond ; Barclay White, Benjamin Lamb, Joseph Smith and myself were at meeting at the Mount ; this was after the testimony in this case had been taken at Burlington ; the question was asked Barclay White, either by Benjamin Lamb or myself, in the presence of Joseph Smith, how they made out there ; Barclay's reply was that they had proved conclusively that all the stockholders were to sign this bond ; Barclay replied that there was a space left in the bond for the signatures of those who did not sign it ; Barclay replied, they were all to sign it, and appealed to Joseph Smith if it were not a fact ; Joseph Smith replied that they all had an opportunity to sign it—it had been taken to them all, but they wouldn't all sign it ; I reside in Springfield township, about 40 four miles distant from here ; have resided there all my life ; am acquainted with John Gibbs ; have known him a considerable number of years, whilst he lived in Mount Holly and before he went there ; I was intimately acquainted with him

whilst he lived in Mount Holly; had considerable dealings with him.

Question. In all your dealings with him, did you find him a man of truth and veracity? (Objected to by counsel on part of complainants.)

Answer. Yes; so far as I'm acquainted, his general reputation for truth and veracity in Mount Holly was good.

JACOB MERRITT.

Affirmed and subscribed this twenty-third day of January, in the year of our Lord one thousand eight hundred and fifty- 10
five, before me.

C. H. HOLLINSHEAD, M. C. C.

Abraham Merritt, a witness produced on the part of defendants, alleging himself to be conscientiously scrupulous of taking an oath, and being duly affirmed, declareth and saith: I reside in Mount Holly; have resided here four years this spring; resided before on a farm about a mile from this place; resided there twelve or thirteen years. Know John Gibbs; have known him seventeen or eighteen years; I consider I am intimately acquainted with him; had considerable deal- 20
ings with him; I believe his general reputation for truth and veracity to be good; would believe him under oath; Mr. Gibbs was a storekeeper in Mount Holly; before he came to Mount Holly he kept store in Columbus, a distance of about five miles; I believe he was born and reared within a short distance of this place; I had dealings with him before he came to Mount Holly.

And being cross-examined.—I am not in any way related to Mr. Gibbs.

Question. Did you never hear of Mr. Gibbs forging Judge 30
McHenry's name? (Question objected to.)

Answer. Never until this trial had been in operation—some time after the commencement of this suit; I mean the taking of the testimony in this case.

Question. Did you never hear of Mr. Gibbs forging Thomas Bullock's name as a witness to a deed? (Objected to.)

Answer. Never.

Question. Did you not hear that Mr. Gibbs had forged George W. and William E. Atkinson's name to notes? (Ob- 40
jected to.)

Answer. I have; it was currently reported here at the time they were winding up their business; this was more than five years ago. Gibbs had left Mount Holly before I came

here—some two or three years before, I think ; I do not know the reason of his quitting Mount Holly ; there was a failure in his business before he left ; I dealt considerably in his store, and bought a carriage and harness of him before he came to Mount Holly, whilst he lived in Columbus ; buying the carriage and harness, and dealing in the store, were the extent of my dealing with him ; I dealt with him a great deal in the store—to a considerable amount.

10 *And being again re-examined.*—I always associated with him in society the same as any other neighbor or friend ; used to be here and see him three or four times a week ; knew him intimately and well.

ABM. MERRITT.

Affirmed and subscribed this twenty-third day of January, in the year of our Lord one thousand eight hundred and fifty-five, before me.

C. H. HOLLINSHEAD, M. C. C.

20 *John Folwell*, a witness produced on part of the defendants, alleging himself to be conscientiously scrupulous of taking an oath, and being duly affirmed, declareth and saith:—I reside in Mount Holly ; have resided here between twenty-five and thirty years ; I am a justice of the peace ; have held the office a little over eleven years. I was intimately acquainted with John Gibbs while he resided in Mount Holly ; had dealings with him to a large amount ; to the amount of a thousand dollars, which is a large amount for me ; did not know him before he came here ; as far as I know, his general reputation for truth and veracity was good ; I should believe him under oath.

And being cross-examined.

30 Question. Did you ever hear of his forging the names of George and William E. Atkinson ? (Objected to by counsel on part of defendants.)

Answer. Yes, I have ; it was a current report at the time ; it was not believed by me ; what others did I cannot tell ; some time ago, I cannot tell how long.

Question. Did you never hear of his having forged Judge McHenry's name ? (Objected to by counsel on the part of defendants.)

Answer. Never until yesterday.

40 Question. Did you ever hear of his forging Thomas Bullock's name to a deed ? (Objected to by counsel on the part of defendants.)

Answer. No, not to a deed ; I heard that he forged his

name to a bond ; this was about the time of the other report, about the Atkinsons' report.

And being again re-examined.—There never was a criminal complaint in relation to these forgeries ever made before me.

And being again cross-examined.—I never heard that there ever was a complaint made to Jabez Kingdon about these forgeries ; never heard of any complaints being made ; Jabez Kingdon was a justice of the peace residing in Mount Holly ; Jabez Kingdon lives in Burlington ; he is the ticket agent. 10

JOHN FOLWELL.

Affirmed and subscribed this twenty-third day of January, in the year of our Lord one thousand eight hundred and fifty-five, before me.

C. H. HOLLINSHEAD, M. C. C.

Peter V. Coppuck, a witness produced on the part of the defendants, alleging himself to be conscientiously scrupulous of taking an oath, and being duly affirmed, declareth and saith:—I reside in Mount Holly ; with the exception of six years have resided here all my lifetime, forty-nine years ; I 20 was absent from the spring of twenty-one to the fall of twenty-seven. Was acquainted with John Gibbs, whilst he resided here ; had daily intercourse with him in business transactions.

Question. What was his general reputation for truth and veracity.

Answer. I hardly know how to answer ; I never heard his character called in question ; I would believe him under oath.

And being cross-examined.

Question. Did you ever hear of his forging the names of 30 George and William Atkinson ? (Question objected to by counsel on the part of defendants.)

Answer. I heard a report after he left here of his forging some name, but whose I never knew ; It is about five years since I heard this—soon after he left here, or about the time of his leaving.

Question. Did you hear whether the notes which the report said he had forged had been presented to the bank ? (Objected to by counsel on the part of defendants.)

Answer. I believe that it had some connection with the 40 bank.

And being re-examined.—The transactions to which I refer

as having heard of, were transactions which took place whilst he was here.

PETER V. COPPUCK.

Affirmed and subscribed this twenty-third day of January, in the year of our Lord one thousand eight hundred and fifty-five, before me.

C. H. HOLLINSHEAD, M. C. C.

Samuel Risdon, a witness produced on the part of the defendants, being duly sworn according to law, deposeth and saith:—I live in Mount Holly; lived here forty years; I
10 am acquainted with John Gibbs; have known him some eighteen years, I think; was intimately acquainted with him when he lived here; had business transactions with him; his general reputation for truth and veracity in this neighborhood was good, to the best of my knowledge; I would believe him under oath.

And being cross-examined.

Question. Did you ever hear of his having committed any forgeries? (Objected to by counsel on the part of defendants.)

20 Answer. I heard the report of his having done so whilst he was here, but I know nothing about it; I heard of this a short time before he left.

Question. Did you hear of his forging on William E. Atkinson? (Objected to by counsel on the part of defendants.)

Answer. That is the name, I believe; I never heard anything about Judge McHenry or Thomas Bullock.

SAMUEL RISDON.

Sworn and subscribed this twenty-third day of January, in the year of our Lord one thousand eight hundred and fifty-five,
30 before me.

C. H. HOLLINSHEAD, M. C. C.

Thomas R. Risdon, a witness produced on the part of the defendants, alleging himself to be conscientiously scrupulous of taking an oath, and being duly affirmed, declareth and saith:—I reside in Mount Holly; have resided here for twenty years past; doing business here; I am acquainted with John Gibbs; have known him upwards of twenty years; previous to my locating in Mount Holly, and whilst he was in the mercantile business in Columbus, have had business with
40 him; I had frequent intercourse with him; as far as my knowledge extends, his general reputation for truth and veracity

in the neighborhood in which he lived was good; I would believe him under oath.

And being cross-examined.

Question. Did you ever hear of any report of his having committed any forgeries? (Objected to by counsel for defendants.)

Answer. To the best of my knowledge, I never heard of any such thing until I heard it here this evening.

THOMAS R. RISDON.

Affirmed and subscribed this twenty-third day of January, 10 in the year of our Lord one thousand eight hundred and fifty-five, before me.

C. H. HOLLINSHEAD, M. C. C.

Joseph White, a witness produced on the part of the defendants, being duly sworn according to law, deposeth and saith:—I reside in Mount Holly; have lived here near forty years; I am not now a justice of the peace; was a justice for ten years; was first appointed about fifteen years ago; have been out of office about two years, and in the mean time was 20 out of office about two years. I know John Gibbs; can't tell how long I have known him; whilst he was in business in Columbus; so far as I know, his general reputation for truth and veracity in the neighborhood in which he lived was good—was always good. I would believe him under oath.

And being cross-examined by counsel on the part of complainants.

Question. Did you ever hear of his having committed any forgeries? (Question objected to, and also the whole of the following cross-examination, by counsel for defendants.)

Answer. Yes.

30

Question. When.

Answer. About the time or a little after he was closing the business of Gibbs & Atkinson; it was about ten or twelve years ago; the first was that of Judge McHenry's; it was the endorsement of Judge McHenry, on a note; the way I understood, it was a forgery by John Gibbs of new notes by Gibbs & Atkinson, or to obtain money. I never heard about Bullock's; I did hear of the forgery of the name of Sowersby; I inquired of Robert and of McHenry also; I never heard about Nathan Atkinson; Sowersby is dead.

JOSEPH WHITE. 40

Sworn and subscribed this twenty-third day of January, in

the year of our Lord one thousand eight hundred and fifty-five, before me.

C. H. HOLLINSHEAD, *M. C. C.*

Thomas F. Keeler, a witness produced on the part of the defendants, being duly sworn according to law, deposeth and saith:—I live in Mount Holly—have resided here a little over twenty years; been engaged in business here during all that period; am acquainted with John Gibbs; since the spring of thirty-seven, I think, I knew him intimately; he kept store
10 next door to me; did business with him; his general reputation for truth and veracity in the neighborhood in which he lived was always good, so far as I know; I would believe him under oath.

And being cross-examined by counsel on the part of complainants.

Question. Did you ever hear of his having committed any forgeries? (Objected to by counsel on the part of defendants.)

Answer. I did last week; that was the first time I ever
20 did, to the best of my knowledge. THOS. F. KEELER.

Sworn and subscribed this twenty-third day of January, in the year of our Lord one thousand eight hundred and fifty-five, before me.

C. H. HOLLINSHEAD, *M. C. C.*

Samuel N. Haines, a witness produced on the part of defendants, alleging himself to be conscientiously scrupulous of taking an oath, and being duly affirmed according to law, declareth and saith:—I live in Mount Holly; I was born and raised within about two miles and a half of this place; have
30 resided in the town fourteen or fifteen years; been a merchant doing business here most of that time; know John Gibbs; have known him fourteen or fifteen years—before he came to Mount Holly, I think; his general reputation for truth and veracity in the neighborhood in which he lived was good, as far as I know; I would believe him under oath; he was in business whilst I was in Mount Holly.

And being cross-examined by counsel on the part of complainants.

Question. Did you ever hear of John Gibbs committing
40 any forgeries? (Objected to by counsel on the part of defendants.)

Answer. I can't say I did, until within a week or two—I

can't say ; if I did hear of it at the time, I have forgotten all about it ; I have no recollection of havng heard it ; the first time I recollect was last week ; I might have heard it before, but I don't recollect.

SAML. N. HAINES.

Affirmed and subscribed this twenty-third day of January, in the year of our Lord one thousand eight hundred and fifty-five, before me.

C. H. HOLLINSHEAD, M. C. C.

John S. Lippincott, a witness produced on the part of defendants, being duly sworn according to law, deposeth and saith:—I reside in Mount Holly ; have resided here about eighteen years ; I was storekeeping several years—six or eight years or more ; since then I have followed farming ; I was acquainted with John Gibbs whilst he kept store here—about as intimately as I am with most persons in Mount Holly ; as well acquainted with him as others ; his general reputation for truth and veracity in Mount Holly was good, as far as I know ; I would believe him under oath at that time ; from the knowledge which I have of his general reputation now, I would believe him under oath.

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And being cross-examined by counsel on the part of complainants.

Question. Did you ever hear of his committing any forgeries. (Objected to by counsel on the part of defendants.)

Answer. I never have ; I have never heard his reputation talked about in any particular way ; I think John Chambers married Samuel N. Haines' sister ; I believe she has been dead a number of years.

JOHN S. LIPPINCOTT.

Sworn and subscribed this twenty-third day of January, in the year of our Lord one thousand eight hundred and fifty-five, before me.

C. H. HOLLINSHEAD, M. C. C.

Abraham Gaskill, a witness produced on the part of defendants, being duly sworn according to law, deposeth and saith:—I reside in Mount Holly ; have resided here about twenty-seven years ; been in business here nearly all that time ; have been sheriff of this county ; my term of office expired three years last fall ; I know John Gibbs ; have known him about sixteen or eighteen years—known him intimately ; done considerable business with him ; his general reputation for truth and veracity in the neighborhood in which he lived I

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thought was remarkably good; I certainly should believe him under oath.

And being cross-examined by counsel on the part of complainants.

Question. Did you ever hear of his having committed any forgeries? (Objected to by counsel on the part of defendants.)

Answer. I never did until this evening.

ABRAHAM GASKILL.

Sworn and subscribed this twenty-third day of January, in
10 the year of our Lord one thousand eight hundred and fifty-five, before me.

C. H. HOLLINSHEAD, M. C. C.

Nathan B. Wilson, a witness produced on the part of the defendants, being duly sworn according to law, deposeth and saith:—I reside in Mount Holly; have resided here about thirty years; been in business here all that time; know John Gibbs; I believe I have known him as long as I have known anybody—we were boys together; have known him about fifty years; were both raised in the township of
20 Mansfield, about seven miles from Mount Holly; our intimacy continued as long as he resided in Mount Holly; did considerable amount of business with him; I consider his general reputation for truth and veracity in the neighborhood in which he lived, was very good; I surely would believe him under oath as quick as any man I know.

And being cross-examined by counsel on the part of complainants.

Question. Did you ever hear of his having committed any forgeries? (Objected to by counsel on the part of the defend-
30 ants.)

Answer. I never did.

NATHAN B. WILSON.

Sworn and subscribed this twenty-third day of January, in the year of our Lord one thousand eight hundred and fifty-five, before me.

C. H. HOLLINSHEAD, M. C. C.

Joseph L. Warren, a witness produced on the part of defendants, alleging himself to be conscientiously scrupulous of taking an oath, and being duly affirmed, declareth and saith:—I reside in Mount Holly; have lived here twelve
40 years; lived in Vincentown prior to that; I was raised there, five miles from Mount Holly; am constable of this township;

have been constable here about ten years ; know John Gibbs ; can't tell how long ; I knew him whilst he was here in business, storekeeping ; done a good deal of business for him ; was intimately acquainted.

Question. What was his general reputation for truth and veracity ?

Answer. I never heard anything against him so far as that was concerned ; his general reputation for truth and veracity was good as far as ever I heard ; I would believe him under oath.

And being cross-examined by counsel on the part of complainants.

Question. Did you ever hear of his having committed any forgeries ? (Objected to by counsel on the part of the defendants.)

Answer. I never did that I know of.

JOS. L. WARREN.

Affirmed and subscribed this twenty-third day of January, in the year of our Lord one thousand eight hundred and fifty-five, before me.

C. H. HOLLINSHEAD, M. C. C.

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Examination of witnesses, &c., in a cause depending in the Court of Chancery of the State of New Jersey, wherein John Black, Joseph Smith, and others are complainants, and Thomas Black, John Chambers and others, are defendants ; taken at the City Hotel, in the city of Burlington, on Saturday, the tenth day of March, one thousand eight hundred and fifty-five, before John Rodgers, one of the Masters and Examiners of said Court, in the presence of Robert D. Spencer, esquire, Solicitor for the complainants, and Edward Wood, esquire, of counsel with the defendants.

The Solicitor of the complainants acknowledged service of notice of taking depositions.

William Irick, a witness produced on the part of the defendants, (the Solicitor for the complainants objects to the examination of the witness, for the ground that he has a suit depending in the Supreme Court, in which the Solicitor is the

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counsel of the witness, and does not think that he can testify in this cause except upon his voluntary consent, and he, the Solicitor, then openly declared that he would say to Mr. Irick that as his counsel in another suit, he ought not to be a witness in this cause,) being duly sworn, saith:—I am somewhat acquainted with the situation of the Delaware and Atlantic railroad; I am acquainted with the section of the country where it terminates, near Lisbon; I know of Mr. John Black's owning woodland in that section of country, at least within a
 10 mile and a half of the termination of the road.

Question. How much land do you suppose that he owns in that section of country? (Objected to.)

Answer. I do not know that I can tell; I suppose that he owned some eight thousand acres; he has sold some since.

Question. How do you know that he owned this land? (Objected to.)

Answer. I know he owned some; I have seen his titles for some; I have papers in my possession; I think that my father was one of the commissioners who divided the Bispham tract;
 20 I think that in the Bispham tract there were two thousand acres in a share, and he got one; I have understood that he got two more shares since.

Question. Did Benjamin Jones, in his lifetime, own pine land in that section? (Objected to.)

Answer. Benjamin Jones did own large tracts of pine land in the neighborhood of Black's land; I have heard of a bond of indemnity or covenant being given by some of the stockholders of this company to the complainants in this suit; I do not know that I have had any conversation with Joseph Smith in regard
 30 to that bond; he has told me on one or two occasions, that he had been deceived, as I understood him, by signing a bond; I think he said that Mr. John Black had deceived him, by stating to him that all the stockholders were to sign to indemnify him; I don't think that he said he had signed it, but he said he had been deceived; I cannot recollect precisely, but it was about the time that the loan from the United States Bank came due, when the first conversation took place between Mr. Smith and myself; it was at Mount Holly, at Stryker's hotel; I cannot recollect how long after this that I had another con-
 40 versation with him; I recollect of having another conversation on the subject, and hearing him mention the matter. [The substance of the conversation was that he considered it a hardship that he should have to pay the money.] The part in brackets was put down in accordance with the direction of

the Solicitor of the complainants, and was in answer to the following question :—What was the second conversation ?

Question. Was the substance of the second conversation the same as that of the preceding conversation between you and Mr. Joseph Smith ?

Answer. I do not know that I can say precisely what it was, but as I said before he said that he thought it a hardship that he should have to pay the money.

Cross-examined.

Question. When did John Black get the additional two 10 shares of the Bispham estate ?

Answer. I do not know that I can tell.

Question. Did John Chambers own any land near the terminus of the road ? (Objected to by the defendants as irrelevant to the matter of the direct examination.)

Answer. I do not know.

Question. When did Benjamin Jones own land there ?

Answer. I do not know that Benjamin Jones owned any land at the terminus of the road.

Question. Can you tell when John Black got this first share 20 of the Bispham estate ?

Answer. I cannot tell.

Examination in chief resumed.

Question. Do you remember whether it was before or after the making of the road ?

Answer. It was before the making of the road.

Question. Did you ever hear Joseph Smith say when John Black got this land ?

Answer. I did.

Question. When ?

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Answer. About two minutes ago.

Question. Did you hear him say how he got it ?

Answer. By his wife, Sally.

Question. Did you hear him say when he got it ?

Answer. In the year eighteen hundred and fourteen.

Question. Did you hear him say how he got it ?

Answer. He said Black got it when he was married—he could not have got it before.

Question. Do you remember whether Joseph Smith, in the second conversation you had with him about the bond, said 40 that he had been deceived ?

Answer. I cannot tell whether he did or did not.

Cross-examined.—Question. How far is the tract of Benjamin Jones from the terminus of this road ?

Answer. I do not think that I can tell.

Question. How far is the furnace of Benjamin Jones from the terminus of this road?

Answer. I suppose some four or five miles.

Examination in chief resumed.

Question. Do you not know that the Hanover furnace tract is very extensive?

Answer. I do.

Question. Do you not know that the furnace is situated somewhat centrally in the tract?

- 10 Answer. It is—the lands extend on all sides; I do not know how far the lands extend this side of the furnace; I have never done any surveying there—I mean in the direction of the terminus of the road.

WM. IRICK.

Sworn and subscribed this tenth day of March, in the year of our Lord one thousand eight hundred and fifty-five, before me.

JOHN RODGERS, M. C. C.

- Oliver H. P. Emley*, a witness produced on the part of the defendants, being duly sworn, saith:—I am acquainted with
 20 the situation of the Jobstown railroad at Jobstown and several other places; I have known it ever since it was built; I reside about seven miles from it, near Jacobstown, in the township of New Hanover; I am acquainted with men whom I supposed were stockholders in the company—Joseph Smith and John Black and others; I have heard Joseph Smith say that he was a stockholder; I have also heard William McKnight say that he was concerned in it in some way; I heard Richard Jones say that they owned stock. In a conversation between Joseph Smith and Thomas N. Emley I heard Joseph Smith say that John Black had procured money in Philadelphia for the company—borrowed it; Black came to him with
 30 an obligation; I do not recollect whether it was a bond or no; it was something to secure the payment, and wished him to sign it; he signed it, with the understanding that the others were to sign it also, directors or stockholders I do not know which; Mr. Smith said that John Black informed him that the rest were to sign it; he then made use of some pretty severe language in reference to John Black, and said that he had deceived him, and that when it came to, they would not sign; Smith said that Black had had it in his power to pay that
 40 money out of the funds of the company; he went on and stated how the funds were obtained, and what money, but I cannot recollect; Thomas asked him what had become of that

money; he said that he did not know, unless John Black had kept it himself; this conversation took place at the house of Thomas N. Emley, in Cookstown, as near as I can tell, a year ago; Thomas N. Emley was a brother-in-law of mine; Mr. Smith was there on a visit, and had staid there the night before; the conversation was introduced somewhat in this way: Mr. Smith was inquiring about some young lady in the neighborhood, and asked how much she was worth; Smith said that he gussed that he would have to send off Jim (his son) to court her, to help make up the railroad loss; I do not suppose 10 that he was in earnest in speaking of sending Jim up, nor in that part of the conversation relating to Jim; I suppose that he was in earnest in the rest of the conversation.

Question. What did you understand by the remark that the rest were to sign it? (Objected to.)

Answer. He said that the rest were to sign also; when it came to they would not; John Black had deceived him. (The evidence as to conversations with Mr. Smith was objected to by the complainants.)

Cross-examined.

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Question. Does Mr. Smith sometimes take too much to drink?

Answer. That is a question I cannot answer; I cannot say that I have any recollection of seeing Mr. Smith under the influence of drink.

Question. Are you intimately acquainted with Mr. Smith?

Answer. Yes.

Question. Can you judge from the appearance of Mr. Smith whether he has been drinking?

Answer. I have never seen him when I thought he was 30 under the influence of liquor; I have seen him drink occasionally.

Question. When he drinks occasionally does it make him talkative?

Answer. I do not know that I have ever perceived any difference in him when I have seen him drink.

Question. Is he a talkative man?

Answer. Yes, rather so.

Question. Is he not in the habit of talking in a jocose or jesting manner often?

Answer. Yes.

Question. Do you know the fact of a loan of thirty-five thousand dollars having been made to this company? 40

Answer. I do not know of it further than what I have heard him say; I know it from no other source; I do not

know the amount of the loan ; I know that Smith, in this conversation, said that it was a large amount of money.

Question. Are you aware of the fact that John Black did not procure that money in Philadelphia, but that it was procured by Benjamin Jones?

Answer. Of course I do not know anything about it except from the conversation between Joseph Smith and Thomas N. Emley ; I am confident that Joseph Smith said that John Black procured the money in Philadelphia.

10 Question. What did he say was the amount of the bond, obligation or note, or whatever it was?

Answer. I cannot recollect ; I think it was in the neighborhood of thirty thousand dollars ; I had no interest in the matter ; I remember that he mentioned a large sum.

Question. Is Thomas N. Emley living or dead?

Answer. He is dead.

Question. What funds of the company did he say Mr. Black had in his possession to pay off this large amount of money?

20 Answer. I cannot recollect ; it was funds belonging to the company, though.

OLIVER H. P. EMLEY.

Sworn and subscribed this twelfth day of March, in the year of our Lord one thousand eight hundred and fifty-five, before me.

JOHN RODGERS, M. C. C.

Ephraim Hancock, a witness produced on the part of the defendants, alleging himself to be conscientiously scrupulous of taking an oath, and being duly affirmed, saith:—I carted wood on the Jobstown railroad ; I was on it about two years
30 on and off ; in the spring of eighteen hundred and thirty-eight I commenced ; the extension to Brown's point was not finished when I commenced ; it was never finished to do anything much on it ; there was a freshet carried it all away in the winter of eighteen hundred and thirty-eight and nine ; I carted wood to the railroad sheds for the railroad company ; the wood that was carted to the sheds was used by the Camden and Amboy Railroad Company ; John Black's wood was going down at that time—a great deal of it ; I believe that went to the use of the company, too—it went to the sheds ; there
40 was wood went down after that ; it went to the sheds, I believe.

Cross-examined.—The wood which went to the sheds was

wood which the Camden and Amboy Company had bought, and was delivered to them there.

Examination in chief.—I took a quantity of Black's wood down myself; it all went to the sheds for the company.

EPHRAIM HANCOCK.

Affirmed and subscribed this twelfth day of March, in the year of our Lord one thousand eight hundred and fifty-five, before me.

JOHN RODGERS, M. C. C.

Examination of witnesses, &c., in a cause depending in the Court of Chancery of the State of New Jersey, wherein John Black and others are complainants, and John Chambers and others are defendants, taken, pursuant to notice thereof, at the house of Stacy B. Campion, innkeeper, in Mount Holly, in the county of Burlington, and state of New Jersey, on the twenty-eighth day of April, in the year of our Lord one thousand eight hundred and fifty-six, before Charles H. Hollinshead, one of the Masters and Examiners of said Court, in the presence of Abraham Browning, esquire, counsel for said complainants, and of E. Wood, esquire, of counsel for the said defendants. 10

The counsel on the part of the defendants object to the taking of evidence, because the rule for taking testimony in this cause has expired.

George W. Atkinson, of the county of Burlington, in the state of New Jersey, a witness produced on the part of the complainants, alleging himself to be conscientiously scrupulous of taking an oath, and being duly affirmed according to law, doth declare and say:—I reside in Springfield, in the county of Burlington; I used to be acquainted with John Gibbs; he resided, when I knew him, part of the time in Mount Holly; something like six years, I think, since I knew him in Mount Holly; I believe he moved from Mount Holly to Philadelphia; he was connected by marriage with my family; he married my sister. 30

Question. What was his character for truth and veracity when he lived in Mount Holly?

Answer. I thought it was bad toward the latter part of the time; his general character for truth and veracity in the neighborhood was bad, so far as I know; I knew him very well; heard people speak of him.

And being cross-examined by counsel on the part of the defendants:—I knew him some years before he resided in Mount Holly; had dealings with him before that time; I never heard but that his general reputation for truth and veracity was very good before that time; he had been here at Mount Holly several years, I believe, before I first heard that his veracity was doubted; he failed whilst he was in Mount Holly; I don't know that I ever heard his reputation impeached before his failure; I believe I did hear it before his failure, I don't know how long; I speak of what I know myself; I never heard anything particular about his general character being impeached for truth before that time; I heard a number of persons speak of him about or after his failure; I don't recollect in particular who those persons were; Matthew McHenry was one of them; I never heard Bullock say much about him; I think I heard him say something about him; I don't remember ever having heard Mr. Beatty say anything about him; I heard a number of them; I have heard fifty of them, I suppose; I don't know that I can recollect any one other than I have named; I don't know how long John Gibbs resided here after he failed; more than a year, I think; when I first heard of his character being impeached was about the time of his failure, before and after; I don't know that I ever heard of any speak of his being in embarrassed circumstances before his failure.

30 *And being again examined in chief, by counsel on part of complainants.*

Question. Do you recollect having heard Mr. Sowersby and Nathan Atkinson speak of his general character for truth and veracity?

Answer. Yes; I recollect both of them speaking of it.

And being again cross-examined by counsel on the part of defendants:—I don't remember what they said now about his general character; they told me about several things; about a particular writing; I don't know that they at that time said anything else about his general character for truth.

40 *And being examined again in chief by counsel for complainants.*

Question. What was that particular writing? (This question objected to by counsel on the part of the defendants.)

Answer. It was a note which he held against me, and

wrote another in the place of it, and he put my name to it.
(This evidence objected to by counsel on the part of defence.)

GEORGE W. ATKINSON.

Affirmed and subscribed this twenty-eighth day of April,
in the year of our Lord one thousand eight hundred and fifty-
six, before me.

C. H. HOLLINSHEAD, M. C. C.

William E. Atkinson, of the county of Burlington, a witness produced on the part of complainants, alleging himself to be conscientiously scrupulous of taking an oath, and being duly affirmed according to law, declares and says:—I reside in Mansfield township, Burlington county. I was acquainted with John Gibbs; he married my sister; he lived in Columbus when I first knew him, then in Mount Holly; the forepart of the time he bore as good character as the rest of the store-keepers in Mount Holly, so far as I know; the latter part of the time it was no better than it ought to be, I think; after his failure, I don't think anybody would put any dependence in what he said; I wouldn't; I heard a good many state that he didn't tell the truth so far as he might have done; I don't know what you would call his general reputation for truth—I shouldn't call it very good. 10 20

Question. What was the general talk as to his truth and veracity?

Answer. Some said he didn't tell the truth; I didn't hear a great many talking to me; some did.

And being cross-examined by counsel on the part of defendants:—He promised them money and didn't pay it, and some other things.

And being again examined in chief.

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Question. What were the other things you heard persons speak about? (Question objected to by counsel on part of defendants.)

Answer. I told you people said he didn't tell the truth at all times; he would promise to pay them money at such a time, and then never do it.

Question. Were these remarks confined to the payment of money, or did they speak of other matters?

Answer. I don't know that I did except on the account of paying money. 40

Question. Was not the general talk that he had forged notes? (This question objected to by counsel on the part of defendants.)

Answer. It was also in regard to forgery that I heard people talk.

Question. From your knowledge of his general character, would you believe him under oath? (Question objected to by counsel on the part of defendants.)

Answer. I don't know that I can answer that question; I don't know what he might do under oath—he might possibly tell the truth, or he might not.

And being again cross-examined by counsel on the part of
10 *defendants.*

Question. Would you believe him under oath, now?

Answer. I can't say; I have never seen him but once since he left Mount Holly, and had very little conversation with him; I don't know whether there is good feeling between him and me or not; never met him but once, and we spoke and inquired about the family.

WILLIAM E. ATKINSON.

Affirmed and subscribed at Mount Holly, in the county of Burlington, this twenty-eighth day of April, in the year of our
20 Lord one thousand eight hundred and fifty-six, before me.

C. H. HOLLINSHEAD, M. C. C.

The complainants also produced before me certified copies of letters of administration of Daniel Stewart, surrogate of the county of Burlington, of Joseph E. Butterworth, administrator of Philip R. Dakin, of Amzi B. Wood, of John B. Bisham, and of Joseph Burr, which I have marked Exhibit AB, on the part of the complainants, subject to all legal exceptions which may be taken thereto by the defendants.

C. H. HOLLINSHEAD, M. C. C.

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INTERLOCUTORY DECREE.

This cause coming on to be heard at a regular term of the Court of Chancery of New Jersey, held at Trenton, on the first Tuesday of February, in the year of our Lord one thousand eight hundred and fifty-six, in the presence of William Halsted, solicitor and of counsel with the complainants, and of John N. L. Stratton, solicitor, and William L. Dayton, of counsel with the defendants; and the bill of the complainants

and the answer of such of the defendants who made answer, and the depositions and proofs on both side having been read, and the arguments of the counsel of the parties having been heard; and time having been taken until the present time to deliberate thereon—It is, on this twenty-sixth day of November, in the year of our Lord one thousand eight hundred and fifty-six, by Benjamin Williamson, esquire, Chancellor of the State of New Jersey, ordered adjudged and decreed; and the said chancellor, by virtue of the power and authority of this court, doth order, adjudge and decree that a feigned issue be 10
 formed in the Supreme Court of Judicature of New Jersey, and tried in the ordinary manner, between the said John Black and Joseph Smith, and Andrew M. Jones and Anthony S. Morris, executors of Benjamin Jones, deceased, complainants, and Elizabeth S. Shreve, Sarah B. Shreve and Barclay White, executors of James Shreve, deceased, Restore S. Lamb, John Chambers, Thomas Black, Barclay White, surviving executors of Jonathan Smith, deceased, Caleb Newbold and Richard C. Shreve, administrators of James Newbold, 20
 deceased, Richard Jones and Nathan Atkinson, defendants, by a jury of the county of Burlington, at the next circuit, to be held in said county, to inquire and determine, by the verdict of said jury, whether the agreement bearing date the second day of February, in the year of our Lord one thousand eight hundred and thirty-five, set out in the complainants' bill, was executed by the parties thereto, as their act and deed unconditionally, or upon the understanding or agreement that the same should be executed by the remaining stockholders of the Delaware and Atlantic Railroad Company before the same should be delivered as an agreement binding 30
 upon the subscribers. And whether the same ever was in point of fact, legally delivered by the parties thereto, or by their authority, to the said John B. Clark, Joseph Smith, and Benjamin Jones, or either of them.

And that upon the trial of said issue, the bill and answer filed in this case, may be read in evidence by either party, and likewise the depositions of such witnesses as have heretofore been examined and may be dead, or incapable of attending from sickness or be out of the jurisdiction of the court at the time of the trial. And that all further directions be 40
 reserved until the said issue shall be tried, and the postea returned to the court.

B. WILLIAMSON, C.

NEW JERSEY SUPREME COURT, }
February Term, 1858. }

Burlington county, ss.—John Black, Joseph Smith, and Andrew M. Jones and Anthony Morris, executors of Benjamin Jones, deceased, complainants, and Elizabeth S. Shreve, Sarah B. Shreve and Barclay White, executors of James Shreve, deceased, Restore S. Lamb, John Chambers, Thomas Black, Barclay White, surviving executors of Jonathan Smith, deceased, Caleb Newbold and Richard C. Shreve, administrators of James Newbold, deceased, Richard Jones and Nathan Atkinson, defendants, being in custody, &c.—For that whereas, on the first day of February, in the year of our Lord one thousand eight hundred and fifty-eight, at Mount Holly, in the county of Burlington, a certain discourse was moved and had between the said plaintiffs and the said defendants, of and concerning a certain agreement bearing date on the second day of February, in the year of our Lord one thousand eight hundred and thirty-five, set out in a certain bill of complaint filed by the said plaintiffs in the Court of Chancery,
10 against the said defendants. And upon that discourse a question then and there arose, and was debated by and between the said plaintiffs and the said defendants, whether the said agreement was executed by the parties thereto, as their act and deed unconditionally, or upon the understanding or agreement that the same should be executed by the remaining stockholders of the Delaware and Atlantic Railroad Company, before the same should be delivered as an agreement binding upon the subscribers. And whether the same ever was in point of fact legally delivered by the parties thereto, or by
20 their authority, to the said John Black, Joseph Smith and Benjamin Jones, or either of them. And the said plaintiffs then and there asserted and affirmed that the agreement was executed by the parties thereto, as their act and deed unconditionally, and not upon the understanding or agreement that the same should be executed by the remaining stockholders of the Delaware and Atlantic Railroad Company before the same should be delivered as an agreement binding upon the subscribers. And the said plaintiffs also then and there asserted and affirmed that the said agreement was in point of
30 fact legally delivered by the parties thereto, or by their authority, to the said John Black, Joseph Smith and Benjamin Jones, or one of them; which said several assertions and affirmations of the said plaintiffs the said defendants then and there denied, and asserted the contrary thereof.
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And thereupon, afterward, to wit, on the same day and year aforesaid, at Mount Holly aforesaid, in consideration that the said plaintiffs had, at the special instance and request of the said defendants, then and there paid them the sum of two hundred dollars lawful money of the United States, they, the said defendants, then and there undertook to pay them, the said plaintiffs, the sum of two hundred dollars money as aforesaid, in case the said agreement was executed by the said parties thereto, as their act and deed unconditionally, and not upon the understanding or agreement that the same should be executed by the remaining stockholders of the Delaware and Atlantic Railroad Company before the same should be delivered as an agreement binding upon the subscribers. And in case the same ever was in point of fact legally delivered by the parties thereto, or by their authority, to the said John Black, Joseph Smith and Benjamin Jones, or either of them. 10

And the said plaintiffs, in fact, say that the said agreement was executed by the said parties thereto, as their act and deed unconditionally, and not upon the understanding or agreement that the same should be executed by the remaining stockholders of the Delaware and Atlantic Railroad Company before the same should be delivered as an agreement binding upon the subscribers. And the said plaintiffs, in fact, also say that the said agreement was in point of fact legally delivered by the parties thereto, or by their authority, to the said John Black, Joseph Smith and Benjamin Jones, or one of them, to wit, on the first day of February, in the year of our Lord one thousand eight hundred and thirty-five; whereof the said defendants afterwards, to wit, on the day and year aforesaid, at Mount Holly aforesaid, had notice. 20 30

Nevertheless, the said defendants, not regarding their said promises and undertakings by them in form aforesaid made, have not paid the said plaintiffs the said sum of two hundred dollars, or any part thereof, although so to do the said defendants afterwards, to wit, on the day and year last aforesaid, to wit, at Mount Holly aforesaid, were by said plaintiffs requested; but to pay the same they, the said defendants, have hitherto altogether refused, and still refuse to their damage two hundred dollars, and therefore they bring suit. 40

And the said Elizabeth S. Shreve, Sarah B. Shreve and Barclay White, executors of James Shreve, deceased, Restore S. Lamb, John Chambers, Thomas Black, Barclay White, one of surviving executors of Jonathan Smith, deceased, Caleb Newbold and Richard C. Shreve, administrator of James

Newbold, deceased, Richard Jones and Nathan Atkinson, defendants, by William L. Dayton, their attorney, come and defend the wrong and injury, when, &c.—And say that the said plaintiffs ought not to have and maintain their aforesaid action thereof against them, the said defendants, because they say that, though true it is that the said discourse in the plaintiffs' declaration mentioned was moved and had by and between the said plaintiffs and the said defendants, wherein the question did arise as aforesaid, and the said defendants did
 10 undertake and promise in manner and form as the said plaintiffs have above thereof in that behalf alleged.

Nevertheless, for plea in this behalf, the said defendants say, that the said agreement in the plaintiffs' declaration mentioned, was not executed as their act and deed unconditionally, but that the same was executed upon the understanding or agreement that the same should be executed by the remaining stockholders of the Delaware and Atlantic Railroad Company, before the same should be delivered as an agreement binding upon the subscribers.

20 And the said defendants further say, that the said agreement never was, in point of fact, legally delivered by the parties thereto, or by their authority, to the said John Black, Joseph Smith, and Benjamin Jones, or either of them, in manner and form as the said plaintiffs have above thereof in that behalf alleged. And of this the said defendants put themselves upon the country, &c.

And the said plaintiffs doth the like, &c.

[L. s.] I, Charles Smith, clerk of the Supreme Court, do hereby certify that the foregoing is a true transcript of the
 30 declaration and pleadings remaining in my office, on file, in the above stated case. In witness whereof, I have hereunto set my hand, and the seal of said Court, this twentieth day of April, in the year of our Lord one thousand eight hundred and fifty-eight.

C. SMITH, *Clerk.*

Afterwards, that is to say, on the day and at the place within contained, to wit, on the third Tuesday of April, eighteen hundred and fifty-eight, at Mount Holly, in the county of Burlington aforesaid, before the Honorable Stacy G. Potts, one of the Justices of our said Supreme Court, according to
 40 the form of the statute in that case provided, come the parties within named, by their respective attorneys within mentioned, and the jurors of the jury whereof mention is within made being summoned also came, who, to speak the truth of

the matters within contained being chosen, tried, and sworn or affirmed, upon their oaths and affirmations, (those who affirmed alleging themselves severally conscientiously scrupulous of taking an oath,) say that the said agreement in the plaintiffs' declaration mentioned was not executed as the act and deed of the said defendants unconditionally, but that the same was executed upon the understanding and agreement that the same should be executed by the remaining stockholders of the Delaware and Atlantic Railroad Company, before the same should be delivered as an agreement binding upon the subscribers thereto. And the said jurors further say, that the said agreement never was, in point of fact, legally delivered by the parties thereto, or by their authority, to the said John Black, Joseph Smith, and Benjamin Jones, or either of them, in manner and form as the said plaintiffs have above thereof in that behalf alleged. Thereof, &c. 10

STACY G. POTTS, J.

BURLINGTON CIRCUIT, }
April Term, 1858. }

JOHN BLACK, JOSEPH SMITH, ET AL.,

vs.

ELIZABETH S. SHREVE, SARAH B SHREVE, and EXECUTORS OF JAMES SHREVE, deceased, RESTORE S. LAMB, JOHN CHAMBERS, THOMAS BLACK, and EXECUTORS OF JONATHAN SMITH, JAMES NEWBOLD'S ADMINISTRATORS, RICHARD JONES, NATHAN ATKINSON. } Feigned Issue.

Questions.—1. Whether agreement of February second, eighteen hundred and thirty-five, was executed by the parties thereto as their act and deed unconditionally, or upon the understanding and agreement that the same should be executed by the remaining stockholders of the Delaware and Atlantic Railroad Company, before the same should be delivered as an agreement binding upon the subscribers. 2. Whether the same was ever, in point of fact, legally delivered by the parties thereto, or by their authority, to the said John Black, Joseph Smith, and Benjamin Jones, or either of them. 20

Mr. Browning opens for plaintiffs. Company procure plaintiffs to loan them thirty-five thousand dollars, secured by

bond and mortgage, and agreement guaranteeing mortgage. Calls *Luke Stansbie*:—I knew Charles Loss, Stacy B. Shreve, Samuel Newbold, Daniel B. Smith, and Samuel H. Jones. Loss is deceased; Stacy B. Shreve and Samuel Newbold are dead; I do not know whether Smith is; Jones is living; I have seen Loss write often, and Samuel Newbold; I don't remember seeing Shreve write; I have seen Jones write; I don't know where Jones is—believe he is in Burlington. This is Loss' handwriting; this is the handwriting of Samuel Newbold; this is the handwriting of Samuel H. Jones.

Joseph W. Smith.—I knew Daniel B. Smith—he is my brother; he is dead; have seen him write frequently; this is his signature. I knew Stacy B. Shreve; he is dead; I have seen him write; this is his signature. I don't know Samuel H. Jones.

James A. Fenwick.—I know Samuel H. Jones; frequently saw him write; he is in Europe; this is his signature.

Cross-examined.—I know he is in Europe, because I received a letter a few weeks ago from him; I have not got it here; he went, I believe, last year; the last letter I got was mailed, I think, at Bordeaux; I don't know when dated; I think last February.

Chief.—When in this country he lived in Philadelphia.

Cross-examined.—I have not the letter here; I know he is in Europe.

The agreement read in evidence, subject to exceptions, the signatures of all the witnesses to agreement being proved. [The agreement is to pay any deficiency or loss on the mortgage given on the road, equally with Black, Smith, and Jones, as far as they remain solvent and able.]

Mr. Wood opens for defence. Bill read. Atkinson, Black, and Jones were appointed to get a loan of thirty-five thousand dollars, and reported that it couldn't be had. The plaintiffs were then induced to borrow the sum on their own security, and upon the faith of the mortgage and agreement of indemnity. The company failed. The mortgage was foreclosed, and the premises sold for one thousand dollars, to Richard Jones, leaving fifty-four thousand dollars and upwards due the complainants.

Answer read. Admits that the committee were appointed and reported as charged. The company then agreed and resolved that the plaintiffs should borrow the money, and that

the stockholders should covenant to indemnify mutually. The mortgage was executed, but the agreement not then, but afterwards it was prepared. But it was agreed at the meeting that the agreement was to be executed by all the stockholders, and not to be delivered until all executed it. That only twenty-one out of thirty-seven signed it. That Chambers was told by the plaintiffs that it was a mere form. That Black held more stock than all the defendants.

Further answer read. An exhibit of finances was made at the meeting of the stockholders. Admits the resolution for 10 loan made and entered in the minutes, and that was the only resolution adopted at the meeting. That defendants are solvent and able to pay.

Defendants call *Thomas Haines*.—Was secretary of company part of time; (book shown) this book is the minutes of the company; is a correct minute of the proceedings of the company; I recollect there was a covenant of indemnity prepared. (Objected to because book is not yet offered in evidence, nor had defendants been permitted to cross-examine as to whether that is the book of minutes of the company or not, and because, if so, it is a transaction of three parties with which plaintiffs have nothing to do.) 20

Question. Look into this book, and say whether that covenant of indemnity was prepared under or by virtue of the entry in that book marked D?

Answer. It was; the book was in my possession as secretary of the company; the minutes were read to the several meetings of the company, and approved by them; there was a small book of minutes Dakin had, who was secretary before me; this was the only book of minutes I had; Dr. Dakin 30 was my predecessor; I first became secretary of the company—I can't tell exactly when—in eighteen hundred and thirty-five, I think; I was made director in September, eighteen hundred and thirty-four; I was made secretary, I think, a short time after; I was secretary at the time of meeting in eighteen hundred and thirty-five; the principal part of the book is in is in Samuel Smith's handwriting—some little my own. Smith lived with me at the time as clerk or scrivener; the minutes were often taken on a slip of paper, and I had it entered in the book under my direction when I got 40 home; there was no other resolution passed that I know of, to execute a covenant of indemnity.

Cross-examined.—Dr. Dakin was secretary before me; he

kept a small blotter, and a good many entries made in it, which I entered in this book; he made the entries himself; I don't know where that book is now; after Dakin ceased to be Secretary, Samuel Smith copied the entries into this book by my direction; it was done very soon after I became secretary; I kept the minutes on small pieces of paper; meetings were held five, and sometimes two miles from my house; after I was done being secretary, I gave all the papers and books to Luke Stansbie; I don't recollect about the loose
10 pieces of paper; I entered them in this book, and don't know whether they were destroyed or not; I was not in the habit of taking this book with me to the meetings; I don't recollect whether I ever took this book or not; I presume after the minutes were copied, the minutes were read at the next meeting; I forget whether I took this book or not; I recollect all I did do at the time was wrote down in this book; I don't recollect whether anything done was not entered in this book; I wrote here all the directors did; I entered here all the directors wished entered; I don't recollect how long it was after
20 meetings before Smith made entries; don't recollect whether he entered them after each meeting or not; they were all entered; I don't recollect in whose place I was elected. Anthony S. Earl died in eighteen hundred and thirty-four; it was, I believe, after that time, September, eighteen hundred and thirty-four, that I was elected secretary; I can't tell how long after; I had nothing to do with this book till I was elected secretary; my election does not appear in the minutes; on the fourth page I wrote one line in eighteen hundred and thirty-three—I was a justice of the peace—I don't know when—I don't re-
30 collect that there; I suppose this part of the book was copied from Dakin's some three or four years after it was done; the entry that Thomas Haines was appointed secretary in April, eighteen hundred and thirty-four, is correct. (Covenant shown.) I suppose this is the covenant to which the resolution refers in book; there was a covenant prepared; I suppose I must have prepared it, but I don't recollect whether I procured it done; the bond and mortgage mentioned in the book were executed, and so was the covenant; there was a new bond presented; the new bond was executed under one of the resolutions; the
40 minutes were copied shortly after the minutes were made; I was secretary of the board of directors; I believe I acted as secretary at meetings of stockholders after I was secretary; the minutes of their meetings were kept in this book, all I ever saw; these are the minutes of both bodies, according as they were held.

Chief. The entry on page forty-one is a minute that the bond was presented. I don't recollect whether I have been a witness as to this book in court before. This book is all the book of minutes I have ever seen used.

Book offered in evidence to show the proceedings of the company and the circumstances under which the bond of indemnity was given.

Mr. Browning objects:—First. Because it is not the book of minutes of the company, nor proved to be so. Second. Because it is irrelevant and incompetent evidence in trial of 10 this issue.

Mr. Dayton and Mr. Vroom replies. Mr. Halsted concludes. The book was admitted. Objected to, and exception noted.

Thursday Morning.—Mr Dayton read extracts from the book admitted, as per extracts annexed, marked I:

Meeting, ninth of January, eighteen hundred and thirty-five; meeting twenty-third of January, eighteen hundred and thirty-five, report of committee and agreement—Mr. Haines appeared to have papers prepared; meeting second of February, eighteen hundred and thirty-five, of stockholders, mortgage bond and covenant presented, with blank for the sum— 20 the secretary filled blanks for thirty-five thousand dollars; sixth of February, eighteen hundred and thirty-five, committee reported and continued; sixteenth of February, eighteen hundred and thirty-five, directors met, report of loan not yet made, and committee continued; adjourned meeting, twenty-third of February, new bond presented by secretary—presented and signed by a number of stockholders; March ninth, eighteen hundred and thirty-five, directors met—Mr. Black reported the loan made and money ready. 30

Thomas Haines recalled.—The minutes, page sixty-two—the affidavit is in my hand, and the signatures are those of parties. (Thirtieth of August, eighteen hundred and thirty-six.) I was appointed secretary on September eighteenth, eighteen hundred and thirty-four. I was present at a meeting on the twenty-third of January, eighteen hundred and thirty-five; the bond was to be signed as mentioned in the resolution; I don't recollect how the bond was to be got to the remaining stockholders; don't remember to whom it was given to go around. (The agreement shown.) I expect I 40 saw parties sign it—a number of them; I don't know who was to go around with it; my name is to it; I had ten shares.

The three lines filled up with names in the papers, are in my hand, down to P. R. Dakin, inclusive; I don't know whose hand the rest are in; I think Burr and Nathan Atkinson are in my hand.

- Cross-examined.*—Dr. Dakin had a small book, and I had one, and some of the minutes might have been made in that—a part of them were taken on loose pieces of paper, and taken home and entered. There were a few meetings when I was absent, and the minutes taken by a secretary pro tem.,
 10 and sent to me; I'm not able to state which were taken by him; they were relative to unimportant matters, settling of accounts, and so on. Samuel Smith is living, I believe, and resides in Pemberton township, in this county; is quite an old man now. (Turn to pages thirty-seven and thirty-eight.) I see I was appointed to have papers drawn. I presume the bond, mortgage, and covenant are the same papers I had drawn by order of previous meetings; I presume I presented them to the meeting; of course I filled up the blanks as directed. (Papers shown—bond and mortgage.) The blanks
 20 in the papers shown are filled up in my hand. I don't recollect what became of the first covenant which I then presented. I do not know whether the covenant here is the one I first presented; the blank in this covenant is not filled up in my hand; I don't know whether I filled up blanks in any covenant; there was a covenant abandoned.

Question. Is the covenant mentioned at the top of page thirty-eight the first covenant made and presented to the meeting?

- Answer. I do not know; it appears so by the minutes.
 30 The bond here is the new bond referred to in the minutes, (page forty-two,) I think—I've no doubt of it. I don't recollect why the new covenant was abandoned and given up; I recollect Eayre Oliphant refused to sign the first covenant; I don't recollect that General Irick refused to sign it—he refused to pay his installments; I don't recollect that Black and Jones refused to loan money on the first covenant, nor why the money could not be raised on it; don't recollect seeing Benjamin Jones about that time; Jones lived in Philadelphia at that time, I guess; don't recollect his ever attending any
 40 of the meetings; I believe I was in the habit of inserting the names of all the directors who attended the meetings; can't say whose seal is stamped on the wafers of the covenant; I think I had no such stamp then; don't know where John B. Bispham then resided; I believe Joseph Burr resided

at Columbus; he didn't keep ferry at the foot of Market street; not this Joseph Burr.

Chief.—The bond and mortgage are in Abraham Brown's handwriting.

John Rodgers.—Am a master in chancery; there was evidence taken before me, Black et al., complainants, and Lamb et al., defendants; I marked the book of minutes and treasurer's book at that time; they were admitted by complainants to be the books of the company, marked A and B.

Counsel of complainants admit John Gibbs resides in Philadelphia. John Gibbs' evidence read. [He objected to sign bond.] (The counsel reserves objections; noted in deposition.) Mr. Halsted moves to overrule the evidence of Mr. Gibbs, to wit: Second question and answer, objected to before master—admitted; third question and answer, objected to before master—admitted; fourth question and answer, objected to before master—admitted; fifth question and answer, objected to before master—not admitted as evidence.

Mr. Dayton offers treasurer's books in evidence, for the purpose of showing the interest of the parties, and to show the disposition of the moneys loaned:—First. To prove that but eleven thousand two hundred and twenty dollars of the money came to the hands of the treasurer. (Objected to by plaintiffs. Not admitted, and exceptions of the defendants noted.)

Chalkley Atkinson.—I was a stockholder of the company from the outset; was a director from the commencement, and remained so till the road was wound up; was at a meeting of the stockholders when it was proposed to raise a loan of thirty-five thousand dollars; was appointed by the meeting as one of a committee to effect that loan; I made a report to the meeting that I had seen the President of the Bank of the United States, and they would lend the money. I don't recollect much about the first outset. (Witness referred to the resolution of twenty-third of January, eighteen hundred and thirty-five.) I was present at that meeting—a meeting of stockholders; I was at all their meetings while negotiations for a loan were pending—don't think I missed a day; I was at a meeting at Jobstown when a bond was laid on the table to be executed; I think most, if not all, the directors were there; it was on the twenty-third of February; several stockholders were there; there was some conversation about the bond; it

- was talked over before signing ; those that were there mostly signed it ; John Black and Joseph Smith were present ; the bond was to be signed by all the stockholders ; I mean those present, and all the other stockholders ; after this bond had been signed by those present, a committee, Dr. Dakin and myself, were appointed to have the bond signed by the other stockholders who were not there ; I took it to some few myself ; I got three or four signatures. I think Samuel Ellis refused to sign ; I think I got all I went to but him. The last
- 10 time I saw the bond, Dr. Dakin had it—what became of it afterwards, I don't know ; I don't know how long I had it before I gave it to Dr. Dakin ; I informed those I called on that all the stockholders were to sign the bond ; the meeting gave me no other authority except to get the signatures of the stockholders. Dr. Dakin is dead, ten years or so. Can't remember whether any witnesses were present when I got these signatures ; don't recollect that anybody was by when I went around ; I signed the bond myself at Jobstown ; I signed on the understanding that all the rest were to sign it.
- 20 *Cross-examined.*—I took the benefit of the bankrupt law of eighteen hundred and forty-two ; I inserted in my list my liability on this bond ; filed a petition on oath. It was a meeting of stockholders I spoke of when the bond was lying on the table ; don't recollect the month ; I think that was the first bond I saw ; don't recollect a meeting when Black, Smith and myself were appointed a committee to negotiate a loan. (Witness referred to minutes of January ninth.) I can't remember that I was appointed on a committee at that time to negotiate a loan—I might have been ; I do recollect being appointed on but
- 30 one committee. I don't think I remember Mr. Haines producing a bond, mortgage, and covenant ; I know we were appointed a committee to take the bond around by the persons present at a meeting ; I don't now remember being appointed on any other committee ; I don't know who it was laid the bond and mortgage on the table. (Bond and mortgage shown witness.) I recollect when these were executed to Black, Smith, and Jones ; I think I was present at that meeting ; I think it was a stockholders' meeting ; it appears to me it was at that time I saw the covenant which John Black and others signed. I
- 40 can't say certain ; it appears to me that was the time ; it is a long time ago ; I think it was the time when the talk among the stockholders which I spoke of took place ; I can't remember of any paper produced at any other meeting—covenant, I mean ; I attended most nearly the whole of the meetings ; I don't think there were any at that meeting that refused to

sign, but Clayton G. Atkinson, my brother. I know John Gibbs; can't remember he was present—he might have been. Don't remember hearing him refuse to sign; I can't say how many or who signed the paper at that meeting; I think Benjamin Jones was not there; Clayton refused to sign at one time he was there, and at that time; can't say whether John Chambers was there; I think I signed there; I took it to Nathan Atkinson, Joseph Burr and Samuel Ellis; it seems to me I got Benjamin Jones; Atkinson and Burr signed towards the last; think I took it to Jones in Philadelphia; I think I didn't 10
leave it with him; I knew John B. Bispham; I think he signed the bond, but I don't remember taking it to him. I know Luke Stansbie, who has been examined here; I never said to him that this was a good bond and ought to be paid; it was a general thing, talked over on all hands at the meeting, that the bond was to be signed by all the stockholders; it was a general thing; I can't tell of individuals; Jonathan Scattergood, John Black, Joseph Smith, and Restore Lamb, I think; think Thomas Black was there; there might have been more, can't remember; think James Newbold was there. 20

Chief.—I never carried around more than one bond to get signatures; that was the last paper to be signed by stockholders that I know anything about; it was the same paper Dr. Dakin carried around. (The bond shown witness.) This is the paper I carried around; that is the paper which was to be signed by all the stockholders, as I understood it; I don't know who got A. B. Wood.

Cross-examined.—I don't remember about the filling up in the article of agreement. I think Clayton Atkinson did sign, can't tell how long after the meeting. 30

William Irick.—I was originally a stockholder in the company; I am acquainted with John Black and Joseph Smith; I heard a bond of indemnity spoken of; I had a conversation with Joseph Smith in reference to it; Mr. Smith said he had been deceived; it was about the time the note became due, or a renewal of it; he complained of John Black; said Black had told him all the parties were to sign it; it was a note in the United States Bank; by parties he meant stockholders; he said so; that they were to indemnify him for the loan—loan, he told me, of thirty-five thousand dollars; I had a second 40
conversation with him; he said he thought it was a hardship for him to pay the money, and he wouldn't have done it if he hadn't thought all were to sign; he said Mr. John Black had deceived him.

Cross-examined.—The first conversation was in Stryker's hotel, I think; don't know that Smith was drowsy; he commenced the conversation himself; it was about the time the note or renewal was due; it was as much as twenty years ago; I made no memorandum of it; I often heard Joseph talk about it; he has called it to my attention more than anybody else; first he asked me about my suit, and then commenced telling me about this; it was after the company had sued me for installments; I think it was in the afternoon; I think there were
 10 several in the bar room—whether they heard the conversation I don't know; think Stryker was present. They appointed me a director; no bond was ever presented to me, as I recollect, for signature. In the first conversation, Smith said he wouldn't have signed it if he had thought all the rest were not going to sign; that Black had told him they were, and in that way had deceived him; I told him I supposed Black thought they were.

Oliver H. P. Emley.—Am acquainted with Joseph Smith, one of the defendants; the first conversation was between
 20 Thomas N. Emley and Joseph Smith; Smith said the company wanted money for some purpose, and could not procure it on the credit of the company; we agreed to borrow it ourselves, and had given their paper for a large amount of money. He said that money was received by John Black; he complained of Black, and said the money was not used for the purpose for which it was borrowed. At the second conversation, Smith called at my house. In the first conversation, Smith said, we agreed to sign a paper because we could not borrow the money on the credit of the road, and so agreed to
 30 borrow it ourselves. He spoke of we—was speaking of the company. My opinion is that he said Black had got the money in Philadelphia; don't remember his saying from the United States Bank; I have no distinct recollection who he said was to sign as security for the money; there was a sum named, but I don't recollect what it was; it was in May, eighteen hundred and fifty-five, that Smith came to see me; he came to my house; in the first conversation he was severe on Mr. Black; he said in substance that he had no confidence in Mr. Black's word; the reasons were the transactions of the
 40 company; don't know what they were particularly.

Jacob Merritt.—Heard a conversation between Smith and Barclay White, in my presence, at Mount meeting-house, (about the time of taking the testimony, eighteen months since,

at Burlington.) They were talking of the testimony; Barclay said to Smith, "thee knows, uncle Josey, all the stockholders were to sign the bond, why didn't you get them to do it." He replied, "well, they had an opportunity; we took it around to them, and they wouldn't all sign it."

George Haywood.—Knew Sylvanus Zillay, Anthony Taylor, Dr. James B. Coleman, Mark Richards, Joseph and Nathan Trotter, Isaac Jones, and others, stockholders of the company. (Question objected to by plaintiffs. The defendants offer it to show that these parties were responsible men in point of property—not having signed the bond.) Not admitted. 10

Friday, 10 A. M.—Defendants' counsel offer to prove the extent of Mr. Black's interest in lands affected by the road, and the disposition he made of the loan; that there was only eleven thousand dollars and odd came into the treasurer's hands. (Objected to and overruled.) The plaintiffs object to all the defendants' evidence. Defendants rest.

Mr. Browning opens rebutting evidence. Thirty-seven stockholders, all living except A. S. Earl. First agreement abandoned, and one of twenty-third of February substituted. 20

Thomas Haines.—The first covenant was drawn so that each stockholder should sustain loss in proportion to the number of shares he held. John Black, I believe, objected to it, and I presented it to Eayre Oliphant, and he objected to it; I don't know whether Benjamin Jones objected to it; Anthony S. Earl was then dead; I don't recollect of any other objection, that I know of; I remember I could not obtain the signatures of all the stockholders to it; I don't know of any other reason why it was abandoned; I signed the new covenant; I did not attach any condition or qualification to it when I executed it; I don't recollect whether any others did; there was a good deal said at the meeting; I don't remember what it was. I thought it was a binding and absolute agreement on me, as far as I was concerned. 30

Cross-examined.—It occurred to me directly after my examination, that the first covenant was informal, but I couldn't tell how; I said yesterday it was informal, but couldn't tell how. I was examined before a master in this cause, in eighteen hundred and fifty-five; I don't recollect what I said then. I repeat now that this present covenant was executed under the agreement in the minutes marked D; I say now it was to be signed by the persons mentioned in the said minutes; I 40

felt myself bound after I put my name there, agreeably to the covenant; don't remember who put their names to the covenant; I think some, not positive; I recollect taking the first paper to Lisbon, and Eayre Oliphant would not sign it; it was after the meeting; I took the covenant to some parties to get it signed; Mr. Black was present at the meeting of the second of February; he made some objection to the covenant; he did not sign it; I don't know what the objection was; I know Black did not execute the paper—don't remember what he said, or what reasons he gave; the board, I suppose, gave it to me to get signers; don't remember how long I had it in my hands. I don't know Eayre Oliphant's reasons, but he would not sign; don't recollect how much stock Eayre Oliphant held. I was subpoenaed by both parties. I did not take the last bond to Eayre Oliphant to sign. I have not said all the stockholders abandoned the first covenant. Have conversed with Mr. Black's counsel this morning; I have no recollection as to what questions were put to me at Burlington. I don't know now what was the reason the first covenant was abandoned; I only know now that it was abandoned.

Chief. I said I supposed this new covenant was drawn in reference to both the resolutions, yesterday, and say so now.

Richard Jones.—I am a son of Benjamin Jones, of Philadelphia, whose name is subscribed to the bond here; the name Benjamin Jones, in the body of the bond, is my father's writing. I am also a party to the bond. I have an indistinct recollection of being at a meeting when the subject was discussed, previously to the time when the bond was executed. I remember being present at Jobstown when this instrument was executed; I executed it in the order in which my signature appears; it was executed as I understood it, absolutely, at the time; I remember it was expected all the stockholders would be induced to sign it; that expectation was expressed at that meeting. I know nothing of a previous covenant executed and abandoned, but hearsay, on that day. I did not consider it a condition that all were to sign; I never heard of such an agreement among the parties to the instrument. I was informed at that meeting that my father had refused to sign it—I think from Chalkley Atkinson; he said my father's reason was that he had already interested himself a good deal in that road—put more money in than he desired, and he did not choose to incur a risk in proportion to the money he had

put in; don't remember that Atkinson assigned any other reasons of my father for refusing to execute the first bond.

Cross-examined.—I speak only for myself as to what I understood when I signed the bond; I don't know whether all who were present at the meeting did execute the paper. I don't know when my father executed the paper; don't know who was appointed to get signatures; don't remember taking part in any discussion in regard to it; it was understood the paper was to be taken around; Chalkley Atkinson and Dr. Dakin said at the meeting it was expected all would sign. I do not recollect the form of the entry in the book of minutes. 10

Isaac Hilliard.—I was a stockholder of the company; I was never called on to sign this or any bond.

Cross-examined.—I was in the county at the time.

Luke Stansbie.—I know Chalkley Atkinson; I was in the company's employ several years; had an office at Columbus; he was at my office almost daily; we often talked on the subject of this covenant; he frequently said the bond ought to be paid; that was previous to the opinion received from Mr. Dayton; before that I never heard him say anything against its validity; the opinion was received after the suit was commenced; I knew James Newbold; he frequently talked to me about this covenant, during his life time; he expressed his candid opinion that the bond ought to be paid; never heard him question its validity; he is dead. 20

Cross-examined.—I live at Hoboken—near there; I was examined last January two years ago as a witness; I have no recollection of having stated these facts then; I presume, if the question was put to me, I testified then as I have now; I have been, since here, at Mr. Black's, and last evening staid in Mount Holly; it was in the neighborhood of eighteen hundred and thirty-five and thirty-six that I first heard of the difficulty about this bond; Atkinson said that from Mr. Dayton's opinion the bond was invalid; I understood there was an opinion of Mr. Dayton that the bond without the signatures of all the stockholders was invalid; he didn't say Governor Vroom concurred in the opinion; it was Mr. Dayton's opinion, as I understood it; I don't know of a written opinion of Mr. Dayton and Governor Vroom; never saw such paper about the office; I don't remember the time of the opinion; all I know is what Chalkley Atkinson told me; I understood it was on question of validity of that bond; it must have been in forty-eight or forty-nine Atkinson told me—after suit in 30

- chancery to foreclose; I don't know that, acting under that opinion, they forbid the sale under mortgage; I heard the conversation of Newbold, in thirty-seven or thirty-eight—not positive; I don't remember any difficulty about the bond; it was only said it was good, and should be paid; it was general conversation among people who visited my office; Newbold came there, and this conversation took place; don't remember whether it was after thirty-eight; it was about thirty-seven, thirty-eight or thirty-nine; don't know whether
 10 after the bill was filed; don't know when it was filed; I came here in eighteen hundred and thirty-four, and left in eighteen hundred and forty-nine, I think; I am a native of England.

Chief.—I am a general broker and superintendent of Land Improvement Company of Hoboken, under Messrs. Stevens; been there so employed six years; I don't know what the difficulty was about the bond; there was something about it; I think it was that induced what Atkinson and Newbold remarked; I have no recollection out of what the conversation grew; it was a general thing in the office to talk about the
 20 bond, but don't recollect out of what the conversation grew.

Mr. Browning now offers *John Black* as a witness, to disprove the allegations of the answers which have been read. (887 Nixon's Dig., sec. 2, p. 27.)

Mr. Vroom objects. This is not a case within the contemplation of the act. Not, as it stands here, an equitable proceeding; the evidence was not closed in chancery till after the act passed, and he might have been examined there. Mr. Halsted and Browning reply. Mr. Dayton answers. The offer was rejected and exception noted.

- 30 The cause was then summed up, and the jury charged—and after an absence of several hours they returned into court with a verdict for the defendants, upon the issue in the record, as appears by the *postea* returned. And although the case was not free from difficulty, I am, on the whole, satisfied with the verdict.

STACY G. POTTS, J.

Extract from the Minutes of the Delaware and Atlantic Railroad Company:

- 40 "Then adjourned to meet at the house of Francis B. Warner, on Friday, the ninth of January, instant, at one o'clock, P. M."

"The stockholders of the road having been previously notified that a general meeting was to take place—Present, John

Black, James Shreve, Joseph Smith, Jonathan Scattergood, Chalkley Atkinson, Clayton G. Atkinson and Thomas Haines, directors, and a number of the stockholders.

"It was moved and seconded that a loan of thirty-five thousand dollars be made for the company, and John Black, Benjamin Jones and Chalkley Atkinson were appointed a committee to make such loan."

"Agreeable to adjournment, the directors met at the house of Francis B. Warner, on the twenty-third day of January, eighteen hundred and thirty-five.

10

"Present—John Black, James Shreve, Joseph Smith, Chalkley Atkinson, C. G. Atkinson, Jonathan Scattergood, Thomas Haines, and the following stockholders: Richard Jones, Jonathan Smith, Caleb Wright, Amzi B. Wood and others, it being a general meeting of the stockholders.

"The committee appointed to make a loan reported that the sum of thirty-five thousand dollars could not be obtained upon the credit of the road.

"It was agreed by the stockholders that John Black, Joseph Smith and Benjamin Jones do, by their joint obligation, get the sum of thirty-five thousand dollars; and it is also agreed that they have a mortgage on said road delivered to them; and also further agreed that the remaining stockholders execute a joint bond, to the said persons so loaning the money, as security to them. In case of any losses sustained by said loan, each one to bear his proportion of the loss.

"Thomas Haines was appointed to have the necessary papers drawn ready for examination, at the next meeting—ready to making the aforesaid loan.

"Then adjourned to meet at the house of Francis B. Warner, at Jobstown, on Monday, the second day of February ensuing."

"February 2d, 1835. Pursuant to adjournment and notice, a general meeting of the stockholders of the Delaware and Atlantic Railroad Company met at the house of Francis B. Warner, at Jobstown. Directors present—John Black, James Shreve, Joseph Smith, Chalkley Atkinson, Clayton G. Atkinson, Jonathan Scattergood, Jonathan Smith and Thomas Haines.

"The mortgage bond and covenant was presented by Thomas Haines, secretary, with a blank left to insert the sum to be loaned by John Black, Joseph Smith and Benjamin Jones.

"It was moved and seconded in general meeting that the sum of thirty-five thousand dollars be raised by the aforesaid

40

loan, and the secretary was ordered to fill up the blanks accordingly. The secretary did therefore fill the blanks for the sum of thirty-five thousand dollars.

"It was moved and seconded that the bond and mortgage be signed by Thomas Haines, their secretary, and was agreed to; and he was ordered to sign the same, which was done, and fully executed according to law."

"Pursuant to adjournment, the directors met at the house of Francis B. Warner, on Friday, the sixth of February, eighteen hundred and thirty-five. Present—John Black, James Shreve, Jonathan Scattergood, C. G. Atkinson, Chalkley Atkinson, Jonathan Smith and Thomas Haines.

"The committee appointed to make the aforesaid loan of thirty-five thousand dollars, reported that they had not succeeded in making such loan. The committee was continued."

"February 16th, 1835. Pursuant to the above adjournment the following directors met: Present—James Shreve, Joseph Smith, Jonathan Smith, C. G. Atkinson, Chalkley Atkinson, and Thomas Haines.

20 "Chalkley Atkinson reported that the loan was not yet made. The committee continued.

"Then adjourned to meet at the house of Francis B. Warner, at Jobstown, on Monday, the twenty-third of February instant, at two o'clock, P. M."

"Pursuant to adjournment, the following directors met: Present—John Black, Joseph Smith, James Shreve, C. G. Atkinson, Chalkley Atkinson, Jonathan Smith, Jonathan Scattergood, and Thomas Haines.

30 "A new bond was presented by the secretary, for the purpose of effecting the aforesaid loan, and signed by a number of the stockholders.

"John Black and Joseph Smith undertook to effect the said loan, in conjunction with Benjamin Jones, and to report at the next meeting."

"March 9th, 1835. Pursuant to adjournment, the following directors met: John Black, James Shreve, Joseph Smith, James Newbold, C. G. Atkinson, Chalkley Atkinson, Jonathan Scattergood, and Thomas Haines.

40 "John Black reported: the loan in Philadelphia has been made, and the money ready."

CHARGE TO THE JURY.

In the commencement of the year eighteen hundred and thirty-five, the Delaware and Atlantic Railroad Company were in pressing need of a loan of money.

The plaintiffs and defendants now before the court, or those whom they represent, were all, at that time, stockholders in this company, some owning a greater, and some a less amount of shares.

In this state of things, Messrs. John Black, Joseph Smith, 10 and Benjamin Jones, borrowed of the United States Bank, upon their own note or notes, thirty-five thousand dollars, for the use of the company.

The company gave them as security, in their corporate capacity, a bond for the amount, accompanied by a mortgage on all their real and personal property.

They have also in their possession a sealed instrument, purporting in effect to be a covenant to indemnify them, by contributing an equal proportion of any loss on account of the loan aforesaid, and which is signed and sealed by the plain- 20 tiffs and the defendants.

The loss occurred, and the plaintiffs have gone into the Court of Chancery for relief, and the bill and answer have been read in your hearing.

In the progress of the cause there, the Chancellor has ordered a feigned issue to be made up and sent here for trial.

That issue, stripped of the form in which it is wrapped up, presents the following questions:

I. "Whether the agreement of the second of February, eighteen hundred and thirty-five, for indemnity, was executed 30 by the parties thereto as their act and deed, unconditionally?"

II. "Or upon the understanding and agreement that the same should be executed by the remaining stockholders of the Delaware and Atlantic Railroad Company, before the same should be delivered as an agreement binding upon the subscribers?"

III. "And whether the same ever was, in point of fact, legally delivered by the parties thereto, or by their authority, to the said John Black, Joseph Smith, and Benjamin Jones, or either of them?" 40

You perceive, therefore, the plaintiffs here insist, that this agreement for indemnity was executed by the defendants unconditionally, and was legally delivered to some or one of them.

This the defendants deny, and contend that it was executed

by them, upon an understanding or an agreement that all the remaining stockholders were to execute it, before it was delivered as a binding agreement on those who subscribed it, and that it never was legally delivered.

This is the question for you to try, as a question of fact, and your verdict is to be returned to the Chancellor, to be used in the cause in the Court of Chancery.

The plaintiffs are in possession of the covenant. There is no such condition as the defendants insist on, upon the face
10 of the instrument.

The plaintiffs prove its execution by proof of the signatures of the five subscribing witnesses, all of whom are deceased, or out of the jurisdiction of the court.

This is sufficient evidence, *prima facie*, to make out their side of the issue; if there were no other evidence in the case, it would of itself be conclusive.

Then the defendants offer evidence to prove there was such an understanding and agreement as they allege, had or made by the parties, before or at the time the instrument was executed.
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They offer first a book, purporting to be the book of minutes of the company, and to contain true minutes of the proceedings had at the meetings of the directors and stockholders. So much of it has been admitted in evidence as embraces the time during which Thomas Haines was secretary. That is from September, eighteen hundred and thirty-four, covering the time during which the matter of the loan was agitated, and up to the time it was consummated.

By these minutes it appears, that on the ninth of January, eighteen hundred and thirty-five, at a meeting of stockholders, convened by notice, it was resolved to borrow thirty-five thousand dollars for the use of the company, and Messrs. John Black, Benjamin Jones, and Chalkley Atkinson were appointed a committee to carry out the resolution.
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It may be inferred that this first attempt was to borrow the money upon the security of a mortgage on the road, for at an adjourned meeting of the stockholders, on the twenty-third of January following, this committee reported that the money could not be obtained upon the credit of the road.

Then, say the minutes, "It was agreed by the stockholders, that John Black, Joseph Smith, and Benjamin Jones, do, by their joint obligation, get the sum of thirty-five thousand dollars. And it is also agreed that they have a mortgage on said road delivered to them, and also further agreed, that the remaining stockholders execute a joint bond to the said per-
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sons so loaning the money, as security to them, in case of any loss sustained by said loan, each one to bear his proportion of the loss.

From succeeding entries it appears that Thomas Haines was to have the papers prepared, and he presented at the next stockholders' meeting, on the second of February, the mortgage, bond, and covenant, with blanks left in which to insert the sum to be loaned. That Haines there filled the blanks with thirty-five thousand dollars, and the bond and mortgage was then executed. But nothing is there said of 10 any execution of the covenant.

By succeeding entries, it appears that on the sixth of February, and the sixteenth of February, at meetings of the directors, the committee reported that the loan was not yet effected.

Then, on the twenty-third of February, the directors met, and a new bond was presented by Mr. Haines, signed by a number of the stockholders, and then, that "John Black and Joseph Smith undertook to effect the said loan, in conjunction with Benjamin Jones." 20

And at the next meeting, on the ninth of March, eighteen hundred and thirty-five, John Black reported that the loan had been made and the money was ready.

These minutes are important, if you believe they are a correct record of what occurred at these several meetings of the stockholders and directors, and of that you must judge from the evidence of Thomas Haines, who tells you how the minutes were kept, and how and by whom they were entered in the book which you will have before you.

They are records made before the difficulties occurred between these parties, or any motives could exist for misrepresentation. They are records from minutes made at the very 30 time of the occurrences of which they speak, now some twenty-three years ago, and more reliable than the mere recollections of witnesses for that reason.

The defendants, in their answer, insist, and their counsel here contend, that these entries show—establish—the fact that this covenant of indemnity was executed upon the understanding or agreement that the same should be executed by all the stockholders of the company, before it should be 40 delivered as a binding covenant upon them, and that, not having been signed by all—twenty-one only signing it out of thirty-seven stockholders—that it never was so executed as that it could be legally delivered as a valid and binding instrument.

They rely, of course, upon the minutes of the agreement, entered or noted at the meeting of the stockholders of the twenty-third of January, which says that it is also further agreed that the remaining stockholders, that is, all the other stockholders, as well as Black, Smith and Jones; and they insist that though the first covenant which was presented by Mr. Haines to the subsequent meeting of February second, was abandoned, and a new bond was substituted, and presented and signed by a number of stockholders, at the meeting
 10 of directors on the twenty-third of February, and which is the covenant now here, according to Mr. Haines' testimony; yet that this covenant was executed without any change of the agreement except that as to the liability according to shares held.

To support and strengthen this view they have produced before you several witnesses.

The entry in the minutes of the twenty-third of January is the only written evidence of an agreement that all the stockholders were to sign the covenant. The entry of the twenty-
 20 third of February says nothing about it. It is therefore important to determine whether the new covenant was prepared and executed under that agreement, as the defendants contend, or whether that agreement was abandoned with the first covenant, and the second prepared and executed and delivered subject to no understanding as to who or how many should sign it.

They, the defendants, in the first place, have read the answer of James Shreve, Restore S. Lamb, John Chambers, Nathan Atkinson, Thomas Black, and of the representatives
 30 of Jonathan Smith and James Newbold, who were deceased at the time.

This answer is under the affirmation of these defendants, taken on the thirteenth of February, eighteen hundred and fifty-two.

They set out the agreement entered in the minutes of the twenty-third of January, and say in substance that it is true they executed this covenant, but that it was executed subject to the understanding and agreement mentioned in that minute—that is to say, that all the stockholders were to execute it
 40 or it was not to be a binding and valid covenant, and that it was in fact only signed by twenty-one out of thirty-seven stockholders, and therefore could not have been legally delivered, or have any validity as against them.

You will have the bill of the complainants and this answer before you, and it is unnecessary for the court to dwell on its

statements. That part of the answer which sets up this alleged understanding or agreement is not strictly responsive to the bill. It is new matter set up in avoidance of the covenant. But it is, nevertheless, entitled to your consideration as evidence in the cause. Its weight is exclusively for you to determine.

Then Thomas Haines, who was the secretary of the directors, and acted as secretary also, at the meeting of the stockholders, was examined. He testified that the covenant he first had prepared, and which he presented to the meeting of the second of February, was abandoned; he don't know why. That Eayre Oliphant refused to sign it. That a new covenant was prepared and presented at the meeting of the twenty-third of February, and that this he believed to be that paper. He don't know what became of the old covenant. 10

The testimony of Mr. John Gibbs was then read. You will have it before you. He says he was at a meeting of stockholders in February when he saw a bond lying on the table—a bond of indemnification. He refused to sign it. He says it was stated at that meeting that it was to be executed by all the stockholders, or not to be binding; that it was so generally understood from what he saw and heard. It was signed by several stockholders. He says Mr. Black and Mr. Smith were present at that meeting; he don't recollect that either of them assented or dissented to the statement that all were to sign. And he says that subsequently Dr. Dakin called on him to sign, and gave him to understand the bond was to be executed by all the stockholders. He did not sign. He said Dakin asked him if he did not know there were two bonds, that one was a little informal, a new one was drawn, and that this was the one that would be signed by them all. 20

Chalkley Atkinson testifies. (Read it.)

Then General Irick testifies that Joseph Smith told him, that Mr. Black had told him that all the stockholders were to sign—and that he wouldn't have signed if he had not thought all were to sign. It was some twenty years ago.

Judge Emley also testifies to some conversation between Joseph Smith and Thomas H. Emley.

And Jacob Merritt speaks of a conversation between Barclay White and Joseph Smith, at Mount meeting house. You 40 recollect the purport of these several conversations.

So far then: The plaintiffs have produced the covenant, and proved the signatures of the witnesses to it.

The defendants have met this by: First—Producing the minutes of the agreement of twenty-third January, under

which they insist both covenants were executed, so far as the condition that all were to sign is concerned.

Second—The allegation that this bond was executed subject to that condition, affirmed to by James Shreve, John Chambers, Restore S. Lamb and Thomas Black, who were four of the defendants who signed the covenant, in their answer.

Third—The evidence of Chalkley Atkinson and John Gibbs to the same effect, and Mr. Haines, whose evidence, as first
10 produced, was less certain.

Fourth—The evidence of Joseph Smith's admissions.

Fifth—What is called the intrinsic evidence deduced from the fact of the inequality of the covenant as it stands, and the improbability that any would have signed such a covenant, without knowing how many would sign.

This is a brief summary of the defendants' case, so far as it rests in evidence. To overcome this case, and support the issue on their part, the plaintiffs then called several witnesses. The theory, you will remember, of the plaintiffs is, that the
20 agreement of the twenty-third January and the first covenant were both abandoned, and the new covenant, presented on the twenty-third February, was substituted for both. Thomas Haines testifies—(Read extracts.) Richard Jones—(Read.) Isaac Hilliard—(Read.) Luke Stansbie—(Substance.) Then the plaintiffs rely upon various intrinsic facts apparent in the case.

First—That there was a blank left in this covenant for the names, which they insist would have been filled up originally, if all were to have signed it. That the blank is not sufficient
30 for thirty-seven names.

Second—That it appears upon the face of this covenant that all the parties to it signed it in the presence of the subscribing witnesses, and that this is against the presumption that it is the same covenant which Chalkley Atkinson and Dr. Dakin carried round.

Third—That this covenant, to which these parties have set their names, contains the recital of an agreement different and inconsistent with that in the minutes of twenty-third January.

40 First—In that it uses the words, "we—stockholders," &c., and not "we being all the stockholders."

Second—That it provides for the indemnity *pro rata*, instead of in proportion to stock.

Third—That it provides that this indemnity is to be paid by those who remain solvent at the time of the deficiency.

Fourth—That the entry in the minutes of March nine, fourteen days after the new bond was presented at the meeting of twenty-third February, that “John Black reported the loan in Philadelphia had been made, and the money was ready,” is presumptive evidence that the security had then been completed and was ready for delivery.

Fifth—That it appears the plaintiffs actually loaned the money to the company, and that this raised a presumption that he had received the security upon which it was to be furnished.

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This is, in few words, substantially the plaintiffs' case.—There is no doubt that the burden of proof is on the defendants. The plaintiffs have a covenant signed and sealed by the defendants. The presumption is that they have it lawfully. The legal proof of execution and possession is sufficient evidence of execution and delivery, *prima facie*. They who set up an outstanding condition must prove it. There is no doubt, either, if the defendants have satisfactorily established by evidence an understanding or agreement that the covenant was to be subject to the condition that all the stock- 20 holders were to sign, or the covenant to be void, that no delivery could be lawful until it was so signed—unless a waiver of that agreement was shown, in some way. A delivery by the covenantors to the covenantees, or by the agent of one party duly authorized to the agent of the other, absolutely, might operate as a waiver. But there is no evidence, one way or the other, as to either actual delivery in this way or in any other, or of any waiver.

It is not a case, therefore, which comes within the rule, that if a deed, absolute upon its face, be delivered by the 30 grantor to the grantee, it takes effect at once as an absolute deed, and cannot be avoided by parol proof of a condition precedent, unperformed.

You will take the case, examine and weigh the evidence—consider the arguments which have been presented on both sides, and determine whether this covenant was executed as the act and deed of the parties to it, unconditionally, or upon the understanding or agreement that it should be executed by all the stockholders before delivery. If you come to the conclusion that the former was the fact, you will find accordingly 40 in the words of the issue. If you believe the latter was the fact, you will so find.

It is agreed by the Solicitors of the respective parties, that there are the following omissions in the report of the Judge, viz.:

First. He omitted to state that Haines said on his cross-examination that the covenant was executed under both resolutions. (Page five of report.) Admitted it was.

Second. He omits the evidence of Thomas Haines that the fourth line of the names is in John Black's writing. (Page six.) Admitted.

10 Third. It is not stated that he admitted Gibbs' testimony, because of the broad character of the issue. (Page eight.) Admitted.

Fourth. He omits to state that the plaintiffs objected to the bill, answer, Gibbs' deposition, and the interlocutory decree given to the jury. Admitted.

Fifth. He omits objections to the charge; and that he said he admitted the answer because the Chancellor had so ordered. Admitted.

All these objections are agreed to.

AFFIDAVIT OF JOHN BLACK.

20 Burlington County, ss.—John Black, one of the complainants in this case, alleging himself to be conscientiously scrupulous of taking an oath, and being duly affirmed on his solemn affirmation saith:—That the covenant of indemnity mentioned and referred to in the feigned issue above stated, is not the covenant or bond of indemnity mentioned and referred to in the minutes of the Delaware and Atlantic Railroad Company, under the date of the twenty-third day of January, eighteen hundred and thirty-five, and which is also mentioned and referred to in said book, in the minutes of the

30 second day of February of that year, and therein stated to have been presented to a meeting of the stockholders of said company by Thomas Haines, the secretary thereof; that the said covenant, so presented by the said Thomas Haines, after having been executed by a portion of said stockholders, was abandoned, because several of the said stockholders would not join in its execution, or any other covenant of indemnity, and because this affirmant, Benjamin Jones, and Joseph Smith, refused to loan the required sum of money to said

company on such a covenant, dividing the loss in the ratio of the stock owned by the parties, or join in its execution ; that afterwards the covenant mentioned in said issue and referred to in the minutes of said book, under date of the twenty-third of the said month of February, was agreed upon, and drawn to avoid the aforesaid objections to the abandoned covenant, to be executed only by so many of said stockholders as might be induced to join in its execution, and with a full knowledge and understanding that some of them would not ; and having been so drawn, it was presented to a meeting of the directors of said company, attended by a number of the stockholders not directors, held on the said twenty-third day of February, and after being read and discussed, and, as this affirmant believes, fully understood by all, it was then executed by most of the persons whose seals and signatures are to it, and, according to this affirmant's recollection, by all of them, except Benjamin Jones, John B. Bispham, and Amzi B. Wood, who were not present ; that the said covenant was not drawn or executed under the aforesaid minute, agreement, or resolution of the twenty-third day of January, or under any other understanding or agreement than recited in said covenant ; that the same was executed as the absolute and unconditional deed of the parties mentioned therein, and without any understanding or agreement by the parties thereto, that it should be executed by all of said stockholders, or not be binding ; on the contrary, it was then well known by those who executed it, that several of said stockholders had refused to join in any covenant of indemnity, and this was drawn to be executed by a portion only of said stockholders, in order to obviate that difficulty, as above stated ; and that, if this affirmant had been allowed to be examined as a witness on the trial of said issue, he would have so testified, provided it had been held competent for him so to do ; that after the said covenant had been executed by such of the stockholders at said meeting on the twenty-third day of February aforesaid, as would join in its execution, it was executed by said Benjamin Jones, John B. Bispham, and Amzi B. Wood, is their absolute deed, without, so far as this affirmant knows or believes, any understanding or agreement other than what is contained therein ; and having been fully executed as aforesaid, it was delivered, by and with the full knowledge and consent of the parties thereto, to said Benjamin Jones, for the use of himself and said Joseph Smith and this affirmant, together with the bond and mortgage of said company, mentioned in the aforesaid minutes of the second of February, eighteen hundred and thirty-five ; and

- thereupon this affirmant, and said Jones and Smith, upon their joint promissory note for thirty-five thousand dollars, bearing date the sixth day of March, eighteen hundred and thirty-five, and payable to the order of the said Jones, (and by him endorsed,) six months after the date thereof, obtained the said sum from the Bank of the United States, less the discount, and loaned the money so obtained to said company, depositing, at the same time, in said bank, as collateral security for said note, the said bond, mortgage, and covenant, which were
- 10 retained by said bank until said note was fully paid and satisfied, and then returned to this affirmant, and said Jones and Smith, who have ever since retained them. And this affirmant further saith, that all the money so obtained from said bank, and loaned to said company, was, by the order and consent of said company, paid and advanced by and to and for the use of said company, as follows, that is to say: seventeen hundred dollars and twenty-four cents, were paid to Robert S. Johnson, of Philadelphia, in discharge of a debt of that amount owing him by said company; and the further sum of
- 20 ninety-six dollars and seventy-five cents, was paid to Daniel White, of said city, in discharge of a debt of that amount owing him by said company; and the further sum of twelve thousand five hundred and seventeen dollars and seventy-five cents, was paid to A. and G. Ralston, of said city, in discharge of a debt of that amount owing them by said company; and the further sum of one hundred dollars and ninety-six cents, was paid to said Benjamin Jones, in discharge of a debt of that amount owing him by said company; and the further sum of twelve hundred and forty dollars and nine cents, was paid to Andrew M. Jones, of said city, in discharge of a debt of that amount owing him by said company; and the further sum of four thousand dollars was paid to the Philadelphia Bank, in discharge of debt of that amount owing by said
- 30 company to said bank; and the further sum of twenty-six hundred and fifty-six dollars and fifty-three cents, was paid to the Bucks County Bank, in discharge of a debt of that amount due it by said company; and the further sum of five hundred dollars was paid to the Farmers' Bank of New Jersey, at Mount Holly, in discharge of a debt of that amount due it by said company; and the residue of the aforesaid money, so as aforesaid loaned said company, amounting to the sum of eleven thousand two hundred and thirty-eight dollars and twenty-one cents, was paid to Thomas Black, the then treasurer of said company.
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JOHN BLACK.

Affirmed and subscribed before me, at Mount Holly, this twenty-eighth day of April, in the year of our Lord one thousand eight hundred and fifty-eight.

STACY G. POTTS, J.

AFFIDAVIT OF JOSEPH SMITH.

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Burlington County, ss.—Joseph Smith, one of the complainants in this case, alleging himself to be conscientiously scrupulous of taking an oath, and being duly affirmed, on his solemn affirmation saith: That before the execution of the covenant of indemnity mentioned in the feigned issue above stated, another covenant of indemnity had been drawn and partly executed by stockholders of the Delaware and Atlantic Railroad Company, under and pursuant to an understanding and agreement among a number of said stockholders who attended a meeting at Jobstown, on the twenty-third day of January, in year of our Lord one thousand eight hundred and thirty-five, and another meeting thereof on the second of February following; that this last mentioned covenant contemplated that all of the stockholders of said company would join in its execution, and provided for the parties bearing any loss that might be sustained under it, in the ratio of the amount of stock in said company held by each; that several of said stockholders refused to execute this or any other covenant of indemnity, and this affirmant and John Black and Benjamin Jones refused to loan the amount of money required by said company upon a covenant which provided for such ratable loss, in conveyance of which the said covenant had to be and was abandoned; that afterwards the covenant mentioned in said issue was prepared and executed under a new understanding and agreement between the parties thereto, which understanding and agreement are embodied and contained in the covenant itself, which was executed by the parties as their absolute and without any other understanding or agreement than what is contained therein, and without any condition or understanding that if all of said stockholders should not join in its execution, it should not be binding upon those who did execute it; that according to the affirmant's recollection, the last said covenant was presented to and executed at a meeting of the directors of said company—attended by several of said stock-

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- holders not directors—held on the twenty-third day of February, eighteen hundred and forty-five, by nearly all of the parties thereto, at which meeting the same, before being executed, was read and discussed, and, as this affirmant believes, fully understood by all who then executed it, and especially was it understood and known that several of the stockholders of said company would not join in its execution, (they having previously refused to give any covenant of indemnity,) and was therefore executed as the absolute deed of those who joined in its execution, without any understanding or agree-
- 10 ment between the said parties that it should not be valid or binding unless executed by all of said stockholders; that after the said last mentioned meeting the said covenant was executed by several of the parties thereto who did not attend said meeting, without, as this affirmant believes, any other understanding or agreement that what is embodied in the covenant itself, and without any condition or reservation, and then, with the bond and mortgage of said company, which had been executed about one month previously, delivered to Benjamin Jones for the use of himself and said John Black and this affirmant; that after the said securities had been so delivered to said Benjamin Jones, he and said John Black and this affirmant went together to the Bank of the United States, and on
- 20 their note borrowed from said bank the sum of thirty-five thousand dollars, less the discount thereon, for six months, and loaned the same on said securities to said company, leaving the said securities in said bank as collateral security for said note; that said securities so remained in said bank until the said note was fully paid, and then surrendered to this affirmant and said Black and Jones, who, or some of whom, have ever since had the possession thereof.

JOSEPH SMITH.

- 30 Affirmed and subscribed this twenty-eighth day of April, in the year of our Lord one thousand eight hundred and fifty-eight, at Mount Holly, before me, one of the Masters in Chancery of New Jersey.

FRANK B. LEVIS, *M. C. C.*

AFFIDAVIT OF SAMUEL H. JONES.

- Mercer county, ss.—Samuel H. Jones being duly sworn ac-
- 40 cording to law, doth depose and say:—That he is one of the subscribing witnesses to the covenant between John Black,

Joseph Smith, James Shreve, and others, stockholders of the Delaware and Atlantic Railroad Company, dated February second, in the year of our Lord one thousand eight hundred and thirty-five, and marked Exhibit 6, on the part of the complainants, and the name Benjamin Jones affixed to said instrument is the proper handwriting of the said Benjamin Jones, who is the father of this defendant; that this deponent saw said Benjamin Jones sign and execute said bond unconditionally; that the said bond or covenant was brought to said Benjamin Jones' office in Philadelphia by Chalkley Atkinson and, as deponent thinks, Philip R. Dakin; that after the said bond or covenant was executed by Benjamin Jones, the same was left with said Benjamin Jones; that the said bond or covenant was placed in the fire-proof safe of the said Benjamin Jones, at No. 17 South Wharves, Philadelphia, where it remained for a long time. Witness has a distinct impression that the said bond or covenant was signed by other persons in his presence, unconditionally, but who they were besides witness' father he does not now recollect. Deponent was the only subscribing witness to the signature of those persons who executed it in his presence. Deponent heard from time to time many conversations between Chalkley Atkinson, John Black, Joseph Smith, and Benjamin Jones regarding the signing said bond or covenant, and the business of the railroad company, but never in any instance understood that the same was executed conditionally, or that the same was not to be delivered or to be binding until all the stockholders had signed it. Chalkley Atkinson appeared to take much interest in the affairs of the railroad company; remember his assuring Benjamin Jones after the last signature was placed to the bond or covenant, of his perfect security from loss. Witness also remembers paying a note of thirty-five thousand dollars at the Bank of the United States, signed by John Black, Joseph Smith and Benjamin; said note was, as witness understood at the time, for money they lent the railroad company; witness paid it with his father's, Benjamin Jones' check; deponent sailed from New York for Europe on the sixteenth of April, eighteen hundred and fifty-seven, and remained in Europe until the eighth of May last, when he sailed from Liverpool, and arrived in Boston on the twenty-first day of the same month of May last, he thinks—it may have been on the twentieth instead of the twenty-first, he is not absolutely certain whether it was one or the other; he returned to Florence on the twenty-seventh or twenty-eighth of May last.

SAM'L H. JONES.

Sworn and subscribed this twenty-fourth of June, in the year of our Lord one thousand eight hundred and fifty-five.

W. M. BABBITT, *M. C. C.*

AFFIDAVIT OF JONATHAN SCATTERGOOD.

State of New Jersey, *ss.*—Jonathan Scattergood, of the county of Salem, alleging himself to be conscientiously scrupulous of taking an oath, and being duly affirmed according to law, declareth and saith:—That he is one of the signers to a certain bond or covenant, bearing date on the second day
 10 of February, in the year of our Lord one thousand eight hundred and thirty-five, upon which suit was brought in the Court of Chancery of this State, by John Black, Joseph Smith and Benjamin Jones, against Thomas Black and others, and which suit is still pending in said court, respecting the execution and delivery of which a feigned issue has recently been tried in the Circuit Court of the county of Burlington, in the term of April last; that although the said bond or covenant bears date as of the second day of February, in the year of our Lord one thousand eight hundred and thirty-five, the same
 20 was not in fact signed by affirmant until on or about the twenty-third day of February, in the same year; that he, this affirmant, signed the same at the house of Francis B. Warner, at Jobstown, at the same time that several others of the persons there present signed their names thereto; that it was on occasion of the meeting of the directors of the Delaware and Atlantic Railroad Company, at which meeting several of the stockholders of said company (who were not directors,) were present, upon notice; that at the time this affirmant signed his name as one of the parties thereto, he
 30 did it upon the express assurance and understanding that unless said covenant or bond was signed by all the stockholders of said company—and that in case any of the said stockholders refused to sign said bond, the same was not to be binding upon those who did sign; and that this was the general understanding between all the parties there present, as this affirmant understood and verily believes; that there was considerable conversation between the persons and parties there present at the time, respecting the mode in which the said bond or covenant was to be signed, and by whom it was to be

signed ; and that this affirmant understood it in the way and manner as is above stated ; and this affirmant further states, that at the time he signed the said bond, it was his express understanding, and the same under which he did sign it, that the same was not to be delivered to the obligees therein named, as the act and deed of any or either of the parties who did sign it, until after or unless all the stockholders of the said Delaware and Atlantic Railroad Company should sign the same ; and that this affirmant never did deliver the said bond or covenant as his absolute act and deed, or ever authorized any other person or persons to deliver the same for him ; and further, that this affirmant never executed the said covenant or bond, in any other way and manner than as above stated, viz. : upon the express condition that he was not to be bound thereby unless all the remaining stockholders of the said company also signed the same ; and this affirmant further states, that he verily believes that such was, at the time, the understanding of the obligees named in the said bond, or at least of John Black and Joseph Smith, who were both present at that meeting. 10

JONATHAN SCATTERGOOD. 20

Affirmed and subscribed this twenty-fourth day of May, in the year of our Lord one thousand eight hundred and fifty-eight, before me, at Salem.

ANDREW SINNICKSON, *M. C. C.*

AFFIDAVIT OF CLAYTON G. ATKINSON.

State of New Jersey, Burlington County, ss.—Clayton G. Atkinson, of Columbus, in the county of Burlington, alleging himself to be conscientiously scrupulous of taking an oath, and being duly affirmed according to law, declareth and saith :— That he is one of the signers to a certain bond or covenant bearing date on the second day of February, in the year of our Lord one thousand eight hundred and thirty-five, upon which a suit has been brought in the court of chancery of this state by John Black, Joseph Smith and Benjamin Jones against Thomas Black and others, which suit is still pending in said court, respecting the execution and delivery of which a feigned issue has recently been tried in the circuit court of the 30

county of Burlington, in the term of April last; that although the said bond or covenant bears date on the second of February, in the year of our Lord one thousand eight hundred and thirty-five, the same was not signed by this affirmant until on or about the twenty-third day of February, in the same year aforesaid; that this affirmant signed the same at the house of Francis B. Warner, (who then kept tavern at Jobstown, in said county of Burlington,) at the same time that several others of the persons then present signed their names thereto; that

10 it was at the time of a meeting of the directors of the Delaware and Atlantic Railroad Company, (of which this affirmant was at the time one,) and at which meeting several of the stockholders of said company who were not directors, were also present, upon invitation or notice; that at the time this affirmant signed his name to the said bond as one of the parties, it was upon the express assurance, and with the understanding that unless the said bond or covenant was signed by all the stockholders of said company, it was not to be binding upon those who did or should sign it; and that in case any of

20 the said stockholders should refuse to sign it, those who did sign it were not to be bound thereby, and that this was the general understanding and agreement between all the parties then present, so far as this affirmant knows and understood and verily believes; that there was considerable conversation between the parties then present at the time respecting the mode in which the said bond was to be signed and executed, and by whom it was to be signed; that this affirmant himself at first objected to sign the said covenant or bond, alleging that it was not right, and that John Black or Joseph Smith

30 (one or the other of them, but which this affirmant can't now state to a certainty,) made reply to this objection of his, that all the stockholders were to sign it, or it was not to be binding; and further, that it would not be likely that we would have to pay anything on the bond; that this affirmant recollects that Nathan Atkinson, John Gibbs, and others besides the directors, were present at that time; and that this affirmant recollects of hearing John Gibbs say at the time that he meant to make a note of the conversation, as it might, at some future time, become important; and this affirmant further

40 saith, that at the time he signed the said covenant or bond it was his express understanding, and the only one under and with which he did sign it, that the same was not to be delivered to the said John Black, Joseph Smith, and Benjamin Jones as the act and deed of this affirmant, or of any of the other parties who did sign it, unless all the stockholders of the

said Delaware and Atlantic Railroad Company should sign the same; and that this affirmant never did deliver the said bond or covenant as his absolute act and deed, or ever authorized any other person or persons to deliver the same for him to the said John Black, Joseph Smith, and Benjamin Jones, or either of them, and that he never signed the said covenant or bond in any other way or manner than upon the express condition and understanding that he was not to be bound thereby unless all the remaining stockholders of the said company also signed and executed the same and agreed 10 to become also bound thereby. And this affirmant further saith, that he verily believes that that was at the time the understanding of the obligees named in the said bond, or at least of the said John Black and Joseph Smith who were present at that meeting and took part in the conversation, and all of whom made the reply as above stated to this affirmant, upon his refusing to sign the said bond. And this affirmant further states, that in consequence of the said understanding that all the said stockholders were to sign the said bond or covenant before any of the signers thereto were to become bound 20 thereby, that Chalkley Atkinson and Philip R. Dakin were at the same meeting appointed a committee by the persons there present, to procure the signatures of the other stockholders of the said company who were not present at said meeting, to the said covenant or bond, and into whose hands the said bond or covenant was then placed, for that and no other purpose.

CLAYTON G. ATKINSON.

Affirmed and subscribed this twenty-second day of May, in the year of our Lord one thousand eight hundred and fifty- 30 eight, before me, at Mount Holly.

FRANK B. LEVIS, M. C. C.

} Petition for Re-hearing.

Your petitioners also believe and charge, that the Judge, at the Circuit, on the trial of the said feigned issue, rejected legal

evidence offered on the part of the complainants, viz: the evidence of John Black.

Your petitioners also believe and charge, that the Judge, at the Circuit, on the trial of the said feigned issue, charged the jury contrary to law.

Your petitioners also believe and charge, that the jury who tried the feigned issue at the Circuit Court at Burlington, rendered a verdict in favor of the defendants, against the weight of evidence.

Your petitioners also believe and charge, that the said Judge who held the Circuit Court at Burlington, and before whom the said feigned issue was tried, admitted illegal evidence to be taken out by the jury when they retired to consider of their verdict, to wit, the deposition of John Gibbs and the answer in Chancery of the defendants. 10

Your petitioners also believe and charge, that said questions arising upon the pleadings and in issue between the parties, ought not to have been sent to a jury to try, but ought to have been disposed of by the Chancellor upon the evidence in the cause.

Your petitioners also believe and charge, that they have discovered new evidence since the trial of the said feigned issue, which is material for the complainants, viz: the evidence of Samuel Jones, one of the subscribing witnesses to the covenant, who was not in the country at the time the trial took place. 20

Your petitioners also believe and charge, that the jurors who tried the said cause on the said feigned issue, were not impartial, but that some of them had expressed opinions unfavorable to the said complainants previous to the said trial.

Whereupon your petitioners humbly pray that your Honor will be pleased to vouchsafe a re-hearing of the cause before your Honor, your petitioners submitting to pay such costs as the court shall award, in case their complaint shall be groundless. 30

WM. HALSTED,

Solicitor of Complainants.

We certify that we have examined the case referred to in the foregoing petition, and are of opinion that the decree therein is erroneous in the particulars mentioned in said petition. 40

WM. HALSTED,

A. BROWNING,

Counsel.

Dated Trenton, October 29, A. D. 1858.

D E C R E E .

IN CHANCERY OF NEW JERSEY.

Between

JOHN BLACK, JOSEPH SMITH, and ANDREW M. JONES and ANTHONY S. MORRIS, EXECUTORS of BENJAMIN JONES, dec'd., complainants,

and

iTHOMAS BLACK, JOHN CHAMBERS, and ELIZABETH S. SHREVE, SARAH B. SHREVE, and BARCLAY WHITE, EXECUTORS of JAMES SHREVE, dec'd.; RESTORE S. LAMB, BARCLAY WHITE, surviving EXECUTORS of JONATHAN SMITH, dec'd., and others, defendants.

Decree Final.

This cause coming on to be heard at a regular term of the Court of Chancery of New Jersey, held at the State House, in the city of Trenton, on the first Tuesday of February, in the year of our Lord one thousand eight hundred and fifty-six, in the presence of William Halsted, solicitor, and Abraham Browning, esquire, of counsel with the complainants, and of William L. Dayton, solicitor, and John L. N. Stratton and Edward Wood, esquire, of counsel with the defendants, and the pleadings, depositions, exhibits and proofs being read, and the arguments of the respective counsel being fully heard and considered, and the Chancellor having taken time to advise thereon:—It has, on the twenty-sixth day of November, in the year of our Lord one thousand eight hundred and fifty-six, by Benjamin Williamson, esquire, Chancellor of the State of New Jersey, ordered, adjudged and decreed that a feigned issue be joined in the Supreme Court of Judicature of New Jersey, and tried in the ordinary manner, between the said John Black, Joseph Smith, and Andrew M. Jones and Anthony S. Morris, executors of Benjamin Jones, deceased, complainants, and Elizabeth S. Shreve, Sarah B. Shreve and Barclay White, executors of James Shreve, deceased, Restore S. Lamb, John Chambers, Thomas Black, Barclay White, surviving executors of Jonathan Smith, deceased, Caleb Newbold and Richard C. Shreve, administrators of James Newbold, deceased, Richard Jones and Nathan Atkinson defendants, by a jury of the county of Burlington, to inquire and determine by their verdict whether the agreement bearing date the second day of February, in the year of our Lord one thousand eight hundred and thirty-five, set out in the complainants' bill, was executed by the parties thereto, as their act and deed unconditionally, or upon the understanding or

agreement that the same should be executed by the remaining stockholders of the Delaware and Atlantic Railroad Company before the same should be delivered as an agreement binding upon the subscribers. And whether the same ever was in point of fact legally delivered by the parties thereto, or by their authority, to the said John Black, Benjamin Jones and Joseph Smith, or either of them. And that upon the trial of said issue, the bill and answer filed in the case might be read in evidence by either party, and likewise the depositions of such witnesses as had heretofore been examined and might be dead, or incapable of attending from sickness, or be out of the jurisdiction of the court at the time of the trial; and that all further directions should be reserved until the said issue should be tried, and the *postea* returned to this court. And the said issue having been in due form of law made up and joined in the said Supreme Court, by apt and proper pleadings, approved by the attorneys and counsel of the said parties, respectively—and it appearing by the *postea*, duly signed by the Honorable Stacy G. Potts, esquire, one of the justices of our said Supreme Court, and returned to this court, in the term of May last, that the said issue so directed as aforesaid had been duly tried by a jury of the said county of Burlington, at Mount Holly, in said county, on the third Tuesday of April, in the year of our Lord one thousand eight hundred and fifty-eight, before the said Stacy G. Potts, esquire, one of the justices as aforesaid, and in the presence of the said parties and their respective attorneys, according to law and the order of this court; and that the said jury, upon their oaths and affirmations, (those who affirmed first alleging themselves conscientiously scrupulous of taking an oath,) did find and say:—"That the said agreement in the plaintiffs' declaration mentioned was not executed as the act and deed of the said defendants unconditionally, but that the same was executed upon the understanding and agreement that the same should be executed by the remaining stockholders of the Delaware and Atlantic Railroad Company before the same should be delivered as an agreement binding upon the subscribers thereto; and that the said agreement never was in point of fact legally delivered by the parties thereto, or by their authority, to the said John Black, Joseph Smith and Benjamin Jones, or either of them." And it further appearing that the said Stacy G. Potts, esquire, one of the justices as aforesaid, did at the said term to which said *postea* was returned make his report in writing to this court of the proceedings had upon said trial, and did thereto annex his certificate, duly signed, certi-

fying that although the said case was not free from difficulty, he was, "upon the whole, satisfied with the verdict" of said jury. And upon the filing of which said postea, report and certificate, as aforesaid, the said counsel of the said defendants did, in the said term of May last, move this court for a final decree against said complainants; and the said counsel of the said complainants did, at the same time and place, move the said court to set aside the said verdict, and grant a new trial, or that the said defendants show cause at some future day to be fixed by the court why the said verdict should not be set aside and a new trial granted; and the court being satisfied that it was right and proper that the said complainants should be fully heard upon their said application, as well as in opposition to the motion for a decree as aforesaid, did order and adjudge that the whole matter stand over for further hearing and directions to the first day of July then next ensuing, at the State House, in the city of Trenton aforesaid, at which time and place the parties aforesaid, by their respective counsel, appeared before the Chancellor, and then

20 and there fully argued said motions respectively. And the Chancellor having taken time to advise thereupon, and being satisfied, upon full consideration of the same, and of the pleadings, proofs and exhibits in said cause, that there are no sufficient grounds for setting aside the said verdict and granting a new trial, and having subsequently heard an application for a re-hearing of said case, on the reasons assigned by the complainants' counsel, and being satisfied that there are not sufficient grounds therefor; and being further satisfied that the said agreement in the complainants' said bill of complaint

30 contained, bearing date the second day of February, in the year of our Lord one thousand eight hundred and thirty-five, was not executed as the act and deed of the said defendants unconditionally, but that the same was executed upon the understanding and agreement that the same should be executed by the remaining stockholders of the Delaware and Atlantic Railroad Company before the same should be delivered as an agreement binding upon the subscribers thereto, and which was not so executed by the said remaining stockholders. And that the said agreement never was in point of fact legally de-

40 livered by the parties thereto, or by their authority, to the said John Black, Joseph Smith and Benjamin Jones, or either of them; and that the complainants are not entitled to the relief sought and prayed for in their said bill of complaint. It is now, on this second day of February, in the year of our Lord one thousand eight hundred and fifty-nine, on motion of Wil-

liam L. Dayton, solicitor and of counsel with the defendants, ordered, adjudged and decreed that the relief sought in the complainants' said bill be denied, and that the bill of said complainants be dismissed with costs, to be paid by said complainants to said defendants.

B. WILLIAMSON, C.

PETITION OF APPEAL.

NEW JERSEY COURT OF ERRORS AND APPEALS.

Between

JOHN BLACK, JOSEPH SMITH, ET AL., com-
plainants,

and

THOMAS BLACK, JOHN CHAMBERS, ET AL.,
defendants

On Bill
and

} Petition of Appeal.

To the honorable the Court of Appeals in the last resort in all causes of law, the humble petition of John Black, Joseph Smith, and Andrew M. Jones and Anthony S. Morris, executors of Benjamin Jones, deceased, the appellants in the above stated cause, respectfully shew that they find themselves aggrieved by a final decree made in the Court of Chancery, by his Honor Benjamin Williamson, Chancellor of New Jersey, bearing date the second day of February, in the year of our Lord one thousand eight hundred and fifty-nine, wherein the said John Black, Joseph Smith, and Andrew M. Jones and Anthony Morris, executors as aforesaid, were complainants, and the said Thomas Black, John Chambers, Elizabeth S. Shreve, Sarah B. Shreve, and Barclay White, executors of James Shreve, deceased, Restore S. Lamb, Barclay White, surviving executors of Jonathan Smith, deceased, and others, were defendants, in this respect, to wit, that the said decree adopts and confirms, and is founded upon an interlocutory order of said court, bearing date on the twenty-sixth day of November, in the year of our Lord one thousand eight hundred and fifty-six, directing a feigned issue to be tried before the Circuit Court of the county of Burlington, whether the agreement bearing date the second day of February, in the year of our Lord one thousand eight hundred and thirty-five, set out in the bill of complainants, was executed by the parties

thereto as their act and deed unconditionally, or upon the understanding or agreement that the same should be executed by the remaining stockholders of the Delaware and Atlantic Railroad Company, before the same should be delivered as an agreement binding upon the subscribers, and whether the same ever was, in point of fact, legally delivered by the parties thereto, or by their authority, to the said John Black, Benjamin Jones, and Joseph Smith, or either of them; and that upon the trial of said issue, the bill and answer filed in the case might be read in evidence by either party, and likewise the depositions of such witnesses as had heretofore been examined, and might be dead, or incapable of attending from sickness, or be out of the jurisdiction of the court at the time of the trial.

And also in this respect, to wit, that the said decree adopts and confirms the verdict of the jury, rendered on the trial of the said feigned issue, by the said Circuit Court of the said county of Burlington, and the report of the judge of the said Circuit Court before whom the said feigned issue was tried.

And also in this respect, to wit, that the said decree is founded upon the verdict of the jury, rendered upon the said trial, although upon the trial of said feigned issue, the judge at the Circuit admitted illegal evidence, and rejected legal evidence, and charged the jury contrary to law.

And in this respect also, to wit, that the said decree was rendered for the defendants against the said complainants, instead of being rendered for the complainants against the said defendants; and in this respect, also, that the Chancellor refused to grant a new trial on said feigned issue; and in this respect, also, that the said Chancellor refused to grant a rehearing of the said cause on the petition of the said appellants; and in this respect, to wit, that the said Chancellor refused to allow the complainants in said cause to be sworn or examined to disprove the allegations contained in the answer of the defendants; and in this respect, also, that the said decree orders the complainants' said bill to be dismissed, with costs.

And your petitioners humbly appeal from the said final decree of the said Chancellor, which decrees as aforesaid, upon the ground that the same is erroneous. Your petitioners therefore pray that the said decree of the said Chancellor may be in the particulars aforesaid reversed, set aside, and for nothing holden, and that your petitioners may have such relief in the premises as to this honorable court shall seem meet.

WM. HALSTED,

Solicitor and of counsel with appellants.

Dated February 24, A. D. 1859.

The following are the Exhibits on the part of the complainants :

EXHIBIT NO. 1.

Chalkley Atkinson's receipt.

EXHIBIT NO. 2.

Day Book of the Delaware and Atlantic Railroad Company.

EXHIBIT NO. 3.

Ledger of the Delaware and Atlantic Railroad Company.

EXHIBIT NO. 4.

Ledger of the Delaware and Atlantic Railroad Company.

EXHIBIT NO. 5.

10

Promissory note of John Black, Joseph Smith and Benjamin Jones, payable to Benjamin Jones, at the Bank of the United States, six months after date, for thirty-five thousand dollars, and dated March six, eighteen hundred and thirty-five.

EXHIBIT NO. 6.

The covenant upon which the writ is founded.

To all to whom these presents shall come or may concern :
 We, John Black, Joseph Smith, James Shreve, Clayton G. Atkinson, Chalkley Atkinson, Jonathan Smith, Timothy Field, 20
 Thomas Haines, Jonathan Scattergood, Richard Jones, Philip R. Dakin, Thomas Black, Jacob Ridgway, Restore S. Lamb, James Newbold, Benjamin Jones, John B. Bispham, John Chambers, Joseph Burr, Nathan Atkinson, A. B. Wood, stockholders in the Delaware and Atlantic Railroad Company, send greeting :—Whereas, the Delaware and Atlantic Railroad Company borrowed of John Black, Joseph Smith, and Benjamin Jones, who are also stockholders in the said company, the sum of thirty-five thousand dollars, to be applied towards the completion of the said railroad and its appendages ; and 30
 in order to secure the repayment thereof, with its interest, the said Delaware and Atlantic Railroad Company have given their bond or obligation and their indenture of mortgage upon

all the lands contained within the bounds of the said railroad as now actually located, graded, excavated, and embanked, from the river Delaware, at the mouth of Craft's creek to the head of New Lisbon pond, and all the materials of which the said road is constructed, and the appendages thereof, and all dividends, proceeds, and profits which may hereafter be declared, grow due, or become payable from the use of the said road, to the said John Black, Joseph Smith, and Benjamin Jones, their heirs, executors, administrators, and assigns, as

10 by the said bond or obligation and indenture of mortgage both bearing even date with these presents, reference being thereto had will more fully and at large appear. And whereas we whose names are hereunto subscribed and seals affixed, have agreed with the said John Black, Joseph Smith and Benjamin Jones that in case the corporate property so as aforesaid mortgaged to the said John Black, Joseph Smith, and Benjamin Jones should prove insufficient to pay the said sum of money so loaned by them, and its interest, so that a loss or deficiency should happen, that in such event each of us, and

20 each of them, the said John Black, Joseph Smith and Benjamin Jones shall bear and sustain an equal portion of such loss or deficiency; and in the event that any of the said parties, that is, of us who have signed these presents, should before or at the time when such loss or deficiency shall be ascertained, become or be unable to pay his proportion of such loss or deficiency, that in such case such of us as remain solvent and able shall bear and sustain such loss equally with the said John Black, Joseph Smith and Benjamin Jones, that is to say, each of us that remains solvent to bear an equal part thereof

30 with each of them, the said John Black, Joseph Smith, and Benjamin Jones. Now know all men by these presents, that in order to confirm the said agreement and give it legal operation and effect, we whose names are hereunto subscribed and seals affixed, do hereby covenant, promise, grant, and agree to and with the said John Black, Joseph Smith, and Benjamin Jones that in case the said corporate property so as aforesaid mortgaged to the said John Black, Joseph Smith, and Benjamin Jones, should prove insufficient to pay the said sum of money so loaned by them, and its interest, so that a

40 loss or deficiency should happen, that in such case we, our heirs, executors, or administrators shall and will forthwith pay such sum of money to the said John Black, Joseph Smith and Benjamin Jones, their executors, administrators or assigns, as will divide the said loss or deficiency equally between such of us as remain solvent at the time such loss or deficiency is as-

certained, and the said John Black, Joseph Smith, and Benjamin Jones, that is to say, each of the said several individuals to bear an equal part of such loss.

In witness whereof, we have hereunto set our hands and seals, the second day of February, in the year of our Lord one thousand eight hundred and thirty-five.

Signed, sealed, and delivered in the presence of, (the words "these presents," "promise," "that is to say, each of the said several individuals to bear equal parts of such loss," being first interlined.)

Ch. Loss, Samuel Newbold, Stacy B. Shreve, Daniel D. Smith, Sam'l H. Jones.

10

JAMES SHREVE,
C. G. ATKINSON,
CHALKLEY ATKINSON,
JONATHAN SMITH,
TIMOTHY FIELD,
THOMAS HAINES,
JONATHAN SCATTERGOOD,
RICHARD JONES,
PHILIP R. DAKIN,

JOHN BLACK,
JOSEPH SMITH,
THOMAS BLACK,
JACOB RIDGWAY,
RESTORE S. LAMB,
JAMES NEWBOLD,
BENJ. JONES,
JOHN B. BISPHAM,
JOHN CHAMBERS,
JOSEPH BURR,
NATHAN ATKINSON,
A. B. WOOD.

20

EXHIBIT NO. 7.

The statement by Thomas Black, treasurer.

EXHIBIT NO. 8.

The memorandum of Mr. Stansbie, attached to No. 7.

EXHIBIT NO. 9.

30

The estimate of funds required to complete the extension of the road from Brown's point to Craft's creek.

EXHIBIT NO. 10.

The statement in the handwriting of Benjamin Jones.

EXHIBIT NO. 11.

The bill and receipt of Benjamin Jones.

EXHIBIT NO. 12.

The book of bills payable of the Delaware and Atlantic Railroad Company.

EXHIBIT NO. 13.

Book of Thomas Haines, Secretary of the Company—Copy of Entries in Minutes.

Mr. Dayton offered to read the following extracts from the
10 Book of Minutes of Directors :

9th January, 1835. (Page 36.) It was moved and seconded that a loan of thirty-five thousand dollars be made for the company, and John Black, Benjamin Jones and Chalkley Atkinson was appointed a committee to make such loan.

23d January, 1835. (Page 36.) Agreeable to adjourn-
ment the directors met at the house of Francis B. Warner,
on the twenty-third day of January, eighteen hundred and
thirty-five. Present—John Black, James Shreve, Joseph
Smith, Chalkley Atkinson, C. G. Atkinson, Jonathan Scatter-
20 good, Thomas Haines, and the following stockholders :—
Richard Jones, Jonathan Smith, Caleb Wright, Amzi B. Wood
and others, it being a general meeting of the stockholders.

The committee appointed to make a loan reported that the
sum of thirty-five thousand dollars could not be obtained upon
the credit of the road.

It was agreed by the stockholders that John Black, Joseph
Smith and Benjamin Jones do, by their joint obligation, get
the sum of thirty-five thousand dollars; and it is also agreed
that they have a mortgage on said road delivered to them;
30 and also further agreed that the remaining stockholders exe-
cute a joint bond to the said persons so loaning the money, as
security to them. In case of any losses sustained by said
loan, each one to bear his proportion of the loss.

Thomas Haines was appointed to have the necessary pa-
pers drawn, ready for examination at the next meeting—
ready to making the aforesaid loan.

2d February, 1835. Pursuant to adjournment and notice,
a general meeting of the stockholders of the Delaware and
Atlantic Railroad Company met at the house of Francis B.

Warner, at Jobstown. Directors present—John Black, James Shreve, Joseph Smith, Chalkley Atkinson, Clayton G. Atkinson, Jonathan Scattergood, Jonathan Smith, and Thomas Haines.

The mortgage bond and covenant, with a blank left to insert the sum to be loaned by John Black, Joseph Smith, and Benjamin Jones.

It was moved and seconded in general meeting that the sum of thirty-five thousand dollars be raised by the aforesaid loan, and the secretary was ordered to fill up 10 the blank accordingly. The secretary did therefore fill the blank for the sum of thirty-five thousand dollars.

It was moved and seconded that the bond and mortgage be signed by Thomas Haines, their secretary, and was agreed to; and he was ordered to sign the same, which was done, and fully executed according to law.

6th February, 1835. (Page 39.) Meeting of directors. Present—John Black, James Shreve, Jonathan Scattergood, C. G. Atkinson, Chalkley Atkinson, Jonathan Smith and Thomas Haines.

The committee appointed to make the aforesaid loan of thirty-five thousand dollars reported that they had not succeeded in making such loan. The committee was continued. 20

16th February, 1835. Present—James Shreve, Joseph Smith, Jonathan Smith, C. G. Atkinson, Chalkley Atkinson and Thomas Haines.

John Black being absent, James Shreve was appointed President, pro tem. Chalkley Atkinson reported that the loan was not yet made. The committee continued. 30

23d February, 1835. Present—John Black, Joseph Smith, James Shreve, C. G. Atkinson, Chalkley Atkinson, Jonathan Smith, Jonathan Scattergood and Thomas Haines.

A new bond was presented to the secretary, for the purpose of effecting the aforesaid loan, signed by a number of the stockholders. John Black and Joseph Smith undertook to effect the said loan in conjunction with Benjamin Jones, and to report at the next meeting.

9th March, 1835. (Page 42.) Present—John Black, 40 James Shreve, Joseph Smith, James Newbold, C. G. Atkinson, Chalkley Atkinson, Jonathan Scattergood and Thomas Haines.

John Black reported: The loan in Philadelphia has been made, and the money ready.

Names of Stockholders, from Minute Book.

	1	John Black,	-	-	-	-	-	300	shares.
	2	Jonathan Smith,	-	-	-	-	-	60	"
	3	Joseph Smith,	-	-	-	-	-	70	"
	4	Restore S. Lamb,	-	-	-	-	-	40	"
	5	John Chambers,	-	-	-	-	-	40	"
10	6	Chalkley Atkinson,	-	-	-	-	-	60	"
	7	Nathan Atkinson,	-	-	-	-	-	20	"
	8	James Shreve,	-	-	-	-	-	20	"
	9	Sylvanus Zilley,	-	-	-	-	-	20	"
	10	C. G. Atkinson,	-	-	-	-	-	15	"
	11	James B. Coleman,	-	-	-	-	-	5	"
	12	Timothy Field,	-	-	-	-	-	10	"
	13	Jonathan Scattergood,	-	-	-	-	-	20	"
	14	Benjamin Jones,	-	-	-	-	-	100	"
	15	Anthony Taylor,	-	-	-	-	-	20	"
20	16	Mark Richards,	-	-	-	-	-	10	"
	17	Joseph and Nathan Trotter,	-	-	-	-	-	10	"
	18	Isaac Ivins,	-	-	-	-	-	10	"
	19	Thomas Haines,	-	-	-	-	-	10	"
	20	John Gibbs,	-	-	-	-	-	5	"
	21	Phillip R. Dakin,	-	-	-	-	-	5	"
	22	Anthony S. Earl,	-	-	-	-	-	50	"
	23	Isaac Hilliard,	-	-	-	-	-	30	"
	24	James Newbold,	-	-	-	-	-	*79	"
	25	John Earl,	-	-	-	-	-	10	"
30	26	Benjamin Lucas,	-	-	-	-	-	10	"
	27	Jacob Ridgeway,	-	-	-	-	-	5	"
	28	Thomas Black,	-	-	-	-	-	20	"
	29	Henry Bostwick,	-	-	-	-	-	20	"
	30	Samuel Ellis,	-	-	-	-	-	5	"
	31	Robert Bap,	-	-	-	-	-	5	"
	32	John B. Bispham,	-	-	-	-	-	80	"

*Memorandum in pencil that the shares be "30."

33	William Irick,	-	-	-	-	20	"
34	Richard Jones,	-	-	-	-	5	"
35	Eayre Oliphant,	-	-	-	-	5	"
36	D. S. Oliphant,	-	-	-	-	1	"
37	Samuel Shinn,	-	-	-	-	5	"
						1210	shares.
Deduct, error,						49	"
						1161	" 10

EXHIBIT NO. 16.

Coditions of sale.

EXHIBIT NO. 17.

Supplement to the charter of the railroad.

EXHIBIT AB.

Letters of administration for various parties.

COURT OF CHANCERY.

October Term, 1858.

JOHN BLACK, et al.,	}	OPINION.	20
RESTORE S. LAMB, et al.			

W. Halsted, A. Browning, *for Complainants.*

Attorney General Dayton, P. D. Vroom, *for Defendants.*

WILLIAMSON, C. This cause having been argued on the pleadings and proofs, the Court of its own motion, ordered a trial at law of an important issue made by the 30

pleadings. The foundation of the complainant's bill, and of their right to relief, was an indemnity bond which the bill alleges was executed and delivered by the defendants to the complainants. The issue directed to be tried was this: "Whether the agreement bearing date the second day of February, one thousand eight hundred and thirty-five, set out in the complainant's bill, was executed by the parties thereto, as their act and deed unconditionally, or upon the understanding or agreement that the same should
 10 be executed by the remaining stockholders of the Delaware and Atlantic Rail Road Company before the same should be delivered as an agreement binding upon the subscribers, and whether the same ever was in point of fact legally delivered by the parties thereto, or by their authority, to the said John Black, Joseph Smith, and Benjamin Jones, or either of them."

The jury found, as appears by the posted returned, that the said agreement was not executed as the act and deed of the said defendants, unconditionally, but that the same
 20 was executed upon the understanding and agreement that the same should be executed by the remaining stockholders of "The Delaware and Atlantic Rail Road Company," before the same should be delivered as an agreement binding upon the subscribers thereto, and that the said agreement never was in point of fact legally delivered by the parties thereto, or by their authority, to the said John Black, Joseph Smith, and Benjamin Jones, or either of them, in manner and form, &c.

The judge certified the verdict to this court, with his
 30 notes of the trial. In his certificate he states, that although the case was not free from difficulty, on the whole, he is satisfied with the verdict.

At the last term of the court a motion was made, on behalf of the complainants, for a new trial, which was very fully argued by counsel on both sides.

This cause is an important one, and has excited a good deal of interest. The amount of money at stake is large, and there are a number of citizens of the county of Burlington immediately interested in the issue. As in its
 40 progress it has been presented for my deliberation, I have given it the best consideration in my power, and my decisions have been without the least regard to the parties on either side. I make this general reference to the case because it was declared, with some emphasis,

on the argument of this motion, that as an issue at law was not requested by either party, it ought not to have been directed, and that the court ought to have assumed the responsibility, and decided the cause. It is true neither party did ask for the issue, and I presume the reason was, judging from the confidence assumed by the counsel on both sides, that both considered the case so clear in favor of their respective clients, that they did not consider there was any room for a doubt in the mind of the court. This very circumstance is some evidence of the propriety of the course adopted, and upon further reflection, and looking at the result of the trial, I do not at all regret that I directed the issue. It appears to me now, with the additional light I have upon the subject, to be an issue eminently fitted to be submitted to a jury. The whole case turns upon a question of fact—whether the execution of the instrument was consummated by delivery. The obligors produce the instrument. It is signed and sealed by twenty-one obligors in the presence of five subscribing witnesses. These witnesses upon the face of the instrument purport to be the subscribing witnesses to its execution by all the obligors, which in fact was not the case, but each witness attested for different obligors. Upon proving the handwriting of the witnesses, some of whom were dead, and others absent from the country at the time the testimony was taken, and the handwriting of the obligors, the obligees rely upon the *prima facie* case thus made of a delivery. The obligors insist that there was no delivery; that when it was executed by them, it was upon condition, that it should not be delivered until it was executed by all the stockholders of the rail road company. It is an old transaction of more than twenty years standing. The recollection of the witnesses differ as to facts, and the intrinsic evidences and circumstances, relied upon, are susceptible of different interpretations. The amount involved is upwards of sixty thousand dollars. The suit was brought into this court, not because this is the appropriate tribunal to determine the fact upon which the whole case rests, but because, after that fact is ascertained, the intervention of this court is necessary to adjust the rights of the parties, if the instrument was, in fact, legally executed and delivered. Now, it is very manifest, if this court had decided the fact thus involved in so much embarrassment, the unsuccessful party would always have

considered that he had been unjustly deprived of his rights, and that the determination of the fact upon which those rights depended ought to have been submitted to a jury of the country. After very able and elaborate arguments of counsel upon the facts, my mind was embarrassed. I could not decide the disputed question of delivery with a consciousness that I had decided right. I felt that I had a right under such circumstances, to call in the aid of a jury. In the case of *The Trenton Bank v. Woodruff*, et al., 1. *G. C. R.* 117, the Chancellor of his own motion, directed an issue.

Before considering the grounds upon which this application is based, I would remark, that this matter of a new trial is entirely in the discretion of the court, so much so that I suppose there can be no doubt that an appeal will not lie from a decision of the court upon such a motion as this. Certainly no appeal would lie from an order of the court directing an issue, or for refusing one upon the application of either party, and it would seem very clearly to follow that no appeal would lie from any disposition the court might see fit to make in regulating the proceedings consequent upon the original order. As the whole proceeding is adopted for the purpose of informing the conscience of the Chancellor, and as he is not bound by the verdict, but must still decide the very issue according to the dictates of his own judgment, all the proceedings must necessarily be a matter of discretion with him. He may give directions to the court, to which the issue is sent for trial, to disregard the strict rules of law. He may direct the admission of evidence which the rules of law would exclude, and he may order one, or both parties, to be examined as witnesses. *Gresley's Eq. Ev.* 402, 403. *Hoff. Ch. Pr.* 511. It may be perfectly clear that competent testimony has been rejected, and illegal admitted, or that the judge has misdirected the jury, and yet this court is not bound to grant a new trial for any of these reasons. *Basset et al., v. Johnson, et al.*—1 *G. Ch. R.* 155. *Van Alst, et al., v. Hunter, et al.*—3 *I. C. R.* 149. “The standard itself being so vague as the satisfaction of the conscience of the individual judge who has directed the issue, the rules for granting a new trial are extremely indefinite. He will often, almost arbitrarily (perhaps on a suspicion which he has formed that a witness has been perjurying himself,) send it back to another jury, or even

decide in the teeth of a verdict. And he will often pay no heed to the most flagrant misdirections of the judge, or mistakes as to the admission of evidence, if he can satisfy himself what the verdict ought to have been on the admitted and tendered evidence which was sound." *Gresley's Eq. Ev.* 405.

But the court ought to exercise its discretion in this as well as in all other matters of mere discretion, in such a manner, and upon such principles, as will give satisfaction in the administration of justice. If therefore the court 10 gives any weight to the verdict, in the decision of the cause, it ought not to allow a verdict to stand as a guide to its judgment and an excuse to its conscience, where important evidence, which is entitled to material weight with the jury, has been improperly admitted, or rejected, or where the judge has charged the jury in a manner calculated to mislead them on an important point. The court ought not to listen to mere technical objections, and may very properly and often does refuse a new trial upon grounds which would prevail as a matter of course in a 20 court of law. In the case of "The Trenton Banking Company v. Rossell, trustee"—1 *G. C. R.* 511, the chancellor said, that as he was satisfied with the verdict he would not examine the question whether any such misdirection of the jury was in fact made by the judge at the circuit, as was insisted on by the counsel on the motion for a new trial.

I will consider in detail, the several grounds which have been urged in favor of a new trial.

First. The issue is objected to, both as to form and 30 substance. It is said the wording of the issue caused embarrassment in the progress of the trial, and that it should have been simply an issue of *non est factum*. The issue is the one made by the answer. I do not see how any embarrassment could possibly arise from the language in which it is couched. The judge did not seem to entertain the opinion that any such embarrassment existed. He explained it to the jury very satisfactorily and presented to them the very point of the controversy, in so clear a manner as to leave no room for any misunder- 40 standing as to its purport and character. An issue of *non est factum* would have been an improper one, and wholly uncalled for as the case stood before this court. It would have opened a field of unprofitable and useless

- controversy. The signatures of the obligors were admitted. Upon a plea of *non est factum*, the defendants would have been at liberty to prove the instrument a forgery, and to have set up many other defences against it which were not open to controversy. The issue was properly confined to the question whether the instrument was executed by the parties thereto unconditionally, or upon the understanding or agreement that the same should be executed by the remaining stockholders before the same
- 10 should be delivered as an agreement binding upon the subscribers. The very issue which the parties themselves made by their pleadings in this court, and the one upon which the court desired light and information, has been submitted to the jury, and I think, in a manner, to reach the very object the court had in view. But the counsel are too late with such an objection. The issue was made up with their concurrence. The order has the endorsement of the solicitor upon it, which was placed there without any objection or suggestion made, as to the form
- 20 or substance, of the issue. The feigned issue was made up by the counsel of the complainants, and is wholly in the handwriting of their solicitor. This is the first that any objection has been made to it. If it was objectionable, its defects were waived. In the case of *Baset, et al., v. Johnson, et al.*, before referred to, upon a motion for a new trial, it was objected that the issue formed was not broad enough, and that other inquiries ought to have been involved in it. The chancellor held that the objection was too late.
- 30 *Second.* The objection is made that illegal evidence was admitted on the trial. First, that parol evidence was admitted to contradict a written instrument. The judge admitted parol evidence to show that previous to the obligors signing there was an agreement between the parties to the instrument, that all the stockholders of the company should sign it, and that it was signed by them with the understanding or agreement that it should not be delivered until the signatures of all were procured. It would be difficult to find any well adjudged case where
- 40 such evidence has been declared inadmissible. The authorities cited by the counsel of the complainants do not sustain their objection. They go no further than to decide that where the instrument has been delivered to the obligee or covenantee by the obligor or his agent, it

is not competent to show, by parol testimony, that it was delivered as an escrow, or upon condition. The authorities are conflicting upon this point. But the objection now made is not sustained by any one of the authorities cited. Parol testimony was not offered in this case, nor was it admitted for the purpose of showing that the instrument was delivered as an escrow, or upon a condition to be performed precedent to its vitality. The testimony was to show, that the instrument was never legally delivered, but that it came into the possession of the complainants without the consent of the defendants, and that there was consequently no delivery. The complainants had not shown any actual delivery. They had made out a *prima facie* case only. They had shown a presumptive delivery only. It was not to contradict the instrument but to overcome this presumption that the evidence was offered and admitted. It was to show, that the possession of the complainants was not a lawful possession, but had been obtained illegally. In the case of the State Bank v. Evan—3 *Green's R.* 155. the defendant's name was on the bond as one of the sureties, and he proved that the bond was brought to him by one of his co-sureties, and that when he signed it he delivered it to his co-surety and said to him, now this bond is not to be delivered up until all the persons named in it have signed it. The court held, that the testimony was admissible, and that it overcome the presumption of any legal delivery arising from the mere fact of the obligees having possession of the bond. In *Pawling and others, v. The United States—4 Cranch*, 219, the court decided that a bond may be delivered as an escrow, by the surety to the principal obligor. In the case of *Duncan's heirs and representatives v. The United States—7 Peters*, 435, the court say : It is a principle of the common law, too well settled to be controverted, that where an instrument is delivered as an escrow, or where one surety has signed it on condition that it shall be signed by another before its delivery, no obligation is incurred until the condition shall happen. In the case of *The United States v. Jacob and Seffer—11 Peters Rep.* 86, on the trial of the cause before a jury, the principal in the bond having been released by his co-obligors was offered by the defendants, and admitted by the circuit court, to prove that one of the co-obligors had executed the bond on condition that others would execute it, which

had not been done. *Roberts v. Jackson, ex dem Well—1 Wendell*, 478, it was held that parol evidence that a deed in the possession of the grantee was not delivered, is admissible, and does not infringe the rule that such evidence shall not be received to contradict a deed. Ch. I. Savage says, the only question here is, whether parol evidence could be received to show the non-delivery. It is always competent to show that a deed was delivered as an escrow, or that the grantee obtained possession of it
 10 by fraud, or in an unwarrantable manner. This must of necessity be shown by parol, and this species of evidence has never been considered as coming within the rule which rejects parol proof when offered to contradict a deed. So also 1 *Greenleaf's Ev.* § 284. In *Johnson and others v. Baker—4 B. & A.* 437; 6 *E. C. L.* 479. Before the execution of a composition deed, it was agreed, in the presence of the surety for the payment of the composition, that it should be void unless all the creditors executed it. The surety at the same interview, afterwards executed the deed in the ordinary way without saying anything
 20 at the time of execution. The deed was then delivered to one of the creditors, in order that he might get it executed by the rest of the creditors. It was held that this was to be considered a delivery of the deed as an escrow, and that all the creditors not having executed it, the surety was not bound. The case of *Worrall v. Munn & Prall—1 Selden's Rep.* 229, only decides, that delivery of a deed or agreement as an escrow, can only made to a stranger, and that in such case, parol evidence of conditions qualifying the delivery, being contrary to the terms
 30 of the instrument, is not admissible. This is not in conflict with the authorities which decide that parol evidence is admissible to show that the instrument was executed upon condition that it should not be delivered until a certain condition should be performed. The judge did not mean to disaffirm such a proposition, as is evident from what he says: "It was not handed to Henry Worrall as an unexecuted and imperfect paper. There was no direction to him to retain it and not to deliver it to the
 40 appellant until it was ratified by Prall. It was not left in his hands for a temporary purpose, and to be returned in case Prall did not assent to it, but it was delivered to Henry Worrall as the agent of the appellant, as an executed and perfect instrument, on condition that Prall subsequently assented to it. Such a delivery was in law an

absolute delivery." There is a manifest difference where the testimony is offered for the purpose of showing that the writing was not to be delivered until a condition precedent was performed, and that it was delivered with an agreement that the condition was to be performed. In the one case the purpose of the evidence is to show that the instrument never was legally delivered, and therefore never had any binding effect—in the other to contradict the instrument which is absolute upon its face, by showing contrary to the instrument that it was not absolute, but conditional. In the one case the delivery is denied, in the other it is admitted, and testimony is offered to show that such delivery was in contravention of the instrument itself which is absolute on the face of it. This evidence was properly admitted. 10

Second. It is insisted that the book of minutes of the railroad company was improperly admitted as evidence to go to the jury. The book was offered for the purpose of proving what took place at several meetings of the stockholders called for the purpose of procuring the loan for the company with which the indemnity bond in question is immediately connected. The meetings were regularly organized by the appointment of chairman and secretary, and it is alleged that their proceedings were entered in this book of minutes. The objections to the book are that the proof of its being the book of minutes was not sufficient, and that if proved it is not competent, because it is the book of a third party. There was positive evidence of this being the book of minutes of the company, kept by their secretary. The correctness of the manner in which the book was kept was questioned; and whether it was kept in such a manner as entitled it to full confidence as a true record of the proceedings of the company was a question not entirely free from doubt. The judge properly instructed the jury, that because the book was sufficiently proved to make it evidence for their consideration, they must judge from the proof offered how far it was entitled to credit, and that they must give just such weight to the evidence as in their judgment it deserved from the character of that proof. As to the objection that this is a book of a third party, this is true. It is the book of minutes of the directors of the company. But the book was not offered indiscriminately. There were certain minutes of meetings of the stockholders of that com- 30 40

- pany recorded in the book, and these were offered in evidence. Those meetings were regularly organized by the appointment of officers, and these minutes are offered as the minutes of their proceedings. They are not the history of meetings of third parties but of the very parties to this writing. It is true they met as stockholders, but this business appertained to them in that capacity. The secretary says the minutes were read at the several meetings of the company and approved by them. But Thomas
- 10 Haines, the secretary, swears that this covenant writing was prepared in pursuance of the directions of a meeting at which the obligors and obligees were present, and that he kept a minute of the meeting of the parties, in writing, which is truly recorded in the book. Here then was a meeting of the parties, an agreement entered into between them, and that agreement reduced to writing by a person mutually chosen for the purpose. It is evidence and can be called for as the best and only legal evidence, of what took place between the parties.
- 20 But the admissibility of this evidence is put beyond all question, both as to the sufficiency of the proof, and as to the competency of the evidence, by the complainant's bill. The bill refers to these very proceedings of the stockholders, the minutes of which were offered in evidence, and makes them the foundation upon which they build their claim. Special reference is made to the meeting of the ninth of January, eighteen hundred and thirty-five, and which is alleged to have been a general meeting of the directors and stockholders, held upon due notice
- 30 personally given to the stockholders, for the purpose of devising means to extricate the company from embarrassment. It states what took place at that meeting, and that it was then and there resolved to procure the loan of thirty-five thousand dollars. Reference is made to the subsequent meeting of the stockholders of the twenty-third of January, eighteen hundred and thirty-five, at which the committee upon the subject of the loan made their report; but the fact upon which this whole defence rests, is not stated, viz: that it was resolved at that meeting
- 40 that all the stockholders should execute the indemnity. Can there be a doubt, when the defendants produce the minutes of the meetings thus referred to, and show that this is the record and the only record of them, that this record is competent evidence to go to the jury? There

cannot be a doubt but the book of minutes was properly admitted as evidence by the judge at the circuit.

The third objection to the evidence admitted, is to the deposition of John Gibbs, which was taken before the master. After reading the deposition, the complainant's counsel moved to overrule the second, third, fourth and fifth questions. The fifth question was overruled. I think the judge erred in this ruling, not however, in admitting the second, third and fourth questions, but in overruling the fifth question. This deposition was read 10
under the order of this court. It was taken by its authority, and under its rules. When this court made an order that it should be read at the trial, the judge conducting that trial had nothing to do with the admissibility of the whole, or any part of the evidence. This court by its order, became itself responsible for the legality of the evidence. The only point is this: where testimony has been taken in the usual course of proceedings in this court, and a trial at law is awarded, and this court orders certain depositions to be read, can the judge, at the circuit, say, that in his opinion they are not competent, and they shall not be read? The question is too plain a one, to admit of any but one answer. The order was drawn up under the supervision of the counsel of the respective parties. It is an order taken upon the complainant's motion, and is endorsed by their solicitor. Neither party having made any objection to the order which directed the deposition of such witnesses as had theretofore been examined, and might be dead or incapable of attending from sickness, or be out of the jurisdiction of the court 30
at the time of the trial, to be read, it was too late to make any objection at the trial. The proper time and place for excepting to the supposed objectionable questions, was before this court, at the time the order was made. It is true the questions were objected to before the master; but when objections to testimony are taken before the master, they are to be settled by this court, and if they are not renewed at the hearing, or when the depositions are acted upon by the court, they are waived. It certainly was not the duty of this court to wade through all the 40
evidence and to select out of it such parts as are illegal. It was the duty of counsel, when the court made the order in reference to the deposition to object to them or to such parts of them as they deemed objectionable, if there were any objections to be made.

The fourth objection to evidence, is that to the declarations of Joseph Smith. Joseph Smith is a co-obligee in the covenant, and a party to the record. His declarations were properly admitted. The general rule admitting the declarations of a party to the record in evidence, applies to all cases where the party has any interest in the suit, whether others are joint parties on the same side with him or not, and howsoever the interest may appear, and whatever may be its relative amount.—1 *Greenleaf's*

- 10 *Ev.* § 172. And in the absence of fraud, if the parties have a joint interest in the matter in suit, whether as plaintiffs or defendants, an admission made by one is in general evidence against all.—§ 174.

A fifth objection in reference to the admission and rejection of testimony is that the complainants offered John Black, one of the complainants, as a witness to disprove so much of the defendants' answer as is responsive to the allegations contained in the bill of complaint.

- This offer was made under the law of eighteen hundred
20 and fifty-five—*Nixon's Dig.* 887, § 27—which provides, that the complainant or petitioner, in any action or proceeding of an equitable nature in any court, shall be a competent witness to disprove so much of the defendant's answer as may be responsive to the allegations contained in the bill of complaint or petition. In order to appreciate the merits of this question, it is necessary to understand fully the character of the trial in the court of law. It was not a proceeding of an equitable nature in that court. The court was directed to try an issue at law.
30 After the issue is settled, or agreed upon, the subsequent proceedings are regulated by the practice of that court in which it is to be tried, subject, however, to the control of this court over the parties as to the mode and terms of trying such issue. 1 *Hoff. Ch. P.* 511. 1 *Turn. Prac.* 450. The court of law knows nothing of the equitable proceedings in the case, or whether there is any, or what, are the pleadings in the court of equity. The court must try the issue, not as an equitable proceeding, nor regulated by any statutes or rules which are applicable to proceedings
40 of an equitable nature. The issue must be tried as a strict issue at law; and the rules of law in regard to evidence, its admissibility and the weight of it, govern the proceedings, except so far as they have been otherwise regulated by the terms of the issue out of this court. It

is a principle, upon which equity jurisprudence is administered, as inflexible, in its application, as any statute could make it, that in equity a defendant is entitled to the benefit of his answer, and that where it is responsive to the bill, it must be overcome by the oaths of two witnesses, or of one confirmed by strong circumstances. But if the issue is made up without any order to read the answer at the trial, the court will not hear it. An appeal to the court, that in equity the defendant is entitled to the benefit of his answer, would be in vain. The reply of the 10 court would be that it was trying a pure question of law, and that it had nothing to do with any statute, or rules of pleading or evidence, regulating proceedings of an equitable nature. The statute has no application to the case. The complainant, who was offered as a witness, was not a complainant or petitioner, in any action or proceeding of an equitable nature in that court. He was the plaintiff in a feigned issue of law. The record showed the character of the proceedings. It purported to be 20 pleas in the supreme court, and contained the pleadings of the parties, and the issue to be tried. When the party was offered as a witness, and claimed, that as a complainant in an action of an equitable nature the statute gave him the privilege of being sworn as a witness, the court had no other guide to ascertain the position which the party claimed, than the record itself which described the parties and the issue. By that record the parties appeared as plaintiffs and defendants in an ordinary suit at law.

If a party desires to be examined as a witness he should make application to this court. If the application is proper, the court will make the order for his examination. 30 But in this case, had an application been made to this court, for the examination of John Black, the court would have refused it. If such refusal would have been right, it shows the propriety of the decision of the judge at the circuit; for the grounds of such refusal are such as could not, in any judicial way, have been made known to the judge. The proofs had been closed in this court, and the cause had been argued here. The cause had been submitted upon the proofs taken. If this law then of eighteen 40 hundred and fifty-five, was passed, as was insisted by the complainant's counsel, before the proofs were closed, then the party had waived his privilege under the statute. He could not submit his cause for decision without offering

himself as a witness, and then finding by the decision of the chancellor where the shoe pinched, and where proof was wanted but upon one single issue in the case, offer himself as a witness upon that issue. He waived his right. The court might well ask him, why he had not made the offer before, and if he had that information in his own breast which would have relieved the embarrassment of the case, why he had not divulged it sooner so that the necessity of this issue might have been avoided.

10 I think the court was right in rejecting John Black as a witness.

I have disposed of all the objections which were taken as to the admission or rejection of evidence. I shall notice very briefly the remaining grounds upon which a new trial is asked. Objection is made to the court's permitting the jury to take out with them the answers of the defendants, and also the depositions which were ordered to be read. It appears to me that this was a matter entirely in the discretion of the court. If only parts of the

20 answers and parts of the depositions had been directed to be read, the propriety of permitting the jury to take them as a whole, might well have been questioned. But as the answers and depositions, as they were before the court, were directed to be read in evidence, the object of reading them was that their contents might be impressed upon the minds of the jury, and I can see no reason why the papers should have been withheld from them.

The charge of the court, in one particular, is objected to. In reference to the bill and answer which were ordered to be read as evidence, the judge charged as follows:

30 "You will have the bill of the complainants, and this answer before you, and it is unnecessary for the court to dwell on its statements. That part of the answer which sets up the alleged understanding or agreement, is not strictly responsive to the bill. It is new matter set up in avoidance of the covenant. But it is nevertheless entitled to your consideration as evidence in the cause. Its weight is exclusively for you to determine."

Now the counsel of the complainants say, that the court

40 was in error in charging that the part of the answer which sets up the alleged understanding or agreement is not strictly responsive to the bill. They were obliged to assume this position in order to gain a foothold for the admission of John Black as a witness. He could not

possibly be a witness, except as to matters in the answer which are strictly responsive to the bill, and as the point on which they wished to examine him was the alleged understanding or agreement, if the part of the answer referring to it is not responsive to the bill, there could be no pretence that he was a competent witness. If then the judge was in error, and should have told the jury that this was responsive to the bill, I cannot see how the complainants can complain that the jury were told that the answer was entitled to their consideration as evidence. 10

Whether the judge was or was not correct in telling the jury that this part of the answer was not responsive to the bill, is a question not entirely free from difficulty. I am inclined, however, with the counsel on both sides, to think that the answer in this particular is responsive to the bill. The complainants had seen proper to state in their bill, the proceedings of the directors and stockholders of the company in reference to the loan, the financial situation of the company—the inducement to make the loan—the borrowing the money consequent upon these proceedings 20 of the directors and the stockholders. Then the bill states as consequent upon all these proceedings, the execution and the delivery of the covenant of indemnity, and the defendants are called upon for a discovery as to all these particulars, and as to the execution of the covenant. The response to these particulars necessarily included the fact which constitutes the defence. The defendant could not answer the bill, and state truly what took place at the meetings of the directors and stockholders, and the inducement for making the loan, and of making this indemnity, without revealing and stating the fact that it was a part of the transaction that this indemnity was to be given, and that it was to be signed by all the stockholders. It was not at all necessary for the complainants to make their case so broad; but a bill may be so framed as to make a matter of defence responsive to the bill, which if the bill had been otherwise framed would have been new matter in avoidance. The charging as well as interrogating parts of a bill are too often used to no purpose, and without any regard to consequences. Lord 40 Eldon, in *Partridge v. Haycraft*, 11 Ves. 574, says:—"Formerly the bill contained very little more than the stating part. I have seen such a bill, with a simple prayer, that the defendant may answer all the matters aforesaid, and

then the prayer for relief. I believe the interrogating part had its birth before the charging part. Lord Kinyon never would put in the charging part; which does little more than unfold and enlarge the statements."

It appears to me the charge of the Judge in the particular referred to, is as unexceptionable, as far as the complainants rights are concerned, as it well could be. The order of this court made the answer evidence. The court was obliged to admit it, and could not say less than
 10 that it was entitled to the consideration of the jury as evidence in the cause, and that its weight was exclusively for them to determine.

It is insisted that the verdict is against the weight of evidence. The judge has certified, that although the case was not free from difficulty, on the whole, he is satisfied with the verdict. If after an examination of the evidence, I should have been satisfied that the verdict was against the weight of it, and should have been the other way, I would not direct a new trial, but would disregard the ver-
 20 dict. Because if my judgment was satisfied that upon the evidence the verdict should have been for the plaintiff in the issue, I should not want the formality of another trial to satisfy my conscience how I ought to decide the fact to be. But I cannot, after a most careful and thorough investigation of the case say, that I am not satisfied with the verdict of the jury.

The only other ground upon which a new trial is asked, is that there is additional evidence which it is now in the power of the complainants to produce. There are five
 30 subscribing witnesses to the writing. Four are dead. Samuel H. Jones, who is the only one living, was absent in Europe at the time of the trial. He is a son of Benjamin Jones, one of the complainants, and has returned lately to this country. His affidavit is produced, and a new trial is asked that the complainants may have the benefit of his testimony. It is not unreasonable to suppose, that at the time of the trial, the complainants knew that the witness would shortly return. It would have been a strong ground upon which to have based an ap-
 40 plication for a postponement of the trial, that the only living subscribing witness was then absent, and that he would shortly return. No such application was made. The complainants chose to risk a trial without him. The nature of the evidence that would be produced they were

fully apprised of, and cannot plead that they were not aware of the materiality of the evidence of the witness, and the importance of his presence.

But upon a careful examination of the affidavit of the proposed witness, I do not think that the facts within his knowledge are of much importance. The important fact is disclosed by him, and it is one which is very much against the complainants, that the subscribing witnesses put their name to the paper more as a matter of mere form than as witnesses who were to be relied upon to prove its execution. As I have said before, upon the face of the instrument the signatures and seals of the obligors purport to be attested by five subscribing witnesses. Now the fact is disclosed by this witness, that it was not executed in the presence of five subscribing witnesses. The witness says, the paper was brought to the office of his father in Philadelphia, and that he there signed it. That after it was executed by his father, it was placed in his fire proof safe, No. 17, South Wharves, Philadelphia, where it remained a long time. The affidavit does not tell us when or where he subscribed the paper. He says he has an impression that it was signed by other persons in his presence, but who they were, besides his father, he does not recollect. And yet, after saying that he had an impression only, (compelling the counsel who drew the affidavit to erase the word recollection, and to substitute impression for it, as appears from an inspection of the affidavit,) he undertakes to say that he was the only subscribing witness to the signature of those persons who executed it in his presence, and that they signed it unconditionally. The evidence of this witness would not help the complainants. He does not pretend to know any thing of the origin of the transaction; and from the careless manner in which he was called upon to be a subscribing witness, would seem to give color to the allegations of the defendants, that it had been all arranged as to who should be parties to the instrument, and how executed.

This verdict must stand for what it is worth. I can see no good reason for disturbing it.

OPINION OF CHANCELLOR.

I have examined and made up my mind upon all the questions which are now raised, and upon which a rehearing is asked.

I have exercised my best judgement in the examination and decisions of the important points involved in the controversy.

I have written a lengthy opinion and referred to all the authorities, which I think sustain me in the conclusions I reached in that opinion.

I overlooked no point submitted to me by Counsel on the argument, or which has been suggested on the motion for rehearing.

I am satisfied that no diligence I could bring to a further investigation of the cause, can bring me to a result more satisfactory to myself than the one I have reached.

There are questions of great difficulty in the cause, questions upon which Judges may well differ. As to some of them, I am not free from doubt, and yet I am fully persuaded no further argument could relieve me.

Three times, the cause has been fully argued before me, in different shapes, another argument would be expensive and harrassing to the parties, and I do not feel justified, under the circumstances, in further burthening the parties.

The parties have the right of an appeal, and I am unable to see any difficulty in their having the benefit in the Court of Appeals, of a rehearing upon every point that has been argued before me.

The return of the Judge, at the Circuit, is on file, and is part of the Record. As such, it will go to the

Court above ; and any point raised on the trial, will be as fully before the Court of Appeals, as it is before this Court.

If the issue was not a proper one—if improper evidence was admitted—or the ruling of the Judge, in any respect, against law—then the verdict will have no weight with the Court, and they will decide the cause upon the evidence altogether irrespective of the verdict. This is what the complainants desire.

I do not think it will be conducive to the ends of justice that the matter should, as it now stands, be further litigated in this Court.

