

WM. S. SHARP, Printer, 86 and 88 Warren Street, Trenton, N. J.

COURT OF ERRORS AND APPEALS.

IN CHANCERY OF NEW JERSEY.

<i>Between George S. Coe and George Opdyke, Complainants, and The New Jersey Midland Railway Company, and others, Defendants.</i>	}	<i>On Bill, &c.</i>
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Petition of C. A. Wortendyke.

[Filed August 9, 1875.]

*To the Honorable Theodore Runyon, Chancellor of the State
of New Jersey.*

The petition of Cornelius A. Wortendyke respectfully
sheweth—

I. That he is president of said New Jersey Midland Railway Company, and has been since its organization, and has been and is familiar with all of its business transactions and operations, and with all of its affairs and property, up to the time of the appointment of receivers to take charge of the same.

II. Owing to the embarrassed financial condition of said company, caused by the failure of The New York and Oswego Midland Railway Company to fulfil their obligations and contracts, made with said New Jersey Midland Railway Company, its officers were obliged to resort to every means within their power to continue the operation of said road and thus preserve the property of the company from disastrous depreciation, and from total loss to its creditors. Among other things for this purpose they were obliged to and did purchase loco-
10 motives and rolling stock for the use of the company, to be paid for by instalments, and to remain the property of the sellers until the purchase money had been entirely paid and satisfied.

III. Before the appointment by your Honor of receivers to take charge of the property and affairs of said company, certain instalments had become due and payable on account of said rolling stock, which said company had not the means to pay. In order to preserve said property for the benefit of
20 said company and its creditors, your petitioner and Hezekiah Watkins, De Witt C. Littlejohn, E. Theodore Bell, Henry R. Low, John N. Gamewell, Garret A. Hobart, Richard P. Terhune, and Samuel E. Olmsted, who were directors and officers of said company, advanced and paid on account of said rolling stock to the several owners thereof about the sum of seventeen thousand dollars, with the understanding that they should, for their own security, until said company were in condition to reimburse and pay back such advancements, be
30 subrogated to all the rights of said owners of said rolling stock, and should, upon the payment of the balance due thereon, themselves become the owners of said rolling stock, and hold the same for the benefit of said company until reimbursed and paid back by said company for the advancements thus made by them. No note or other obligation was given by said company for said advancements, except in one or two cases, and the same were not made as an ordinary loan to said company, but were only paid for the purpose of saving the property of said company as aforesaid, and with the express understanding that they should be subrogated to the extent
40 of said advancements to the rights of the vendors and owners of said rolling stock.

IV. After your petitioners and the other directors and officers of said company had made said advancements and payments on account of said rolling stock, and before the full balance due thereon had been paid, and before said company had paid back any of said advancements or any part thereof, proceedings were commenced by the complainants in this suit, in this honorable court, and Garret A. Hobart and James W. McCullough were appointed receivers by your Honor of said railroad and all of its property and effects, and invested with full power and control over the same, according to law, subject only to the direction and control of your Honor in this honorable court, over the same. The said receivers now have possession and use of all of said rolling stock, which was thus preserved to said company and its creditors by the advancements made by your petitioner and others as aforesaid, and the same is being used for the benefit of said complainants in this suit.

V. By reason of such proceedings, your petitioner, and those advancing said money for the benefit of said company and its creditors, have been deprived of all means of being secured and paid back the moneys thus advanced them, save by the aid of your Honor in this honorable court. They have applied to said receivers for the payment of said moneys, but they decline to make the same without the special order of your Honor for that purpose.

Your petitioner, therefore, prays that your Honor will make an order directing that your petitioner, and the said Hezekiah Watkins, De Witt C. Littlejohn, E. Theodore Bell, Henry R. Low, John N. Gamewell, Garret A. Hobart, Richard P. Terhune and Samuel E. Olmsted may be subrogated to the rights of said vendors of said rolling stock, mentioned in said petition, to the extent of the advancements made by them to said vendors, on account of the same, and that said receivers do pay to your petitioner and others, directors and officers of said company, hereinbefore named, the amount of money by them respectively advanced, on account of said rolling stock, as hereinbefore set forth, with the interest which has accrued thereon, and that your Honor will make such order in the premises as, to your Honor, shall seem meet, and may be agreeable to equity and good conscience.

LINN & BABBITT, *Solicitors of Petitioner.*

Hudson county, ss.—Cornelius A. Wortendyke, being duly sworn, on his oath saith that the facts set forth in the above petition are true.

C. A. WORTENDYKE.

Subscribed and sworn this 7th day of August, 1875.

A. B. BUNTING, M. C.

Order to Show Cause.

[Filed August 9, 1875.]

Upon reading and filing the petition of Cornelius A. Wortendyke in the above stated case, it is on this ninth day of August, eighteen hundred and seventy-five, ordered by the Chancellor, that said complainants, and Garret A. Hobart and James W. McCullough, the receivers appointed in the above stated case, do show cause before the Chancellor, at his chambers in the city of Newark, on Monday, the twenty-third day of August instant, at ten o'clock in the forenoon, why the prayer of said petition should not be granted; and it is further ordered, that either party may take testimony on two days' notice to the other party, to be used on the hearing of said rule to show cause, and that a copy of said petition, and of this order, be served upon said receivers, and upon the solicitors of said complainant, within five days from this date.

THEODORE RUNYON, C.

Testimony.

NEW YORK, Aug. 20th, 1875.

Evidence taken by consent of the counsel for the complainants, counsel for the receivers, and counsel for the petitioners, to be used on the rule to show cause granted in this case on pe-

tition of Cornelius A. Wortendyke, at the office of the receivers, No. 93 Liberty street, this 20th day of August, 1875.

E. Theodore Bell, of Paterson, county of Passaic, N. J., being duly sworn, testifies as follows:

By counsel for complainants—

Q. You were a director of the New Jersey Midland Railway Company in 1874?

A. Yes, sir.

Q. Had that company contracts for the purchase of rolling stock, to be paid for by installments, to become the property of the company only when entirely paid for?

A. They had, sir.

Q. Was any money advanced by any of those directors to be paid on account of those contracts?

A. Yes, sir.

Q. By whom, to what amounts, and when?

<i>A.</i> By Hezekiah Watkins,	\$2,000 00
“ D. C. Littlejohn,	2,000 00
“ H. R. Lowe,	2,000 00 20
“ C. A. Wortendyke,	2,000 00
“ G. A. Hobart,	1,000 00
“ R. P. Terhune,	2,000 00
“ S. E. Olmsted,	2,000 00
“ E. T. Bell,	1,871 84
“ J. M. Gainwell,	3,559 75

Total,

\$18,431 60

Q. When was that money advanced?

A. During July of 1874; part payments were made in notes maturing as late, some of them, as October, all of which, however, have been paid.

Q. Were installments due at that time to the owners of the rolling stock on account of these contracts?

A. Yes, sir.

Q. Were they necessary to be paid in order to preserve the property for the benefit of the company?

A. They were, sir.

Q. Was there any understanding as to what position these gentlemen who advanced these moneys should occupy?

A. We were to become the owners of the rolling stock.

Q. Were these advances made in the ordinary shape of a loan to the railway company?

A. The money was returned to the railway company, and the railway company returned it to the parties.

Q. Did you take obligation to the railway company?

A. No, sir; it is a *bona fide* loan without any obligation of the railway company being given for it.

10 Q. If I understand you then, the persons advancing this money were to be subrogated to the rights of the owners of the rolling stock?

A. These parties advancing the money were to be put in the place of the owners of the rolling stock, and to become the owners of it themselves, when paid for.

Q. Has that money ever been paid back by the railway company?

A. No, sir.

Q. Has the whole amount due the owners of the rolling stock, yet been paid?

20 A. No, sir; it has not yet become due.

Cross-examination—

Q. Were you an officer of the company otherwise than as a director, at this time?

A. I believe I have the honor to be the chairman of the financial committee.

Q. Not treasurer?

A. No, sir.

Q. Do you know of your own knowledge that these payments were made by the different directors you have named?

30 A. Yes, sir; the payments were paid to me, and I paid them over to the company.

Q. Were the contracts of which you have spoken, all with one company?

A. No, sir; with sundry parties.

Q. Name them?

A. They consisted of Mr. Adams, The Bristol and South Wales Railway Wagon Company, Cummings Car Company, Rhode Island Locomotive Works and the Herrick Car Works.

Q. Payments were made by the directors you have named on all these contracts?

A. I imagine so; I can't speak definitely as to that.

Q. Were all the payments made through you?

A. Yes, sir; the money was received by me, and turned over to the company.

Q. At what periods did the contracts mature?

A. Monthly, semi-monthly and weekly; I made a mistake in my previous answer: there was a note of the Rhode Island Locomotive Works for a thousand dollars (\$1,000) which I did not pay myself; it was paid by one of the directors for and on account of the owners of the rolling stock. 10

Q. Under these contracts there were payments to be made at least monthly to the different car and locomotive companies?

A. Yes, sir.

Q. You have spoken of an agreement by which the directors making these payments were to stand in the position of purchasers of the equipment; how was that agreement made?

A. We expected to assume these contracts and become the owners of the rolling stock. 20

Q. Was there any agreement in that respect between the individuals you have named and the New Jersey Midland Railway Company?

A. Yes, sir.

Q. How was this agreement made?

A. Under the title of the New Jersey Rolling Stock Company.

Q. Have you it?

A. I have not it; we were a corporation under the laws of the State of New Jersey. 30

Q. It was under that contract in writing that these persons you have named took the position of the railway company in regard to the rolling stock?

A. We were about organizing a rolling company for the purpose of getting and controlling this rolling stock, and then to let the New Jersey Midland Railway have it.

Q. That was never?

A. Only so far as to pay our money in,—that is as far as we ever advanced.

By counsel for the receivers—

Q. Were the first payments made in July, 1874?

A. About that time.

Q. Was there at that time any formal agreement between the parties advancing the money and the railway company as to the character of the transaction?

A. No more than a verbal understanding.

Q. No formal action was taken by the board of directors or by resolution of the company?

10 *A.* No, sir.

Q. At what time did you cease making these payments on account of the rolling stock?

A. The payments were made from about June or July; they were all made at about one time.

Q. The installments subsequently accruing on account of the rolling stock were not paid by these individuals?

A. No, sir.

Q. In making the payments to the rolling stock company was any receipt taken?

20 *A.* There were two or three—probably half a dozen receipts given, only I gave them as a member of the rolling stock company; I gave receipts to the individuals who advanced the money.

Q. The owners of the rolling stock gave no receipts?

A. No, sir.

Q. Do you know whether the owners of the rolling stock gave credit to the railway company on account of the payments which you made as chairman of the finance committee?

A. That I don't know.

30 *Q.* Who did actually pay the money to the owners of the rolling stock?

A. It was paid by the New Jersey Midland Railway Company, in check of the company.

Q. What you did was to pay the money over to the New Jersey Midland Railway, and not to the owners of the rolling stock?

A. Yes, sir.

By counsel—

Q. I understand, then, at the time these advances were made
40 there was a vague understanding between the members of the

board to the effect that a rolling stock company should be formed, who should assume the contracts for the purchase of the rolling stock under the various contracts you have named; that such rolling stock company should hold these cars to turn over at a reasonable time to the New Jersey Midland Railway Company, but that such arrangement was never finally consummated?

A. Yes, sir.

Re-direct examination—

By counsel for complainants—

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Q. At the time these advances were made, had the railway company funds of their own, to make the payments when they came due?

A. They had not.

Q. If the payments had not been made, would not the contracts have been forfeited?

A. I believe they would.

Q. The owners of the rolling stock threatened to take it away from the company, unless the installments were paid at that time?

20

A. Yes, sir.

Q. These advancements were made for the purpose of saving it?

A. Yes, sir.

Re-cross-examination—

By counsel for receivers—

Q. At the time that these payments were being made, did the owners of the rolling stock know where the money came from?

A. I don't know whether they did, or did not.

30

Q. You had no personal dealings, and was not brought in contact at all, with the owners of the rolling stock; all that you did was to receive this money from these gentlemen, in the proportion you have named, and turn it over to the railway company?

Q. Have you in your possession, or under your control, any books, or papers, or documents belonging to the New Jersey Midland Railway Company?

A. I have papers in my possession referring to the affairs of the New Jersey Midland Railway Company, but not belonging to the company

Q. If you have any, you would be ready at any time to surrender them to the receivers, would you not?

A. I would.

Cornelius A. Wortendyke, being duly sworn, testifies as follows:

By counsel for complainants—

10 Q. You were director and president of the New Jersey Midland Railway Company, in 1874?

A. Yes, sir.

Q. Do you know of the advancement of these moneys made for the benefit of the company, spoken of by Mr. Bell in his testimony?

A. Yes, sir.

Q. Did or did not the owners of the rolling stock understand from whom the money came to make the payments at that time?

20 A. Yes, sir.

Q. What was the understanding between yourself and the owners of the rolling stock, in reference to making those payments?

A. That we should become the owners of the rolling stock, with the then owners of the rolling stock.

Q. Was there any pressing necessity for that money on behalf of the railway company at that time? If it had not have been paid, what would have been the consequence?

A. We couldn't have operated the road.

30 Q. Did the owners of this rolling stock peremptorily demand payment, and threaten to take the rolling stock away if payment was not made?

A. They have, and threatened to take possession of the rolling stock, if they did not pay.

Q. Then for that reason these advances were made by the officers and directors?

A. Yes, sir.

Q. Were the company in a condition to pay that money themselves at that time?

40 A. No, sir.

Q. Have they ever paid back that money to these persons making advances?

A. Never.

Q. This money, for what purpose was it advanced, and to whom was it paid?

A. It was advanced for the purpose of paying for this rolling stock; it was paid on account of the rolling stock.

Q. When the New Jersey Midland resumed possession of their property after the failure of the New York and Oswego Midland, what was the condition of the company as to rolling stock—had they any? 10

A. Yes, we had some; we had five (5) locomotives, two (2) passenger cars, and two freight cars.

Q. Had you enough to operate the road?

A. No, sir.

Q. It was then absolutely necessary to purchase rolling stock?

A. We were obliged in the meantime, before we got this rolling stock, to arrange with the receiver of the New York Midland, for the amount necessary to operate the road, at a very great cost.

Q. Then the New Jersey Midland was in an embarrassed condition, and obliged to make a contract to purchase rolling stock to be paid for by installments, and the rolling stock so purchased remained the property of the vendor until paid for? 20

A. Yes, sir.

Q. And it was on account of those purchases that these advances were made subsequently?

A. Yes, sir.

Cross-examination—

By counsel for receivers—

Q. These payments that were made, were made in checks, I understood from Mr. Bell, of the Midland Railway—where 30 are those checks?

A. I suppose they are here in the office.

Q. Were they turned over to the receivers?

A. Yes, sir.

Q. Were there any entries made in the books of N. J. Midland Company, of the transaction?

A. Yes, sir.

Q. And of the receipt of the money from Mr. Bell?

A. Yes, sir.

Q. And have these books been turned over to the receivers?

A. Yes, sir.

Q. Have you in your possession or under your control, any books, papers, deeds or other documents belonging to the New Jersey Midland Railway Company, that have not been delivered to the receivers?

A. None to my recollection.

10 Q. If you have any, are you ready to turn them over to the receivers?

A. Yes, sir.

Q. Do you know of any books or papers, deeds or other documents, belonging to or relating to the business of the New Jersey Midland Railway Company in possession of any one of the parties in favor of whom this petition is made, which have not been turned over to the receivers?

A. I do not know of any—no, sir.

Garrett A. Hobart, being duly sworn, testifies as follows:

20 By counsel for complainants—

Q. Please state what you know in reference to the advancement of this money to preserve the property of the railway company?

A. I know more particularly, Mr. Linn, about my own advance, which was one thousand dollars (\$1000); I made the payment direct to Mr. Bell; I never received any check, note, or receipt for it; my understanding was, that I was to have interest in the rolling stock; my rights were to be sub-

30 I gave very little attention to the matter at the time.

Q. Was it the expectation of these individuals to organize a rolling stock company and pay the whole?

A. It was, but the attempt was abandoned; there were a number of subscriptions made to that rolling stock company, which a number of the subscribers were not good, and would not be paid, and therefore they refused to go further and pay more money, on account of that subscription.

Cross-examination—

By counsel for receivers—

Q. You were one of the directors of the New Jersey Midland Railway Company?

A. Yes, sir.

Q. And afterwards was appointed receiver, in the proceedings of *Varick v. The Midland Railway Company*, and afterwards, full receiver with Mr. McCulloh, in the foreclosure proceedings, brought by Cole and Opdyke, as trustees, against the New Jersey Midland Railway Company?

A. Yes, sir.

Q. Did you ever have any conversation with the owners of 10 the rolling stock?

A. Never, until I became a receiver.

Q. And the holders of the rolling stock are now demanding payment?

A. Every one of them, sir.

Q. Have you caused any examination to be made as to the amount of payments to be made?

A. Yes, sir.

Q. You found Mr. Bell's account to be correct?

A. I believe it to be absolutely correct. 20

Q. Do you know of there being in the possession, or under the control, of any one of the gentlemen in whose behalf this petition is presented to the Chancellor, excepting yourself, as receiver, any books, papers, documents, deeds, or other property of the New Jersey Midland Railway Company?

A. I understand there are some books, or documents, still due the receivers from Mr. Watkins.

Q. Have you made any application to Mr. Watkins for these papers?

A. Demand has been made by me, as receiver, to these individuals, for all books, papers, documents or other property in 30 their possession, belonging to the New Jersey Midland Railway Company.

Q. Has he delivered them over to you?

A. No, sir.

Q. How is it with the other gentlemen?

A. I believe Mr. Wortendyke has delivered everything in his possession; there was a demand made upon Mr. Terhune, for bonds and stocks in his possession, which, to my knowledge have not been yet delivered; \$600,000 of stock was issued to 40

him, as Treasurer, which he claims to hold as property of individuals, and not of the company; with the exception of Mr. Watkins and Mr. Terhune, I know of no officer of the company refusing anything to the receivers; I do not know whether there was anything in Watkins' hands, or not; Mr. Terhune claims to hold the bonds in the interest of certain individuals, as securities for loans or accommodation advancements of the company, and the receivers have let it run until this time.

- 10 *James W McCulloh*, being duly sworn, testifies as follows:
By counsel for receivers—

Q You are one of the receivers of the New Jersey Midland Railway Company, appointed under the order of the chancellor of the State of New Jersey, in the suit of Cole and Opdyke, as Trustees, against the New Jersey Midland Railway Company?

A. Yes, sir.

- Q*. Do you know of Mr. Hezekiah Watkins, or any of the rest of these gentlemen named in the petition, having in
20 their possession any of the books, papers, documents or other property belonging to the New Jersey Midland Railway Company?

A. I know of the stocks and bonds in the possession of Mr. Terhune, that Mr. Hobart has spoken of; I also know by Mr. Watkins' own admission that he had retained possession of deeds and papers which he at that time admitted belonged to the company, on the alleged ground that they had been so retained by reason of an attachment against the New Jersey Midland Railway Company by the sheriff of the city and
30 county of New York

Q. Was any demand made of Mr. Watkins for those papers?

A. I made a demand upon him personally, and in writing, of which I will give you a copy.

Q. Were the papers and other property delivered over to the receivers?

A. No, sir; the sheriff had already given directions to the deputy to turn over all papers connected with the company to Mr. Hobart and myself, and take our receipt for them;

and that fact was communicated to Mr. Watkins by the deputy sheriff in my presence.

Q. Were those papers of importance to the receivers?

A. I believe them to be of vital importance, or they wouldn't have been retained.

By counsel for complainants—

Q. You do not know what the papers are, or the books?

A. I have a good idea what they are; I can only infer what they are from things I have missed.

Q. Do you know?

10

A. No, sir.

By counsel for receivers —

Q. Mr. Watkins, when demand was made of him for the papers, did not deny that he had them?

A. He admitted publicly in Broadway, at a meeting of the bondholders, that he did have them.

Q. Mr. McCulloh, is it possible, with the funds that are in the hands of the receivers, to pay the amount of the moneys which Mr. Bell has stated have been advanced by the petitioners in cash?

20

A. No, sir.

Q. Could you do it in any other way than by the issuing of receiver's certificates at par?

A. Not unless we discounted the receiver's certificates.

Q. What rate of discount would you probably be compelled to take?

A. That would be hard to fix.

Q. In your judgment would it be for the interest of the property in your hands for the receiver's certificates to be issued in small sums?

30

A. No, sir.

Q. Why?

A. If issued in small sums and placed in a number of hands, they would be so handled as to decrease in value?

Q. So that the course for the receivers to pursue, in your judgment, would be to negotiate the whole of the receiver's certificates with one party?

A. Yes, sir; the receivers are trying to negotiate all these certificates with one person.

Depositions.

Examination of witnesses on the part of the petitioners in the above entitled cause, taken by agreement of parties at No. 93 Liberty street, in the city of New York, on Friday, the eighth day of October, in the year of our Lord one thousand eight hundred and seventy five, before J. Herbert Potts, one of the masters and examiners in Chancery, of the State of New Jersey, in the presence of William S. Updyke, solicitor and of counsel for the said complainants, and of
10 Ashbel Green, solicitor and of counsel for the receivers, and John Linn, solicitor and of counsel with petitioners.

D. C. Littlejohn, a witness produced on the part of the petitioners, being duly sworn, deposeth and saith—

I was connected with the New Jersey Midland Railway Company, in the year 1874, as managing director for a portion of the time.

Q. Please state in your own way what was the then condition of the company in reference to its rolling stock, and what was done by yourself and others for the purpose of preserving that rolling stock for the benefit of the company, and
20 its mortgage creditors?

A. The New Jersey Midland Company was leased to the New York and Oswego Midland Railway Company, at an annual rental equal to seven per centum on its cost; in September, 1873, the New York and Oswego Midland became involved, and was unable to meet payments of rent; in consequence, the directors of the New Jersey Midland Railway Company took upon themselves its management, previously managed by the New York and Oswego Midland Company,
30 which latter company had furnished in its operation, a greater portion of its rolling stock; the directors when they entered upon the management of the road, found themselves largely deficient in the rolling stock with which to operate it; and were obliged to enter into contract in the following winter and spring for locomotives, freight, baggage and passenger cars to a considerable extent, relying upon the income of the road and sale of bonds to meet the payments therefor;

under the depressed business of the company in the year 1874, the income of the road fell far short of estimate, and the sale of bonds was impossible; under this state of things, for the purpose of continuing the road in operation, and protecting the interests of all concerned, a number of gentleman organized a rolling stock company, of which J. M. Gamewell was president, and E. T. Bell, treasurer; an agreement was made between the New Jersey Midland Railroad Company and this rolling stock company, under which (said agreement, I think, was not in writing) the New Jersey Midland Railway 10 Company was to assign its contracts for the rolling stock to which I have referred before, to the rolling stock company, which company was to meet all subsequent payments on the contracts which had been made by the railway company for locomotives and cars; it being understood that in consideration therefor, the railway company should use said rolling stock, keep it in repair, and pay a moderate compensation for the use thereof; under this agreement, moneys were paid by several gentlemen who had become subscribers to the rolling stock company, myself amongst the number; the money was 20 paid to the treasurer of the rolling stock company, and disbursed to meet the payment for the rolling stock; this was the only mode by which the payments upon the contracts which had been entered into by the railway company, could be met, and the New Jersey Midland Railway Company retained the use of the rolling stock in operating the road; my recollection is that I paid in \$2,000; I do not know what the others paid, but it was the intention that we all pay alike.

Mr. E. T. Bell was treasurer of the rolling stock company; my recollection is that the money paid in was paid in preliminary 30 to the organization of this rolling stock company; the company needed the money, consequently the payments had to be made at once; I know that the whole arrangement was terminated by the appointment of a receiver of the company; these contracts were in all cases made in writing. [The counsel for the complainants in this suit stipulates that any copies of contracts certified to by either one of the receivers shall be used in evidence the same as if the original was produced.] The payments to be made by the company upon these contracts extended through different periods of time, from two to five 40

years; my recollection is that seven of the directors of the New Jersey Midland Company became guarantors upon two of the contracts,—one unto Mr. Adams, and the other with another company—I have forgotten the name; Mr. Adams, for himself and as agent of the Bristol Wayne Company, knew of the arrangement, and verbally assented to it; the Rhode Island Locomotive Company assented, and either the company or one of the officers was to take stock in the rolling stock company to help complete the arrangement.

10 And being cross-examined, witness says—

I can't give the exact date of the agreement between the railway company and rolling stock company,—sometime during the summer of 1874; Mr. Wortendyke, as president, acted for the railway company, and I was quite confident that the board of directors passed resolutions. [Witness requested to produce any resolution on the subject, — certified copy of resolution produced and marked *Exhibit A*, *ex parte* petitioners] Mr. Gamewell, as president, and Mr. Bell, as treasurer, acted for the rolling stock company; my recollection is that
20 there was no assignment made in writing, but it was ordered to be done; before it was finally consummated, the arrangement was broken up by the appointment of a receiver by the Chancellor of New Jersey.

DE WITT C. LITTLEJOHN.

Taken, sworn and subscribed before me, this 8th day of October, A. D. 1875.

J. HERBERT POTTS, *M. C.*

W. H. Fenner, Jr., a witness produced on the part of the petitioners, being duly sworn, says—

30 I was secretary and assistant treasurer of the Rhode Island Locomotive Works; that company had a contract with the New Jersey Midland Railway Company for the ultimate sale of locomotives,—ten locomotives in all; our company had information that there was to be a rolling stock company organized, and that they were to pay for the engines and to hold them; I do not know whether the gentlemen composing the rolling stock company paid anything on account of the engines.

Q. Did your company assent to the arrangement proposed to be made between the Midland company and the rolling stock company, by which the rolling stock company undertook to pay for the locomotives in place of the Midland company?

A. We consented so far as to entertain the idea to become members of that company ourselves; we were willing that it should be so, although there was no formal consent given; payments from the Midland company to our company were coming due from time to time; these payments were by notes on account of the rental of the rolling stock; if those payments had not been made, we should probably have taken possession of the stock—that is to say, the locomotives. 10

And being cross-examined, witness says—

There were some payments made—a few; the installments were represented by notes, and these notes represented the rental of the rolling stock; these notes were the New Jersey Midland Railway notes, payable at the office of the company, I think; the locomotive company did not actually subscribe for any stock of the company, not to my knowledge; I should probably know it if they had; there was never any actual agreement of any sort ever made between the rolling stock company and the locomotive company in reference to these locomotives, or the payments on account; as I understood the arrangement, they were to furnish the money to the N. J. Midland Company to pay the notes, and hold the possession of the engines after the notes were all paid; the supposition that I had as an officer of the locomotive company, was that we had nothing to do with the rolling stock company, but dealt with the N. J. Midland Railway Company. 20

W. H. FENNER, JR. 30

Taken, sworn to and subscribed before me, at 93 Liberty street, this 8th day of October, A. D. 1875.

J. HERBERT POTTS, M. C.

John N. Gamewell, a witness produced on the part of the petitioners sworn, says—

I was a director of the New Jersey Midland Company in 1874; I was one of the persons that advanced money to pre-

serve the rolling stock of the company; I advanced about \$4,618.75; that is, \$3555.75 through E. T. Bell, treasurer of the rolling stock company, and \$1,059 that did not pass through his hands, which was to be applied to the same purpose; my understanding was we were to be secured as members of the rolling stock company for these advances, by an assignment of contracts which the New Jersey Midland Railway Company had with three different parties.

And being cross-examined, witness says—

10 I paid a note of the New Jersey Midland Company, given to the Rhode Island Locomotive Works, for \$1,059, the amount above named, which would have gone to protest—took up the note and now hold it.

J. N. GAMEWELL.

Taken, sworn to and subscribed before me, at 93 Liberty street, this 8th day of October, A. D. 1875.

J. HERBERT POTTS, M. C.

By agreement of counsel, this examination was kept open until to-day, for the purpose of allowing the counsel for the petitioners time to obtain and offer in evidence copies of cer-
20 tain agreements, which copies (marked *Exhibit B* and *C ex parte* petitioner) are produced, and the testimony closed this 30th day of October, A. D. 1875.

J. HERBERT POTTS, M. C.

Exhibit A Ex parte Petitioners.

At a meeting of the Board of Directors of the New Jersey Midland Railway Company, held at their office, No. 93, Liberty street, New York city, on the 10th day of June, 1874,
30 at 11 o'clock A. M., the following resolution was offered by Mr. Olmsted, and adopted:

Resolved, That this company will enter into contract with any rolling stock company which will furnish such rolling stock as may be required for the operation of the road, at an annual rental of ten per cent. on its cost value, this company

keeping the same, at all times, in good order and condition, such rental payable quarterly.

At a meeting of the same company, at the same place, on the 23d day of June, 1874, at the same hour, the following motion was made, and resolutions offered and adopted :

Moved, That a contract be prepared by the secretary, in the proper form, between the New Jersey Midland Road and the rolling stock company, for adoption by the two companies.

The following committee was appointed: Messrs. Watkins and Hobart.

10

Resolved, That the contract of Rhode Island Locomotive Works be accepted and signed by the president, after terms of payment shall have been agreed upon, in case the company or assigns shall purchase.

Resolved, That this company request the rolling stock company to deliver to this road at least one more engine for use on the road.

I certify the above to be a correct extract from the minutes of the New Jersey Midland Railway Company, of meetings held on the above-named dates.

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J. HERBERT POTTS, *M. C.*

Order continuing Rule, &c.

[Filed October 14, 1875.]

It is ordered by the Chancellor, that the rule to show cause heretofore granted in this case be continued, and that both parties be at liberty to take further testimony to be used on the hearing of the same, and that the hearing may be had on any regular motion day at the Chancellor's chambers upon five days' notice in writing of either party to the others.

THEODORE RUNYON, *C.*

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Opinion.

[Filed May 10, 1876.]

- THE CHANCELLOR. The New Jersey Midland Railway Company is an insolvent corporation. Its effects are in the hands of receivers appointed by this court by two orders, one in a suit in insolvency, and the other in a suit for foreclosure of the first mortgage on its property. In the last-mentioned suit Cornelius A. Wortendyke has filed a petition in behalf of himself and certain others who, with him, before the proceedings
- 10 in insolvency, advanced money upon contracts which the company had made with certain venders of locomotive engines and railroad cars. These advances were made to enable the company to meet its engagements to pay installments of money on account of rent, or as it may more accurately be termed, purchase money of engines and cars delivered to it by those venders as upon lease, but on agreement that on the payment of the rent in full, according to the contract, the company should become the owner of the demised rolling stock. The agreements provided also for the retaking of the property by
- 20 the lessors into their possession in default of payment of rent. There was therefore, a consequent liability to loss by the company in case of inability to meet its engagements. The petitioners and all the others, except four, in whose behalf he appears, were guarantors of the company on the contracts, and all those by whom the payments were made, were, at the time of making them, directors of the company. The complainant claims that the rolling stock is covered by his mortgage. The petitioner prays to be subrogated to the rights of the lessors for the payments. All parties in interest have had notice of
- 30 this application. The complainants' counsel took part in the examination of the witnesses in support of the petition, and on the hearing of the order to show cause granted on the petition, opposed the granting of the relief prayed for. Their opposition was, however, solely upon the merits; no objection being made to the form of proceeding; but on the contrary, they expressed a willingness that the matter should be disposed of on the petition and testimony.

The payments, in respect of which subrogation is sought, were made under circumstances which entitle those by whom they were made, to substitution. Some of those persons were sureties for the company on the contracts for the payment of that money, and, irrespective of suretyship, the money was paid by all of them, at the request of the company, and on the understanding that they would be subrogated to the rights of the lessors in respect th. reto. It is proved that these payments were made in pursuance, and in partial execution of an arrangement, by which, for the relief of the company, it 10 had been agreed that a rolling stock company should be formed by the persons who made the payments, and that the rolling stock company should take, by assignment, the contracts of the railroad company for the rolling stock which the latter held under lease, and provide the means for paying the rent. The railroad company, under this arrangement, was to become the lessee, or vendee, of the rolling stock company, in respect to the engines and cars, on more favorable terms than those of the contracts, and so would have relief from the stringent terms imposed by the contracts, and with which, in 20 its then embarrassed condition, it was unable to comply, and a non-compliance with which threatened such serious consequences. At the time when these payments were made, it was understood between the railroad company and those who made them, that they were made on account of the rolling stock company, which had been incorporated, but had not yet been formally organized, although it appears to have had a temporary organization. Again, those who made these payments were directors of the railroad company; as such, they were in the position of trustees, and they are, therefore, apart 30 from other considerations in favor of substitution, entitled to reimbursement out of the trust property, for advances made by them to save that property. It would, manifestly, be gross injustice to give to the mortgagees, or other creditors of the railroad company, the benefit of those advances at the expense of those by whom they were made. It was argued by the complainants' counsel, that the payments under consideration must be regarded as voluntary, and that, therefore, no right of subrogation can be gained by means of them. The guarantors were in no sense volunteers; and as to the 40

others, their payments were, indeed, made to relieve the railroad company, and were made directly to it, but they were, nevertheless, made on an understanding that those by whom they were made were to have security for their repayment, by subrogation, through the arrangement by which the rolling stock company was to have an assignment of the contracts. In *Paine v. Hathaway*, 3 Vern. 212, it was held that if a person who has agreed with a debtor to advance the money (to be secured by mortgage on land) to discharge a debt, which
10 is secured by incumbrance on that land, himself pays the debt with the money and discharges the incumbrance, he is not to be regarded as a volunteer. After such an agreement with the debtor, he will not be considered a stranger with regard to the debt he has paid, but, in equity, may be entitled to the benefit of the security which he has satisfied, with the expectation of receiving a new mortgage or lien on the land, for the money paid.

In view of the resolutions of the board of directors of the railroad company on the subject, and of the testimony generally, none of the payments in question can be held to have
20 been merely voluntary, and made solely on the faith of the credit of the railroad company. As to the guarantors, their claim to subrogation does not depend on request or agreement. Equity will, as a matter of course, and without any agreement to that effect, substitute in the place of the creditor a person who advances money to pay the debt for which he is bound as surety.

But it is urged that no subrogation can take place here because the whole debt has not yet been paid, and because since
30 the payments in question there have been other payments made under the same contracts, on account of the same rolling stock by the receivers. The subrogation decreed will be subject to the rights of the lessors, to which it will accordingly be postponed. The right to it is superior to any claim of the receivers upon the property in respect to payments made by them, for they represent the railroad company or its mortgagees of the property.

Order to Subrogate, &c.

[Filed May 16, 1876.]

A petition having been filed in this cause by Cornelius A. Wortendyke, in behalf of himself, Hezekiah Watkins, De Witt C. Littlejohn, E. Theodore Bell, Henry R. Lowe, John N. Gamewell, Garret A. Hobart, Richard P. Terhune and Samuel E. Olmsted, praying that James W. McCullough and Garret A. Hobart, the receivers appointed by the Chancellor in this cause, be directed to pay to the above-named persons the moneys particularly mentioned in said petition, with the interest thereon; and that said parties might be subrogated to all of the rights of the lessors or vendors of the rolling stock mentioned and referred to in said petition, and on account of which the said moneys were advanced and paid by said parties. And the counsel for said complainants, as well as of said receivers, having been respectively heard upon said petition; and it having been submitted to the Chancellor by all of the parties to be decided upon the merits of the application, without reference to the form of the proceedings or to any purely technical objections; and the Chancellor having duly considered the evidence taken under the rule to show cause in this case and the arguments of the counsel of the respective parties thereon, and being of the opinion that under the circumstances of this case it is equitable and just that the said persons in whose behalf said petition was filed should be subrogated to the rights of the vendors or lessors of said rolling stock to the extent of the moneys thus, as aforesaid, advanced, with the interest thereon, subject, however, to the rights of said lessors still existing against said rolling stock, and that said parties should be reimbursed and paid back the moneys thus advanced by them, with interest: 10 20 30

It is on this sixteenth day of May, eighteen hundred and seventy-six, ordered, directed and decreed by the Chancellor that the said Cornelius A. Wortendyke, Hezekiah Watkins, De Witt C. Littlejohn, E. Theodore Bell, Henry R. Lowe, John N. Gamewell, Garret A. Hobart, Richard P. Terhune and

Samuel E. Olmsted be subrogated to all of the rights of the vendors or lessors of said rolling stock, mentioned in said petition and disclosed in the evidence taken under the rule to show cause in this case, to the extent of eighteen thousand four hundred and thirty-one dollars and sixty cents, being the amount of moneys advanced by said parties for said railway company on account of said rolling stock, with interest thereon from the first day of September, eighteen hundred and seventy-three, subject, however, to the superior right of said
10 lessors or vendors to be paid any unpaid balances due from said company on account of said rolling stock, and other remedies for or rights in case of non-payment thereof; and it is further ordered, directed and decreed that if in the judgment of said receivers it is for the interest of said complainants and the general creditors of said company that said receivers retain the use and possession of said rolling stock, for the benefit of said complainants, in the operation of said railroad, and they so determine to do, that they then pay out of the first moneys which may come into their hands, as such receivers,
20 to the said petitioners or their solicitors, the said sum of eighteen thousand four hundred and thirty-one dollars and sixty cents, with interest as aforesaid, or deliver to said petitioners therefor receivers' certificates of the issue already authorized.

THEODORE RUNYON, C.

Appeal from Order, &c.

[Filed June 24, 1876.]

30 Garret A. Hobart, receiver, &c., who has filed an answer on behalf of Daniel B. Halstead, Joseph N. Balestier, and John J. Brown, in the above stated cause, under the provisions of an order of the Court of Chancery of the State of New Jersey, dated the twenty-third day of May, A. D. eighteen hundred and seventy six, under the provisions of said order, hereby ap-

peals from so much of the order of the Chancellor made on a petition in said cause, by Cornelius A. Wortendyke, on behalf of himself, Hezekiah Watkins, De Witt C. Littlejohn, E. Theodore Bell, Henry R. Lowe, John A. Gamewell, Garret A. Hobart, Richard P. Terhune, and Samuel Olmsted, praying, among other things, that James W. McCullough and Garret A. Hobart, the receivers appointed by the Chancellor in this cause, be directed to pay certain moneys to said petitioners, with interest, as declares that, under the circumstances of the case, it is equitable and just that the said persons in whose behalf said petition was filed, should be subrogated to the rights of the vendors or lessors of the rolling stock, to the extent of the moneys advanced, with the interest thereon, subject, however, to the rights of the lessors still existing against said rolling stock, and as declares that said parties should be reimbursed, and paid back the moneys advanced by them, with interest; and as orders that the said Cornelius A. Wortendyke, Hezekiah Watkins, De Witt C. Littlejohn, E. Theodore Bell, Henry R. Lowe, John R. Gamewell, Garret A. Hobart, Richard P. Terhune, and Samuel E. Olmsted, be subrogated to all of the rights of the vendors or lessors of said rolling stock mentioned in said petition, and disclosed in the evidence taken under the rule to show cause in this case, to the extent of eighteen thousand four hundred and thirty-one dollars and sixty cents, recited as being the amount advanced by said parties for said railway company, on account of said rolling stock, with interest thereon, from the first day of September, eighteen hundred and seventy-three, subject, however, to the superior right of said lessors or vendors to be paid any unpaid balance due from said company on account of said rolling stock; and as orders that if, in the judgment of said receivers, it is for the interest of said complainants and the several creditors of said company that said receivers retain the use and possession of said rolling stock, for the benefit of said complainants, in the operation of said railroad, and they so determine to do, that they then pay out of the first moneys which may come into their hands as such receivers, to the said petitioners or their solicitors, the said sum of eighteen thousand four hundred and thirty one dollars and sixty cents,

with interest as aforesaid, or deliver to them receivers' certificates therefor of the issue already authorized, to the Court of Errors and Appeals in the last resort in all causes, as heretofore.

Dated June 24, A. D. 1876.

WILLIAMSON, MAN & SPENCER,
*Solicitors of Garret A. Hobart, receiver, &c., on behalf
of Daniel B. Halstead, Joseph N. Balestier and
John J. Brown.*

I conceive there is good cause for appeal in the above stated
10 cause.

ROBT. GILCHRIST, *of Counsel.*

Order Staying Proceedings.

[Filed June 30, 1876.]

It appearing to the court that an appeal has been filed to a decree of this court, made the sixteenth day of May, A. D. 1875, by Garret A. Hobart, receiver, on behalf of Daniel B. Halstead, Joseph N. Balestier and John J. Brown, it is on this thirtieth day of June, A. D. 1875, ordered that James W. McCullough and Garret A. Hobart, receivers appointed by
20 this court, in the above entitled cause, do refrain from paying the sum of eighteen thousand four hundred and thirty-one dollars and sixty cents, to the persons to whom by said decree they were directed to pay the same, or from delivering to them receivers' certificates therefor, or from taking any action whatever under or by virtue of said decree, till the further order of this court be made, or the said appeal be heard and decided in the Court of Errors and Appeals of this state.

THEODORE RUNYON, C.

EXHIBITS.

EXHIBIT B.

This agreement, made this twentieth day of September, eighteen hundred and seventy-four, by and between The Rhode Island Locomotive Works, of Providence, R. I., party of the first part, and New Jersey Midland Railroad Company, party of the second part, witnesseth—That whereas the said party of the first part is the owner of five locomotive engines and tenders complete; and whereas, the said party of the second part is desirous of using and eventually purchasing the same: now therefore, in consideration of the sum of one dollar, to the said party of the first part by the said party of the second part in hand paid, the receipt whereof is hereby acknowledged, and in consideration of the covenants and agreements hereinafter contained, the said party of the first part agrees to let and lease, and hereby does let and lease, to the said party of the second part, and the said party of the second part agrees to have and take from the said party of the first part the said five locomotive engines and tenders, with the right to place the same upon its railroad, and to use the same in the usual manner in transacting the business of the said railroad; and in consideration thereof, the said party of the second part hereby covenants and agrees to pay to the said party of the first, for the use and rent of the same, the sum of fifty-four thousand eight hundred thirty-seven dollars, in notes as follows:

1875.

May	23.	Note due this date.....	\$2741 85
June	23.	“ “	2741 85
July	23.	“ “	2741 85
Aug.	23.	“ “	2741 85
Sept.	23.	“ “	2741 85
Oct.	23.	“ “	2741 85

1875.

Nov.	23.	Note due this date.....	\$2741 85
Dec.	23.	“ “	2741 85

1876.

Jan.	23.	“ “	2741 85
Feb.	23.	“ “	2741 85
Mch.	23.	“ “	2741 85
April	23.	“ “	2741 85
May	23.	“ “	2741 85
10 June	23.	“ “	2741 85
July	23.	“ “	2741 85
Aug.	23.	“ “	2741 85
Sept.	23.	“ “	2741 85
Oct.	23.	“ “	2741 85
Nov.	23.	“ “	2741 85
Dec.	23.	“ “	2741 85

\$54,837 00

And the said party of the second party hereby further covenants and agrees, during the time hereby demised, to keep
 20 and maintain the said five locomotive engines and tenders in as good condition as they now are, reasonable and ordinary wear and tear excepted; but it is understood and agreed that any injury by collision, by running off the track, or by fire, or destruction from any cause, is not to be considered reasonable and ordinary wear and tear. And the said party of the first part, in consideration of the foregoing, further covenants and agrees that in case the said party of the second part shall pay the said notes promptly, as hereinbefore set forth, on payment of the last-mentioned note (viz., twenty-seven hundred and
 30 forty-one and 85-100 dollars,) and all renewals of same, it will grant, sell, assign, transfer and convey to the said party of the second part the said five locomotive engines and tenders in the condition they then are, to have and to hold the same to the said party of the second part, its legal representatives, successors and assigns, forever.

And the said party of the second part further covenants and agrees that if it shall fail to make any of the said payments

when due, then the said party of the first part shall be at liberty, and it shall be lawful for it to enter upon and take possession of the said five locomotive engines and tenders, and to that end to enter upon the road and other property of the said party of the second part.

And the said party of the second party further covenants and agrees that in case of any default on its part in any of the payments as hereinbefore provided, it will, within ten days thereafter, deliver the said five locomotive engines to the said party of the first part. And the said party of the first part shall thereafter, upon twenty days' written notice to the said party of the second part of the time and place of sale, proceed to sell the said five locomotive engines and tenders, and shall apply the proceeds of such sale, first, to the payment of the expenses of the sale; second, to the payment of any balance then due, or thereafter to become due, for or on account of the rent as hereinbefore provided; and if, after these payments, there shall remain any balance of the proceeds of the sale, the same shall be paid to the said party of the second part.

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And the said party of the second part further covenants and agrees that they will not in any way exercise or claim the right to release, encumber or in any way dispose of said five locomotive engines and tenders, or employ them, during the term of this lease, in any other way than in the service or upon the railroad of the said *New Jersey Midland Railroad Company*, or in any way or manner interfere with the said party of the first part in re-possessing and re-taking said five locomotive engines and tenders, should default be made in any of the hereinbefore provided-for payments, but the full legal right and title of said five locomotive engines and tenders shall and does remain in the Rhode Island Locomotive Works as fully, to all intents and purposes, as though the lease had not been made.

And the said party of the first part hereby covenants and agrees that if the said party of the second part shall and do well and truly make each of the payments aforesaid, at the times hereinbefore specified, without any let or hindrance or delay whatever as to any or either of said payments, that upon the last-mentioned payment, (viz., twenty-seven hundred

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forty-one and 85-100 dollars,) and all renewals being made, as well as each and all of the other said payments, the said party of the first part will and shall convey the said five locomotive engines and tenders to the said party of the second part, and give them a full acquittance for the same, and that the title thereto shall, *ipso facto*, by the completion of such payment, vest in the said *New Jersey Midland Railroad Company*.

In witness whereof, the parties hereto have hereunto set the corporate seal by the respective officers duly authorized.

10 (Signed,) R. I. LOCOMOTIVE WORKS,
 Earl P. Mason, *Treas'r.* [L. s.]
 NEW JERSEY MIDLAND R'D Co.,
 By C. A. Wortendyke, *Pres't.*
 [L. s.]

Be it known, that the foregoing lease is to take effect on the 23d day of April, 1875, and is to take the place of a lease between the same parties, made and dated on the 23d day of April, 1874, but is not to be invalidate, or affect, in any manner, said lease.

20 (Signed,) R. I. LOCOMOTIVE WORKS,
 Earl P. Mason, *Treas'r.* [L. s.]
 NEW JERSEY MIDLAND R'D Co.,
 By C. A. Wortendyke, *Pres't.*

[NOTE.—On the margin of first page are the Nos. 531, 532, 533, 534, 535.]

EXHIBIT C.

State of New York, city and county of New York, ss.—We whose names are hereunto subscribed, do hereby associate ourselves together and form a company pursuant to the provisions of the act of the legislature of the State of New York, entitled "An Act to authorize the formation of corporations
 30 for manufacturing, mining and mechanical or chemical purposes," passed February 17th, 1848, and the several acts extending and amending the said act; and in compliance with the requisitions of the aforesaid acts, we do hereby certify as follows, that is to say:

First—The corporate name of the said company shall be "New Jersey Rolling Stock Co."

Second—The objects for which said company is formed are to own, use, lease and hire engines, cars and rolling stock for railway purposes. And

Third—The amount of the capital stock of said company shall be one hundred and fifty thousand dollars (\$150,000.)

Fourth—The number of shares of which said capital stock shall consist shall be fifteen hundred shares of one hundred dollars each.

Fifth—The term of existence of said company shall be fifty 10 years.

Sixth—The number of trustees of said company, who shall manage its concerns, shall be nine, and the following-named persons shall be such trustees for the first year:

- | | |
|------------------------|--------------------------|
| 1. E. Theodore Bell, | 6. Hezekiah Watkins, |
| 2. J. N. Gamewell, | 7. R. C. Strumeall, Jr., |
| 3. J. W. Schermerhorn, | 8. C. A. Wortendyke, |
| 4. D. C. Littlejohn, | 9. W. H. Butterworth. |
| 5. Henry R. Low, | |

Seventh—The places in which the operations of the said 20 company are to be carried on, are the city and county of New York, which shall be the principal places of business in this state, and the place of its financial business, and the principal office for managing the business of said company, but the said company shall also carry on its business in the State of New Jersey, and especially in those parts of said state lying along the railroads leading from the city of Jersey City, in said state.

In witness whereof, we have hereunto set our hands and seals this tenth day of June, in the year of our Lord one thousand eight hundred and seventy-four.

30

G. E. Olmsted, Norwalk, Conn.

J. W. Schermerhorn, Boarsville, N. J.

J. N. Gamewell, Hackensack, N. J.

D. C. Littlejohn, Oswego, New York.

H. R. Low, Middletown, N. J.

R. P. Terhune, Hackensack, N. J.

E. T. Bell, Paterson, N. J.

Hezekiah Watkins, New York City.

R. C. Strumeall, Jr., Brooklyn, N. Y.

Wm. H. Butterworth, New York City.

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City and county of New York, ss.—On this tenth day of June, A. D. 1874, before me came J. N. Gamewell, D. C. Littlejohn, Henry R. Low, R. P. Terhune, Hezekiah Watkins, R. C. Strumeall, Jr., and Wm. H. Butterworth, G. E. Olmsted, J. W. Schermerhorn and C. A. Wortendyke, and on the 11th day of June, 1874, came also E. Theo. Bell, to me known to be the same persons described in, and who executed the foregoing certificate, and severally acknowledged to me that they had executed the same.

10 [L. s.]

THEO. KILVERT,

10 Notary Public in and for New York city and county.

WILLIAM S. SHARP, Printer, 86 and 88 Warren Street, Trenton, N. J.

IN CHANCERY OF NEW JERSEY.

Between	
GEORGE S. COE and GEORGE OPDYKE,	}
Complainants,	
and	
THE NEW JERSEY MIDLAND RAILWAY	
COMPANY and others,	On Petition, &c.
Defendants.	

Petition as to action of Sussex Railway Co.

[Filed October 9th, 1876.]

*The Petition of Garret A. Hobart and James W. McCulloh
respectfully shows to this Court :*

I. That they were, on the thirtieth day of March, 1875, duly appointed by an order of this court herein, receivers of the mortgaged property mentioned in the bill of complaint in this cause, with authority to operate said railway and all its branches and leased lines, and other roads operated by it, and that on the second day of April, 1875, they went into 10 possession of said road, and are now operating the same, pursuant to said order.

II. That among other property that came into the posses-

sion of your petitioners, as receivers as aforesaid, was a certain spur-switch or turn-out, extending from the intersection of the furnace branch of the Boston Franklinite Company's railroad, near the village of Franklin, in the county of Sussex, in the State of New Jersey, to the mines of the New Jersey Zinc Company, formerly known as George's Mine, in said county, being a distance of about fifteen hundred feet, and that the said spur-switch or turn-out has, since the second day of April, 1875, remained in the possession of your petitioners, as receivers as aforesaid, and has during that time been used and operated by them as a part of the New Jersey Midland Railway, and that no other person or corporation has the right to use said switch or turn-out without the consent, or under the instructions of your petitioners.

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III. That certain differences having arisen between the officers of the Sussex Railroad Company and your petitioners, in regard to the use of the switches or turn-outs constructed by the New Jersey Midland Railway Company, your petitioners requested an interview with the officers of the said Sussex Railroad Company, to amicably arrange such differences. That thereupon an interview took place between John I. Blair, president, and Timothy Case, superintendent, of the Sussex Railroad, and your petitioners, on the twenty-ninth day of September, 1876, and a proposition was made by your petitioners, and was entertained by the president of the said Sussex Railroad Company, for the adjustment of said differences, and that said Blair promised to call upon your petitioners again and arrange the details of such adjustment within a few days thereafter, but that the said president of the said Sussex Railroad Company has not since that time communicated with your petitioners, nor in any way indicated a wish that such arrangements should be completed, whereupon your petitioners sent a communication in writing to Timothy Case, superintendent of the Sussex Railroad Company, a copy of which is hereto annexed, marked *Exhibit A*, to which your petitioners have received no reply.

40
IV. And your petitioners further show that on or about the second day of October, 1876, the officers of the Sussex Railroad Company caused certain of their cars to be run in upon the said switch in the possession of your petitioners, and to

be partially loaded with ore, and that said action of said officers was in nowise authorized by your petitioners, and your petitioners caused the said cars to be removed. That said cars were afterwards placed upon said switch, under the direction of the officers of the said Sussex Railroad Company, and the loading of the same has been continued, and the cars, with their freight, removed over said switch to the road jointly used by your petitioners and the Sussex Railroad at Franklin, and carried thence over the main line of the Sussex Railroad Company.

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V. And your petitioners further show that the said Sussex Railroad Company have not offered or in any way arranged to compensate your petitioners for the use of the said switch. That by the running of their cars and removing their freight thereon as hereinbefore stated, they are causing damage to your petitioners as receivers, as aforesaid, by depriving them of a portion of their legitimate business. That your petitioners have protested to the officers of the said Sussex Railroad Company against the action aforesaid, but that such protests have been disregarded.

20

VI. That your petitioners further show that unless the conditions and terms of the agreements between the New Jersey Midland Railway Company and the Sussex Railroad Company, copies of which are hereto annexed, marked *Exhibit B*, are settled, it will lead to a serious conflict between the interests of your petitioners as receivers as aforesaid, and said Sussex Railroad Company, and damage will ensue to the property and trusts in the hands of your petitioners as receivers as aforesaid.

VII. And your petitioners further show that the unlawful 30 acts of the said Sussex Railroad Company and its officers and agents, seriously damage the business of your petitioners as such receivers, and are diminishing the value of the property in their hands as custodians of this court; and that if the claims of said company and its agents and officers are carried into practice as threatened, they will be at the great hazard of life to the passengers transported by your petitioners, and to the employees on the railroad operated by your petitioners as such receivers; that the portion of the main line of said railroad hereinbefore mentioned is operated under the direc- 40

tion and control of the superintendent and train despatcher of your petitioners, and all the trains on said road are properly under his control, and that if the said trains of the Sussex Railroad Company are run over any portion of said road, branches or switches, without the authority or knowledge of said superintendent and train despatcher, they may at any time come into collision with the trains of the road operated by your petitioners as receivers, and cause great loss of life and property.

- 10 Wherefore your petitioners pray the instructions of this honorable court in the premises, and for an injunction restraining the unlawful acts of said railroad company, and its officers and agents.

And your petitioners, as in duty bound, will ever pray.

GARRET A. HOBART,

JAMES W. McCULLOH,

Receivers, by

ASHBEL GREEN, *Col.*

- 20 State of New Jersey, ss.—James W. McCulloh, being duly sworn, says that he is one of the petitioners named in the foregoing petition, that he has read the said petition, and the same is true to the best of his knowledge, information and belief.

JAMES W. McCULLOH.

Sworn to before me, this 8th day of October, 1876.

RAYMOND P. WORTENDYKE, *M. C.*

EXHIBIT A.

NEW YORK, Oct. 4th, 1876.

Timothy Case, E-q, Sup't Sussex R. R., Newton, N. J.:

- 30 DEAR SIR—We had hoped that our interview with Mr. Blair and yourself, a few days since, would have brought

about a fair adjustment of all questions with regard to the use of the track, switches, &c., at Franklin, but regret that such has not been the result.

You will doubtless remember that at that interview we asked Mr. Blair to make with us an agreement, to continue during our receivership, under which all business between the two roads should be conducted, leaving in abeyance all questions of past difference between the roads, and reserving all rights of the respective roads.

This we deemed a fair and equitable proposition, and supposed Mr. Blair did also, as he agreed to arrange with you the details of such an agreement, and to see us on the day following.

Since that time we have heard nothing from you or from him, and regret that you now appear determined to take the law into your own hands, and force us into conflict or submission.

We have done all that we could to avoid such a state of affairs, and must protect ourselves by resort to the Chancellor, which we shall now do.

Meanwhile we give you notice not to trespass upon the property in the custody of the Court of Chancery, committed to our charge, and shall hold you, personally as well as your company, liable for any damages which may ensue to persons or property by the acts which you are performing and threatening.

Yours, respectfully,

[Sig'd,]

JAS. W. McCULLOH,

Receiver.

EXHIBIT B.

30

The Boston Franklinite Company to The Sussex Railroad Company and the New Jersey Midland Railway Company.

This indenture, made the 28th day of July, A. D. 1870, between The Boston Franklinite Company, a corporation duly incorporated under and pursuant to the laws of the State of

New Jersey, party of the first part, and The New Jersey Midland Railway Company, party of the second part—

- Witnesseth, that the said party of the first part, for and in consideration of the sum of one dollar, to them in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged, and for other good and valuable considerations received of The Sussex Railroad Company, have granted, bargained, sold, and conveyed, and by these presents do grant, bargain, sell, and convey to the said party
- 10 of the second part, its successors and assigns, the right of way for its railroad, as now located across all their lands situate in the county of Sussex and State of New Jersey, being over three or more strips, pieces, or parcels of land, for a distance of three miles, more or less, and not exceed one hundred feet in width, except where, from the nature of the cuts and embankments of said railroad, it shall be necessary to occupy a greater width, and at such points only, such additional width as said road shall require. It is hereby expressly agreed that the said New Jersey Midland Railway
- 20 Company shall not use or occupy any more land than is actually necessary for the running of cars on a double track railway, from the point of intersection of the Sussex Railroad, near the house of John H. Brown, Esq., and extending thence, in a southerly direction, to the culvert under said road, a distance of six hundred feet, or thereabouts, and until the double track is in operation, not more than is necessary for a single track, the intention being, at this, to disturb the street and buildings as little as possible. The said party of the first part reserve the necessary street crossings and
- 30 turnouts required by themselves and the Sussex Railroad Company, across the several pieces of land. It is also expressly agreed that this grant of right of way does not include any portion of the lands occupied by the line of the Sussex Railroad Company's road, in and near the village of Franklin, the joint use of which, for trackage and other purposes, the said New Jersey Midland Railway Company is permitted to enjoy, under and in conformity to a certain contract made with the said Sussex Railroad Company, July 28th, 1870. And the said Boston Franklinite Company
- 40 hereby covenants and agrees to warrant and defend said

premises in the peaceable possession of the said party of the second part, its successors and assigns, against all persons lawfully claiming the same, or any part thereof, under them, and that they have not incumbered the premises in any manner whatever, and that they now have lawful authority to convey the same in manner aforesaid.

In witness whereof, the party of the first part hath hereunto set its hand and seal, the day and year first above written.

JOHN H. BROWN, [L. s.]

10

President of the Boston Franklinite Co.

JNO. L. BROWN, *Sec'y.*

Countersigned by

MOSES TAYLOR,

WILLIAM E. DODGE,

Directors.

State of New Jersey, County of Sussex, ss.—Be it remembered, that on this 10th day of August, A. D. 1870, before me, personally came John L. Brown, who is, I am satisfied, is the secretary of the within-named Boston Franklinite Com- 20
pany, who, being by me duly sworn, did depose and say that he knows the corporate seal of said company, and that the seal was affixed to the within instrument, is the corporate seal of said company. and that the said seal was affixed to the said instrument by order of the directors of the said company; that John H. Brown is the president of said company, and did sign the said instrument, by order of the said directors. in deponent's presence, and that he, this deponent, by the like order, did sign his name thereto, as the secretary of said company.

DANIEL HAINES,

30

Master in Chancery of New Jersey.

Rec'd and recorded May 27th, A. D. 1871.

P. A. VANSICKLE, *Clerk.*

State of New Jersey, Sussex County Clerk's Office, ss.—I, George H. Neldon, clerk of the said county and of the several courts of record thereof, do hereby certify that the

above and foregoing is a full, true, and correct copy of a deed from the Boston Franklinite Company to the Sussex Railroad Company and the New Jersey Midland Railway Company, as remains of record in my office, in Book E 6 of Deeds, on page 167, &c.

In witness whereof, I hereto set my hand and
[L s.] affix my official seal, this 8th day of April, A. D.
1876.

GEO. H. NELDON.

- 10 Agreement entered into this twenty-eighth day of November, in the year of our Lord one thousand eight hundred and seventy-three, between The New Jersey Midland Railway Company, party of the first part, and The Sussex Railroad Company, party of the second part.

Whereas the said parties are operating railroads which connect together for their mutual accommodation and benefit, have, and by these presents do enter into the following articles of agreement, that is to say:

- 1st. It is understood and agreed that all freight and passengers which shall be transported over either of the roads of the said companies, or any future extension or branches of the same, to the point of intersection of said railroads, and destined for any towns or places at the termini or on the line of the said roads respectively, or any future extension or branches of the same, shall be forwarded, by said respective companies, to the towns or places of their destination, with all convenient dispatch, and by the ordinary means of transporting freight and passengers on said respective roads, and at the prices not exceeding those charged per mile, at the time,
- 20 by said companies respectively, for other freight and passengers of the same class, to and from the places on the line of said roads respectively. And the said New Jersey Midland R'way Company agrees to stop its trains at Franklin, the point of intersection, to receive the passengers and freight which may be brought to said point of intersection over the said Sussex R. Road, in the trains of the said Sussex Railroad Company, which trains shall be run to meet and connect with the trains of the said New Jersey Midland R'way
- 30

Company, and to discharge freight and passengers intended for the same.

2nd. That the rates of transportation of all freight and passengers passing upon both of said roads shall be mutually agreed upon by said companies; and in case they fail to agree as to said rates, then that each company shall and may fix the said rates upon their respective roads; but it is hereby expressly agreed that neither of the said companies shall fix or adopt any higher rate of transportation upon freight and passengers to and from the said point of intersection, than the average rate per mile adopted by the said company, between Franklin and Jersey City and places on the line of the Sussex Rail Road, for the same class of freight and passengers. Nor shall either of the said companies in anywise so arrange its tariff of charges and freight and passengers as to discriminate against the freight and passengers which may be offered for transportation by the other company. 10

3d. That the settlement between the companies shall be made monthly, and that the said New Jersey Midland R'way Company shall allow and pay to the said Sussex R. Road Company, in addition to the regular receipts of the said Sussex R. Road Company, according to the provision of the foregoing articles, thirty (30) per cent. of the gross amount of the receipts of the said New Jersey Midland R'way Comp'y, for the transportation of all passengers passing on the roads of both companies between Franklin and Jersey City, and twenty-five (25) per cent. of the gross amount of the receipts of said comp'y, for the transportation of all freight passing on the roads of both of said companies, between Franklin and Jersey City, and also the same per cent- age on all deductions which shall be made to the said the New Jersey Midland Railway Company, for the said freight or passengers by any other railroad company, from the ordinary charges of such other company, over whose railroad the said passengers and freight may be transported east of Franklin. The said allowance and payment is not, however, to be made on any passengers and freight which shall pass over said Sussex railroad for any distance less than two (2) miles, nor shall any drawback be received by the Sussex R. Road Company upon ore, coal, lumber, milk, stone, lime, salt, and 40 30

grain which shall be transported over both roads in car loads to one consignee, nor upon such other heavy articles in car loads as may be hereafter agreed upon. It is distinctly understood that no drawback upon freight or passengers shall be allowed to the Sussex R. Road Company by the New Jersey Midland R'way Comp'y, upon business passing from one road to the other, westerly from Franklin.

4th. That the cars required for the transportation of all freight passing on the roads of both of said companies, and
10 each of said companies shall furnish its fair proportion, the length of the respective roads from the point of intersection to the termini thereof, being taken as the standard, and if either of the said companies shall supply more cars than it is required to do upon the above basis, a reasonable allowance shall be made therefor by the other company at the regular monthly settlement.

5th. That the officers of said respective companies, that is to say, their directors, treasurers, and secretaries, and one
20 superintendent of each road, shall be transported over the said respective roads by said companies respectively, free of charge to the other.

This article to take effect December 1st, 1873.

In witness whereof, the said the New Jersey Midland R'way Company has hereunto affixed its seal, and have caused these presents to be signed by its president, and the said Sussex Railroad Company has also hereunto affixed its seal, and caused these presents to be signed by its president the day and year above written.

New Jersey Midland Railway Company,
[L. s.] by C. A. WORTENDYKE, *President*.
30 Attest: HEZEKIAH WATKINS.

The Sussex Railroad Company,
[L. s.] by JOHN I. BLAIR, *President*.
Attest: GEORGE H. NELDEN, *Secretary*.

State of New York, City and County of New York, ss.—
On this fourth day of December, A. D. 1873, before me personally came C. A. Wortendyke, the president of the New Jersey Midland Railway Company, to me known, who, being by me duly sworn, did depose and say, that he was the presi-

dent of the New Jersey Midland Railway Company, that he knew the seal of the said railway, that the seal affixed to the within instrument was such corporate seal, and that he signed his name thereto as such president, and he acknowledged to me that he executed the same for the uses and purposes therein mentioned.

In witness whereof I have hereunto set my hand and official seal, this fourth day of December, 1874, at the city of New York.

[L. s.]

ELLIOT SANDFORD, 10

A Commissioner for the State of New Jersey.

This agreement, made and concluded this twenty-eighth day of July, in the year of our Lord one thousand eight hundred and seventy, between the Sussex Railroad Company, party of the first part, and the New Jersey Midland Railway Company party of the second part, both of the parties being severally corporations duly organized, and existing under the laws of the State of New Jersey —

Witnesseth, that the parties hereto in consideration of the premises, covenants and agreements hereinafter set forth to be made, kept and performed by the parties hereto, and each of them respectively, and of the benefits to be mutually derived therefrom, and in consideration of certain valuable right, of way, privileges procured by the party of the first part, through lands of the Boston Franklinite Company, for the use and benefit of the party of the second part, and conveyed to the said party of the second part by the said Boston Franklinite Company, by deed dated the twenty-eighth day of July, A. D. 1870, and in further consideration of the sum of one dollar each to each of the said parties, by the other in hand paid, do hereby covenant, promise and agree to and with each other in manner and form following, that is to say:

Section I. The Sussex Railroad Company agrees to give, and does hereby give, grant and convey to the New Jersey Midland Railway Company, the perpetual right to run over and use so much of the railroad track and turnouts, depots, grounds and other appurtenances of the party of the first part, as lies southerly and easterly from the point of junction of the lines or tracks of railway of said companies parties

hereto, near the residence of Mrs. Samuel Fowler, in the village of Franklin, in the county of Sussex, and state aforesaid, and extending to a point opposite or near to the residence of John H. Brown, Esq., in Franklin aforesaid.

II. The party of the first part shall and does hereby agree to build and erect at the Franklin station, on said road, a suitable depot or station building and appurtenances, one-half the cost whereof, with interest, is to be paid to the said party of the first part, by the said party of the second part,
10 in trackage at the rate hereinafter specified.

But each of the parties hereto shall lay down, maintain and use in the yard at said station, its own side-track and fixtures.

III. The party of the first part shall and does hereby agree to lay down, maintain and keep in order and repair, at its own expense, that portion of its track, road-bed and appurtenances lying southerly and easterly of the aforesaid point of junction, as hereinbefore set out in section one of this agreement, and the party of the second part shall and does hereby agree to lay down, maintain and keep in order and repair, at
20 its own expense, that portion of its track, road-bed and appurtenances, which is to be or may be used by the party of the first part, as hereinafter provided in section four of this contract.

And the party of the first part hereby further agree, that whenever the party of the second part shall and does lay down a double track or line of railway at each end of that portion of track or railway of the said Sussex Railroad Company, hereinbefore described in section one of this agreement, that they, the said party of the first part, shall and will, at the
30 same time, lay down, construct and maintain a double track or line of railway over the intervening portion of its main line, to connect with the track of the said Midland Railway Company, and for the joint use of the two companies, subject to the same terms and compensation as the present line under this contract.

IV. The party of the second part hereby agrees that the party of the first part shall have the perpetual right to transport freight, in its own cars, over those portions of the track of the said Midland Railway Company, extending from the
40 station at Franklin for the distance of ten miles, or any por-

tion thereof along said track in a southerly or easterly direction, and from the same point for a distance of six miles, or any portion thereof along said track in a northerly or westerly direction, at and after the rate and price of three quarters ($\frac{3}{4}$) of a cent per ton per mile for the trackage thereon for each and every ton of freight run over the said track of the said Midland Railway Company, which rate the said party of the first part hereby agrees to pay.

And the party of the first part hereby agrees that the party of the second part shall have the perpetual right to transport 10 freight, in its own cars, over that part of the track of the said Sussex Railroad Company hereinbefore described in section one of this agreement, at and after the rate and price of five hundred and twenty four one thousandths ($\frac{524}{1000}$) of a cent per ton for each and every ton of freight run over the aforesaid portion of the track of the said Sussex Railroad Company for the trackage thereon, which rate the said party of the second part agrees to pay.

But it is hereby mutually understood and agreed that no charge shall be made by either party against the other for 20 trackage for the running of empty cars or engines, or for passengers carried in passenger cars connected with freight trains, over any or all of the above described portions of the tracks of the respective parties hereto.

V. The said Sussex Railroad Company shall have and does hereby have the right to run passenger trains over the track of the said Midland Railway Company between Franklin and Hamburg, in the county of Sussex aforesaid, and to make use of the depots, grounds, and other appurtenances on such portion of said road for such trains, free of charge forever; and 30 the said Midland Railway Company shall have and does hereby have the right to run passenger trains over the portions of the track of the said Sussex Railway Company hereinbefore described in section one of this agreement, and to make use of the depots, grounds, and other appurtenances on such portion of said road for such trains, free of charge forever; it being the intention and design of the respective parties hereto to offset the use of the aforesaid portions of the road of one party for the transportation of passengers, against the use of the aforesaid portions of the road of the other 40 party for the like purpose.

VI. The said Midland Railway Company hereby agrees that in fixing the rates for the transportation of coal over its line of railway, or any portion thereof, east or west, that it shall and will make to the said Sussex Railroad Company as favorable rates as it shall or may make for the transportation of coal with any party or parties whatsoever.

VII. It is hereby further mutually understood and agreed that all trains over the roads of the respective parties hereto, embraced within the limits of this contract, shall be run under
10 and in accordance with the rules and regulations of time tables which shall be made up by the superintendents of said companies, and the said time-tables shall not be changed except upon due notice.

VIII. It is hereby further mutually agreed by and between the parties hereto, that in case the freight business of the Sussex Railroad Company shall at any time require one or more switches or side tracks at points along the line of the road of the said Midland company between the points hereinbefore
20 named, where the business of the latter company will not warrant them in putting them in, then and in such cases the said Sussex Railroad Company shall have the privilege of putting in the same at their own expense, and for their exclusive use.

IX. It is hereby further mutually understood and agreed by and between the respective parties hereto, that each of the said companies shall make up and deliver to the other monthly, and during each and every month, a statement of the amount of the aforesaid trackage for freight under this agreement, which shall or may have accrued during the preceding
30 month, and settlement and payment of any balance which may be due to either company from the other shall be made within thirty days from the time of making and delivery of such statement.

In witness whereof, the parties hereto, in pursuance of resolutions passed by their respective boards of directors, have hereunto caused their respective corporate seals to be affixed, and these presents to be signed by their respective presidents, the day and year first in this indenture written.

The Sussex Railroad Company,

by JOHN I. BLAIR, *President.*

State of New York, City and County of New York, ss.—
Be it remembered that on this twenty-eighth day of April, A.
D. 1871, before me the undersigned commissioner for the State
of New Jersey, residing in the State of New York, personally
came John I. Blair, who is, I am satisfied, the president of the
Sussex Railroad Company, who being by me duly sworn, did
depone and say, that he knows the corporate seal of said com-
pany, and that the seal affixed to the foregoing instrument is
such corporate seal, and that the said seal was affixed to said
instrument by the order of the directors of said company; that 10
the said John I. Blair is the president of said company, and
did execute the said instrument for the said railroad company
by the like order of the directors of said company.

[L. S.]

HEZEKIAH WATKINS,

*Commissioner for the State of New Jersey, residing in the
State of New York.*

This agreement made the seventeenth day of October, in
the year of our Lord one thousand eight hundred and seventy-
one, between the New Jersey Midland Railway Company of
the first part, and the Boston Franklinite Company of the 20
second part, witnesseth that the said party of the first part,
for and in consideration of the covenants and agreements
hereinafter contained, to be kept and performed by the party
of the second part, do hereby covenant and agree to and with
the party of the second part to construct, according to the
plan hereunto annexed, and which is to be taken as a part of
this agreement, a railway on and over the lands of the party
of the second part, at Franklin Furnace, in the county of
Sussex, in the State of New Jersey, from a point in the rear
of the present office of the said party of the second part, to 30
the present dump of the New Jersey Zinc Company, on the
easterly side of the Wallkill, and to allow and give to the
party of the second part the right of using the said railway
for the purpose of loading and transporting ore and other
material over the same, excepting that part of the said rail-
way which will lie between station twelve, as marked on the

said plan, and the northerly end of the said track; but the party of the second part is to have the right to construct side tracks to connect with the track of the said railway at any point; provided, always, that the party of the second part shall not obstruct or unnecessarily hinder or delay the party of the first part in the use of the said track for transportation.

And the said party of the second part, for and in consideration of the premises, do hereby covenant and agree to and with the party of the first part to give and cede to them the
10 right of way for a single track of the said railway on and over the lands of the party of the second part, between the said point in the rear of their said office and the dump of the New Jersey Zinc Company, as above mentioned, and also give to them the right of trackage or passage over the railway track of the party of the second part from the said point in the rear of the said office to its junction with the railway of the Sussex Railroad Company, but in such manner and at such times only as shall not obstruct or unnecessarily delay the party of the second part in their use of the said track.

20 And it is further mutually agreed to, by and between the said parties, that the said party of the second part shall have the right and privilege, at any time within ten years from the date hereof, to take and have the exclusive use and possession of the said newly-constructed railway, paying therefor a sum of money equal to the cost of its construction; and that the party of the first part shall and will, at the request of the party of the second part, at any time within ten years from the date hereof, and on the payment of the said sum of money equal to the cost of its construction, bargain and sell, release
30 and convey, to the party of the second part all their right, title and interest in and to the said railway, and that in the event of such conveyance, the party of the second part will give to the party of the first part the right of trackage over the said newly-constructed railway, and also over the present railway of the party of the second part to its junction with the railway of the Sussex Railroad Company, at the rate of one cent for each ton of material so transported to be paid therefor.

In witness whereof, the said parties have caused the respective corporate seals to be hereunto annexed, and the

names of their respective presidents to be hereunto subscribed the day and year first above written.

The New Jersey Midland Railway Company,

[L. s.] by C. A. WORTENDYKE, *President*.

The Boston Franklinite Company,

[L. s.] by JOHN W. BROWN, *President*.

Signed, sealed and delivered in duplicate, in presence of
JOS. C. PLATT,

as to Jno. H. Brown,

Pres'd't B. F. Co.,

10

as to C. A. Wortendyke,

Pres. N. J. & M. R'y Co.

Order to Show Cause.

A petition, bearing date the 9th day of October, 1876, having been presented to the Chancellor, praying for instructions in regard to the relations existing between the said receivers and the Sussex Railroad Company, the Chancellor doth, on this 9th day of October, 1876, order that the said The Sussex Railroad Company show cause before the Chancellor, at his chambers, in Newark, on the 16th day of October, 1876, 20 at ten o'clock in the forenoon, why the said Sussex Railroad Company, its officers and employees should not be enjoined from any interference with the property in the possession of the said receivers in this cause, in respect of which relief is prayed in the petition, and why the petitioners should not have such other and further relief in the premises as to the court may seem meet. It is further ordered that a copy of this order, and of said petition, be served on the president of the said The Sussex Railroad Company within two days from this day.

30

THEODORE RUNYON, C.

Affidavit of James W. McCulloh.

Essex County, ss.—James W. McCulloh, being duly sworn, deposes and says, that he is one of the receivers of the New Jersey Midland Railway, and that since his appointment as such receiver, on the 30th day of March, 1875, he has been familiar with the work done upon said railway, its spurs, and switches, and that during his said receivership, the Sussex Railroad Company have never used the switch of said New Jersey Midland Railway, running from the New Jersey Zinc
 10 Mines, near Franklin, to the side-track of the Boston Franklinite Company, for the transportation of any ore or other merchandise up to and until the use of said switch, which is now the matter of controversy in this case. And the deponent further says that upon information derived from employees of said New Jersey Midland Railway, prior to the appointment of receivers, the said switch had never been used by the Sussex Railroad Company for the transportation of zinc ore from the New Jersey Zinc Company's mines, but had only been used south of station twelve, on said switch, for the
 20 transportation of iron ore and other property in furtherance of its business with the Boston Franklinite Company, and in no wise connected with business of the New Jersey Zinc Company.

JAS. W. McCULLOH.

Sworn and subscribed before me this 20th day of November, 1876.

JNO. LINN, M. C.

Affidavits of Lewis and Chipman.

William E. Lewis, being duly sworn, deposes as follows:
 30 I am now, and have been superintendent of the New Jersey Midland Railway since about the 10th day of October,

1873, and prior to that date was train despatcher in the superintendent's office of said road; from August 1st, 1871, and from the latter date to this time, have been intimately acquainted with the operation of said road, and also of the Sussex Railroad Company, at or near Franklin, in Sussex county, and of all the switches or spurs in that vicinity, and especially the switch or spur built by the New Jersey Midland Railway Company from the New Jersey Zinc Company's mines to a point of intersection with the side track of the Boston Franklinite Company, in the rear of the office of 10 said Boston Franklinite Company, and that during the whole time of my connection with the New Jersey Midland Railway, the said spur or switch has never been used by the Sussex Railroad Company for the transportation of zinc ores from the said New Jersey Zinc Company's mines, nor has it ever been used by the said Sussex Railroad Company beyond Station 12, on said spur or switch, for any purpose whatever, since the appointment of receivers, on the 30th of March, 1875, until the month of October, 1876, and that prior to that time, this deponent has no knowledge that said spur or 2) switch had ever been used by said Sussex Railroad Company, and if so used, it was without the knowledge of this deponent, and only so used by said Sussex Railroad Company for the transportation of iron ore or other property for the said Boston Franklinite Company. And deponent further says, that in the use of that portion of the main track of the Sussex Railroad Company, at or near Franklin, the arrangement of the time-tables, and the movement of trains thereon, has always been directed and controlled by the superintendent and train dispatchers of the New Jersey Midland Rail- 30 way, by consent and with the concurrence of the officers of said Sussex Railroad Company.

W. E. LEWIS.

Subscribed and sworn to before me, at Jersey City, this 20th day of November, A. D. 1876.

B. Z. SEYMOUR, M. C.

Richard H. Chipman, being duly sworn, deposes as follows: That he is now the general freight agent of the New

Jersey Midland Railway, and has been since about November 1st, 1873, and that for about three years prior to that date, he was freight agent for the New York and Oswego Midland Railroad, which then operated the New Jersey Midland Railway, and that he has been intimately acquainted with the freight business upon the said New Jersey Midland Railway for the past five years; that he is well acquainted with William E. Lewis, now superintendent of the New Jersey Midland Railway, and has read his affidavit hereunto annexed, and that as far as said affidavit relates to the transportation of freight, upon the spur or switch, from the New Jersey Zinc Company's mines, near Franklin, to the side track belonging to the Boston Franklinite Company, he knows the same to be true, and that, with his knowledge, no zinc ore has ever been transported over said spur or switch by said Sussex Railroad Company prior to the 1st of October, 1876.

R. H. CHIPMAN.

Sworn to and subscribed, before me, at Jersey City, this 20th day of March, A. D. 1876.

20

ALEX. T. MCGILL, M. C.

Answer of Sussex R. R. Company.

The answer of the Sussex Railroad Company to the petition of Garret A. Hobart and James W. McCulloh, receivers of the Midland Railroad Company, petitioners.

The Sussex Railroad Company, now and at all times hereafter, saving and reserving to itself all and all manner of benefit of advantage to the many errors and insufficiencies in the petition of the said Garret A. Hobart and James W. McCulloh, receivers of the New Jersey Midland Railroad Company, petitioners, for answer thereto or unto so much and such parts thereof as they are advised it is material or necessary for them to make answer unto, they answer and say, to the first

paragraph of the said petition, that they have been advised and believe it to be true that the said petitioners were, on the day, month and year mentioned therein, by an order of this court, made receivers of the said Midland Railroad Company, but whether the said petitioners were, by the said order, authorized to operate said railway and all its branches and leased lines and other roads operated by it, these respondents cannot tell, never having seen or read the said order; and these respondents therefore leave the said petitioners to make such proof in reference to the said matter as they may be advised 10 it is material or necessary for them to make. And these respondents further say, they have been informed and believe it to be true, that the said petitioners did, as such receivers, on or about the time mentioned in the said petition, take possession of the said road, and these respondents are informed and believe that the said petitioners are now operating the said railroad.

To the second paragraph of the said petition, these respondents further, in answering, reply and say, that they deny that among other property that came into the possession of 20 the said petitioners as receivers, was a certain open switch or turn out, extending from the intersection of the furnace branch of the Boston Franklinite Company's railroad, near the village of Franklin, in the county of Sussex, in the State of New Jersey, to the mines of the New Jersey Zinc Company, formerly known as Georges Mine in said county, being a distance of about fifteen hundred feet. And they further deny that the said spur, switch or turn-out has, since the second day of April, eighteen hundred and seventy-five, remained in the possession of the said petitioners as receivers as aforesaid, 30 and has, during that time, been used and operated by them as a part of the New Jersey Midland Railway, and that no other person or corporation has the right to use said switch or turn-out without the consent or under the instructions of the said petitioners; on the contrary, these respondents declare and show the truth to be, that the said petitioners can have no higher rights in the said switch than the Midland company had therein, if so much; and they further say that the Midland railway never, at any time, had the exclusive right to the possession and use of the said switch or turn-out, and 40

never had the exclusive use and possession of it; but these defendants declare the truth to be, in the first place, that by an agreement made on the seventeenth day of October, eighteen hundred and seventy-one, between the New Jersey Midland Railway Company, of the first part, and the Boston Franklinite Company, of the second part, a copy of which agreement is annexed to the said petition, and to which these respondents refer, the Midland Railway Company bound itself to construct the switch in question over the lands of the said Boston Franklinite Company, and did bind itself, in and by the said agreement, to allow and give to the said Boston Franklinite Company, the party of the second part to the said agreement, the right of using the said railway for the purpose of loading and transporting ore and other material over the same, excepting that part of the said railway or switch which would lie between station twelve of said switch as marked on the plan, and the northerly end of it and which only embraced a small portion of the said switch at the extreme northern end. And these respondents further say that the said Boston

2) Franklinite Company, the party of the second part to the said agreement, did, in and by the said agreement, covenant and agree to and with the said Midland Railway Company, the party of the first part, to give and cede to them the right of way for a single track over their lands for the construction of the said switch between the said point in the rear of their said office and the dump of the New Jersey Zinc Company and also gave to them the right of trackage or passage over the railway track of the said party of the second part, the said Boston Franklinite Company, from the said point in the

30 rear of the said office to its junction with the railway of these respondents, but in such manner and at such times only, as should not obstruct or unnecessarily delay the party of the second part, the said Boston Franklinite Company, in their use of the said track. And these respondents further say that the Midland Railway Company took the said track in entire subservience to the rights of the Boston Franklinite Company and could only use it at such times when the Boston Franklinite Company were not using the said track. And these respondents further say that after the making of the said contract all the rights and privileges of every kind of the Boston

Franklinite Company became and were vested in the Franklin Iron Company, a corporation created by the legislature of New Jersey on the fourteenth day of March, eighteen hundred and seventy-one. And the said Franklin Iron Company became the assignees of the said agreement and the owners of all the lands on which the said switch is constructed, and of all the lands of the Boston Franklinite Company, and became and was entitled to all the rights and privileges of the Boston Franklinite Company either in the said agreement or in the said lands, and became the absolute owners in fee of the very lands on which the said switch was constructed, throughout its entire length. And these respondents further say that the Franklin Iron Company immediately upon the construction of the said switch, used the said switch from a point in the rear of the present office of the said party of the second part, the Boston Franklinite Company, to the dump of the New Jersey Zinc Company for the purpose of loading and transporting ore and other materials over the same, using for that purpose at all times the cars of these respondents, or rather employing these respondents to haul ore and other materials for them. And these respondents further say, that the interest of the Franklinite Company and the interest of these respondents in the said lands and in the said switch are identical. And that the said Franklin Iron Company, by the consent and agreement of its president and directors from the time of the construction of the said switch down to the present time, authorized and empowered these respondents to use the said switch throughout its length and breadth, at all times, giving them all the rights and privileges in the use of the said switch which the Boston Franklinite Company obtained under and by virtue of the said agreement, and which the Franklin Iron Company as assignees enjoyed, and all the rights which the Franklin Iron Company had in such switch as the owners in fee of the land on which the same was constructed. And these respondents further say that the Franklin Iron Company own the land on which the said switch is constructed from the one end to the other thereof, and that not only by virtue of their power as assignees of said agreement, but as owners of the fee they had a right to use and enjoy the said switch; and 40

these respondents further say, that the said switch was completed in the fall of 1871, or early winter of 1872, and from the time of the completion of the said switch to the present time, these respondents have used the said switch from the dumps of the New Jersey Zinc Company to a point in the rear of the office of the Boston Franklinite Company, and from the said point in the rear of the said office over the switch of what was then called the Boston Franklinite Company, to its junction with the railroad of these respondents, for the purpose of loading and transporting ore and other materials over the same, and that in thus using the said switch they continually run their cars beyond what is known as Station No. 12, on said switch, toward the northerly end of said switch, and that during all that time the said Midland Railroad Company had full knowledge of the use of the said switch by these respondents, and made no objection whatever thereto; and that these respondents were in the full use and possession and enjoyment of the said switch as represented, when the Midland Railway passed into the hands of said petitioners, and that this enjoyment of the said switch was in subserviency of the right of these respondents to the use of said switch. And these respondents further say that the said New Jersey Midland Railway Company could not run their cars on the said Franklin Iron Company's switch, from the point to which by the said agreement they were permitted to run, and used by common consent the southerly end of the Franklin Iron Company's switch, on which to run their cars to get on the said switch. And these respondents further say, that the track mentioned in the said agreement in running from the rear of the said office to its junction with the railway of these respondents was conveyed by the said Boston Franklinite Company to the Franklin Iron Company, on or about the latter part of the year eighteen hundred and seventy-one, and that the said Franklin Iron Company from that time became the actual owners of the said track and of the lands on which it was constructed, and with all the rights and privileges therein, and that whatever rights the said Midland Railroad Company had therein, they hold under the said Franklin Iron Company. And these respondents further say, that the Franklin Iron Company by the consent and authority

of its president and directors, gave to your respondents the full right, power, and authority to use the said switch between the points last aforesaid, at any and at all times, without the let or hindrance of any person or corporations. And these respondents further say, that the said Midland Railroad Company could not use the said switch at all, nor could they find a curve to their said railroad at all from the said switch, except by the permission of the Franklin Iron Company; and these respondents further insist and declare the truth to be that they have now the right to use the said switch in the same manner 10 and to the same extent they did use it while the said Midland Railway Company operated the said road. And these respondents further say, in answer to the said second paragraph, that by virtue of the fourth paragraph in the article of agreement, made between the said Midland Railway Company and these respondents, and bearing date on the twenty-eighth day of July, eighteen hundred and seventy, a copy of which is annexed to the said petition, and to which these respondents refer, it is provided that these respondents shall have the perpetual right to transport freight in their own cars over 20 these switches of the track of the Midland Railway Company, extending from the station at Franklin for a distance of ten miles, or any portion thereof, in a southerly or easterly direction, and from the same point for a distance of six miles, or any portion thereof, along said track, in a southerly or westerly direction, at and after the rate and price of three-quarters of a cent per ton per mile for the trackage thereon, as by the said agreement will more fully and at large appear. And these defendants declare the truth to be that the switch in question is the part of the track of the Midland Railroad 30 Company covered by the said agreement last above mentioned. And that under and by virtue of it, these respondents have a right to the use of the said switch for the purpose of carrying freight, and that these respondents are now, and have been heretofore using the said switch only in the manner and in the way provided for in the said agreement; and these respondents have always paid the percentage provided for in the said last-named agreement, and are ready and willing to pay the said percentage according to the terms of the said agreement. And these respondents further say that the said 40

- Midland Railway Company constructed their said railway under and by virtue of the powers granted to the New Jersey, Hudson and Delaware Railroad Company by an act of the legislature of the State of New Jersey, passed the eighth day of March, eighteen hundred and thirty-two, and that by the fifteenth section of the said act, it is provided that the said road or roads authorized by the said act should be, and as by the said section were declared to be, public highways, and should be constructed with a track for one or more horses,
- 10 and for the passage of any railroad carriage thereon, with passengers or property, upon payment of the tolls prescribed by the said act; provided that the carriages so used thereon should be of the same description in the formation of the wheels and length of the axle as those used by the company, and should be so regulated as to the times of starting and speed of traveling as not to interfere with the carriages of the company. And these respondents declare the truth to be that by virtue of the said section, these respondents had the right to use the said switch, or a part of the said Midland
- 20 Railway, upon complying with the provisions of the said section, and that these respondents were using the said road in compliance with the said provisions, and are now willing, at all times hereafter, to use the said road in compliance with the terms of the said section in said act. And these respondents respectfully beg leave to refer to the said act incorporating the said New Jersey, Hudson, and Delaware Railroad Company, and to the act creating the said New Jersey Midland Railway Company, approved March seventeenth, eighteen hundred and seventy, if it be necessary so to do.
- 30 And these respondents further show that the said New Jersey Midland Railway Company had no right, power, or authority, under and by virtue of any right vested in them by any act of the legislature of the State of New Jersey, or otherwise, to execute the said agreement with the Boston Franklinite Company, or to construct the said switch, it not being any part of the main line of the said New Jersey Midland Railway, nor any lateral road connecting with the said road, and that the said New Jersey Midland Railway Company, nor the said petitioners, have any right to the said switch, but that the
- 40 same belongs, in law, to the Franklin Iron Company, the

owners of the land upon which said switch is constructed, and that the said Franklin Iron Company have fully authorized and empowered these respondents to use and occupy the said switch in the manner they are now doing.

And these respondents, answering the third paragraph of the said petition, say that the said petitioners did request and obtain an interview with John I. Blair, the president of the said Sussex Railroad Company, on or about the time mentioned in the said paragraph, and that in said interview, the said petitioners, or one of them, suggested that these respondents were carrying ore from Ogdensburg, a point below the switch in question, two miles or thereabouts, at too low a rate and that the said companies should not underbid each other, and one or the other of the said petitioners did suggest a doubt as to the right of these respondents to use the said switch in the manner they were then doing without the consent of the said petitioners, and that the said John I. Blair informed them that these respondents had no disposition to underbid them in carrying freight, and he insisted and alleged that this company had the strict legal right to use the said switch in the manner these respondents were then doing, and that said John I. Blair informed the petitioners that these respondents would be happy to come to an arrangement with them upon any matter really in dispute, and would be glad to receive past arrearages from the New Jersey Midland Railroad Company, which was largely indebted to these respondents upon the several matters contained in the two agreements between the said companies. And these respondents further show that no conclusions were reached in the said interview, and the said John I. Blair did, within a few days after this said first interview, call at the company's office in New York to have a further interview with the said petitioners or one of them, in order to ascertain the views of the said petitioners, but found none of them in, and that before the said John I. Blair could have another interview with the petitioners they had instituted these proceedings. And these respondents declare that they have no wish or desire to have any controversy with the petitioners, but they insist that they have made no use of the said switch which by law they had not an absolute right to make.

And these respondents, answering the fourth paragraph in the said petition, say that they did, on or about the second day of October, eighteen hundred and seventy-six, cause two or three of their freight cars to be run in upon the said switch for the purpose of loading ore thereon; but these defendants deny, as they have hereinbefore denied in answer to the former paragraph of the said petition, that the petitioners were in possession of the said switch at the time, to any further or other extent than these respondents have stated.

- 10 And these respondents admit that they did not ask the consent of the petitioners to place their cars upon the said switch, and they insist that they were not bound to obtain their consent for so doing, that they had a legal right for any and for all the reasons which they have already given to the second paragraph of the said petition, to place their cars upon the said switch and to use the said switch for the purpose for which they were then using it, to draw ore over the said switch; and these respondents further say that the said petitioners did very improperly and without any legal right interfere with the cars of these respondents, and did remove them without the knowledge or consent of these respondents from the place where they were being loaded with ore, and that these respondents replaced the said cars upon the said switch and had them loaded with ore and sent over the switch jointly used by these respondents and the New Jersey Midland Railway Company, to the main line of these respondents' road, and over the same to its proper destination, as they had a legal right to do for the reasons already given.
- 20

- And these respondents, further answering the said petition and replying to the fifth paragraph of the said petition, say they deny that the said Sussex Railroad Company have not offered or in any way arranged to compensate the said petitioners for the use of the said switch, and they further deny that by the running of their cars and removing their freight thereon, as stated by said petitioners, they are causing damage to the petitioners as receivers as aforesaid, by depriving them of a portion of their legitimate business. But on the contrary, these respondents declare the truth to be, that the agreement existing between the said companies already
- 30
- 40 referred to, provides for the amount to be paid by these re-

spondents to the said petitioners as receivers, and that under that agreement these respondents have paid to the said petitioners a large amount of trackage for freight carried over, and are now ready and willing to settle with the said petitioners, according to the terms of said agreement, for all sums that may be due for trackage for the transportation of freight over the said Midland railway, according to the terms of the said agreement, and if any balance shall be found due petitioners upon such settlement, these respondents are ready and willing at once to pay it, and to pay for trackage for all 10 freight carried according to said agreement, but the said petitioners have constantly refused to come to such settlement, because they know they will be largely in debt to these respondents. And these respondents insist and charge the truth to be, that the said petitioners have no right to the use of the said switch, nor to the main line of these respondents, until they do settle and pay these respondents for the large sums due these respondents for trackage, for freight carried over these respondents' road, and also for their share of their said

And these respondents further say, that in carrying 20 the said ore which they are now carrying, and which the said petitioners are seeking to prevent these respondents from carrying, they are neither causing damage to the said petitioners as receivers, nor are they depriving them of a portion of their legitimate business. But these respondents declare that the ore which they are carrying, and to the transportation of which, by these respondents, the petitioners so strenuously object is the property of the New Jersey Zinc Co., and that these respondents have arranged with the said New Jersey Zinc Co. to carry a certain amount of the said ore for them 30 over the road of these respondents, and over the road of the Delaware, Lackawanna and Western Railroad, with which these respondents have a contract upon the subject, to Bethlehem, in the State of Pennsylvania; that the route over which these respondents carry the said freight, is the legitimate route for the transportation of it; that the said petitioners are not able to carry the said ore at all to Bethlehem, Pa., except they run it over the track of these respondents, unless they carry it over their own road and the Montclair road to Meade's basin, a distance of thirty miles, then employ the 40

- Delaware, Lackawanna and Western Railroad Company to carry it for them to Easton, Pa., and some other railroad from there to Bethlehem, a thing which is impracticable, not only on account of the great distance which they would be compelled to transport it, being full sixty miles by their route from Franklin to Waterloo, whereas, by these respondents' route, it is only twenty-three miles from Franklin to Waterloo, but because the said receivers have no joint arrangement with the said Delaware, Lackawanna and Western Railroad Company for the transportation of the said ore. And these respondents hereby tender themselves ready and willing to pay the petitioners all sums of money due for trackage, for freight drawn over the said switch, and over said Midland railroad according to the said agreement between the said companies; and they tender themselves willing to pay the said petitioners all sums of money which may be due them for freight carried by these respondents over the said switch, according to the provisions of the charter of the New Jersey and Hudson and Delaware Railroad Company. And these respondents deny that
- 20 the said petitioners have protested to the officers of these respondents any further than these respondents have stated; they have spoken to these respondents on the subject, and these respondents have asserted their right to the use of the said switch in the manner these respondents are using it, and that these respondents have told the said petitioners repeatedly that they are ready and willing to come to a settlement with them, and have urged them to come to a settlement, but they have not done it.

- And these respondents, answering the sixth paragraph of
- 30 the said petition, further say, that no complaint at all can arise between these respondents and the said petitioners, unless the said petitioners persist in these unlawful attempts to deprive these respondents of their legitimate rights and privileges to carry freight over the line of their road. And these respondents declare the truth to be that the petitioners have forfeited all the right to the use of any part of these respondents' road, because of their refusal to pay these respondents their trackage for the freight hauled over it by the said petitioners, according to the terms of their agreement with them, and these
- 40 respondents are ready and willing to submit to the court

whether the said petitioners are entitled to the use of said switch, or any part of the road of these respondents. And these respondents further say, that by the said contract the said Midland Railway Company was to pay in trackage for one half the cost of the depot at Franklin, which was over twenty-five hundred dollars, which the said company has never paid, and these respondents submit that they have a right to use that switch until said sum is paid. And these respondents, replying to the seventh paragraph of the said petition, say that they deny that the acts of these respondents and their officers and agents in the premises are unlawful, for the reasons these respondents have already given; and they further deny that they are seriously damaging the business of the petitioners as such receivers, or are demanding the value of the property in their hands or custodies of this court; on the contrary, these respondents insist and declare the truth to be that they are not only not damaging the said petitioners, but are, for the reasons given by these respondents in their answer to the sixth paragraph of the said petition, actually benefiting the said petitioners as such receivers, by paying them for freight transported over the said switch, which they would not in fact otherwise receive. And these respondents further deny, that if the claims of these respondents and their agents and officers are carried into practice, as these respondents propose, that it will be at the great hazard of life to the passengers transported by the said petitioners, and to the employees on the said railroad operated by the said petitioners as such receivers; and they further deny that the portion of the main line of the said railroad hereinbefore mentioned is operated under the directions and control of the superintendent and train despatcher of the petitioners, and that all the trains on the said road are properly under his control; and they deny that the said trains of these respondents are run over any part of the said road, branches or switches, without due knowledge of the said superintendent or train despatcher, or that they may at any time come into collision with the trains of the petitioners' road, and cause great loss of life and property; on the contrary, these respondents declare the truth to be that all such petitions on the part of the said petitioners are unfounded and idle and have no foundation whatever in fact,

these respondents, in fact, say that by the terms of the said agreement between these respondents and the New Jersey Midland Railroad Company, all trains over the railroad of these respondents and the petitioners embraced within the counts of the contract were to be run under and in accordance with the rules and regulations of time tables which should be made up by the superintendents of said companies, and that the times should not be changed except upon due notice, and that the trains have always been so run upon the time

10 tables made by the superintendents of both companies, and the trains have been run by such time tables, and these respondents only run their cars for the transportation of the said ore by such time tables and on their own time, and that there is not the slightest ground for anticipating a collision by the running of such freight cars with the cars of the petitioners. And these petitioners further say, that the said switch runs into the switch of the Franklin Iron Company, which runs into the main line of these respondents' road, and is absolutely, in that respect, under the control of these re-

20 spondents, so that no collision can ever take place; and these respondents further say, that they have delivered the quantity of ore they are to deliver for the month of October and they will transport no more ore over the said switch until after the first day of November next. And these respondents deny all unlawful combination, etc., without this, that there is any other matter or thing in the said petition that is not herein fully, well and sufficiently answered, traversed, avoided or denied, is true, to the knowledge or belief of these respondents. All which matters and things these respondents

30 will maintain and prove as this honorable court shall direct, and they pray hence to be discharged with their reasonable costs on their behalf sustained.

J. G. SHIPMAN & SON,

*Solicitors of, and of Counsel with the Sussex Railroad Co.,
the said respondents.*

State of New York, City and County of New York, ss.—
The answer of the Sussex Railroad Company in the foregoing cause is taken and acknowledged under the corporate seal of

the said company, before me, the undersigned, on this 23d day of October, 1876.

[L. s.]

Attest: E. T. HATFIELD,
Secretary Sussex R. R. Co.

[L. s.]

LUDWIG R. MILLER,
Commissioner State of New Jersey in New York.

New Jersey, ss.—John. I. Blair, of full age, being duly sworn according to law, on his oath saith that he is now and for the last ten years has been the president of the Sussex Railroad Company; that he has heard the answer of the said 10 company to the petition of the receivers of the New Jersey Midland Railway Company read, and understands the contents thereof, and that the facts, matters and things therein set forth, so far as they relate to the acts and doings of the Sussex Railroad Company, and of the Franklin Iron Company, and the Boston Franklinite Company are true, of his own knowledge, and so far as they relate to the acts and doings of other persons, he believes them to be true, and that deponent is particularly acquainted with all the proceedings of the Boston Franklinite Company, and with all the 20 proceedings of the Franklin Iron Company, and with all the proceedings of the said respondents, and that he knows of his own knowledge, that all the statements in said answer in reference to the rights of the Boston Franklinite Company, and of the sale and transfer of the said Boston Franklinite Company, of all their rights and interests in the said lands in which the said switch is constructed to the Franklin Iron Company, and all these statements in the said answer contained in reference to the rights granted to the Sussex Railroad Company by the Franklin Iron Company, are true. And de- 30 ponent further saith that the Franklin Iron Company became, in the year eighteen hundred and seventy one, or thereabouts, became the purchasers of all the rights of the Boston Franklinite Company on the lands and mineral rights at Franklin, in the said county of Sussex, embracing the lands on which the switch in question stands, and also the switch with which the said switch in question connects, and that they are the assignees of all the rights and privileges contained in the agreement between the Boston Franklinite Company and the New Jer-

sey Midland Railway Company set forth in the said petition of the said receivers, and he knows the location of the said switch of the said Franklin Iron Company, and the point of junction between it and the switch in question, and that renders the agreement between the said New Jersey Midland Railway Company and the said Boston Franklinite Company, the said Midland company could not run their cars over upon the switch of the Franklin Iron Company, without running over a part of the said switch over which they have no right at all to run, and that they have been permitted, as a matter of favor by the Franklin Iron Company, to use the southerly end of their said switch to run back their cars upon, in order that they can get on the switch of the Franklin Iron Company, to run up to the track of the Sussex Railroad Company. And deponent further saith that the Franklin Iron Company has invested the Sussex Railroad Company, ever since they became the owners of the rights of the Boston Franklinite Company, with full power and authority to use the said switch of the Franklin Iron Company, by a recent resolution of their board having confirmed said right. And deponent further saith that ever since the year eighteen hundred and seventy-one, the said Sussex Railroad Company have drawn in their cars for the Franklin Iron Company, from the mines of the said Franklin Iron Company situated on the easterly side of the switch in question, and near to what is known as Station No. 12, on the said switch, thousands of tons of iron ore over the switch in question, and in drawing said ore and running their cars on said switch, their cars would run over and beyond the station known as No. 12 on the said switch. And deponent further saith that this use was made by the knowledge of the New Jersey Midland Railway Company. And deponent further saith that the said Sussex Railroad Company have agreed to transport for the said New Jersey Zinc Company a certain quantity of ore to Bethlehem, in the State of Pennsylvania; that they are carrying the said ore over a portion of the said switch in question, and over the switch of the Franklin Iron Company to the main line of the Sussex Railroad Company, and thence to Waterloo on this line of the Morris and Essex Railroad, operated by the Delaware, Lackawanna and Western Railroad Company, and from

thence to Easton and Bethlehem, Pennsylvania; and deponent saith, that the said route for the transportation of the said ore, and deponent saith that he, as the president of the Sussex Railroad Company, made the contract with the New Jersey Zinc Company for the carrying of the said ore, and that when he made the said contract he, as well as the other officers of the Sussex Railroad Company, supposed and believed that the said Sussex Railroad Company had the absolute legal right to use the said switch for the transportation of the said ore, and deponent still believes that the said company has the right so to do. And deponent saith, that the transportation of the said ore by the said Sussex Railroad Company cannot, in the judgment of deponent, injure, but benefit the said receivers; that the said receivers cannot carry the said ore except in the manner set forth in the said answer, and that in deponent's judgment it would be impracticable for the receivers to carry it by the said route. And deponent further saith, that sometime during the first of the present month of October, this deponent and Timothy Case, the superintendent of the said Sussex Railroad Company, went by invitation of the receivers, or one of them, to the office of the said company, in New York; that the said receivers, or one of them, spoke of carrying ore from Ogdensburg, and thought the Sussex Railroad Company was carrying too low, and was underbidding them, and that some man was using this company to get a better contract from them, and they alluded to the rumor that the Bethlehem and New Jersey Zinc Company had made a contract together for zinc, and that the Sussex Railroad Company had agreed to carry the ore for the said New Jersey Zinc Company to Bethlehem, and were underbidding them, and that deponent told them he had no disposition to underbid them, and that a general conversation followed about settling all matters between said company under said contracts between them; and that deponent expressed his willingness to settle up everything, and deponent distinctly asserted his right to transport the said ore over the said switch; and deponent saith it was understood that deponent would call again at the office of the said company in a few days to get their views, and to see if an amicable arrangement of all these affairs could be made, but found no one in with whom he could com-

municate. And deponent further saith, that the Sussex Railroad Company is ready and willing to pay for the use of the said switch three-quarter cents per ton per mile, according to the agreement between the said company, or any other sum which they may by law be required to pay for the transportation of the said ore over the said switch. And deponent further saith, that the said New Jersey Midland Railway Company is largely indebted to the Sussex Railroad Company for trackage for freight carried by them over the line of the said
10 company's road, under the contract of July twenty-eighth, eighteen hundred and seventy. And deponent further saith, that it has always been understood by this deponent and his said company, that the said last named contract gave to the Sussex Railroad Company the right to the use of the whole of the said switch, and that independent of that, that it was by common consent understood and practiced, that the said New Jersey Midland Railway Company should use the southerly end of the Franklin Iron Company's switch, and the Sussex Railroad Company should use the northerly end of the
20 switch in question beyond station twelve, and each has continually so done without fault from the other; and deponent further saith, that no collision can take place between the receivers' trains and the freight cars which deponent's company are using for the carrying of the said ore.

JOHN I. BLAIR.

Sworn and subscribed before me, this 21st day of October,
A. D. 1876.

E. I. SMITH, *M. C.*

New Jersey, ss.—Timothy Case, of full age, being duly
30 sworn, on his oath says, that he is the superintendent of the Sussex Railroad Company, the respondents, and has been for the past eleven years; that he has heard the answer of said company to the petition of the receivers of the Midland Railway Company; that the facts, matters and things therein contained, so far as they relate to his acts and doings, are true, and so far as they relate to the acts and doings of other parties, he believes them to be true; that all the statements in the said answer contained in reference to the use of the switch in

question, by the Sussex Railroad, are true; that the statements in reference to the use of the switch beyond station twelve are true, and that the southeasterly end of the switch of the Franklin Iron Company is four to five hundred feet beyond the point of junction of the switch in question, and beyond the point where the Midland Railway Company were authorized to enter upon the switch of the Franklin Iron Company, and that the switch in question, from station twelve to the end of said switch, is about four hundred feet, and that the Sussex Railroad Company has continually used the northerly end of said switch from station twelve without let or hindrance until the present difficulty, and that the Midland Railway Company have continually used the northerly end of the switch of the Franklin Iron Company, to which they had no right, without the let or hindrance of the Sussex Railroad Company or the Franklin Iron Company; and deponent further says, that the time tables for the running of trains over the lines mentioned in said agreement have always been made up by deponent and the superintendent of the New Jersey Midland Railway Company; that the proportion of the ore to be carried has been taken out, and that there will be no more run out over the said switch during this month, or until the first of next month; that no possible collision can take place between the freight cars and the trains of the receivers, because the said cars are run upon the schedule time fixed for trains by deponent and superintendent of the Midland Railway Company, and that the switch in question joins with the switch of the Franklin Iron Company, and that switch runs and joins with the main track of the Sussex Railroad Company and is under their direct control and supervision.

T. CASE.

Sworn and subscribed, before me, this 21st day of October,
A. D. 1876.

E. I. SMITH, *M. C.*

New Jersey, ss.—William A. Thompson, of full age, being duly sworn, on his oath says, that he is the chief engineer of the Sussex Railroad Company; that he is well acquainted with the location of the switch and of the junction of the said rail-

road with which it connects, mentioned in the annexed petition and answer; that the maps hereunto annexed contain an accurate exhibit of the location of said switch and of the switch of the Franklin Iron Company and its connection with the main line of the Sussex Railroad.

WILLIAM A. THOMPSON.

Sworn and subscribed, before me, this 21st day of October, A. D. 1876.

E. I. SMITH, M. C.

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Order for Injunction.

[Filed February 13, 1877.]

A petition, bearing date the 9th day of October, 1876, having been presented to the Chancellor, praying for instructions in regard to the relations existing between the said receivers and the Sussex Railroad Company;

And the Chancellor having heard counsel for the respective parties therein—

It is on this 13th day of February, 1877, by his Honor, Theodore Runyon, Chancellor of the State of New Jersey, ordered
20 that an injunction do forthwith issue out of and under the seal of this court, directed to the Sussex Railroad Company, its officers, employees and agents, therein and thereby commanding them, and each and every of them, to refrain from any interference with the property in the possession of the said receivers, and more especially from entering upon with their cars, locomotives, workmen, switchmen and engineers that portion north of station twelve upon the side track from the intersection of the Furnace Branch of the Boston Franklinite Company's Railroad, near the village of Franklin, in the county of Sussex, and State of New
30 Jersey, to the mines of the New Jersey Zinc Company, formerly known as "George's Mine," in said county, and in the hands of James W. McCulloh and Garret A. Hobart, receiv-

ers of the New Jersey Midland Railway, except with the written permission and under the direction of the said receivers, until the further order of this court.

Dated Trenton, New Jersey, February 13th, 1877.

THEODORE RUNYON, C.

Opinion of the Chancellor.

[Filed January 29, 1877.]

Bill to foreclose. Petition of receivers for relief against use of track by Sussex Railroad Company. On petition, answer and affidavits.

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Mr. B. Williamson, for the receivers.

Mr. Joseph Coult and *Mr. J. G. Shipman*, for the respondents.

THE CHANCELLOR. The New Jersey Midland Railway Company, in or about the fall of 1871, constructed a short railroad from a switch on the land of the Boston Franklinite Company, to what was then known as the dump of the New Jersey Zinc Company. The road was constructed under an agreement between the railway company and the Franklinite company, dated October 17th, 1871, by which the former agreed to construct the railroad, and give the mining company the right to use it (excepting a small part) for the purpose of loading and transporting ore and other material; and the mining company granted to the railway company, the right of way for the track, and also the right of trackage or passage over the before mentioned switch, from the point of junction of the track therewith, to the railroad of the Sussex Railroad Company, over which at that place the railway company had the right of passage. The part of the track reserved by the above mentioned exception, was that part which lies between Station 12 thereon, and the northerly terminus of the

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track. The respondents claim to have succeeded to the rights of the mining company in the premises, and to have the right to use not only that part of the track which the latter was by the agreement authorized to use, but also the excepted portion. They claim this right not by virtue of any new agreement between the mining company or its representatives or assigns, and the railway company or the petitioners, but by virtue of an alleged user by the mining company and by themselves, since they succeeded to the rights of that company, of the excepted portion at pleasure, from time to time. They also claim it under their construction of an agreement made between the railway company and them in 1870, by which the former granted to them in consideration of certain compensation, the perpetual right to transport freight in their own cars, over "those portions of the Midland track extending from the station at Franklin, ten miles northerly and six miles southerly." They further insist that by the charter of the railway company, (*Pamph. L.*, 1832, *p.* 133,) the road of the latter is declared to be a public highway, and they also defend their use of the track on the ground that the railway company had no legislative authority to construct or maintain it. The agreement between the railway company and the mining company is explicit in its terms, and the reservation and exception of the portion of the track in question are unequivocally declared, so far as the respondents' defence rests on their claim under the mining company, it cannot be maintained for the manifest reason that the exception is as binding on the representatives or assigns of that company, as it was on them. The alleged user cannot prevail against the express terms of the agreement. Nor could the fact that the railway company in, or to pass from the track in question to the before mentioned switch (the right to pass over which is granted to them by the agreement) were, and that the petitioners are, under the necessity of backing their trains upon a part of the switch not included within the terms of the agreement, constitute any warrant, as the respondents insist that it does, for disregarding the exception. The right so to use that part of the switch would, it may be remarked, for aught than appears, be held to pass by necessary implication. The agreement between the railway company and the respondents under which,

as before stated, the latter obtained the right to use the track of the former for a certain distance each way from the Franklin station, was made more than a year before the agreement between the railway company and the mining company. The track in question had not then been constructed, and it does not appear to have been ever in contemplation. Nor do the terms of the agreement with the respondents embrace this track. It is no part of the main track of the Midland road, nor can it by any just construction be held to be embraced within that agreement. It is not a switch or turnout, intended to promote the safe or convenient use of the track of the road, but it was designed and used merely as a special auxiliary to the business of the company, to enable them to bring to their road for transportation thereon, the freight of the particular customer or customers up to or in the vicinity of whose premises it was constructed, and for which purpose only it was of value or available to them. The use of it no more passed under the agreement with the respondents, than would the use of a track which the railway company might have constructed to their own gravel-pit, or to a coal yard or warehouse. This view disposes also of the claim to the right to use the track as a public highway. It is no part of the road, within the meaning of the section of the charter which provides that the road or roads of the company shall be public highways. As to the claim to the right to use the track on the ground that the railway company had no authority to construct it, it is enough to say that if the want of authority were conceded that would not give the respondents any right to the use of the track. The respondents will be enjoined from using the part of the track between Station 12 and the northerly terminus.

Appeal of Sussex R. R. Co.

The Sussex Railroad Company hereby appeals from so much of the order and decree of this court, made on the thirteenth day of February, A. D. eighteen hundred and seventy-

seven, directing that an injunction do forthwith issue out of and under the seal of this court, directed to the Sussex Railroad Company, its officers, employees, and agents, therein and thereby commanding them, and each and every of them, to refrain from any interference with the property in the possession of the said receivers, and more especially from entering upon, with their cars, locomotives, workmen, switchmen, and engineers, that portion north of station twelve upon the side track from the intersection of the Furnace Branch of the
 10 Boston Franklinite Company, near the village of Franklin, in the county of Sussex, and State of New Jersey, to the mines of the "New Jersey Zinc Company," formerly known as "George's Mine," in said county, and in the hands of James W. McCulloh and Garret A. Hobart, receivers of the New Jersey Midland Railway, except with the written permission and under the direction of the said receivers, until the further order of this court, to the Court of Appeals, in the last resort in all causes of law.

J. G. SHIPMAN & SON,

20 *Sols. of Defendants, the Sussex Railroad Company.*

Dated February 12th, 1877.

I conceive there is good cause for appeal in the above-stated cause.

J. G. SHIPMAN,

Of Counsel with the Sussex Railroad Co.

Petition of Appeal.

To the Honorable the Court of Appeals in the last resort in all causes at law:

The humble petition of the Sussex Railroad Company, the
 30 appellants in the above stated, respectfully shows that your petitioners find themselves aggrieved by a decree made in the Court of Chancery, by his Honor Theodore Runyon, Esq., Chancellor of the State of New Jersey, bearing date the thirteenth day of February, in the year of our Lord one thousand

eight hundred and seventy-seven, on a petition dated the ninth day of October, one thousand eight hundred and seventy-six, presented to the Chancellor by Garret A. Hobart and James W. McCulloh, receivers of the New Jersey Midland Railway Company, against the Sussex Railroad Company, your petitioners in this respect, to wit: That the said decree adjudges that an injunction should forthwith issue out of and under the seal of this said court, directed to the Sussex Railroad Company, its officers, employees and agents, therein and thereby commanding them and each and every of them to 10 refrain from any interference with the property in the possession of the said receivers, and more especially from entering upon with their cars, workmen, switchmen, and engineers, that portion north of station twelve, upon the side track, from the intersection of the Furnace Branch of the Boston Franklinite Company's railroad, near the village of Franklin, in the county of Sussex, and State of New Jersey, to the mines of the New Jersey Zinc Company, formerly known as "George's Mine," in said county, and in the hands of James W. McCulloh and Garret A. Hobart, receivers of the New Jersey Midland Railway, except with the written permission and under the direction of the said receivers, until the further order of this court. And your petitioners humbly appeal from the said decree of the Chancellor which decrees as aforesaid, upon the ground that the same is erroneous, because the Chancellor should not have decreed that an injunction should issue out of and under the seal of the said Court of Chancery, directed to your petitioners, its officers, employees, and agents, therein and thereby commanding them and each and every of them to refrain from any interference with the property in 20 the possession of the said receivers, and more especially from entering upon, with the cars, locomotives, workmen, switchmen, and engineers, that portion of north of station twelve, upon the side track, from the intersection of the Furnace Branch of the Boston Franklinite Company's railroad, near the village of Franklin, in the county of Sussex and State of New Jersey, to the mines of the New Jersey Zinc Company, formerly known as "George's Mine," in said county, and in the hands of James W. McCulloh and Garret A. Hobart, receivers of the New Jersey Midland Railway, except 40

with the written permission and under the direction of the said receivers, until the further order of the court. And for the further reason that the said receivers were not in possession of the said property, and because your petitioners had a legal right to the use and possession of the said track upon the part designated in the said decree. Your petitioners therefore pray that the said decree of the said Chancellor may be reversed, set aside, and for nothing holden, and that your petitioners may have such relief in the premises as to this

10 Honorable Court shall seem meet.

J. G. SHIPMAN & SON,
Solicitors of the Sussex Railroad Company, the said Appellants.

J. G. SHIPMAN,
Of Counsel.

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