
NEW JERSEY SUPREME COURT.

The Lehigh Valley Railroad }
Company, }
vs. }
Cornelius Stewart and Joseph }
C. Stewart. }

In Case.
On Postea, &c.

McCARTER and KEEN, Attorneys.

As yet, of the eleventh day of July, A. D. eighteen hundred and seventy-two.

Witness,

MERCER BEASLEY, Esq.,
Chief Justice.

BENJ. F. LEE, *Clerk.*

Hudson County, ss :—Cornelius Stewart and Joseph C. Stewart, the defendants in this suit, were summoned to answer The Lehigh Valley Railroad Company, the plaintiffs therein, of a plea of trespass on the case upon promises, and thereupon the 10 plaintiffs, by McCarter & Keen, their attorneys, complain. For that whereas the said defendants heretofore, to wit, on the first day of June, in the year one thousand eight hundred and seventy-two, at Newark, in the county of Essex, were indebted to the plaintiffs in the sum of twenty-thousand dollars, for divers reasonable tolls before that time, and then due, and of right payable by the defendants to the plaintiffs according to the form of the statute in such case made and provided, for the pas-

sage before that time over the Morris canal of divers boats, goods, cattle, passengers, produce and merchandise of the said defendants.

And for that whereas, also, the defendants heretofore, to wit, on the first day of June, in the year of our Lord one thousand eight hundred and seventy-two, at Hudson City, in the county of Hudson, was indebted to the plaintiffs in the sum of twenty thousand dollars, for goods, wares and merchandise before that time sold and delivered by the plaintiffs to the defendants, at
 10 their request; and in twenty thousand dollars for work and labor before that time done and performed, and materials furnished by the plaintiffs for the defendants at their request; and in twenty thousand dollars for so much money by the plaintiffs before that time lent and advanced to the defendants at their request; and in twenty thousand dollars for so much money by the plaintiffs before that time paid for the use of the defendants at their request; and in twenty thousand dollars for so much money by the defendants before that time had and received, for
 20 the use of the plaintiffs; and in twenty thousand dollars for interest upon, and for the forbearance by the plaintiffs to the defendants, at their request, of divers large sums of money before that time due and owing from the defendants to the plaintiffs; and in twenty thousand dollars for so much money then and there found to be due from the defendants to the plaintiffs, on an account stated between them, and being so indebted, the defendants, in consideration thereof, then and there promised the plaintiffs to pay them the said several sums of money on request, yet the defendants have disregarded their said several promises, and have not paid the said several sums
 30 of money, nor any of them, or any part thereof, although often requested so to do, but to do so have hitherto wholly refused, and still do refuse, to the damage of the plaintiffs twenty thousand dollars, and, therefore, they bring their suit, &c.

[Notice is hereby given that this action is brought to recover the amount due on a certain book account.]

And the said defendants, by Jacob Vanatta, their attorney, come and defend the wrong and injury when &c., and say, that they did not undertake in manner and form as the said plaintiff has above thereof complained against them, and of this they
 40 put themselves upon the country, &c.

And for a further plea in this behalf by leave of the court here for this purpose first had and obtained, according to the form of the statute in such case made and provided, the said defendants say that the said plaintiff ought not to have or maintain its aforesaid action thereof against them, because they say, that after the said supposed promises and undertakings of the said defendants in the said declaration mentioned, and before the commencement of the said action of the said plaintiff in this behalf, to wit, on the first day of June, eighteen hundred and seventy-two, to wit: At Jersey City, in the said county of Hudson, the said defendants paid to the said plaintiff the said several sums of money in the said declaration mentioned, except the sum of nine thousand six hundred and thirty-four dollars and eighty-two cents, parcel of the said several sums of money in the said declaration mentioned; and as to the said sum of nine thousand six hundred and thirty-four dollars and eighty-two cents, the said defendants say, that heretofore, to wit, on the twenty-ninth day of January, in the year eighteen hundred and sixty-eight, to wit: At Jersey City, in the said county of Hudson, a certain corporation of the State of New Jersey, called and known by the name of The Morris Canal and Banking Company, by a certain agreement in writing, sealed with the common seal of the said The Morris Canal and Banking Company, and also with the seals of the said defendants, the date whereof is a certain day and year therein mentioned, to wit: the day and year last aforesaid, which agreement after reciting, that whereas these defendants proposed to organize and carry on a "freight line" for the transportation of goods, wares and merchandise, upon and over the Morris Canal for the consideration of one dollar paid by the said defendants to the said Morris Canal and Banking Company; and for the purpose of enabling the said defendants to organize and carry on the said freight line, did grant and lease unto the said defendants for the term of five years from the date of said agreement, thirty-two canal boats in the said agreement mentioned and described, and therein valued as of the value in the aggregate of fifteen thousand nine hundred and sixty-five dollars; and the said The Morris Canal and Banking Company in and by the said agreement did agree with the said defendants to allow to them, the said defendants, a draw-

back of one-half of the tolls charged to and paid by the said defendants to the said The Morris Canal and Banking Company upon all such merchandise, lumber, plaster and bituminous coal as should be transported by the said defendants in the boats of the said freight line westward upon said canal, and also upon all articles that should be transported by the said defendants in the boats of said freight line eastward upon said canal, except charcoal, mineral coal, oil, iron ore, lime in bulk, limestone, posts and rails, railroad ties, zinc ore and wood.

- 19 And in and by the said agreement the said The Morris Canal and Banking Company did agree with the said defendants, that the boats of the said freight line should have the same privilege of loading other freight at Port Delaware and Port Washington as were afforded and possessed by The New Jersey and Pennsylvania Freight Line; further, that no drawback from the established rates of tolls should be allowed to any other party or parties competing with the said freight line of the said defendants, for the same business, upon and over the Morris Canal, during the said term of five years, unless the said
- 20 defendants should, by negligence, carelessness or otherwise, fail to secure and maintain the business which it was contemplated and intended should be transacted and carried on by the said freight line of the said defendants.

And the said The Morris Canal and Banking Company, in and by the said agreement, did further agree, that the said defendants might terminate the said agreement at the expiration of the first year thereof, upon giving to the said The Morris Canal and Banking Company three months' notice, in writing, of their intention so to do. Whenever the said agree-

- 30 ment should be terminated, the said The Morris Canal and Banking Company would take from the defendants the boats employed in the said freight line, at their proper value as coal boats; and in and by the said agreement the said The Morris Canal and Banking Company did further agree that if these defendants should well and faithfully fulfill all the covenants and stipulations in the said agreement contained, on their part to be done and performed, the said The Morris Canal and Banking Company would, from time to time, give lawful bills of sale for such of the boats, in said agreement mentioned, as might
- 40 become unfit for use in said freight line.

And in and by the said agreement the said defendants, for and in consideration of one dollar to them in hand paid by the said The Morris Canal and Banking Company, and of the privileges to them granted by the said agreement, did covenant and agree to and with the said The Morris Canal and Banking Company to pay to the said The Morris Canal and Banking Company the aforesaid sum of fifteen thousand nine hundred and sixty-five dollars for the said boats, as in said agreement described, in ten equal semi-annual payments (installments), the first installment to be due and payable on the fifteenth day of 10 July, one thousand eight hundred and sixty-eight, with interest at the rate of seven per cent. upon the said installment, and the amount of installments unpaid.

And the said The Morris Canal and Banking Company, in and by the said agreement, did covenant and agree to give to the said defendants lawful bills of sale for the before mentioned boats, upon the payment of the tenth semi-annual installment above mentioned.

And the said defendants, in and by the said agreement, did further agree to furnish the said boats with the necessary rig- 20 ging, and with competent and capable captains and crew, and to employ the said boats in a freight line upon and over the said The Morris Canal, exclusively, unless upon the written consent of the said The Morris Canal and Banking Company, and to keep each of said boats in good repair during the said term of five years, &c., so long as the same should be fit to run in the said line; and the said defendants, in and by the same agreement, did further agree to keep the number of boats in said freight line during the said term of five years equal to the number of boats by said agreement granted and leased to the 30 said defendants, unless the consent of the said The Morris Canal and Banking Company thereto, in writing, should be first had and obtained.

And the said defendants in and by the said agreement, did further agree to pay to the said The Morris Canal and Banking Company, full rates of toll according to the printed rates of tolls for the time being, or established and published by the said The Morris Canal and Banking Company, upon all articles which might be transported upon and over the Morris Canal in the

- said boats employed in the said freight line as by reference to the said agreement will fully appear; and the said defendants further say, that after the making of the said agreement, to wit, on the first day of February, in the year eighteen hundred and sixty-eight, to wit: At Jersey City, in the county of Hudson aforesaid, the said defendants did organize and put in operation the freight line mentioned in the said agreement, and included therein the boats named in said agreement and other boats of the said defendants, and from thence hitherto have
- 10 carried on the said freight line so constituted as aforesaid for the transportation of goods, wares and merchandise, upon and over the Morris Canal pursuant and according to the terms, true intent and meaning of the said agreement, and from the making of the said agreement hitherto, the said defendants at all times, and continually, have well and faithfully performed, fulfilled and kept, all and every of the covenants, stipulations and agreements in the said agreement contained on their part to be done, performed and kept; and the said defendants further say that afterwards, to wit, on the first day of April, eighteen
- 20 hundred and seventy-one, to wit: At Jersey City, in the said county of Hudson, the said The Morris Canal and Banking Company leased and demised for a term not yet ended, to the said plaintiff, the canal of the said The Morris Canal and Banking Company, commonly called the Morris Canal, with all of its boats, property, works, appurtenances and franchises, powers and privileges, and also assigned to the said plaintiff all contracts and agreements and rights in action of the said The Morris Canal and Banking Company, including the said agreements so as aforesaid made between the said defendants and the said The
- 30 Morris Canal and Banking Company, and the said plaintiff accepted the said assignment of the said agreement and adopted the said agreement as their own, and have received the benefits thereof and promised and agreed to fulfill and perform the same for and on the part of the said The Morris Canal and Banking Company, so far as the same remained unperformed and was to be performed, observed and kept by the said The Morris Canal and Banking Company.

And the said defendants further say, that under and by virtue of and in pursuance of the said agreement so as aforesaid made

between the defendants and the said The Morris Canal and Banking Company, the said defendants from the thirty-first day of March, eighteen hundred and seventy-one, to wit, the first day of January, eighteen hundred and seventy-two, in the boats of the said freight line of the said defendants, including as well the boats named in the said agreement as other boats of the said defendants which were rented of the said plaintiffs, and added to and made a part of the said freight line, upon and over the Morris Canal did transport divers large quantities of merchandise, lumber, plaster and bituminous coal westward upon said canal; and also in the boats of the said freight line did transport divers large quantities of merchandise, goods, chattels and personal property eastward upon said canal (not including charcoal, mineral coal, ore, iron ore, lime in bulk, limestone, posts and rails, railroad ties, zinc ore, nor wood),^r in respect of, and upon which a large amount, to the sum of nineteen thousand two hundred and sixty-nine dollars and sixty-four cents of tolls accrued to the said plaintiffs as lessee and assigns of the said The Morris Canal and Banking Company, and upon which tolls, by virtue of the said agreement between the said defendants and the said The Morris Canal and Banking Company, the said defendants became and are entitled to a drawback of one-half, amounting to a large sum of money, to wit: to the said sum of nine thousand six hundred and thirty-four dollars and eighty-two cents, first in this plea mentioned, which is a parcel of the said several sums of money in the said declaration mentioned and demanded.

And the said defendants, in fact, further say, that at and before the commencement of the said action, the said plaintiff was, and from thence hitherto hath been, and still is, indebted to said defendants, for and on account of the drawback aforesaid, in a large sum of money, to wit: in the sum last above named, which said sum of money so due and owing from the said plaintiff to the said defendants, equals the damage sustained by the said plaintiff, by reason of the non-payment by the said defendants to the said plaintiff, of the said sum of nine thousand six hundred and thirty-four dollars and eighty-two cents first in this plea first mentioned, and the said sum so due from the said plaintiff to the said defendants, they, the said defendants,

are ready and willing, and hereby offer to set off and allow to the said plaintiff in full payment and satisfaction of the said sum of nine thousand six hundred and thirty-four dollars and eighty-two cents, first in this plea mentioned, according to the form of the statute in such case made and provided, and this the said defendants are ready to verify, wherefore they pray judgment, if the said plaintiff ought to have or maintain its aforesaid action thereof against them.

1. And the said plaintiffs, as to the plea of the said defendants by them first above pleaded, and whereof they have put themselves upon the country, do the like.

2. And as to the plea of the said defendants by them secondly above pleaded, the said plaintiffs say that they ought not to be barred from having or maintaining their aforesaid action thereof against the said defendants by reason of anything in the said second plea alleged, because (protesting that the defendants did not at the time in the said second plea mentioned, or at any other time, pay to the plaintiffs the said several sums of money in the said declaration mentioned, except the sum of nine thousand six hundred and thirty-four dollars and eighty-two cents, or any of them, or any part thereof) they say that the said sum of nineteen thousand two hundred and sixty-nine dollars and eighty-four cents, in the said second plea mentioned, and which is therein alleged to have accrued to the plaintiffs as tolls in respect of the transportation of the merchandise, goods, chattels and personal property transported on said canal by the said defendants, did not, nor did any part thereof, accrue to the plaintiffs in respect of any merchandise, goods and chattels transported by the said defendants over said canal, in the said thirty-two boats, by the said agreement leased to said defendants by The Morris Canal and Banking Company, but the whole of the last said sum of money accrued and became due to the plaintiffs in respect of and upon the transportation of the said goods and chattels, in the said second plea mentioned, over the said canal in divers other boats of the said defendants, exclusive of and in addition to the said thirty-two boats so leased to the said defendants by the said Morris Canal and Banking Company, by the said agreement in the said second plea set forth, and this the said plaintiffs are ready to verify ;

wherefore they pray judgment; their damages by them sustained on occasion of the not performing of the said several promises and undertaking in the said declaration mentioned to be adjudged to them, &c.

3. And for a further replication to the said second plea, the said plaintiffs, by leave of the court here, for that purpose first had and obtained, according to the form of the statute in such case made and provided, say, that they ought not to be barred from having or maintaining their aforesaid action thereof against the said defendants, by reason of anything in the said 10 second plea alleged, because they say that the said defendant, Cornelius Stewart, was, at the time of the making and entering into of the said lease and agreement in the said second plea mentioned, and for a long space of time prior thereto, to wit: five years, had been one of the directors of The Morris Canal and Banking Company, and as such director was present at and participated in the meeting of directors at which the said lease and contract was authorized by the said Board of Directors of The Morris Canal and Banking Company, and remained and continued one of the directors of said company from the time of 20 the execution of the said lease and agreement until after the said The Morris Canal and Banking Company leased and demised to the said plaintiffs the said canal, with its boats, property, works, appendages and franchises, powers and privileges, and the said plaintiffs did not adopt the said agreement as their own, and did not promise and agree to fulfill and perform the same for and on the part of the said The Morris Canal and Banking Company, in manner and form as the said defendants have in their said second plea alleged; and this the said plaintiffs are ready to verify, wherefore they pray judgment 30 and their damages by them sustained, on occasion of the not performing the said several promises and undertakings in the said declaration mentioned, to be adjudged to them, &c.

And the said defendants say, that the first replication of the said plaintiffs to the said second plea of the said defendants, and the matters therein contained, in manner and form as the same are above pleaded and set forth, are not sufficient in law for the said plaintiffs to have or maintain their aforesaid action thereof against the said defendants, and that the said defendants are not

bound by law to answer the same, and this the said defendants are ready to verify, wherefore, by reason of the insufficiency of the said replication in this behalf, the said defendants pray judgment if the said plaintiffs ought to have or maintain their aforesaid action thereof against them, &c.

To the plaintiff above named, or whom it may concern :

10 Notice is hereby given by leave of the court that the defendants on the trial of this action, under the plea of the general issue, pursuant to the statute in such case made and provided, intend to give in evidence in bar of the said action, the special matter hereinafter mentioned, to wit :

1st. That the tolls claimed by the plaintiff in this action wholly and entirely arose and accrued under and in pursuance, execution and performance of the agreement, a copy whereof is hereunto annexed and marked *Schedule A*, and that the said plaintiff at the said times when, &c., in the declaration mentioned, was the assignee of and subject to and bound by the said agreement.

20 2d. That when the said agreement was made, executed and delivered, to wit : on the twenty-ninth day of January, eighteen hundred and sixty-eight, The Morris Canal and Banking Company had notice and knew that the said defendants construed and understood the said agreement as entitling them, the said defendants, to the drawback of fifty per cent. therein provided for, as well on and in respect of goods carried on all boats employed in said freight line, extra of the thirty-two boats specially mentioned in said agreement, as on and in respect of goods
30 and Banking Company then gave the same construction to and had the said understanding of the said agreement, and that, in pursuance of that construction and understanding of said agreement, the said The Morris Canal and Banking Company, from the making of the said agreement until the first day of April, eighteen hundred and seventy-one, continually in every year and on every occasion of accounting with the said defendants in respect of said tolls allowed to the defendants, a drawback of fifty per cent. on all the tolls charged on the goods carried on all the boats which the defendants used in the said freight line,

as well in respect of the goods carried in all boats extra of the said thirty-two boats, as in respect of the goods carried in said thirty-two boats named in said agreement, of all which the plaintiff had notice when it became the assignee of said agreement.

3d. That if the defendants be allowed said drawback as herebefore claimed, there will be due to the defendants from the plaintiff in respect thereof the sum of nine thousand six hundred and thirty-four dollars and eighty-two cents, with interest since the first day of April, eighteen hundred and seventy-one, being just equal in amount to the amount claimed by the plaintiff of the defendants in this action. 10

SCHEDULE A.

This agreement made this twenty-ninth day of January, in the year of our Lord one thousand eight hundred and sixty-eight, between The Morris Canal and Banking Company, a body corporate of the state of New Jersey, party of the first part, and Cornelius Stewart, of the township of Lebanon, in the county of Hunterdon, and Joseph C. Stewart, of the township of Washington, in the county of Warren, and state aforesaid, partners in business, trading in the name, style and firm of C. Stewart & Son, parties of the second part, witnesseth: 20

That whereas the parties of the second part propose to organize and carry on a freight line for the transportation of goods, wares and merchandise upon and over the Morris Canal.

Now the said party of the first part for and in consideration of the sum of one dollar, lawful money of the United States, to them in hand paid by them the said parties of the second part at and before the delivery of these presents, the receipt whereof is hereby acknowledged and for the purpose of enabling the said parties of the second part to organize and carry on the said freight line do hereby grant and lease unto the said parties of the second part the following named boats (the value of each being herein expressed and set forth) for the term of five years from the date hereof to wit: 30

	Morris Canal Register, No.	No.	Value
	627.....		\$125
	“ “ “ “ 631.....		125
	“ “ “ “ 634.....		325
	“ “ “ “ 635.....		400
	“ “ “ “ 636.....		450
	“ “ “ “ 637.....		550
	“ “ “ “ 638.....		475
	“ “ “ “ 639.....		400
	“ “ “ “ 640.....		415
10	“ “ “ “ 641.....		600
	“ “ “ “ 642.....		600
	“ “ “ “ 643.....		650
	“ “ “ “ 645.....		950
	“ “ “ “ 693.....		150
	“ “ “ “ 978.....		100
	“ “ “ “ 981.....		100
	“ “ “ “ 1071.....		150
	“ “ “ “ 1072.....		225
	“ “ “ “ 1073.....		175
20	“ “ “ “ 1074.....		150
	“ “ “ “ 1686.....		725
	“ “ “ “ 1687.....		725
	“ “ “ “ 1688.....		725
	“ “ “ “ 1689.....		750
	“ “ “ “ 1692.....		750
	“ “ “ “ 1693.....		725
	“ “ “ “ 1694.....		675
	“ “ “ “ 1695.....		750
	“ “ “ “ 1697.....		750
30	“ “ “ “ 1698.....		725
	“ “ “ “ 1699.....		775
	“ “ “ “ 1700.....		775

The total valuation of said boats being (\$15,965) fifteen thousand nine hundred and sixty-five dollars, and the said parties of the second part for and in consideration of the sum of one dollar, lawful money of the United States, to them in hand paid by the said party of the first part, at and before the delivery of these presents, the receipt whereof is hereby acknowledged and of the privileges to them granted herein contained for themselves,

their heirs, executors and administrators, do covenant and agree to and with the said party of the first part to pay them, the said party of the first part, the aforesaid sum of fifteen thousand nine hundred and sixty-five dollars for the said boats as above described, in ten equal semi-annual installments, the first installment to be due and payable on the fifteenth day of July, one thousand eight hundred and sixty-eight, with interest at the rate of seven per cent. upon the said installment, and the amount of installment unpaid, and the said party of the first part do hereby covenant and agree to give the said parties of the second part, 10 lawful bills of sale for the before mentioned boats, upon the payment of the tenth semi-annual installment above mentioned.

And the said parties of the second part do hereby agree to furnish the said boats with the necessary rigging and with competent and capable captains and crews, and to employ the said boats in a freight line upon and over the Morris Canal exclusively, unless upon the written consent of the party of the first part, and to keep each of the said boats in good repairs during the said term of five years or as long as the same are fit to run in the said line; and the said parties of the second part do 20 further agree to keep the number of boats in the said freight line during the said term of five years, equal to the number of boats herein granted and leased to them, the said parties of the second part, unless the consent of the said party of the first part thereto in writing be first had and obtained.

And the said parties of the second part do hereby further agree to pay to the said party of the first part full rates of toll according to the printed rates of tolls for the time being, as established and published by the said party of the first part, upon all articles which may be transported upon and over the 30 Morris Canal in the said boats employed in the said freight line.

And the said party of the first part do hereby agree to allow the said parties of second part a drawback of one-half of such tolls upon all such merchandise, lumber, plaster and bituminous coal, as shall be transported by the said parties of the second part in the boats of the said freight line westward upon the said canal; and also upon all articles that shall be transported by the said parties of the second part in the boats of the said freight

line eastward upon the said canal, except charcoal, mineral coal, ice, iron ore, lime in bulk, limestone, post and rails, railroad ties, zinc ore and wood.

And the said party of the first part do hereby agree to and with the said parties of the second part, that the boats of the said freight line shall have the same privileges of loading other freight at Port Delaware and Port Washington as are now afforded to and possessed by the New Jersey and Pennsylvania freight line.

- 10 And the said party of the first part do further agree to and with the parties of the second part, that no drawback from the established rates of tolls shall be allowed to any other party or parties competing with the said freight line of the parties of the second part, for the same business, upon and over the Morris Canal, during the said term of five years, unless the said parties of the second part shall, by negligence, carelessness, or otherwise fail to secure and maintain the business, which it is contemplated and intended shall be transacted and carried on by the said freight line of the said parties of the second
- 20 part.

And the said party of the first part do hereby agree that the party of the second part may terminate this lease at the expiration of the first year thereof, upon giving to them, the said party of the first part, three months notice in writing, of their intentions so to do, and whenever this lease is terminated, the party of the first part will take from the party of the second part, the boats employed in the said freight line, at their proper value as coal boats.

- 30 And the said party of the first part do hereby agree, that if the said party of the second part do well and faithfully fulfill all the covenants and stipulations herein contained on their part to be done and performed; the said party of the first part will, from time to time, give lawful bills of sale for such of the before mentioned boats as may become unfit for use in the said freight line.

In witness whereof, the party of the first part have caused these presents to be signed by their president, and the corporate seal of the said company to be hereunto affixed; and the said

parties of the second part have hereunto set their hands and seals the day and year first above mentioned.

W. H. TALCOTT, *President.*

Attest: JOHN ROGERS, *Secretary.* [L. S.]

Signed, sealed and delivered in the presence of

CORNELIUS STEWART, [L. S.]

JOSEPH C. STEWART, [L. S.]

10

JOHN ROGERS.

It is understood and agreed that the boats named in the foregoing lease and contract, are, on this twenty-ninth day of January, A. D. 1868, delivered to and in the possession of the said parties of the second part.

CORNELIUS STEWART & SON.

Please take notice, that on Saturday, the thirteenth of September, 1873, at nine o'clock in the forenoon, before Hon. Van- 20
 cleve Dalrimple, at his chambers, at Morristown, I will apply for an order or rule permitting the defendants to amend their pleadings in this case, in this, to wit: to add to the plea of payment already and in due season pleaded, a notice of set off, pursuant to the statute in such case made and provided, a copy of which notice I heretofore sent to you. If that be denied, I shall ask leave to amend the second plea, by averring in substance therein, that from and after the making of the agreement set out in that plea, until the first of April, 1871, The Morris Canal and Banking Company continually in every year and on every 30
 occasion of accounting, allowed to the defendants a drawback of fifty per cent. on all the tolls charged on the boats which the defendants employed in the said freight line, in respect of all and every of the goods, wares and merchandise for which a drawback was by said agreement to be allowed, as well on and in respect of all boats, extra of the thirty-two boats mentioned in said agreement, which were used and employed by the said defendants in the said freight line, as on and in respect of the thirty-two boats named in said agreement, and that The Morris

Canal and Banking Company, during all that time understood, construed and applied said agreement as the said defendants understood and construed the same, and as the same is construed and sought to be applied in and by the said second plea, of which the said plaintiffs had notice when they became the lessees of the property of The Morris Canal and Banking Company, and assignees of said agreement.

Sept. 5, 1873.

Yours, &c.,

10

JACOB VANATTA,

Attorney of Defendants.

To Messrs. McCARTER & KEEN,

Attorneys of Plaintiffs.

Replication.

The court having heard the argument of counsel, and the court having duly considered the same, and being of the opinion that the plea filed by the defendants is bad, it is ordered that judgment be entered accordingly in favor of the plaintiff on said demurrer.

20 Entered May 4, 1874, as of Nov. Term, 1873, on motion of
McCARTER & KEEN, *Atty's.*

The above named defendants having filed, by leave of Mr. Justice Dalrimple, a notice of special matter to be annexed to the plea of general issue in the above case, and a motion having been made at the November term last, of this court, in behalf of the plaintiff, to strike out said notice, and the said motion to strike out having been heard by the court, on argument by the counsel of the respective parties, and the court having taken time until the present term to consider the same, it is ordered
30 that the said notice be, and the same is hereby stricken out, with costs.

Entered May 7th, 1874, on motion of

McCARTER & KEEN,

Attys. of Pltff's.

Therefore, let a jury thereupon come before the Chief Justice or some other justice of the Supreme Court of the state of New Jersey, at a Circuit Court to be holden at Hudson City, in and for the county of Hudson, on the first Tuesday of October, in the year of our Lord one thousand eight hundred and seventy-four, by whom, &c., and the same day is given to the parties aforesaid, there, &c.

And now at this day, to wit, the fourth day of November, A. D. eighteen hundred and seventy-four, before our said Supreme Court at Trenton, come the said plaintiffs by their attorneys aforesaid, and the justice before whom, &c., having sent hither his record had before him, in these words, to wit:

Afterwards, that is to say, on the twenty-ninth day of October, in the year of our Lord one thousand eight hundred and seventy-four, before the Honorable Joseph D. Bedle, one of the Justices of the Supreme Court of Judicature, of the state of New Jersey, according to the form of the statute in such case made and provided, come the within named, The Lehigh Valley Railroad Company, by their attorneys within named, as well as likewise come the within named Cornelius Stewart and Joseph C. Stewart, by their attorney, also within named, and the jurors of the jury, whereof mention is within made, being summoned, also come, who, to speak the truth of the matters within contained, being chosen, tried and sworn, say upon their oath, that the said Cornelius Stewart and Joseph C. Stewart did undertake and promise in manner and form, as the said The Lehigh Valley Railroad Company have within complained against them; and that the said Cornelius Stewart and Joseph C. Stewart, did not, at the time and place mentioned in the second plea of the said Cornelius Stewart and Joseph C. Stewart, or at any other time, pay to the said The Lehigh Valley Railroad Company, the said several sums of money in the said declaration mentioned; and they assess the damages of the said The Lehigh Valley Railroad Company, on occasion of the not performing the promises and undertakings within mentioned, over and above their costs and charges by them about their suit in this behalf, expended to ten thousand six hundred and thirteen dollars and thirty-four cents, and for those costs and charges six cents.

Therefore it is considered that the said The Lehigh Valley

Railroad Company do recover against the said Cornelius Stewart and Joseph C. Stewart there said damages by the jurors in form aforesaid, found to ten thousand six hundred and thirteen dollars and twenty-four cents, and also two hundred and forty-three dollars and forty-four cents for their costs and charges aforesaid, by the court now here adjudged to the plaintiffs and with their assent, which said damages, costs and charges in the whole, amount to ten thousand eight hundred and fifty-six dollars and sixty-eight cents.

10 Judgment signed this fourth day of November A. D. eighteen hundred and seventy-four.

M. BEASLEY, *C. J.*

I, Benj. F. Lee, Clerk of the Supreme Court of the State of New Jersey, do certify that the foregoing is a true copy of the judgment in the above stated cause, as the same remains of record in my office.

In testimony whereof I have hereto set my hand and [L. s.] seal of said court at Trenton, this twenty-eighth day of November, A. D. eighteen hundred and seventy-four.

20

BENJ. F. LEE, *Clerk.*

Depositions.

October Term, 1874. Before HON. JOSEPH D. BEDLE, Justice—with a jury.

Thomas McCarter, Esq., for plaintiffs.

Jacob Vanatta, and *Leon Abbett, Esqs.*, for defendants.

Mr. McCarter stated the case on the part of the plaintiffs, and offered evidence, as follows :

Thomas K. Johnson, sworn for plaintiffs, testified as follows, on direct examination—

I am a clerk in the office of the Secretary of State; I have with me a document relating to the lease of the Morris canal; I have the original lease filed in the office of the Secretary of State. [Witness produces a document.]

Mr. McCarter. This is not the original lease, it is a consent to the lease, signed by a majority of the stockholders.

[Defendants admit the signature of Cornelius Stewart.]

[Plaintiff offers the document in evidence.]

Mr. Vanatta. If the plaintiff can make it legitimate evidence then it may go in, but we object now on the ground that no affidavit of the stockholder will satisfy the first section of the act of 1871, except the affidavit of the man subscribing. No objection is made to the order of proof.

THE COURT. My judgment is that it does not require the affidavit of the stockholder. You may consider that as the ruling of the court. I will admit the paper. The effect of it will be determined hereafter. And thereupon the defendants excepted, and prayed that their exception might be sealed, and it is sealed accordingly.

[L. s.]

J. D. BEDLE, 20
Justice Supreme Court.

Mr. Vanatta. It would not be competent evidence unless preceded by a lease duly authorized, and if they show a lease duly authorized then probably this would be competent, but if they fail to show a lease duly authorized, then we do not wish to regard this as in, and we object to it because we apprehend they cannot make it legitimate.

[Plaintiff offers in evidence the lease of The Morris Canal The Lehigh Valley Railroad Company, dated May 4th, 1871.]

[Defendants object to its being received, on the ground that there is no authority from the state of New Jersey to make the lease to a foreign corporation.] 30

Adjourned for the day.

SECOND DAY. Oct. 27th, 1874.

Plaintiff offers in evidence Pam. Laws of Pennsylvania, 1870, p. 31, Act No. 8, approved February 17th, 1870. Also laws

of 1871, p. 248, No. 235, approved May 3, 1874. Also calls the attention of the court to Pam. Laws of New Jersey, 1850, p. 313. Also offers in evidence laws of Pennsylvania, 1853, No. 1, p. 1.

Jacob F. Randolph, sworn for plaintiffs, testified as follows:

Direct examination—I am President of The Morris Canal Company; have held that position about five years; I was president of the company at the time the canal and its works were transferred to the Lehigh Valley Railroad Company.

10 *Quest.* Acquainted with its works?

Ans. Yes sir.

Quest. At that time did the Lehigh Valley Railroad Company have a railroad bridge across the Delaware at Easton?

Ans. They had.

Quest. Where is the western terminus of the Morris Canal?

Ans. At Phillipsburg opposite Easton.

Quest. At the time of that lease, did the Lehigh Valley Railroad connect with the Morris Canal so that merchandise could be transported in a direct line from one to the other?

20 *Ans.* They did form a continuous route.

Quest. Did you know how long that state of things had continued prior to 1871?

Ans. I believe it to have commenced about 1855.

Cross-examination—

Quest. The Morris Canal passes under the bridge of the Lehigh Valley Railroad Company, doesn't it?

Ans. To get into the river, yes.

Quest. There is about what difference in the elevation; that is, how much above the canal are the tracks of the railroad on
30 the bridge?

Ans. I can't say.

Quest. Some 30 to 50 feet?

Ans. I could not say; I have never measured it; I guess at least 18 feet.

Quest. Then when you get on the New Jersey side, or at the New Jersey end of the bridge, there is a side track running down the river, isn't there?

Ans. There are a good many tracks; I don't know which track you refer to.

Quest. Whereabouts do they transfer coal from the Lehigh Valley road to the Morris Canal?

Ans. Immediately after crossing the bridge; the Lehigh Valley extend their track to the Morris Canal property.

Quest. What distance is it from the easterly end of the bridge to where they reach the Morris Canal property?

Ans. We have two or three connections with them; the one connection the Lehigh Valley built as far as their property run, 10 and the Morris Canal Company built the rest; we have another connection where the Lehigh Valley built the whole connection, extending the rails perhaps three quarters of a mile down on the Morris Canal property.

Quest. You have got on the New Jersey side of the Delaware river shoots or dumps where you dump the coal from the railroad cars into the canal boats?

Ans. Yes.

Quest. About how far from the New Jersey end of the bridge are those dumps? 20

Ans. Three-eighths of a mile, or one-quarter perhaps.

Quest. How do you connect the end of the bridge with those dumps?

Ans. By railroad track on the New Jersey side.

Quest. Built by what company?

Ans. That I can't say; those tracks were built before I went into the company, and I can't say who built them.

Quest. Who maintained and kept in order that track before this lease was made?

Ans. That I can't say, either. 30

Ques. You were superintendent of the canal before you became president?

Ans. Yes.

Quest. You were assistant superintendent for several years, were you not?

Ans. No sir; about a year after I went into the company as assistant superintendent our president died, and in the meantime I had been made vice president, and at his death became acting president.

Quest. Having been there some time can't you tell us who kept and maintained those connecting railroad tracks that you have been speaking of prior to making this lease?

Ans. To the best of my knowledge we maintained what was on our ground and the Lehigh Valley maintained what was upon their ground.

Quest. Did the Lehigh Valley road have any authority, that you know of, to build a railroad in New Jersey, after crossing the Delaware river?

10 *Ans.* I don't know.

Quest. Did the Morris Canal Company have any power to make a railroad?

Ans. Yes, sir; by an act; I can't refer to it; we have an act to connect with any railroad, providing the tracks shall be no longer than so many miles; it was prior to the lease; it is an old act; we also have another connection with the Lehigh Valley Railroad, running down alongside of the other connection, and extending perhaps half a mile further down, to the wharf of the Morris Canal Company.

20 *Quest.* But starting from the bridge?

Ans. Starting connecting with the bridge.

Quest. Connecting with the tracks of the Lehigh Valley road on the bridge?

Ans. No, sir; not on the bridge; they connect, perhaps, a thousand feet below the bridge, on the New Jersey side.

Quest. What did they connect with there?

Ans. With a new track which was made jointly by the Lehigh Valley Company and the Morris Canal Company.

Quest. On whose grounds?

30 *Ans.* On the Morris Canal grounds and on the Belvidere and Delaware Railroad grounds.

Quest. The Morris Canal Company extend to within one thousand feet of the bridge?

Ans. That I can't say; the property of the Lehigh Valley Company connects with the Morris Canal Company, but where the dividing line is—whether it is fifty feet or five hundred feet from the bridge—I can't say.

Quest. There are lands of other owners intervening between the two, isn't there?

Ans. Not to my knowledge.

Quest. Where is the land of the Belvidere Railroad Company?

Ans. That is beyond; the Morris Canal land intervenes between them and the Lehigh Valley.

Quest. In getting from the canal company's property to the Lehigh Valley Company's you pass over a strip of land belonging to the Belvidere Company?

Ans. No, sir; just the reverse of that; we go from the Lehigh Valley's lands to the Morris Canal Company's lands; this track extends further beyond on to the Belvidere and Delaware Company's lands, but it is not for the use of the Belvidere and Delaware Company; it is for the exclusive use of the Morris Canal Company, in connection with the Lehigh Valley Company.

[Plaintiffs offer in evidence the charter of the Morris Canal and Banking Company, passed December 31st, 1824, and also a supplement, approved March 9th, 1855, referring to the first section especially. Plaintiffs also offer in evidence the lease.]

[Defendants object to the lease being received in evidence, on the ground that no power has been shown in the Morris Canal and Banking Company to transfer their rights and franchises to a foreign corporation; the authority to make such a transfer must be in express terms; the general power to lease to any corporation has a settled construction and fixed meaning in New Jersey, and means to a domestic corporation and not to a foreign corporation; that express legislative authority must exist in terms to grant or lease to a foreign corporation.]

THE COURT. I don't think it worth while to have this question discussed here at the Circuit. I have looked at it, and the question raised is of that gravity, that it is no doubt the expectation of each side that it should be settled deliberately, and my ruling must partake, to some extent, of a *pro forma* character, but I think the question is of that nature that I ought to rule in favor of the admissibility of the lease, and allow the other side an exception, and the lease is admitted to be read in evidence; and thereupon the defendants except to this ruling of the court, and to the admission in evidence of said lease, and their exception is sealed accordingly.

[L. s.]

J. D. BEDLE,
Justice Supreme Court. 40

Defendants also pray an exception on the ground that there is no proof that the Lehigh Valley Company at the time of the lease legally connected with the works of the Morris Canal Company, and their exception is granted and sealed accordingly.

[L. s.]

J. D. BEDLE,
Justice Supreme Court.

Jacob F. Randolph re-called by plaintiffs.

Quest. From the time of the execution of that lease which has been offered in evidence, who has operated and conducted the
10 business of the Morris Canal?

Ans. The Lehigh Valley Railroad Company.

Quest. Have you been since in their employ?

Ans. I have.

Quest. I didn't understand you clearly as to the nature of the two connections between these two companies at Phillipsburg, one you said was a tract built in part by the Lehigh Valley Railroad Company, and in part by the Morris Canal Company; how was the other one built?

Ans. The first one was built by the Morris Canal Company.

20 *Quest.* How does that connect the Lehigh Valley Railroad with the Morris Canal?

Ans. That connects at the bridge, the Morris Canal property extending under the bridge—and this point has occurred to me since I was on the stand before, it escaped my memory then—the Lehigh Valley Company in constructing the bridge across the river also crossed the canal, and of course across the Morris Canal property, and their abutments as I believe, on the New Jersey side, was built upon the Morris Canal lands. That
30 matter escaped my memory before, but I believe that to be the true state of the case.

Quest. The point was, how this track built by the Morris Canal Company, connected the business of the Lehigh Valley Railroad with the Morris Canal?

Ans. By a switch at the bridge, running down to the trestle works.

Quest. So that the cars of the railroad could be run on this switch down to and on the trestle work, to be dumped into the canal?

Ans. Yes.

Quest. And that you say was built by the Canal Company?

Ans. Yes.

Quest. (By court.) When?

Ans. I think in 1855; one of the Morris Canal reports states the fact that the connection was made in '55 or '56; at all events it was so when I commenced, in the fall of 1867.

Cross-examined—

Quest. At Phillipsburg, the Morris Canal, where it crosses under the bridge of the Lehigh Valley, is on the New Jersey side of the Delaware, isn't it? 10

Ans. Yes, sir.

Quest. Close to the river?

Ans. It runs into the river.

Quest. But it passes under the bridge?

Ans. The railroad bridge.

Quest. Under what railroad bridge?

Ans. (No answer).

Quest. And continues on down the river?

Ans. Up the river.

Quest. The tracks on the railroad bridge are above canal? 20

Ans. Yes.

Quest. The distance you could not tell, but there is no means of transferring merchandise from the railroad bridge to the canal, right at the bridge, is there?

Ans. There is no provision made.

Quest. But at the end of the bridge you run a switch down the river a third of a mile, or something like that?

Ans. Yes.

Quest. And there you have shutes which deliver the coal from the cars into the boats? Isn't that the mode in which it is arranged? 30

Ans. We connect with the Lehigh Valley bridge by a track; the Lehigh Valley cars run over that track, and deliver their cargoes upon our shutes and trestle works, there to be loaded into our boats.

Quest. Those shutes, as I understand it, are about a third of a mile down the river, below the bridge?

Ans. About a third of a mile, more or less, below the bridge.

Quest. That side track, as I call it, or that piece of railroad

which carries the cars to those shutes I understood you to say was built by the Lehigh Valley Railroad Company down to a certain point about a thousand feet from the bridge?

Ans. I attempted to explain that; you have the evidence on the one, now I will begin the other.

Quest. I want to see whether we understand as to this one that connects the bridge with the shutes we have been talking of—what I want to understand is, whether or no the track from the bridge which carries the cars to those shutes was wholly
10 built by the Morris Canal, or whether it was partly built by the Lehigh Valley Railroad Company and partly by the Morris Canal?

Ans. That was, as I believe, wholly built by the Morris Canal Company.

Quest. I understood you in your previous examination to say you didn't know anything about it?

Ans. No, sir; that was with reference to the other which I said was built partly by both; a later construction, built in 1870, I think.

20 *Quest.* Where does that start?

Ans. It starts from a switch off this same track.

Quest. It runs into that track?

Ans. It runs into that track.

Quest. But don't connect with this bridge immediately?

Ans. Except by this track; it is this track constructed by the Morris Canal Company in about 1855 or '6.

Quest. How far from that bridge does this second track you are speaking of connect with the other track?

Ans. It may be a thousand feet.

30 *Quest.* That thousand feet from that point of connection to the bridge was built when?

Ans. In about 55 or '6 as I understand it.

Quest. What I want to get at is when that part starting off from the bridge immediately connecting with the bridge was built?

Ans. I suppose about 55 or '6.

Quest. You was not then connected with the company?

Ans. No, sir; at any rate it was there in the fall of 1867, when I became connected with the company.

Quest. You don't know who built it or who maintained it prior to that?

Ans. No, sir.

Quest. Do you know in which company the title to the land is to this day?

Ans. The Morris Canal and Banking Company.

Quest. Immediately in connection with the bridge?

Ans. Yes.

Quest. When did they acquire it?

Ans. Long ago, when the canal was first built; they have 10 deeds for the property with a map.

John R. Burnett, for plaintiff, sworn, testifies as follows :

Direct examination—

Quest. Have you been connected with The Morris Canal and Banking Company?

Ans. I have.

Quest. How long?

Ans. Eight or nine years.

Quest. In what capacity?

Ans. Several—first as collector, then as assistant secretary, 20 and then as secretary.

Quest. Were you so engaged in the year 1871?

Ans. Yes.

Quest. Did the defendants, Cornelius Stewart and his son Joseph Stewart, do business on that canal?

Ans. Yes.

Quest. They were partners in business?

Ans. I presume they were; they done business under the name and style of C. Stewart and Son.

Quest. What kind of business? 30

Ans. General freighting business—transportation of merchandise over the canal.

Quest. Describe the course of business as it was done between the Canal Company in that year and Stewart and Son, as to the mode of keeping accounts of tolls. By whom was the canal operated in 1871?

Ans. In the interest of The Lehigh Valley Railroad Company as lessees; I can state in a very few words the general

manner ; the canal company have one general manner of receiving accounts of the business done over the whole line of the canal ; the principal office of the canal is at Jersey City, and between that point and the western terminus of the canal, including the principal office, we have fifteen offices—at which boats, with their cargoes, are tolled as they pass, and an entry made on blanks printed and furnished for the purpose ; these blanks are kept by our collectors at those offices, and are forwarded weekly to the general office at Jersey City ; there they
 10 are assorted, and the items that appear on them as charged to the different parties, are consolidated in bill shape, and a bill rendered to the parties for the amount of tolls thus found charged on the blanks for each week.

Quest. What record do the company keep ?

Ans. These bills as they are made out are pressed in a book, a press copy taken of them, and the bills are then sent to the parties, and from this press copy the entries are made into our general books, the journal, and from there to the ledger.

Quest. Have you that press-book here ?

20 *Ans.* I have.

Quest. That contains the entries of reports of tolls due from Stewart & Son during the year 1871 ?

Ans. Yes.

Quest. Is this the book you refer to ? [Showing witness book.]

Ans. Yes.

Cross examined—

Quest. Refer to the first bill of 1871.

Ans. Bill No. 1 is dated April 8th, 1871—it is for the week ending April 8th ; the amount of the bill is \$179.40—the gross
 30 amount of the bill is \$358.75—that is the gross amount of the tolls, the actual amount less the drawback leaves \$179.40.

Quest. The gross amount of tolls was \$358.79, and you deducted just half of it ?

Ans. Yes.

Quest. And claimed of Stewart & Son the remaining half ?

Ans. Yes.

Quest. Turn to the second bill in the year 1871.

Ans. It is dated April 15th,—the gross amount of tolls on

this bill is \$915.75,—we deducted one-half, \$457.88, and claimed of them \$457.88, just one-half of the gross amount.

Quest. Why did you make that deduction of fifty per cent?

Ans. By the articles of their agreement they were entitled to fifty per cent. drawback.

Quest. Which article of agreement do you refer to?

Ans. The agreement between Stewart's Freight Line and the Morris Canal, made in 1868.

Quest. Is this the agreement you refer to? [Showing witness paper.] 10

Ans. Yes, that is the agreement; I understood by the articles of agreement that the Stewart's Freight Line were to be allowed fifty per cent. drawback on all articles transported over the canal in the boats as named or numbered in the agreement, it being my duty to either make out these bills or to see that they were made out; and all instructions that I received with reference to making out bills or with reference to tolls, I invariably obtained from the President or Secretary of the company, and I was informed from time to time that a special agreement had been made with the Stewarts' with 20 reference to tolls on certain other boats, or with reference to cargoes carried on boats other than the Stewart's Freight Line, and that they should also be included in the fifty per cent. drawback until further notice.

Quest. You recollect my question was with reference to these bills that I have called your attention to?

THE COURT: My understanding was that these two bills were specimens of the whole account of 1871.

Defendant's Counsel: No, they are exceptions.

Quest. Are there not boats in that bill that are not part of 30 the thirty-two mentioned in this agreement; that is the second bill?

Ans. Yes; I presume there are.

Quest. Have you any doubt about it?

Ans. No, I have no doubt about it; there are boats enumerated in here other than those enumerated in that lease.

Quest. Are there not boats in your first bill that are not enumerated in the Stewart's contract?

Ans. Yes; there are other boats there.

Quest. You have allowed in these two bills drawback on all boats that they run on the canal, haven't you?

Ans. Yes.

Quest. Do you mean to say that you understood there was a special agreement with regard to those boats in these two bills that were not of the thirty-two; that there was a special agreement with regard to the drawback on them?

Ans. Yes; I understood there was a special agreement with reference to all boats outside of those enumerated in that agree-
10 ment.

Quest. With regard to these outside boats there, did you understand there was a special agreement with regard to them?

Ans. I naturally inferred that there was a special agreement with reference to them.

Quest. Who informed you as to any special agreement with reference to those boats?

Ans. Either the secretary at that time, or the president of the company.

Quest. You had been making out bills for three years before
20 that time, under this agreement, had'nt you?

Ans. Yes.

Quest. And in every one of those bills you made in those three years, you had allowed a drawback of fifty per cent. on?

Ans. No, sir.

Quest. Are you sure of that?

Ans. Yes, I am sure of that; I wish to explain there were certain cargoes carried by Messrs. Stewart, upon which the drawback did not apply at all, but a special rate of toll was given to apply on that special load, therefore, I answer that we
30 did not allow, in previous years, a fifty per cent. drawback on the whole, as a whole, because there were certain cargoes that came under a special rate of toll, exclusive of any matter of drawback.

Quest. [Showing witness bills.] Look at those bills, and see whether they were made by the Morris Canal and Banking Company?

Ans. Yes, they seem to be for the year 1870.

Quest. And they are for tolls of Stewart's Freight Line?

Ans. Yes; some of them were made by myself—they were all made in our office under my direction.

Quest. Are there not boats in there that were not part of the thirty-two?

Ans. Yes.

Quest. A good many of them, are there not?

Ans. Yes.

Plaintiff's Counsel: I do not consider that the parties' previous mode of conducting business, is at all material to this case, and yet I have no objection to its coming in. I don't wish the fact that I don't object to this testimony, to be made use of in the future progress of the cause. I suppose I might object and ask the court to rule out the testimony of the previous course of dealing between these parties, because that was a matter which was stricken out by the Supreme Court. I do not want the testimony to go in *sub silentio* in such a way that I cannot object to the legal effect or force of it hereafter. 10

Quest. Don't that bundle of bills comprise bills of everything done by Stewart's Freight Line,—the tolls against every boat in Stewart's Freight Line for the year 1870?

Ans. I could not say. 20

Quest. Where is your book?

Ans. I haven't the book for 1870 with me.

Quest. I wish you would look through those bills, and say whether or not the fifty per cent. drawback was not allowed on every boat that run in the year 1870, without reference to whether it was one of the thirty-two or not?

Ans. No, sir; it was not. In bill No. 3, dated April 16th, 1870, the gross amount of which is \$1,150.41, there has been deducted fifty per cent. on the whole amount, and a further deduction by a special agreement with reference to special loading has been made, some ten cents per ton, some more. 30

Quest. How much do the deductions amount to altogether?

Ans. \$604.34.

Quest. That is more than eighty per cent., isn't it.

Ans. Yes.

Quest. The fifty per cent. is deducted, isn't it, and something more.

Ans. I am not through with the bill yet. After which a charge was made for extra on certain cargoes, of fifteen cents

per ton, which reduces the drawback of fifty per cent. on that article—or, which not reducing the drawback, but in other words, after deducting fifty per cent. we added fifteen cents per ton, it being the simplest way to render a bill; so instead of charging them, for instance, fifty cents per ton, we charged them sixty-five cents.

Quest. What was the article in respect to which that fifteen cents was charged?

Ans. This article here seems to have been ice.

10 *Quest.* That was one of the things excluded from their agreement—that they were by the terms of their agreement not to have a drawback on—or not to include in their freight line?

Ans. I don't recollect.

Quest. The aggregate or amount of that bill No. 3 was how much?

Ans. \$1,150.41.

Quest. And the balance you claimed on that?

Ans. \$554.32.

Quest. That is the balance you claimed payment for?

20 *Ans.* Yes.

Quest. So that the net drawback exceeded fifty per cent?

Ans. Yes.

Quest. You say you charged that fifteen cents a ton back on the article of ice, but by the agreement I see that ice was one of the things excepted, so that it was in strict pursuance of this agreement that you made that charge of fifteen per cent.

Ans. No, sir; it was in accordance with instructions.

Quest. Was there any special arrangement that you should make that extra charge upon ice?

30 *Ans.* I had special instructions to do it.

Quest. Was it with reference to any special agreement as to that ice?

Ans. No; by the written agreement he would have been chargeable with the full amount of tolls on the ice.

Quest. Did't those special agreements that you speak of, always relate to articles that were excepted out of their agreement, and in respect to which they did not have the right of any drawback at all?

Ans. No, sir.

Quest. [Showing witness bills.] Look at that bundle of bills for 1868. That first bill, No. 1, is dated what time?

Ans. April 11th, 1868; it is probably the first bill of the year, running through one whole week and part of another week—that was the first bill for that year's business.

By COURT. Is it controverted that, previous to the lease, all the boats, whether the thirty-two or not, were charged at the same rate mentioned in the contract?

Plaintiff's Counsel. My understanding is that it is controverted—my understanding is that a special agreement was 10 always made as to boats not in the thirty-two.

Quest. Is that the first bill that was made out after this written contract was made?

Ans. Yes.

Quest. In whose handwriting is that?

Ans. My own.

Quest. Under whose direction did you make that out?

Ans. Either under the direction of John Rogers, as secretary, or the president or superintendent of the company; Mr. Talcot was then president; there seems to be two receipts on it; the 20 receipts are signed by John Rogers, secretary, and looks very much like his handwriting—both the bodies of the receipts and the signature and all.

Quest. Does this bill include boats outside of the thirty-two?

Ans. Without comparing the number of the boats here with those in the lease, I am unable to say.

Quest. [By *Plaintiff's Counsel.*] Are the numbers given there in the bill?

Ans. Yes.

Quest. Is there among the thirty-two boats, there in the 30 agreement, one called the "Lizzie?"

Ans. No, sir; those thirty-two are all known by numbers.

Quest. Is there one described as "B. Smith?"

Ans. No, sir.

Quest. Or the boat "A. H. Fatsinger?"

Ans. No, sir.

Quest. "W. C. Thompson?"

Ans. No, sir.

Quest. "B. C. Osborn?"

Ans. No, sir.

Quest. "William B. Naphew?"

Ans. No, sir.

Quest. Is there one numbered 1387?

Ans. No, sir.

Quest. Fifty per cent. was deducted on all boats in that bill of April 11th, was there not?

Ans. Yes; there seems to have been.

Quest. How far are these bills in your handwriting?

10 *Ans.* I presume they were all in my handwriting; they seem to have been; I may have been absent a week or so; during that year I was collector, and had special charge of it.

Quest. These bills, I understand you, were made out under the general direction of the president or secretary?

Ans. Yes.

Quest. I show you bills of 1869, the first bill dated April 3rd, 1869; is that in your handwriting?

Ans. Yes.

Quest. Does it include boats other than the thirty-two?

20 *Ans.* Yes; I notice boats here that are not enumerated in that list.

Quest. The fifty per cent. drawback is allowed on all of that bill?

Ans. Yes.

Quest. See whether all those bills are in your handwriting, or made in your office under your direction, by some of your clerks?

Ans. I notice a little note in lead pencil made on the bottom of one of these bills; it is my note; there has been no rates
30 fixed on lumber this season, as I am aware of; as soon as I get instructions I will fix it in bill.

Quest. This agreement did not extend the drawback to lumber?

Ans. No; but it only referred to some special agreement that might be made on that point; I had received no instructions, therefore could not fix the rate of lumber; I have no doubt all these bills are from the Morris Canal Company, they are all on our regular bill-heads, and apparently in my own handwriting.

Quest. The first two bills in the year 1871 were made out in the same way that they had been made out for the three prece-
40 ding years?

Ans. They seem to have been the same general way.

Quest. After them in the subsequent bills you made a change didn't you?

Ans. There seems to have been a change in bill No. 3 of that year.

Quest. What was the difference then between bill No. 3 and those made out for the three preceding years?

Ans. No. 3 seems to have been made out and the drawback allowed on the tolls occurring on the regular line boats; that is, boats that we knew, thirty-two in number; some of those boats had been changed from numbers to a name; they were, nevertheless, understood by us to be Stewart's Freight Line boats, although he had changed them from numbers and running them under the name.

Quest. How many of the thirty-two boats had ceased to be used in the year 1871?

Ans. I could not say.

Quest. How many boats was he running on the canal that year?

Ans. I could not say. 20

Quest. Do you mean that Mr. Stewart changed any of the boats named in that agreement from a number to a name?

Ans. I don't know that he changed any of those boats; he had boats which were running under a name, and represented to us to be regular line boats; some of these boats may have rotted out and gone out.

Quest. You do not mean to say that any of those boats had changed from number to name?

Ans. I could not say that they were these identical boats.

Quest. [BY COURT.] Do you mean that for those boats that were numbered and in the contract, that were worn out, that other boats were substituted?

Ans. It may have been a substitution for those.

Quest. [BY COURT.] Do you know anything about it?

Ans. No sir; I only know that he represented to us that certain boats running under a name were his regular freight line boats; we could not always be governed by the number.

Quest. After you began to make out bills as you have here in 1871, I want to know whether Stewart & Son consented to that change? 40

Ans. I don't know whether they consented to it or not; I had instructions to see that the bills were made out in that form.

Quest. From whom did you get those instructions?

Ans. From Mr. Randolph, the President of the Company.

Quest. Did, or not, Messrs. Stewart object to it?

Ans. I rather think that we had some intimation that they objected to it.

Quest. Didn't they claim that they were entitled to a drawback, as you had been accustomed to allow it previously?

10 *Ans.* Yes; I think that was their ruling of it.

Quest. And the altered method of making them out was without their consent?

Ans. Yes; I suppose it was without their consent; we didn't suppose we had to go to see Stewart and Company to make out our bills.

Quest. How did you tell which boats to allow the drawback on—what was your guide? After the second bill of 1871 was made out, what was the rule you followed?

20 *Ans.* Any boats here that we positively knew were not Stewart's Freight Line boats we excluded, that is, did not allow a drawback.

Quest. What did you think were Stewart's Freight Line boats?

Ans. Boats that were enumerated in this agreement, or boats which he may have advised us had been either substituted for those that had gone out of use, or put in in addition to the line running under a name; our rule and test was simply this: that any boat that we had reason to believe was regularly employed by Stewart in his freight line, as a freight line boat, was entitled
30 to the fifty per cent., although it may not have run under a number; it may have been a substitution for the number.

Quest. Then you meant to make it up to allow him a drawback on all boats employed in his freight line?

Ans. No, sir; we meant to make it up to cover all boats which he owned and controlled in his freight line as a freight line, not on all boats that he might employ—outside boats.

Quest. Did you mean to make it up on all boats which he employed in his freight line, and was the owner of?

Ans. If we knew that he was, and if we knew that the boat

was a regular freight line boat, came under that ruling, in our estimation.

Quest. What was your test of whether it was a freight line boat or not?

Ans. We had no test, any further than the numbers or the names, as they may be given to us by him or his agent.

Quest. Given to you as boats employed in his freight line?

Ans. As regular freight line boats.

Quest. If he notified you that he had put a boat in his freight line, then you allowed him drawback on that? 10

Ans. If we knew or were satisfied that it was so.

Quest. No difference how many, eh?

Ans. No; if we knew that they were continually in the freight line business, and not owned by anybody else at all.

Quest. Did you pretend to limit the number of boats, in respect to which you allowed a drawback, to thirty two?

Ans. Not to thirty-two; I don't think he ever had thirty-two in the line.

Quest. What was the test—how many did you allow him on?

Ans. I cannot answer the question any plainer than I have; 20
I don't know what our test was.

Quest. You did not pretend to be confined to thirty-two?

Ans. No, sir; and yet they never exceeded that.

Quest. You meant to make up the bills to allow the drawback on all boats employed in his freight line that he owned?

Ans. If I knew he owned them, and was substitutes for those numbers, as he was required to keep up the line.

Quest. Did you keep any memorandum or list of boats he had substituted in place of those?

Ans. No, sir. 30

Quest. Did he ever give you notice of boats that he substituted?

Ans. I think we have received notice from him or his agent that a certain boat was a regular freight line boat.

Quest. Were those notices in writing?

Ans. May not have been—may have been verbal.

Quest. Before 1871 you never paid any attention to making up your accounts, if he did give such notice, did you?

Ans. No, sir

Quest. And you are not sure that they ever did give any such notice?

Ans. I am not sure that they did or did not.

Quest. What agent do you refer to when you speak of Stewart's agent?

Ans. He had an agent in New York, Mr. Fatsinger; he was at their office in New York, Pier 19, North river.

Quest. What was he agent for—what did he do there?

Ans. He attended to Mr. Stewart's freight business there, I suppose; receiving freight and discharging it.

Quest. Did he have any charge of boats on the canal?

Ans. I do not know whether he did or not.

Quest. Or have anything to do with his business except with the goods on the New York side?

Ans. I do not know in what capacity he acted as agent, further than we understood he was their agent, and sometimes had conversations with him.

Quest. Did you have conversations with him about substituted boats?

20 *Ans.* Not that I know of positively, but yet I might.

Quest. Do you remember any such conversation with him.

Ans. I do not remember.

Quest. How many boats had Mr. Stewart employed in his freight line in 1870?

Ans. I don't know.

Quest. How many did he employ in 1871?

Ans. I don't know.

Quest. He had considerably more than thirty-two in 1870, didn't he?

30 *Ans.* I don't know; I could not state from my own knowledge how many boats he had in use from the time he entered into that agreement until its expiration.

Quest. He had thirty-eight the first year, didn't he?

Ans. I don't know.

Quest. And between fifty and sixty in 1870, didn't he?

Ans. I could not answer the question, because I have no knowledge; I never sought to ascertain the number.

Quest. (BY COURT.) This bill No. 3 is made up on the basis of not allowing drawback on boats not within the numbers of
40 the contract, or as you regard, substituted boats?

Ans. Yes; that I believe was the idea, the understanding.

Quest. Tell us how you got at the boats that were substituted?

Ans. Without referring to any special information as to any particular boat, which I cannot do, I am under the impression that we received notice, either written or verbal, to the effect that a boat, for instance, running under the name of "B. Smith," or some other name, had been placed in the line, and was a regular freight-line boat.

Quest. From whom did you receive that notice or information?

Ans. It must have come from Messrs. Stewart, or from some one as we considered their duly authorized agent.

Quest. Have you any knowledge of receiving any such notice from either of the Messrs. Stewart?

Ans. No.

Quest. Or from any agent by them, having any authority in the premises?

Ans. I cannot say, with reference to any particular boat.

Re-direct examination—

20

Quest. What was the course of business between Stewart & Son and the company, during the year 1871, as to bringing or using other boats than those belonging to his line, those enumerated in the contract or substituted for them on the canal; what had been Stewart's practice in regard to taking boats belonging to other people, or the canal company, and using them in his line, prior to 1871?

Ans. He had loaded other boats in his business over the canal, prior to 1871.

Quest. Boats belonging to whom?

30

Ans. Belonging to the canal company.

Quest. Can you speak, of your own knowledge or recollection, as to the loading of those boats belonging to the canal company, as to its being a subject of any special arrangement, previous to 1871?

Ans. Not positively; and yet there is no question in my mind; but I could not refer to any day or date, yet I know the thing was of general conversation on account of the business of

the company, in my hearing, between the officers of the company and Mr. Stewart, or his agents.

Quest. Who were his agents?

Ans. Fatsinger was one of his agents; and he had an agent at the basin, in Jersey City, in 1870 or '71—William Wheelan; he seemed to have charge of Mr. Stewart's loading.

Quest. Did Stewart, or Fatsinger, or Wheelan, prior to '71, apply to the company for permission to load boats not of his line—the company's boats, and use them in his business?

10 *Ans.* I cannot fix any dates.

Quest. Was that the fact; were any such applications made?

Ans. I haven't any doubt of it; and yet I cannot refer to any occasion.

Quest. I am asking you as to the fact, whether permission was given by the canal company—whether he came and got permission of the canal company to use them in his business to transport freight?

Ans. I don't know.

20 *Quest.* Prior to the sending of that third bill, in the month of April, 1871, was there any issue or discussion raised between Stewart and Son on the one side, and the officers of this company, as to this written contract?

Ans. Yes.

Quest. [Showing witness page 75 of the memorandum book.] That memorandum, in whose handwriting is that?

Ans. It is in my own.

Quest. When was it made?

Ans. April 17th, 1871.

30 *Quest.* Can you state what occurred, if anything, between Messrs. Stewart and the officers of the company, at that date, in respect to this contract, from the tenor of this memorandum?

THE COURT. You can use the memorandum only to refresh your memory, then give us your memory.

Ans. As near as I can recollect, Mr. Stewart claimed—this is dated April 17th, 1871—a right to load his freight line boats with coal, which the company did not want to allow, as the loading was very scarce, and we had a large number of boats of our own waiting for loading, and to admit of a boat that was particularly adapted for merchandising, in preference to our own
40 regular coal boats, the company did not feel inclined to do it.

Quest. State what occurred at that interview ?

Ans. Mr. Stewart made a demand upon the company that these boats should be loaded in their turn, and contended for his rights under the strict letter of that agreement; under the strict letter of that written agreement between him and the company; after basing his demand upon the strict letter of the agreement, the company felt inclined to accede to his demand, and we consented on such demand to allow the boats which were at that time laying at Port Delaware for loading, to load, the company claiming at the same time — 10

[Interrupted by defendant's counsel, objecting to it as irrelevant.]

Plaintiff's Counsel. Yes, it is relevant to show that Mr. Stewart on demand, put an end to the lax construction of this agreement.

Quest. Now state what was said and done ?

Ans. And the company, claiming at the same time in so doing they claimed a right to determine as to certain other points mentioned in said agreement; the company contending that the spirit of the agreement might not allow his boats to load there, he claiming it in strict conformity to the letter of the agreement; we allowed him, and reserved the right to determine certain other points in that agreement. 20

Quest. Were any other points at that time discussed between you ?

Ans. I cannot recollect any others at that time.

Quest. During the year 1871, was any notice or any information given on the part of the company to Mr. Stewart, or persons engaged in managing his boats, as to what boats they might or might not use in their freight line ? 30

Ans. Some time during the early part of the year, when their agent at Jersey City took the boats belonging to the company to load with Stewart's freight, we notified him to discontinue such use of our boats, by letter and verbally.

Quest. Frequently ?

Ans. Yes; we would frequently take occasion to resort to messages.

Quest. What would be done that would lead to such messages ?

Ans. By taking the company's boats to load, without permission.

Quest. Who took the company's boats to load?

Ans. His agent in his employ.

Quest. And that was the practice which was forbidden?

Ans. Yes.

Quest. How early in the spring of 1871 was that notice given Messrs. Stewart or his agent, not to engage in that practice?

Ans. I don't know how early; it may have been along about
10 the middle of the season, or it may have been earlier; I can't recollect the date; I have my mind fixed upon a certain letter directed to him, but I can't fix the date of it.

Quest. A letter directed to him from your office on that subject?

Ans. Yes.

Re-cross examined—

Quest. Did you keep a copy of that letter?

Ans. Yes.

Quest. Did you write the letter?

20 *Ans.* No, sir.

Quest. Did you send it?

Ans. No, sir, I only refer to the letter.

Quest. How do you know they ever got it?

Ans. I am very positive that the letter was delivered to a man in our employ, to hand to that agent; I can't say whether he ever received it or not; I know he has acknowledged to me that he has received it; I can't say from my own knowledge whether that agent ever received that, except in so far that he has acknowledged the receipt of it to me.

30 *Quest.* Who?

Ans. Mr. Wheelan.

Quest. [BY COURT.] You have stated about sending bills; these bills were made out how often?

Ans. Once a week, and were sent every week on Thursday usually of each week.

Quest. [BY COURT.] Who received the money?

Ans. The secretary of the company; I was secretary during the year 1871.

Quest. [BY COURT.] These bills were sent to Stewart and Company, the same as No. 3, through the rest of the season?

Ans. Yes.

Quest. [BY COURT.] Then as to the payment of those bills—how were they made, or any part of them?

Ans. They were made by Joseph C. Stewart, generally by check, frequently on account of bills not covering any particular bill; he may have inclosed a check for five thousand dollars on account of bills rendered, not covering any particular bill.

Quest. You speak of Mr. Stewart's insisting on the strict letter of the agreement with regard to the right to load his boats at Port Delaware, I want to ask you whether this was the clause of the agreement to which you had reference: "And the said party of the first part do hereby engage to and with the said parties of the second part, that the said boats of the freight line shall have the same privileges of loading their freight at Port Delaware and Port Washington as are now afforded to and possessed by the New Jersey and Pennsylvania Freight Line?"

Ans. Yes; that is the article to which I refer.

20

Quest. Did Mr. Stewart insist upon having the benefit of that?

Ans. Yes; with reference to the New Jersey and Pennsylvania Freight Line; that line was restricted, and also it was granted certain privileges; that was a mutual concern.

Re-examined by plaintiff.

Quest. After you sent Bill No. 3, which differs from the former bills in limiting the drawback to the boats in the contract, was that change in your mode of making the bills and allowing the drawback, the subject of conversation between the officers of the company and Mr. Stewart, soon after?

Ans. Yes; Mr. Stewart objected to the style of making out the bill; I am quite positive he sent the bill back to the office for correction, based on not allowing him the full drawback.

Quest. Was that correction made?

Ans. No, sir; I think not, the bill was returned to him again.

Quest. During the course of the season was that subject of

30

not allowing the drawbacks the subject of discussion between the officers of the company and Stewart as the business progressed?

Ans. Yes, frequently.

Mr. Vanatta. I submit to the court whether without putting the agreement in evidence they can recover; where the plaintiff's case shows that there was a special agreement in writing between the parties they cannot rely upon a general assumpsit, a general liability, but they must put in the agreement. I think they ought to be non-suited if they do not put it in.

THE COURT. If it appeared clearly that this claim was based upon a written agreement I should non-suit, but that is the matter in controversy here as to whether it is within the agreement or not.

Defence.

Defendants offer in evidence a written agreement between The Morris Canal and Banking Company, party of the first part, and Cornelius Stewart and Joseph C. Stewart, parties of the second part.

Plaintiffs admit the execution of the agreement, and also admit that Mr. Rogers and Mr. Talcott, officers of the company who signed the agreement, are both dead.

Joseph C. Stewart, one of the defendants, sworn for defence testified as follows:

Direct examination.

Quest. You are one of the defendants in this case?

Ans. Yes.

Quest. Were you engaged in business in any way on the Morris Canal before making this agreement on January 28th, 1868?

Ans. I was, I had three boats running on the canal, selling and transporting flour, feed and grain.

Quest. For how long had you been in business on the canal?

Ans. I think about three years before this agreement.

Quest. Did you know anything of a company known as the New Jersey and Pennsylvania Freight Line ?

Ans. I knew there was such a line on the canal.

Quest. How long was that line in operation ?

Ans. I can't say.

Quest. Was it in use in the year 1867 ?

Ans. Yes, during the time I did business on the canal and prior to that, but how long before I can't answer.

Quest. What kind of business did that New Jersey and Pennsylvania Freight Line do ? 10

Ans. They were carriers of merchandise, lumber, coal and plaster.

Quest. Did they carry all kinds of merchandise, or were they confined to a certain business ; what was their business ?

[Plaintiff objects to it as immaterial.]

[Defence offer to prove that the New Jersey and Pennsylvania Freight Line immediately preceded the defendants in the transaction of a business similar to that carried on by the defendants on the Morris canal, and that the canal company had allowed that company drawbacks as extensively and broadly as the 20 defendants claim it in this case, and that the defendants knew of that at the time they made this contract.]

Plaintiffs object to it as immaterial and irrelevant ; and the court overrules the offer, to which ruling the defendants pray an exception and pray it may be sealed, and it is allowed and sealed accordingly.

[L. s.]

J. D. BEDLE,
Justice Supreme Court.

Quest. Were you present when the agreement in question was agreed upon ? 30

Ans. Yes.

Quest. I don't mean when the paper was signed, but when the agreement was made which was afterwards put in the paper ?

Ans. Yes ; I was present at at least one meeting previous when the terms of the agreement were agreed upon verbally before the contract was written or signed.

Quest. Where was it ?

Ans. At the Morris Canal Company's office, Jersey City.

Quest. Who were present?

Ans. President, William H. Talcott, and my father and myself; no one else that I remember.

Quest. Was the matter of the drawback discussed on that occasion between the parties?

Ans. Yes.

Quest. On that occasion was there anything said between Mr. Talcott on one side and you and your father on the other as to whether this drawback should apply only to thirty-two boats or
10 whether it should be applicable to all boats employed in the freight line?

[Plaintiff objects to the question.]

[Defendants propose to prove by that question that the conversation which then occurred shows that the canal company intended to allow and that the defendants expected to receive a drawback of fifty per cent. on all the merchandise, in respect to which, by the agreement, a drawback was to be allowed whether carried on the boats mentioned in the agreement or on other boats belonging to or employed by the defendants in that freight
20 business, with a view of showing that both parties put the same interpretation in advance that they did subsequently upon it.]

[Plaintiff objects to it, and also suggests that it is objectionable on the ground that it was a conversation previous to the agreement.]

THE COURT. That I consider disposed of by the rulings of the Supreme Court. I will overrule that question and allow defendants an exception. And the defendants pray that this exception may be sealed, and it is sealed accordingly.

[L. S.]

J. D. BEDLE,

Justice Supreme Court.

30

Quest. At the time you were negotiating that contract with Mr. Talcott, was there anything said as to whether your freight line was to be limited to thirty-two boats, or as to whether you were expected to put in a greater number of boats, if the business required it, and as to whether there was to be any limit as to the number of boats in the line, except the requirements of your business, and if any, what was said between the parties on that subject?

[Plaintiffs object to the question.]

THE COURT. I will hear defendant's counsel as to the difference between that and the first proposition, if he regards there is any.

Mr. Vanatta. I don't apprehend there is any difference in the principle; there may be a propriety in hearing that testimony, in order to learn whether the parties at that time contemplated the use of a definite number of boats, or whether they were seeking to perform a certain branch of business, be its extent what it may; to understand what they meant by *freight line*, what is meant by the scope of this contract; and we offer it also to reach the boats, which they say are not reached by the agreement and the amount to be charged, to the extent that it has been acted upon, and as it was mutually understood. 10

THE COURT. I shall rule in favor of the defendants on this question, under the suggestion of counsel, that it is intended to elicit what is proposed. After the answer is in and the case sufficiently developed on that point, I may change this ruling. It is only admitted on the idea that it was acted on afterwards.

[Plaintiffs except.]

20

Ans. There was a conversation; the understanding was that the drawback of fifty per cent. was to apply to all the business done by the freight line, whether in the thirty-two boats or whatever boats were necessary to do the business; that the line was to do this business and it was to employ a sufficient number of boats and have the benefit of the drawback.

Quest. How many boats did you employ in the line the first year?

Ans. Regularly do you mean?

Quest. Did you employ any besides thirty-two the first year? 30

Ans. I had thirty-eight boats regularly employed in the line; I suppose the number of boats would average fifty for the year 1868.

Quest. The boats beyond these thirty-two, where were they gotten?

Ans. I had some boats built, new ones, and I owned two or three boats myself when this contract was made; I had two or three boats built.

Quest. The additional boats, where did you get them?

Ans. They were owned by individuals; one man I employed him by the month with his boat, and put him in the line.

Quest. Were there any rented of the canal company?

Ans. Yes.

Quest. Outside of the thirty-two?

Ans. Yes.

Quest. How many?

Ans. I can't tell; they were chartered from time to time as they were needed.

10 *Quest.* Why did you employ so many boats that first season?

Ans. Because the business required them.

Quest. [Showing witness Bill No. 1, 1868.] Did you receive that bill?

Ans. Yes.

Quest. From where?

Ans. The Morris Canal office, Jersey City.

Quest. Were there tolls charged there in respect to boats other than the thirty-two?

Ans. Yes.

20 *Quest.* Name which were outside of the thirty-two in that first bill?

Ans. On April 11th, the boat Lizzie; April 6th, the boat, B. Smith; April 8th, the boat A. H. Fatsinger; April 8th, the boat W. C. Thompson; April 9th, the boat B. C. Osborn; April 6th, the boat William G. Lathrop; April 11th, the boat 1387.

Quest. Did you ever change the names or numbers of any of the boats in the line?

Ans. No, sir.

30 *Quest.* You never gave a name to any of those boats that were designated by numbers in the agreement?

Ans. No, sir; they always went by their number.

Quest. [BY COURT.] You substituted boats, didn't you?

Ans. Not the first year.

Quest. Were you present when this Bill No. 1 was made out?

Ans. No, sir.

Quest. Did you give any directions about making it out?

Ans. No, sir.

Quest. Where did you first see it?

Ans. It was sent to Washington, the general office of the 40 line, by mail.

Quest. You had given no directions about the making of it out?

Ans. No, sir.

Quest. Made no request in regard to it?

Ans. No, sir.

Quest. How did they come to allow the drawback on these boats outside of the thirty-two?

Ans. That was the understanding.

Quest. Understanding when?

Ans. When the contract was made. 10

[Last question and answer is objected to by plaintiffs. The Court allow them to stand; to which ruling plaintiffs except.]

Quest. You have personally examined every one of these bills in 1868?

Ans. Yes.

Quest. State whether or not the fifty per cent. drawback was withheld in any case during that season on any boat employed in that freight line?

Ans. I don't understand your question.

Quest. Did they that year withhold the fifty per cent. drawback on any boat you employed in your freight line? 20

Ans. No sir.

[Plaintiffs desire to enter an objection to the admission of the practice of allowing drawback in previous years, as being virtually overruled by the Supreme Court in refusing leave to defendants to put on the record by way of notice, proof of the facts which the testimony now seeks to establish; and also objects to all testimony going to show that the drawback was allowed on the accounts intervening between the adoption of this contract and the spring of 1871.] 30

THE COURT. So far as it comes within the ruling of the Supreme Court it would be incompetent; it would be incompetent to vary the terms of that written contract; I don't understand that is the ground it is insisted on; the object is to give character to some of these bills; it seems to me there is a plain distinction between an offer of a course of dealing to vary the terms of the written contract and an offer to show a course of dealing to give character to the transactions to show the extent that they have been mutually acted on; I admit it now

solely on the ground to give character to the dealings between these parties to the extent to which it was mutually acted on. [Plaintiffs except.]

Quest. Explain what there was about special arrangements after the spring of 1868?

Ans. I understood there was to be fifty per cent. on the whole business, and in some cases they gave us an additional drawback over the fifty cents, because where we would show to the company that business couldn't be carried on at that rate of
10 tolls they would give us a drawback in addition to the fifty per cent.

Quest. The special arrangements were arrangements for a drawback beyond fifty per cent.?

Ans. Yes.

Quest. Were there any other special arrangements after you had entered on the business except for an allowance beyond fifty per cent. in particular cases?

Ans. No, sir; I know of none.

Quest. Have you ever examined to see what the result of
20 your business would have been at the end of the first year if the company had charged you full rates of toll on all boats you used in your line outside of the 32?

Question objected to and overruled, to which ruling defendants pray an exception and that it may be sealed, and it is allowed and sealed.

Quest. Would you have continued the contract beyond the first year, if they had indicated that fifty per cent. drawback would not have been allowed on all the boats employed in the freight line, whether included in the thirty-two or not?

30 Question objected to and overruled, to which ruling defendants pray an exception, and that their exceptions may be sealed, and it is allowed and sealed accordingly.

[L. s.]

J. D. BEDLE,
Justice Supreme Court.

Quest. Why did you not, at the end of the first year, rescind this contract for the future, by giving the three months' notice of rescision provided for in the agreement?

Question objected to and overruled, to which ruling defend-

ants pray an exception, and that it may be sealed, and it is allowed and sealed accordingly.

[L. s.]

J. D. BEDLE,
Justice Supreme Court.

Quest. Would you have had a profit or a loss on your first year's business if the drawback had been allowed in that year, as the plaintiff proposes to allow it for the year 1871?

Question objected to and overruled, to which ruling defendants pray an exception, that it may be sealed, and it is allowed and sealed accordingly. 10

[L. s.]

J. D. BEDLE,
Justice Supreme Court.

Quest. Could the business be made to pay expenses with only such drawback allowed as the plaintiffs allow for the year 1871?

Question objected to and overruled, to which ruling defendants except and prayed that their exception might be sealed and allowed, and it is allowed and sealed accordingly.

[L. s.]

J. D. BEDLE,
Justice Supreme Court.

Quest. In the freighting business, was it the custom, or not, 20 prior to that, to make the arrangements for tolls for the season before commencing the business of the season.

[Question objected to on the ground that there is a contract between the parties regulating the tolls, and custom cannot control in such cases. The question is also objectionable in assuming a custom to exist.]

[Question overruled by the court.]

Quest. Is there any custom in that respect on the canal?

[Question objected to; it is not specific enough.]

Quest. Had you knowledge of other persons that dealt with 30 the canal company in that respect?

Ans. I had no knowledge other than my own business.

Quest. Did they publish a tariff of tolls?

Ans. Yes.

Quest. How long were they in the habit of doing that?

Ans. They published one each season; that is, a toll sheet each year.

Quest. What time was that toll sheet issued?

Ans. About the opening of navigation.

Quest. Were they in the habit of changing it during the course of the season?

Ans. No.

Quest. [BY COURT.] That is a mere schedule of rates of toll?

Ans. Yes.

Quest. These bills in 1868, which I showed you, do they comprise all the bills that were sent you in that year?

10 *Ans.* Yes.

Quest. This bundle of 1869, does this comprise all the bills for that year's business or not?

Ans. It does.

Quest. Were these bills made out in the form they are at your request or at your father's request?

Ans. No, sir; they were made out and sent from the canal office in their own way.

Quest. In any case, are you allowed less than fifty per cent. drawback in 1869?

20 *Ans.* I know of none.

Mr. McCarter. This comes within the objection already made and which has been overruled already.

THE COURT. Yes.

Quest. [Showing witness package of bills.] Are all the bills you received from them that year, 1870, in that package?

Ans. I believe they are; yes.

Quest. Were they made out at your instance or on any special application in the form they are?

Ans. No, sir.

30 *Quest.* Made in the same manner the others were for the preceding years?

Ans. Yes, sir.

Quest. In any of those bills are you allowed on any of the business of the freight line any less drawback than fifty per cent?

Ans. No, sir.

Quest. And allowed on all of it?

Ans. On all except those articles which are especially named in the contract, that are excluded from the privileges of the
40 contract; such as ice, and some of those excepted articles.

Quest. When did you first learn about a purpose to change the rate of drawback?

Ans. When I received bill No. 3, of 1871; I received it by mail, I think; it was sent to the New York office, whether by carrier or mail I don't know—pier 19, North river—and I returned it for correction as to the drawback; I asked for fifty per cent. drawback on all the boats of the business, and they returned it to me without correction.

Quest. You made payments during that season?

Ans. Yes. 10

Quest. Did you go to the canal office to see anything about the matter of which you complained, about the error in the drawback?

Ans. I did.

Quest. How soon?

Ans. I don't know; as soon as I could see Mr. Randolph; I don't know but I went more than once before I saw him.

Quest. What occurred in regard to it?

Ans. I asked him what it meant after our understanding in the spring; he said it was the orders from the Lehigh Valley 20 Railroad Company; he had no doubt if we saw Mr. Sayers it would be all right, and he would arrange for an interview so that father and I could meet Mr. Sayers; he said he had no control over it now; something of that kind.

Quest. What did you refer to about the spring?

Ans. I referred to a visit I made in the office before the opening of navigation in 1871; I saw Mr. Randolph.

Quest. What occurred at that interview?

Ans. I talked to him about special drawbacks.

Quest. How long before the opening of navigation in '71? 30

Ans. It may have been a month, may not have been over two weeks; it was at least two weeks before the opening of navigation.

Quest. What do you mean by saying you went to arrange with him about special drawbacks?

Ans. I told Randolph that the time had come for me to make contracts with large shippers and I wished to know if the leasing of this canal by the Lehigh Valley Railroad Company would make any difference in the matter of special drawbacks; he

said it wouldn't, that I should go on and make the contracts and the tolls should be the same as the year before.

Quest. Explain what you referred to when you said you come to see about special drawbacks?

Ans. It was drawbacks in addition to the fifty per cent.

Quest. [BY COURT]. That's what you meant?

Ans. Yes.

Quest. Do you know whether Mr. Randolph understood what you meant? (Overruled).

10 *Quest.* What was said?

Ans. He said I should have the same drawbacks I had the year before, that I should go on and make the contracts.

Quest. Did you or not go on and make the contracts?

Ans. I did.

Quest. Before navigation opened?

Ans. Yes.

Quest. Name the parties you contracted with?

Ans. Grant Locomotive Works, Paterson; Rogers Locomotive Works, Paterson; James Horner & Co., Pompton; Fuller,
20 Lord & Co., Boonton.

Quest. Were those contracts for the season?

Ans. For the season.

Quest. For small or large amounts of freight?

Ans. Large amounts.

Quest. Fuller, Lord & Co. were doing what business at Boonton?

Ans. Nail manufactory; this was partly for transportation of their nails and partly for supplies.

Quest. What was the business of Horner & Co.?

30 *Ans.* Steel manufacturers.

Quest. What time was it you received the third bill?

Ans. About the middle of the fourth week.

Quest. The fourth week was what time?

Ans. I can't remember what time; the bill is dated Saturday, April 22d, I received it I suppose on the Thursday of the next week; that is about the time I generally received it; that would be about the 27th I received it.

Quest. On what basis did you make your contracts with the Grant Locomotive Works; the Rogers; Horner; Fuller, Lord
40 & Co. for the year 1871?

[Question objected to and overruled on the ground that if defendants put themselves on that special contract it don't make any difference what his contracts were; and if defendants don't put themselves on a special contract it don't effect the case.]

Quest. After that conversation with Mr. Randolph, in the spring of 1871, did you or not accept and act on what he told you at that conversation, about the rates of toll?

[Question objected to.]

It is overruled by the court on the ground that it is too indefinite, and may lead to an answer that will be incompetent; to which ruling defendants pray an exception, and that their exception may be allowed and sealed, and it is allowed and sealed accordingly. 10

[L. s.]

J. D. BEDLE,
Justice Supreme Court.

Quest. Did you continue that business that year?

Ans. Yes.

Quest. Would you have made the arrangements with Fuller, Lord & Co., and these other parties, that you did make, if Mr. Randolph hadn't told you what he did tell you in the spring? 20

[Question objected to and overruled.]

Quest. How did you arrange as to paying what you did pay in the year 1871?

Ans. I paid the same as I had paid before, from time to time, by check on account generally.

Quest. Did you consent to pay their bills before the allowance of the drawbacks which you claimed?

Ans. No, sir; I didn't agree to anything of that kind.

Quest. What did you say about resisting that claim, to them, if anything? 30

Ans. I think Mr. Randolph told me, if we didn't pay he would sue; I told him the quicker he would sue the quicker he would know if I had to pay it; I didn't think I owed that money and I didn't want to pay it.

Quest. When was that?

Ans. At the close of navigation.

Quest. When you first called there he referred you to Mr. Sayers?

Ans. Yes.

Quest. And said he would bring Mr. Sayer down?

Ans. He said he would arrange so that father and I could have an interview with Sayer.

Quest. Did you get an interview with Sayer?

Ans. Not till after the close of navigation; never could meet him.

Quest. Who was Mr. Sayer?

Ans. General manager of the canal; he seemed to be over Mr. Randolph.

10 *Quest.* How was he connected with the Lehigh Valley Railroad?

Ans. He signs himself "president's assistant."

Quest. Who is superintendent of the Lehigh Valley Railroad?

Ans. Robert H. Sayer; this was William who we saw after the close of navigation, after this had all occurred at the Morris Canal Company's office in Jersey City.

Quest. Did you ever have an interview with Robert H. Sayer in relation to it?

Ans. No sir.

20 Cross-examined—

Quest. You speak of a conversation which preceded the execution of that contract between you and the company, and you say it was the understanding that the drawback was to apply to all the business done on the line, not exclusively in the 32 boats, but in all the boats that were employed to do the business; that was the understanding which you had before the contract was executed?

Ans. Yes sir.

30 *Quest.* Did you make, in your understanding, any different contract in regard to boats outside of the 32 from that which related to the 32?

Ans. I don't understand you.

Quest. Did you understand you had a different bargain with the canal company in respect to the boats in addition to the 32 from that which you had in regard to the 32 boats?

Ans. I understood the bargain was the same as to all the boats.

Quest. And you understood the written bargain covered both?

Ans. I never took any particular notice of that.

Quest. Did you understand when the written bargain was executed that it covered the whole transaction between you?

Ans. I don't know that I did.

Quest. Did you have any other contract with them outside of the written contract?

Ans. I had contracts with them as to special drawbacks.

Quest. [BY COURT.] Did you intend to put in writing what you had agreed?

Ans. I think that was the original intention.

Quest. And your subsequent arrangements were special contracts in addition to the fifty per cent.?

Ans. Yes.

Quest. And those special drawbacks had relation to what—what kinds of freight? how would they come to be made?

Ans. I would go to the office of the canal company and show the officers of the company that I could not carry freight without I had more drawback than fifty per cent.; I would show them what I could get it for; they would arrange to have me make the contracts for the freight, and they would make the tolls right, and give me a special rebate.

20

Quest. When you wanted to have any arrangement different from that in writing, you went to the company and made a special arrangement about it?

Ans. When I wanted to have a different arrangement from the way the business was carried on.

Quest. Was the business carried on, as you understood, according to the written agreement?

Ans. Fifty per cent. drawback.

Quest. And that was claimed by you because you had that written agreement for it?

30

Ans. That is the way I understood it.

Quest. [BY COURT.] Up to the time the company refused to allow you fifty per cent. drawback, up to that time, was it your opinion that you were receiving the drawback by virtue of the written agreement?

Ans. I never paid much attention to the contract myself; I supposed that the agreement was that the drawback was to apply to all the business except those few articles in the agreement.

Quest. What agreement did you suppose was to that effect?

Ans. The agreement with the Morris Canal Company.

Quest. [BY COURT.] The written agreement?

Ans. I suppose the written agreement.

Quest. [BY COURT.] Had you any idea at the time the company refused to allow the drawback that the written agreement didn't secure the fifty per cent. drawback?

Ans. I never thought of it, because it was never brought up.

Quest. When you went to the company, after the company
10 had changed the mode of making out the bills, didn't you then claim you were entitled to fifty per cent. drawback by virtue of the written agreement?

Ans. I claimed it by virtue of the way the business had been done.

Quest. Didn't you claim it by virtue of your written agreement?

Ans. I don't recollect that I made any such a claim.

Quest. Wasn't that just the dispute between you and the company, whether your agreement did cover boats over and
20 above the thirty-two?

Ans. I claimed I was entitled to fifty per cent. drawback, from the conversation I had had with Mr. Randolph before the opening of navigation in 1871.

Quest. Then you didn't go on the written agreement at all?

Ans. I don't know as I said anything about it.

Quest. Did you abrogate the written agreement in the spring of 1871?

Ans. There was nothing said about it.

Quest. You didn't agree to change its terms, then?

30 *Ans.* No, sir; there was nothing said about it.

Quest. You went to Mr. Randolph in 1871, you say, to see if the leasing of the canal to the Lehigh Valley Railroad Company would make any difference in the matter of special drawbacks—what drawbacks did you refer to?

Ans. There was lumber, bituminous coal, slate, I think, and ice.

Quest. Had you had special drawbacks on those articles in previous years?

Ans. Yes.

Quest. In addition to the fifty per cent. allowed by the agreement?

Ans. Yes.

Quest. And you went to see Mr. Randolph, to see whether the leasing of the canal would make any change in the arrangement you had for those special drawbacks?

Ans. I went to talk with him about the whole business.

Quest. But the point of your inquiry related to an increased drawback, over and above the fifty per cent?

Ans. Yes, that was the point of the conversation. 10

Quest. And those articles were bituminous coal, lumber, slate and ice?

Ans. Yes.

Quest. Did you say anything to him about the written contract?

Ans. I don't recollect that I did.

Quest. Did you make any change in the terms of that written contract?

Ans. I don't think there was.

Quest. Did you consider, after your conversation with Mr. Randolph, your written contract was in force?

Ans. Yes.

Quest. You didn't understand that your conversation with Mr. Randolph changed the terms of this written contract?

Ans. No, sir.

Quest. But it had reference to matters that the contract didn't regulate?

Ans. Yes, the contract partly regulated, but this was additional.

Quest. So far as the difference was concerned, the contract didn't regulate?

Ans. No, sir.

Quest. Where did that conversation take place?

Ans. In the office in Jersey City.

Quest. In whose presence?

Ans. I don't know that there was anybody else present.

Quest. In which room was it?

Ans. In the front room, second floor, next to Grand street.

Quest. Was there anybody else present?

Ans. I don't think there was anybody in the room. 40

Quest. Was any written memorandum given to you by Mr. Randolph, of the result of your conversation?

Ans. No, sir.

Quest. You took no written memorandum?

Ans. No, sir; I done just the same as I done years before; I took his word for it.

Quest. Did you that year make an arrangement for special drawback on the business done with the Grant Locomotive Works, or had you the previous year?

10 *Ans.* No, sir.

Quest. With the Rogers Locomotive Works?

Ans. No, sir.

Quest. With Horner & Co., the previous year?

Ans. Yes, sir.

Quest. What was that special arrangement as to drawbacks?

Ans. I think it was an additional drawback of 25 per cent. on bituminous coal; that was all the freight I carried for them.

Quest. Your business with them was bituminous coal?

Ans. Yes.

20 *Quest.* And you got in the year 1870, an additional drawback of 25 per cent. on the business done with James Horner & Co.?

Ans. Yes, sir; I think it was that.

Quest. What drawback had you had the year previous in the business done with Fuller, Lord & Co.?

Ans. Fifty per cent.

Quest. What was it?

Ans. I brought nails from their works to New York and took back scrap iron, soapstone and lumber.

30 *Quest.* Those articles were articles which were, according to your construction of the contract, included in the fifty per cent. clause?

Ans. Yes.

Quest. Then you didn't require any special arrangement with regard to them?

Ans. No, sir.

Quest. Then the only special drawback you had an arrangement for was the business of bituminous coal taken to Horner & Co.?

40 *Ans.* I don't remember; there may have been others?

Quest. You say William Sayer was the general manager of the canal?

Ans. So Mr. Randolph told me.

Quest. Did he tell you he was the general manager of the canal?

Ans. I don't know as he told me he was the general manager, he referred me to him; I don't remember what title he used; he give me to understand he was over him.

Quest. About what date was that that he talked to you about Mr. Sayer? 10

Ans. I think about the first of May, somewhere thereabouts, after I received the third bill.

Quest. Fix as near as you can the date of the conversation you had with Mr. Randolph about special drawbacks?

Ans. I can't fix it any nearer than two to four weeks before the canal opened. The canal opened about the first of April, in 1871.

Quest. Your father was in partnership with you?

Ans. He was.

Quest. Was your father a director of the canal company? 20

Ans. He was at one time.

Quest. When did he cease to be a director?

Ans. I think soon after the leasing of the canal by the Lehigh Valley Railroad Company.

Quest. How long before that had he been a director?

Ans. For a number of years.

Quest. Five years or more?

Ans. Yes, more than five years.

Quest. The conversation you had with Mr. Randolph had reference to the leasing of the canal? 30

Ans. No, sir.

Quest. The first conversation in the spring of '71?

Ans. My first conversation was with reference to tolls, I asked him if I could make arrangements for tolls for the year so I could make my contracts.

Quest. Didn't you say something about the Lehigh Valley Railroad Company?

Ans. I did.

Quest. Then at the time you had your conversation with him

you knew it was contemplated leasing the canal to the Lehigh Valley Railroad Company?

Ans. That is the way I understood it.

Re-direct examination—

Quest. Who attended to this freighting business?

Ans. I had charge of it.

Quest. Had your father any active participation in the business?

Ans. No sir, none whatever.

10 *Quest.* For whose benefit was it carried on?

Ans. Mine.

Quest. Had your father anything more to do with it than as surety for you as between you and him?

[Objected to as immaterial.]

Defendants want to show that Mr. Stewart, Sr., had no beneficiary interest in it, but was interested only as surety for his son, and gave credit and responsibility to him.

THE COURT. I will overrule it.

[Plaintiffs withdraw their objection.]

20 *Ans.* That was the understanding; the business was carried on in my own name, and these tolls were paid by checks in my own name.

Quest. [BY COURT.] Wasn't the business in the name of your father?

Ans. No sir; only so far as this contract with the company.

Quest. If there was any profit made who got it?

Ans. I was to have it; the contract was made for my benefit.

Quest. Had the contract any considerable profit in it?

30 Question objected to and overruled; to which ruling defendants pray an exception, and that it be sealed, and it is allowed and sealed accordingly.

[L. s.]

J. D. BEDLE,
Justice Supreme Court.

Quest. Was it in any way injurious to the business of the Morris Canal and Banking Company?

[Objected to and overruled.]

Exception prayed by defendants and allowed and sealed.

[L. s.]

J. D. BEDLE,
Justice Supreme Court.

Quest. Was it in any way advantageous to The Morris Canal and Banking Company ?

Objected to ; overruled ; exception prayed by defendants, and it is allowed and sealed.

[L. S.]

J. D. BEDLE,
Justice Supreme Court.

Mr. Vanatta. These questions are asked as to the *bona fides* or *mala fides*.

Quest. Something has been said about your agent in New York, Fatsinger ; did you have such an agent ? 10

Ans. Yes, sir.

Quest. For what ?

Ans. Shipping and receiving goods.

Quest. Did he have any direction or control over the boats ?

Ans. No more than over his station ; his business was the same as an agent at a railway station ; he received freights and discharged them, and collected freights.

Quest. Did he provide boats ?

Ans. No, sir ; he had nothing to do with the general management of the concern. 20

Quest. He merely put on and took off goods ?

Ans. Yes.

Quest. Wheelan, in Jersey City, what was his business ?

Ans. He was shipping agent ; he received and loaded the boats that were loaded in Jersey City—received freight and loaded boats in Jersey City.

Quest. Did he have the putting in or taking out of boats out of the line ?

Ans. No, sir.

Quest. Who had that power ? 30

Ans. I done that.

Quest. Anybody else ?

Ans. No, sir.

Quest. Did you ever depute it to anybody ?

Ans. No, sir.

Re-cross-examined—

Quest. How many of the 32 boats remained in use in the line at the spring of 1871—of the original 32 boats ?

Ans. I can't give you the exact number.

Quest. As near as you can tell?

Ans. I think there was 20 of them, perhaps 25.

Quest. What had become of the others?

Ans. Some of them had become unfit for the business; I sold three or four of them, and one or two was torn up.

Quest. Haven't you substituted others in their place?

Ans. Yes.

Quest. This boat Lizzie, was that one you bought?

10 *Ans.* No, sir; that was chartered; I don't remember whether for the season or the voyage; B. Smith was my own boat, Fatsinger was my own, Thompson was my own.

Quest. Were those boats you had on the canal the time the contract was made?

Ans. Two of them are.

Quest. How about Osborn?

Ans. That I bought after the contract was made.

Quest. W. S. Lathrop?

Ans. That I bought, also.

20 *Quest.* 1387?

Ans. That belonged to an individual; he was chartered, I think, for the trip; I sometimes chartered boats for a single trip.

Quest. Did you use the boats of the canal company?

Ans. Used some of them.

Quest. For a single trip?

Ans. Yes, sir.

Quest. Where was your freight loaded on your boats?

Ans. At Jersey City, going west.

30 *Quest.* Where did you live?

Ans. At Washington.

Quest. Whose business was it to find boats to take freight?

Ans. Wheelan's in 1871, for that purpose, to charter such boats as the New York agent could not furnish him out of the monthly boats.

Quest. Then when the New York agent could not provide boats out of the monthly boats, it was Wheelan's business to get such boats as he could to transport your freight?

Ans. Yes.

Quest. He was employed by you for that purpose?

Ans. Yes.

Quest. That was part of his duties?

Ans. Yes.

Quest. Prior to 1871, hadn't you obtained from the canal company, frequently, boats of theirs, for special voyages?

Ans. I had boats other than the thirty-two all the time through the three years.

Quest. I mean other boats of the canal company for special trips?

10

Ans. I had boats of the Morris Canal Company; boats of the Delaware and Lackawanna Company, and boats belonging to individuals; whenever I had more than the regular line boats, monthly boats, could carry, I chartered these boats from time to time as I could pick them up.

Quest. Whenever your regular supply of boats was not adequate, you got a boat wherever you could?

Ans. Yes.

Quest. And it was Wheelan's and Fatsinger's business, at this end of the route, to provide those boats?

20

Ans. Yes, sir.

Quest. During the early part of the season of 1871, just about the time the season commenced, and just after that, was there not some controversy between you and the officers of the company in regard to the future use of the company's boats?

Ans. I think there was a letter; I think Wheelan received a letter some time in 1871; I think it was in the fall.

Quest. Early in the season didn't you receive notice from the canal company not to use their boats?

Ans. I had no such notice in the month of April.

30

Quest. Didn't you in the month of May?

Ans. I think not.

Quest. Didn't you receive a letter from the company on the subject of using their boats?

Ans. I don't think I ever received any letter.

Quest. Didn't you see a letter that come to your place?

Ans. I think Mr. Wheelan showed me a letter sometime in the season, it was late in the season, I think, saying that the company had great demand for boats at Port Delaware to load

coal and they didn't want us to load any just now; I told Wheelan not to load any.

Quest. Prior to that when you wanted to take the company's boats to whom did you apply?

Ans. I didn't apply to anybody; the captains had the right to take back loads.

Quest. Then you were in the habit of appropriating to your business the boats of the canal company without application to the officers of the company?

10 *Ans.* I went to the captains of the boats.

Quest. Early in the season of 1871 didn't the company endeavor to break up that arrangement with you and prevent you from taking their boats without their consent?

Ans. They didn't tell me they was trying to break up anything; my understanding of it was they wanted the boats to load coal at Port Delaware.

Quest. In the early part of the season?

Ans. No, not in the early part of the season.

Adjourned for the day.

20 WEDNESDAY, Oct. 28th.

Re-cross examination continued by Mr. McCarter.

Quest. You said when you wanted boats belonging to the canal company to use in your business you applied to the captains for them, and you said the captains had authority to let you have them?

Ans. Yes.

Quest. Did you consider you had a right to use those boats without the consent of the company?

Ans. The way I understand it the captains had charge of the
30 boats and that they had the right.

Quest. From whom did you understand that?

Ans. It was custom.

Quest. Sometimes the captains did exercise the right?

Ans. It had been done for years.

Quest. Didn't you receive a letter dated 27th of May, 1871, from Mr. Randolph, the president of the company, in respect to the use of their boats?

Ans. I don't remember whether I did or not.

Quest. Haven't you got such a letter?

Ans. I have no knowledge of it.

Quest. Have you any letters here received from the canal company during the month of May or April, 1871?

Ans. No sir.

Re-examined by Mr. Vanatta—

Quest. You were asked whether you had the consent of the officers to use the boats counsel has been asking about; I want to ask you whether Mr. Talcott the president at any time said 10 anything to you or your father about getting boats; putting on boats to do the business?

Ans. He did; he said, as near as I can recollect, that we could have all the boats we wanted.

Quest. When did he say that?

Ans. At the commencement of the business.

Quest. State the conversation as fully as your memory can serve you?

Ans. That's as near as I can recollect; merely stated if there wasn't boats enough to do the business we could have their boats; 20 to get such boats as we wanted; he wanted us to do all the business that was offered.

Quest. Was that all he said?

Ans. He said the drawback should apply to all of them.

Quest. [*Mr. McCarter.*] When was this conversation?

Ans. 1868.

Quest. [*Mr. McCarter.*] Before or after the execution of the contract?

Ans. After the execution of the contract; had repeated conversations amounting to that. 30

THE COURT. If you can give the conversation give it?

Quest. State what was said by Mr. Talcott as fully as your memory will enable you; what you said, what he said, and what your father said?

THE COURT. When was it; first fix that?

Ans. This talk I spoke about was early in 1868.

Mr. McCarter. If they propose to introduce any new agreement with Mr. Talcott, it is a part of their principal case; it is

not responsive to what I have examined about, and is entirely different from the case presented by this witness yesterday, and I object to it.

Quest. These boats of the company, which you used occasionally, were the company paid for the use or hire of them?

Ans. Yes, I paid the company for the use of them; I took twenty per cent. out of the captain's freight and paid it to the company, and they received it monthly for the use of the boats.

Quest. Did the company keep their boats for hiring?

10 *Ans.* That is the per centage they charged the captains on all their business.

Quest. So you didn't use them without paying?

Ans. No, sir.

Quest. Hired them of them instead of somebody else?

Ans. Yes.

Quest. Had there ever been any objection made to that course of business?

20 *Ans.* Not till the latter part of 1871; I think, then, Mr. Randolph, either by letter or verbally, told me that they had a demand for their boats, and he didn't want me to load any more at Jersey City; I ordered the agent not to load any more; I asked him if there wasn't plenty of boats, he said there was, Scranton boats and other boats, and he could get along without using the Morris Canal Company's boats.

Examined by Mr. McCarter—

Quest. State where this conversation took place with Mr. Talcott?

Ans. In the office, at Jersey City.

Quest. How did he come to say that?

30 *Ans.* I think he started the conversation himself; he was urging me to get all the business I could.

Quest. Did you tell him you hadn't boats enough to do the business?

Ans. I didn't say anything about that; he volunteered that.

Quest. But you say he did there give you consent, that you might take the company's boats, and that the drawback should apply to them?

Ans. Yes.

Quest. [BY COURT.] I understood you yesterday to say that

you understood at the time this agreement was made, that it included all the boats you were to put on the line; that is, before the written contract was drawn up?

Ans. Yes, sir.

Quest. [BY COURT.] And this written contract was drawn up, and you supposed, as I understood you, that the agreement was in writing; you supposed it was put in there?

Ans. I didn't pay much attention to it.

Quest. [BY COURT.] I understood you yesterday that you supposed it was in? 10

Ans. I don't know that I said that; I must have misunderstood the question.

Quest. [BY COURT.] Did you suppose your agreement was put in writing?

Ans. I supposed it was, as far as the boats of the line, the regular boats of the line.

Quest. [BY COURT.] I understood you yesterday that you understood the regular line to be as many boats as you chose to put in it?

Ans. I did, in one sense.

Quest. [BY COURT.] Now, this conversation with Mr. Talcott, 20 are you sure that he said, in terms, that the drawback should apply to additional boats, or do you draw that without having it said?

Ans. He said it; I am positive of it.

Quest. [BY COURT.] Give his language?

Ans. He was urging upon me to get all the business I could for the line; says he, if you hav'nt got enough boats take our boats, get such boats as you can, and you shall have the fifty per cent. drawback.

Quest. [Mr. Vanatta.] That was after you signed the agree- 30 ment?

Ans. Yes.

Quest. [Mr. Vanatta.] Do you know who drew this agreement—who drafted it?

Ans. It was made in the Morris Canal Company's office at Jersey City; I think John Rogers dictated it.

Cornelius Stewart, for defence, sworn, testified as follows :

Direct examination.

Quest. Where do you live?

Ans. Changewater, New Jersey.

Quest. Were you a director of The Morris Canal and Banking Company?

Ans. Yes, for fifteen years, I think, continuously; I went out the time the Lehigh Valley Railroad Company leased the property, was a director and I resigned; they wanted some men to represent them from Philadelphia, so I told them I would go
10 out, and I resigned.

Quest. How long, about, was that lease to the Lehigh Valley under consideration by the company, and in negotiation, before it was actually signed?

Ans. It was talked of considerable time; I can't tell how long.

Quest. When was the annual meetings of the company, the stockholders meeting?

Ans. I think in March or April.

[Mr. Jacob F. Randolph says it was the first Monday in April, and it is so admitted by both sides. STENOGRAPHER.]

20 *Quest.* Was this lease talked of in the board and among the officers before the annual meeting?

Ans. Yes, sir.

Quest. About how long before that?

Ans. I can't tell, sometime before that; when the lease was fixed on, how it was to be, Mr. Talcott asked me to go out while the directors consulted whether they would give the lease or not; I went out.

Quest. You are speaking of the lease of the boats?

Ans. Yes.

30 *Quest.* I am speaking of the lease to the Lehigh Valley Company; how long, about, before the annual meeting was this lease to the Lehigh Valley Railroad Company talked about?

Ans. It was some considerable time, probably a month or six weeks, probably two months; it was considerable time before the annual meeting.

Quest. Who had done the business of the freight line that you took, who had done it before you made this agreement with the company.

Ans. The New Jersey and Pennsylvania Line.

Quest. Was that an outside company, or was it carried on by the company itself?

Ans. I think it was carried on by the company themselves.

Quest. Kept as a separate department of business?

Ans. I understood it was, but I don't know myself; I never looked at the books.

Quest. Where did you get your information?

Ans. From the office of the company; from the officers there at the office.

[Plaintiffs object to this testimony as irrelevant.] 10

Defendants' Counsel. The point made by the other side is, that the contract was vitiated by the relation that Mr. Stewart held to the company; that it was *per se* illegal by his being a director. If they abandon that point I will ask none of these questions. I propose to show that the business had been done by the company in a sort of separate department, under a particular name, and had been kept as a separate business, and there had been fifty per cent. drawbacks allowed in the accounts, and certain results had ensued, and it was supposed it would be more advantageous to the company if a similar arrangement 20 was made with an individual or individuals, for various reasons, and with that view this contract was entered into.

Plaintiff's Counsel. My position is, that the law prohibits such a contract—such an arrangement; it is a contract which the law forbids a party occupying that fiduciary relation to enter into with his corporation, and if the contract had been made with a stranger it is void as against public policy; and without reference as to whether it was beneficial or injurious to the company, or whether it was made in good faith or bad faith.

Defendant's Counsel. My insistent is, that the motive was 30 to make it beneficial to the company, that it was made in good faith to benefit the company.

THE COURT. I am prepared to rule on this point now; I will rule as a matter of law, that the contract is not *per se* void because it is made between a corporation and a director; that will give plaintiffs the benefit of that question, and I suppose that ruling will apply to the written contract, and also any contract that is made outside of it in this case; the ruling will cover the whole scope of the case; this ruling is as to the contract between the corporation and a director. 40

[Plaintiffs except.]

THE COURT. I would state here what has been assumed in this case, but it ought to be definite: that these bills have been made out according to the general rates of tolls charged by the company.

[It is understood by both sides.]

Quest. This agreement that was made between Cornelius Stewart & Son, were you present when that agreement was made; when that bargain was made?

10 *Ans.* I was.

Quest. Who else were present?

Ans. Mr. Talcott, John Rogers, that is when it was executed; it was talked about before the lease was made; Mr. Talcott spoke to the directors about, and when they determined on it, they asked me to leave the directors' room till they determined whether they would make the bargain or not; till after they fixed on the bargain.

Quest. You was not present at their deliberation?

20 *Ans.* Not when they made up their minds that they would make the lease; they asked me to withdraw before the lease was made out; I did withdraw.

Quest. You didn't vote on it?

Ans. No, I didn't vote on making the lease.

Quest. Did you have a conversation with Mr. Talcott about the business you were to do?

Ans. I did after the lease was made.

Quest. How long after the lease was made?

Ans. Right away; about the time, after the lease was signed, the same day.

30 *Quest.* Tell us what it was?

[Plaintiffs object to the question.]

Defendants propose to prove, that immediately after this agreement had been signed and consummated, that the president of the company said to Mr. Stewart, I want you to go and do all the business you can, and if fifty per cent. drawback won't enable you to do it, I will give you as much further drawback as will enable the business to be carried on.

[THE COURT] I will take the testimony on that. There is some testimony in the case from the other witness that I shall

dispose of when the defence is through, and I will take this testimony also.

[Plaintiffs except.]

Quest. You spoke of a conversation between you and Mr. Talcott, immediately after signing the agreement, the same day, now tell that as fully as you can?

Ans. After this contract was signed, I said to Mr. Talcott, supposing now we can get goods to carry that we can't carry for the fifty per cent. drawback; he said I should go on and get what I could on the canal, they wanted to carry the produce, 10 and if fifty per cent. drawback wouldn't pay me, we should not lose by it, he would make the thing right.

Quest. Was that the whole conversation at the time?

Ans. I don't recollect of anything more.

Quest. Did you have any conversation upon that subject with him at any time after that?

Ans. I don't know that I had; I asked him that distinctly, because I wanted to know; very often we can buy grain that there isn't hardly any margin to move it; he said he wanted me to get all I could, and I always did; there was two railroads 20 there snatching off the freight, and I always tried to do all I could for the benefit of the company.

Quest. Did you see the bills that the company made out from time to time for the tolls?

Ans. No, sir; I might, but I don't remember about that.

Quest. Who had charge of the business?

Ans. Joseph, my son, had.

Quest. When did you first hear any dispute or any question about your right to have the fifty per cent. drawback on all the business of your freight line—when was that first denied or dis- 30 puted?

Ans. Never, till the latter part of the third year I think there was something said about it.

Quest. [BY COURT.] What year was that?

Ans. 1870, I think; but that year's business was all settled up at the regular drawback of fifty per cent.

Quest. Was there any dispute that year about the regular drawback of fifty per cent.?

Ans. Mr. Randolph said something to me about it; I forget

what was said about it, but I think I told Mr. Randolph if he had any doubts about it he should mention to the board of directors at their meeting, and let them talk about it, and if there was anything wrong about it we would have a talk about it; but Mr. Randolph never said anything to the directors about it that I know of; not while I was present.

Quest. You never heard anything more about it?

Ans. No sir; Mr. Randolph never said anything to me about it afterwards.

10 *Quest.* When did you next hear anything about it?

Ans. The first year of the Lehigh Valley Railroad Company's lease.

Quest. Who did you hear from about it in 1871?

Ans. I heard it from Mr. Randolph, and I think he said I had better see Mr. Sayer; and I saw Mr. Sayer in April or May after; the last year of the lease.

Quest. Did you see him in 1871?

Ans. I forget about that; I know Mr. Randolph got Mr. Sayer to come to Jersey City, and I met him in the Jersey City
20 office; Mr. Sayer wrote to Mr. Randolph on the 18th of April, 1872, on that subject; it was in 1872 that I saw him.

Quest. You had no interview with him before that?

Ans. I think not.

Cross-examined—

Quest. Tell us what question was raised by Mr. Randolph in the fall of 1870 about this drawback?

Ans. He said something about some of the boats he said was not entitled to a drawback.

30 *Quest.* Didn't he claim according to the strict letter of the contract you were not entitled to a drawback, except upon boats leased of the line?

Ans. Likely that was it.

Quest. When was that?

Ans. That was the third years' business.

Quest. At the close of the third years' business?

Ans. Yes sir.

Quest. You told him that that question had better be raised before the board?

Ans. I told him if it wasn't right he should present it to the board and we would have it settled.

Quest. But you say it never was presented to the board?

Ans. Not to my knowledge.

Quest. How soon in the spring of 1871 did you discover that the company meant to insist upon that view, that is limiting the contract to the boats leased by it?

Ans. About the time the third bill was made out I think.

Quest. Hadn't there been a dispute prior to the reception of the third bill between you and your son and the officers of the company in respect to your right to load boats at Port Delaware? 10

Ans. I didn't understand there was any.

Quest. Didn't you know that Joseph had been to the officers of the company to insist upon his right to have those boats load and to get the company to consent that their boats might load?

Ans. Yes, he either went or wrote to them; he thought he was entitled to load coal by the contract.

Quest. He thought by the contract he was entitled to his view of the mode of loading coal? 20

Ans. Yes, sir.

Defendants offer in evidence the bills of 1868-69 and '70 which were shown to Wm. Burnett and proved by him.

[The agreement is already in and its execution admitted.]

Plaintiffs object to the admission of the bills of 1868-9 and '70 on the ground that they are irrelevant.

The court admit them as showing the course of dealing and as bearing upon part of the claim in this case.

[Plaintiffs except.]

Defence rest. 30

[THE COURT.] I will deal with the testimony of Joseph Stewart anterior to the written contract. That testimony was admitted by reason of the suggestion that there might be what might be regarded as a severable arrangement, separate from the contract that didn't go into the writing, that was not intended to go into the writing. Now, I am satisfied, that testimony having been taken, that it was the intention of the parties to put into the writing whatever occurred previous to it, and,

therefore, I am prepared to rule out his evidence previous to the written instrument, unless plaintiff's counsel desires to have it in. It may have a bearing on the credibility of the witness in regard to the subsequent conversation, and now plaintiff's counsel may take his option and have it in or not. I am prepared to rule it out as a distinct piece of testimony, and allow an exception to the other side.

[Plaintiff's counsel elects to have it ruled out.]

[THE COURT.] That testimony, then, gentlemen, of Joseph
10 Stewart, in regard to a conversation between him and Mr. Talcott, previous to the writing, is overruled, upon the ground that it is very evident to my mind, from the testimony of Mr. Stewart, that the parties intended to put in the writing whatever occurred anterior to the writing. The ruling don't effect any conversation subsequent to that; and, therefore, in this case you will entirely disregard Joseph Stewart's statement, founded on that conversation. Defendants except, and pray that their exception may be allowed and sealed, and it is allowed and sealed.

20 [L. s.]

J. D. BEDLE,
Justice Supreme Court.

Jacob F. Randolph, re-called by plaintiffs.

Quest. When did you become president of the canal company?

Ans. In the spring of 1869; I was elected at the annual meeting in April, 1869; I was acting president from December 8th, 1868; the president Wm. H. Talcott, having died December 8th, 1868; prior to that I was vice president and assistant superintendent; Mr. Talcott was president and superintendent,
30 I was vice president and assistant superintendent.

Quest. During the summer season of 1868, where was Mr. Talcott?

Ans. He was quite sick and was boarding in Morristown a large portion of the summer, and when he was't there he was elsewhere; and for a season before his death was confined to his house; he was very little in the office during 1868.

Quest. Who had the principal superintendence and management of the canal during the year 1868?

Ans. I had; that had devolved upon me as vice president.

Quest. From the spring of 1869 you have continued to be president of the canal and superintendent?

Ans. Yes.

Quest. And are still?

Ans. Yes.

Quest. You retained those offices and those duties after the lease to the Lehigh Valley Railroad Company?

Ans. Yes.

Quest. Did any dispute or controversy arise between Joseph Stewart and you, as representative of the company in the 10 spring of 1871, with reference to the right to load boats under that lease or contract?

Ans. There did.

[Defendants object to the last question, and answer on the ground that it is irrelevant and immaterial; and also because it is not rebutting.]

THE COURT. I understand the effect of Mr. Stewart's testimony is, that in the spring there was an acquiescence on the part of the company that the thing should be continued as before as to boats and as to drawbacks. It may stand. 20

Defendants except and pray an allowance and sealing of their exception, which are granted.

[L. s.]

J. D. BEDLE,
Justice Supreme Court.

Quest. When was that?

Ans. In April; it was prior to the 17th of April; Mr. Stewart wished to load coal at Port Delaware; Joseph C. Stewart called at my office on the 17th of April, with reference to this matter; we declined loading his boats at Port Delaware with coal; he came there and insisted that they should be loaded, 30 because the written agreement (which has been offered in evidence) gave him the right to load, and I made a memorandum of that interview at the time which, if I may be allowed to read, will perhaps be as correct as anything; I can give my recollection; Mr. Stewart insisted upon the loading; I told him we didn't want to load the boats; he said we must do it, because we were obligated to do it by the contract, and I admitted we were, finally, but said I, Mr. Stewart, if you insist upon that, upon a strict adherence to the contract, so will we in all its parts, and

I hereby give you notice from this time we will adhere to the strict letter of the contract ; I said to him, that implies that you are not to use any boats out of the boats given you in the contract for any of your loading, and I forbid your loading any other boats than those under the contract and named in the contract ; that was April 17th ; I made a memorandum at the time, and on the 18th of April I wrote him in effect as much on the same subject.

Quest. Have you a press copy of that letter ?

10 *Ans.* I have.

Mr. McCarter. Will you permit us to read that press copy of the letter ?

Mr. Vanatta. You can read it to show you wrote such a letter, as to whether we received it, that will be another part of the case.

[Witness produces press copy of letter dated April 18th, 1871, and reads it.]

[That letter was sent as directed, to Washington, New Jersey, and directed as it has been read.]

20 *Quest.* After that letter was written, how was the next bill made out ?

Ans. Charging full tolls on other boats than those belonging to the freight line.

Quest. What interviews or conversations, if any, between you and the Messrs. Stewart followed the writing of that letter or the sending of that bill ?

Ans. Joseph C. Stewart called upon me, we had a conversation in regard to it ; he insisted that it was wrong ; I insisted it was right ; he intimated that I was doing it from personal
30 motives ; that I wanted to get the freight line myself out of his hands.

Quest. On what did he base his claim that he was entitled to his view of the drawback ; state what he said ?

Ans. That he had been allowed formerly to take boats that he wanted ; I told him he had been allowed from time to time to use boats because we had the boats, and we were very glad to have them used, but now the thing was changing ; we were going into other hands ; we were really gone into other hands, and we would have more loading, and we needed all our boats

ourself; that if he went on as he had he would use a great many more boats than he had before of ours, because his boats were wearing out, and a good many of them were really out of service, and his business was increasing, and we would require a great many boats of ours; and the Lehigh Valley Company would need all the boats that we had for coal loading; that we could no longer allow him to use any boats belonging to the company or controlled by them in his freight line; he attributed my decision to personal motives; that I wanted the freight line myself; I said to him, I didn't want the freight line, but if he chose to terminate the lease we would terminate the lease in the name of the company as if the five months had expired; we would call it closed then upon the same conditions and term as therein stated, if he wished. 10

Quest. What did he say to that?

Ans. He objected to it.

Quest. Have you stated the whole of that conversation, as you recollect it?

Ans. About the whole of it, as I remember it, I received a letter a few days after from him, appointing an interview; I have that letter; (witness produces letter;) I believe it to be in the handwriting of Joseph C. Stewart; I am acquainted with his handwriting; it is dated New York, April 28th, 1871, to me, as president of the Morris Canal and Banking Company; (Witness reads letter. 20

Quest. Was there a meeting in pursuance of that letter?

Ans. I can't tell; we had interviews, however; I was away from the office when it was received, and Mr. Burnett, the secretary, answered it.

Quest. You have had interviews subsequently? 30

Ans. Yes, a good many.

Quest. In which this matter was discussed?

Ans. Yes, sir.

Quest. In what part of the season were those interviews?

Ans. After this date till the close of the season.

Quest. In the conversations which you had after the 18th of April was anything said or any allusion made between you to the writing or the reception of your letter dated April 18th?

Ans. Yes, Mr. Stewart acknowledged to me the reception of that letter; it was the subject matter of our controversy. 40

Quest. You heard the testimony of Joseph C. Stewart in regard to a conversation had with you, the date of which was fixed from two weeks to a month prior to the commencement of the season in 1871, about special drawbacks?

Ans. Yes.

Quest. State what arrangement, if any, you made in the spring of 1871, prior to the commencement of the season, or prior to the writing of the letter, or the interview of April 17th with Mr. Stewart about special drawbacks or drawbacks
10 of any kind?

Ans. I made no special arrangement with him whatever; we were expecting to go over into the hands of the Lehigh Valley Company, and for that reason I made no special contracts or engagements with anyone or anybody of any kind whatever.

Quest. Mr. Stewart testified that some two weeks or a month prior to the commencement of the business in the spring of 1871 he came to you and asked you if the leasing of the canal to the Lehigh Valley Company would make any difference in regard to your previous arrangement as to special drawbacks,
20 and you replied to him that it would not, that the special drawbacks and all drawbacks would remain for the ensuing year as they had before, and that he might act with that understanding; did you have any such conversation with him?

Ans. Mr. Stewart called there, and the question was spoken of; he called there, it might have been the middle of March; I said to him, there was an act passed empowering us to lease, and I suppose we would lease or sell our canal to some party, I didn't know who; that if we leased I didn't know whether my management would continue, of the business of the company;
30 and the clerks of the company supposed, when we leased, our agreements as such, would terminate, and I fully expected I said to him that when we lease I would go out of office; that was my mind, that I had nothing else in my mind but that my engagement as officer would cease, and I was careful; I said to him I had no right to commit the company, because I didn't know what the management of the company would be.

Quest. Did you, at any time before the commencement of navigation, make any agreement with Mr. Stewart as to drawbacks for the ensuing year, in the spring of 1871?

Ans. I didn't; nor with any one else.

Quest. During the early part of the season of 1871, what other difficulties or disagreements arose between you, in regard to the matter of your boats taken for Stewart's business?

Ans. They were taken without our knowledge or consent, and it seriously discommoded our business; we seemed to have lost control of our boats; he was in the office perhaps twice a week, and we continually objected to his doing it, and his man down on the dock—Wheelan; we informed him that he must not take the boats, and finally a boat was taken and injured, and I 10 immediately wrote to Wheelan and Fatsinger; that was in May, I think; (witness refers to press copy book of letters, and there being no objections, reads letter to Joseph C. Stewart, general agent, Washington, N. J., dated May 27th, 1871, and also a letter dated Aug. 19th, 1871, and says,) "that letter was sent to Wheelan down to the dock, and I think a copy of it was also sent to the New York office."

Cross-examined—

Quest. Where was Mr. Talcott in the spring and summer of 1868? 20

Ans. His family was living in Jersey City; he was there off and on; he was in very feeble health, and I think he spent some time up the Northern road somewheres; and afterward I think went to Morristown; and he was in the office very little during the spring and summer of 1868.

Quest. His being up the Northern road was about July, was't it?

Ans. I could'nt say.

Quest. He came down to the Morris Canal office, almost every day, did'nt he? 30

Ans. No, sir.

Quest. How long was he at Morristown?

Ans. I can't say; I think he was in Morristown at the time the camp meeting was held, whatever time that was.

Quest. But he went up and down on the cars nearly every day, did'nt he, while he was at Morristown?

Ans. If his health permitted, and he wished to come down he did; he was considered an invalid, and we really didn't put much dependence upon his being in the office.

Quest. Mr. Talcott gave very great attention to all the details of his office, didn't he?

Ans. He filled his position satisfactory to the company.

Quest. Wasn't he rather remarkable for looking after the details of his office in person?

Ans. I don't know that he was.

Quest. Were you all the time at the office in 1868, or out on the line part of the time?

Ans. I was at times on the line; I was most of the time in
10 the office.

Quest. When did Stewarts stop their business under the freight line—when did it cease?

Ans. In the fall of 1872, I believe.

Quest. Who has been doing their business since?

Ans. They have no successor.

Quest. How is that kind of business done since that they were doing?

Ans. A great deal of it is not done at all.

Quest. So much of it as is done, who is it done by?

20 *Ans.* The Lehigh Valley Railroad Company.

Quest. What do you mean by saying a great deal of it is not done at all?

Ans. We have no New York office for the reception of merchandise.

Quest. And the business does not come on the canal then?

Ans. A portion of it does and a portion does not.

Quest. Why didn't you continue an office in New York for the transaction of business?

[Objected to and overruled.]

30 *Quest.* At that interview between you and Joseph C. Stewart in March, 1871, didn't Mr. Stewart ask you whether it would make any difference in their business if the lease to the Lehigh Valley Company was made?

Ans. It was not known to Mr. Stewart or anyone else that the Lehigh Valley Company was to take the canal at that time; I could not have said it for that reason.

Quest. I ask you whether Joseph C. Stewart did not ask you whether, if the canal was leased to the Lehigh Valley Company, it would make any difference in their business, or something to
40 that effect, at that interview?

Ans. No, sir ; he did not.

Quest. Did he at any other interview in the month of March, 1871 ?

Ans. I don't think he did.

Quest. How did the conversation about leasing the canal commence between you and him ?

Ans. It was supposed we would lease the canal, but it was not known we would lease it to the Lehigh Valley Company ; a great many supposed we would lease it to the Delaware, Lackawanna and Western. 10

Quest. Did Mr. Stewart ask you whether, in the event of your leasing the canal, it would make any difference in their business carried on on the canal ?

Ans. In effect he asked that question.

Quest. What answer did you make to him ?

Ans. That I could not tell ; if we leased the company I would probably be out of power.

Quest. Did you not tell him that you had already made an arrangement to remain there and that the administration would be the same as it had been before, or words to that effect ? 20

Ans. No, sir, I did not, I never did make an arrangement, I tendered my resignation on the giving of the lease.

Quest. Didn't you tell him you expected to remain there in your position after the making of the lease ?

Ans. No, sir.

Quest. Were you in favor of or opposed to the lease at the time it was in negotiation ?

Ans. I was in favor of the lease upon a proper basis ; if we could make a proper arrangement.

Quest. What did you say to Mr. Stewart about your expecting to remain there in your position if the lease was made ? 30

Ans. I said to him I don't know whether I could remain there or not, for I didn't know what they would say to it, what they would talk about, whoever they were ; at the first conversation the Lehigh Valley wasn't mentioned at all, it was not known, it was not known to the directors except one, but all this while it was supposed we would lease to some one ; I said to him I didn't know whether I would remain in office, and the day of giving the lease I tendered my resignation to the Lehigh

Valley Company and it was then and not till then I learned I was to remain.

Quest. Didn't you have a conversation with Joseph C. Stewart in Trenton about the leasing of the canal prior to this conversation in the canal office?

Ans. I don't know, I had conversations with a great many about the bill; I have no remembrance of any special conversation with Mr. Stewart in Trenton about it.

Quest. Don't you recollect of meeting Joseph C. Stewart at
10 Trenton, in the American Hotel, in room of The Morris Canal and Banking Company, while you were there looking after the passage of your bill and having a conversation with him about the leasing of the canal.

Ans. The Morris Canal and Banking Company had no room at the American Hotel.

Quest. Well, the room you were in at the hotel?

Ans. I have no remembrance of having any special conversation with Mr. Stewart in reference to his business on the canal.

Quest. Do you recollect any conversation with him at all in
20 Trenton about his business?

Ans. No, sir.

Quest. Didn't that conversation which you have located in the canal office, in reality occur in the American House, at Trenton?

Ans. No, sir, it did not.

Quest. And when he talked with you in the canal office, wasn't it then known that the parties likely to lease were the Lehigh Valley Company?

Ans. No, sir, it was not known till after that talk.

Quest. When did you first suppose you would continue president under the Lehigh Valley Company?

Ans. At the time of the execution of the lease; I went to Philadelphia to pass the lease; I then tendered my resignation.

Quest. But you didn't expect it to be accepted?

Ans. I did; I had partially made other arrangements for business; and it was done in this way: "Mr. Randolph we would like to have you continue till we appoint your successor;" I made no permanent arrangement with them at that time; that's what Judge Packer said to me; I came home, not knowing

but my successor would be appointed in a week, or two weeks, or a month.

Quest. Tell us when negotiations commenced with the Lehigh Valley Railroad Company for the leasing of the canal?

Ans. On the 20th of March, 1871.

Quest. Had it not been talked of before that?

Ans. No, sir.

Quest. With nobody?

Ans. Nobody in the Morris Canal Company.

Quest. What was done on the 20th of March? 10

Ans. A proposition was received from them.

Quest. In writing?

Ans. No, sir.

Quest. And the subject hadn't been submitted to the Morris Canal officers, or any individual connected with them, before that?

Ans. No, sir; I didn't know it myself.

Quest. You say there was one director knew about it, who was he?

Ans. He knew about it; he lived in Philadelphia; Lewis 20 Cooper; he was also a stockholder of the Lehigh Valley Company, and without any authority from the Morris Canal Company, he took it upon himself as an individual to confer with the Lehigh Valley Company; I don't think that an officer or a director of the company knew that he had done so; he stated that he alone knew of this matter, and he made the proposition verbally, and he would not give the name of the company till it was stated whether, if it was a first-class company, the Morris Canal Company would consent to the lease, and he required that admission upon the part of the company before he would name 30 the company who made the offer.

Mr. McCarter. Those letters referred to by witness are offered in evidence.

Plaintiffs rest.

Joseph Stewart re-called by defence.

Quest. You spoke about a conversation with Mr. Randolph in the canal office, before navigation commenced, in 1871; if anything was said, at that time, about Mr. Randolph's continu-

ing there after a lease was made, state what was said upon that subject?

[Objected to, because this witness has given his version of that conversation.]

[THE COURT.] It may be answered by confining his answer distinctly to the question.

Quest. In the conversation which you had with Mr. Randolph in the canal office, before the opening of navigation, in 1871, state what Mr. Randolph said, if he said any thing as to
10 his expectation of remaining in his position of president in the event of the leasing of the canal to the Lehigh Valley Railroad Company?

Ans. He told me he had made arrangements to stay there.

Quest. Was that before or after the opening of navigation?

Ans. Before.

Quest. Had you had any conversation with him previously, about the leasing of the canal?

Ans. I met him in Trenton, I think it was sometime in the month of February, it was sometime before this meeting in
20 Jersey City.

Quest. Did you have any conversation with him in Trenton?

Ans. Only in a general way, about this bill they were trying to pass, to get power to lease the canal.

Mr. Vanatta. I forgot to ask him, and I meant to when he was on the stand before, that is, whether they had been in the habit of allowing drawbacks to freighters of merchandise on the canal, whether the company adhered to the published tariff of tolls, or whether it was a customary thing on the canal to make drawbacks with persons who were freighting on the canal?

30 THE COURT. That may open a very wide issue in this case.

Mr. Vanatta. Our understanding is, that they published a general rate or schedule of tolls, and the uniform course of business was to make deviations from that, and it was a usual thing with a great many persons on the canal, all large customers on the canal, as is really the custom with nearly all transportation companies, to make a rate which means a different arrangement from the general tariff.

[Plaintiffs object to it.]

[The court admits it.]

[Plaintiff excepts.]

Quest. How long have you been acquainted with business done on the canal?

Ans. I done business on the canal about eight years.

Quest. In what way?

Quest. Transporting flour and feed.

Quest. Did you or not become acquainted with what the habit of the company was in dealing with its freighters that were engaged in business similar to yours?

Ans. I supposed I did. 10

Quest. How did you get the information?

Ans. From my predecessors; bills they showed me; Taylor & Thompson, who had the flour and feed business before I did, they showed me what bills they paid and what tolls they paid.

Quest. Did you have drawbacks on your business anterior to the business in question?

Ans. Yes.

Quest. Was there other people besides Taylor & Thompson did business on the canal who had drawbacks?

Ans. I knew nothing about drawbacks in that line other than Thompson & Taylor. 20

Quest. You didn't know whether any drawbacks were allowed to such places as the Boonton Works, or such places as that?

Ans. I have no knowledge of my own; I cannot say positively that the Boonton Iron Works had drawbacks.

Quest. I ask you whether your predecessors, Taylor & Thompson, or whether you had, anterior to these, drawbacks on the business you did?

Mr. McCarter. So far as his own knowledge is concerned in regard to his own drawbacks there is no objection; I do object to his statement about Taylor & Thompson. 30

Ans. I had a drawback.

Quest. What drawback in your business prior to this contract?

Ans. Fifty per cent.

Quest. Were you ever told by Mr. Talcott or Mr. Randolph, while one or the other was president, as to what drawbacks the company allowed; were you ever told by them what their custom as to drawbacks was?

[Objected to.]

Quest. Have you ever had any conversation with them about their allowance of drawbacks; that is, with Mr. Talcott or Mr. Randolph, and especially Mr. Talcott when he was at the canal office; whether the president ever made any statement as to what the habit or usage of the company was in reference to drawbacks with its customers?

Ans. I don't recollect having any such conversation.

Jacob F. Randolph called for defence.

Quest. In 1868 and '7, along that period, who were the large shippers, persons doing a large freight business on the canal who were charged tolls?

Ans. I don't know as I could state any particularly large shippers; we shipped for Pardee a good deal, and for different miners, coal shippers; that however was only coal which had a rate of its own.

Quest. I mean shippers of merchandise, such as was provided for in this contract?

Ans. There were no large large shippers.

Quest. Was it customary to allow drawbacks to customers shipping goods on the canal; were you in the habit of making special rates?

Ans. We at times made special rates.

Quest. In the business as carried on, the freight business, immediately before Stewart's agreement was made, was there not fifty per cent. drawback allowed on that business?

Ans. The Pennsylvania and New Jersey Freight Line was not an individual, it was only the name of an account.

Quest. My question is whether in making that account there was not fifty per cent. drawback carried in to the account?

30 *Ans.* Not at all times.

Quest. Generally was there not?

Ans. That I could not say; in the season of 1867 I had no special access to the items of account; it was not my department; I came with the company in the fall of 1867.

Quest. That company did all the business, that is all the transportation of the kind of merchandise that is covered by this agreement?

Ans. I come there just as the season was closing, and I never made inquiry enough to investigate.

Quest. You haven't examined the account and don't know how the account was kept?

Ans. No, sir.

Cross-examined—

Quest. How were the rates of toll for the business of the canal adopted?

Ans. By the board, at their annual meeting, in April.

Quest. The board then adopted the rates of tolls for the ensuing year? 10

Ans. Yes; never longer than for one year; all agreements continued but for one year, except they were in writing, and all departures from customary tolls was a matter of special arrangement.

Quest. Were those rates of tolls which were adopted by the board printed and published?

Ans. Printed and published, and distributed along the line of the canal, and put up at the various offices, and given, upon application, to any one who wanted to ship.

Re-direct examination—

20

Quest. Who made the special arrangements, when they were made?

Ans. They were made by the officers of the company, generally by the president; they were never made except by his approval.

Quest. [BY COURT.] You say the rates of tolls were adopted by the board at the annual meeting in April, for the ensuing year, and never longer than for a year, and if longer than a year they were in writing; explain what you mean by that? 30

Ans. All special agreements which might be made with reference to a reduction of tolls were but for a year, for the season, for that current season; where they were made for longer than one year they were in writing, and submitted to the board.

Case closed.

Defendant's counsel requests the court to charge the following propositions :

First. That the written agreement, by its terms, entitles the defendants to a drawback of fifty per cent. on the amount of the tolls charged at the general tariff rates in respect of all the merchandise transported by the defendants, in respect of which by the agreement, drawback was to be allowed without reference to what boats the merchandise was transported in.

Second. If from the bills made out by the Morris Canal and Banking Company and the course of business between the parties, the jury believe that the contracting parties intended when the written agreement was made that the drawback should be allowed as to all the merchandise of the kinds for any of which drawback was to be allowed without reference to the boats it was carried on, then the plaintiffs are not entitled to recover, and the verdict should be for the defendants.

Third. If the written agreement as to drawback applies only to the goods carried on the thirty-two boats or those substituted for them, yet if when the written contract was made, or shortly afterwards, the Morris Canal and Banking Company promised the defendants that they should be allowed at least fifty per cent. drawback on all the merchandise of the kinds for carrying which drawback was to be allowed without reference to what boats the transportation was done in, and the defendants acted upon that promise, and both parties continued to act on that promise for more than one year without objection or notice of change, the Morris Canal and Banking Company, or its assignee, cannot after that, without the consent of the defendants, depart from or change that promise, and the plaintiffs cannot recover in this action.

Fourth. If the jury believe from the evidence in the cause that the plaintiff or its assignor, prior to the commencement of navigation in the year 1871, induced the defendants to believe that they should in the year 1871 have the same allowance of drawbacks as had been allowed to them in the year 1870, and

the defendants made their arrangements for and entered upon the business of the season upon that understanding, the plaintiffs could not after that, without the consent of the defendants, change the extent of the drawback during the year 1871, but during that year the defendants are entitled to drawback as it was allowed in 1870.

Fifth. It being proved beyond doubt, and it being undisputed, that for over three years immediately next after the making of the written contract in question the plaintiffs' assignor in all its bills made out to the defendants for tolls under this contract allowed to the defendants a drawback of fifty per cent. on all tolls for business done by them in the freight line in the manner claimed by the defendants for the year 1871, the intent and meaning of the written contract was thereby fixed and settled as allowing the drawback on the tolls on all merchandise transported by the defendants without reference to what boats it was carried in, and the plaintiff is estopped from denying or disputing that interpretation of the contract. 10

Sixth. The plaintiff having adopted the contract existing between the Morris Canal and Banking Company and the defendants, and also the business done under that contract in 1871, prior to the 22d of April in that year, are bound by that contract as fully, and in the same manner as was the Morris Canal and Banking Company. 20

Seventh. That the plaintiff being a foreign corporation, not authorized by the Legislature of New Jersey to hold, use, or exercise the franchises of The Morris Canal and Banking Company, has no lawful right by the lease or otherwise, to demand, sue for, or collect tolls for business done on that canal, and for that reason cannot recover in this action. 30

Charge.

Gentlemen of the Jury: The court will put this case in such shape as that you can determine what I regard as the only question of fact really involved in it; that is, the only question of fact to which there is any substantial controversy. The suit is brought by The Lehigh Valley Railroad Company against the defendants, Stewart and Company, who were freighters on the Morris Canal, to recover tolls from April 22d—I refer to the bill—from April 22d, 1871, through that season up to and
 10 including December 2d, 1871. The claim is for \$9,634.82, with interest from April 3d, 1872, to November 3d, 1874; and it is made up on the idea of full tolls according to the established rates on the canal. Stewart and Company were freighters over this canal, and this claim is made up on the basis of the established tolls, the regular rates that would be charged to everybody going over the canal or using it for freighting. There is no controversy about that; it is admitted that the bills are made up on that basis. The controversy is really as to whether the defendants should have a drawback of fifty per cent. on the
 20 claim, in other words, whether they should have a deduction of fifty per cent. from the established rates. If in this case it is found that they are entitled to that, that absorbs the whole of the claim, for this balance is only the fifty per cent., the rest of the claim has been paid, in other words, there has been money enough paid to give the canal company, or The Lehigh Valley Railroad Company, the lessees, the whole amount due them, on the basis of half tolls, fifty per cent.; but the defendants claim that they are entitled on the schedules of tolls, or full rates, to
 30 a drawback of fifty per cent. and that this claim is that drawback. You see, therefore, if you conclude that they are entitled to the fifty per cent. your verdict would necessarily be for them—for the bill has nothing in it but the fifty per cent. Now, then, the claim being based on the regular rates of tolls charged to every person, or at least on rates made up for people generally to be charged, the bills being made up upon that basis, the plaintiffs are entitled to recover, unless the defendants show you that they are entitled to the drawback claimed in this case.

You see that is a plain principle. If they are charged the regular rates that are fixed for general freighters on the canal, the company is entitled to recover that amount of them, unless they show that they have got some contract with the company, or their relations are such with it, as that they are entitled to have their freightage at the fifty per cent. deduction. That, then, gentlemen of the jury, brings us to the defence—and the whole controversy is there. Now, this defence, speaking generally, is two-fold. Understand first what it is: it is to a drawback of fifty per cent., or, in other words, it is for one-half of the rates established. Now, it is of two-fold; first on a written contract, which, it is said, was entered into between The Morris Canal Company and Stewart and Company, and failing that, it is claimed that either by special verbal arrangement with the company, or by a course of dealing between Stewart and Company and the company, that they are entitled to the fifty per cent. deduction. Speaking generally, the defence assumes those two shapes. Now, first as to the defence under a written contract. Stewart and Company, as you will see by looking at the paper, on the 29th of January, 1868, entered into a written contract with The Morris Canal Company, for the establishment of a freight line on the canal, to be conducted by Stewart and Company. This is a contract for the establishment by Stewart and Company, of a freight line on the canal for the transportation of merchandise. Now, it is claimed first, by the defendants, that under this contract they could put more boats than those enumerated in it on the canal, in their business, as part of the freight line, and be charged only the fifty per cent. rates, or half rates, except as to certain articles enumerated therein. Now you see it is claimed by the defendants, that under this contract, which to a certain extent provides for the half rates, it is claimed that the contract is broad enough to include any boats that Stewart and Company chose to put into the freight line, however extensive the business may be. That is a very broad claim; it might absorb a very considerable business of the canal if there is no limitation to it, and, therefore, that question has been before the Supreme Court, the claim having been made, and the Supreme Court have decided it, and we are bound by that. The Supreme

Court have held that this contract is not an indefinite contract; that it is not a contract under which Stewart and Company could put on as many boats as they chose, outside of the thirty-two mentioned in the contract, and claim a deduction of fifty per cent. on all the business they might choose to do on that canal, provided they put their boats in the freight line. The Supreme Court have decided that that claim is not good under this contract, and that this written contract is confined to the thirty-two boats, and that by virtue of this written contract,
 10 the drawback can be claimed on nothing but the thirty-two boats. The thirty-two boats are not included in this claim; this suit is for tolls outside of the thirty-two boats; and defendants set up that by virtue of this contract, the written contract gives them the right to a drawback of fifty per cent. The Supreme Court have settled that question, and it is the duty of this court to charge you, that so far as this claim for drawback is based upon the written contract produced here, that it amounts to nothing; that they cannot, under this written contract, claim
 20 a drawback for more than the thirty-two boats; and the thirty-two boats are not involved in this suit; the claim is outside of that.

Now, then, the Supreme Court having decided as to the meaning of this contract, and when parties have used language capable of construction, they are bound by that to the extent that the contract includes what was intended to have gone into it; but it is said, on the part of the defence, that there has been, by the conduct of the parties in their dealing with each other previous to the year 1871, and for the years 1868, 1869 and 1870, that there has been a course of dealing between the com-
 30 pany and Stewart & Company, which gives character to this written contract; and it is insisted by the defence, that there is by that course of dealing, a practical construction to this contract, and that the contract must be taken, therefore, to hold other boats that Stewart & Company chose to put into their freight line, outside of the thirty-two boats. That question has also been settled by the Supreme Court, and the Supreme Court have substantially held, that you cannot, by practical construction, vary the terms of a written contract, that is susceptible of construction on its face. The Supreme Court have held that

this contract means thirty-two boats, this written contract I speak of, and that the mere fact of a practical construction by the parties, by a course of dealing, afterwards acquiescing in the putting in of more boats at the same rate, does not affect the written contract, and the court so charge you—that that does not enlarge the terms of the written contract in the least, the written contract only extending to the thirty-two boats, and not an indefinite freight line giving Stewart & Company the power to absorb in their business just as much as they chose. Now don't misunderstand—this practical construction given by the parties, the court charge you, cannot affect the written contract so as to give it any more force than it has by the construction given to it already by the Supreme Court. This conduct of the parties may have another effect; it may have the effect of binding the parties to the extent that it has been acted upon; but as to the future acts it can have no effect. I mean the mere course of dealing in this case, apart from any special arrangement, proved the mere course of dealing in this case, the putting in of additional boats in 1868, 1869 and 1870, and the acquiescence by the company that they should do it, and the company allowing the drawback, that that course of dealing is binding in this case upon the company only to the extent that it has been mutually acted upon. It has no relation to the written instrument at all; it gives that no more strength than it had without it, and as a mere character or course of dealing in this case, it can have no effect but to the extent that it has been mutually acted upon by the parties. And in order that the parties in this case may have the full advantage of the ruling the court charge you distinctly that there is no defence in this case under the written contract, or by force of its terms in any way.

That brings us, then, gentlemen of the jury, to the next branch of the defence, which is this: that either by special verbal arrangement between these defendants and the company, The Morris Canal Company, or The Lehigh Valley Railroad Company, or by the course of dealing between them, that Stewart and Company can only be called upon to pay fifty per cent. of the full tolls.

Now, then, that part of the defense the court will divide into two parts; and the first is as to the course of dealing. I repeat

that that can be a defence in this case, standing by itself, I mean, apart from special arrangement, special verbal arrangement, that that can be a defence only to the extent that it has been mutually acted on by the parties. And you see there is a fairness about that; it would not be fair to allow the company after there was an acquiescence, and Stewart and Company putting on more boats than the thirty-two, and the rates being fixed with reference to that, to allow the company any claim beyond that; therefore, the court charge you that to the extent

10 that this course of dealing is a completed thing, acted upon mutually by the parties; that that is a finality in this case. But the course of dealing under the testimony in this case, and these legal aspects, binds only to the extent that it has been mutually acted upon, and that is apart from any special arrangement. And in order that the charge may be entirely definite upon this point, and the defendants get full advantage of the exception, the court charge you, that apart from any question of special contract, special verbal contract, in this case, that

20 there is nothing in the course of dealing, from the testimony, between these parties, or the Morris Canal and Stewart and Company, that amounts to any defence after the time when the defendants had notice that the Morris Canal Company intended to charge full tolls; that whatever the course of dealing may have been outside of the written contract that The Morris Canal Company or the plaintiffs, and when I say the company, I mean the plaintiffs in this suit generally, of course; there is nothing in the course of dealing that would prevent the company from giving notice that the thing should cease; it was to be treated as a mere indefinite arrangement, not binding under any event

30 more than the year, and not affecting the year 1871, previous to the receipt by Stewart and Company of notice that the canal company intended to charge the full rates.

Now then, as to the notice that the company intended to charge the full rates. There is some testimony, that about April the 18th there was notice given on account of a difficulty at Port Delaware in regard to loading coal, that the company would strictly adhere to the terms of that contract. But I prefer to be more definite than that with this part of the case. The first bill that contains full charges was April 22d, 1871—there were two or

three bills back of that, but they were made out on the drawback basis—this is the first bill, April 22d, 1871, where the whole amount is claimed, and the half of the would be claimed by that bill. These bills were sent every week, you recollect, or during the week, but it is uncertain when that bill was received; it was received during the week. The next bill is April 29th, 1871, and while that bill was in course of being sent the freightage was going on, so that the bill of April 29th, 1871, was for freightage done between the week from April 22d to April 29th, and therefore, you would not consider the com- 10
pany as affected by notice of a cessation of that course of dealing, allowing the drawback until they had notice, only as to freights after the period of time that they had notice. This April 22d, 1871 bill, may not have been received until about April 29th, and the April 29th bill must necessarily have been for some freightage before they got notice of the bill of April 22d, 1871, therefore, this part of the case, these two bills of April 22d and April 29th are so uncertain on the fact of the notice, that the court say to you to disregard them and to fix the time from the testimony when Stewart & Company had notice, that is, May the 4th, 20
1871, that is a convenient period of time. That would exclude from this claim, between six and seven hundred dollars, and all the other questions that cluster around this part of the case are under control by fixing that date as the period of time, to limit the plaintiff's claim. The court further say, in this connection, that after about May 4th there is nothing in the course of dealing that would bind this company, nothing at all, and if there is any defense in this case to be claimed after May the 4th, it must be based upon some other ground than the written contract, and also the course of dealing must be based upon some other ground.

That brings us to the other branch of defense, and that is as 30
to a special agreement claimed between the president of the Morris Canal Company and Stewart & Company, in regard to the freights or rates of freight for the year 1871. Now, there is sought to be set up a special agreement by three pieces of evidence; the first is that of Cornelius Stewart, which is of a conversation between himself, as he states, and Mr. Talcott, a former president of the company in the year 1868, and on the day, as I recollect the testimony, that the contract was signed.

"I said to Talcott, supposing now we can get goods to carry that we cannot carry for the fifty per cent. drawback; he said, I should go on and get what I could on the canal, they wanted to carry the produce, and if fifty per cent. drawback would not pay me we should not lose by it, he would make the thing right." Now, there are several objections against that having any force in this case, and I will not refer to all the reasons why it cannot have any force as a defence: First, it don't have any relation in terms to freights outside of those men-

10 tioned in the written contract, it only has a relation to further deductions, if necessary, to enable Stewart & Company to carry on their business; and secondly, it is indefinite as to time, and is binding, just like the course of dealing only to the extent it has been acted upon; thirdly, it is obnoxious to the statute of frauds, except only so far as it is executed; and for these, and some other reasons that might be suggested, the court charge you distinctly, gentlemen of the jury, that conversation between Cornelius Stewart and Talcott, on the day

20 this written contract was signed, in 1868, amounts to no defence at all standing by itself. As proof of a special arrangement, it amounts to no defence; it can only have reference to the course of dealing, and like the course of dealing, so far as this case is concerned, it must cease when the parties themselves cease to mutually act on it. The second piece of testimony under which a special agreement is claimed, controlling these freights for 1871, is that sworn to by Joseph Stewart, in a conversation with Mr. Talcott. I do not speak now of the conversation with Mr. Randolph. He said: "Talcott said, as near as I can recollect, that we could have all the boats we wanted at the com-

30 mencement of the business; could have their boats, and said the drawbacks should apply." That was early in the season of 1868. That special agreement, as it is claimed, is within the same objections that have already been stated with reference to the testimony of Cornelius Stewart, except as to the force of the terms as to its application; this goes further than that, but it is within all the objections that the testimony of Cornelius Stewart is, and it has force only to the extent that it was mutually acted upon, and so far as that is set up as a matter of defence in itself, the court charge you, gentlemen, that it amounts to no

defence at all in this case. That, then, disposes of all the evidence set up as amounting to a special agreement to affect the year 1871, excepting that sworn to by Joseph Stewart, in reference to the conversation between himself and Mr. Randolph, the president of the company. Now, then, if such an agreement, in your judgment, has been made; a question of law arises here as to the power of the president to make such an agreement. There is difficulty about that question. I have, however, concluded to charge the jury, that so far as the mere question of power was concerned to make that agreement, that if made, it should be regarded as in the course of dealing accustomed to be had by the president of the company, so far as the year was concerned, and so far as special contracts with special freighters were concerned. I therefore charge the jury on this part of the case, that President Randolph had power to make an agreement affecting the freights in the year 1871; that is charged as a mere question of power. That leaves the question still open as to whether there was such an agreement or not. And now we come to an important question of fact for your consideration. You see the case thus far has been dealt with as a matter of law, and the court has taken control over it; now we come to that part of the case involving a question of fact. That is within your province, and the court desire to leave it squarely to you; for it is important that your finding on this question of fact should be entirely accurate, and that you find coolly and with careful judgment, and purely within the light of the testimony.

Now, what is the agreement set up here? It is an agreement between the president of the company, Mr. Randolph, and these defendants that the freightage business of Stewart & Company should be carried on for the year 1871 at the same rates of toll that it had been carried on in 1870; that is the extent of the claim; and, it is said, that such an agreement was entered into from two to four weeks before the opening of navigation; navigation opened about the first of April; two weeks would make it about the middle of March, which was about the time of the approval of the act authorizing the lease; four weeks would bring it to about the first of March; the act authorizing the company to lease in general, and was approved March

14th, 1871, that is about two weeks previous to the opening of navigation.

It is said that that agreement was entered into between the president of the company and these defendants that the freightage of 1871 should be at the same rates of toll that it was carried on in 1870. On that subject, you see, Mr. Stewart has one version of that conversation, and Mr. Randolph has another, and it is your duty to reconcile that testimony if you can; one may be mistaken; if each intends to swear distinctly what he
 10 does one must be mistaken. It may be that you can solve this case upon the idea that each intends to tell the truth about that, but there is a mistake as to the scope of the contract. It is important to know what that agreement was, if any was made, and in order to find it out you will have to put yourselves very much in the position of the parties, you will have to put yourselves in the position of Stewart and of Randolph. Stewart, now, must have known that these works were to be leased, or likely to be leased, to the Lehigh Valley Railroad Company, for he said to Mr. Randolph "how is this leasing to the Lehigh
 20 Valley going to affect me, if it would make any difference in the matter of special drawbacks." Mr. Randolph swears that at the time of the conversation with Mr. Stewart, whatever it was, that he had no assurance that he would remain in the company, and that it was uncertain whether he would or not, and that his expectations were that he would be changed.

Now, you bring two parties together, one knowing that negotiations were pending in regard to a lease, if you believe Mr. Stewart on that, a lease that was to transfer the canal and its operations over to the Lehigh Valley Railroad Company; and
 30 Mr. Randolph, if you believe his testimony, having that sort of a tenure, uncertain as to what his position would be with reference to the Lehigh Company; now, you bring two such parties together and see whether they would be likely to make an arrangement of the character understood by Mr. Stewart. If such an arrangement was made, the court have already charged you it would be binding, but the point for you to determine is as to whether any such arrangement was made; or if any arrangement was made there, and what was it; and then, if they did make any arrangement, did it include a contract in

regard to the rates of toll for all their business, or did the parties intend only to contract in regard to special drawbacks. And in determining that you must remember that there is testimony in this case which has an indication that Stewart & Company supposed they were protected by their written contract to the extent that they chose to operate in this freight line, and whether Stewart & Company went there, or not to make a special bargain in regard to the whole freightage, you see, may be questionable, or whether they went there merely to ascertain what they may have thought was indefinite, special drawbacks, 10 and having, no doubt, under their idea of the contract, that it included the right to put on the additional boats to the thirty-two. I will read his testimony, and I will read some of Mr. Randolph's. Mr. Stewart says: "I went to the canal company's office, and asked Mr. Randolph what it meant, after our understanding in the spring, he said it was the orders from the Lehigh Valley Railroad Company, he had no doubt if I saw Mr. Sayers it would be all right, and he would arrange for an interview, so that father and I could meet Mr. Sayer; he said he had no control over that now, or something to that effect." This was 20 after bill No. 3, which has been produced here. Question—"What did you refer to about the spring? Answer—"I referred to a visit I made to the office before the opening of navigation. I saw Mr. Randolph and talked to him about special drawbacks; it may have been a month, may not have been over two weeks before opening of navigation in the spring of 1871. I told Mr. Randolph that the time had come for me to make contracts with large shippers, and I wished to know if the leasing of the canal by the Lehigh Valley Railroad Company would make any difference in the matter of special drawbacks; he said it would not, 30 that I should go on and make the contracts and the tolls should be the same as the year before." Now, what does that refer to? You see there is the question still open, as to whether that refers to the tolls for the whole business or whether he intended to make a contract, provided his version is right, in regard to special drawbacks only; feeling himself secured that the contract took in the right to additional boats. You see if there is a defense to these tolls it must be by force of a special contract that the business should be carried on in 1871 the same as in 1870.

“By special drawbacks I meant drawbacks in addition to the fifty per cent. He said I should have the same drawbacks I had the year before, to go on and make contracts.” That part of the testimony seems to be more extensive than the other, but whether it is, or not, with reference to special drawbacks, or whether it was really intended by Mr. Stewart at that time to make a contract for the whole thing, you must judge from the whole testimony.

- On cross-examination. Question—“When you went to the
 10 company after the company changed the mode of making out the bills, didn't you then claim you were entitled to fifty per cent. drawback by virtue of the written agreement? Answer—“I claimed it by virtue of the way the business had been done. Question—“Didn't you claim it by virtue of your written agreement. Answer—“I don't recollect that I made any such a claim.” Question—“Wasn't that just the dispute between you and the company, whether your agreement did cover boats over and above the thirty-two?” Answer—“I claimed I was entitled to fifty per cent. drawback from the conversation I had had with
 20 Mr. Randolph, before the opening of navigation in 1871.” Question—“Then you didn't go on your written agreement at all?” Answer—“I don't know as I said anything about it.” Question—“Did you abrogate the written agreement in the spring of 1871?” Answer—“There was nothing said about it.” Question—“You didn't agree to change its terms then?” Answer—“No, sir; there was nothing said about it.” Question—“You went to Mr. Randolph in 1871, you say, to see if the leasing of the canal to The Lehigh Valley Railroad Company would make any difference in the matter of special drawbacks;
 30 what drawbacks did you refer to?” Answer—“There was lumber, bituminous coal, slate and ice; I had had special drawbacks on those articles in previous years, in addition to the fifty per cent. allowed by the lease.” Question—“And you went to see Mr. Randolph, to see whether the leasing of the canal would make any change in the arrangement you had for those special drawbacks?” Answer—“I went to talk with him about the whole business.” Question—“But the point of your inquiry related to an increased drawback, over and above the fifty per cent.?” Answer—“Yes, that was the point of the

conversation?" You see the testimony is just of that character that you must settle this, as to whether he intended from that conversation—supposing his version of it is right—and so expressed himself, that he was making a contract with reference to special drawbacks, or a contract which would include the whole thing as the year before, outside of any written contract. Question—"And those articles were bituminous coal, lumber, slate and ice?" Answer—"Yes." Question—"Did you say anything to him about the written contract?" Answer—"I don't recollect that I did." Question—"Did you consider after 10 that conversation with Mr. Randolph your written contract was in force?" Answer—"Yes." Question—"You didn't understand that your conversation with Mr. Randolph changed the terms of this written contract?" Answer—"No, sir." Question—"But it had reference to matters that the contract didn't regulate?" Answer—"Yes; the contract partly regulated, but this was additional." Question—"So far as the difference was concerned the contract didn't regulate?" Answer—"No, sir." And further along he says: "My first conversation with Mr. Randolph was with reference to tolls. I 20 asked him if I could make arrangements for tolls for the year so I could make my contracts. At that time I understood it was contemplated leasing the canal to the Lehigh Valley Railroad Company." That is about the sum and substance of the testimony of Joseph C. Stewart on the subject. First, you have to settle whether his version of that conversation is right; whether there was any contract; and when you settle that then you must determine whether that was a contract in regard to the whole scope of tolls or whether it was only a contract in regard to special drawbacks. If only in regard to these things 30 (special drawbacks) then of course there is no defence in this suit, for that question is not in controversy.

Mr. Randolph, in substance, says: "I made no special arrangement with him whatever. We were expecting to go over into the hands of the Lehigh Valley Company, and for that reason I made no special contracts or engagements with anyone or anybody of any kind whatever. Mr. Stewart called upon me; might have been middle of March; I said to him, there was an act passed empowering us to lease, and I supposed we

would lease or sell our canal to some party, I didn't know who; that if we leased I didn't know whether my management would continue of the business of the company, and the clerks of the company; supposed when we leased our arrangements as such would terminate; and I fully expected, I said to him, that when we leased I would go out of office; that was my mind; that I had nothing else in my mind but that my engagement as officer would cease, and I was careful; I said to him, I had no right to commit the company, because I didn't know what the manage-
 10 ment of the company would be." "I made no agreement as to drawbacks in the spring of 1871 with Stewart or anyone else."

You see that Mr. Randolph denies that there was any agreement made there at that time. Whether there was such an agreement, and whether it was such a contract as would amount to a defence in this case for the tolls of 1871 at the half rates you must determine. It may be that there was an agreement only as to special drawbacks according to the previous arrangement; it may be that there was not as to the general business, as to the rates of tolls generally the same as the preceding year,
 20 or it may be that there was. Now, if there was, then that would be a defence in this cause, and without saying anything further upon the testimony, for it is all in a very narrow compass, on this part of the case, the court leave that for your exclusive determination.

As to the monopoly clause claimed, or the discrimination I have concluded that the questions can be better settled in this suit by charging against the contention of the plaintiffs on those points than by charging formally for a verdict. If counsel for plaintiff is right in his position it disposes of the case entirely,
 30 but my desire is that the jury should pass upon this question of fact only as to the one agreement, and in order that there may be no misunderstanding the further charge of the court is that there is no defence in this case at all unless it comes out of the conversation between Randolph and Joseph C. Stewart in the spring of 1871; if there is any defence it must be in that; if it is not there it is not anywhere. I would suggest that as to the monopoly clause in the contract, that under the authority of the case of *The Union Locomotive Company vs. The Erie Railway Company* in 6th Vroom, that that might be regarded

as severable, and if void, as not affecting the rest of the contract, and as to the question of the illegality of the verbal agreement, if the jury believe it proved, by reason of discrimination, I charge against the plaintiffs on that point.

That leaves me then to deal with the propositions asked by the defence, and many of these are formally involving the questions already settled before the Supreme Court for the purpose of getting this case in the Court of Errors.

The seventh proposition the court declines to charge.

The sixth proposition: "The plaintiffs having adopted the 10 contract existing between the Morris Canal and Banking Company and the defendants, and also the business done under that contract in 1871, prior to the 22d of April, in that year, are bound by that contract as fully and in the same manner as was the Morris Canal and Banking Company." The court charge you, gentlemen, what has already been charged, that the Lehigh Valley Railroad Company are bound in this case, after the fourth of May, only by the contract testified to by Joseph C. Stewart, and that if you think his version is right, and you think it broad enough, the Lehigh Valley Company would be 20 bound by that. Further than that it is not necessary to charge that proposition. I therefore decline to charge it further than I have charged.

The first, second, third and fifth propositions the court declines to charge further than already charged.

Fourth proposition: "If the jury believe, from the evidence in the cause, that the plaintiff or its assignor, prior to the commencement of navigation in the year 1871, induced the defendants to believe that they should, in the year 1871, have the same allowance of drawbacks as had been allowed to them in 30 the year 1870, and the defendants made their arrangements for and entered upon the business of the season upon that understanding, the plaintiff could not after that, without the consent of the defendants, change the extent of the drawbacks during the year 1871, but during that year the defendants are entitled to drawback as it was allowed in 1870." I charge that, gentlemen, subject to this, that that conclusion can only be drawn from the conversation sworn to by Joseph Stewart as had with Mr. Randolph; it must be there or nowhere, and it must

amount to a contract; that is, it must amount to an agreement, an understanding between those parties at the time that there should be a contract covering the freights included in this suit for the year 1871. If it comes short of that it don't amount to a defence.

That disposes of the whole case so far as the duty of the court goes. If you find for defendants, your verdict would be simply for defendants. If you find for plaintiffs, you need not stop to make the figures, you can simply say the amount of the bill
10 from May 4th, 1871, with interest from April 30th, 1872, to November 3d, 1874.

Plaintiff's counsel—Your Honor left it to the jury to determine the meaning of the language used by the parties; if they find such language was used, as Joseph C. Stewart testified, my desire is to ask the court to state to the jury that if that language was used, then it is a question for the court to determine the legal effect of that language and not the jury.

The Court—That question has not escaped my attention, and instead of seeking to control that conversation as a mere matter
20 of legal construction, I have preferred to leave it to the jury to determine what that conversation was. It is of such a character that I have difficulty in defining in my own mind what it was, and, therefore, I have concluded to leave it to the jury, saying that, before the defence is allowed on the basis of that contract, the jury must be satisfied that that was an agreement to include all these tolls. The burthen is on the defence to show that.

Defendant's counsel—I suppose your Honor does not mean to say that the jury may not look at how the bills were made
30 out right after that conversation, on that question.

The Court—They may look at any fact in the case bearing on the question, so far as the correctness of that statement is concerned; so far as to what was meant by that, meant between the parties; as to what that conversation was, as they both understood it, but the pivot of the defence must be on that conversation, that is, gentlemen, you must believe that the contract comes out of that conversation.

Plaintiff's counsel prays an exception may be allowed to that part of the charge of the court to the jury which held that Mr.

Randolph had power to make a contract, such as was said to have been made by Joseph C. Stewart as to the business of 1871.

And also, to that part which left to the jury to determine the meaning of the parties from the language testified to by Joseph C. Stewart—my point being that if such language was used then the intention of the parties and the subject matter to which it applied is a matter of construction for the court, and not for the jury.

And also, to that part which held that the agreement as claimed by Joseph C. Stewart to have been made would be a defence if the jury found it to have been made. 10

And also, to that part ruling against the plaintiff on the monopoly clause in the written contract.

And also, to that part which held that the contract was legal notwithstanding the discrimination made in favor of the defendants.

And also, to that part which held that The Lehigh Valley Railroad Company were bound by the contract made by Mr. Randolph in the spring of 1871, if the jury were satisfied such a contract was made. 20

Defendant's counsel prays that an exception be allowed to that part of the charge of the court to the jury, which held that the written contract applied only to the thirty-two boats, and prayed that their exception might be allowed and sealed, and it is allowed and sealed accordingly.

[L. s.]

J. D. BEDLE,
Justice Supreme Court.

And also to that part which instructed the jury that the meaning and extent of the contract could not be fixed by the conduct of the parties in its execution and performance, and prayed that this exception be sealed and allowed, which are done accordingly. 30

[L. s.]

J. D. BEDLE,
Justice Supreme Court.

And also to that part instructing the jury that the practical interpretation and construction put upon the contract by the action of the parties could affect only what had been done up to

the point of divergence, and prayed that this exception be allowed and sealed, and it is done accordingly.

[L. s.]

J. D. BEDLE,
Justice Supreme Court.

And also to that part which instructed the jury that the course of dealing could be a defence only to the extent it has been mutually acted on, apart from any special arrangement; and that there was nothing in the course of dealing that amounted to any defence after notice received of the intention
10 to charge full tolls, and prayed that this exception be allowed and sealed, and it is done accordingly.

[L. s.]

J. D. BEDLE,
Justice Supreme Court.

And also to that part which instructed the jury that the course of dealing could be no defence to the claim after May 4th, prayed that this exception be allowed and sealed, and it is allowed and sealed accordingly.

[L. s.]

J. D. BEDLE,
Justice Supreme Court.

20 And also to that part which instructed the jury that the matters testified to by Cornelius Stewart as having occurred between him and the president of the canal company immediately after the signing of the written contract, could constitute no defence in this case, and prayed that this exception be allowed and sealed, and it is done accordingly.

[L. s.]

J. D. BEDLE,
Justice Supreme Court.

And also to the declination of the court to charge the several written requests of defendants, in each case, so far and to the
30 extent that the court had refused to charge as requested, which is allowed and sealed.

[L. s.]

J. D. BEDLE,
Justice Supreme Court.

Writ of Error.

[Filed January 11th, 1875.]

THE STATE OF NEW JERSEY—*ss.*

*To the Justices of the Supreme Court of the State of New Jersey,
Greeting :*

Because in the record and proceedings and also in the giving of judgment in a certain plaint which was in our said Supreme Court between The Lehigh Valley Railroad Company, plaintiff, and Cornelius Stewart and Joseph C. Stewart, defendants, of a plea of trespass on the case, as it is said, manifest error hath 10 intervened to the great damage of the said Cornelius Stewart and Joseph C. Stewart, as by their complaint we are informed. We being willing that the error, if any there be, should in due manner be corrected, and full and speedy justice done to the parties aforesaid, in this behalf do command you, that if judgment be thereupon given, then without delay, you distinctly and openly send under your seal, the record and proceedings aforesaid, with all things touching the same to our Court of Errors and Appeals at the next term thereof, on the twenty- 20 eighth day of November, instant, at Trenton, together with this writ, that the record and proceedings aforesaid being inspected, we may further cause to be done thereupon what of right and according to the constitution and laws of this state ought to be done.

Witness, THEODORE RUNYON, Esq., our Chancellor, at Trenton, the twenty-third day of November, in the year of our Lord eighteen hundred and seventy-four.

HENRY C. KELSEY.

JACOB VANATTA, *Attorney.*

The answer of the Justices of the Supreme Court of New 30 Jersey within named. The record and proceedings whereof mention is within made in all things touching and concerning the same, we do certify to the Court of Errors and Appeals in a certain schedule to this writ annexed as within commanded.

[L. s.]

M. BEASLEY, *C. J.*

Assignment of Errors.

[Filed February 10th, 1875.]

Afterwards, that is to say, on the ——— day of ———, (as yet of the term of November) 1874, in the Court of Errors and Appeals, in the last resort in all causes in the State of New Jersey, come the said Cornelius Stewart and Joseph C. Stewart, by Jacob Vanatta, their attorney, and say that in the record and proceedings aforesaid, and also, in the matters recited and contained in the said bills of exception, and in the verdict and
 10 judgment aforesaid, there are manifest errors, in these to wit:

1. That the said Supreme Court, on the demurrer to the second and third replications, overruled the said demurrer and gave judgment thereon in favor of the said The Lehigh Valley Railroad Company, and against the said Cornelius Stewart and Joseph C. Stewart, when, by the law of this State, the said demurrer should have been sustained, and judgment thereon should have been given in favor of the said Cornelius Stewart and Joseph C. Stewart, and against the said The Lehigh Valley Railroad Company.
- 20 2. And for that the said Supreme Court, on motion in behalf of the said The Lehigh Valley Railroad Company, struck out the notice of the now plaintiffs of special matter intended to be given in evidence, under the plea of the general issue in bar of the plaintiffs action, and refused to permit the now plaintiffs to give the said special matter in evidence in bar of the said action, when by the law of this state, said notice should not have been struck out, and the now plaintiffs should have been allowed to give the said special matter in evidence in bar of said action.
- 30 3. There is also, manifest error in this, to wit: That the said justice before whom the said issues were tried, at the trial of the issues so joined, suffered and permitted the now defendants, against and notwithstanding the objection of the now plaintiffs, to read in evidence to the jury, a certain paper writing, purporting to be a lease to the now defendant, from The Morris Canal and Banking Company of the franchises, rights and property

of the Morris Canal and Banking Company, dated May 4th, 1871, when by the law of this state, said pretended lease was made without lawful power or authority and was illegal and void, and should have been overruled and rejected, and not allowed to go in evidence.

4. There is also manifest error in this, to wit: That the said justice before whom the said issues were tried, at the trial thereof, where the now plaintiffs offered to prove that the New Jersey and Pennsylvania Freight Line, which immediately preceded the now plaintiffs in the transaction of a business similar to that carried on by the now plaintiffs on the Morris Canal, and that the canal company had allowed that company drawbacks as extensively and broadly as the now plaintiffs claim it in this case, and that the now plaintiffs knew of that at the time they made a certain agreement in writing with the Morris Canal and Banking Company, which agreement had been offered and was then in evidence in said case, on the objection and motion of the now defendant, refused to admit, and rejected and overruled said evidence, when, by the laws of this state, the evidence so offered was relevant and material to said issues, was legal evidence, and should have been allowed to be proved. 10 20

5. There is also a manifest error in this, to wit: That the said justice before whom the said issues were tried, at the trial thereof, when the now plaintiff in reference to a certain agreement in writing made by the Morris Canal and Banking Company with the now plaintiffs, dated the 29th of January, 1868, which had been offered and was then in evidence in this case, and having reference to the time when the terms and provisions of said agreement were discussed and agreed upon between the parties thereto, asked Joseph C. Stewart, one of the now plaintiffs, a witness who was present at the said making of said agreement, this question: 30

"On that occasion was there any thing said by Mr. Talcott on one side and your father on the other, as to whether this drawback should apply only to the thirty-two boats, or whether it should be applicable to all boats employed in the freight line."

The now defendant by its counsel, objected to said question, and thereupon the said justice called upon and required the now plaintiff's counsel to state what he offered and proposed to prove,

and thereupon the counsel of the now plaintiffs stated that the now plaintiffs proposed to prove by that question, that the conversation which there occurred, showed that the canal company intended to allow and that the now plaintiffs expected to receive a drawback of fifty per cent. on all the merchandise, in respect to which, by the agreement, a drawback was to be allowed, whether carried on the boats mentioned in the agreement or on other boats belonging to or employed by the now plaintiffs in that freight business, with a view of showing that both parties
 10 put the same interpretation upon said agreement, in advance; that they did subsequently and thereupon, on the objection and motion of the now defendant, the said justice overruled the said question, and refused to admit and rejected said evidence, when, by the law of this state, the evidence so offered was relevant and material to said issues—was legal evidence and should have been admitted.

6. There is also manifest error in this, to wit: that the said justice before whom the said issues were tried, at the trial thereof, when the now plaintiffs asked a witness, Joseph C.
 20 Stewart, one of the now plaintiffs, this question:

“Have you ever examined to see what the result of your business would have been at the end of the first year, if the company had charged you full rates of toll on all boats you used in your line outside of the thirty-two?”

And also this question:

“Would you have continued the contract beyond the first year if they had indicated that fifty per cent. drawback would not have been allowed on all the boats employed in the freight line, whether included in the thirty-two or not?”

30 And this question:

“Why did you not, at the end of the first year, rescind this contract for the future, by giving the three months' notice of rescission provided for in the agreement?”

And this question:

“Would you have had a profit or a loss on your first year's business, if the drawback had been allowed in that year as the plaintiff (the now defendant) proposes to allow it for the year 1871?”

And likewise this question:

40 “Could the business be made to pay expenses with only such

drawback allowed as the plaintiff (the now defendant) allowed for the year 1871?"

On the objection of the now defendant, made to each of said five questions, as they were severally put, severally overruled each one of said five questions as it was put, and would not allow any one of said five questions, to be answered, when, by law, every one of said questions was relevant and material to said issues, and should have been allowed to be answered.

7. There is also manifest error in this, to wit: That the said justice before whom the said issues were tried, at the trial thereof, when the now plaintiffs in reference to a conversation had between one of the now plaintiffs and the President of the Morris Canal and Banking Company, in the spring of 1871, concerning the business to be done by the now plaintiffs on the Morris Canal in the season of 1871, asked a witness this question: 10

"After that conversation with Mr. Randolph in the spring of 1871, did you or not accept and act on what he told you at that conversation about the rates of toll, on the objection and motion of the now defendant, overruled said question, and would not allow it to be answered, when by the law of this state, said question was relevant and material and should have been answered?" 20

8. There was also manifest error in this, to wit: That the said justice before whom the said issues were tried, at the trial thereof, when the now plaintiffs, in regard to a contract between them and said canal company, which was then and there in question, asked a witness, one of the now plaintiffs, the following questions, viz:

1. Had the contract any considerable profit in it?
2. Was it in any way injurious to the business of The Morris Canal and Banking Company? and
3. Was it in any way advantageous to The Morris Canal and Banking Company? 30

On the objection of the now defendant made to each of said three questions, when severally put, overruled every one of said questions when put, and would not permit any one of said questions to be answered, when said questions were and every one of them was legal, relevant and material to the issues there being tried and should have been answered.

9. There is also manifest error in this, to wit: That the said

justice before whom the said issues were tried, on the trial thereof, without the consent and against the objection of the now plaintiffs, overruled and excluded from the consideration of the jury, certain evidence previously given in said trial by Joseph C. Stewart, one of the now plaintiffs, touching and as to certain conversations between the now plaintiffs and Mr. Talcott, the President of the Morris Canal and Banking Company, previous to the execution of the agreement between the now plaintiffs and the last named company, dated the 29th of January, 10 1868, and relative to the terms and conditions of said agreement, when, by the law of this state, said evidence was legal, relevant to the issues then and there being tried, and material to the defence of the now plaintiffs, and should not have been ruled out or withdrawn from the consideration of the jury.

10. There is also manifest error in this, to wit: That the testimony having been concluded, and the parties having rested the cause, the now plaintiffs by their counsel, requested the said justice to charge the jury before whom said issues were then and there being tried,—that the now defendant (but then and 20 there plaintiff) being a foreign corporation, not authorized by the Legislature of New Jersey, to hold, use or exercise the franchises of the Morris Canal and Banking Company has no lawful right, by the law, or otherwise, to demand, sue for or collect tolls for business, and for that reason cannot recover in this action, whereupon the said justice declined to charge, as above requested; whereas, by the law of this state, he should have charged the jury as above requested.

11. There is also manifest error in this, to wit: That after the evidence was closed the now plaintiffs requested the said 30 justice to charge the said jury. That the written agreement, by its terms, entitles the defendants (the now plaintiffs) to a drawback of fifty per cent. on the amount of the tolls charged at the general tariff rates, in respect of all the merchandise transported by the defendants, in respect of which, by the agreement, drawback was to be allowed, without reference to what boats the merchandise was transported on.

That if from the bills made out by The Morris Canal and Banking Company, and the course of business between the parties, the jury believe that the contracting parties intended when

the written agreement was made, that the drawback should be allowed as to all the merchandise of the kinds for which drawback was to be allowed, without reference to the boats it was carried on, then the plaintiff below is not entitled to recover, and the verdict should be for the defendant below, (the now plaintiff);

That if the written agreement as to drawbacks, applies only to the goods carried on the thirty-two boats or those substituted for them, yet, if when the written contract was made or shortly afterwards, The Morris Canal and Banking Company promised the defendants, (the now plaintiffs) that they should be allowed at least fifty per cent. drawback on all the merchandise of the kinds, for carrying which drawback was to be allowed, without reference to what boats the transportation was done in, and the now plaintiffs acted upon that promise, and both parties continued to act on that promise for more than one year without objection or notice of change, The Morris Canal and Banking Company, or its assigns, cannot after that, without the consent of the now plaintiffs, depart from or change that promise, and the plaintiffs, (the now defendants) cannot recover in this action; and,

That it being proved beyond doubt, and it being undisputed that for over three years immediately next after the making of the within agreement in question, the plaintiff's (now defendant's) assignor, in all its bills made out to the defendants, (the now plaintiffs) a drawback of at least fifty per cent. on all tolls for business done by them in their freight line in the manner claimed by the defendants, (the now plaintiffs) for the year 1871, the intent and meaning of the written contract was thereby fixed and settled, as allowing the drawback on the tolls on all merchandise transported by the defendants (the now plaintiffs) without reference to what boats it was carried in, and the plaintiff (the now defendant) is estopped from denying or disputing that interpretation of the contract.

Whereupon the said justice refused so to charge; whereas, by the law of the land, the said justice should have charged the jury, as above requested.

11. There is also manifest error in this, to wit: that after the evidence was closed, the said (now) plaintiffs requested the said justice to charge the said jury, that if the jury believe,

from the evidence in the cause, that the plaintiff (the now defendant) or its assignor, prior to the commencement of navigation in the year 1871, induced the defendants (the now plaintiffs) to believe that they should, in the year 1871, have the same allowance of drawbacks as had been allowed to them in 1870, and the defendants made their arrangements for and entered upon the business of the season upon that understanding, the plaintiff (now defendant) could not after that, without the consent of the defendants (now plaintiffs), change the extent
 10 of the drawbacks during the year 1871, but during that year are entitled to drawbacks as it was allowed in 1870, whereupon said justice refused to charge as above requested, except with certain qualifications, limitations and additions, which in that connection appear in his charge, whereas, by the law of the land, said justice should have charged as above requested, without any of said qualifications, limitations or additions.

12. There is manifest error in this, to wit: that after the evidence was closed, the now plaintiffs requested the said justice to charge the said jury, that the plaintiff (the now defendant)
 20 having adopted the contract existing between The Morris Canal and Banking Company and the defendants (now plaintiffs) and also the business done under that contract in 1871, prior to the 22d of April in that year, is bound by that contract as fully and in the same manner as was The Morris Canal and Banking Company.

Whereupon the said justice refused to so charge, except with certain qualifications, limitations and restrictions appearing in that part of said charge which is responsive to the last stated request, whereas, by the law of New Jersey, he should have
 30 charged said last stated request, without any of said qualifications, limitations or restrictions.

13. There is manifest error, also, in this, to wit: that after the evidence was closed, the said justice charged said jury, that so far as the claim of the now plaintiffs for drawback is based upon the written contract produced here, they cannot, under this written contract, claim a drawback for more than the thirty-two boats, and the thirty-two boats are not involved in this suit—the claim is outside of that; whereas, by the law of the land, the said justice should not have so charged said jury,

but should have charged that the now plaintiffs are entitled to a drawback of fifty per cent. on the drawback goods carried in any and all boats of the said plaintiffs employed in the said freight line.

14. There is manifest error also in this, to wit: That after the evidence was closed the said justice charged the said jury:

I. That the meaning and extent of said written contract could not be fixed by the conduct of the parties thereto, in its execution and performance.

II. That the practical interpretation and construction put 10 upon the said written contract by the action of the parties thereto, could only affect what had been done up to the point or time, when a difference arose between the said parties as to the interpretation and construction of said contract.

III. That the course of dealing could be a defence only to the extent it has been mutually acted on, apart from any special arrangement, and that there was nothing in the course of dealing between the said parties that amounted to any defence after notice given and received to charge full tolls on all boats extra of the thirty-two boats, and that the course of dealing between 20 said parties could be no defence to that part of the plaintiff's (now defendant's) claim, which arose after the 4th of May, 1871.

IV. And also, that the matters testified to by Cornelius Stewart, as having occurred between him and the President of the Morris Canal and Banking Company, immediately after the signing of the written contract, could constitute no defence in this case.

Whereas, the said justice should not have charged any of the four last mentioned subjects in manner, and as appears by his charge, he did charge the same. 30

15. There is also manifest error in this, to wit: that by the record and proceedings aforesaid, it appears that judgment in the plea aforesaid, was given for the now defendant against the now plaintiffs, when by the law of the land, judgment in the said plea ought to have been given for the now plaintiffs and against the now defendant; therefore, in this, there is manifest error.

Therefore the said Cornelius Stewart and Joseph C. Stewart, pray that the judgment aforesaid, by reason of the aforesaid

errors and of the errors appearing in the record and proceedings aforesaid, may be reversed, annulled and for nothing holden, and that the said Cornelius Stewart and Joseph C. Stewart may be restored to all things they have lost on occasion of the said judgment, and that the said The Lehigh Valley Railroad Company may rejoin to said errors.

JACOB VANATTA,
Attorney of Plaintiffs in Error.

No. 1.

JERSEY CITY, April 11, 1868.

MESSRS. C. STEWART AND SON,
To Morris Canal & Banking Company, Dr.

FOR TOLLS AT PT. DELAWARE.

April 8	Cl.	19	Bt.	642	Easton to Washington, Boat,	\$2 32
11		31	Lizzie,		" to Pt. Delaware,	2 00
						\$4 32
WASHINGTON.						
1	1	636	Washington to Pt. Murray,	Furniture,	1.	\$ 15
			"	"	"	4 73
4	10	693	"	"	Boonton, Timber,	30.
			"	"	"	20 00
	12	1700	"	"	Dover, Timber,	30.
			"	"	Inn Dale, Lumber,	20.
6	18	636	"	"	N. York, Corn,	47.
	25	V. Smith,	Stewartsville	"	"	59.
	26	640	"	"	"	51.
	33	1697	Washington	"	Rockaway, Lumber,	27.
			"	"	"	25.
8	39	1695	"	"	Dover,	10.
			"	"	"	25 59
			"	"	I. Dale, Timber,	15.
			"	"	"	6 98
			"	"	"	6 60
	40	A. H. Fatsinger,	"	"	Boonton, Boat,	86
	44	W. C. Thompson,	"	"	Newark, F. & Feed,	21 19
	59	1699	"	"	Rockaway, Timber,	34 9
			"	"	I. Dale, Lumber,	22 12
9	63	634	Stewartsville	"	N. York, Corn,	56.
	65	1073	Washington	"	Dover, Timber,	16.
			"	"	Stanhope, Lumber,	11.
			"	"	H'stown,	10.
			"	"	"	10.
			"	"	Timber,	10.
	75	B. C. Osborn,	"	"	Boonton, Boat,	86
10	91	1689	"	"	"	19 93
			"	"	Timber,	30 18
			"	"	Lumber,	22 25
						512 04
						\$516 36

STANHOPE.

April 11 Cl.	Bt. A. H. Fatsinger,	Hackettstown to Boonton, Oats,	1.10	72	
				—	72

MONTVILLE.

6	6	W. G. Lathrop,	Boonton to J. City,	Nails,	47.15	42 90
8	11	637	" " "	"	47.15	42 90
	12	645	" " "	"	47.15	42 90
						—\$ 128 90

BEAVERTOWN.

8	637	Beavertown to New York,	Furniture,	.05	18	
					—	18

JERSEY CITY.

3	24	1688	"	Washington,	Boat,	1 74
		25	645	"	Boonton,	"
		50	641	"	Waterloo,	Salt,
4						40.
6	62	1072	"	Washington,	Boat,	1 74
7	73	631	"	Sundry places,	Sundries,	29 51
8	86	639	"	Newark,	Boat,	26
	87	635	"	Washington,	"	1 74
	92	1693	"	"	"	1 74
	93	1074	"	"	"	1 74
9	99	627	"	Sundry places,	Sundries,	26 51
	100	643	"	Washington,	Corn,	50.2
	104	638	"	Easton,	Wheat,	53.11
10	105	W. G. Lathrop,	"	Sundry places,	Sundries,	17 46
11	109	1060	"	Pompton,	Castings,	43.14
	110	1686	"	Washington,	Boat,	1 74
	112	1387	"	Sundry places,	Poudrette,	15 70
						— 273 68
						\$919 64
						459 82
						\$459 82

Less 50 per cent ,

Stamp. Received, Jersey City, April 17th, 1863, three hundred and fifty-nine dollars and
2 cts. eighty-two cents, on the above bill.

JNO. RODGERS, Sec'y

Stamp. Received, Jersey City, April 21, 1868, one hundred dollars on the above bill.
2 cts.

JNO. RODGERS, Sec'y.

No. 2.

JERSEY CITY, April 18th, 1868.

MESSRS. C. STEWART AND SON.

To Morris Canal & Banking Company, Dr.

FOR TOLLS AT PT. DELAWARE.

April 4 Cl.	6 Bt.	634	Pt Delaware to Stewartsville,	Boat,	\$ 10
18	109	631	Easton to Washington,	"	2 32
					—\$ 2 42

WASHINGTON.

11	118	1692	Washington to Rockaway,	Timber,	30 9	Stamp.
			"	Dover,	Lath,	10.2
			"	D. Basin,	Lumber,	13.
13	148	693	"	Rockaway,	Timber,	11.18
			"	Dover,	Lumber,	23.17
			"	I. Dale,	"	19.4
14	173	642	Stewartsville,	New York,	Corn,	55.
						48 07
						56 94

April 16	Cl. 240	Bt. 1688	Washington,	"	Boonton,	Lumber,	20.7	
			"	"	Rockaway,	"	10.	
			"	"	Dover,	"	20.2	50 25
	254	1687	"	"	Easton,	"	55.12	27 00
17	327	1697	"	"	Newark,	"	37.16	
			"	"	Boonton,	Timber,	10.11	44 60
								<u>259 69</u>

STANHOPE.

13	23	641	Waterloo to Boonton, Boat				50	
	75	B. C. Osborn,	Pt. Murray to Boonton, Furniture	1.		1 14		1 64

POWERSVILLE.

13	—	631	Boonton to Easton, Nails		25.	29 50	
	—	627	" " "		18.	21 24	
17	—	645	" " "		4.6	5 07	
							<u>55 81</u>

MONTVILLE.

13	63	634	Boonton to Jersey City, Boxes		1.	88	
14	14	A. H. T.	" " " Nails		57.6	51 30	
15	15	W. G. L.	" " " "		47.16	42 94	
16	16	641	" " " "		57.6	51 30	
17	17	B. C. O.	" " " "		57.6	51 30	
							<u>197 72</u>

JERSEY CITY.

13	117	877	Jersey City to Boonton, Lumber		46.17	47 73	
14	125	637	Jersey City to Sundry places, Sundries		—	48 97	
15	136	645	" " " "		—	25 58	
	142	636	Jersey City to Easton, Wheat		53.11	55 61	
16	148	V. Smith,	Jersey City to Newark, Salt		26.15	5 48	
17	152	634	Jersey City to Sundry places, Sundries		—	23 88	
	156	640	Jersey City to Sundry places, Salt		50.	39 24	
18	160	A. H. T.,	Jersey City to Sundry places, Sundries		—	21 02	
							<u>267 51</u>
							<u>784 79</u>
							<u>392 39</u>
							<u>\$392 39</u>

Less drawback on \$784 79-100 @ 50 per cent.,

Received Payment,

JNO. RODGERS, Sec'y.

No. 3.

JERSEY CITY, April 25th, 1868.

MESSRS. C. STEWART AND SON,

To Morris Canal & Banking Company, Dr.

FOR TOLLS AT PT. DELAWARE.

April 21	Cl. 162	Bt. 1694	Easton to Washington, Boat,		\$2 32	
23	198	645	Easton to Washington, Boat,		2 32	
	208	627	Easton to Washington, Boat,		2 32	
24	220	634	Easton to Washington, Boat,		2 32	
						<u>\$9 28</u>

WASHINGTON.

18	349	1686	Washington to Rockaway, Timber,	31.2	
		1686	Washington to I. Dale, Lumber,	10.	26 56
	370	635	Washington to Easton, Boat,		32

April 20	395	Bt.	631	Washington to Newark, Flour,	6.10		
	413		1689	Washington to Paterson, Furniture,	.02	8	48
				Washington to Dover, Lumber,	11.		
				Washington to D. Basin, Timber,	8.10		
				Washington to Hackettstown, Lumber,	4.		
				Washington to Waterloo, Lumber,	12.	21	75
21	450		637	Washington to Boonton, Boat,			86
	470	W.C.Thoms'n,		Washington to Newark, F. & F.,	45.42	47	12
	475		1699	Washington to Easton, Lumber,	35.14	17	46
22	521		1692	Washington to Boonton, Timber,	22.		
				Washington to I. Dale, Lath,	10.		
				Washington to Hackettstown, Lumber,	20.	25	44
	533		1688	Washington to Newark, Lumber,	41.		
				Washington to Waterloo, Timber,	10.	43	85
24	595	Lit. Ann		Washington to Pt. Murray, Boat,		10	
	599		645	Washington to Boonton, Boat,		86	
	600		640	Washington to Boonton, Boat,		86	
	604		643	Stewartsville to Rockaway, Corn,	.11		
				Stewartsville to Powerville, Corn,	2.17		
				Stewartsville to N. York, Corn,	31.6		
				Washington to Hackettstown, Sundries,	.01	35	92
24	606		1072	Washington to Hackettstown, Lumber,	30.		
				Washington to Waterloo, Timber,	21.	15	88
	608		635	W. Vale to J. City, P. Iron,	59.13		
				Pt. Del. to Pt. 4 West, Oil,	.08	61	92
	617		627	Washington to Pt. Murray, Boat,		10	
	620		1693	Washington to Waterloo, Lumber,	22.7		
				Washington to Stanhope, Lumber,	20.1		
				Washington to Boonton, Timber,	21.	39	52
						<hr/>	347 00

STANHOPE.

21	23		693	Reis Mills to Newark, Posts,	23.		
				Reis Mills to Newark, Wood,	28.	39	96
23	470	W.C.Thoms'n		Rockport to Newark, Feed,	2.	2	00
						<hr/>	41 96

DOVER.

21	—		631	McCains to N. Y., Barrels,	1.10	1	77
				Dover to N. Y., Rivets,	8.15	9	45
						<hr/>	11 22

POWERSVILLE.

24	—		641	Boonton to Rockaway, Nails,	.09		
				Boonton to Phillipsburg, Nails,	.15	95	
						<hr/>	95

MONTVILLE.

22	18	A. H. T.		Boonton to J. C., Nails, &c.,	57.9	51	43
23	19	W. G. L.		Boonton to J. C., Nails, &c.,	52.6	46	90
	20		637	Boonton to J. C., Nails,	62.2	55	53
						<hr/>	153 86

BEAVERTOWN.

24	73		978	Paterson to Washington, Stone,	3.	3	02
						<hr/>	3 02

NEWARK.

18	92	V. Smith,		Newark to J. C., Boat,		24	
24	143		693	Newark to J. C., Boat,		24	
						<hr/>	48

JERSEY CITY.

April 20	162	639	Jersey City to Sundry places, Sundries,	29 58
	170	W. G. L.	Jersey City to Sundry places, Sundries,	7 39
22	179	641	Jersey City to Sundry places, Sundries,	29 32
	184	V. Smith.	Jersey City to Easton, Powder,	16.3 26 29
23	187	B. C. O.	Jersey City to Sundry places, Sundries,	20 56
	193	1580	Jersey City to Dover, P. I.,	50. 48 33
24	210	642	Jersey City to Sundry places, Sundries,	19 58
				<u>181 05</u>

Total Tolls,	\$748 82	
Less Cargo Posts and Wood,	39 96	
	<u>\$708 86</u>	
Less drawback 50 per cent. of \$708 86-100,		354 43

\$394 39Stamp.
2 cts.

Received Payment,

JNO. RODGERS, Sec'y.

81 05

48 82

54 43

4 29

y.