

## New Jersey Court of Errors and Appeals.

Between

THE LONG DOCK COMPANY, appellants,

and

JAMES H. MALLERY, CHARLES D. CLARK,

*et al.*, respondents,

} *On appeal.*

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*To the Honorable Benjamin Williamson, esquire, Chancellor of the State of New Jersey.*

In chancery, humbly complaining, sheweth unto your Honor your orators the Long Dock Company; that on or about the twenty-eighth day of May, in the year eighteen hundred and fifty-six, they were seized in fee simple of certain lands and real estate in the city of Hudson, in the county of Hudson, and state of New Jersey, over and across which the New York and Erie Railroad Company had located and laid out the route of the railroad to be built and constructed by them to continue and extend the railroad of the Paterson and Hudson River Railroad Company to the Hudson river, by virtue 10 of the privileges and powers granted to them by the act entitled, "An act to authorize the New York and Erie Railroad Company to purchase and hold lands, and to complete and finish the railroad of the Paterson and Hudson River Railroad Company to the Hudson river," approved the twenty-first day of February, eighteen hundred and fifty-six; and that your orators, in order to perform and fulfil an agreement before that time entered into by and between them and said New York and Erie Railroad Company, being desirous to excavate, construct, and complete across and through said lands in the 20 city of Hudson, and a hill known as Bergen hill, a tunnel and shafts, and the approaches or open cuts at each end of the tunnel, in such manner as to prepare the same for receiving the superstructure of said railroad, on or about said twenty-eighth day of May, eighteen hundred and fifty-six, by articles of agreement dated on that day, and made and executed un-

der their respective hands and seals, between James H. Mallery, of the first part, and your orators, of the second part, said James H. Mallery agreed with your orators to make, excavate, and complete said tunnel, shafts, and approaches in the manner in said agreement specified, and to complete the same on or before the fifteenth day of December, eighteen hundred and fifty-seven; and your orators thereby agreed with said James H. Mallery, that whenever, in the opinion of the engineer of their company, the said contract should have  
 10 been wholly completed by the said James H. Mallery, they would pay for the same in full, for workmanship and materials, according to a schedule of prices in said agreement fixed and contained; and it was, by said contract, further agreed as follows: "It is further agreed that payments shall be made from time to time, as the work progresses, on the certificate of the engineer for work done, the said engineer to deduct such per centage as he may think proper from the value of the work done, which shall in no case be less than ten per cent.," as by said contract, now in possession of your orators  
 20 ready to be produced and proved, as this court shall direct, a copy whereof is hereto annexed, marked *Schedule A*, and to which your orators for greater certainty pray leave to refer, will more fully and at large appear.

And your orators further show, that said James H. Mallery, under said contract, and in fulfilment of the same, as the workman of your orators, entered upon said premises of your orators, along the route of said railroad so located as aforesaid, and commenced the excavation and construction of said tunnel, shafts, and approaches; and for the purpose of fulfilling  
 30 said contract, and constructing said tunnel, shafts, and approaches, he built and erected on said lands and premises of your orators shaft houses, engine house, blacksmith shops, and other shops and buildings, steam engines, with their boilers, blowers, shafting, gearing, and other machinery and apparatus thereunto belonging, and other machinery and gearing, and also a bridge, which houses, shops, engines, boilers, machinery, gearing, and bridge were built upon and attached to the said lands of your orators, and bought and procured other tools and machinery, and furnished and provided said black-  
 40 smith shops with forges, bellows, anvils, and other tools and im-

plements usually belonging to such shops, and considered part of the same, which shaft houses, engine houses, blacksmith shops, and other shops and buildings, engines, machinery, gearing, bridge tools, and implements are specified and enumerated in the inventory annexed to the mortgage herein after mentioned, a copy of which inventory is annexed to this bill, and marked *Schedule B*; and that said James H. Mallery, with said buildings, shops, machinery, implements, and tools, did proceed to excavate and construct said tunnel, shafts, and approaches.

And your orators further show, that on or about the twenty-  
 eighth day of July, in the year eighteen hundred and fifty-  
 seven, said James H. Mallery had made considerable progress  
 in the construction of said tunnel, shafts, and approaches, and  
 that your orators had paid him for such work from time to  
 time, as the same progressed, for the same, on the certificate  
 of the engineer, as to the value thereof, deducting from the  
 supposed value of said work done by said James H. Mallery  
 ten per cent. of the value thereof, which was, according to the  
 terms of said contract, and by and with the assent of said  
 James H. Mallery, retained by your orators until the full com-  
 pletion of said work; and your orators had paid said James  
 H. Mallery about four hundred thousand dollars upon said  
 contract, for work performed under the same, and had retained  
 out of the estimate of the supposed value of the work done  
 by him under and in fulfilment of said contract about the sum  
 of forty-two thousand dollars, being ten per cent. of the esti-  
 mates or supposed value of said work done.

And your orators further show, that said James H. Mallery,  
 being desirous of obtaining the advance and possession of said  
 sum of forty-two thousand dollars before the completion of  
 said contract, until which time it was not payable by the terms  
 thereof, applied to your orators, and requested them to pay  
 and advance the same to him, and offered to secure the com-  
 pletion of the work by the time mentioned in said contract,  
 or the repayment of said sum by a mortgage upon said houses,  
 shops, buildings, engines, machinery, tools, implements, and  
 other property above mentioned, which he had erected, built,  
 and placed upon your orators' said lands; and that your ora-  
 tors thereupon agreed that they would advance and pay to  
 said James H. Mallery said sum of forty-two thousand dollars,

upon his securing the payment of the same on a mortgage, as above mentioned.

And your orators further show, that on or about said eighth day of June, in the year eighteen hundred and fifty-seven, they did advance and pay to the said James H. Mallery said sum of forty-two thousand dollars, and upon said payment and to secure the repayment of the same, in case said tunnel shafts and approaches should not be fully completed by the time in said contract mentioned, said James H. Mallery made, 10 executed, and delivered unto your orators an indenture of mortgage, bearing date on that day, made by him, of the first part, and your orators, of the second part, under the hand and seal of said James H. Mallery, which indenture is of the tenor following: This indenture, made this eighth day of July, in the year eighteen hundred and fifty-seven, between James H. Mallery, of Newburgh, Orange county, in the state of New York, of the first part, and the Long Dock Company, of the state of New Jersey, of the second part, witnesseth, that whereas the said James H. Mallery, by a contract made with 20 said party of the second part, dated on the twenty-eighth day of May, in the year eighteen hundred and fifty-six, contracted and agreed to construct and excavate a tunnel through Bergen hill and to do other work in said contract in the manner therein set forth, and at the prices and within the time therein specified, and it was, among other things, agreed that ten per cent. of the estimates of the work done by said James H. Mallery under said contract should be retained until said work was completed and the contract fully performed in the manner and within the time designated therein, the same being 30 retained as security for such performance; and whereas said party of the second part have paid and allowed to said James H. Mallery forty-two thousand dollars of said moneys so retained, upon said James H. Mallery giving to them security by these presents upon his tools and machinery, that said contract shall be fully performed on his part, or said money, with interest, refunded. Now therefore, said party of the first part, in consideration of the premises and of one dollar to him paid by the said party of the second part, doth hereby grant, bargain, sell, assign, transfer, and convey to said party of the 40 second part and their assigns all and singular the tools, ma-

chinery, fixtures, and apparatus belonging to him and bought or used by him for the making the excavations and constructing the said tunnel through Bergen hill, in the city and county of Hudson, and state of New Jersey, and now in the course of being constructed and made by me, which tools, machinery, fixtures, and apparatus are specified and designated in the inventory hereto annexed, and forming part of these presents, together with all and singular the appurtenances thereunto belonging or in any wise appertaining: to have and to hold the same to the said party of the second part and their assigns to 10 their only proper use for ever. Provided always, and it is agreed between the parties to these presents, that if the said James H. Mallery shall well and truly perform in all things the said contract by him made with the said party of the second part within the time and in the manner therein specified, or in case said contract shall not be fully performed in the manner therein specified within the time therein mentioned and stipulated for the completion thereof, shall at the said time repay to said party of the second part the said sum of forty-two thousand dollars, with interest thereon from the date here- 20 of, then these presents to be void and of no effect, and the right and title to said tools, fixtures, and machinery to revert and belong to the said party of the first part.

In witness whereof, the said James H. Mallery hath hereunto set his hand and seal the day and year first above written.

JAMES H. MALLERY, [L. s.]

Signed, sealed, and delivered in presence of.

J. L. ZABRISKIE.

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And your orators show, that there was annexed to said mortgage, at the execution thereof, an inventory, therein re- 30 ferred to, certified by said James H. Mallery under his hand, of which inventory and certificate *Schedule B*, hereto annexed, is a true copy, as in and by said deed of mortgage, and the inventory thereto annexed, now in possession of your orators ready to be produced and proven as this court shall direct, and

to which your orators pray leave to refer, will more fully appear.

And your orators further show, that the buildings, shops, houses, and engines, in said mortgage and inventory described and mortgaged, are annexed to the land upon which they are erected, and are real estate, and that the execution of said deed of mortgage was, on the ninth day of July, eighteen hundred and fifty-seven, duly proved by John Lansing Zabriskie, the subscribing witness thereto, before Enos A. Skill-  
 10 man, a commissioner for the county of Hudson for taking the acknowledgments and proof of deeds, and a certificate of such proof was indorsed thereon; and said mortgage was afterwards, on the tenth day of July, eighteen hundred and fifty-seven, left for registry in the office of the clerk of the county of Hudson, and was recorded by him in Liber 18 of Mortgages for said county, pages 119 to 125, as by said certificate of proof and a certificate of said registry endorsed on said mortgage, to each of which your orators refer, will more fully appear.

And your orators further show, that said James H. Mallery  
 20 did not perform in all things his contract made with your orators within the time and in the manner therein specified, nor did he, at the time mentioned in said contract for the completion thereof, said contract not then being performed, pay back to your orators said sum of forty-two thousand dollars, with the interest thereon from the date of said mortgage; but on the contrary, the said James H. Mallery, on the said fifteenth day of December, eighteen hundred and fifty-seven, the day mentioned in said contract for the completion of the work therein contracted to be done and performed, had not per-  
 30 formed and completed the work therein by him agreed and stipulated to be done and performed, and had left more than one-third, both in quantity and value, of the work in said contract agreed to be performed utterly undone and unperformed, and has not since that time done anything towards or in the performance of the same; and that said James H. Mallery, although often requested so to do by your orators, has not paid to them said sum of forty-two thousand dollars, or the interest thereon, or any part thereof.

And your orators further show, that by reason of the said  
 40 James H. Mallery not performing said contract within the

time and manner herein specified, and not having thereupon at said time repaid to your orators said sum of forty-two thousand dollars, with interest, according to the condition of said mortgage, that said mortgage has become forfeited, and the title to the property thereby mortgaged is absolute in your orators.

And your orators further show, that said James H. Mallery resided in the state of New York, and out of the state of New Jersey, and that, on or about the eighth day of October, eighteen hundred and fifty-seven, one Cornelius D. Clark, 10 claiming to be a creditor of said James H. Mallery, sued out a writ of attachment against said James H. Mallery, as a non-resident debtor, from the Circuit Court of the county of Hudson, which writ was for the sum of one thousand dollars, and was returnable on the fourteenth day of the same month; and that by virtue thereof, Henry B. Beaty, esq., the sheriff of the county of Hudson, to whom the same was directed and delivered on the ninth day of the same month, seized, attached, and took possession of the said shaft houses, engine houses, shops, buildings, engines, machinery, gearing, tools, and im- 20 plements mortgaged to your orator by said mortgage, and specified in the inventory thereto annexed; and that said sheriff returned said writ, with an inventory of the same and other property levied on by him thereunto annexed, a copy of which inventory is hereto annexed, and marked *Schedule C*.

And your orators show, that of said property so attached and returned in said inventory by said sheriff, the greater part are contained and enumerated in said mortgage to your orators, and are mortgaged to them, and that the parts so contained and mortgaged are as follows, *viz*: 30

Six steam engines, 13 inch cylinders, three feet stroke; one 12 inch, three feet stroke; one 8 inch, two feet stroke; one 7 inch, one and a half feet stroke; five boilers, four feet shell, seventeen feet long; three, three feet shell, twelve feet long; one, three feet shell, twelve feet long, with full sets of hoisting and gearing to each; steam gauges and patent blowers; eight shaft houses, 23 feet post, 17 by 19 feet; nine engine houses, 13 feet post, 28 by 31 feet; one truss bridge, with shaft houses, 18 feet post, 12 by 20 feet; also a heavy set of extra hoisting gearing in No. 1 shaft house, and wire rope at each shaft; 16 40

blacksmith shops, 7 feet post, 13 by 24; one jobbing shop, 12 feet post, 17 by 26; one carpenter shop, 12 feet post, 23 by 26; with material and warehouses attached; also 33 anvils, 31 blacksmith's bellows, two full set of jobbing blacksmith's tools, six patent fan blowers, two common box blowers, 25 tunnel trucks, 3 tunnel dumpers.

And your orators further show, that before the return of said writ of attachment, said circuit court appointed Garrick M. Olmsted, David Bedford, and Edmund T. Carpenter auditors therein, and such proceedings were thereupon had that, 10 on the thirteenth day of May, in the year of our Lord one thousand eight hundred and fifty-eight, judgment was rendered in said attachment suit against said James H. Mallery in favor of said Cornelius D. Clark for the sum of five hundred and fifty dollars and fifty-eight cents, besides costs of suit to be taxed, and also in favor of one hundred and twenty-seven other persons, who had respectively presented their claims, as creditors of said James H. Mallery, to said auditors, and approved the same, which other claims, as allowed by said au- 20 ditors, and upon which judgment is so given, amount in the whole to the sum of twenty-four thousand and twenty-four dollars and eighty-three cents.

And your orators further show, that said auditors have advertised and given notice, in the manner required by law in such cases, that they will sell at public auction, on the twenty-fifth day of June, eighteen hundred and fifty-eight, the property so attached by said sheriff, including the part included as aforesaid in your orators' said mortgage, and that said sheriff, when he attached the same, took it into his possession, 30 and has delivered the same to said auditors, and that they threaten and intend to sell the same, on said last mentioned day, at public auction in parcels, to any person who may bid for the same, and to deliver the possession thereof to said purchasers, and permit them to remove the same.

And your orators further show, that said buildings, machinery, fixtures, tools, and chattels, so mortgaged to them, are of great value, and of the value of twenty-five thousand dollars and upwards, and that a large part of their present value consists in their being erected, fixed, and located in the proper 40 positions for use and operation for the purpose for which they

were procured, and that they will not be worth half their value if pulled down and removed to any other situation.

And your orators further show, that said auditors and said plaintiff in attachment give out and pretend that said mortgage of your orators is not a valid lien on said property in said mortgage and the inventory thereto annexed, described and mortgaged as against said attachment, and that a sale by them will sell said property free from said mortgage; and your orators claim that said mortgage is a valid lien on said property; that by reason of said contrary claim, said property, at such auditor's sale, will not bring half of the value, or what it otherwise would bring, and that if the same is sold by said auditors at public auction, it may be purchased by a great number of buyers, who will remove the same, and also may be irresponsible, and the whole security of your orators will be much injured, and rendered almost worthless.

And your orators further show, that said property is a scanty and insufficient security for said sum of forty-two thousand dollars, and the interest thereon, and that the whole of said sum is due and payable from said James H. Mallery to your orators, and that the possession and use of said mortgaged property has remained, and still remains, with said James H. Mallery and said Henry B. Beaty and said auditors, or some of them, and has never been with your orators.

And your orators have frequently and in a friendly manner applied to said James H. Mallery and said Cornelius D. Clark, and said Garrick M. Olmsted, David Bedford, and Edmund T. Carpenter, who are the defendants in this suit, and requested them, or some of them, to pay said sum of forty-two thousand dollars, with the interest as aforesaid so due to your orators, and to desist from selling said mortgaged property until your orators' said debt was paid and satisfied, and your orators had well hoped that they would have complied with such reasonable request of your orators, as in equity and good conscience they ought to have done; but now so it is, may it please your honor, that said defendants refuse to comply with such reasonable request of your orators, and threaten and intend to sell said property so mortgaged to your orators.

All which actings, refusals, and threats are against equity and good conscience, and tend to the manifest wrong, injury, and oppression of your orators. In tender consideration whereof, and inasmuch as your orators are remediless in the premises in the courts and by the rules of common law, and can only have adequate relief in this court, where such matters are properly cognizable, and to the end that the said defendants may, upon their several and respective corporeal oaths, true, full, and perfect answer make to all and singular the premises,

10 as fully and particularly as if the same were here again repeated, and they thereto particularly interrogated, and that your orators' said mortgage may be declared to be a lien upon the said property described in said mortgage, and the inventory thereto annexed, prior to said attachment, and that the amount due on said mortgage, for principal and interest, may be ascertained, and that the defendants, or some of them, may be directed to pay the same, and in default thereof that said property may be sold by the order and decree of this court, and that out of the moneys arising from the sale your orators

20 may be paid the amount due on said mortgage, with all their costs in this suit, and that said Garrick M. Olmsted, David Bedford, and Edmund T. Carpenter may be restrained by this court from selling so much of said property attached by said sheriff as is included in said mortgage, and the inventory thereto annexed, comprising the articles herein above enumerated as so included, and that a receiver may be appointed to take charge of said property so attached and included in your orators' said mortgage, and that your orators may have such other and further relief as the nature of their case requires, as

30 may be agreeable to equity and good conscience, and as to your Honor shall seem meet.

May it please your Honor, the premises considered, to grant unto your orators the state's writ of subpœna, issuing out and under the seal of this honorable court, to be directed to said James H. Mallery, Cornelius D. Clark, Garrick M. Olmsted, David Bedford, and Edmund T. Carpenter, commanding them, and each of them, at a certain day and under a certain penalty, therein to be expressed, to appear before your Honor, in this court, to answer all and singular the premises in manner afore-

40 said, and to stand to, abide by, and perform such order and

decree therein as to your Honor shall seem meet and as shall be agreeable to equity and good conscience; and also to grant unto your orators the state's writ of injunction, to be directed to said defendants, commanding them, and each of them, absolutely to refrain and desist from selling, disposing of, or carrying away any of the property or articles mentioned or contained in your orator's said mortgage or the inventory thereto annexed, including those above enumerated, as contained therein and attached by the sheriff in said suit, until the further order of this court therein. 10

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

A. O. ZABRISKIE,  
*Solicitor and of counsel with complainants.*

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*Schedule A, referred to in the annexed bill.*

Articles of agreement, made and concluded this twenty-eighth day of May, in the year one thousand eight hundred and fifty-six, between James H. Mallery, of Newburgh, Orange county, and state of New York, of the first part, and the Long Dock Company, chartered by the state of New Jersey, of the second part, whereby it is covenanted and agreed as follows, 20  
*to wit:*

The aforesaid party of the first part, in consideration of the prices herein after agreed to be paid to him by the party of the second part, hereby covenants and agrees to perform all the labor, and furnish all the tools, implements, materials, and all other things requisite and necessary to complete a tunnel and shafts, and to excavate all the earth and rock required to construct the same, and the approaches or open cuts at each end of the tunnel, and prepare the same ready for receiving the superstructure upon that portion of the New York and 30  
Erie railroad recently located between the Hudson river and the Paterson and Hudson River railroad, in such manner as will conform, in every respect, to the following specifications and conditions, *viz:*

*Specifications.*

1. The approaches or roadway excavations at either end of the tunnel shall be forty feet wide at grade, that is, with a road-bed twenty-six feet wide, and two ditches seven feet wide, each.
2. When the cutting occurs in rock, it shall be excavated two feet below the grade line, and the side slopes shall be one foot horizontal to two feet perpendicular; in earth, the slopes shall be such as the engineer shall direct.
- 10 3. The embankment for a double track road will be twenty-six feet wide at grade, with the usual slopes of one and a half to one.
4. The tunnel will be about four thousand feet in length, more or less, as shall be determined by the engineer on opening the approaches.
5. The extreme width of the tunnel will be about twenty-nine and a half feet, and the height twenty-three feet, having an arch of three centres rising about thirteen and a half feet.
- 20 6. The outlines of the tunnel will be so arranged by the engineer as to give a sectional area of five hundred and eighty and a half square feet, or twenty-one and a half cubic yards, per lineal foot of tunnel.
7. The rock shall be excavated fully up to the outlines of the section of the tunnel throughout; but any unnecessary excess of excavation beyond those outlines will not be estimated or paid for.
8. The work shall be executed in such manner as to conform to the lines, levels, and sections furnished by the engineer, and as to present throughout a regular, uniform, and work-  
30 manlike appearance.
9. There will be two or more shafts, not less than fifteen feet in diameter, and of about sixty feet average depth; the locations and dimensions of the shafts to be fixed by the engineer after ascertaining the depths of the rock.
10. The materials taken from the tunnel and its approaches and shafts shall be deposited as directed by the engineer.
11. In case the engineer shall require the materials from the western approach and from the shafts to be hauled over the surface of the hill, and deposited upon the slope or on the

meadow, from two to five hundred feet from the east end of the tunnel, a railway track for the purpose will be provided by the Long Dock Company.

12. In case the engineer shall require the material from the eastern approach, or which shall have been deposited near the eastern approach, from any part of the tunnel, the shafts or the western approach to be removed to and deposited in the bulkhead, piers, or crib work to be constructed by the Long Dock Company in the Hudson river, or to be deposited at any point near the shore of the Hudson river, a railway 10 track for the purpose, with suitable horse path, will be provided by the Long Dock Company.

13. In case the engineer decides that the western approach shall not be excavated to the full width of forty feet at grade until the tunnel shall be completed, so that a large portion of the material of the western approach may be taken on cars through the tunnel without being moved a second time, no difference of price per cubic yard shall be paid for excavation, but the advantage of loading directly into cars shall be considered as a full offset to the disadvantages of working a 20 narrow cut. In this case, the furnishing the cars, the hauling and dumping, will be done by the Long Dock Company. The cut shall not be made so narrow as to seriously interfere with working it in a judicious manner without the consent of the contractor.

14. In case the engineer shall require the rock or stone which shall have been excavated, or any portion of it, to be laid up in regular piles for measurement at any point or points he may designate, the same shall be done.

15. Should any masonry or timber work be required in or 30 about the tunnel or shafts, or should earth excavations be met with in the tunnel, or should any work of an unforeseen or unexpected character be required, and for which no price is provided in this contract, the price of doing such work shall be agreed upon between the parties before such work shall be commenced; and in case of any delay or failure to agree upon a price or prices for such work, it will be undertaken by the Long Dock Company, or be let by that company to other parties to be done in the shortest practicable time.

*Conditions.*

1. The work shall be commenced as soon as practicable after the execution of these presents, and shall be completed on or before the fifteenth day of December, one thousand eight hundred and fifty-seven.

2. The work shall be executed under the direction and constant supervision of the engineer of the company, by whose measurements and calculations the quantities and amounts of the several kinds of work performed under this contract shall  
10 be determined, and whose determination shall be conclusive upon the parties, and who shall have full power to reject or condemn all work or materials which in his opinion do not fully conform to the spirit of this agreement, and shall decide every question which can or may arise between the parties relative to the execution thereof, and his decision shall be final and binding upon both parties.

3. The several stipulations of this contract shall be performed in such a manner that the party of the first part shall not be relieved from the immediate charge and responsibility  
20 of the work; and no part thereof shall be transferred or sub-contracted, unless by the sanction and approval, in writing, of the engineer of the company having the charge of the work.

4. If any foreman or laborer employed by the contractor shall, in the opinion of the engineer, execute his work in an unfaithful or unskilful manner, or in any respect prove remiss or inadequate to the performance of his duty, or disrespectful or violent in his conduct, he shall forthwith, by direction of said engineer, be discharged; and no person shall be employed  
30 on the work in the capacity of foreman or overseer who has been previously discharged for neglect or unfaithfulness from any work within the knowledge of said contractor or said engineer.

5. If any damage shall be done by the party of the first part, or by workmen in his employ, to the owners or occupants of lands or other property adjoining or in the vicinity of the work herein contracted to be done, the engineer of said company shall have the right to estimate the amount of the said damage, and to pay the same to such owner or occupant; and the amount so paid for such damage shall be deducted  
40 from the value of work done under this contract.

6. All work done under this contract to be performed without the use of ardent spirits.

The aforesaid party of the second part hereby covenant and agree, that whenever, in the opinion of the engineer in their employ, this contract shall have been wholly completed by the party of the first part, they will pay for the performance of the same in full for materials and workmanship, as follows, *to wit*:

For excavation of earth, as found in approaches to tunnel or in open cuts, and depositing within five hundred feet, per 10 cubic yard, twenty-five cents (25 cents).

For excavation of earth, as found in shafts, and depositing within five hundred feet, per cubic yard, seventy-five cents (75 cents).

For excavation of rock in approaches to tunnel or in open cuts, and depositing within five hundred feet, per cubic yard, one dollar and seventy-five cents (\$1.75).

For excavation of rock in shafts, and depositing within five hundred feet, per cubic yard, twelve dollars (\$12).

For excavation of rock in tunnel, and depositing same not 20 more than five hundred feet from tunnel, per cubic yard, five dollars and twenty-five cents (\$5.25).

For hauling earth or rock with carts or wagons, on requisition of the engineer, when the distance exceeds five hundred feet, for each additional one hundred feet above the first five hundred feet, per cubic yard, eight mills (8 mills).

For hauling earth or rock from the shafts and from the western approach over the surface of the hill to the slope at the east end of the tunnel, over a railway track furnished by the Long Dock Company, per cubic yard, per hundred feet, 30 seven mills (7 mills).

For reloading material at eastern approach of tunnel, when required, per cubic yard, twenty-five cents (25 cents).

For hauling earth or rock from the east end of the tunnel or slope of the hill to the proposed bulkhead, or to any point between the tunnel and bulkhead, on track furnished by the company, per cubic yard, per hundred feet, four mills (4 mills).

For additional price of material taken out of western approach, at a depth of more than fifteen feet from the surface, and deposited outside of the cut, within five hundred feet, per 40 cubic yard, eight cents (8 cents).

For piling stone, selected for building or other purposes, under direction of the engineer, per cubic yard, twenty-five cents (25 cents).

The prices named for the foregoing items are intended as a full consideration for labor and materials, except in cases where it is stated for labor only.

It is further agreed, that payments shall be made from time to time, as the work progresses, on the certificate of the engineer for work done; the said engineer to deduct such per centage as he may think proper from the value of the work done, which shall in no case be less than ten per cent.

For the purpose of avoiding all causes of difference or dispute between the parties to this contract, relative to its true intent and meaning, and for the purpose of adjusting, in an amicable manner, any difference that can or may arise relative thereto, it is hereby mutually understood and agreed by and between the parties, as follows, *to wit*:

1. No extra charges shall be claimed or allowed on account of changes in the work, the prices herein mentioned being considered as full compensation for various kinds of work herein agreed to be performed.

2. If the party of the first part shall refuse or unreasonably neglect to remedy any imperfections which may be pointed out by the engineer, or in any manner violate the conditions of this contract, so that in the judgment of the engineer there shall be just grounds of apprehension that the work will not be completed in the manner and within the time herein specified, then it shall be the duty of the engineer to serve a written notice upon said party, setting forth the grounds of his apprehension, and specifying the manner, together with a reasonable time in which said party may cause such grounds to be removed; and if, at the expiration of such time, said grounds of apprehension be not removed, then full power and authority are mutually vested in said engineer to declare this contract forfeited; and on such declaration being given in writing by the engineer to the parties hereto, this contract shall cease and determine immediately, and the said party of the second part may for ever retain the reserved per centage on account of the consideration for damages which they may have sustained by reason of the forfeiture of this contract.

Or, as an alternative to declaration of forfeiture, the party of the second part shall, on written report of their engineer, that apprehensions are entertained that this contract will not be completed in the manner or time herein stipulated, have the right to take such measures as may be deemed by their engineer necessary to insure the completion of the contract in the time and in the manner herein stipulated, and to deduct from the monthly and final estimates of work done under this contract such sums as may be required to defray the expenses of such measures. Among the measures which under such 10 circumstances may be resorted to are: the execution, by their own agents, of such portions of the work as the said engineer may select, or the requirement that the party of the first part shall provide for and employ in the most efficient manner such additional men, carts, teams, &c., as the party of the second part shall furnish; in which case, said party of the first part agrees to employ said men, carts, teams, &c., in the manner directed by the engineer of the party of the second part.

Or, as another alternative to a declaration of forfeiture, the party of the second part, at their option, may allow the party 20 of the first part an extension of time; in which case the party of the first part hereby agrees to forfeit to the party of the second part the sum of two thousand five hundred dollars for each and every month the work shall be delayed beyond the time herein stipulated for the completion of the same, the amount to be deducted from the engineer's estimates or from the reserved per centage.

3. It is further agreed, that in case a single track excavation in the western approach, as may be directed by the engineer, and all the other work herein specified, shall be fully 30 completed according to the several stipulations of this contract, before the fifteenth day of December, one thousand eight hundred and fifty-seven, as aforesaid, the party of the second part shall pay to the party of the first part a bonus of two thousand five hundred dollars for each and every month the time of completion shall be shortened.

The party of the first part hereby further agrees to secure to the party of the second part the payment of twenty-five thousand dollars, as a further forfeit in case of a declaration

of forfeiture, as herein before provided ; otherwise, the agreement to pay this forfeit is to be void.

This contract shall not be binding upon either party until signed by all the parties thereto, and duly approved and ratified by the board of directors, to be attested by the signatures of the president and secretary and the affixing of the corporate seal of the company.

In witness whereof, the parties to these presents have hereunto set their hands and seals, in triplicate, the day and year  
10 first above written.

JAMES H. MALLERY, [L. s.]  
HOMER RAMSDELL, [L. s.]  
*Pres't Long Dock Company.*

In presence of J. L. Zabriskie.

Attest.—J. L. ZABRISKIE, *Sec'y.*

*Schedule B, in the foregoing bill mentioned.*

Inventory of machinery and fixtures on the Bergen hill tunnel :

Shaft 1.—One steam engine, 7 in. cylinder, 18 in. stroke, 20 with crank shaft, balance wheel, and pinion ; one counter-shaft and spur-wheel, with drum and friction for hoisting complete ; one locomotive boiler, 3 feet cylinder, 14 feet long, with 44 tubes 8 feet by 2½ in., britchen, smoke-pipe, steam-gauge, wrought iron steam and water connections complete ; one 22 in. patent fan blower, with belting and air pipe complete ; one wire rope, No. 8 ; one 4½ feet shieve, and 2 large irons ; tubs, shaft and engine houses and blacksmith shops complete.

Shaft No. 2.—One steam engine, 13 in. cylinder, 3 feet stroke, 30 with crank shaft ; one 10 feet balance wheel, 16 in. face ; one 4 feet pulley, 12 inch face ; one 26 in. pinion ; one drum shaft and crown wheel ; 1 drum, 20 in. by 3 feet, with friction gearing complete for hoisting ; one counter-shaft, with 2 pulleys, 21 in. and 48 in., 6 in. and 10 in. faces ; one 22 in. patent fan blower, with belting and air pipes complete ; one 4½ in. wrought iron shaft, 7 feet long, with friction and brake ; one 4 feet pulley, 10 in. face ; 2 bevel wheels ; one upright shaft

with pinion; one 5 in. horizontal shaft, 12 feet long; one 16 in. pinion, 8 in. face; one 6 in. drum shaft, 12 feet long, with one drum, 8 feet in diameter, and one crown wheel, 10 feet diameter and 8 in. face; one 2 feet shieve, wire rope, and 2 large iron buckets; one locomotive boiler, 17 feet long and 4 feet shell, with 43 three in. tubes, britchen, smoke-pipe, steam gauge, wrought iron steam and water connections complete; shaft house, engine house, and blacksmith shops complete.

Shaft No. 3.—One steam engine, 10 in. cylinder, 32 in. stroke, with 6 in. crank shaft; 10 feet balance wheel, 12 in. 10 face; one 26 in. pinion, one drum shaft and crown wheel, 1 drum, 20 in. by 3 feet long, one friction and brake, one 4½ feet shieve, wire rope, and 2 large iron buckets, complete for hoisting; one 22 in. patent fan blower, with belting and air pipe complete; one 5 in. drawing lift pump, with pipe and balance beam complete for raising water out of shaft; one locomotive boiler, 16 feet long, with britchen, smoke-pipe, steam gauge, and wrought iron steam and water connections complete; one shaft house, 17 feet by 19 feet, 23 feet post; one engine house, 26 feet by 31, 13 feet post; blacksmith shop, 12 20 feet by 24 feet, 10 feet post.

Shaft No. 4.—One steam engine, 13 in. cylinder, 3 feet stroke; one crank shaft and balance wheel, 10 feet diameter, 16 in. face; one 16 in. pinion; one 18 in. pulley, 6 in. face; one 4½ in. drum shaft, 7½ feet long; one 42 in. crown wheel, 6 in. face; one drum, 2 feet diameter, by 3 feet long; one 4 feet friction and brake, with wire rope, iron buckets, &c., complete for hoisting; one upright pump, with crank shafts and pulley; 2½ in. plunger, 12 in. stroke, with worm heater for feeding boiler; one rotary pump, with spiral wire hose and 30 wrought iron pipe; one 5 in. drawing lift pump, with pipe and balance beam complete for drawing water out of shaft; one locomotive boiler, 17 feet long, with britchen, smoke-pipe, steam gauge, wrought iron steam and water connections complete; shaft house, engine house, and blacksmith shop complete.

No. 5 shaft.—One steam engine, 12 in. cylinder, 3 feet stroke, with governor, crank shaft; one 12 feet balance wheel; one 4 feet pulley, 10 in. face; one 20 in. pinion; one drum shaft, with 40 in. crown wheel; one drum and friction wire rope 40

and 3 buckets, complete for hoisting; one 8 feet pulley; one 3 feet fan blower, 10 in. wings, with belting and air pipe complete; one 4½ feet shieve; one locomotive boiler, with smoke pipe, britchen, steam gauge, wrought iron steam and water connections complete; one quartz crusher (for breaking tempering) with pulleys and belting complete; shaft house, engine house, and blacksmith shops complete.

No. 6 shaft.—One steam engine, 13 in. cylinder and 3 feet stroke, with governor and cut-off; one 6 in. crank shaft; one 10 feet balance wheel, 16 in. face; one 30 in. pinion; one drum shaft with drum, crown wheel friction attached; one 4½ feet shieve, wire rope, 3 iron buckets, complete for hoisting; one 22 in. patent fan blower, with belting and air pipes complete; one locomotive boiler, 17 feet long, with britchen, smoke-pipe, steam gauge, wrought iron steam and water connections complete; shaft house, engine house, and blacksmith shop complete.

No. 7 shaft.—One steam engine, 13 in. cylinder, 3 feet stroke, with governor, cut-off, and reversing excentrics; one crank 20 shaft; one balance wheel, 10 feet diameter, 16 in. face; one 16 in. pinion, 6 in. face; 1 drum shaft, 14 feet long, with 2 drums 3 feet long and 4 feet diameter; one 42 in. crown wheel, 6 in. face; also one drum 16 in. diameter, 2 feet long, with friction and brake; one counter balance crank wheel and 5 in. drawing lift pump, with pipes and balance beam complete; one air machine and pipes complete; two wire ropes; two 4½ feet shieves; two iron buckets; one locomotive boiler, 4 feet shell, 17 feet long, with britchen, smoke-pipe, steam gauge, wrought iron steam and water connections complete; 30 shaft house, engine house, and blacksmith shops complete.

No. 8 shaft.—One steam engine, 13 in. cylinder, 3 feet stroke, with cut-off and governor; one crank shaft; one 10 feet balance wheel, 16 in. face; one 26 in. pinion, 6 in. face; one 4¾ in. wrought iron counter shaft, with 2 drums, each 20 in. diameter and 3 feet long, with frictions and brakes; one 42 in. crown wheel, 6 in. face; two 4½ feet shieves, 2 wire ropes, 3 large wrought iron buckets, all complete; one locomotive boiler, 4 feet shell and 17 feet long, with 43 3 in. tubes, britchen, smoke-pipe, steam gauge, steam and water connections 40 (wrought iron) complete; one 22 in. fan blower (patent), with

belting and air pipes complete ; shaft house, engine house, and blacksmith shop complete.

West approach.—One steam engine, 8 in. cylinder, 2 feet stroke, with governor, crank shaft, and pinion ; one 8 feet (diameter) balance wheel, 10 in. face ; one drum shaft ; one crown wheel ; one drum, 20 in. by 2 feet ; one 2 feet pulley wheel, 8 in. face, friction and brake complete for hoisting ; one 4½ feet shieve ; one wire rope ; 2 large wrought iron buckets ; one locomotive boiler, 3 feet shell, 16 feet long, with 43 2½ in. tubes, britchen, smoke pipe, steam gauge, steam and water 10 connections (wrought iron) complete ; one truss bridge, 73 feet span, with shaft house attached, engine house, and blacksmith shop complete.

Cars, trucks, &c.—16 rotary dump cars, 6 feet gauge ; 4 side dump cars, 6 feet gauge ; 6 platform truck cars, 6 feet gauge ; 22 small truck cars, 4 feet 4 in. gauge ; 12 car beds for hoisting rock out of shafts from tunnel.

The above is the inventory mentioned and referred to in the mortgage, to which the same is annexed, dated this 8th day of July, A. D. 1857.

JAMES H. MALLERY.

Signed in presence of J. L. Zabriskie.

20

*Schedule C, in the annexed bill mentioned.*

Hudson Circuit Court.

|                    |   |                                    |
|--------------------|---|------------------------------------|
| Cornelius D. Clark | } | <i>Attachment in case, \$1000.</i> |
| <i>v.</i>          |   |                                    |
| James H. Mallery,  |   |                                    |

Inventory and appraisalment of the effects, rights, and credits of the defendant, made, by virtue of the annexed writ, October 9th, A. D. 1857, by Henry B. Beaty, sheriff, and 30 Hugh Slater, an impartial freeholder of said county, as follows, *viz* :

Engines.—Six 13 in. cylinders, 3 feet stroke ; one 12 in., 3 feet stroke ; one 8 in., 2 feet stroke ; one 7 in., 1½ feet stroke ; five boilers, 4 feet shell,

|    |                                                                                                                                                                                                                                                                                                                                                                                                                                                        |            |
|----|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|------------|
|    | 17 feet long ; three 3 feet shell, 16 feet long ; one 3 feet shell, 12 feet long, with full sets of hoisting gearing to each, also steam gauges, patent blowers ; 3 shaft houses, 23 feet post, 17 feet by 19 feet ; 9 engine houses, 13 feet post, 28 feet by 31 feet ; one truss bridge, 73 feet span, with shaft houses, 18 feet post, 12 feet by 20 feet ; also heavy set of extra hoisting gearing in No. 1 shaft house, wire rope at each shaft, | \$3,600.00 |
| 10 | 16 blacksmith shops, 7 feet post, 13 by 24,                                                                                                                                                                                                                                                                                                                                                                                                            | 640.00     |
|    | 1 jobbing shop, 12 feet post, 19 by 26,                                                                                                                                                                                                                                                                                                                                                                                                                | 125.00     |
|    | 1 carpenter shop, 12 feet post, 23 feet by 36, with material and warehouses attached,                                                                                                                                                                                                                                                                                                                                                                  | 275.00     |
|    | 1 butcher shop, 10 feet post, 16 by 16,                                                                                                                                                                                                                                                                                                                                                                                                                | 50.00      |
|    | 40,900 lbs. drill steel in tunnel and warehouse,                                                                                                                                                                                                                                                                                                                                                                                                       | 5,112.50   |
|    | 2,000 lbs. cast steel hammers and in warehouse,                                                                                                                                                                                                                                                                                                                                                                                                        | 500.00     |
|    | 10,000 lbs. round, square, and flat iron,                                                                                                                                                                                                                                                                                                                                                                                                              | 350.00     |
|    | 33 anvils, about 3630 lbs., at 5 cents,                                                                                                                                                                                                                                                                                                                                                                                                                | 181.50     |
|    | 31 blacksmith bellows, at \$5,                                                                                                                                                                                                                                                                                                                                                                                                                         | 155.00     |
| 20 | 2 full set of jobbing blacksmith tools,                                                                                                                                                                                                                                                                                                                                                                                                                | 150.00     |
|    | 21 set sharpening tools,                                                                                                                                                                                                                                                                                                                                                                                                                               | 100.00     |
|    | 400 feet wire rope,                                                                                                                                                                                                                                                                                                                                                                                                                                    | 120.00     |
|    | 6 patent fan blowers, at \$60,                                                                                                                                                                                                                                                                                                                                                                                                                         | 360.00     |
|    | 2 connor box blowers, at \$25,                                                                                                                                                                                                                                                                                                                                                                                                                         | 50.00      |
|    | 25 tunnel trucks,                                                                                                                                                                                                                                                                                                                                                                                                                                      | 625.00     |
|    | 3 tunnel dumpers,                                                                                                                                                                                                                                                                                                                                                                                                                                      | 300.00     |
|    | 1 bay horse,                                                                                                                                                                                                                                                                                                                                                                                                                                           | 100.00     |
|    | 1 brown do.,                                                                                                                                                                                                                                                                                                                                                                                                                                           | 100.00     |
|    | 1 gray do.,                                                                                                                                                                                                                                                                                                                                                                                                                                            | 100.00     |
| 30 | 1 set of heavy single harness,                                                                                                                                                                                                                                                                                                                                                                                                                         | 10.00      |
|    | 1 " light " " "                                                                                                                                                                                                                                                                                                                                                                                                                                        | 10.00      |
|    | 1 powder wagon, 3 fly-nets, 2 blankets, 6 circin-gles, 2½ bags of feed,                                                                                                                                                                                                                                                                                                                                                                                | 30.00      |
|    | 1 top wagon,                                                                                                                                                                                                                                                                                                                                                                                                                                           | 40.00      |
|    | 3 lumber wagons,                                                                                                                                                                                                                                                                                                                                                                                                                                       | 100.00     |
|    | 1 stone boat and chain,                                                                                                                                                                                                                                                                                                                                                                                                                                | 3.00       |
|    | 3 pairs of shafts and jack,                                                                                                                                                                                                                                                                                                                                                                                                                            | 30.00      |
|    | 1 gray horse,                                                                                                                                                                                                                                                                                                                                                                                                                                          | 100.00     |
|    | 1 brown horse, long tailed,                                                                                                                                                                                                                                                                                                                                                                                                                            | 125.00     |
| 40 | 1 sorrel horse,                                                                                                                                                                                                                                                                                                                                                                                                                                        | 175.00     |

|                                                                                                                                                 |                    |
|-------------------------------------------------------------------------------------------------------------------------------------------------|--------------------|
| 1 strawberry roan horse,                                                                                                                        | \$175.00           |
| 1 brown mare,                                                                                                                                   | 75.00              |
| 1 sorrel mare,                                                                                                                                  | 150.00             |
| 1 gray horse,                                                                                                                                   | 150.00             |
| 1 spotted mare,                                                                                                                                 | 150.00             |
| 1 dapple gray horse,                                                                                                                            | 125.00             |
| 3 sets of double harness,                                                                                                                       | 45.00              |
| 5 " single "                                                                                                                                    | 50.00              |
| 3 extra collars,                                                                                                                                | 5.00               |
| 3 covers,                                                                                                                                       | 12.00              |
| 3 neck yokes and straps,                                                                                                                        | 5.00               |
| 2 chains,                                                                                                                                       | 2.00               |
| 1 feed box,                                                                                                                                     | 4.00               |
| 1 sorrel horse,                                                                                                                                 | 175.00             |
| 1 black horse,                                                                                                                                  | 100.00             |
| 60 bags, at 1s. each,                                                                                                                           | 7.50               |
| 1 feed box,                                                                                                                                     | 3.00               |
| 1 cutting machine,                                                                                                                              | 4.00               |
| In the store.—The whole contents of the store, consisting of crockery, boots and shoes, tea, soap, &c., valued and appraised at                 | 20<br>300.00       |
| Also, all and singular all stock, chattels, rights, credits, and effects of the said defendant, James H. Mallery, not herein before enumerated, | 5,000.00           |
| Total amount of appraisement,                                                                                                                   | <u>\$50,394.50</u> |

H. B. BEATY, Sh'ff, }  
 HUGH SLATER, } *Appraisers.*

New Jersey, ss.—J. Lansing Zabriskie, being duly sworn on his oath saith, that he is, and has been since the first day of April, eighteen hundred and fifty-six, the secretary of the 30 Long Dock Company, and that the matters and things in the above bill set forth and contained, so far as they relate to his acts and to matters that have come to his knowledge as secretary of the said company, are true, and as to the other matters therein contained, he believes them to be true; that he was the subscribing witness to the mortgage set forth in said bill, and saw the said James H. Mallery sign and execute the same, at or about the time that it bears date.

J. L. ZABRISKIE.

Sworn and subscribed the 23d day of June, A. D. 1858, at Jersey City, before me.

A. S. JACKSON, M. C.

New Jersey, ss.—Alfred B. Seymour, being duly sworn on his oath saith, that he now is, and has been for two years last past, the agent of the New York and Erie Railroad Company, and also of the Long Dock Company, for the purchasing, taking care of, and managing the lands upon and through which the extension of the Paterson and Hudson River railroad, in  
 10 the annexed bill mentioned, is being constructed, and the Bergen tunnel built, and in superintending parts of said work; that he is well acquainted with the property, tools, and machinery contained and described in the mortgage given by James H. Mallery to the Long Dock Company, dated June 8th, A. D. 1857, and knew the same at the date of said mortgage; and that he is acquainted with and knows the property and tools and machinery mentioned and described in the inventory returned by the sheriff to the writ of attachment in the annexed bill mentioned; and that the property and arti-  
 20 cles on said sheriff's minutes, in the annexed bill enumerated as contained in the said mortgage and inventory thereto, are the same as in said mortgage and inventory contained; and that he saw the work of said James H. Mallery in constructing the tunnel, shafts, and approaches mentioned in the contract referred to in said mortgage from day to day, as the same progressed, and has examined the same since said Mallery ceased working on the same; that at least one-third of said work, both in quantity and value, was still unfinished on the fifteenth day of December last, since which time said Mal-  
 30 lery has done no work at the same; that the value of said mortgaged property much depends upon its being constructed, fixed, and located where it can be used to advantage; and that, if sold at auction to be taken away and removed, it will not be worth, or bring, one half of its actual value in its present condition; that this deponent has seen an advertisement, published in the Daily Telegraph of Jersey City (a copy whereof is here annexed), signed by the auditors in said attachment suit, in which they give notice that they will offer said property for sale at public auction, and he believes that

they intend to offer the same for sale, and to sell the same, without regard to said mortgage, on the twenty-fifth day of June, instant.

A. B. SEYMOUR.

Sworn and subscribed, this 23d day of June, A. D. 1858, at Jersey City, before me.

A. S. JACKSON, M. C.

State of New Jersey, *to wit* :—Nathaniel Marsh, being duly sworn on his oath saith, that he is and has been, for more than two years last past, treasurer of the Long Dock Company; that said company, at the request of James H. Mallery, in the month of June last, agreed to advance to him forty-two thousand dollars, being part of the ten per cent. which they had retained of the amount of the estimates of the work done by him in his contract for constructing Bergen hill tunnel, in the annexed bill mentioned, and which they were entitled to retain until the completion of the work, on condition that he would secure the repayment of the same in case he did not complete the work by the time of the said contract; that said forty-two thousand dollars was paid to said James H. Mallery 20 by this deponent, as such treasurer, partly in cash, and partly in acceptances, that have since been paid, and that the same was paid upon the giving of said mortgage in the annexed bill mentioned over as the consideration thereof.

NATHANIEL MARSH.

Sworn to and subscribed, this 23d day of June, A. D. 1858, at Jersey City, before me.

A. S. JACKSON, M. C.

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*The several answer of James H. Mallery, one of the defendants to the bill of complaint of the Long Dock Company, 30 complainants.*

This defendant, reserving to himself all right of exception to the said bill of complaint, for answer thereunto, or unto so much and such parts thereof as this defendant is advised is material or necessary for him to make answer unto, answering

says—that he admits it to be true that the said complainants, on or about the twenty-eighth day of May, eighteen hundred and fifty-six, were seized in fee simple of the lands and real estate, in the city and county of Hudson, in this state, over and across which the New York and Erie Railroad Company, or the complainants, had laid out and located the route of the railroad to be built and constructed by them, to continue and extend the railroad of the Paterson and Hudson River Railroad Company to the Hudson river; and that said extension  
 10 of said railroad was to be made by the authority of the law of New Jersey, in the bill of complaint mentioned, or some other law, and that, in order to make a tunnel through said Bergen hill, the contract herein after next mentioned was made.

And this defendant further answering admits, that on or about the twenty-eighth day of May, eighteen hundred and fifty-six, he and the complainants made and executed, under their respective hands and seals, the contract in the said bill of complaint mentioned, and which in *Schedule A*, to said bill  
 20 annexed, is fully set forth.

And the defendant also admits, that under said contract, and in fulfilment of the same, he entered upon said premises of the complainants, along the route of said railroad so located, and commenced the excavation and construction of said tunnel, shafts, and approaches; and for the purpose of fulfilling the said contract, and constructing said tunnel, shafts, and approaches, built and erected on said lands shaft houses, engine houses, blacksmith shops, and other shops and buildings, steam engines, with their boilers, blowers, shafting, gearing, and  
 30 other machinery and apparatus thereunto belonging, and other machinery and gearing, and also a bridge, which houses, shops, engines, boilers, and machinery, gearing and bridge, were built upon said lands; but this defendant expressly denies that they were attached to said lands in any other sense than that some of the said houses rested upon said lands; that all of the same could and can be removed without the slightest injury to said lands, and were intended and contemplated to be removed by this defendant and by the complainants as soon as the said work should be stopped or finished.

40 And this defendant further answering admits, that he bought

and procured other tools and machinery, and furnished and provided said blacksmith shops with forges, bellows, anvils, and other tools and implements; but this defendant denies that all other tools and implements, usually belonging to such shops, and considered part of the same, were bought and procured by him, or that the said blacksmith shops were furnished and provided therewith; and on the contrary, this defendant charges, that no other tools or implements were bought or provided, except such as were necessary to be used in making and repairing the tools used in rock and other excavations, or 10 such as could be used in and about completing and performing the said contract so made between the said complainants and this defendant, and that said shops and other structures have in fact been used for no other purpose than facilitating the performance of said contract and the progress of said work.

And this defendant further answering denies, that said shaft houses, engine houses, blacksmith shops, and other shops and buildings, engines, machinery, gearing, bridge tools, and implements, are all specified in the said schedule to the said bill annexed, marked B, although most of them are so specified; 20 and this defendant admits, that with said machinery, implements, and tools, he did proceed to excavate and construct said tunnel, shafts, and approaches.

And this defendant further answering admits, that on or about the eighth day of July, eighteen hundred and fifty-seven, this defendant had made considerable progress in the construction of said tunnel, shafts, and approaches, and that the complainants had in part, and only in part, paid him for such work from time to time, as the same progressed, but not above one quarter of the said payments were in cash; that 30 three quarters thereof were made in acceptances of the New York and Erie Railroad Company and of the Long Dock Company, and other acceptances which had from two to three months to run; that the defendant, up to the last day of March, eighteen hundred and fifty-seven, was paid on the certificate of the engineer as to the amount of work done, deducting from the amount of said certificate, and not from any supposed value of said work done, ten per cent. of the amount of such certificate; that subsequent to the last of March, eighteen hundred and fifty-seven, up to October, eighteen hundred and 40

fifty-seven, this defendant was paid, so far as he was paid, on the certificate of the engineer as to the relative value of work done, pursuant to a resolution of the board of directors of the complainants, passed on the first day of April, eighteen hundred and fifty-seven, herein after set forth, directing the said engineer to make his estimates in such manner.

That said estimates and certificate of such engineer upon which said payments were made were low, and did not in fact amount to or state the real value of said work, in this, 10 that they stated the value of that part of said work, about which part only any dispute has arisen, at less than was the fair value thereof, according to the prices in the said contract named therefor, considering that the said work already done, and for which such estimates were made, was by far, and as much as five to one, the most expensive of all the work contracted to be performed by this defendant in and by the terms of the contract aforesaid.

And this defendant admits, that it was according to the terms of said contract, and by and with the assent of this defendant, 20 that the complainants retained the ten per cent. of such estimates; that the same was not to be retained until the full completion of the said work, but for the purposes in said contract set forth, and for no other purpose; and this defendant admits that the complainants had paid him, in and by the acceptances and cash aforesaid, only about three hundred and seventy-eight thousand dollars upon said contract, for work performed and materials furnished under the same, and had retained out of the estimated value, which was less than the real value of the work done and materials furnished under 30 and in fulfilment of said contract, about the sum of forty-two thousand dollars, being about the ten per cent. of the estimated (which was less than the real) value of said work done.

And this defendant in further answering admits, that he was desirous of obtaining the advance and payment of said sum of forty-two thousand dollars before the completion of said contract; that whether the same was not payable until the completion of said contract, by the terms thereof, this defendant submits to the judgment of this honorable court; that this defendant applied to the complainants to pay and advance 40 the same to him, and offered to give the said mortgage (which

is herein after referred to) to answer the same purposes which the retaining of the said ten per cent. was intended to answer by the terms of said contract, upon the property in the schedule to said mortgage annexed, mentioned, and not upon any other property, as in and by the said bill of complaint is supposed ; and this defendant admits, that the said complainants did, on or about the eighth day of July, eighteen hundred and fifty-seven, advance and pay to this defendant the said sum of forty-two thousand dollars, not in cash, but in acceptances of the Long Dock Company at four months, without interest ; 10 that upon said payment of said sum of forty-two thousand dollars in the acceptances of the complainants, the defendant executed and delivered to the complainants the mortgage set forth in the said bill of complaint at length, bearing date the eighth day of July, eighteen hundred and fifty-seven, and also signed the schedule to the same annexed, a copy of which is annexed to the said bill of complaint, and marked B.

And this defendant further answering says, that he denies that the buildings, shops, houses, and engines, in said mortgage and inventory mentioned, are annexed to the land upon which 20 they are erected ; and this defendant also denies, that they are real estate, and on the contrary thereof, charges that the same rest upon sleepers laid down upon the land on a level, and that they were put down in such manner for the purpose of being easily removed when the tunnel should be done or stopped ; the forges are nothing but a wooden box resting on the top of the ground, and filled with earth and stone to answer a temporary purpose, and the chimneys are put on top of said box, and not let into the ground.

And this defendant admits, that said mortgage was, on the 30 ninth day of July, eighteen hundred and fifty-seven, duly proved, and on the tenth day of July, eighteen hundred and fifty-seven, left for registry in the office of the clerk of the county of Hudson, and recorded as in said bill stated ; but this defendant is advised by counsel, and insists, that such record is of no validity, and can give no effect to said mortgage other than it has as a mortgage on chattels.

And this defendant utterly denies that it is true that he did not in all things perform his contract made with the complainants within the time and in the manner therein specified, in 40

the sense in which the same is alleged in the bill of complaint, and on the contrary thereof, this defendant expressly charges, that he did perform the same in all things, until, as herein after mentioned, the said complainants required this defendant to cease and discontinue the performance of the same; but this defendant admits, that he did not, at the time mentioned in said contract for the completion of said work, pay to the complainants the sum of forty-two thousand dollars, with interest, and that he had not (for the reason before stated, to  
10 wit, that the complainants desired him to desist therefrom,) at the said time last mentioned completed the whole tunnel therein by him agreed and stipulated to be made; that the complainants, as early as the month of August, eighteen hundred and fifty-seven, and frequently after that, requested the defendant to retard the progress of said work, and employ fewer men, so that this defendant should not earn money faster than the complainants could raise the same; but this defendant expressly charges, that after the giving and recording of said mortgage, he did pay back and return to the complainants the  
20 said sum of forty-two thousand dollars in the same acceptances of the complainants he had received from the said complainants for which said mortgage was given, as the said acceptances were unavailable, and this defendant could not realize anything thereon; and this defendant is advised by counsel, and humbly insists, that thereby the said mortgage is discharged; but this defendant at the same time admits, that the complainants afterwards advanced, partly in cash, and partly in other acceptances of other persons, the said sum of forty-two thousand dollars, but he insists that thereby the said  
30 mortgage was not received, nor were the moneys last mentioned secured thereby.

That the said complainants are largely indebted to this defendant in an amount exceeding the said sum of forty-two thousand dollars, and that if the same had not been paid, as is last stated, the complainants hold funds of this defendant in their hands exceeding that sum, which, as this defendant is advised by counsel, and humbly insists, would operate a discharge of said mortgage.

And this defendant charges, that the complainants have not  
40 sustained any damages whatever chargeable to any default or

neglect or wrongful acts of this defendant in not performing his said contract, or finishing said work at the time stipulated.

And this defendant denies, that more than one third, both in quantity and value of the work in said contract agreed to be performed, is utterly undone and unperformed, and on the contrary this defendant charges, that only a little more than one third in the number of yards and other the work required to be excavated and done to finish said tunnel remains unfinished, and that only about one sixth in value of the said work 10 required to be performed by said contract remains undone; that said work remains undone by the interference and commands of the said complainants, and their refusal to allow the defendant to proceed therewith.

And this defendant admits, that since the fifteenth day of December, eighteen hundred and fifty-seven, he has done nothing towards the performance of the said contract for the reason aforesaid; and this defendant denies, that he has ever been requested to pay the said sum of forty-two thousand dollars to the complainants. 20

And this defendant is advised by counsel, and humbly insists, that by reason of the facts herein before and herein after stated, the said mortgage has not become forfeited, and the title to the property thereby mortgaged is not absolute in the complainants, and on the contrary, that the said mortgage is discharged and satisfied, and that the same should be delivered to this defendant and cancelled.

And this defendant further answering says, that he admits that he resided out of the state of New Jersey, and has been informed, and believes that, at the time in said bill stated, 30 Cornelius D. Clark caused an attachment to be issued against this defendant out of the Circuit Court of the county of Hudson, in this state, under which the property in said mortgage contained and other property of this defendant was attached, as in and by the said bill is set forth; that the said sheriff of Hudson county took possession of the property so attached, and returned the said attachment with an inventory, a copy of which is annexed to said bill of complaint, in a schedule marked C; that the greater part of the property attached is contained in the complainants' mortgage; that the part of the 40

property so attached, and so contained in said mortgage, is truly stated in said bill of complaint of the complainants, except that one patent blower, one jobbing shop, twelve feet post, 17 by 26 ; one carpenter shop, twelve feet post, 23 by 26, and the materials and warehouses attached, and two full sets of jobbing blacksmith tools, are not contained in said mortgage or inventory to said mortgage annexed, and there is a mistake in the said bill of complaint in the particulars last stated.

- 10 And this defendant on information denies, that auditors were appointed in said attachment suit before the return of said writ of attachment, but admits, that after the return day thereof, and the actual return of said writ, the auditors in the bill mentioned were appointed, and that judgments were rendered in said attachment suit against this defendant, in favor of said Cornelius D. Clark, for five hundred and fifty dollars and fifty-eight cents, besides costs, and in favor of one hundred and twenty-seven other persons, and that the judgments aforesaid amount to twenty-four thousand and twenty-four  
20 dollars and eighty-three cents.

And this defendant admits, that said auditors gave notice, in the manner required by law in such cases, of the sale of said property on the twenty-fifth of June last, and that said sheriff, when he attached the same, took it into his possession ; but whether the same has been delivered to said auditors, this defendant does not know and is not informed, and that said auditors threatened and intended to sell the same, on the day last aforesaid in parcels, to any responsible person who would bid for the same, and not to any person, and that they intend-  
30 ed to deliver the possession thereof to such purchasers, and permit them to remove the same ; and this defendant admits and charges, that said buildings, machinery, fixtures, tools, and chattels, so mortgaged to the complainants, are of the value of forty-five thousand dollars, and that a large part of their present value, if to be used for the prosecution of the work in said tunnel, consists in their being erected, placed, and located in the proper position for use and operation for the purposes for which they were procured, and that they will not be worth half so much elsewhere, or for any other purpose ;  
40 and this defendant admits, that said creditors, and the plaintiff

in said attachment allege, as also does this defendant, that the said mortgage of the complainants is no lien upon the said property therein and thereby mortgaged, and that a sale under said attachment would in fact make a good title free from any claim of the complainants; and this defendant utterly denies that said mortgage is a valid lien on said property, and this defendant denies, that by reason of said contrary claim of the complainants, the property would not bring as much at said auditor's sale as it would otherwise, and denies that it is more likely that said property will be purchased by irresponsible bidders, at said sale by said auditors, than by a sale in any other mode or by any other persons. 10

And this defendant admits, that if the said forty-two thousand dollars were in fact due from this defendant, said property so mortgaged would be a scanty security to any one else than the complainants for such amount, but to them the security is ample and sufficient.

And this defendant utterly denies, that the whole of said sum of forty-two thousand dollars, or any part thereof, is due and payable from this defendant to the said complainants, but 20 on the contrary thereof, the same has never become due, and neither have the events on which the said sum was to become due ever happened, nor can the same now ever happen; and this defendant admits, that the possession and use of the property mortgaged has remained, and still remains, with this defendant or the other defendants, and has never been with the complainants.

And this defendant denies, that the complainants have ever applied to any of the defendants in this suit to pay the said sum of forty-two thousand dollars, with the interest, but that 30 this defendant believes that they have requested the said auditors to desist from selling said mortgaged property, but whether such request was made, that said auditors should desist until the complainants' pretended debt was paid and satisfied, this defendant does not know, has not been informed, and does not believe; and this defendant is advised by counsel, and humbly insists, that the complainants, if all the facts alleged in said bill were true, have an adequate remedy at law.

And this defendant further answering says, that he commenced the said work of making the said tunnel under the 40

said contract on the third day of June, eighteen hundred and fifty-six, and prosecuted the same with the greatest possible vigor, sparing neither money nor labor, wherever it could be applied to advantage, in urging on the work ; that the buildings, machinery, tools, fixtures, and other things required to start and prosecute the said work cost the defendant about seventy thousand dollars.

That pursuant to the last clause but one in said contract, this defendant, about the time the work commenced, gave to  
 10 the complainants a note, with the amplest personal securities, signed by himself and said sureties, to pay twenty-five thousand dollars to the complainants, as a forfeit in case of a declaration of forfeiture of the contract, as therein provided, and that the said complainants still retain the same.

That he prosecuted the said work with diligence and success for several months, but as early as the month of October, eighteen hundred and fifty-six, it was found impracticable and inconvenient to carry on the upper portion of the tunnel, called the headings, and the lower portion, called footings, with equal  
 20 paces or in such manner that men could be employed in full force at each ; that working the footings a short distance from the headings, as is sometimes practised, was found to be impracticable, on account of the hardness of the rock, the weight of the blasts, the smoke thereof, the difficulty of clearing the material from the headings over the workmen at the footings, and the great and imminent danger to the lives of the workmen engaged at the footings, upon whom the stones incessantly blasted from the headings were likely to fall ; that those  
 30 engaged at the footings could work but little more than half time, by reason of the extraordinary watchfulness and continual relinquishment of the work necessary to escape the said danger ; that to work the headings and footings alternately would cause a great waste of skill, and money to pay the more skilful, who were needed mainly for the headings, and who could not be afforded at the footings, which require men of much less skill ; that there was then ample time to finish the whole work within the time stipulated in the contract, and would have been up to the stoppage of the work, and from that time on, if this defendant had not, at the said request of  
 40 the complainants, employed less men, and had not the com-

plainants made other requests before stated, that both parties were desirous of having it done in the method least expensive to the contractor; that upon consultation, it was deemed advisable and desirable to finish the headings of the tunnel first, and accordingly, as early as November, eighteen hundred and fifty-six, by the consent of the complainants and their engineers, that method was agreed upon by both parties; that the contract was a very heavy one, and the complainants deemed it for their interests to request the defendant to prosecute the work in that manner; and about the time last stated, the 10 working of the headings first was, with the full knowledge and approbation of the complainants, undertaken and continued until the complainants finally stopped the work.

That some discussion arose as to the right of this defendant to estimate more nearly representing the real value of the work done by this defendant than he had theretofore received; that this defendant then alleged, and now charges, that there is a very great difference in the difficulty, labor, value, and expense of excavating the headings of tunnels over and above the expense of excavating the footings, and such ex- 20 pense of constructing said headings, as compared with the footings, is as five to one; that it is not usually deemed important to divide the rock work of the tunnel into the two classes of headings and footings, or to fix a price for each, but that for convenience in arriving at the total cost of the excavation before undertaking the work or making the contract, an average price per yard for excavation is settled upon for the whole work; yet that both the contractor and the engineer, in making up their estimates of such average price, and of the cost of the work, are obliged to, and do calculate separately the 30 cost of the footings and headings; that any other method of proposing for a work than by an average price for the total, would be much more difficult to calculate by unprofessional persons interested in the work, and is never employed in the proposal for that reason.

That where a large work is contracted for, such as the work contracted for by this defendant and the complainants, and where such contract provides for payment as the work progresses, and therein one price per yard for the whole of an excavation, parts of which are more, and parts less expensive, 40

but which are classed in the contract under one general head, is fixed, and the work or excavation is, by the nature or subject thereof, of such a character that one part may be made or done by the contractor at a much less expense and outlay than another, and for a much less price than that fixed by the contract for the whole work or excavation, and where the contractor may in fact execute one or the other in such manner that they may not be equally progressed with at the time estimates may be made by the engineer, then and in that case a  
 10 uniform and certain usage and custom exists, and did exist when the said contract was made by and between the defendant and said complainants, and before and ever since, and with reference to which usage and custom said contract was made, which was well known to this defendant and the complainants and their officers and engineers, and has long been practised and established in such cases, and is as follows, that such price shall be considered an average price, made for and used for the convenience of calculation when the whole work shall be done ; and notwithstanding such average price, the  
 20 employer is to pay such sum, less the per centage named in the contract, as the work progresses as will, on the basis of the price fixed by the contract for the whole, compensate the employee for that part of the work he has done.

In some cases, by such usage and customs, the amount paid as the work progresses is much less than the price fixed by the contract, which is a mere average ; that the price fixed by the contract is made an average price, and made so only for the convenience of calculation in the final estimate and settlement of the amount due for the work done, but the usage and custom is uniform where the contract is to pay as the work progresses ; that such payments shall be of such a sum as, at the contract price for the whole, shall compensate the employee for the kind of work he has done.

In some cases, such sum is ascertained by reducing, in the engineer's estimate, the amount of work actually done, and estimating that less has been done in quantity than has in fact been done.

In some cases, such sum is ascertained by increasing, in the engineer's estimate, the amount of work actually done, and  
 40 estimating that more has been done in quantity than has actually been done.

In some cases, by decreasing or increasing, in the engineer's estimate, the prices named in the contract ; that such estimates are known as relative estimates, or estimates of the relative price or cost or relative value of the work ; that the employer is, by usage and the terms of the contract, guided by the said estimates of the engineer in making the payments as the work progresses.

And this defendant further answering says, that he also then alleged, and now charges, that by the clause in said contract, "It is further agreed that payment shall be made from time 10 to time as the work progresses, on the certificate of the engineer for work done, the said engineer to deduct such per centage as he may think proper from the value of the work done, which shall in no case be less than ten per cent.," this defendant was and still is entitled to an estimate and a payment of the value of that part of the work which is or may be done, that is to say, of such sums as would compensate him for that part of the work done on the basis of the price fixed for the whole, less the ten per cent. ; and that by reason of the headings costing more than the footings, that his estimate and pay- 20 ment for the headings should be greater than that allowed for the whole by the average price in the contract ; that this defendant finally made a formal application in writing to the complainants, on the twenty-sixth day of March, eighteen hundred and fifty-seven, as follows :

Bergen Tunnel, March 26th, 1857.

Homer Ramsdell, esq., president Long Dock Company.

Dear sir,—By the terms of my contract with your company, your engineer, Mr. Post, does not feel at liberty to estimate according to the relative value of the work done. I would re- 30 spectfully ask your board to direct the estimates to be made according to the relative value of all work done. My reasons for asking it are as follows, *viz* :

It is necessary to do a large amount of work in the drift or headings of the tunnel in advance of the footings, the headings costing some five times as much per yard as the footings, and was, on the first instant, some nine thousand five hundred cubic yards in advance, and has cost at least ten dollars per yard, or four dollars and seventy-five cents more than contract price,

which amounts to about forty-five thousand dollars; this with the ten per cent. retained, twenty-three thousand eight hundred dollars, together with the large expenditures for machinery and fixtures (which are completed), costing about fifty thousand dollars, makes one hundred and eighteen thousand eight hundred dollars, which makes an amount burdensome for me carry, and trust, from the facts stated, you will deem it but justice to grant my request.

Yours very respectfully,

10

JAMES H. MALLERY.

P. S. You must be aware that it is customary in contracts generally to pay relatively, at least it has been so in all contracts that I have been connected with.

J. H. M.

That the said letter is in the possession of the complainants, and this defendant prays that he and his counsel may be allowed to inspect the same, and that the said complainants may be required to produce the same for that and for the purpose of this defendant proving the same in this cause, which he  
20 prays he may have leave to do.

That the president of the Long Dock Company applied to their chief engineer to know the relative cost of the headings and footings; that without the knowledge of this defendant, the said engineer had obtained such cost, and that another engineer of said company, at the same time, also had examined the subject, and made his report thereon; that thereupon the said chief engineer addressed a letter to the president of the Long Dock Company, of which the following is a copy:

Long Dock Company, office of the chief engineer, New York,  
30 March 26th, 1857.

Homer Ramsdell, esq., president, &c.

Sir,—The comparative cost of excavating the headings, or upper drift of the tunnel, is some three or four times as great as that of the footings. Up to the first of this month, the contractor has taken out equal to 419½ feet in length of the tunnel complete, or 9019 cubic yards. His upper drift was 1110 lineal feet, or 9447 cubic yards in advance of the portion of the tunnel completed, in all 18,446 cubic yards of tunnelling, for

which he was estimated, March 1st, at \$5.25 per cubic yard, \$96,946.50.

|                                                                                                                                                                                |              |
|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|--------------|
| I estimate the cost of the heading, alone, at \$9 per cubic yard, and the footing at \$2.79 8-10 per cubic yard : thus, 8½ cub. yards of heading, per foot, of tunnel, at \$9, | \$76.50      |
| 13 tunnel, at footings (per foot of tunnel), at \$2.79 8-10,                                                                                                                   | 36.37½       |
| 21½ cub. yds. tunnel complete, per foot of tunnel, at \$5.25,                                                                                                                  | 112.87½ 10   |
| <hr/>                                                                                                                                                                          |              |
| Then 9019 cub. yds. tunnel complete, at \$5.25,                                                                                                                                | \$47,319.75  |
| 9447 cub. yds. heading in advance, at \$9,                                                                                                                                     | 85,023.00    |
| <hr/>                                                                                                                                                                          |              |
| Amount per present estimate,                                                                                                                                                   | \$132,372.75 |
| Amount March 1st,                                                                                                                                                              | 96,946.50    |
| <hr/>                                                                                                                                                                          |              |
| Difference,                                                                                                                                                                    | \$35,426.25  |
| 10 per cent. off,                                                                                                                                                              | 3,542.63     |
| <hr/>                                                                                                                                                                          |              |
| Due,                                                                                                                                                                           | \$31,883.62  |

Respectfully yours,

S. S. Post, *Chief Engineer.*

Which letter was laid before the directors of the said com- 20 plainants, and read to them, on or prior to the first day of April, eighteen hundred and fifty-seven, and which is now in their possession, and which this defendant prays they may be required to produce for the inspection of this defendant and his counsel, and that he may prove the same in this cause, which he prays he may have leave to do.

On the first day of April, eighteen hundred and fifty-seven, a meeting of the board of directors of the complainants was held, at which the following resolution was passed :

“ *Resolved*, That if the New York and Erie Railroad Com- 30 pany concur, the chief engineer be directed, in making up the monthly estimates of the amount due to James H. Mallery, under his contract for tunnelling, to fix such relative prices for the headings and footings, or the upper and lower drifts, as shall be in his opinion proportional to the cost of each to the

contractor, and shall not increase the average cost of five dollars and twenty-five cents per cubic yard."

That the estimate of the first day of April, eighteen hundred and fifty-seven, was made by the chief engineer, by and with the consent and concurrence of the complainants and of the New York and Erie Railroad Company, and in accordance with the resolution of the complainants, bearing date the first day of April, eighteen hundred and fifty-seven, that is to say : the number of yards excavated in the headings of the tunnel, 10 up to the time beyond, or in advance of the footings, were estimated at seventy-six dollars and fifty cents per lineal foot, or nine dollars per cubic yard, and such estimate was paid, less than the ten per cent., in part, or in the whole, by the New York and Erie Railroad Company, for and in behalf of the complainants, with full knowledge, on the part of the complainants, of the amount of such estimate, of the manner in which it was made, of the fact that three dollars and seventy-five cents more was estimated per yard for the headings, than was the price in the contract per yard for the whole tunnel 20 when completed, and of the fact, that such estimate was of the relative value of the work done ; that such estimate was certified by the engineer and agents of the complainants, and by the president of the complainants, with full knowledge of all the facts aforesaid, and paid in the manner aforesaid, deducting the ten per cent. ; that the directors and president of the New York and Erie Railroad Company and of the Long Dock Company were the same persons, with the exception of one director of the Long Dock Company, during the whole period from March, eighteen hundred and fifty-seven, to October, 30 eighteen hundred and fifty-seven.

That the Long Dock Company is in fact a company created, at the solicitation of the New York and Erie Railroad Company, to carry out, among other things, the work of making a tunnel through Bergen hill ; that the stockholders of the complainants are largely interested in the New York and Erie Railroad Company, and the former company is in fact controlled by the latter corporation, especially as to the building of said tunnel, and the orders of the agents of the Erie company are authorized, received, and obeyed by the complainants. 40

That the estimates for May, June, July, August, September, and October first, eighteen hundred and fifty-seven, were of the same character (that is to say, estimates of the relative value of the work done,) as the estimates of April first, eighteen hundred and fifty-seven, and made so with the full knowledge, approbation, and consent of both companies, and each estimate, including the last, was in the manner aforesaid, certified to be correct by the engineer and president of the complainants, and in each case with full knowledge on the part of both companies, that each estimate was one of the relative 10 value of the work done; that each estimate, except that of October first, was paid, or acceptances therefor given, in part or in the whole, by the New York and Erie Railroad Company for the complainants, and with their approbation and assent, always excepting the ten per cent., and with full knowledge of all the facts aforesaid.

All of which estimates, including that of October first, eighteen hundred and fifty-seven, are now in the possession of the complainants, the one of October first, eighteen hundred and fifty-seven, having been unlawfully retained by the complainants, and which after their president had certified, and finally refused to pay the amount, kept; and all of which estimates, this defendant prays the complainants may be required to produce, and that this defendant and his counsel may inspect the same, and that they may be produced and proved in this cause. 20

That in order to enable this defendant to prosecute said work, and pay his expenses, which had considerably increased from April first, eighteen hundred and fifty-seven, by the increased price of miners' wages, and by the large losses this defendant had theretofore sustained on the acceptances in which 30 he was paid by the complainants, he desired to receive the back per centage, and for that purpose, on the thirtieth day of June, eighteen hundred and fifty-seven, addressed to the complainants a letter, of which the following is a copy:

Hudson City, June 30th, 1857.

Homer Ramsdell, esq., president Long Dock Company.

Dear sir,—In prosecuting the work embraced in my contract with your company, the cost of machinery and large accumulating percentage retained, which amounts by this time to

some \$98,000, I find myself compelled to ask your company to advance me the per centage, for which I am willing to have the interest deducted until such times as it would be due under the contract; and in lieu of the amount so advanced, I would transfer to you, to hold as security for the faithful performance of the contract on my part, all my machinery, which has cost and is worth (for prosecuting the work) at least \$55,000. Add to this the bond you now hold, \$25,000, making \$80,000, I trust you will consider ample. The most difficult  
 10 and expensive part of the work, the shafts and headings, are now well advanced, the shafts all down, and the headings three quarters, leaving only eleven hundred feet to drive out of 4316 feet.

The relative value, as estimated by your engineer, nine dollars (\$9) being much less than is usually allowed for driving headings, and less than it actually costs, the usual price being \$12 for headings, when the whole price is \$4 per yard.

In a former letter, I stated the headings cost me \$10 per yard. I now think that amount will cover cost, from the fact  
 20 of it being necessary in this case to drive a larger heading than is usual. If you should make the advance I ask you, would it not be paying over the actual cost, and certainly a low relative value? I would further state, that my understanding of the contract was, that all monthly payments were to be paid in cash. At the request of your treasurer, I have been compelled to take acceptances at three months. The amount due June 1st, \$43,000, I could not get discounted at the banks, and was obliged to furnish other security to get the necessary funds to pay my workmen. I trust you can make the balance  
 30 of such payments in cash. By so doing you will relieve me of much trouble and expense, as I shall be obliged to sell the paper in the street. I have recently tried to sell those I now hold, but the present stringency in the money market prevents their sale.

Very respectfully yours,

JAMES H. MALLERY.

Which letter was received by the complainants on the day of its date. That thereupon the mortgage heretofore admitted to have been given to the complainants was executed, and the

complainants, on or about the eighth day of July, eighteen hundred and fifty-seven, paid to this defendant the sum of forty-two thousand dollars in acceptances of the complainants.

That this defendant continued to prosecute the said work with vigor, but finding that he suffered great losses on the acceptances in which his estimates were paid, he addressed the following letter to the complainants, on the seventh day of September, eighteen hundred and fifty-seven :

Bergen Tunnel, Sept. 7th, 1857.

Homer Ramsdell, esq., president Long Dock Company. 10

Dear sir,—I commenced work upon the Bergen tunnel about fourteen months ago, and have progressed with it with reasonable success, having performed up to this time about three quarters of the work embraced in my contract, and so far as I can judge, to the entire satisfaction of your company up to this time. With the exception of some of the earlier estimates, I have taken in settlement, by your request, the paper of your company, not, however, without reminding your treasurer that, by the terms of the contract, I was entitled to cash. But for the last two months I have experienced 20 a great deal of difficulty in making negotiations, and at the last settlement I was compelled to notify your treasurer that hereafter I should be under the necessity of requiring cash in payment.

I regret, however, that on presenting my estimate, I have not been able to obtain prompt payment, and that serious inconvenience, and I fear loss, will inevitably follow. My own means, as well as a large amount that I have borrowed from my friends, are now involved in the work, and I find myself unable any longer to progress with it, unless the monthly estimates are paid in cash. 30

I shall deeply regret to surrender the work, and now appeal to you for that aid which shall enable me to finish it, which I have every reason to believe I shall be able to do within the time mentioned in my contract and at a living profit to myself.

But should you regard the impediments in the way of making cash payments so formidable as to call for a suspension of the work, I shall not throw unreasonable embarrassments in the way of such judicious action as in the deliberate judgment of

your board may be indicated. In any event, however, I shall look to your company to be saved harmless in case you require me to suspend the work, which virtually you do when you are unable to pay me in cash. I shall ask that the whole work be measured up, and paid for ratably in proportion to its cost, compared with the prices named in my contract, and that the machinery, fixtures, and tools be paid for at their fair value, keeping in view their use in finishing the work. A committee of your own board, together with your chief engineer, would probably find no difficulty in settling with me upon those terms, and I respectfully and most urgently ask of you very early, if not immediate action.

Respectfully your ob't servant,

JAMES H. MALLERY.

That said letter was received by said company on the same day it was written.

That this defendant still continued to prosecute the said work after writing this letter, but less vigorously, by request of the complainants; but still suffering from the want of the  
20 means, with which the complainants were bound to furnish him, he again, on the fourteenth day of September, eighteen hundred and fifty-seven, addressed them a letter, of which the following is a copy:

Bergen Tunnel, Sept. 14th, 1857.

Homer Ramsdell, esq., presd't Long Dock Co.

Dr. sir,—In my letter to you, of the 7th inst., I stated the serious inconvenience I had suffered by reason of taking paper in lieu of cash for my monthly estimates. After making every effort myself, and through my friends, I have been unable to  
30 obtain from any source the money upon the acceptances given me on the first of the month, and to-morrow, Tuesday, the 15th inst., my regular pay day, I shall be without the means to pay my men. I have made it a point, and it is a strong one, in governing men as ignorant and of the reckless character as those at work on the tunnel, to pay them on a given day, at whatever inconvenience to myself. And in default of punctual payment, I can scarcely predict the consequences; I fear, however, most serious results to my interests at this time. I cannot anticipate that I can maintain that subordination among my

men that will enable me to progress with the work. Allow me, therefore, to refer you to my letter of the 7th inst., in which I pretty fully stated this whole question, and to urge that immediate action be taken for my relief. If your company cannot pay me in cash, may I not claim to-day an interview with a committee of your board, that shall result in the cancelment of my contract, by which means I may protect myself against, perhaps, ruinous consequences. I am a nonresident in New Jersey, and my property will be attached and sacrificed unless it shall pass out of my hands. Again, may I request your 10 immediate action to-day.

Respectfully yours,

JAMES H. MALLERY.

That said letter was received by the complainants on the day it was written, which said three letters are in the possession of the complainants, and which this defendant prays he and his counsel may inspect, and that the complainants may be required to produce the same for that purpose, and that this defendant may prove the same in this cause.

That thereupon, and on the fifteenth day of September, 20 eighteen hundred and fifty-seven, Mr. Charles Moran, acting as and being the agent of the complainants, and having for a long time acted as such, and being, by the relation created by the agreement between the two companies in the said bill of complaint, first referred to and by the resolution of the Long Dock Company, of the first day of April, eighteen hundred and fifty-seven, and other the dealings, resolutions, permissions, and consents of the complainants from time to time, from the twenty-eighth day of May, eighteen hundred and fifty-six, to the present time, authorized to act in such manner, requested 30 this defendant to raise ten thousand dollars, promising himself, in behalf of the Long Dock Company, to raise ten thousand dollars more, and therewith the said Moran, agent of the complainants, thereunto duly, lawfully, and fully authorized, directed this defendant to pay the workmen engaged on the tunnel, and then to discharge them, and stop the whole work under his contract, which agreement between the complainants and the New York and Erie Railroad Company this defendant prays the complainants may be required to produce for the inspection of this defendant and his counsel, and that 40

the same may be proved in this case. That thereupon, and in consequence of such directions, this defendant, at a cost to him of about one thousand dollars, took the whole implements wherewith said tunnel was being worked thereout, and locked them up in the store house ; and the engine houses, shops, and all the buildings connected with said work were closed and secured.

On this day, part of the property of defendant was attached, and on the same day this defendant, by the hands of J. D. 10 White, received from the said Moran ten thousand dollars, for the purpose of paying the men ; that this defendant, on acceptances, raised the other ten thousand dollars from Charles G. Sisson, herein after mentioned, for the purpose of paying the money to the men, by paying to the said Charles G. Sisson therefor a bonus, six hundred and fifty dollars, of which bonus so paid both companies were aware.

And this defendant further answering says, that on the sixteenth day of September, eighteen hundred and fifty-seven, he received a letter from the said Charles Moran, of which the 20 following is a copy :

Office of the N. Y. and E. R. R. Company, New York, 16th  
Sept., 1857.

J. H. Mallery, esq., Bergen.

Dear sir,—After due reflection, I have come to the conclusion that you had better go on with your work until the 1st Oct., if you obtain the \$10,000 you expect. If on that day we do not see our way to pay you money for the future, we will at once give you money to pay off and discharge your men, and then stop the work. To do so at present would be 30 too great a loss to the company, as well as to yourself; say to the men, that you have secured the money for the payment of next month's wages, and let them go to work again.

Yours truly,

CHAS. MORAN.

And on the same day, also, a letter signed by Homer Ramsdell, the president of the Long Dock Company, of which the following is a copy :

Office of the N. Y. and E. R. R. Company, New York, Sept.  
16, 1857.

J. H. Mallery, esq.

Mr. Moran makes positive promise that the money shall be paid in cash for the wages of the men, on the 1st of Oct. next, let what may happen, say to the amount of \$20,000, if the work does not go on, should it go on; he will pay it on the 14th proximo.

HOMER RAMSDELL.

That thereupon this defendant, being willing to obey the 10 instructions of the complainants, although he might then have rested upon the previous orders to stop the work at a great additional expense, resumed the said work, and prosecuted the same until Saturday, the third day of October, eighteen hundred and fifty-seven; that on or about the 1st day of October, eighteen hundred and fifty-seven, and at the time when the October estimate was presented to the treasurer of the complainants for payment, the said treasurer requested this defendant to go to Charles Moran, who was to pay the same; that on the said third day of October, until which time this defendant 20 had continued said work, the said Charles Moran, acting and being still the agent of the complainants, and for that purpose duly authorized, again ordered the defendant to stop the whole work, discharge the men, and pay them off.

That the said Charles Moran, for the last mentioned object, promised this defendant to pay him on Tuesday, the sixth day of October, eighteen hundred and fifty-seven, ten thousand dollars, on Thursday, the eighth day of October, eighteen hundred and fifty-seven, five thousand dollars, and on Saturday, the tenth, or Monday the twelfth day of October, eighteen hun- 30 dred and fifty-seven, five thousand dollars; that the said Moran did not pay the said ten thousand dollars to this defendant on Tuesday, the sixth day of October, eighteen hundred and fifty-seven, or at any time afterwards, refusing, on the day aforesaid, on various frivolous pretences, as that it was after bank hours on the day when this defendant called for it, but that if this defendant's agent would call the next day, he would pay the same; and on the next day told the agent of the defendant, that he could not pay it till he saw this defendant; and finally refused to pay the said money, on the pretence

that the said Charles G. Sisson and one A. B. Seymour had informed him that this defendant had been largely over estimated by the engineers in their monthly estimates of the work done.

And this defendant further answering says, that such estimate which the complainants complained of was of the relative value of the headings, and was at nine dollars per yard, and less than it ought to have been; that nine dollars a yard was based upon a heading of eight and a half yards, which was low for that quantity of heading, which cost about ten  
10 dollars, as stated in this defendant's letter of the thirtieth day of June, eighteen hundred and fifty-seven, and was much lower for a heading of only six and a half yards; that eleven dollars and seventy-five cents would have been a low relative estimate for a heading of six and a half yards, and twelve dollars and fifty cents for such heading, as is last stated, would have been the ordinary relative value thereof, and the reason that a heading of six and a half yards, is worth more than one of eight and a half, is the same; that the whole tunnel of twenty-one and a half yards is worth five dollars and twenty-  
20 five cents per yard, and the heading of eight and a half yards worth at least nine dollars per yard, to wit, the larger the tunnel, the less it will cost per cubic yard to excavate it.

And this defendant further answering says, that besides the fact of the nine dollars being charged in such estimates for the headings of eight and a half yards, and the not finishing the tunnel on the day stipulated in the contract, the only ground of complaint ever alleged by the complainants against said estimates, and the only ground on which they have ever or do now pretend that the said mortgage is due, or the estate  
30 become absolute in them, was and is, that the said estimates for a portion of the summer and fall of the year eighteen hundred and fifty-seven, were based upon and asserted that the contents of such drift was eight and a half yards, and that by the calculation of eight and a half yards the relative value was increased, and that in truth the drift was only six and a half yards, and that if six and a half yards had been estimated, the relative value would have been less, if calculated at nine dollars per yard, than as estimated by the engineers aforesaid; but this defendant expressly charges, that  
40 the size of said drift, being only six and a half yards, was

during the whole period that such estimates were made, as of a drift of eight and a half yards, well known to the agents and engineers who made the measurements, and was considered by the said engineers in making up the estimate, and that the estimate was returned of an excessive number of yards, according to one of the ordinary methods, as herein before stated, of arriving at the relative value; that such estimates of excessive quantity would, on the principle of relative estimates, have been corrected by largely diminished estimates of quantity, when the less expensive work should 10 come to be estimated; but such estimates of an excessive quantity did not in fact add more to the real value of the relative estimates in question than the said complainants had assented and agreed such relative estimates should amount to; that the said estimates were in full compliance with the said resolution of April first, eighteen hundred and fifty-seven, and were and still are, in the opinion of the complainants' engineer, as they were by said resolution required to be, proportional to the cost to the contractor, and did not increase the average cost of five dollars and twenty-five cents per cubic 20 yard; that to give to the contractor the relative estimate agreed upon between the parties to the contract on the first day of April, eighteen hundred and fifty-seven, it was necessary for the engineer either to increase in his estimate the number of yards beyond the number actually taken out, or to increase the price per yard from nine dollars (which had been calculated by the chief engineer as a fair allowance for the relative value of the headings in a drift of eight and a half yards) to eleven dollars and seventy-five cents, or more, and the former was chosen by the engineer as the method. 30

That the said chief engineer of the complainants, in compliance with the resolution of the first day of April, eighteen hundred and fifty-seven, fixed the relative value of such drift of six and a half yards at eleven dollars and seventy-five cents, and that to make the estimate in money amount to the rate of eleven dollars and seventy-five cents for the drift of the size last mentioned, the excessive quantity was added, and no more in quantity was added than was necessary for that purpose; that the said drift was altered from eight and a half yards to six and a half yards in good faith, with no desire to 40

mislead the engineers or the complainants, and with full knowledge on the part of the complainants' agents and engineers who measured the work, and for the reason that the whole work could be more promptly accomplished by such drift of six and a half yards; that the two extra yards not excavated were left unexcavated in the lower or footing part thereof, and for the purpose of making a grade, so that the material taken out could be more easily taken from the blasts to the shafts and for the purpose of drainage. And this defendant

10 expressly charges, that the estimates which charged as for a heading of eight and a half, instead of six and a half yards, were not by that excessive charge of quantity made to amount to more than what this defendant was fairly entitled to have estimated, both under the terms of the contract and under the custom, and under the resolution of the complainants, passed on the first day of April, eighteen hundred and fifty-seven; and that on a relative estimate, by either estimating the work as it was estimated, and in the manner all the estimates since April, eighteen hundred and fifty-seven, were made and paid,

20 with full knowledge on the part of the complainants that the estimates were of a relative value, or by estimating the work without giving an excessive number of yards, but making the same a relative estimate at the price fixed for  $6\frac{1}{2}$  yards by the chief engineer, the complainants are largely indebted to this defendant, and were at the time of the refusal to pay this defendant, as herein before mentioned.

And this defendant further answering says, that the said alteration of said excavation from eight and a half to six and a half yards, was not done with any purpose or design of doing

30 less work, and at the same time of receiving an estimate as for eight and a half yards, but in good faith for the purpose of facilitating the progress of the work and with the full knowledge of the engineers of the complainants, and not, as has been pretended by the complainants, for the purpose of doing less work, and receiving pay for a larger amount, for this defendant charges that the work of carrying a drift of six and a half yards is greater and more expensive in proportion than the larger drift; and this defendant expressly charges, that such pretence was a subterfuge, set up merely as an excuse

40 by the complainants for not paying this defendant in cash for such estimates.

And this defendant expressly charges, that upon the statement to him, as the ground of refusal to pay the first October estimate, that he had been over estimated, he was so confident of the fact, and now expressly charges the same to be true; that whatever excessive quantities may have been stated in the estimates, the same were merely the statement of a relative quantity, for the purpose of arriving at the relative value as agreed upon, and acted upon by all parties intelligently for five or six months; he immediately offered, and has repeatedly from time to time made the same offer to the complainants, 10 as follows: that the company and himself should each appoint one arbiter, submit the whole matter to them, and if they could not agree, that the arbiters should appoint a third, whose decision shall be final; each party to give ample security to perform their award; which proposition was then and since has been repeatedly declined by the complainants; that this defendant also offered to give security to pay back any excess of money that it might appear he had received; and as said Moran claimed that this defendant had received sixty thousand dollars more than was due to him, this defendant offered 20 to give ample security to that amount, if it was so found by said arbitrators.

On the same day, to wit, October seventh, eighteen hundred and fifty-seven, that such final refusal to pay the October estimate was made, this defendant received a letter from the said Charles Moran, of which the following is a copy:

Office of the N. Y. & E. R. R. Company, New York, 7th October, 1857.

J. H. Mallery, Bergen.

Dear sir,—Having made arrangements with Mr. Sisson to 30 obtain the necessary funds to meet your estimate due 1st November, I beg you will resume the work.

Very truly yours,

CHAS. MORAN, *President.*

And this defendant further answering says, that the work having been twice stopped within the course of eighteen days, and having twice discharged his force of twelve hundred men, and removed from the tunnel, at an expense of two thousand

dollars at least, all the implements and tools necessary to progress with the work, and suffered great losses by the conduct of the complainants, and having complied with his contract, this defendant is advised by counsel, and humbly insists, that he was not bound to proceed with said work.

And in further answering says, that the said letter last set forth was not written by the said Moran in good faith, or with any view to a resumption of the work, but for the purpose of embarrassing this defendant in any measures he might take to  
 10 obtain from the complainants what was justly and honestly due to him, and also for the purpose of basing thereon a fraudulent pretension, that this defendant had violated the contract, and had consequently forfeited large sums of money due to this defendant, and the sum of twenty-five thousand dollars, which in case of a declaration of a forfeiture of his contract he had secured to be paid to the complainants; but this defendant is advised by counsel, and humbly insists, that all the pretended forfeitures in said contract contained are only agree-  
 20 ments to indemnify the complainants for damages, and in case this defendant had violated the contract (and he avers he has not) could never have prevented his recovering, even at law, what was equitably due him, after deducting the real damages sustained by the complainants, nor could said twenty-five thousand dollars ever have been recovered against this defendant in such case, or the said ten per cent. retained, nor can the said forty-two thousand dollars, in the said mortgage mentioned, ever be recovered against this defendant or be made out of the mortgaged property, unless the complainants show their damages to have amounted to so much, and that the said  
 30 mortgage cannot be forfeited by the nonperformance of said work within the time stipulated by the contract for its performance, because a particular sum of one hundred dollars per day is reserved by the contract to meet that case.

That this defendant, on the said seventh day of October, eighteen hundred and fifty-seven, wrote to the complainants' said agent as follows :

New York, Oct. 7th, 1857.

Chas. Moran, esq., president, &c.

Dear sir,—In your note of this morning, informing me of

your arrangements for funds to meet the estimates, on the first of November next, for work done on the Bergen tunnel, you say nothing about paying the last estimate, which I handed to you yesterday, and the amount of which I have frequently asked for. Notwithstanding the work is stopped by the direction of the company, through you, yet I am prepared to go on and prosecute the work, if the September estimate is now paid.

Let me also suggest, that a prompt payment of the amount is absolutely necessary, if you conclude to make it, for the reason that my employees are waiting for their money, and 10 may, even to-morrow, take legal measures for its collection very much to my detriment.

I am truly yours,

JAMES H. MALLERY.

Which letter was received by the complainants' said agent on the same day, and which is in the possession of the complainants, and which this defendant prays he and his counsel may have leave to inspect, and that the complainants may be required to produce the same, that it may be proved in this cause. 20

That prior to the writing of said two letters last mentioned, or about that time, the said Moran reported to the New York and Erie Railroad Company, on page fifteen of his report for the fiscal year ending September thirtieth, eighteen hundred and fifty-seven, the fact that he had, as agent for the plaintiff, stopped the work, as follows: "I therefore greatly regret that the company has been forced to suspend the improvements on the Long Dock."

And this defendant further answering says, that the said report refers to the work contracted to be done by this defend- 30 ant as suspended by the New York and Erie Railroad Company or the Long Dock Company, whose interests are esteemed identical, and not by the contractor; that the words, "improvements on the Long Dock," were artfully inserted, so as to give the true impression to the public that the tunnel had been stopped, as the tunnel was known to be carried on in connection with the improvements at the Long Dock and by the Long Dock Company, but at the same time to evade an admission of that fact, which might be used by the contractor

as evidence in his favor ; that said improvements on the Long Dock were not suspended at the date of said report.

That a day or two, or a few days subsequent to the seventh day of October, eighteen hundred and fifty-seven, this defendant, being extremely desirous of progressing with the work, and avoiding all collision, controversy, or suit with the complainants, offered to go on with the work, if five thousand dollars were furnished him in cash, in part payment of what was due on the last estimates, and if security were given for  
10 the payment of the rest and of subsequent estimates ; but the said agent of the complainants declared he had not five thousand dollars, and did not know where to get it.

That about one or two, or a few days after the seventeenth day of October, eighteen hundred and fifty-seven, this defendant received a communication from the secretary of the complainants, of which the following is a copy :

Office of the Long Dock Company, Oct. 17, 1857.

Mr. James H. Mallery.

Dr. sir,—At a meeting of this company, held this day, the  
20 following resolutions were passed, a copy whereof was requested to be handed to you, that your action thereon might be ascertained.

“Whereas there is a difference between the board and the contractor of the Bergen tunnel, and it is believed that this company has overpaid him for work done, therefore it is

*Resolved*, That this board, with the consent of the New York and Erie Railroad Company, appoint a competent engineer, who together with one chosen by the contractor, shall accurately measure up the work done by the said contractor,  
30 and in case of disagreement, they shall choose a third engineer, whose decision shall be final.

*Resolved*, That after the action of the engineers above mentioned shall have furnished this board with correct data, the work shall be continued by the contractor, and such deductions be made from the monthly estimates as shall reimburse to this company, as the work progresses, the amount found to have been overpaid him.

J. L. ZABRISKIE, *Secretary.*”

That this defendant considered the said proposition in the resolutions last stated with attention, and was exceedingly desirous of coming to an accommodation with the complainants, and at first supposed the propositions therein contained were equivalent to those made by this defendant, to submit the real question in dispute to the arbitrament of indifferent and disinterested persons; but upon examination of the said propositions, this defendant found that the same were disingenuous and unfair, and intended to entrap this defendant into an arbitration only on the question of the number of yards excavated 10 by this defendant, about which there was no disagreement between the complainants and this defendant, the real question being, whether notwithstanding the number of yards excavated had been increased in the estimates beyond the actual number excavated, this defendant was in fact over estimated in amount of money due to him on the principles of the usage before stated, the contract between him and them, and the resolution of April first, eighteen hundred and fifty-seven, for the actual quantity and value of work done.

That the second resolution, if such proposition had been accepted by this defendant, was intended to import a waiver, by this defendant, of his whole title to an estimate of the relative value of work done theretofore, and to be done thereafter, and also either to induce this defendant to reject a seemingly fair proposition, (which the complainants could not for want of means carry out by reason of their utter insolvency) and refuse to go on with the work, and thereby prejudice or forfeit his claims under the contract, or to accept the same, with all the consequences of a waiver of his rights, and, as a final result of such acceptance and waiver, to produce an inability to 30 go on, and an abandonment of the work by this defendant, and a forfeiture of his right to compensation.

That such propositions were illusory and fraudulent, and designed to injure and oppress or utterly ruin this defendant, for the purpose of saving the company from paying what it was legally and equitably bound to pay.

That this defendant did not accept such propositions, for the reasons stated.

That subsequently, on or about the seventh day of November, eighteen hundred and fifty-seven, this defendant received a 40

letter from the president of said complainants, Homer Ramsdell, dictated by the said Charles Moran, suggesting an appointment of engineers to examine and measure the work, but this defendant, in writing, declined the same, to which said letter this defendant prays leave to refer, and that the letters, being in the possession of the complainants, may be produced for the inspection of this defendant and his counsel, and that he may be allowed to prove the same; that said proposition was made, as this defendant charges, in the spirit of the former  
 10 one, and did not meet the difficulty; that there was no prospect of this defendant being paid, if he continued the said work; that the only reliance of the complainants for money was upon the acceptances of the New York and Erie Railroad Company, which were unsaleable, except at enormous and ruinous discounts; that said complainants were in fact insolvent; that on one occasion, during the summer of the year eighteen hundred and fifty-seven, this defendant, at the request of the treasurer of the complainants, raised a large amount of  
 20 money on the acceptances given him on account of work done on his own credit, and with the understanding that the discount should be paid by the complainants, and it was paid by them, at the rate of one and a half to two per cent. per month.

And this defendant further answering says, that shortly after writing the said letters last stated, the said Charles Moran was elected the president of the complainants, and has so continued from that time to the present.

And this defendant further answering says, that the chief engineer has never by verbal or written declaration, as provided for in the contract, declared the said contract forfeited,  
 30 nor could he do so with justice, although the complainants have pressed him to do so.

That even after the repeated requirements of the complainants upon this defendant, that he should discontinue the performance of his said contract, he would have gone on and performed it, if he had any hope, or the complainants had given him any reasonable hope, assurance, or security that payment would be made according to the contract, and the before mentioned usage and resolution of the first day of  
 40 April, eighteen hundred and fifty-seven; and that this defendant repeatedly informed the said complainants thereof, both

verbally and in writing ; and that after the final stoppage of the work on account of their repeated commands, while in their written communications they sometimes seemed to require this defendant to proceed, they admitted their utter inability to perform their part of the contract, in case this defendant should attempt to go on, at the greatest hazard, if not certain and utter ruin to himself.

And this defendant further answering says, that at the time of the final stoppage of said work by the complainants' orders, on the third day of October, eighteen hundred and fifty- 10 seven, the headings of said tunnel were entirely excavated at an area varying from nine to eight and a half, and six and a half yards, and at the meetings of the drifts down to five yards, except the balance of ninety-three feet ; that then he had eight gangs of workmen at four different points, and the heading between points four and five would have been holed in three days, between five and six, and six and seven, in ten days, and the remaining, between one and two, would have been holed in twenty days, at which time there would have been a perforation of at least six and a half yards through and 20 through the whole tunnel, *i. e.* four thousand three hundred and sixteen feet.

That the footings were being worked at eighteen different places, of which ten were free from obstructions, and the remaining eight would have been free in less than a month ; that one month's work would have finished the footings between east approach and shaft A, which would have dispensed with one steam engine and about seventy workmen.

In two months the footings between number seven and the west approach would have been finished, and another engine 30 and about seventy more men dispensed with ; that wages were constantly falling, and were then much reduced below what they had been during the summer, and the more skilful were taking employment at the footings at the low wages ; that on the first of December, wages would, and in fact were reduced to about sixty or seventy cents per day ; that the season of the year was exceedingly favorable to the rapid progress of the work, as the smoke in the fall and winter is a very little obstruction, and so little that air machines are not necessary, but in summer an obstruction so formidable that 40

the men at work on the footings can then make only a little more than half time; that every equipment about the said work necessary to the rapid and successful construction of the tunnel was in the most complete condition, and it could have been finished within the time stipulated by the contract, had it not been for the retarding of the same at the request of the complainants, as herein alleged, and notwithstanding that the same would have been finished within from three to five months after it was stopped, unless the complainants had, as  
 10 before stated, stopped the same; that but ninety-three feet, or about two thousand cubic yards of the tunnel remained untouched, which at the rate of wages then existing could have been excavated at three dollars and seventy-five cents per cubic yard, leaving a profit of one dollar and fifty cents per cubic yard—three thousand dollars.

That about twenty-nine hundred lineal feet of footing (exclusive of that first mentioned as contained in the untouched part of the tunnel) remained, equal to forty-three thousand five hundred and seventy-five cubic yards, which could be  
 20 excavated for one dollar and seventy-five cents per cubic yard, for which, by the estimate of the engineers, was left, after allowing for the excessive quantity of yards of heading estimated, two dollars forty-two and a half cents per cubic yard, leaving to the contractor a profit of twenty-nine thousand four hundred and thirteen dollars and twelve cents.

That the extra cutting of the false and shaky ground in the roof and sides would be about 6-105 in quantity of the work remaining to be excavated, that is to say, two thousand four hundred and ninety cubic yards, which, at five dollars and  
 30 twenty-five cents, would amount to thirteen thousand and seventy-two dollars and fifty cents, which could have been done for three thousand dollars, leaving a profit to the contractor of ten thousand and seventy-two dollars and fifty cents.

That at the western approach there was on the single track about twenty thousand yards of earth, fifteen feet below the surface, unexcavated, for which, and for hauling the same, this defendant was to receive forty-two and a quarter cents per cubic yard, in all eight thousand four hundred and fifty  
 40 dollars, which could have been done for four thousand six

hundred and fifty dollars, leaving a profit of three thousand eight hundred dollars.

That there was left about twenty-five hundred yards of open cut-rock excavation to be done at the western approach, by the single and double track, for which, by the contract, the defendant was to receive one dollar and seventy-five cents per yard, and which could have been taken out for one dollar, leaving a net profit of one thousand eight hundred and seventy-five dollars.

That there was left in the western approach, on the double 10<sup>7</sup> track, about sixty-seven thousand five hundred cubic yards of earth, for excavating and loading which this defendant was entitled to twenty-five cents per cubic yard, and the same could have been done for seven cents per cubic yard, leaving a net profit to the contractor of twelve thousand one hundred and fifty dollars.

That between the east approach and the Hudson river was left about forty thousand cubic yards of earth or sand excavation, for which this defendant was entitled to receive twenty-five cents per cubic yard, and which could have been done 20 for one half that sum, leaving a net profit of five thousand dollars thereon, which profits altogether amount to sixty-five thousand three hundred and ten dollars and sixty-two cents.

That this defendant has, by the conduct of the complainants in preventing him from fulfilling his contract, lost the said sum of sixty-five thousand three hundred and ten dollars and sixty-two cents.

That, besides this, the complainants owe to this defendant, for work already done, at least the full amount of the estimate of October first, eighteen hundred and fifty-seven, to wit, the sum 30 of twenty-six thousand four hundred and eighty dollars, as near as can be ascertained without actual measurement; and this defendant believes that the value of the work done up to the first of October, eighteen hundred and fifty-seven, after deducting what he has been paid, would leave due to him more than the amount of said estimate last mentioned.

That since October first, eighteen hundred and fifty-seven, this defendant excavated three thousand one hundred and five yards of earth at the western approach, which is not included in the estimate of October first, eighteen hundred and fifty- 40

seven, for which, at the contract price, this defendant is entitled to one thousand three hundred and eleven dollars and eighty-six cents.

That for work done and materials furnished the complainants, in making cars for them, on and since the first day of September, eighteen hundred and fifty-seven, and not included in any estimate, the complainants are indebted to this defendant in the sum of six hundred and sixty-nine dollars and sixty cents, which is, by a paper in the possession of the complainants, certified by their engineer and president to be due to this defendant, and which this defendant prays they may be required to produce.

That the complainants also are indebted to this defendant in the sum of ten thousand seven hundred and thirty-six dollars and seventy-nine cents, for the percentage on the value of the work done up to October first, eighteen hundred and fifty-seven, which they now wrongfully retain, making in all due to this defendant from the complainants (without regard to the profits lost by this defendant by the conduct of the complainants), after deducting the sum of sixteen thousand eight hundred and twenty dollars, which the complainants paid (as this defendant is informed, but does not know, and leave them to prove) to the workmen in the employ of this defendant the liquidated sum of twenty-two thousand three hundred and thirty-eight dollars and twenty-five cents, with interest, which sum, not only, as this defendant is advised by counsel, and humbly insists, the complainants are bound to pay to him, with interest, but also the said sum of sixty-five thousand three hundred and ten dollars and sixty-two cents, the amount of this defendant's losses as aforesaid, and bound to surrender the said mortgage and the said note for twenty-five thousand dollars to this defendant to be cancelled.

And this defendant expressly charges, that by the stoppage of the said work, he was obliged to, and did expend two thousand dollars, in twice taking the said tools and implements out of said tunnel, and in other expenses in protecting his property from injury, and by the conduct of said complainants has been sued by his creditors, and his property attached and exposed to sale at a great sacrifice; and that he has lost the use and value of the tools and implements, machinery, en-

gines, and other things situate in and about said tunnel, by the said complainants refusing to allow this defendant to use the same, either on the said work or to sell the same, and with the proceeds thereof to pay his creditors, falsely pretending that the said mortgage was a subsisting security.

And this defendant further answering says, that the complainants well know that this defendant has not been overpaid for the work done under the said contract, and that this defendant has not, by reason of not having finished the said tunnel by the time in the contract stipulated, been guilty of 10 any violation of his contract, for the complainants themselves failed to perform their part of the contract, by not paying to this defendant the moneys he had earned, and requested this defendant, from about the month of August, eighteen hundred and fifty-seven, and afterwards at different times, to retard the said work, in order to relieve them from raising money to meet his estimates, and expressly and repeatedly, during the months of September and October, eighteen hundred and fifty-seven, forbid this defendant to progress with the performance of his contract, which were the causes of the noncompletion of the 20 said tunnel within the time in the contract stipulated; and this defendant charges, that the said bill has been filed by the complainants for the purpose of harassing this defendant, and the injunction procured for the purpose in part, as this defendant charges and believes, to obtain time to raise money to purchase at less than half its value the property which is attached; that by delaying the sale of the property under the attachment, they hope to deprive this defendant of the benefit that will result to him by discharging so much of the debts he owes his employees, who are the attaching creditors and meritorious 30 claimants, as the proceeds of said property will pay; and they also hope, inasmuch as by their bill it appears that the said property is worth, for any other purpose than that for which they wish to use it, or to any other person, only half of its real value, to be able to purchase said property, under a sale to be made by a receiver, for less than half the value thereof, a result which would do great injustice to this defendant, and would be a benefit to the complainants, realized by their wrongful and oppressive conduct to this defendant in setting up said satisfied mortgage as a lien upon the said property, 40

and claiming this defendant to be their debtor, whereas in truth and in fact, this defendant not only does not owe them, but they are largely indebted to this defendant; that as this defendant, whether the said auditors or a receiver are or is to act in the premises, is to have his property exposed to sale by auction, at which he cannot hope it will bring more than one half the value, he is desirous that he may derive the benefit from it of paying therewith his creditors, whose debts bear interest, and whose legal expenses are increasing and a charge  
 10 on said property, rather than place it in the power of the complainants, besides refusing to pay the just demands they owe him, to withhold from him until a long litigation may be ended, all the further property and assets of this defendant, which they can make any pretence of a right to hold by virtue of some forfeiture, claim, or lien.

That the present proceeding is taken by the complainants for the purpose of pressing this defendant into a submission to their terms, by which he would suffer great pecuniary losses, in addition to those already caused by the wrongful conduct  
 20 of the complainants, or of forcing him longer to suffer the non-payment of his just claims, and bear the odium which their pretences of his being over estimated in the quantity of work done under his contract is calculated to throw upon him.

And this defendant denies all and all manner of unlawful combination and confederacy wherewith he is charged by the said bill, without this, that there is any other matter or cause or thing in the said bill of complaint contained material or necessary for this defendant to make answer unto, and not herein and hereby well and sufficiently answered, confessed,  
 30 traversed, and avoided or denied, is true, to the knowledge or belief of this defendant. All which matters and things this defendant is ready and willing to aver, maintain, and prove, as this honorable court shall direct, and humbly prays hence to be dismissed with his reasonable costs and charges in this behalf most wrongfully sustained.

ROBT. GILCHRIST, JUN.,

*Solicitor for and of counsel with James H. Mallery,  
 one of the defendants.*

Hudson county, ss.—James H. Mallery, being duly sworn  
 40 according to law, on his oath deposes and saith, that the facts,

matters, and things in the foregoing answer set forth, so far as they relate to the acts and deeds of this defendant, are true of his own knowledge, and so far as they relate to the acts and deeds of others, he believes the same to be true.

JAMES H. MALLERY.

Sworn and subscribed before me, at Jersey City, in the state of New Jersey, this 14th day of July, A. D. 1858.

JOS. ANNIN, M. C.

A true copy.

W. M. BABBITT, *Clerk.*

Filed July 17, 1858.

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*The answer of Cornelius D. Clark, one of the defendants, to the bill of complaint of the Long Dock Company, complainants.*

This defendant, now and at all times hereafter saving and reserving to himself all manner of benefit and advantage of exception to the many errors and insufficiencies in the complainants' said bill of complaint contained, for answer thereto, or unto so much and such parts thereof as this defendant is advised is material to make answer unto, answers and says: 20

That he admits that the said complainants and the said James H. Mallery did make and execute the contract mentioned in the said bill of complaint for the construction of the said tunnel through Bergen hill, and the shafts and approaches connected thereunto, and that, in order to perform the said contract, this defendant is informed and believes that the said James H. Mallery did erect and construct, or cause to be erected and constructed, certain temporary buildings, on the line of and near to the said proposed tunnel, shafts, and approaches, for the purpose of protecting and securing the engines, machinery, and tools requisite and necessary for the prosecution of the said work under the said contract; but this defendant denies that the said buildings and structures, so 30

erected and mentioned in the said bill of complaint, were permanent structures, and annexed to the freehold, as charged in the said bill of complaint, but on the contrary avers that the same were merely erected to answer a temporary purpose, and to enable the said James H. Mallery to do and perform the work mentioned in the said contract.

And this defendant further answering denies all knowledge, except from the said bill of complaint, of the conditions contained in said mortgage upon the houses, shops, buildings, engines, machinery, tools, implements, and other property mentioned therein, alleged to have been made by the said James H. Mallery to the said complainants to secure the payment of forty-two thousand dollars, or any other sum, or to secure the completion of the work under the said contract; but this defendant for further answer saith, that he is informed and believes, that if any such mortgage was made, that the conditions therein contained (upon the failure of which the same was to become absolute) to be kept and performed by the said James H. Mallery have been by him fully performed, according to the tenor and effect of the said supposed mortgage.

And this defendant further answering says, that he is informed that the said supposed mortgage, at the time the said writ of attachment in favor of this defendant against the estate of the said James H. Mallery was issued out of the Circuit Court of the county of Hudson, as in the said bill of complaint set forth, was not a valid and existing lien on the property described therein, and which, with the other property, was attached and taken by the sheriff of the said county of Hudson, to whom the said writ was directed; and this defendant, upon his information and belief, avers that the said supposed mortgage, if the same ever was a valid and existing lien on the property described in the same, was, prior to the issuing of the said attachment, fully paid, satisfied, and discharged by the said James H. Mallery to the said Long Dock Company, to whom the said mortgage was given, and that the said mortgage should be given up to be cancelled.

And this defendant further answering, upon his information and belief, denies that the said mortgage has become forfeited, and that the estate to the property thereby mortgaged is absolutely vested in the said complainants, as alleged in the said

bill of complaint ; and this defendant is informed and believes that the conditions in the said mortgage contained have been fully, in all respects, complied with on the part of the said James H. Mallery, and that so far as the claims of this defendant, founded upon the said attachment is concerned, the said mortgage is void and of no effect ; that the said mortgage is in fact nothing more than a chattel mortgage, operating as a bill of sale merely, and is not valid as a subsisting outstanding encumbrance upon the property described therein, as against the demand of this defendant, upon which the said attachment is 10 founded ; and that this defendant had no notice from the said Long Dock Company of the existence of the said mortgage, or that the said complainants claimed to have any interest whatever in the property attached by virtue of the said writ of attachment.

And this defendant further answering says, that the affidavit of the indebtedness of the said James H. Mallery to this defendant, and of the nonresidence of said Mallery in this state, was duly filed with the clerk of the Circuit Court of the county of Hudson, on the seventh day of October, in the year 20 of our Lord one thousand eight hundred and fifty-seven, and the attachment writ was duly registered by the said clerk, and the entry thereof made on that day, as required by law, and was issued and executed on the same day or the day following, and that the said writ of attachment has been regularly prosecuted to judgment, and that, on the thirteenth day of May last past, the said Circuit Court, upon the report of the auditors in the said attachment case, ordered judgment to be entered in favor of this defendant, and against the said James H. Mallery, for the sum of five hundred and fifty dollars and 30 fifty-eight cents, besides costs of suit to be taxed, and also for other persons, creditors of the said James H. Mallery, for the amount stated in the said bill of complaint, and that on the day last aforesaid, the said court ordered the said auditors to proceed to sell the property attached according to law, to the end that the proceeds thereof might be distributed between this defendant and the other attaching creditors.

And this defendant further answering says, that he is informed, and believes, that the said complainants, by their agent, A. B. Seymour, and through other means, were fully 40

advised of the issuing of the said attachment, and the proceedings thereon, and that no claim to the property attached, or any part thereof, has, to the knowledge of this defendant, been made by the said complainants, or any person for them, to the sheriff of said county, or to the auditors, or to this defendant, nor has any notice at any time been given by them, or in their behalf, of the existence of said mortgage, except by filing the said bill of complaint, or that the property therein described was their property; but on the contrary, this defendant

10 charges the fact to be, that the said property described in the said mortgage was, at the time the same was made, and from that time down to the levying of the attachment, in the custody and control of the said James H. Mallery, and during all that time, or to within a few days of issuing said attachment, was used and employed by the said James H. Mallery as his own property in the prosecution of the said work; and this defendant and other creditors of the said James H. Mallery, to a large amount, knowing the value of the said property, and seeing the same in the possession of the said Mallery, and used

20 by him, and having no notice from the said complainants of the existence of the said mortgage, or that the same was a lien upon the said property, were in a great measure induced to give credit to the said Mallery, as this defendant and others did do, upon the belief that he was the rightful owner of the property said to have been thus mortgaged to the Long Dock Company; and this defendant humbly submits to your Honor, that if the said complainants were the owners of the said property, by reason of the forfeiture of the conditions contained in the said mortgage or otherwise, that ample redress at law

30 was at their command to attain the possession thereof, either by an action of replevin or by trying their right of property, or by an action against the sheriff for damages for dispossessing them of their property.

And this defendant further answering avers, that the neglect on the part of the said complainants to take any measures, either by notice to the said sheriff or to the auditors, or to this defendant, of their alleged claim to the said mortgaged property, in case the same should be established in this honorable court, will work to him and to the other attaching creditors

40 great injustice, because since the said attachment was issued,

this defendant and other creditors of the said Mallery, to a large amount, have relied upon the property attached as the means, and only available means, by which their demands against said Mallery, as allowed by said auditors, and approved by the court, are to be paid and satisfied, and that this reliance hath, to a great extent, prevented this defendant and other creditors of said Mallery from taking other means to secure their claims against him.

And this defendant further answering denies, that the said auditors were appointed by the court before the return of the 10 said attachment writ, as alleged in the said bill of complaint, and avers that the said writ of attachment was issued on the seventh day of October, one thousand eight hundred and fifty-seven, returnable on the fourteenth day of the same month, and that the said auditors were not appointed until the tenth day of November following.

And this defendant further answering says, that if the said mortgage was recorded, as stated in the said bill of complaint, that the record thereof is without the authority of law, and does not give to the said mortgage any validity as against the 20 claim of this defendant and the other attaching creditors of the said James H. Mallery, the same being a chattel mortgage.

And this defendant denies all unlawful combination and confederacy in said bill charged, without that any other matter or thing material for this defendant to make answer unto, and not herein or hereby well and sufficiently answered, confessed, or avoided, traversed or denied, is true, to the knowledge or belief of this defendant.

All which matters and things he is ready to aver, maintain, and prove, as this honorable court shall direct, and humbly 30 prays that a decree may be made by this honorable court to dissolve the injunction restraining the said auditors from selling the said property attached, described in the said mortgage, to the end that they may make distribution of the proceeds thereof to this defendant and the other applying creditors of the said James H. Mallery according to law; and he prays to be hence dismissed with his reasonable costs and charges in this behalf most wrongfully sustained.

EDGAR B. WAKEMAN.

*Solicitor for and of counsel with the defendant, 40  
Cornelius D. Clark.*

New Jersey, county of Hudson, ss.—Cornelius D. Clark, the above named defendant, being duly sworn on his oath saith, that the matters and things set forth in the above answer, so far as they relate to his own acts, are true, and so far as they relate to the acts of others, he believes them to be true.

C. D. CLARK.

Sworn and subscribed, this 14th day of July, A. D. 1858, at Jersey City, before me.

NATH'L C. HAIGHT, M. C.

10 Filed July 20, 1858.

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ORDER FOR INJUNCTION.

Upon reading the bill of complaint in this cause, and the affidavits thereunto annexed, and on motion of J. S., of counsel with the complainant—It is ordered, that, upon filing the said bill and affidavits, an injunction do issue according to the prayer of said bill.

B. WILLIAMSON, C.

Filed June 24, 1858.

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DEPOSITIONS.

20 Examination of witnesses in the above cause, taken before me, Abraham S. Jackson, one of the masters and examiners of this court, at the office of Abraham O. Zabriskie, in Jersey City, on the twenty-seventh day of July, eighteen hundred and fifty-eight, at ten o'clock in the forenoon of said day, due notice of said examination having been served upon Robert Gilchrist, junior, the solicitor of James H. Mallery, and on Edgar B. Wakeman, solicitor of Cornelius D. Clark, and in presence of Abraham O. Zabriskie and the respective solicitors of James H. Mallery and Cornelius D.  
30 Clark.

*Henry L. Southard*, a witness produced on part of complainants, being duly sworn, saith—[The solicitor of James H. Mallery and Cornelius D. Clark object to all testimony except such as is in contradiction of new matter in the answers, if any such there be,] I am an engineer and surveyor; I reside in New York city; I have never been employed by the New York and Erie Railroad Company or the Long Dock Company until within a few days; I have lately been employed to measure the work done on the tunnel in Bergen hill—I I was employed on Saturday, and measured it yesterday; I 10 measured between the eastern end of the tunnel and the second shaft; I didn't commence directly at the end, but near the second shaft, and measured towards the eastern end; I have not the exact distance from where I commenced to the eastern end; the object of my measurement was to ascertain the amount of heading taken out; I measured from a point three hundred and eighty-four feet west of the first shaft up to within sixty-six feet of that shaft; between those two points I measured eight cross-sections; I stopped there, as the tunnel was taken out to the bottom as I suppose, as water was there; 20 the size of the tunnel at these different cross-sections did not vary very much—the first three are the largest.

*Quest.* Do these cross-sections give an approximation, and how near an approximation, to the size of the drift or opening between them?

*Ans.* Assuming the depth from the roof to be such as I have taken it, the approximation is very near it; the roof and sides are nearly continuous and of the same shape; at one hundred and sixty-one feet from where I commenced, the opening at a point is not more than ten or twelve feet, the 30 solid rock projecting from the two sides forming a kind of abutment, from four to six feet wide; I did not measure one of my cross-sections in that place—I disregarded that; I did make a calculation of the contents of the opening, or drift, at each of these sections, per lineal foot; I calculated what would be the average contents per lineal foot of the whole length measured; I found the average per lineal foot to be four forty-hundredths cubic yards. The diagram shown to witness, marked *Exhibit A*, represents the average section of the part measured, but not one of the sections. The average height 40

from the floor, as I measured, is six feet nine inches; the average width of the bottom of the tunnel was nineteen feet four inches; the shape of the tunnel, as by *Exhibit A* is represented, is the shape called for by the contract; the contract does not describe the shape of the tunnel, it gives the height, the width, and shape of the top, as a circle drawn from three centres, and this diagram (*Exhibit A*) is drawn according to that; the width of the tunnel, on the line assumed by me for the measurement of the bottom of the drift, would be twenty-

10 seven feet nine inches—that is the line on which I have stated the excavation was only nineteen feet four inches on the average—the absolute measurement on that line would be a little more; my object was to get the contents above the assumed base—the excess is shown by the opening on the diagram beyond the dotted line; I assumed the side of the tunnel to be plumb for two or three feet; I am satisfied that my measurement fairly represents the actual excavation very nearly; there were loose stones lying on the floor; I removed the stones in several places, until I came to solid rock; I did not

20 do so at every section; I was guided by the water on the floor and by parts of the track of the railroad, which had been laid for cars for removing the stone; I went through only that part of the tunnel between the point where I commenced to measure and the eastern end; I measured a part of the driftway between the eastern approach and shaft A, being the first shaft; I measured forty-five feet in length, taking a cross-section at each end; this, with what I have mentioned, includes the whole driftway between the point where I commenced and the eastern mouth of the tunnel; I calculated the average

30 contents of this forty-five feet—the contents of this was the same as the rest, as I have measured; the measurement here differed very little from the other part; I cannot give the actual contents of the drift at each cross-section; I made the calculations, but have not got them here—and if I had had time I would have made a diagram of each cross-section; I made no accurate measurements of other parts of the tunnel; I noticed and made some rough estimates of other parts of the tunnel; I noticed the part of the tunnel between the eastern end and the first breast, where I stopped measuring the drift.

40 *Quest.* State how you found the part east of the first breast?

*Ans.* I found that there were some points that would have to be trimmed off to conform to the outline of the tunnel—the quantity I could not estimate.

I made some measurements, but not accurately, couldn't do it, hadn't the time; I couldn't say what proportion, such as a tenth or twentieth, was to be taken out east of the breast-work. I did not go to any of the other shafts; the tunnel was full of water up to level of the stone breasts; I walked through the water all the time.

I had Mr. Buckhout, my partner, as my assistant, and had 10 some men with lanterns—couldn't see without lantern; the water served me, instead of a level, to get the points of the same height on each side. Mr. Seymour, an agent of the company, was with us while making the measurements; he did not assist, except so far as to hold a lantern.

Cross-examined by Robert Gilchrist.—I assumed the roof, as it was in the centre, to be the proper height of the tunnel, as called for by the contract; I had no other method of ascertaining the height of the tunnel, except the height, as I found it, and the range of the part where I supposed the tunnel was 20 finished; I found the projections in some places from the top, or from what I supposed to be top of the tunnel, as are represented on the diagram.

*Quest.* Did you find projections as numerous and as large below what you supposed the top of the tunnel as you have shown on diagram A?

*Ans.* In some particular instances they were, in general they were not.

As a general thing, the projections from the top are not such, through the part I measured, as are shown on the dia- 30 gram; I only made a rough sketch.

All the instruments we had were a tape-line, rod, and foot rule. To make a perfectly accurate estimate of the quantity excavated where I measured, I can't say how many cross-sections would be necessary; I would determine that on the ground. I can't say how many days it would take me to make an accurate measurement of the quantity excavated in the part I measured, not many days, however.

I had to guess or assume the line of the top of the tunnel

above the grade, and the same, with the exception of two or three points, as to the centre line; in two or three points, I found the centre line by marks; I did not assume a centre line; I measured to each side, to ascertain the actual width of the excavation.

*Quest.* Do you know whether there is a single projection below the top of the tunnel, as called for by the contract, or did you assume that the highest point was the true top?

*Ans.* I do not know that there is any projection below the 10 top, as called for by the contract, but such projections are shown by diagram A.

I do not know that the track lay upon solid rock—at some points it did; it was difficult to ascertain where it was taken out to the solid rock; I didn't use the centre line of tunnel for any purpose in my measurements.

I had no time to make any more measurements than I did; I was engaged about four hours in making my measurements; the water where I measured was from one inch to a foot and half deep—the average depth of the water where I measured 20 was about eight or ten inches.

Exhibit A on part of defendants shows the look of the tunnel, as it was when I measured it; the lower lines I made no measurement of.

*Quest.* As you have no true centre line of the tunnel, and did not use any assumed one, and did not know the true top, as called for by the contract, can you say with certainty that the rock on diagram A on part of complainants, shown as unexcavated at the sides, is in fact unexcavated?

*Ans.* I can with certainty say yes, for this reason, that if 30 you throw the top of the tunnel higher or lower it makes it more.

The irregular lines on the sides of the tunnel do not show accurately what was excavated; the greatest width of the bottom of the tunnel at any cross-section was twenty feet eight inches; I intended to measure the widest parts of the driftway and the narrowest parts, for the purpose of making an average; there were points where there were holes in the sides five or six feet long, which I didn't measure, but did take into account in my average of the rock excavated.

40 The line that I assumed as the bottom of the drift was not the top of the water.

*Quest.* Don't you know that in the parts which you measured there are two places where separate gangs of men were drifting towards each other, and where they did meet, which is always the least excavated part of such work?

*Ans.* I supposed that to be the case where it projected out from the sides is the part where the gangs met.

*Quest.* Don't you know, or have you not been informed by the agents of the complainants or the Erie company, that the part of the tunnel wherh you measured is the least excavated of any part of the whole drift? 10

*Ans.* I did not know it, and have not been so informed by the agents or the complainants of the company.

Mr. Seymour directed me to measure the point in the tunnel which I did measure; Mr. Seymour told me that there was some dispute between the company and contractor, as to the amount of work done.

I have been engaged, as engineer, in superintending the excavation in a tunnel, as an assistant engineer, on the Lehigh and Susquehanna railroad; the nature of the rock there is hard sandstone, the tunnel, in part, is sandstone and part 20 earth, and the tunnel was a third of a mile long; I was engaged there about nine months; I was then twenty-one or twenty-two years of age. There were two shafts in that tunnel.

Direct examination resumed.—My measurement of this work did not have any reference to the true line of the tunnel; I measured the opening; the true contents of the area measured by me would not be varied if the top of the tunnel was five feet higher or lower; my only object and instructions was to ascertain the real amount of rock removed; I was not re- 30 quested to measure any other part of the tunnel, for the reason that the rest was, as I understood from Mr. Seymour, filled with water.

H. L. SOUTHARD.

Taken, sworn, and subscribed, this 27th July, A. D. 1858, before me, at Jersey City.

A. S. JACKSON, *M. C.*

Filed October 20, 1858.

## AFFIDAVIT AND NOTICE.

New Jersey, ss.—Alfred B. Seymour, being duly sworn on his oath saith—that he resides in Jersey City, and is and has been for two years last past the agent of the complainants and of the New York and Erie Railroad Company in the purchase of lands and in superintending part of the work connected with the extension of the Paterson and Hudson River railroad to the Hudson river and the Bergen hill tunnel, and has been for many years engaged in and employed upon like work; that  
10 he is well acquainted with the shaft houses, engine houses, and other buildings, and the engines, machinery, and tools included in the mortgage set forth in the complainants' bill, and has examined and watched them from the levying of the attachment sued out by Cornelius D. Clark, in the complainants' bill set forth; that although the same have, since they were seized by the sheriff under said attachment, been guarded and watched, they have much deteriorated in value by being kept without use, and the engines without the constant cleaning and care which is bestowed upon them by engineers  
20 and the hands about them when in use; and that this deponent would not be willing to give for said property, on account of said injury, as much by twenty per cent. as he would at the levy of said attachment; and that all the property attached is of a kind that must necessarily receive much injury by standing still exposed to the weather without use.

This deponent further says, that the engine and shaft houses and the engines are situate upon the lands of the complainants, at and near the mouth of the shafts on the Bergen hill tunnel, which work the complainants and the New York and  
30 Erie Railroad Company are anxious to resume, and are making efforts to resume; and that said work cannot be resumed without taking down the engines and engine and shaft houses now there, and erecting others, and that the value of said houses and engines by being taken down and removed, even if done with the greatest care, will be lessened at least thirty per cent. from what it now is placed, as they are fit for use; and that, as this deponent believes, they will bring at a fair public sale

thirty per cent. more standing as they now do, than if taken down and then sold.

A. B. SEYMOUR.

Subscribed and sworn to this 12th day of July, A. D. 1858, before me, at Jersey City.

ENOS A. SKILLMAN, *M. C.*

New Jersey, *ss.*—Charles Moran, being duly sworn on his oath saith—that he is the president and one of the directors of the Long Dock Company, and was elected such president and director on the 19th day of November last, previous to which 10 he had never been president of said company, nor had he been director thereof for thirteen months next preceding said day. And this deponent further says, that previous to his being chosen such president and director, he was not the agent of the Long Dock Company authorized to interfere with and give directions to James H. Mallery relative to the continuance or suspension of his contract with said company, or to his going on with the work under the same; and that, according to this deponent's recollection and belief, he did not, at any time previous to said 19th day of November last, give said James H. 20 Mallery any order or directions as to his going on with or stopping his work under said contract; that he had frequent conversations with said James H. Mallery relative to the time and manner of the payments for said work, which were provided for by the New York and Erie Railroad Company, of which deponent was the president; and all the suggestions made by deponent to said Mallery relative to the stopping or continuance of said work were conditional and dependent upon the prospect of funds for such payments being received at the times and in the manner desired or required by said 30 Mallery; and that he did not, as an officer or agent of said Long Dock Company, or by any authority from them, order, direct, or request said Mallery to stop his work.

That this deponent made efforts to induce said Mallery to go on with his contract, and to raise funds to meet the payments that might become due to him, until in the month of October, 1857, when this deponent found that said Mallery had received money on estimates for work done by him, which estimates were founded on the number of cubic yards reported to

have been excavated by him, and that said estimates were founded upon a number of cubic yards much greater than had been actually excavated by said Mallery, and that the amount paid him was, by several thousand dollars, over and above the price of the work actually done by him, either by the contract price or the price of nine dollars per cubic yard, the price which the engineer of the complainants, under their authority, had fixed as the value of the headings of the tunnel work under said contract.

- 10 And this deponent further saith, that the payments before that time made on said contract were made upon estimates of the quantity of work done by said James H. Mallery, which were for a much greater quantity of work than that done, and at a price beyond the contract price agreed upon, and beyond the price which they had agreed to pay, to wit, nine dollars per yard; and that said payments so received by said James H. Mallery were paid by the said company in ignorance of the facts, and were a fraud and injury upon the complainants; and that, as deponent is informed and believes, the said James
- 20 H. Mallery knew that said estimates were false, and that he received larger sums of money than he was entitled to receive by the contract or the agreement to advance for headings.

And this deponent saith, that according to the best of his knowledge and belief, the complainants did not at the time said Smalley stopped his work, nor do they now, owe him any money for work done on said contract, according to the terms thereof, or according to the price fixed for work by their engineers, but that said Mallery was and is overpaid for the work done by him; and that there was not any reason or

30 cause in existence, or assigned or given by said Mallery, for stopping work under said contract that this deponent knows or has heard of, except the fact, that he had not been paid in full, which until the discovery of the amounts overpaid on said false estimates, this deponent supposed might be true.

CH. MORAN.

Sworn and subscribed, this 21st day of July, A. D. 1858,  
before me, at Jersey City.

J. R. WORTENDYKE, M. C.

Filed October 20, 1858.

Sir,—The annexed are copies of affidavits to be used before the Chancellor on the motion for the appointment of a receiver for an order of sale, and on motion to dissolve the injunction heretofore issued in this cause, which motions are noticed to be made on the 28th instant.

Your ob't serv't,

A. O. ZABRISKIE,  
*Solicitor of complainants.*

Dated July 24th, 1858.

To E. B. Wakeman, esq., solicitor for C. D. Clark. 10  
To Robert Gilchrist, jun., solicitor for Jas. H. Mallery.

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ORDER FOR DISSOLVING INJUNCTION.

This cause coming on to be heard at Elizabeth, on the twenty-eighth day of July last, before the Chancellor, on bill and answers and affidavits, on the motion of the defendants to dissolve the injunction heretofore issued in this cause, and on the motion of the complainants for the appointment of a receiver and for a sale of the mortgaged property, in the presence of A. O. Zabriskie, of counsel with the complainants, of Robert Gilchrist, junior, of counsel with James H. Mallery, one of the 20 defendants, and of E. B. Wakeman, of counsel with Cornelius D. Clark; and the pleadings and affidavits being read, and the arguments of the respective counsel being heard and considered, and the Chancellor having taken time to advise thereon; and now, on this twentieth day of October, in the year eighteen hundred and fifty-eight, it appearing to the Chancellor that the defendants are entitled to a dissolution of the injunction heretofore issued in this cause, and that the complainants are not entitled to the appointment of a receiver or a sale of the property mortgaged; and it further appearing to 30 the Chancellor that the complainants are not entitled to the relief sought and prayed for by them in their said bill—it is ordered, that the said injunction be dissolved with costs, and

that the said motion for a receiver and for a sale of said property be denied with costs.

B. WILLIAMSON, C.

Filed October 26, 1858.

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PETITION OF APPEAL.

NEW JERSEY COURT OF ERRORS AND APPEALS.

Between

|    |                                                                                                                       |                                    |
|----|-----------------------------------------------------------------------------------------------------------------------|------------------------------------|
|    | THE LONG DOCK COMPANY, appellants,                                                                                    | } <i>On bill to<br/>foreclose.</i> |
|    | <i>and</i>                                                                                                            |                                    |
| 10 | JAMES H. MALLERY, CORNELIUS D. CLARK,<br>GARRICK M. OLNSTEAD, DAVID BEDFORD,<br>and EDMUND T. CARPENTER, respondents, |                                    |

*To the Court of Errors and Appeals.*

The petition of the Long Dock Company, the appellants in the above stated cause, respectfully shows—

That your petitioners find themselves aggrieved by a decree made in the Court of Chancery, by the Honorable Benjamin Williamson, Chancellor, bearing date the twentieth day of October, in the year eighteen hundred and fifty-eight, wherein the said the Long Dock Company were complainants, and  
20 James H. Mallery, Cornelius D. Clark, Garrick M. Olmstead, David Bedford, and Edmund T. Carpenter were defendants, in this respect, to wit: that the said decree declares that the complainants are not entitled to the relief sought and prayed for by them in their bill, and orders that the injunction granted in said cause be dissolved with costs, and that the motions for a receiver and for a sale of the property be denied with costs.

And your petitioners appeal from that part of the decree of the Chancellor that decrees as aforesaid, on the ground that the same is erroneous, and that your petitioners were entitled  
30 to such relief, and to have a receiver appointed and a sale of said property ordered.

Your petitioners therefore pray that the said decree of the Chancellor may be in the particulars aforesaid reversed, set aside, and for nothing holden, and that your petitioners may have such relief in the premises as to this honorable court shall seem meet.

A. O. ZABRISKIE,  
*Solicitor and of counsel with appellants.*

Dated October 30th, 1858.

Filed October 30, 1858.

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CHANCELLOR'S OPINION.

The complainants and the defendant Mallery entered into a 10  
contract, by which the defendant contracted to construct a  
tunnel through Bergen hill, for a price to be paid by the com-  
plainants in the manner stipulated in the contract. The work  
was to be completed on or before the seventh of December,  
A. D. 1857, and payment was to be made from time to time,  
as the work progressed, on the certificate of the engineer for  
work done, the engineer to deduct such per centage as he  
might think proper from the value of the work done, which  
should in no case be less than ten per cent. In the progress  
of the work, up to the 28th day of July, 1857, Mallery had 20  
received from the complainants about four hundred thousand  
dollars, and the complainants had retained in their hands about  
the sum of forty-two thousand dollars, being the ten per cent.  
of the estimates, or supposed value of the work done.

Mallery, being desirous of obtaining the advance of the  
forty-two thousand dollars, requested the complainants to pay  
it to him, and offered to give a mortgage upon a large amount  
of property, consisting of buildings and machinery, tools, &c.,  
used in and about the construction of the work, with a condi-  
tion that the contract should be fully performed on his part, or 30  
the forty-two thousand dollars, with interest, refunded. The  
company paid Mallery the money, and he executed and deli-  
vered to them the mortgage, with the condition as above  
stated.

Shortly after the execution of the mortgage, an attachment was taken out against Mallery, as an absent debtor, and the mortgage property was levied upon. The attachment went to judgment, and the auditors advertised the property for sale. The complainants then filed this bill upon their mortgage, praying for a sale of the property to pay the mortgage money, that they might have priority over the attaching creditors, and that the creditors might be enjoined from selling under their attachment. The injunction was issued according to the prayer  
10 of the bill.

The defendant, Mallery, has answered the bill, and the defendants move a dissolution of the injunction.

On their behalf it is insisted, that there is no equity in the bill, and that the answer is full as to any merits the bill may possess.

The object both parties had in view, in reference to the mortgage, was evidently this, and nothing more, to give Mallery the benefit of the money which he had earned, and to substitute for it the mortgage; so that if eventually, under  
20 the contract, the company should be legally entitled to retain the whole, or any part of the forty-two thousand dollars, they might raise it, and reimburse themselves through this mortgage.

It is quite clear that the company have no right to call upon Mallery for any part of the money, and consequently have no right to enforce the mortgage to raise it, unless, by the terms and conditions of the contract, they have an absolute right to the money on account of some default in the execution of the contract by Mallery which legally entitles them to it. If the complainants retain a lien upon the property by virtue of their  
30 mortgage, then the injunction to stay the sale under the attachment was properly granted.

A mortgage of personal property may be enforced, if the mortgagee has possession of the property, by a sale by him in *market overt*, or he may sell it under a *decree* of this court. It is his right to enforce his mortgage by proceedings in this court, and there are many good reasons why a party holding a mortgage for so large an amount as this should not incur the risk of selling it without a decree of the court. Such a decree will always remain a record for his protection. It settles all  
40 equities between the parties. If he undertakes to enforce the

mortgage, and raise the money without such decree, he is liable to be called upon at any time to account for the execution of his trust. Where the property is out of the possession of the mortgagee, there seems a necessity for his coming here, otherwise he must first resort to his action at law to recover the possession of the property. The counsel in this case insisted that the injunction was wrongfully granted, because the complainants had their remedy at law, and that they ought to have brought *replevin* to try whether the auditors in attachment had a legal right to the possession of the property, as 10 against them. But the remedy at law would have been a very inadequate one. If they had recovered, it would have given them only the *possession* of the property, and not a satisfaction of their mortgage. They still could have been obliged to resort to a court of equity to enforce their mortgage. It was said, a court of law is the proper tribunal to test the validity of the attachment, and the right of possession of the auditors under it.

The validity of the attachment, or the rights of the auditors under it, are not disputed. But the complainants say they have 20 an equitable lien on that property, which has priority over the *legal* lien of the creditors, and that a court of equity is the proper tribunal in which to enforce their mortgage and to settle the priority of the several liens. The defendants do not dispute the complainants' priority; but insist that, on account of what has taken place between the mortgagor and mortgagee, the mortgage cannot be enforced. If this is so, this is the proper tribunal to try that question. It is a question which properly belongs to equity jurisdiction. The complainants having rightfully resorted to this court to enforce their lien, 30 and to have the priorities of all parties claiming liens upon the property ascertained and settled, the injunction was clearly right. Without it, the mortgage would have been worthless. A decree of this court would have amounted to nothing if a sale by the auditors had have been permitted. It was eminently proper that the court should protect the property for the benefit of all the lien creditors. The questions which arise are questions belonging to equity, and all parties are rightfully brought here to settle them. Neither party should be permitted to enforce his lien until the rights of all parties are settled. It 40

was for the preservation of the property that the injunction issued. The injunction, until the rights of all parties are ascertained, is for the benefit of all. The sale by the auditors, if it had taken place, would have been a mere matter of speculation. It would have been a sale of property worth some twenty or thirty thousand dollars, with an encumbrance upon it of forty thousand. What design could the creditors have had, who complain of this injunction, in pressing a sale, except to scatter this property in the hands of a hundred purchasers, or  
 10 else to avail themselves of the opportunity of purchasing it, with its value depreciated, with this alleged prior encumbrance upon it?

On behalf of the defendant's counsel insist that the injunction should be dissolved, if the affirmative of either of two propositions which they state is correct: first, if it appears on the face of the bill that, according to the condition of the mortgage, there has been no such default as entitles the mortgagee to enforce the payment of the money secured by the mortgage; and, second, if it appears on the face of the bill that  
 20 there is no default, and that there never can be any such default as to entitle the mortgagee to enforce the mortgage. The last proposition is so evidently correct that it does not admit of argument. If circumstances have so changed between the parties since the execution of the mortgage, in reference to its subject matter, that there never can be any default, then the complainants can have no rights secured by it, and consequently a bill cannot be maintained upon it for any purpose. It has answered its object. It is satisfied, as much so as if it had been a mere condition to pay a sum of money at a particular  
 30 time, and the money had been paid.

But the first proposition is not correct. The condition of the mortgage may not have been broken; the time may not have arrived when the money is payable, and so that, as between the mortgagor and mortgagee, the latter may claim his money, and the right to enforce his mortgage for its payment; and yet there may be circumstances, notwithstanding, which will entitle the mortgagee to exhibit his bill upon the mortgage for the maintenance and protection of the mortgage property, and to justify the court in converting the mortgage  
 40 property into money, for the better protection of all the parties

in interest. The propriety and necessity of such a course may be illustrated by this very case. The complainants, under their contract with the defendant, Mallery, had in their hands forty-two thousand dollars, which was the value of work done for them by Mallery. They had a right, under the contract, to retain that money for their indemnity, and to enable them to secure the faithful fulfilment of the contract. They had the right, under certain stipulations, to declare the contract forfeited, and to retain the money as their damages under that forfeiture. They substituted, by agreement, the mortgage for 10 that money. Now it is true (supposing, for illustration, this to be the only default that could occur), as between the parties to the mortgage, the complainants never could file a bill to enforce payment of the money until a forfeiture should occur. But, in the mean time, is this mortgaged property to be carried off by those attaching creditors? Is the lien to be lost, and the mortgagees without remedy in the premises? Why should this be, when this court can afford to all parties ample protection? The mortgage is an honest one; its *bona fide* is not questioned. It is a substitute for the money which the 20 company has paid to Mallery. The defendants raise no equity in their own favor against the mortgage or its priority. They do not complain of the property remaining in the hands of the mortgagor, and set up that, in consequence of it, they were induced upon the credit of the property to trust their debtor. Why, then, should these complainants lose their lien? They must lose it, if the mere fact of there being no default in the mortgagor prevents their filing their bill. If the property was in the possession of the mortgagees, no one will pretend that the attaching creditors could deprive them of that possession 30 without first paying the encumbrance. And yet they would be entitled to the possession only to protect their lien. They could not sell it. It would remain in pledge for the complainants' indemnity, just as the money for which the mortgaged property was substituted would have remained if the substitute had never been made. The creditors might have attached that money in the complainants' hands, but it would have been subject to the lien which the complainants had upon it under the contract, and that is all the claim they have upon the mortgaged property. It is subject to the complainants' 40 lien.

Under such circumstances it is that the complainants ask the protection of this court. It is these creditors who have driven them here. They are about impairing their lien. They come here for protection, and are entitled to it. But must the property remain in *statu quo* until the *future* shall reveal how much out of the forty-two thousand dollars the complainants are entitled to *recoupe* for any lawful demand they may have against the mortgagor? Would it not be right, upon the case assumed, for this court to order the property sold and converted  
 10 into money? The attaching creditors say they have a right to a sale, and so they have; but the question is, how shall that right be exercised? They will sell subject to the mortgage, if this court does not interfere. There would be nothing to hinder this court's ordering the property sold clear of all encumbrances for the benefit of the creditors. Should it bring more than the amount of the mortgage, such surplus would be paid at once to the attaching creditors, and the balance this court would protect until the complainants' rights were settled. If eventually the complainants should have no claim  
 20 upon the money, then the attaching creditors would be entitled to all of it, or to so much of it as might be necessary to satisfy their demands.

I think the case I have supposed a very clear one, where it would be eminently proper for the court to decree the sale of the property before any default had occurred in the proviso, or condition, of the mortgage. But these complainants have not filed their bill for the purpose of protecting the lien to answer any future contingency. They do not claim the right to have their lien preserved, and the property protected, to  
 30 answer any future default in the contract between them and Mallery. The object of the bill is not to preserve the property for their future indemnity. They allege a default. They claim the absolute right to the forty-two thousand dollars, on account of a part default. This is the aspect of their bill, and if it cannot be maintained in this respect, it must be dismissed.

Has there been any such default as to entitle the complainants to this money? As I have before stated, the bill shows that the mortgage is nothing more than a substitute for the \$42,000. The complainants are not entitled to the money until  
 40 the condition of the mortgage is broken. When the complainants can claim the \$42,000 as their own on account of some

breach of the contract, and not merely the right to hold it as an indemnity, then they may enforce their mortgage, and not before. He must then resort to this contract, which is attached to and made part of the bill, for the purpose of ascertaining whether, according to its terms, the complainants are entitled to the money.

There are but three clauses in the contract which make any reference to the reserved ten per cent.

The first clause is as follows: "It is further agreed, that payments shall be made from time time, as the work progresses, on the certificate of the engineer for work done, the said engineer to deduct such percentage as he may think proper from the value of the work done, which shall in no case be less than ten per cent." There are two clauses which particularly specify the purposes to which this fund may be appropriated. One is the following: if the party of the first part shall refuse, or unreasonably neglect to remedy any imperfections which may be pointed out by the engineer, or in any manner violate the conditions of the contract, so that in the judgment of the engineer there shall be just grounds of apprehension that the work will not be completed in the manner and within the time herein specified, then it shall be the duty of the engineer to serve a written notice upon the party, setting forth the grounds of his apprehension, and specifying the manner, together with a reasonable time in which said party may cause such grounds to be removed; and if, at the expiration of such time, said grounds of apprehension be not removed, then full power and authority are mutually vested in such engineer to declare this contract forfeited; and on such declaration being given in writing to the parties hereto, this contract shall cease and determine immediately, and the said party of the second part may for ever retain the reserved percentage, on account of the consideration for damages which they may have sustained by reason of the forfeiture of this contract."

Whether, if under the clause just recited, the engineer had declared the contract forfeited, the company could claim the ten per cent. then in their hands as liquidated damages or an absolute forfeiture, or could only remunerate themselves out of it for the actual damages sustained by them, it is not ne-

cessary for the purpose of their cause to determine. The stipulation for the retention of the per centage is very different from that in the contract of the parties in the *Philadelphia, Wilmington, and Baltimore Railroad v. Howard*, 13 *Howard's Rep.* 342. The contract between the parties in that case expressly declared that the per centage was retained "to indemnify and protect the party of the second part from loss in case of default and forfeiture" of the contract. In the opinion of the court, it is said, "there is a wide difference, 10 both in fact and in law, between indemnity and forfeiture; yet it is the former, and not the latter, which the parties had in view. Whether the express stipulation for a forfeiture of this fifteen per cent. could have been enforced, it is not necessary to decide." I am inclined to think, however, that the parties in this case had a forfeiture in view, not only from the language and phraseology of the clause recited, but from another consideration. They immediately provide in the contract for two *alternatives* to the declaration of forfeiture, in one of which this fund is to be appropriated for the indemnity 20 of the company. It is as follows: "Or, as another alternative, the party of the second part, at their option, may allow the party of the first part an extension of time, in which case the party of the first part hereby agrees to forfeit to the party of the second part the sum of two thousand five hundred dollars, for each and every month the work shall be delayed beyond the time herein stipulated for the completion of the same, the amount to be deducted from the engineer's estimates or from the reserved per centage." But I do not consider the effect of the declaration of forfeiture upon the disposition of this fund 30 material to a right decision of the case now presented for the consideration of the court.

I have recited all such portions of the contract as have any reference to the retention of the ten per cent. by the company. I think it is clear that the company have no claim upon it, except for the purposes particularly mentioned in the two clauses of the contract. After the provision for the creation of the fund, the contract then provides for its appropriation. It is not a fund for the general indemnity of the company against a breach of the contract. Its special appropriation, in particu- 40 lar cases, is an exclusion of the right to appropriate it for any other purpose.

The parties have not seen proper to leave it as a general indemnity for the benefit of the company, but have fixed the terms upon which the company may resort to it for indemnity. It must be appropriated for the purposes and in the manner the contract provides, and in no other way.

The simple questions then are: has the engineer declared the contract forfeited? If he has, then the contract provides, that in such case the company may retain the reserved ten per cent. "on account of the consideration for damages which they may have sustained by reason of the forfeiture." Has 10 the company allowed to the other contracting party an extension of time? In that case the company are entitled to deduct from the fund "twenty-five hundred dollars, for each and every month the work shall be delayed beyond the time stipulated for the completion of the same." There are no other provisions of the contract under which the company have any claim upon the fund. The complainants must bring themselves within these provisions, or they cannot maintain this bill. They do not. There are no allegations in the bill to that effect, and the bill, in connection with the affidavits used on 20 the motion, shows that their engineer has not declared the contract forfeited, and that they have not given the extension according to the terms of the contract.

As the complainants cannot maintain their bill, the injunction must fall of course.

The application for receiver and sale is denied with costs, and the motion to dissolve the injunction is sustained with costs.

