New Jersey Court of Errors and Appeals.

HARRIET N. SIMPSON (now WELLS), Executrix, Etc., of Thomas P. Simpson, deceased,
Plaintiff in Error (defendant below),

AGAINST

JAMES S. NEGLEY,
Defendant in Error (plaintiff below)

BRIEF

for

GENERAL JAMES S. NEGLEY, DEFENDANT IN ERROR.

Steps in the Cause.

This suit was brought in the Essex County Circuit Court in 1886.

Upon a demurrer to the declaration argued before the Hon. DAVID A. DEPUE, Justice, founded chiefly on the objection that the contract was personal the demurrer was overruled with leave to Negley to amend as to a formal defect.

The case was tried before the Hon. DAVID A. DEPUE, Justice, and a jury, and at the close of the case the Justice withdrew it from the jury and prepared to send it to a Referee to state the account as to the " moneys

expended" by Negley (Rec., p. 83). The parties stipulated on this amount to avoid a reference (Rec., p. 20). The Court took the case under advisement and finally certified it to the Supreme Court (Rec., p. 89).

It was there argued and a decision rendered for judgment in favor of NEGLEY, the plaintiff below, for $5,000 with interest from January 15, 1891 (Rec., p. 20), pursuant to the stipulation.

The case is reported in

NEGLEY VS. SIMPSON, *26 Vroom, 396.*

Facts.

Thomas P. Simpson and James S. Negley executed a contract under seal at New York City on the 5th day of June, 1884 (Deposition of David S. McNeish, Rec., p. 12).

This contract is the one upon which suit herein is brought, and a copy thereof is set out as Exhibit A (Rec., pp. 3–7).

THE COVENANT SUED ON.

The action is brought upon the following covenant in said contract: "*It is also agreed that if a settlement of the claim of the said Thomas P. Simpson against said company shall be made with or without suit, judicial sale or otherwise, the amount of such settlement shall also include all moneys actually expended by James S. Negley as shown by his vouchers therefor*" (Rec., p. 6, fol. 20).

THE CIRCUMSTANCES LEADING UP TO THE CONTRACT.

October 17, 1881, *James S. Negley* bought the canal bed from *William E. Scott* (Rec., pp. 12, 13).

February 1, 1883, *The New Castle Northern Railway Company* was incorporated (Rec. p. 12, fol. 10).

April 24, 1883, *The New Castle Northern Railway Company* having bought the right of way along the

canal bed for about 16 miles of its road (Rec., p. 15, fol. 30) from *General James S. Negley*, gave him a bond dated April 24th, 1883, for the sum of thirty-nine hundred and twenty dollars ($3,920) (Rec. pp. 16–18).

This bond recited that the railway company had agreed to buy the right of way from *Negley* for one hundred and fourteen thousand five hundred and sixty dollars ($114,560) (Rec., p. 17, fol. 10); this was payable fourteen thousand five hundred and sixty (14,560) in cash and the balance in first mortgage bonds of the railway company at par on demand (Rec., p. 74, fol. 10).

The arrangement was that *Negley* should deliver the deed " with the understanding, and upon the express condition, however, *that no advantage shall be taken of said Negley or his assigns, by the New Castle Northern Railway Company*, its successors and assigns, *by reason of the execution and delivery of the said deed*, and of said *Negley's* acknowledgment of the receipt of said purchase money, *which said purchase money shall be paid said Negley*, and the same is hereby declared due and payable to him upon the execution and delivery of said deed to this company (Minutes of Board Rec. 74, fol. 20).

This bond further recited that *it was a condition of the sale and delivery of said deed that Negley should be paid the sum of $3,920, in cash*, with interest from April 24th, 1883, " and that *Negley should have the first lien against said premises for said sum of $3,920*, and interest until the same has been fully paid " (Rec., p. 17, fol. 20).

Negley had also expended a large amount of money for and on account of right of way, and in respect to the surveys and purchase money, and this bond was a voucher for the same (Rec., p. 19, fol. 10), and on account of the railway company included in the language of the contract. Evidence as to these is not inserted in the record on account of the following stipulation.

" IT IS HEREBY STIPULATED THAT THE MONEYS ACTUALLY EXPENDED BY THE PLAINTIFF ON BEHALF OF THE NEW CASTLE NORTHERN RAILWAY COMPANY IN THE DECLARATION IN THIS CAUSE MENTIONED AS SHOWN BY THE VOUCHERS THEREFOR, AND SOUGHT TO BE RECOVERED HEREIN UNDER THE COVENANT IN SAID DECLARATION MENTIONED, AMOUNT

TO $5,000, INTEREST TO BE COMPUTED THEREON FROM THE DATE HEREOF. Dated Jan. 15th, 1891" (Rec., p. 20, fol. 10).

On October 5th, 1883, the contract was entered into between the *New Castle Northern Railway Company* and *Thomas P. Simpson* for the building of the railroad of the railway company by Simpson, a distance of about sixteen miles *over the canal roadbed deeded by Negley to the company*, for the sum of $30,000 in stock and $30,000 in first mortgage bonds per mile (Rec., p. 22, fol. 10).

The 9th clause of that contract reads as follows:

"*In case the New Castle Northern Railway Company shall require an additional sum or sums, not exceeding $25,000, to liquidate the costs of rights of way, station grounds, engineers' and other of the company's expenses, then* I AGREE TO ADVANCE THE SAME *from time to time as shall be demanded, and take in payment for each $1,000*, or multiple thereof so advanced, bonds and stock. The bonds to be rated at eighty cents on the dollar, and the stock at par, equaling $1,200 in bonds and $1,000 in stock for each $1,000 in cash so advanced" (Rec., p. 22, fol. 20).

Simpson went on under this building contract, graded the entire roadbed, constructed culverts and built bridges, put in ties on the ground and a portion of them in place, and the timber for the bridge over the Chenango (Rec., p. 23).

THE SURROUNDING CIRCUMSTANCES.

At the time the contract, June 5th, 1884, between *Negley* and *Simpson* was entered into there was a suit pending by *Negley* against the railway company to recover the purchase price of the right of way deeded by *Negley* to the company. At this time also suits were pending by *Negley* against the railway company to recover upon some of the claims for the moneys expended by him on behalf of the railroad company, included in this suit.

Under the laws of Pennsylvania the claim of *Negley* of a vendor's lien upon the right of way used by the railway was a claim which was entitled to payment prior to the payments to be made to Simpson on his contract for building said road.

THE RECITALS IN THE CONTRACT.

The contract between *Negley* and *Simpson* expresses in its recitals the foregoing circumstances (Rec., pp. 3-6 inc.).

It recites that Simpson is engaged in constructing the railroad, that "*litigation is now pending in which* CERTAIN PARTIES, STOCKHOLDERS IN SAID RAILROAD COMPANY, *are seeking the cancellation of said contract*," and, it is believed that, in either event, the claim of *Simpson* for the contract price will be followed by a judicial sale.

That "*it is the purpose and intention* of *Simpson*" to buy the property "*to secure not only his own claim* BUT TO *provide for other claims as hereinafter* SET FORTH."

That *General James S. Negley* has furnished to the railroad company a valuable right of way transferred to the railroad company for $114,000.

That "it is the desire of the said *Thomas P. Simpson* in consideration of the valuable right of way transferred as aforesaid, *and in consideration of the payment* by said *James S. Negley* of certain sums of money to and on account of the said *New Castle Northern Railway Company to secure to the said James S. Negley the amounts thereof.*

THE CONTRACT.

THEREFORE this agreement WITNESSETH THAT "IF THE SAID THOMAS P. SIMPSON SHALL BECOME THE OWNER OF said railroad PROPERTY," then in that event "*Thomas P. Simpson shall bear the relation of* TRUSTEE *to the said James S. Neyley* for the *purpose of securing him* A FAIR AND REASONABLE COMPENSATION OR CONSIDERATION FOR THE RIGHT OF WAY transferred to said railroad company."

It being agreed that after completion and payment therefor and after SIMPSON should receive payment out of the proceeds of the sale of the railroad and the securities issued thereon and after NEGLEY should receive "*all moneys advanced or expended by him on*

account of said railway company or the construction thereof," which amounts should include costs of litigation and expenses in contests then pending in the courts named " and for which either party hereto may be liable, *which said repayments shall be made on the presentation of vouchers and the settlement of accounts thereon, showing actual payment by each party hereto*" then the net profits shall be divided as follows :

" The said *Thomas P. Simpson* shall retain sixty-six and two-thirds per cent. ($66\frac{2}{3}$) of said net profits, and shall pay or deliver, as the case may be, to said *James S. Negley* thirty-three and one-third per *cent. of said net profits*," this to be paid to *Negley* " in addition to the amounts of money expended by him," and on such payment, *Negley* is to deliver up to *Simpson* " any evidence of indebtedness now or then existing between said railroad company and himself, by or on account of the subject matter aforesaid."

It was further agreed that the claim of *Negley* against the railroad company for right of way and moneys advanced, " shall remain intact until the happening of the contingency aforesaid," and in the event of an attempt by the railway company or its Receiver to collect unpaid stock subscriptions due " by the said *James S. Negley* or parties acting with him or his interest, then the said *James S. Negley* shall have the right to default or offset his said claim against, and as a defense to, the said claim, on account of his stock subscription, *though in no wise to affect the consideration as provided as aforesaid.*"

It is further agreed that after a sale of the railroad whereby title " shall vest in the parties hereto," no sale or disposition of the railroad, by lease or otherwise, or of the securities, should be made without joint consent.

IT IS ALSO AGREED THAT IF A SETTLEMENT OF THE CLAIM OF THE SAID THOMAS P. SIMPSON AGAINST SAID COMPANY SHALL BE MADE WITH OR WITHOUT SUIT, JUDICIAL SALE, OR OTHERWISE, THE AMOUNT OF SUCH SETTLEMENT SHALL ALSO INCLUDE ALL MONEYS ACTUALLY EXPENDED BY SAID JAMES S. NEGLEY, AS SHOWN BY HIS VOUCHERS THEREFOR.

And to the due and faithful performance of these covenants, each party hereto doth bind himself, his heirs, and assigns (Rec., pp. 3–6 inc.).

After the Contract.

Negley's Action.

After the making of the Simpson-Negley contract *Negley* took no further steps in his suit for the right of way, and took no further steps in any of his other suits to recover for advances made to the company.

The railroad company obtained a dismissal of his right-of-way suit, and all of his claims against the railroad company became valueless by reason of non-prosecution of said suits and the sale of the road in the *Simpson-Newcastle Northern Railroad* litigation, as hereinafter stated.

Simpson's Death.

Thomas P. Simpson died the 26th day of July, 1886, and Harriet N. Simpson was appointed executrix of his last will and testament, which was duly probated in the Probate Court of Essex County, the day of , 1888, and by said will all the property of the deceased was devised and bequeathed to the said Harriet N. Simpson.

The Simpson-New Castle Northern Litigation.

Meanwhile the proceedings in the suit of certain shareholders suing under the name of the *Railroad Company* against *Simpson* to cancel the building contract and the excess bill of Simpson against the Railroad Company for the contract price had gone on (Rec., pp. 28–30). These litigations resulted in a judgment annulling the *Simpson* building contract, but adjudging that the railway company pay the fair value of the work done thereunder by *Simpson* (Rec., p. 29, fol. 10).

Reference was had to a Master, and thereafter it was adjudged that the *company* should pay *Simpson* $56,644.77 (Rec., 29, fol. 10). The *company* appealed to the Supreme Court of the United States, and filed a bond. On application of a judgment creditor and the Receiver of the road it was decreed that the road should

be sold pending the appeals; proceeds to be held in Court to abide the appeal. Two orders for sale were made, two sales had and the sales set aside. Finally a third order for sale was had, and on January 12th, 1887, the road was bid in by Johnson and his associates for $30,000 (Rec., pp. 29, 30).

On January 19th, 1887, the appeal to the United States Supreme Court was dismissed on consent of the appellant. On January 28th, 1887, Johnson applied to set off the amount of the Simpson judgment against his bid for the purchase of the road, and on April 8th, 1887, an order was entered allowing Johnson and the other purchasers of Simpson's judgment to set off that judgment against the balance of the purchase money due on the bid, and on January 8th, 1889, final order for distribution of funds was entered (Rec., p. 30 and p. 79).

The Relations Between Simpson and "Certain Parties Stockholders in Said Railroad Company."

Immediately after the execution of the Simpson building contract dissensions arose between different members of the Board of Directors of the New Castle Northern Railway Company. The board became split into what was known as the *Negley party* and the *New Castle party*.

The Negley party, also known as the Simpson party because they acted with him and in his interest, consisted of *James S. Negley, Jr.*, *Frank Hummings* and *General James S. Negley*, the plaintiff below; the New Castle party, also known as the Wallace party, consisted of *Noble Holton*, *Forbes Holton*, *A. G. Negley*, *J. S. Newell*, Charles Wallace and *Daniel H. Wallace* (Rec., p. 44, fol. 10).

The Wallace party desired to cancel the *Simpson building contract*.

The *Negley party* desired to affirm it (Rec., p. 44, fol. 20).

Suit was begun by the Wallace faction to cancel the Simpson building contract (Rec., p. 44, fol. 20; Rec., p. 55, fol. 46), and by Simpson to enforce it.

Suits were also begun between the two rival boards (Rec., p. 48, fol. 10; p. 57, fol. 30; p. 58, fol. 10). The *New Castle or Wallace board* made a new contract with *Weaver* for the building of the road, and the shares of that board were transferred to *John C. Wallace* as trustee for a syndicate (Rec., p. 50, fol. 20).

This syndicate was composed of *Chester R. McFarland* and *Charles S. Wallace* (Rec., p. 51, fol. 20). Certificates representing these shares held by the syndicate were written out for distribution for the following named parties: *George W. Johnston*, 510 shares; *E. A. Wheeler*, 100 shares; *L. Raney*, 100 shares; *P. L. Kimberly*, 100 shares; *J. N. Fallis*, 400 shares; *J. C. Stanton*, 10 shares; *Norman Martin*, 10 shares; *H. A. McGoun*, 10 shares; *J. H. McClure*, 100 shares; *Daniel Egan*, 40 shares (Rec., pp. 50 and 51, fol. 40), and the stockholders, consisting of *Chester R. McFarland* and *Charles S. Wallace*, on January 11th, 1886, elected the following officers:

George W. Johnston was elected president; *L. Raney, M. S. Marcus, P. L. Kimberly, Chester R. McFarland, Charles S. Wallace* and three others elected directors (Rec., p. 52), and this board held a meeting on the 16th day of January, 1886 (Rec., 53, fol. 10). These parties thus became the successors in interest of the *New Castle or Wallace board*, and of the stockholders who had been fighting *Negley & Simpson* in regard to the *Simpson* contract. Before this time the *Weaver* contract had been canceled by consent (Rec., p. 76, fol. 10), and the *New Castle or Wallace board* had authorized the company's solicitor to appeal from the *Simpson* judgment to the United States Supreme Court *(Id.)*.

The Settlement.

September 2, 1886, *Mrs. Harriet N. Simpson*, as executrix of *Thomas P. Simpson*, agreed to assign to *Peter L. Kimberly, Leander Raney, G. W. Johnson* and *M. S. Marcus*, the *Simpson* judgment (Rec., pp. 76-78), and she assigned that judgment on that day to those parties.

The factions in the Board of Directors had been known as the *Negley* and *Wallace* factions, and *Charles S. Wallace had been the leading spirit in the fight and still owned and controlled nearly all of the stock, and had interested the other parties named with him in the enterprise under him* (see Testimony of Charles S. Wallace, Rec., pp. 43 to 55, and especially pp. 52 and 53).

This New Castle board had been carrying on the litigation against Simpson and the appeal to the United States Supreme Court (Rec., pp. 55-68, fol. 10), and *shortly after this transfer*, namely, January 19th, 1887, *the ap-*

peal to the United States Supreme Court was dismissed on the consent of the appellant (Rec., p. 30, fol. 10).

On January 28, 1887, an application was made *by the purchasers* of the *Simpson* claim to set off the amount of it against their bid for the road at the sale, and on April 8, 1887, an order was entered *allowing Johnson and the other purchasers of Simpson's judgment to set off that judgment against the balance of the purchase money due on their bid* (Rec., p. 30, fol. 10, p. 79, fol. 30).

Negley heard of this settlement in 1888, and at once demanded payment of his claim under the contract (Rec., p. 31). In answer he received a note from Mr. *John W. Taylor*, attorney, saying that the matter had been referred to him and he would receive any communication. In answer to a subsequent letter, Mr. Taylor wrote: "*Mrs. Simpson (as I am informed)* WHEN SHE SETTLED HER CLAIM *had no knowledge of your claim, and she is yet without the slightest information as to the amount of it.*

"As I understand the clause referred to, Mr. Simpson was to settle your claim in connection with the settlement of his own, not to pay your claim if and when his own was settled" (Rec., p. 33).

In a subsequent letter Mr. Taylor says: "*My information from Mrs. Simpson is that she was not aware of your claim* WHEN SHE SETTLED" (Rec., p. 33, fol. 30).

Thereupon *Negley* brought this suit, alleging such "*settlement*" and breach, etc.

ARGUMENT.

The Assignments of Errors.

There are four assignments of errors which raise the following questions:

1st. *That the covenant sued on is a personal one* (Rec., p. 98, fol. 20).

2d. *That no "settlement" is proved* (Rec., p. 98, fol. 30).

3d. *That Negley cannot recover his claim against the railroad company on a breach by Simpson* (Rec., p. 99, fol. 10).

4th. *That the damages are nominal* (Rec., p. 99, fol. 20).

The 3d and 4th assignments raise the same question, viz., What are the damages? *Nominal* or *substantial?*

The use of the word *claim* in referring to Negley's claim against the railroad under this assignment of errors is misleading.

In this action nothing is sought to be recovered, nothing has been recovered, but Negley's "*moneys actually expended, as shown by his vouchers therefor.*"

The *claim* for the right of way, some $114,000 in bonds and stock was to be taken care of under the first contingency mentioned in the contract, viz., Simpson's buying in the road. This never happened. The "*moneys actually expended*" were to be repaid on the second contingency—Simpson's settling his claim. This happened.

POINTS.

I.

The covenant sued upon is not a personal one.

To this objection that the covenant is personal the learned Supreme Court make this answer:

"*We see no reason for thinking so. There was certainly no express covenant for his personal services, and it is to be implied that an agent or representative, empowered to settle Simpson's claim, could properly examine Negley's vouchers and include their amount in such settlement*" (26 Vr., 399).

Rec., pp. 93, 94, fols. 30-10.

This is concise and conclusive.

If any further argument were needed, the following considerations sustain the conclusion of the Court:

In the first place:

The parties did not intend that the covenant should be personal; they express themselves to the contrary, "and to the due and faithful performance of these covenants each party hereto doth bind himself, his heirs and assigns (Rec., p. 6, fol. 30).

"A testator, by including his heirs, does not exclude his executors. The personal representatives are liable, even when the heirs are mentioned and when they are not mentioned."

Note to Chamberlain vs. Dunlop, 22 Amer. St. Rep., 807-815, citing McClure vs. Gamble, 27 Pa. St., 288.

"The presumption is that the party making a contract intends to bind his executors and administrators, unless the contract is of that nature which calls for some personal quality of the testator, or the words of the contract are such that it is plain no presumption of the kind can be indulged in" (PECKHAM, J., in Chamberlain vs. Dunlop, 126 N. Y., 45).

This was an action to recover damages for an alleged breach of covenant to rebuild contained in a lease executed to plaintiff by defendant's testator. It was held that the executor was liable on this covenant, citing cases from Coke down.

In the second place:

There is no analogy between this case and the concert hall singer case, or the case of a painter or teacher, because there is no personal skill or discretion contracted for.

It is true a personal act is called for, viz., a settlement of a claim.

Since, however, the time of the settlement and the amount of the settlement are fixed and ascertained by the contract, this covenant is more like a covenant to build a house, or to pay rent, or to pay for goods de-

livered, mentioned in the note in 22 Am. St. Rep., 807–815, than the covenants for personal services referred to.

No discretion being vested in the covenantor as to the time or amount of the settement, the essentially personal quality does not enter into the covenant.

THE CONTINGENCY IS SPECIFIED, LIMITED and DETERMINED, namely, "*a settlement of the claim of the said Thomas P. Simpson.*" THE AMOUNT of the SETTLEMENT IS ALSO ASCERTAINED, DEFINED and SETTLED, viz., at least an amount that shall include "*all moneys actually expended by said James S. Negley, as shown by his vouchers therefor.*"

In the third place. The very form of expression used by the parties to express the covenant precludes the idea of a personal act. It does not say "if I settle my claim against the company, I will settle your claim at the amount of fifty cents on the dollar," but it says, "if a settlement of the claim of the said Thomas P. Simpson against said company shall be made with or without suit, judicial sale or otherwise, the amount of such settlement shall also include all moneys actually expended by said James S. Negley as shown by his vouchers therefor." The language is broad enough to include the "settlement of the claim" by whomsoever the same may be effected—an assignee, an executor or otherwise.

The parties contracted with reference to the claim as an asset to be dealt with apart from the person who might at any time own it.

Could a covenant of this kind be made more clearly impersonal on the face of the contract without saying so in express words?

II.

The facts proved show that Mrs. Simpson has settled Simpson's claim within the meaning of the contract.

The argument can not be put more concisely than it has been in the opinion of the Court below. They say:

The first objection made against a recovery by the plaintiff is that the facts do not show "a settlement" of Simpson's claim against the company, within the meaning of the contract; that having been merely transferred to Johnson and others, it was not settled, but remained in full vigor against the corporation.

We think, however, that by the term "settlement," the parties meant any arrangement between Simpson and his opponents in the pending litigation, by which Simpson's concern in the litigation should end. It was their design that, in making any such arrangement, Simpson should not only be empowered, but should also be bound, to include Negley's claim for money expended, so that Negley might have, as an additional security, the likelihood that Simpson and his adversaries would adjust their differences. Perhaps if Simpson's adversaries had paid him the full amount of his decree, that would not have been a "settlement made" within the meaning of this contract, for in that event Simpson would have had no power to include Negley's claim, and it is hardly to be supposed that he contracted to do what it was evident he could not possibly do; but under any other conditions, where his consent was necessary for a settlement, it was his duty to withhold consent, unless Negley's claim was paid. Whether his settlement was made directly with the corporation or indirectly with the stockholders behind the corporation, who were contesting his claims, could not have been deemed important by either Negley or Simpson.

Negley vs. Simpson, 26 Vr., 399.
Rec., p. 93, fols. 10–30.

If any further argument is needed, the following reasons sustain the above conclusion.

A.

This covenant in the contract is to be read in the light of the recitals and surrounding circumstances. When the contract was entered into *both Simpson* and *Negley claimed that they* were NOT *fighting the New Castle Northern Railway Company*, BUT *a certain faction of its stockholders and directors;* and the fact that the "settlement" meant in the contract was a settlement to be made, not with the company, the corporate entity, but in substance with certain stockholders in the company, clearly appears from the recital in the contract.

"WHEREAS LITIGATION IS NOW PENDING IN WHICH CERTAIN PARTIES, STOCKHOLDERS IN SAID RAILROAD COMPANY, ARE SEEKING THE CANCELLATION OF SAID CONTRACT (Rec., p. 2, fol. 40).

Hence the settlement the parties had in mind was a settlement which was expected to be made with the opposing faction of stockholders.

Had Mrs. Simpson assigned her judgment to the New Castle Northern Railway Company there would be no question but that she had settled her claim within the meaning of this contract, although the transaction might, as to form, be put in the shape of a written assignment from her to the company, instead of a receipt in full or a release from her to the company.

In like manner, when the recitals and the surrounding circumstances all show that the company was the shadow, and the opposing faction of stockholders the substance with which the fight was waged, and with which a settlement was expected to be had, the fact that Mrs. Simpson assigned her claim to those stockholders or their successors instead of giving a release or a receipt in full cannot affect the true nature of the transaction as constituting a settlement of her claim within the meaning and intention of the parties under this contract. A sale, therefore, or assignment of the Simpson claim, to this opposing faction, or the succes-

sors in the litigation of this opposing faction, is a settlement of this claim within the meaning of the contract.

EQUITY REGARDS *the substance, and not the form of the transaction.*

Thus, the sale of a note by a pledgee at auction, but according to prior understanding, under a power of sale given in the pledge, to the maker of the collateral note, is a compromise—not a sale under the power—and is unauthorized; and the pledgee is bound to account to the pledgor for the par value.

Zimpleman vs. Veeder, 98 Ill., 613, 615.

But, however this may be, the assignees of Simpson's claim having set off that claim against their liability as purchasers on a bid for the road upon a sale made to pay the Simpson claim, the claim of Thomas P. Simpson against the company was unquestionably settled.

Rec., p. 79, fol. 30.

B.

As stated in the foregoing statement of facts, *the plaintiff proved a settlement of the Simpson claim by proving the following facts:*

1st. Dissensions between two factions of directors and stockholders in the New Castle Northern Railway Company (Rec., p. 55, fol. 10).

2d. That the New Castle or Wallace faction fought the Simpson contract until the transfer hereinafter mentioned *(Id.)*.

3d. That, by tansfers of stock, Charles S. Wallace practically became the sole holder of the stock interests of the New Castle faction (Rec., p. 51, fol. 20; Rec., p. 52, fol. 20).

4th. That he interested George W. Johnston et al. with him in the company (Rec., p. 50, fol. 40; p. 52, fol. 10).

5th. That after judgment for Simpson the *Wallace* faction appealed to the U. S. Supreme Court (Rec., p. 56, fol. 10; p. 76, fol. 10).

6th. That Charles S. Wallace, George W. Johnston and the others named were the parties to whom Mrs. Simpson assigned her claim (Rec., p. 53, fol. 30) for about $30,000 (Rec., p. 54, fol. 40; for the assignment see Rec., pp. 77, 78).

7th. Shortly afterwards, the New Castle Board dismissed the appeal to the United States Court on consent of the appellant (Rec., p. 30, fol. 10).

8th. And afterwards, by order of the Court, Johnston, Wallace and their associates, assignees of the Simpson judgment, were allowed to set off the judgment against the balance due on the purchase money (Rec., p. 30, fol. 10; p. 79, fol. 30).

C.

UNDER THE FOREGOING CIRCUMSTANCES IT IS CLEAR THAT THE CLAIM OF THOMAS P. SIMPSON HAS BEEN SETTLED.

Webster thus defines settle: "settle v.t. * * * * * * 18. To adjust; to close by amicable agreement or otherwise; as, to settle a controversy or dispute by agreement, treaty or by force.

"19. To adjust; to liquidate; to balance, or to pay; as, to settle accounts."

"Settlement n. * * * 9. Adjustment; liquidation; the ascertainment of just claims or payment of the balance of an account.

"10. Adjustment of differences; pacification; reconciliation; as, the settlement of disputes or controversies."

At this time with whom was there a dispute? Not with the railroad company, but with certain stockholders of the railroad company. The settlement intended then was a settlement with them or any of them —any act whereby Simpson should receive his money and get out. Chas. S. Wallace was the leader of the Wallace faction, then fighting Simpson and Negley. An assignment of Simpson's claim to Chas. S. Wallace and others was, therefore, a settlement of that claim within the meaning of this contract—whether Simpson gave a receipt in full to the railroad

company or executed an assignment of the claim to these other stockholders, is a matter of mere form, and not the substance of the transaction. When the defendant was paid for the claim of Simpson by any of those fighting him in the litigations mentioned in the contract; she "*settled*" that claim according to the meaning of the parties when they used that word. Even if it should be held that an assignment by Simpson of his claim to the parties with whom he was fighting was not a settlement, the fact remains that when Simpson's assignees set-off Simpson's claim against the purchase money due by them on their bid, the claim of Thomas P. Simpson was settled within the meaning of this contract, and the condition upon which the covenant sued upon became operative, was performed.

Even if this were not true the defendant is still liable in damages to the plaintiff upon the covenant sued upon, upon the clear ground that there is an implied contract in the contract sued upon that Simpson will not so deal with his claim that it shall be out of his power to bid in the property or to settle it. In other words, if the assignment of the claim to the same parties Simpson was fighting does not amount to a settlement, it is a breach of the implied covenant not to deal with his claim in such a way as to prevent his retaining the control over it for the purposes mentioned in the contract.

McIntyre vs. Belcher, 14 Com. B. (N. S.) 654.

It is, however, impossible to take any other view of the substance of this transaction, than the view, that the assignment to the other parties who were fighting the claim and the subsequent set-off of the claim against the purchase money due on the bid, was a settlement of Simpson's claim.

D.

MRS. SIMPSON IS ESTOPPED TO CLAIM THAT SHE HAD NOT SETTLED THIS CLAIM.

When Negley, before suit brought, inquired of Mrs. Simpson as to this matter, she, through her attorney, advised him that she had "*settled*" her claim (Rec., p. 32, fol. 40 ; Rec., p. 33, fol. 30), but denied liability on other grounds. There was then no pretense that this assignment was anything different from its real nature, *i. e.*, a settlement.

Negley having sued on this statement of facts, it would seem Mrs. Simpson should be held to her own admission as to the nature of this transaction made before suit brought and on the faith of which the action was begun.

E.

There is only one other point to be noticed. The Court says that perhaps, if Simpson's adversaries had paid him the full amount of the decree, that would not have been a "settlement made." In answer we say :

In the first place,

That case is not before the Court.

In the second place,

We respectfully submit that the payment of the claim by Simpson's adversaries, or the obtaining of a judgment on the Simpson claim, appealed from, and appeal pending, could not in any manner affect or impair Simpson's liability on this covenant.

Had the defendants in the suit paid to Mrs. Simpson $56,000 in full and refused to pay anything in settlement of Negley's claim, Mrs. Simpson would still have been liable on her covenant to settle Negley's claim in connection with her own under the familiar rule : "*That when a man contracts to do a thing possible at the time, the subsequent impossibility does not discharge his liability on the covenant.*"

Leake on Contracts, p. 693.
Pollock on Contracts (Walds. Ed.), *360.
School Trustees vs. Bennett, 27 N. J. Law, 513.

In fact, the same objection might be raised to this covenant from the time it was made, namely, that the defendant in the suit might, before judgment, have paid the full amount the plaintiff Simpson claimed, and refused to settle the Negley claim; yet, on another familiar principle, Simpson would have been liable, namely: "*One who contracts for the doing of a thing by another is liable, although that other refuses to perform the contract.*"

Pollock on Contracts (Wald's Ed.), *356, 357.
Leakes' Digest of Contracts, p. 697.
Brogden vs. Marriott, 2 Bing. N. C., 473.

Again, it is settled law that a judgment appealed from is still a claim so far in dispute as to admit of a valid accord and satisfaction upon the payment and acceptance as such in full of a sum less than the amount due.

Boffinger vs. Tuyes, 120 U. S., 198.

In this case no appeal had been taken, but one was threatened; and, pending the expiration of the time to appeal, payment of a part of the judgment accepted in full discharge was held to be a valid accord and satisfaction.

III.

Error is alleged on the holding that on the settlement Negley became entitled to recover from the executrix the amount of his claim against the railroad company, although such claim had not been included in the settlement, etc.

This assignment refers either to the rule of damages or to a question raised below as to the illegality of defendant's claims against the railroad, or to a question somewhat insisted upon, that *non constat*, Negley's

claims against the railroad company were still intact after the settlement.

In the first place :

The question of the illegality of Negley's claims against the railroad company cannot arise.

The claim here made is not on the original causes of action for right of way, etc., but under the stipulation for " *moneys actually expended* " for the railroad company. *The distinction* is between *cash expenditures* and loans to the railroad company and *Negleys claims, as claims* for the agreed price of property transferred.

The Pennsylvania Statute refers to " *materials and supplies.*" A cash loan is neither within the letter nor the spirit of this provision, and the corporation is unquestionably liable to repay the same.

Moyer vs. Penn. Slate Co., 71 Penn. State, 293, 297, 298.

See, further, Armstrong vs. Am. Ex. National Bank of Chicago, 133 U. S., 433.

In the second place, as to the argument that there is no loss because Negley's claims against the company are still good, the answer is :

1ST. *We have proved* a complete wiping out of all the assets of the company under the Simpson suit, judgment and sale.

2D. *By an implied* covenant in this instrument Negley was not to take any further steps on his claims against the company.

POINT IV., subdivision 2D B.

IV.

Negley is entitled to substantial damages.

The Court below say :

" The last position of the defendant to be noticed is that Negley's claim remains unaffected by the settlement of Simpson's claim, and therefore his loss is only nominal.

" The general rule for the measurement of damages on the breach of contract is that the damages shall be such as will put the party in the same situation, pecuniarily, as he would have occupied if the contract had been performed. For this the defendant's contention seems to substitute a rule which will only leave the plaintiff no worse off than he would have been if the contract had not been made. Such a rule would deny to the plaintiff the benefit of his contract. It leaves out of view the right of the plaintiff to performance. If Simpson had performed his express covenant with Negley, he would have received the amount of Negley's claim for money expended, and the law would then have imposed upon him the duty of paying that amount to Negley. Negley can now be put in the same situation only by the law's laying upon Simpson's executrix the same duty (26 Vr., 399)."

(Rec., p. 94, fols. 10–20.)

This conclusion is sustained by the following considerations :

1st.

The defendant, having settled her claim without protecting the claims of Negley for moneys expended, has committed a willful breach of a covenant under seal.

In determining the measure of damages allowed, no presumption should be indulged in favor of the wrongdoer.

Note that although the defendant pleads ignorance of the existence of the contract between Negley and Simpson (see Answer, Rec., p. 8, fol. 20), it appears in the proof that she had possssion of a duplicate of the contract (see Stipulation, Rec.. p. 11, fol. 20), and letter of Mr. Taylor to Negley (Rec., p. 32, fol. 30).

2nd.

The True Construction of the Contract.

A.

On referring back to the prior portions of the contract we find that they draw a *sharp distinction* between the *moneys actually expended* by James S. Negley for the right of way, expenses of suits, engineering, etc., and *the agreed consideration contracted to be paid by the Railroad Company to James S. Negley for the conveyance of right of way* (mentioned in the contract as being $114,000). The repayment of this contracted amount of $114,000, or rather "securing him a fair and reasonable compensation" for the same, is only provided for under the provisions of the contract, dependent upon the first contingency expressed in it—*namely, the contingency of Thomas P. Simpson buying the property.* With the amount agreed to be paid by the railroad company to James S. Negley for the right of way ($114,000) we, therefore, *in this case, and in the suit herein brought upon the covenant in question,* HAVE NOTHING TO DO.

This suit is brought merely to recover the amounts that had been "*actually expended by James S. Negley*" for rights of way and other expenses in the litigations, etc., for and on behalf of the New Castle and Northern Railway Company; and, upon the trial of this action, plaintiff proved that he had expended for the right of way $3,900 for which he held a bond of the railroad company, and, on other items, some thousands more,

running up the total to about seven or eight thousand dollars with interest from 1883.

These items are, however, now covered by the stipulation above referred to, and we are limited to the compromise amount therein agreed upon, namely, $5,000, as the amount expended, with interest.

The result is that the question now to be argued before the Court is simply this: For the breach of the covenant sued upon is the plaintiff entitled to recover the sum of $5,000, with interest, the amount of moneys actually expended by him on behalf of the New Castle Northern Railroad Company, or is he merely entitled to recover nominal damages?

The covenant sued upon might be construed in two different ways:

FIRST. That it means that if Thomas P. Simpson settled his claim against the New Castle Northern Railroad Company, he should pay to James S. Negley out of the amount received by him on such settlement the amount actually expended by James S. Negley.

SECOND. That if Thomas P. Simpson settled his claim against the New Castle Northern Railroad Company he would also at the same time settle the claims of James S. Negley against that road at the amount specified, namely, the "actual amount expended by James S. Negley as shown by his vouchers therefor."

Upon the question of damages involved in this case, it is immaterial which construction of the covenant is adopted.

In either case we claim the rule of damages to be exactly the same, namely, WHAT THE PLAINTIFF WOULD HAVE RECEIVED HAD THE COVENANT BEEN PERFORMED.

And that would have been, in either case, the repayment to him of the "*moneys actually expended by him* as shown by his vouchers therefor."

B.

IN CONSTRUING THIS CONTRACT WE MUST DO SO IN THE LIGHT OF THE SITUATION OF THE PARTIES AND THEIR RELATIONS TO THE NEW CASTLE NORTHERN RAILROAD COMPANY.

It appeared, from the evidence, that *Simpson* and *Negley* were the only two men who had put any money into the enterprise, and that *Simpson* held the construction contract for the building of the road out of which the profits were to be derived, and that one of his covenants contained in that building contract was a covenant on his part to purchase rights of way on behalf of the railroad company, and expend therefor an amount not exceeding $25,000 (9th Clause of Contract, Rec., p. 22, fol. 20). Thereafter litigation arose between certain stockholders on one side, and *Simpson* and *Negley* on the other side, and it is evident, from the recitals, that this contract was entered into by *Simpson* and *Negley* for the mutual protection of their interests in the road. It was supposed that *Simpson* would probably buy the road in on a judicial sale; and this being the probable outcome of the situation, nearly the whole of the contract is taken up with what would be the rights of the parties under such circumstances. In that event they were to be secured as follows: Both parties were to be repaid the amounts of money actually expended by them as shown by their vouchers therefor, and *Simpson* was to be trustee for *Negley* "*to secure to him a fair and reasonable compensation or consideration for the right of way*" transferred by *Negley* to the *company*, and, after these repayments, the net profits were to be divided—two-thirds to *Simpson*, and one-third to *Negley*. It was further agreed that the claim of *Negley* against the *company* on account of right of way or money advanced should remain intact until the happening of the contingency aforesaid; but that *Negley* might use it as an offset in case

he was sued upon his stock subscriptions. Upon a demurrer to the first declaration herein hitherto argued, it was objected that the contract showed upon its face that there was no consideration for the covenants entered into by *Simpson*, and the Court held that this implied covenant on the part of *Negley* to keep his claims as unadjusted, unsettled claims against the company until the contingency mentioned, was practically a covenant not to further prosecute his claim, and formed a full consideration for the agreement.

Negley's covenant not to sue the railroad company is unquestionably implied

(a) from the express language used in the clause allowing Negley to use his claim only as an offset in case of suit brought on the stock subscriptions (Rec., p. 6, fol. 10).

Randall vs. Lynch, 12 East., 179.
Great Northern R. R. Co. vs. Harrison, 12 C. B., 575.
Saltoun vs. Houston, 1 Bing., 433.
Booth vs. Cleveland Rolling Mill Co., 74 N. Y., 15–21.
Jones vs. Kent, 80 N. Y., 585.

(b) from the clause requiring Negley in case Simpson bought the railroad to "*deliver up to said Thomas P. Simpson* any evidence of indebtedness now or then existing between said railway company and himself by or on account of the subject matter aforesaid" (Rec., p. 5, fol. 40).

And this construction is rendered all the more certain when we reflect that under the contingency of *Simpson* buying in the property, which the parties expected would happen, it was to the mutual advantage of both that the expenses and liens against the company should be kept at the lowest possible amount by actively prosecuting only one of the claims, and that the setting aside of *Negley's* claim for right of way, including a claim of vendor's lien for unpaid purchase

money, which might underlie the building contract, was an exceedingly valuable consideration to *Simpson*.

The vendor's lien exists in Pennsylvania.

Eichelberger vs. Gitt, 104 Pa. State, 64.

THERE WAS ANOTHER CONTINGENCY that the parties did not expect to happen, but still provided for, namely, the possibility of *Simpson* settling his claim with or without suit, judicial sale, or otherwise. *In that event* in all probability, a smaller amount than par would be received; and the parties make no provision for any profits, or for any other *claims as such*, except that it is stipulated that the amount of the settlement shall include "all moneys actually expended by *James S. Negley*, as shown by his vouchers therefor."

C.

The intention of the parties clearly was to give *Simpson* the power to settle these claims at any time on this basis.

And, whether we construe the "inclusion" to mean the inclusion of the amounts advanced by *Negley* in the moneys received in settlement of the *Simpson claim*, or the inclusion of both claims *as claims* in the total amount settled for, we arrive at the fact that the "*inclusion*" was intended for only one purpose, which was "*to secure and repay*" (see last recital, Rec., p. 4, fol. 20) to *Negley* the amounts actually expended, and implies a covenant on the part of *Simpson*, upon the happening of the event, to repay *Negley* the amounts expended by *Negley*, as shown by his vouchers.

Unless this was so, the whole covenant would be meaningless (see cases cited above on implied covenants).

Recitals properly influence construction of covenant.

Burr vs. American Spiral Spring Butt Co., 81 N. Y., 175.

D.

In view of the recitals and the whole tenor of this contract, it is evident that what the parties meant by this clause was, that if Simpson settled his claim, he would also settle Negley's claims at the amounts actually expended. Had the covenant been performed, *Simpson* would have held for the use of *Negley* the moneys received on such settlement.

If *Simpson* has broken this covenant by settling his claim without settling *Negley's* claim at the same time, or has assigned his claim in such a manner as to render it impossible for him to settle both claims at once, he has broken this covenant.

The rule of damages for the breach of this covenant is the same in either case; NOT *what the value* of the moneys actually expended by *Negley* as a claim against the company would be, BUT, *the benefit that would have accrued to Negley* through the performance of the contract, *namely*, the payment of the moneys actually expended. Looked at in the light of the rule of damages that, for the nonsettlement of *Negley's* claims along with his own, we are entitled as damages to the value of *Negley's* claims *as claims in eo nomine*, we would have to take into consideration the value of the claim of $114,000 against the railroad company for right of way. By the careful distinction made in different parts of the contract between Negley's *claims as claims and his right to reimbursement for moneys actually expended;* we see that the rule of damage *in this case should be repayment of advances;* and *not indemnity for loss* upon claims as such. Under the conditions named, under which Simpson was expected to accept less than the par value of his claim, Negley was to waive the par value of his and accept a fixed sum in lieu thereof.

ON THE BREACH OF THIS COVENANT IT IS THAT FIXED SUM TO WHICH WE ARE ENTITLED AS DAMAGES, AND NOT THE PROBLEMATICAL VALUE OF THE CLAIMS AS CLAIMS.

The whole contract is entered into with the view to

avoid just such questions, and to settle just such matters between the parties once and for all.

See cases cited in POINT IV., *subdivision* 3D below.

E.

There is only one argument that can be advanced for a different measure of damages on the breach of this covenant than the repayment of the amounts actually expended, and that is that the claims of *Negley* against the company were still intact, and their value as claims against the company is the measure of damages for the breach. If this be the true measure of damages, we have proved by the stipulation a valid claim against the company to the extent of five thousand dollars. We have shown that through the observance by *Negley* of his implied covenant not to prosecute these claims they became valueless by the judgment on the Simpson claim and sale under it, purchase of the road by bidders and setting off of the Simpson judgment against the balance due on the purchase.

There is evidence in the case of the value of this roadbed as being over $100,000 (Rec., p. 67, fol. 20). The value of our claim as a claim is at least equal to the value of the *Simpson* claim as a claim, as shown by the compromise, since a portion of our claim, viz., that as to the purchase price of the right of way *was an underlying lien* hostile to the *Simpson* claim. And hence we, in this view, are entitled to substantial and not nominal damages, and, since no presumptions should be indulged in in favor of the wrong-doer, our damage should be assessed at the amount we would have received had the contract been performed.

But this is not the true way to arrive at the measure of damages in this case, for several reasons: It is clear that the parties intended any settlement made on the part of *Simpson* to be a settlement made on the part of both parties. Under the first contingency of *Simpson buying in*, it was expressly agreed that *Negley* should transfer his claims on full payment to *Simpson*. Under the second contingency of *Simpson's* settling, whichever way the covenant is construed, it is a power to *Simpson* to settle, *not only his own claim, but both claims, provided the amount of the settlement should be at least equal to the amount actually expended by Negley*. It was, therefore, in the intention

of the parties that, on a settlement of *Simpson's* claim, *Negley's should also be settled and compromised, and no longer remain outstanding against the company, Negley* taking his fixed amount in such settlement as stated, as his share of the settlement.

We are, therefore, entitled at the trial, and on this hearing, to tender to *Mrs. Simpson*, and do tender to *Mrs. Simpson* an assignment or transfer of all of *Negley's claims*, upon her paying to us, under the contract, the amount actually expended and due, which she became liable to pay when she settled her claim without settling ours. In other words, on the breach of this contract by her, we are entitled to receive as damages the benefit which we would have received had she duly performed the contract, and are not relegated to any question *of the value of our claims* AS CLAIMS against the company.

THE PARTIES ENTERED INTO THIS CONTRACT FOR THE EXPRESS PURPOSE OF PROTECTING THEIR CLAIMS AGAINST THE COMPANY, AND TO PREVENT ALL FUTURE QUESIONS BETWEEN THEM AS TO PRIORITY OR RESPECTIVE VALUES OF THEIR RESPECTIVE CLAIMS, AND THIS INTENTION SHOULD BE GIVEN EFFECT. In other words, the contract here on the part of *Simpson*, under the contingency of his settling his claim, is a contract to also settle our claim at the amount actually expended, and pay us that amount, and not a contract to indemnify us against loss by reason of our not having prosecuted our claims to judgment and execution, and his not having settled the same.

See POINT IV. subdivision 3D below.

F.

The contention of Mrs. Simpson's counsel is based upon the construction of this covenant, that it is a covenant to settle and indemnify; our construction is that it is a covenant to settle and pay; and a covenant which becomes binding as soon as the condition happens, namely, when Simpson's claim is settled. On this point the argument of Mrs. Simpson's counsel could have been used with equal force to construe the covenant "*to bid the amount of the judgment*" in the

Wicker vs. Hopper case, as a covenant "*to bid and indemnify*" against the loss, instead of a covenant "*to bid and pay.*" The Supreme Court of the United States in that case held that the clear intention of the contract was a covenant to pay and not to indemnify, *for the promisee covenanted to have his judgment paid by the bid, and not to be put to further steps to collect the judgment.* The analogy between the two cases is perfect.

A promise to settle a liquidated demand is a promise to pay.

Stilwell vs. Cope, 4 Denio, 225.

a.

THE LEARNED COUNSEL FOR MRS. SIMPSON CLAIMS WE HAVE HERE MERELY THE RELATION OF PRINCIPAL AND AGENT FOR THE SETTLEMENT OF NEGLEY'S CLAIM.

This is not so. *Simpson* is a contractor, not an agent in settling. The *distinction* between an agent and a contractor, is that the agent is bound by instructions from his principal or by revocation of his authority. After this contract was made *Simpson* had an absolute right to settle *Negley's* claims *at that amount* when he settled his own ; and *Negley* was bound to recognize such a settlement, and could not revoke the authority or withdraw from the contract.

This covenant that Negley's claim should, in the event stated, be settled at the amount stated, was reciprocally binding and enforceable.

A contract whereby it was " agreed " to sell property at a certain price, signed by both parties, is binding on the other as a contract to buy.

Barton vs. McLean, 5 Hill, 256.

The cases of damages for non-collection of claims between principal and agent have, therefore, no application to the facts of this case.

The following reasons show those cases have also *no bearing on the principle* involved here. *In the first*

place, the liability established by those cases is a mere liability dependent upon the *status* of principal and agent, and not upon any express contract made between them. That *status* is presumed to imply a contract to collect, and of course the damages on the failure to collect are always the value of the claim and nothing else. There is no other value mentioned. *If now we had a case of principal and agent where the agent entered into an express contract that in case he collected his own claim he would collect on his principal's claim an amount not less than fifty per cent.*, we would then have a case in point; and the damages would no longer be the value of the principal's claim as a claim, but the amount the agent agreed to collect upon the conditions specified. *It is this express covenant upon a certain condition to do a certain thing, resulting in a return to Negley of the moneys actually advanced, that distinguishes this case from the mere case of the status of principal and agent.* Those cases, therefore, have no application.

The whole intention and meaning of this contract is that Negley shall stand aside with his claim while Simpson realizes on his; and, when Simpson realizes in either of the ways that the parties thought probable, he was to take care of Negley by giving him his proportion under the first condition, or repay him his advances under the second condition. The clear intention that Negley was never to be put to the prosecution of his claims or demands against the company in either event, and that Negley accepts the covenants of Simpson to protect and secure him under either of these conditions in lieu of actively prosecuting his own claims, is apparent. *It is also clear that the parties never intended Negley, in case Simpson broke his covenants, to proceed any further in prosecuting his claims against the company; because, in view of the time when these covenants would be broken, such prosecution would then be absolutely useless.*

b.

The cases cited on the learned brief of Mrs. Simpson's counsel as cases of damages against collection agents

have no application to the case in hand. The nearest approach to analogous facts in the case of a collecting agent arises in the *del credere* commission cases. In the ordinary cases of collection agents the damages for negligence are undoubtedly the actual loss sustained, which is measured by the value of the claim as a claim. The contract of a collection agent is to use diligence in collection. The contract of a *del credere* commission merchant is :

"If I sell your goods to a purchaser, I will obtain payment from him, and in default thereof will pay myself the amount he agreed to pay."

This promise is strikingly like the covenant sued upon in this case. The damages for non-collection in the case of a *del credere* commission merchant are not the value of the claim against the purchaser, but the amount the purchaser agreed to pay. In the only case of a collection agent having a true analogy to the case in hand, the rule of damages is, therefore, as contended for by the plaintiff's counsel, and not as contended for by the defendant's counsel.

THE COVENANT IS, *if my claim is settled, such settlement shall include a settlement of your claim at the amount you have actually expended.* It is similar to a covenant that, if John Smith walks from New York to Albany, I will obtain from Thomas Jones a settlement of Smith's claim against Jones at fifty cents on the dollar. When the condition is performed the obligation becomes absolute and the damages are not the value of a claim as a claim, but the amount which, under the contract, would be received in settlement.

Where a carrier of goods or other agent delivers goods without collecting charges, he is held liable for the amount he should have collected.

3 Sutherland on Dam., 13.

Where the insured employed a factor or agent to settle with the insurers as for a total loss, and an abandonment was made, and the agent, through mistake or

misapprehension, settled for 20 per cent. *Held*, the agent was liable to the principal for the whole loss.

3 Suth. on Dam., 14.
Rindle vs. Moore, 3 Johns. Cas., 36.
Kempker vs. Robler, 29 Iowa, 274.

3d.

DAMAGES SHOULD BE MADE SUCH AS WILL PUT THE PARTY IN THE SAME SITUATION, PECUNIARILY, AS HE WOULD HAVE OCCUPIED IF THE CONTRACT HAD BEEN PERFORMED.

A.

In other words, the measure of damage is the benefit that the plaintiff would have received if the contract had been good: "He should, so far as money can do it, be placed in the same situation as if the contract had been performed."

Leake on Contracts (English Ed.), pages 1044–45, citing Baron PARK in Robinson vs. Harmon, Exchequer, 1855.

Adopted in

Locke vs. Furze, L. R., 1 C. P., 441; 35 L. J., C. P., 141.

and in

Engell vs. Fitch, 38 L. J., Q. B., 306.
Wall vs. City of London Co., L. J., 9 Q. B., 253 *Id.*, 43 L. J., Q. B., 75.

It is added that in assessing damages, "the plaintiff is entitled to the benefit of such presumptions as, according to the rules of law, are made in courts, both of law and equity, against persons who are wrongdoers in the sense of refusing to perform and not performing their agreements—every reasonable presumption may be made as to the benefit which the other party might

have obtained by the *bona fide* performance of the agreement."

Leake on Contracts, page 1045.
Lord SELBOURNE in Wilson vs. Northampton & Banbury Rwy. Co., 43 L. J. C., 505.

The general rule of damages is to put plaintiff in the same condition as if the contract had been performed or tort not committed.

1 Sedg., 34 (7th Ed.), Note A.

In Wall against City of London R. R. Co., BLACKBURN, J., says the rule should be "what the pecuniary amount is of the difference between the present state of things and what it would have been if the contract had been performed."

Wakeman vs. Wheeler & Wilson Mfg. Co., 101 N. Y., 205.
Warren Chem. Mfg. Co. vs. Holbrook, 118 N. Y., 506.

B.

The following cases are illustrations of the application of the foregoing general rule.

(**a**) Thus in Robinson vs. Harman,

1 Ex., 850, it was held that where, a party agrees to grant a valid lease knowing he has no title, he is liable for damages for the loss of the bargain, and the rule of Flureau vs. Thornhill does not apply, and knowledge on the part of the plaintiff of the defect is immaterial.

PARKE, B., thus lays down the law: "The rule of the common law is that where a party sustains a loss by reason of a breach of contract he is, so far as money can do it, to be placed in the same situation with respect to damages as if the contract had been performed."

The rule of *Flureau vs. Thornhill* is not followed in

this State, if vendor knew of flaw in title when contract was made.

Drake vs. Baker, 34 N. J. Law, 359.

(**b**) In an action brought against the executors of a landlord who had given a renewal lease to commence *in futuro* for the consideration of four hundred pounds down and a rental of one hundred and seventy-five pounds per year for twenty-one years, it appeared that the landlord had died, and it was then found he had no title to give this renewal (the renewal was only good during his life, if he had lived). Plaintiff, in order to get the same premises, had to make a new lease at a higher rental with the reversioner—namely, a lease for seven years at three hundred pounds per year. It was claimed that plaintiff was only entitled to recover against the executors of the lessor the deposit of four hundred pounds when the lease was made, and expenses (plaintiff had never gone into possession, the lessor died during the *interesse termini*).

Plaintiff's counsel claimed that the damages were equal to the difference in value of the two leases, namely, fifteen hundred pounds. The Judge instructed the jury according to the latter view. Motion to set aside verdict rendered was denied, and, on appeal to the Exchequer Chamber, decided in 1866, the following opinions were given:

MARTIN, Baron, quotes PARKE, B., in 1 Exchequer, and says: "The deceased by this contract bound himself for the existence of a certain state of things, and, if it is to be altered, why should he not pay the difference?" * * * Page 144: "*Prima facie* THE PLAINTIFF WOULD BE ENTITLED TO BE PLACED IN THE SAME SITUATION AS IF THE CONTRACT HAD BEEN PERFORMED; and I am of the opinion that the Court of Common Pleas were right."

BLACKBURN, J., says: "The general rule is, as laid down by BARON PARKE, * * * that where a contract is broken the injured person is, so far as money can do it, to be placed in the same situation with re-

spect to damages as if the contract had been performed. This is the amount of the damages where the contract would give the actual enjoyment of the thing, and it is immaterial whether the contract is as to real or personal property."

Locke vs. Furze, 35 L. J. C. P., 141 (Ex. Ch., 1866).

(**c**) In a case of an agreement whereby tenant in view of landlord being about to buy adjacent property surrendered an entrance to his premises, and the lessor covenanted to give another entrance and make alterations, and the lease was to contain a covenant for quiet enjoyment, and the alterations were made, but the third party stopped up the new entrance and no new lease was given, and the tenant brought an action for damages against the lessor for not granting the use of the new entrance,

Held : "That the rule of Flureau vs. Thornhill did not apply, and that plaintiff was entitled to more than nominal damages, namely, to damages equal to the difference between the present state of affairs and what the contract would have given him if performed." The damages claimed in the case were loss of profits on luncheon bar and expenses of building it, etc., and made useless by having no entrance.

Wall vs. City of London Real Prop. Co., 9 Q. B., 253.

(**d**) Where a defendant gave an option to resign a living and the life of incumbent was worth ten years' purchase, and the life of the purchaser's nominee was worth fourteen years' purchase, and jury gave damages of the value of the life of the purchaser's nominee, Held, that this was proper. That the damages equaled the value to the plaintiff of the living if the contract had been performed.

Lord Sondes vs. Fletcher, 5 B. & A., as explained in Mayne on Damages, pp. 21 and 22.

(**f**) The Cabbage Seed cases illustrate the same principle that on a breach of a contract the damages are arrived at by ascertaining the difference between what the plaintiff would have had by the performance of the contract and by its default.

Passinger vs. Thorburn, 34 N. Y., 633-4.
White vs. Miller, 71 N. Y., 118.
Walcott vs. Mount, 36 N. J. Law, 262.

The recovery of profits for breach of building contracts is another example of the same principle.

Boyd vs. Meighan, 19 Vr., 404, 407.
Citing Masterton vs. Mayor of Brooklyn, 7 Hill, 61.
Christie vs. McNeal, 48 N. J. L., 404.

In the case of an assignment of a judgment with a covenant of its existence, and that a certain amount was due on the judgment; it was held that the damages equalled the leviable property of the judgment debtor, which he had at the time of the assignment, thus placing the plaintiff in the same position he would have been in if the judgment had been good.

Jansen vs. Ball, 6 Cowen, 628.

The Court of Appeals of New York say: "The rule may be definitely drawn from numerous cases *that where indemnity only is expressed, damages must be sustained before a recovery can be had;* BUT A POSITIVE AGREEMENT TO DO AN ACT WHICH IS TO PREVENT DAMAGES TO THE PLAINTIFF WILL SUSTAIN AN ACTION WHERE THE DEFENDANT NEGLECTS OR REFUSES TO DO SUCH ACT."

Rector, etc., Trinity Church vs. Higgins, 48 N. Y., 532, 537, and cases cited.

Where plaintiff (as in the case at hand) is to receive not money, but a transfer of services or property, then the value of the original consideration is not to be inquired into; but the value of the property or services is the measure of the damages, BECAUSE THIS IS THE REMUNERATION FIXED BY THE AGREEMENT.

1 Sedg. on Damages, 437 (7th Ed.).

On this principle, where plaintiff agreed to work until she was twenty-one or married, and defendant's testator agreed to leave her, in his will, a portion which should be equal to any that he left any of his children, HELD, that the measure of damages for the breach of that contract was the value of the portion promised, and not the value of the services.

Frost vs. Tarr, 53 Ind., 392.

Where, as between a grantor delivering a deed to a grantee, the grantee agreed that out of a portion of the consideration money then withheld he would discharge a mortgage on the premises, and the grantor sued on this promise, and it was proved the grantor, by reason of grantee's default, had not had to pay the mortgage, but had given a new one, and it was objected that no damage was proved, the Court held the grantor "was damnified to the whole extent of the failure by the grantee to appropriate to the discharge of the Douglas mortgage the consideration money left in his hands for that purpose."

Bolles vs. Beach, 22 N. J. Law, 680, 696.

The party whose duty it is to insure as agent for another who does not do so, is held in damages as an insurer himself.

2 Sedg. on Damages, 57.

The following two cases strongly illustrate the principle contended for:

A bankrupt owing a banker put cash in his hands to meet certain bills. The banker applied the cash on debts owed to him by the bankrupt. Plaintiff sued as assignee of the bankrupt in bankruptcy. Held, he could recover.

Hall vs. Smith, 12 M. & W., 618.

In another case defendant agreed to discount a bill of a bankrupt drawn on himself for six hundred pounds, retaining one hundred pounds and discount, and to pay

the rest to the bankrupt. In an action by the assignee in bankruptcy against the defendant,

POLLOCK, B., held: "But this is not a case of trover, but of breach of contract. The defendant promised to deliver to the bankrupt the amount of the bill minus one hundred pounds and discount. The bankrupt would have to receive that sum, and his assignees are entitled to recover the same amount which he would have been entitled to receive had he continued solvent by reason of the breach of the contract."

Aldner vs. Keighley, 15 M. & W., 117 and 119.

Mayne on Damages (Eng. Ed.), 69.

C.

The construction put by the Court below upon this contract was "that it is a covenant on the part of Simpson that he will not settle with the company, unless in that settlement the company shall also include the settlement of the claims of Negley."

Reference to the contract will show that the settlement of Negley's claims was not left at an unliquidated amount but should "include all moneys actually expended by said James S. Negley, as shown by his vouchers therefor."

Had the covenant been performed Negley would have been entitled to sue defendant as for money had and received to his use, to that amount, but no more. It amounts to a covenant to settle Negley's claims at a sum not exceeding his actual expenditures. The covenant having been broken, the plaintiff is entitled, as damages under the foregoing decisions, to be placed in the same position, so far as money can do it, as if a contract had been performed, namely: the benefit he would have received from defendant had she performed the contract.

This is a contract to settle and pay, not a covenant to indemnify, and the distinction is well drawn in the cases cited under the next point.

D.

There are two cases in the books in principle, on all-fours with the rule of damages herein contended for.

"The contract was that the defendant in error should procure judgment against Chapin & Co., levy upon the machinery and fixtures and dispose of them, and that the plaintiff in error should bid for them the amount of the judgment." * * * "Instead of the property selling for the amount of the judgment, Hoppock (defendant in error) was the only bidder, and the property sold was struck off to him for a nominal sum." * * * "The Court below instructed the jury on the question of damages as follows: 'If you shall believe that the plaintiff can recover under the facts and under the circumstances, and under the instruction of the Court, then I think the measure of damages would be the amount of the judgment and costs which the defendant agreed to pay, and interest from the time such bid should have been made.'"

On appeal, the Supreme Court of the United States held this instruction correct, and Justice SWAYNE used the following language:

"If the contract in the case before us were one of indemnity, the argument of the counsel for the plaintiff in error would be conclusive. In that class of cases the obligee cannot recover until he has been actually damnified, and he can recover only to the extent of the injury he has sustained up to the time of the institution of the suit. But there is a well-settled distinction between an agreement to indemnify and an agreement to pay. In the latter case a recovery may be had as soon as there is a breach of the contract, and the measure of the damages is the full amount agreed to be paid." * * * "In the case before us, as in the cases referred to, the defendant made a valid agreement in effect to pay certain specific liabilities. They consisted of the judgments of Hoppock against Chapin & Co. If Wicker had fulfilled, the judgments would have been

extinguished. As soon as Hoppock performed, the promise of Wicker became absolute. No provision was made for the non-performance of Wicker and the further pursuit by Hoppock of the judgment debtors. Indemnity was not named. That idea seems not to have been present to the minds of the parties. The purpose of Hoppock, obviously, was to get his money without the necessity of proceeding further against Chapin & Co. than his contract required. There is no ground upon which Wicker can properly claim absolution. He removed and keeps the property he was to have bought in. The consideration for his undertaking became complete when it was exposed to sale. The amount recovered only puts the other party where he would have been if Wicker had fulfilled, instead of violating, the agreement.

"The rule of damages given to the jury was correct."

Wicker vs. Hoppock, 6 Wallace, 94.

In a grant of land the grantee covenanted to sink a pit for 130 yards in search of marketable coal, and in case a vein was reached to pay the plaintiff twenty-five hundred pounds. Plaintiff sued for a breach of this covenant and proved by a mineral surveyor that in his opinion a marketable vein might have been found by sinking a pit at 130 yards. It appeared that the cost of sinking would have been twenty-six hundred pounds. The Judge charged that the plaintiff had the right to have a pit sunk to the depth of 130 yards and that the jury were entitled to give as damages, either the cost of sinking the pit or the twenty-five hundred pounds which would have been due had the vein been found. The jury assessed the damages at twenty-five hundred pounds. On a motion for a new trial on the ground that the Judge should have left it to the jury to estimate the value of the contingency, PARKE, Baron, thought that the damages of the twenty-five hundred pounds was correct, but not the cost of sinking the pit, and said, "but at all events this is a case of more than nominal damages; and, as the defendants have been instrumental in preventing the discovery of marketable coal, they ought to pay the

plaintiff such an amount as he has lost by their neglect to perform their covenant, and that the true measure of damages was the amount lost by plaintiffs being deprived of the opportunity of finding marketable coal."

Pell vs. Shearman, 32 Eng. Law (in Equity), 496 (Ex. 1855).

In the case in hand the contingency of the settlement of the claim of Thomas P. Simpson against the company, equivalent to the recovery of judgment and sale in the Wicker vs. Hoppock case, has happened, and defendant's agreement to settle Negley's claims at the amount actually evpended by him is equivalent to Wicker's agreement to bid the amount of the judgment and defendant is liable to the plaintiff on an implied covenant to pay that amount to the plaintiff with the same force and effect as if the contract had been duly performed.

AND THE CASE OF PELL AGAINST SHERMAN ABOVE CITED, SHOWS THAT DEFENDANT'S NEGLECT TO SETTLE THE CLAIM OF NEGLEY AT THE SAME TIME WHEN SHE SETTLED HER OWN, IN NO WAY AFFECTS THE RULE OF DAMAGES.

DEFENDANT IS STILL LIABLE TO PAY TO THE PLAINTIFF THE AMOUNT HE WOULD HAVE RECEIVED HAD SHE PERFORMED HER COVENANT TO SETTLE.

V.

In conclusion, we can only urge upon the Court the hardship and injustice that would result from a ruling here that Negley is entitled to only nominal damages.

A solemn contract, with elaborate recitals of mutual interest and intent to protect and vesting of entire con-

trol of joint interests in one man, is willfully broken by that man. Real, substantial loss has, in fact, resulted to the covenantee.

Is it possible that the rules of law as to damage are so technical and unjust that this damage cannot be recovered?

Is it possible that this willful breach of a solemn covenant, under seal, will be allowed to go unpunished?

It is not too much to say that, if any technical rule of law stands in the way of a substantial recovery of damages under the facts of this case, the sooner such rule is overruled and relegated to the limbo of exploded precedents, the better for the law. But, as shown above, the rules of law, equity and common sense coincide and dictate a recovery of substantial damages in this case.

VI.

For the reasons stated above the judgment in the Circuit Court in favor of the plaintiff below, James S. Negley, and against the defendant below, Harriet N. Simpson, as executrix of Thomas P. Simpson, deceased (rendered in conformity to the advisory opinion of the New Jersey Supreme Court), should be affirmed with costs.

WALLIS, EDWARDS & BUMSTED,
Attorneys for Defendant in Error.

R. FLOYD CLARKE,
Of Counsel.

Ward & Tichenor, Law Case Printers, 832-834 Broad St., Newark, N. J.

N. J. Court of Errors and Appeals.

HARRIET N. SIMPSON, Executrix, &c.,

v.

JAMES S. NEGLEY.

On Error, &c.

BRIEF FOR PLAINTIFF IN ERROR.

I.

PLEADINGS.

(See *Case*, p. 1, and *seq.*)

I. Declaration of July 28, 1887:

Alleges that on June 5, 1884, Thomas P. Simpson, now deceased, and the said plaintiff, made an agreement in writing under seal, "whereby it was agreed, among other things, that in the event of a compromise and settlement of a certain claim of said Simpson, therein mentioned, said compromise and settlement was to include the moneys actually expended by said plaintiff in relation to the matters in said agreement set forth."

That the plaintiff "paid, laid out, loaned, advanced and expended for and on account of The New Castle Northern Railroad Company for the said right of way or the construction thereof, and including the costs of litigation and extraordinary expenses occasioned by the contests then pending in the courts of Lawrence county and the United States Court for the Western District of Pennsylvania, for which either the said Negley or the said Thomas P. Simpson was liable, certain sums mentioned in said contract, and to be included in said

settlement, amounting to the sum of nine thousand dollars"

That the plaintiff presented his claim to the defendant July 16, 1887, "and then and there demanded that she, the said defendant, should include the amount thereof in any settlement which she, the said defendant, might make with said railroad company, of the claim of the estate of the said Thomas B. Simpson, deceased."

BREACH.

"That the said T. P. S., during his lifetime, nor the said defendant, after his decease, did not become the owner of said railroad property and franchises, by judicial sale or otherwise, and that, after the decease of the said T. P. S., to wit, on the sixteenth day of July, A. D. 1888, at Newark, aforesaid, said defendant made a settlement of the said claim of said T. P. S. against the said New Castle & Northern Railroad Company mentioned in said contract, for the sum of twenty-five thousand dollars in cash, and the said sum of twenty-five thousand dollars in cash was paid to her, and received by her, as such executrix, in pursuance of such settlement," * * and "that the said defendant did not and would not, upon her settlement aforesaid, with the said railroad company, include therein the moneys, or any part thereof, so advanced, paid, laid out and expended by the plaintiff."

II. PLEAS, as follows:

1. *Non est factum.*

2. That the defendant "did not make a settlement of the said claim of the said T. P. S. against the said New Castle & Northern Railroad Company," &c.

3. "That the settlement of the said claim of the said T. P. S. against the said The New Castle & Northern Railroad Company, was made by her, to

wit, on the second day of September, in the year 1886 (and not at the time in the said declaration in that behalf mentioned,) and on the day when, by a decree of the Circuit Court of the United States for the Western District of Pennsylvania, in a cause therein depending, and wherein the said railroad company was complainant, and the said Thomas P. Simpson was defendant, the property and franchises of the said railroad company were ordered and publicly advertised to be sold, by auction, to the highest bidder, at New Castle, in the county of Lawrence and State of Pennsylvania, for the payment (among other things) of the said claim of the said Thomas P. Simpson against the said company, and although the said plaintiff well knew that the said property and franchises were ordered and publicly advertised to be sold on the day and year last aforesaid, and that the said defendant on that day attended, or would probably attend, at the time and place appointed for said sale, to effect a settlement of said claim, by means of such sale or otherwise, and although she was entirely ignorant of the existence of said articles of agreement, or of any claim being held or pretended by the said plaintiff against the said railroad company, yet the said plaintiff did not, until long after the date appointed for such sale and the date of the settlement of her said claim, notify her that he held any claim against said railroad company, for moneys expended by him or otherwise, or show or produce any vouchers for moneys expended, or request her to effect a settlement of any such claim in connection with that of the said Thomas P. Simpson, deceased, or call her attention to the existence of said articles of agreement. And this she is ready to verify.

"Wherefore she prays judgment if the said plaintiff ought to have or maintain his aforesaid action thereof against her," &c.

4. "That the said plaintiff did not pay, lay out,

loan, advance or expend, for and on account of the said railroad company, the sum of nine thousand dollars, * * * or any sum whatever, nor have any lawful claim against the said railroad company for money paid, laid out, loaned, advanced or expended on its account."

6. "That the said supposed covenant, so as aforesaid alleged to have been broken, is not binding or applicable to this defendant; and of this she puts herself upon the country," &c.

II.

THE COVENANT SUED ON.

"It is also agreed that if a settlement of the claim of the said Thomas P. Simpson against said company shall be made, with or without suit, judicial sale or otherwise, the amount of such settlement shall also include all moneys actually expended by said James S. Negley, as shown by his vouchers therefor."

(*Case*, p. 6, l. 23, and *seq.*)

III.

THE ISSUES.

I. Under the *first* plea, *non est factum.*

This is filed to put the plaintiff to proof of the execution of the contract, and to elicit the place and circumstances of the execution so far as possible.

II. Under the *second* plea, viz: "That the defendant did not make a settlement of the said claim of the said T. P. S. against the said New Castle Northern Railroad Company," &c.

1. The burden of proof is, of course, on the plaintiff.

2. There was no *settlement* ever made by the defendant with anybody. There was simply an *assignment* of the decree in favor of said Simpson, upon his claim, to other parties, as follows:

"For value received, I hereby sell, assign and transfer the decree in favor of Thomas P. Simpson in the above case, (being the cause in which it was made,) and all money secured thereby to G. W. Johnson, P. L. Kimberly, M. S. Marguis, L. Raney and C. S. Wallace.

"Witness my hand and seal this 2d day of September, 1886."

(See *Case*, p. 78.)

3. An assignment is defined as follows:

"A transfer of property to another for himself or creditors. The idea is essentially that of a *transfer* by one party to another of some species of property or valuable interest."

Anderson's Dictionary of Law, *Voc.* Assignment.

"A transfer or making over to another of the whole of any property, real or personal, in possession or in action, or of any estate or right therein."

Bouvier's L. D., *Voc.* Assignment

"Assignment signifies a conveyance of the interest a man has in an estate or chose in action.

Abbott's L. D., *Voc.* Assignment.

4. On the other hand, *settlement* is thus defined:

"As between debtor and creditor, settlement, or a settlement, will usually be considered to mean an adjustment; a liquidation of amounts due."

Abbott's L. D., *Voc.* Settlement.

See also the word "Settle" in *Anderson* and *Bouvier*.

5. It is thus apparent that the ideas conveyed by these two words are totally different, having no element in common.

The *settlement* of a *claim* is an *adjustment* or *extinguishment* of it. The *assignment* of a *claim* is not, in any sense, an extinguishment or adjustment of it. It is simply a *transfer* of it by which one person becomes the holder of it in place of another.

6. Besides, the litigation referred to in the contract and in the argument, was at the suit of the *railway company itself*, and not by individual stockholders or directors on behalf of the company.

See *New Castle Northern Railroad Co.* v. *Simpson*, 21 Fed. Rep., 533, and the remark of the Court on page 537: "*They, however, are not the complainants. This suit is by the corporation.*"

See S. C., 23 Fed. Rep., 214, and 26 Fed. Rep., 133.

7. A *settlement* could be made only with the *corporation*—the *dominus litis*—and thereby only could the strife be ended or settled.

8. The transaction in question, instead of being a *settlement*, was an *assignment* of the defendant's decree.

9. The claim of Thomas P. Simpson having merged in that decree, thereupon ceased to be, in any proper sense, *a claim*; and the covenant in question thereupon became inoperative.

10. The decree of the Federal Court, which extinguished Simpson's claim, was not the act of Simpson.

If the complainant in the suit in which the decree was entered, had paid Simpson the full amount of his decree, that would not have been a "settlement made," within the meaning of the contract in question.

The decree having been made, Simpson, or his executrix, was free to collect the whole or any part of the amount thereof, or otherwise dispose of the

same as he or she should see fit, and to make the most of that decree, independently of Negley, who was not entitled to share in the same.

11. It follows that, by the *assignment* of the ~~claim~~ decree, there was *no settlement*, and therefore no breach of the covenant.

III. Under the *third* plea.

This plea avers that the defendant was unaware, at the time of the alleged settlement, of the existence of the articles of agreement and covenant in question; that the plaintiff, while aware of it, and knowing that a sale under the decree was advertised, did not inform her of the existence of any such contract or covenant.

IV. Under the *fourth* plea the defendant denies that the plaintiff advanced or expended money for or on account of the said railroad company, or had any lawful claim against the same, for money advanced or paid, &c., for or on its account.

(See Bill of Particulars, *Case*, p. 40.)

VI. Under the *sixth* plea, the defendant denies that the covenant is binding on or applicable to her, and insists that the covenant was "personal" to the testator, and within the maxim "*Actio personalis moritur cum persona.*"

1. By an examination of the recitals and provisions of the contract, it will appear that the covenants entered into by Mr. Simpson were contemplated and intended to be performed by him alone.

(See these recitals and provisions.)

2. The concluding clause, binding the "heirs and assigns" of the respective parties, does not make the plaintiff in error liable.

(*a.*) It does not embrace executors or administrators.

(*b.*) If applicable to the plaintiff in error at all, it

would bind her only for the testator's breach of the covenant in his lifetime.

AUTHORITIES.

"The personal representatives * * * are liable as far as they have assets, on all the covenants and contracts of the deceased broken in his lifetime, and likewise on such as are broken after his death for the due performance of which his skill or taste was not required, and which were not to be performed by the deceased in person."

Broom's Maxims, (7th Ed.) 907.

"The proposition * * that executors or administrators are liable on every contract of the deceased, although they be not named, must be understood as not extending to cases where the contract is personal to the testator or intestate; for in such instances no liability attaches upon the executors or administrators, unless a breach was incurred in the lifetime of the deceased. Thus, if an author undertakes to compose a work, and dies before completing it, his executors are discharged from this contract; for the undertaking is merely personal in its nature, and by the intervention of the contractor's death, has become impossible to be performed."

3 *Williams on Executors*, (P.'s Ed.) 1725.

See *Schouler on Executors*, Sec. 278.

"One who stipulates to serve another in person, or to do for him anything else which cannot be done by proxy, or for another's doing a thing of this nature, is released, if the act of God, in the form of sickness or of death, prevents the doing; no action can be maintained against him or his administrator, as for a breach of contract."

Bishop on Contracts, Sects. 600, 601, 602.

2 *Chitty on Contracts*, (11th Ed.) 1411, and cases cited.

Hare on Contracts, 647, 648.

Pollock on Contracts, (Am. Ed.) 367, &c.

In contracts for personal services, it is an implied condition, that the death of either party shall dissolve the contract.

Farrow v. *Wilson*, L. R., 4 C. P. 744.

A contract to build a lighthouse was held to be *personal*, on the ground of its being a matter of personal skill and science.

Per PATTERSON, *J.*, in *Wentworth* v. *Cock*, 1 Da. & E. 45.

Contracts for personal services, whether of the contracting party or of a third person, requiring skill, and which can only be performed by the particular person named, are not, in their nature, of absolute obligation under all circumstances, but are subject to the implied condition that the person named shall be able to perform at the time specified; and if he dies, or without fault on the part of the covenantor, become unable to perform, the obligation to perform is extinguished.

Spalding v. *Rosa*, 71 N. Y. 40.

See also *Dickinson* v. *Calahan's Adm'rs*, 19 Penn. St., 227—a case very analagous to the present.

Arkansas Smelting Co. v. *Belden Co.*, 127 U. S., 379; 5 Am. & E. Cyc. of Law, 136, and note 3.

In the case of *Dickinson* v. *Calahan's Administrators*, *supra*, the following is a syllabus, showing the case in short:

One party, a lumber manufacturer, agreed to sell to the other, a lumber merchant, all of the lumber to be sawed at his mill during five years, and that the quantity should be equal to an average of 300,000 feet in a year,

without stipulating for any fixed quantity in any one year ; the lumber to be paid for as delivered. Before the five years elapsed, both parties died. In a suit by the administrators of the vendor against the executor of the vendee, for lumber delivered by the administrators to the executor under the contract, it was held, that the contract between the original parties was merely a personal relation which was dissolved by the death of either party to the contract ; that the administrators were not bound to fulfill the contract for the remainder of the time, and were liable only for breaches of it committed by the intestate in his lifetime, and not for failing to deliver lumber after his death.

In the case now before the Court, if it be held that Simpson was bound by the covenant in question to render any service to Negley, it is apparent that the settlement to be made by Simpson was to be the result of the employment of Simpson's knowledge and the exercise of Simpson's skill and experience in the building of railroads and in the financial management of such business, such skill being aided by Simpson's knowledge of the parties with whom he and Negley had been dealing in the construction of the railroad in question.

The case thus falls directly within the principle of the authorities cited.

IV.

THE QUESTION OF DAMAGES.

The damages are claimed for an omission, in the settlement of the intestate's claim against the railroad company, to collect, or procure a settlement of the claim of the plaintiff against that company "on account of moneys advanced" by him, as alleged.

First. The plaintiff is not entitled to any damages whatever.

1. The defendant did not make a "settlement" of the intestate's claim against the railroad company.

(See observations and authorities *ante*, under 2d plea.)

2. The covenant in question was *personal*, and not binding on the defendant.

(See observations, &c., under 6th plea.)

Secondly. The defendant, at most, is liable for only nominal damages.

Negley's claim was not assigned to or even put under the control of Simpson, nor did Simpson have any interest in it, but all the time it belonged to and was under the control of Negley, who alone could sue it or enforce it, and who alone could settle it, except in one remote contingency.

This is the situation independently of the provision we are about to refer to, viz: "that the claim of said James S. Negley against said railroad company, as now constituted, on account of the said right of way or moneys advanced, as aforesaid, shall remain intact until the happening of the contingency aforesaid," &c.

(See the whole clause.)

Under this clause the plaintiff's claim (for right of way as well as for advances,) is to remain "in-

tact''—that is, untouched, unprejudiced, unimpaired —in full force, in the ownership and control of Negley, to be prosecuted or enforced by him, or not, at his will and pleasure.

(See *Webster's Dict.*—"Intact.")

5. If the claim was a *valid* one, the plaintiff could have enforced payment of it himself, and presumably he may enforce it yet; and if invalid, neither the plaintiff nor the defendant could have enforced the collection. Therefore, the claim has not been lost or its collection prejudiced by any fault or omission of the defendant.

For the law, see: 106-107.

1 *Sedgwick on Dam.* (8th Ed.,) Secs. ~~812-814~~.

~~*First Nat. Bank v. Fourth Nat. Bank*, 77 N. Y. 320.~~

Thirdly. Admitting the correctness of the construction put by the defendant in error upon the word "settlement," he is entitled to fare no better than Simpson, and is not entitled to more than $\frac{25}{56}$ of the amount of his (Negley's) claim against the company, (fixed at $5,000.)

HENRY B. TAYLOR,

THOMAS ANDERSON,

Of Counsel.

INDEX.

Essex County Court of the twenty-eighth of July, in the year of our Lord eighteen hundred and eighty-seven.

ESSEX COUNTY, SS. :

HARRIET N. SIMPSON, executrix of the last will and testament of Thomas P. Simpson, deceased, the defendant in this suit, was summoned to answer unto James S. Negley, the plaintiff therein, in an action upon contract, and thereupon the said plaintiff, by Wallis & Edwards, his attorneys, complains, for that, whereas heretofore, to wit, on the fifth day of June, one thousand eight hundred and eighty-four, at the City of New York, to wit, at Newark, in the county aforesaid, the said Thomas P. Simpson, now deceased, and the said plaintiff made and entered into a certain agreement in writing, signed and sealed by each of them, wherein and whereby it was agreed, among other things, that in the event of the compromise and settlement of a certain claim of said Simpson, therein mentioned, said compromise and settlement was to include the moneys actually expended by said plaintiff in relation to the matters in said agreement set forth; a copy of which said agreement is hereunto annexed, marked "Schedule A," and to which reference is hereby made, and the same made a part of this declaration.

That after the making of said agreement as aforesaid, and before the commencement of this suit, the said Thomas P. Simpson departed this life, having first made and executed his last will and testament, wherein he appointed said Harriet N. Simpson the executrix thereof, which said will was duly admitted to probate by the Surrogate of the

County of Essex aforesaid, and the said Harriet N. Simpson duly qualified as such executrix and took upon herself the burthen of such estate.

And the said plaintiff further says that he paid, laid out, loaned, advanced and expended for and on account of The New Castle Northern Railroad Company for the said right of way or the construction thereof, and including the costs of litigation and extraordinary expenses occasioned by the contests then pending in the courts of Lawrence County and the United States Court for the Western District of Pennsylvania, for which either the said Negley or the said Thomas P. Simpson was liable, certain sums mentioned in said contract and to be included in said settlement, amounting to the sum of nine thousand dollars.

And the said plaintiff further saith that he has vouchers for the said moneys so paid, laid out and expended, and heretofore, to wit, on the sixteenth day of July, A. D. eighteen hundred and eighty-seven, at Newark aforesaid, he duly presented his said vouchers for the said advances to the said defendant as executrix as aforesaid, and then and there demanded that she, the said defendant, should include the amount thereof in any settlement which she, the said defendant, might make with said railroad company of the claim of the estate of said Thomas P. Simpson, deceased, as shown by such vouchers.

And the said plaintiff further saith that the said Thomas P. Simpson, during his lifetime, nor the said defendant after his decease, did not become the owner of said railroad property and franchises by judicial sale or otherwise, and that, after the decease of said Thomas P. Simpson—to wit, on the sixteenth day of July, A. D. eighteen hundred and eighty-eight, at Newark aforesaid—said defendant made a settlement of the said claim of said Thomas P. Simpson against the said The New Castle and Northern Railroad Company, mentioned in said contract, for the sum of twenty-five thousand dollars in cash, and the said sum of twenty-five thousand dollars in cash was paid to her and

received by her as such executrix in pursuance of such settlement.

And although the said plaintiff has always since the making of such contract well and truly performed, fulfilled and kept all things in the said contract contained on his part and behalf to be performed, fulfilled and kept, he the said plaintiff saith that the said defendant did not, and would not, upon her settlement aforesaid with the said railroad company, include therein the moneys, or any part thereof, so advanced, paid, laid out and expended by the plaintiff, as shown by his vouchers therefor, according to the form and effect of the said indenture, but wholly refused and neglected so to do, contrary to the form and effect of the said indenture and of the covenant of the said Thomas P. Simpson in his lifetime made as aforesaid.

And so the said plaintiff in fact saith that the said defendant, as executrix as aforesaid (although often requested so to do) hath not kept the said covenant so made by Thomas P. Simpson in his lifetime as aforesaid, but has broken the same and to keep the same hath hitherto wholly neglected and refused, and still doth neglect and refuse, to the damage of the plaintiff fifteen thousand dollars, and therefore he brings his suit.

WALLIS & EDWARDS,
Attorneys of Plaintiff.

Exhibit A.

WHEREAS, Thomas P. Simpson, of Montclair, State of New Jersey, is now engaged in the construction of the railroad known as the New Castle Northern, extending from New Castle, Lawrence County, Pennsylvania, to Middlesex, in the County of Mercer, and State of Pennsylvania, and

WHEREAS, litigation is now pending in which certain parties, stockholders in said railroad company, are seeking the cancellation of said contract, and it is believed

that either in the event of an affirmance of said contract or a cancellation thereof, the claim of the said Thomas P. Simpson, for the contract price for the construction of said railroad, will be followed by a judicial sale of said property and franchises, and

WHEREAS, it is the purpose and intention of the said Thomas P. Simpson, if said property can be purchased for a reasonable amount, to buy the same to secure not only his own claim, but to provide for other claims as hereinafter set forth, and

WHEREAS, General James S. Negley, of the City of Pittsburgh, County of Alleghany, and State of Pennsylvania, the President of said New Castle Northern Railway Company, has furnished to said railway company a certain valuable right of way purchased by the said James S. Negley, personally from William L. Scott, of Erie, and by deed duly executed transferred by the said James S. Negley and wife to the said New Castle Northern Railway Company, for the consideration therein named, to wit: one hundred and fourteen thousand dollars ($114,000), which said deed has been delivered to said railway company, and is now of record in the proper county, and

WHEREAS, it is the desire of the said Thomas P. Simpson, in consideration of the valuable right of way transferred as aforesaid, and in consideration of the payment by said James S. Negley of certain sums of money to and on account of the said New Castle Northern Railway Company to secure to the said James S. Negley the amounts thereof, and in further consideration of the sum of one dollar (1.00) to each in hand paid the one to the other, the receipt whereof is hereby acknowledged.

NOW, THEREFORE, This agreement made this 5th day of June, A. D. 1884,

WITNESSETH:

THAT IT IS MUTUALLY UNDERSTOOD AND AGREED by and between the said Thomas P. Simpson and the said James S. Negley that if the said Thomas P. Simpson shall become the owner of said railroad property and

franchises by judicial sale or otherwise, then, and in that event, the said Thomas P. Simpson shall bear the relation of trustee to the said James S. Negley, for the purpose of securing him a fair and reasonable compensation or consideration for the right of way transferred to said Railroad Company as aforesaid, it being agreed and understood that after the completion of said railroad and the payment therefor, and after the said Thomas P. Simpson shall receive payment in full of the proceeds, either of a sale of said railroad or of securities issued thereon, and after the said James S. Negley shall receive all moneys advanced or expended by him on account of said Railway Company or the construction thereof, which amount shall include all costs of litigation and extraordinary expenses occasioned by the contests now pending in the Courts of Lawrence County, and the United States Court for the Western District of Pennsylvania, and for which either party hereto shall be liable, which said repayments shall be made on the presentation of vouchers, and the settlement of accounts thereon, showing actual payment by each party hereto, then the net profits arising out of the construction of said railroad, the sale or lease thereof, or by negotiation of securities thereof, whether in the shape of bonds, stocks or moneys, shall be divided between the parties hereto in the proportion following, to wit: The said Thomas P. Simpson shall retain sixty-six and two-thirds per cent. ($66\frac{2}{3}$) of said net profits, and shall pay or deliver, as the case may be, to said James S. Negley thirty-three and one-third per cent. of the said net profits, the said thirty-three and one-third per cent. ($33\frac{1}{3}$) to be paid to the said James S. Negley in addition to the amounts of money expended by him, and with the same to be full payment and to be received by him as such for the consideration aforesaid, the said James S. Negley on the making of said payment to deliver up to said Thomas P. Simpson any evidence of indebtedness now or then existing between said Railway Company and himself by or on account of the subject matter aforesaid.

It is also agreed, by and between the parties hereto, that the claim of said James S. Negley against said Railroad Company as now constituted, on account of the said right of way or moneys advanced as aforesaid, shall remain intact until the happening of the contingency aforesaid, and in the event of an attempt on the part, either of said Railway Company or the Receiver thereof, to collect the amounts due or unpaid on account of subscriptions to the capital stock thereof by the said James S. Negley, or parties acting with him, or in his interest, then the said James S. Negley shall have the right to defalk or offset his said claim against, and as a defense to, the said claim, on account of his stock subscription, though in nowise to affect the consideration as provided as aforesaid.

IT IS FURTHER AGREED AND UNDERSTOOD that after a sale of said railroad by judicial sale or otherwise, whereby the title thereto shall vest in the parties hereto, that no sale or disposition thereof, by lease or otherwise, or of the securities to be issued on account of said property, shall be made without the consent and approval of both parties hereto.

It is also agreed that if a settlement of the claim of the said Thomas P. Simpson against said company shall be made with or without suit, judicial sale or otherwise, the amount of such settlement shall also include all moneys actually expended by said James S. Negley, as shown by his vouchers therefor.

And to the due and faithful performance of these covenants, each party hereto doth bind himself, his heirs and assigns.

IN WITNESS WHEREOF, the parties hereto have hereunto set their hands and seals this fifth day of June, A. D. 1884.

THOMAS P. SIMPSON. [L. S.]
JAS. S. NEGLEY. [L. S.]

Signed, sealed and delivered
in the presence of
JAMES H. MCCREERY.
DAVID J. MCNIECE.

ESSEX CIRCUIT COURT.

HARRIET N. SIMPSON, Executrix, &c.,
AGAINST
JAMES S. NEGLEY.
} On Contract.

And the said defendant, by John W. Taylor, her attorney, comes and defends the wrong and injury, when, &c., and says that the said supposed articles of agreement are not the deed of the said Thomas P. Simpson, deceased, and of this she puts herself upon the country, &c.

And for a further plea in this behalf, the said defendant, by leave of the Court here for this purpose first had and obtained, says that the said plaintiff ought not to have or maintain his aforesaid action thereof against her, because she says she did not make a settlement of the said claim of the said Thomas P. Simpson against the said New Castle and Northern Railroad Company, mentioned in said contract, according to the true intent and meaning thereof, in manner and form as in the said declaration mentioned, and of this she puts herself upon the country, &c.

And for a further plea in this behalf, the said defendant, by leave of the Court here for this purpose first had and obtained, says that the said plaintiff ought not to have or maintain his aforesaid action thereof against her, because she says that the settlement of the claim of the said Thomas P. Simpson against the said The New Castle and Northern Railroad Company was made by her, to wit, on the second day of September, in the year eighteen hundred and eighty-six (and not at the time in the said declaration in that behalf mentioned), and on the day when, by a

decree of the Circuit Court of the United States for the Western District of Pennsylvania, in a cause therein depending, and wherein the said railroad company was complainant and the said Thomas P. Simpson was defendant, the property and franchises of the said railroad company were ordered and publicly advertised to be sold by auction to the highest bidder, at New Castle, in the County of Lawrence and State of Pennsylvania, for the payment (among other things) of the said claim of the said Thomas P. Simpson against the said company, and although the said plaintiff well knew that the said property and franchises were ordered and publicly advertised to be sold on the day and year last aforesaid, and that the said defendant on that day attended, or would probably attend, at the time and place appointed for said sale, to effect a settlement of said claim by means of such sale or otherwise, and although she was entirely ignorant of the existence of said articles of agreement, or of any claim being held or pretended by the said plaintiff against the said railroad company, yet the said plaintiff did not, until long after the date appointed for such sale and the date of the settlement of her said claim, notify her that he held any claim against said railroad company for moneys expended by him or otherwise, or show or produce any vouchers for moneys expended, or request her to effect a settlement of any such claim in connection with that of the said Thomas P. Simpson, deceased, or call her attention to the existence of said articles of agreement. And this she is ready to verify. Wherefore, she prays judgment, if the said plaintiff ought to have or maintain his aforesaid action thereof against her, &c.

And for a further plea in this behalf, the said defendant, by leave of the Court here for this purpose first had and obtained, says, that the said plaintiff ought not to have or maintain his aforesaid action thereof against her, because she says that the said plaintiff did not pay, lay out, loan, advance or expend,

for and on account of the said railroad company, the sum of nine thousand dollars, in manner and form as in the said declaration mentioned, or any sum whatever, nor have any lawful claim against the said railroad company, for money paid, laid out, loaned, advanced or expended on its account.

And of this the defendant puts herself upon the country, &c.

And for a further plea in this behalf, the said defendant, by like leave of the Court here for this purpose first had and obtained, says that the said plaintiff ought not to have or maintain his aforesaid action thereon against her, because she says that, by an Act of the Legislature of the State of Pennsylvania, approved, to wit, on the fifteenth day of May, in the year eighteen hundred and seventy-four, it was enacted as follows: "No president, director, officer, agent or employee of any railroad or canal company of this Commonwealth shall hereafter be interested in any contract for the furnishing of any material or supplies to any railroad or canal company, and it shall not be lawful for such president, director, officer, agent or employee to institute or maintain any action at law or suit in equity to recover under such contract for his or their interest therein;" which statute has, from the passage thereof, remained, and still remains, in full force and effect.

And the said defendant says that the said plaintiff was, at the time when his said supposed claims against said railroad company accrued, and the said supposed articles of agreement were executed, president of the said railroad company, and was then, and ever since has been, a citizen and resident of the said State of Pennsylvania, and that the contract, express or implied, out of which said supposed claims against said company arose, or on which they were founded, was in violation of the said statute, and the said claims were unlawful and invalid. And this the said defendant is ready to verify.

Wherefore, the said defendant prays judgment if the

said plaintiff ought to have or maintain his aforesaid action thereof against her, &c.

And for a further plea in this behalf, the said defendant, by like leave of the Court here for this purpose first had and obtained, says that the said plaintiff ought not to have or maintain his aforesaid action thereof against her, because she says that the said supposed covenant, so as aforesaid alleged to have been broken, is not binding on, or applicable to, this defendant; and of this she puts herself upon the country, &c.

JOHN W. TAYLOR,
Attorney for Defendant.

ESSEX CIRCUIT COURT,

MONDAY, DECEMBER 22, 1890.

JAMES S. NEGLEY

vs.

HARRIET N. SIMPSON, Executrix.

Before Hon. DAVID A. DEPUE, J.

For plaintiff appear WALLIS, EDWARDS & BUMSTED and R. FLOYD CLARKE.

For defendant appears JOHN W. TAYLOR.

Mr. Clarke opens for plaintiff and reads stipulation between counsel, dated September 6, 1889, of which the following is a copy, and marked "Ex., p. 1."

"ESSEX CIRCUIT COURT.

"JAMES S. NEGLEY,
"Plaintiff,

"AGAINST

"HARRIET N. SIMPSON, as Execu-
"trix, etc.,
"Defendant.

"It is hereby stipulated and agreed by and between the parties hereto as follows:

"1st. That upon the trial of this action the two original duplicates or counterparts of the contract between Thomas P. Simpson and James S. Negley, dated the 5th day of June, 1884, signed and sealed by them in the presence of James H. McCreery and David J. McNiece as subscribing witnesses, one of which is in the possession of each party to this action, and has been exhibited to the other side and a copy of which is annexed to the declaration in this case and marked "Exhibit A," shall be admissible in evidence, when offered by either, with the same force and effect as if the same had been duly proved.

"2d. That the book purporting to be printed by authority and entitled or named:

"'Brightly's Purdon's Digest (11th Edition, 1885),' a copy of which is in the possession of the attorney for the defendant herein, shall be produced upon the trial of this action, and may be used in evidence by either party as presumptive proof of the laws of the State of Pennsylvania, with the same force and effect as if the

same had been duly proved to be the authorized edition of such laws.

" 6th day of September, 1889.

WALLIS & EDWARDS,
Attorneys for Plaintiff.
Per R. FLOYD CLARKE,
Of Counsel.
JOHN W. TAYLOR,
Attorney for Defendant."

Plaintiff's counsel reads depositions of David S. McNeish, taken in New York City, identifying the contract, the execution of which is admitted in the stipulation above referred to. Marked "Exhibit P 2," being same contract as Exhibit A annexed to declaration.

Plaintiff's counsel offers in evidence articles of association of the Newcastle Northern Railway Company, filed February 1, 1883. Marked "P 3."

Plaintiff's counsel also offers in evidence exemplified copy of deed from William L. Scott and wife, to James S. Negley, dated October 17th, 1881. Objected to as irrelevant. Objection overruled.

Defendant's counsel prays an exception. Exception allowed.

Marked "Exhibit P 4."

Plaintiff's counsel offers in evidence the statute of the State of Pennsylvania in regard to the limitations of actions.

JAMES S. NEGLEY, plaintiff, sworn in his own behalf:

DIRECT EXAMINATION BY MR. CLARKE:

Q. Where do you reside, General?
A. Plainfield, New Jersey.
Q. You are the plaintiff in this suit?
A. Yes, sir.

Q. You knew James P. Simpson?

A. I did.

Q. How long did you know him prior to his death?

A. Six or seven years; about six years.

Q. Did you buy a piece of real estate in Pennsylvania about the year 1881?

A. I did.

Q. From William L. Scott?

A. Yes, sir.

Q. You are the grantee named in this deed from Scott to James S. Negley?

A. Yes, sir.

Q. What was the date of the delivery of that deed?

WITNESS: To the railroad or to me?

PLAINTIFF'S COUNSEL: To you.

A. October 16 or 17, 1881.

Q. Will you state in a general way to the jury the nature of the land included in that deed?

Objected to as irrelevant. Objection overruled.

A. It was a conveyance of the original site, or ground, of the canal—the Erie Canal—between the Town of Middlesex, in Mercer County, and the Town of New Castle, in Lawrence County, a distance of about fifteen or sixteen miles. It comprised most of the low lands on the east side of the Neshanic River, and contained at some points almost all the available land in the valley; at other points a narrow strip along the foot-hills.

Q. What was the length of the tract?

A. About sixteen miles, following the sinuosities of the river. The abandonment of the canal led to the drainage of the valley, and, consequently, this property, which was purchased by Mr. Scott, was conveyed in parcels to different purchasers, and I purchased from him all the remaining portion of the land between Newcastle and Middlesex.

By the Court: Q. Your purchase from Scott was about sixteen miles?

A. Yes, sir.

By the Plaintiff's Counsel: Q. Will you state whether there was any particulars in which that land was especially adapted to railroad purposes?

The Court: I will assume that to be the case. I don't think it would make any difference if it should be shown otherwise. The company bought the land for that purpose, and it is to be presumed they knew what they were buying.

Q. Will you state what you did in regard to putting that land to railroad uses?

Objected to.

The Court: That possibly may present a question in regard to the expenses. I will receive the evidence and consider it after it is in.

Defendant's counsel prays an exception.

The Court: You are not entitled to an exception yet.

Q. Will you state what you did in regard to adapting that land for railroad uses afterward?

A. A company was organized by myself and my friends in February, 1883, for the purpose of constructing a line of railroad connecting with other lines of railroad that I was interested in, between the Town of Newcastle and Middlesex, connecting there with the New York, Pennsylvania and Ohio, a lateral of the Erie Railway.

Q. How long was that road that was incorporated?

A. I think it was fifty miles. It was to extend beyond the Town of Middlesex.

Q. Up to Middlesex about how long?

A. About sixteen miles.

Q. Will you state whether any action was taken by that corporation to locate its line upon this canal bed?

Objected to as not the best evidence.

THE COURT: I think that is competent. It is a fact that this railroad was located.

BY THE COURT: Q. Was any part of it ever built?
A. Yes, sir.

MR. TAYLOR: May I ask counsel why he wants to prove this?

MR. CLARKE: It is to connect the expenditure for the right of way with the expense of forming this company.

MR. TAYLOR: Does the Court consider that he has a right to recover what he paid in 1881, before the railroad was organized, as an advance to the company?

THE COURT: All I can say is that I think this evidence is competent. When I get it all in I will see.

Q. The Company located a new line and built on it; when did they build?

A. They commenced their construction in the spring of 1883—April or May, I believe, of 1883. This line or right of way was a very important connection. Several railroads were endeavoring to procure it.

Objected to.

THE COURT. Proceed.

BY THE COURT: Q. Was any action taken by the Newcastle Northern Railway Company to purchase this right of way from you after the organization?
A. Yes, sir.

Defendant's counsel admits that said purchase of right of way was made as claimed by plaintiff.

BY PLAINTIFF'S COUNSEL: Q. (Paper shown to witness.) Look at the document shown you and state whether you recognize the signature in the certificate to that document.

By the Court (interrupting): Q. Was the consideration money of the transfer of this property to the railroad company by your deed paid?

A. No, sir. I recognize that paper. It is a true copy.

By Plaintiff's Counsel: Q. Whose signature is it?

A. The signature of my son, who was the secretary of the company at that time.

Q. You were the president of the company, were you not?

A. Yes, sir.

Objected to.

The Court: In point of fact it was not paid; that is all that is necessary. It is very plain from this agreement that the parties agreed that it was not paid.

Q. (Paper shown to witness.) Will you look at the document now shown you, and state whether you recognize the signatures upon that document? This is the bond for $3,920 given by the railroad to him for the actual expenditures made?

A. That is the paper.

Q. You have seen these parties write?

A. Yes, sir.

Q. Do you recognize the seal of the company?

A. Yes, sir.

Plaintiff's counsel offers in evidence the paper identified by witness, dated April 24, 1883, marked "Ex. P5," of which the following is a copy:

Exhibit P5.

Whereas, the New Castle Northern Railway Company, by resolution of its Board of Directors, adopted at their meeting, held at the City of New Castle, Penna., on the ninth (9th) day of March, A. D. 1883, purchased from James S. Negley, of the City of Pitts-

burgh, certain property, known as that portion of the Erie Canal extending from a point in the City of New Castle, County of Lawrence, and State of Pennsylvania, to West Middlesex, in the County of Mercer and State aforesaid, for the sum of one hundred and fourteen thousand five hundred and sixty ($114,560) dollars, which resolution and purchase was afterwards, to wit: On the seventeenth (17th) day of April, A. D. 1883, duly approved, ratified and confirmed by all the stockholders of said railway company—

AND WHEREAS, no portion of said purchase money has yet been paid, and the said railway company is desirous that the deed of said premises be delivered to it at once, for the purpose of enabling it to maintain an action or actions against persons trespassing upon said lands, and to permanently establish its rights in relation thereto;

AND WHEREAS, it is a condition of said sale and delivery of said deed that the sum of thirty-nine hundred and twenty ($3,920) dollars of the amount above referred to, with interest at the rate of six (6%) per cent. per annum from April 24th, 1883, shall be paid, principal and interest, to the said James S. Negley in cash, out of the first moneys realized by said Railway Company from the sale of its first mortgage bonds, or from other sources, and that said Negley shall have a first lien against said premises for said sum of thirty-nine hundred and twenty ($3,920) dollars and interest until the same has been fully paid.

NOW, THEREFORE, THESE PRESENTS WITNESS that the said New Castle Northern Railway Company, its successors and assigns, in consideration of the premises and the delivery of said deed, the receipt whereof is hereby acknowledged, is held and firmly bound unto the said James S. Negley, his certain Attorney, Executors, administrators and assigns, in the sum of Thirty-nine hundred and twenty ($3,920.00) dollars and interest from April 24th, 1883, at the rate of six per cent. per annum; to which payment, well and truly

to be made, it binds itself, its successors and assigns firmly by these presents. Sealed with its Corporate seal and dated the twenty-fourth (24th) day of April, A. D. 1883.

Now, the condition of this obligation is such that if the said New Castle Railway Company, its successors and assigns, shall pay or cause to be paid to the said James S. Negley, his executors, administrators and assigns, the said sum of Thirty-nine hundred and twenty ($3,920) Dollars and interest, then this obligation to be void and of no effect; otherwise, to remain in full force and virtue.

THE NEW CASTLE NORTHERN RAILWAY COMPANY,
by DANIEL H. WALLACE, Vice-President.

[SEAL N. C. N. RY. CO.]

Attest:

JAMES S. NEGLEY, JR.,
Secretary.

Approved:

D. H. WALLACE,
Treasurer.

ALLEGHENY COUNTY, SS.:

On this eighth day of October, A. D. 1884, personally appeared James S. Negley, Jr., who, upon oath by me duly administered, says: That the seal affixed to the above and foregoing indenture is the common or corporate seal of the said New Castle Northern Railway Company, and that the signature of this deponent subscribed thereto in attestation of the execution and delivery thereof, is of this Deponent's own proper and respective handwriting.

JAMES S. NEGLEY, JR.

[SEAL.] In Testimony Whereof I have hereunto affixed my notarial seal the day and year aforesaid.

H. T. HANNA,
Notary Public.

Q. Will you kindly state what moneys were expended by you for and on account of that right of way, in regard to the purchase money and the surveys, &c., in detail ?

A. The amount stated in that voucher was the amount according to the memorandums I submitted, and the receipts and payments for money which I had expended on that right of way.

Q. Doing what ?

A. In making surveys, in expelling persons who were taking portions of the right of way, farmers who had their lines along it, and some on account of the right of way. The separate items of these accounts I can't give, because all papers connected with the receipts, etc., were surrendered to the treasurer of the company, and that voucher given me in lieu of it.

Q. Was that a settlement between you and the treasurer ?

A. It was a settlement between me and the board of directors, and that paper was executed at that time.

Q. Will you state what other advances you made for and on account of the Newcastle Northern Railway Company from this time on, which are included in the language of their contract ?

The following evidence as to the advances mede to the Newcastle Northern Railway Company is omitted owing to a stipulation thereafter made, of which the following is a copy :

"ESSEX CIRCUIT COURT.

"JAMES S. NEGLEY "vs. "HARRIET N. SIMPSON, Executrix, &c., "of Thomas P. Simpson, dec'd.	On Contract Stipulation.

"It is hereby stipulated that the moneys actually expended by the plaintiff on behalf of the Newcastle Northern Railroad Company, in the declaration in this clause mentioned, as shown by his vouchers therefor, and sought to be recovered herein, under the covenant in said declaration mentioned, amounts to five thousand dollars, interest to be computed thereon from the date hereof.

"This stipulation is made and is to conclude the parties only for the purposes of this suit.

"Dated January 15, 1891.

"WALLIS, EDWARDS & BUMSTED,
"Attorneys for Plaintiff,
"Per R. FLOYD CLARKE,
"Of Counsel.
"JOHN W. TAYLOR,
"Attorney for Defendant."

BY PLAINTIFF'S COUNSEL: Q. When did Thomas P. Simpson first become interested in the Newcastle Northern Railway Company?

A. As a contractor in October, 1883.

Q. Do you know whether the contract made by him with the railway company was in writing?

A. Yes, sir; it was.

Plaintiff's counsel calls on defendant to produce said contract.

Defendant' counsel responds that he never saw said contract.

The witness was here directed to stand aside to permit a witness to be called to identify a paper.

CORNELIUS CLARK, sworn on behalf of plaintiff.

DIRECT EXAMINATION BY MR. CLARKE:

Q. (Paper shown to witness.) Do you recognize your signature on this paper?

A. Yes, sir.

BY THE COURT: Q. Are you the subscribing witness?

A. Yes, sir.

Q. Did you see it executed?

A. Yes, sir.

BY PLAINTIFF'S COUNSEL: Q. Did you see Thomas P. Simpson sign that paper?

A. Yes, sir.

Q. Did you see James S. Negley sign it?

A. I presume I did. I see my name there as a subscribing witness.

Q. Where was it executed?

A. In New York.

Plaintiff's counsel offers paper in evidence as bearing on the subject matter and the relations of the parties at the time the contract of June 5 was entered into by Thomas P. Simpson with reference to liquidating the cost of the right of way referred to.

Objected to.

THE COURT: I think the whole contract is competent evidence. What its effect may be I don't know.

Defendant's counsel prays an exception. Exception allowed.

Plaintiff's counsel reads in evidence the ninth clause of said contract, dated October 5, 1883, marked "Ex. P."

Cross-examination waived.

The following is a copy of the material portion of said contract :

"THIS AGREEMENT made the 5th day of October, 1883, between the Newcastle Northern Railway Company, a corporation existing under the laws of the State of Pennsylvania, party of the first part, and Thomas P. Simpson, of the City of Montclair and State of New Jersey, party of the second part. Simpson agrees to build the railroad of the party of the first part from the junction with the Pittsburgh and Lake Erie Company, in the City of New Castle, to the town of Middlesex, in Mercer Co., Pennsylvania, a distance of about sixteen miles, with sidings and branches two miles in length, for the sum of $30,000 in the Capital stock of the railroad Company, and $30,000 in its first mortgage bonds at par for each and every mile of track and fraction thereof. Simpson in no event to be compelled to expend more than the sum of $200,000," and the Ninth clause reading as follows :

"In case the Newcastle Northern Railway Company shall require an additional sum or sums not exceeding $25,000 to liquidate the cost of rights of way, station grounds, engineer's and other of the Company's expenses, then I agree to advance the same from time to time as shall be demanded, and take in payment for each $1,000 or multiple thereof so advanced, bonds and stock. The bonds to be rated at eighty cents on the dollar, and the stock at par, equaling $1,200 in bonds and 1,000 in stock for each $1,000 in cash so advanced."

JAMES S. NEGLEY, plaintiff, resumes the stand.

FURTHER DIRECT EXAMINATION BY MR. CLARKE :

Q. Did Mr. Simpson go on under this building contract and do certain work ?

A. Yes, sir.

Q. Were you present on that work from time to time ?

Objected to.

By the Court: Q. How long did he go on?

A. He worked about six months or longer.

By Plaintiff's Counsel: Q. Was that work done on this right of way in question?

A. Yes, sir.

Q. Will you state how far he had progressed in the work?

A. The entire roadbed was graded, culverts were constructed, and the bridges were built; the ties were on the ground, a portion of them in place, and the timber for the bridge over the Chenango.

Q. You are familiar with the facts in regard to certain suits that were brought about this time?

A. Yes, sir.

Q. Affecting this building contract?

A. Yes, sir.

Plaintiff's counsel offers in evidence a paper purporting to be a stipulation between counsel in the course of testimony taken at Newcastle, Pa., in relation to the facts relative to the last inquiry.

Objected to.

The Court: I have no question that every paper that has been offered is competent evidence, except, possibly, some of these little items of expenditure; and this agreement was competent for the purpose of showing a common interest in the affairs of the company, and that would tend to throw light on a great many things connected with the company, and obligations assumed by the company. It is also competent evidence for the purpose of showing his knowledge of certain things—certain obligations that were due from the company to the plaintiff. It is possible that your case may break down suddenly when you get to the end, from your inability to prove that this matter was compromised.

Plaintiff's counsel reads said stipulation, con-

tained in the examination of Charles F. Wallace.

Q. Just after this contract with Mr. Simpson was signed, will you state whether any dissensions arose in the Board of Directors, and if so, between what parties, in regard to that contract—the Board of Directors of the Newcastle Northern Railway Company?

Objected to as incompetent.

THE COURT: That is competent with a view of trying to show that there was a settlement.

A. Yes, sir; there was quite a controversy, which ended in a great deal of litigation—an effort on the part of Charles F. Wallace and others to oust Simpson from his contract.

BY THE COURT: Q. And a bill was filed in the name of the company?

A. Yes, sir; I think there were six suits. Anyway there were suits in Mercer County, in Allegheny County, and in the United States Court.

Q. Were you a party to those suits?

A. Yes, sir; the defendant is one of them. I was a plaintiff in one with Mr. Simpson.

BY PLAINTIFF'S COUNSEL: Q. And in those litigations you speak of you and Simpson were coparties in every one of them?

A. Yes, sir.

Q. Simpson was in the Board of Directors?

A. Yes, sir; he was at one time.

Q. Not at this time?

A. No, sir; later on he was.

Q. Refer to the names of the original directors and incorporators of this company. As to this fight in regard to the Simpson contract, will you state which of the directors were fighting for Simpson, and which against him, to cancel this contract?

Defendant's counsel objects to this line of examination.

THE COURT : I don't think it is worth while for us to go into that. I don't care to sit here and inquire into this squabble of the officers of a corporation that are disagreeing. Here is a bill filed in the name of the corporation, the object of which was to obtain the rescission or cancellation of the Simpson contract. Is it not enough, for the purposes of this suit, to show that in point of fact there was a litigation of that kind, having for its object the purposes I have mentioned. I listened to your opening with regard to these dissensions in the Board, and it seemed to me then to be irrelevant to the case I am trying, and it seems to me all that is necessary to show is that there was such a controversy, and that Simpson was interested in it. The settlement of that controversy would be a settlement within the meaning of this agreement. The only object you could possibly accomplish by proof of this kind would be to show that this transfer was an indirect method of settlement. You may, by a short cut, without this evidence, reach the same result.

BY THE COURT: Q. You were president of this company ?

A. Yes, sir.

Q. From what time ?

Q. From what time ?

A. I was the first president—elected in 1883.

Q. How long did you continue president ?

A. That was also a question, because the Court decided that I was not president. There were two presidents and two Boards of Directors.

Q. When did the Court decide that you were not president ?

A. In 1884.

Q. Did the Court decide before or after this agreement ?

A. Before.

Q. You were not present at the time of this alleged settlement ?

A. No, sir—well, not when the final decision was rendered and order of sale.

Q. When did you cease in fact to perform the duties of president ?

A. Substantially when the Receiver took possession of the property.

Q. When was that ?

PLAINTIFF'S COUNSEL : That is in the stipulation, your Honor.

A. Of course, irrespective of any—that was in September, I think, of 1884.

Q. That is, after this agreement was made ?

A. No, sir; the Receiver took the papers April 7, 1884.

Q. That was before this agreement was made ?

A. Yes, sir.

PLAINTIFF'S COENSEL : I can give you the exact date of the Receiver's appointment.

WITNESS : I will state to Mr. Clarke that my recollection is refreshed by looking at the receipt.

PLAINTIFF'S COUNSEL : March 29, 1884, the decree was signed appointing a Receiver.

MR. EDWARDS, of counsel for plaintiff : And on April 2 the Receiver qualified.

THE COURT : It was before this agreement.

(Witness :) I stated when the Receiver took possession of the property, which was on April 7, 1884, and his receipt to me was dated on that day.

BY PLAINTIFF'S COUNSEL : Q. Have you that receipt here ?

A. Yes, sir.

Q. Just produce that receipt ?

A. I think I have got it here (producing paper).

Q. At the time this contract of June, 1884, was entered into the Receiver was in possession, and what were the assets of this company ?

A. Well, there were no assets, excepting the work—the constructed portion of the road and the right of way.

Q. Those were the only two practical assets?

A. Yes, sir.

Q. Besides some stock subscribed for?

A. Yes, sir.

Q. One of the stockholders was Daniel S. Wallace; was he solvent?

A, No, sir.

Q. Or insolvent?

Objected to.

Question withdrawn.

Plaintiff's counsel calls on defendant to produce a letter written by plaintiff to defendant, dated September 15, 1886, of which the following is a copy:

NEW YORK, N. Y., Sept. 15th, 1886.

JOHN M'NISH, ESQ., MRS. THOS. P. SIMPSON, Executors of the estate of T. Thomas P. Simpson, deceased:

Referring to a certain agreement entered into between Mr. T. P. Simpson and myself, under date of June 5th, 1884, wherein Mr. Simpson covenanted to protect my interests in the property of the Newcastle Northern Railway Company, and, in case of final payment to him, to refund to me my claim against said property, and understanding that you have disposed of said judgment and made a final settlement without observing the terms of said agreement, I beg to inquire when you will settle with me.

Address your reply to me, Care American Finance Company, No. 96 Broadway, New York.

Yours very truly,

THE COURT: You might as well go at once to the evidence in regard to the breach of this contract. That would turn it very much into a question of law; and, if I found that to be the case, I could settle that question, and it could go to an account after that.

PLAINTIFF'S COUNSEL: We have practically got all the account in now, and there is no dispute about this account practically.

THE COURT: Have you offered the record of those suits in Pennsylvania any further than the stipulation?

PLAINTIFF'S COUNSEL: No, sir; only to that extent at present. We have an exemplified copy of all the proceedings.

THE COURT: Put them all in.

Plaintiff's counsel offers in evidence the record referred to, consisting of two bundles of papers.

Marked, respectively, "Ex. P12" and "P Ex. P13."

The following is a summary of the Court Record:

Dec. 15, 1883, Bill filed in Common Pleas Court of Lawrence Co., Pa., on behalf of certain stockholders of the New Castle Northern Railway Co., Daniel H. Wallace and Charles S. Wallace *et al.*, to obtain the cancellation of the building contract between Thomas P. Simpson and the Newcastle Northern Railway Company, a copy of which is extracted above. The title is The Newcastle Northern Railway Company, plaintiff, vs. Thomas P. Simpson and James S. Negley, Defendants.

Injunction issued.

January 14, 1884, amended bill filed.

January 15, 1884, case removed to United States Circuit Court for the Western District of Pennsylvania.

February 29, 1884, answers of Thomas P. Simpson and James Negley filed.

October 28, 1884, Replication filed.

October 28, 1884, Thomas P. Simpson filed cross-bill to compel payment of moneys due on his work or *quantum meruit.*

March 29, 1884, Receiver appointed.

March 28, Receiver's bond filed.

April 5, 1884, Plea to cross-bill filed.

April 26, 1884, Supplemental bill filed.

July 15, 1884, Order amending supplemental bill by striking out all charges and allegations against James S. Negley.

July 15, 1884, Answer to supplemental bill filed.

July 15, 1884, Cause heard on pleadings and proof.

August 13, 1884, Opinion of court and decree.

August 28, 1884, Decree entered canceling building contract of which an abstract is given above and sending cause to a Master to determine the amount properly due to Thomas P. Simpson for work done.

March 20, 1885, Decree on cross-bill that the Company pay Simpson $56,643.77.

May 13, 1885, Appeal to the United States Supreme Court from last-mentioned decree.

May 19th, 1885, Bond on appeal filed.

June 5, 1885, Bond approved.

May 6, 1886, application of Hanna, judgment creditor, and receiver for sale of road pending appeal.

July 13, 1886, decree for the sale of the road, proceeds to be held in court to abide appeal.

August 21, 1886, Harriet N. Simpson, executrix, substituted for Thomas P. Simpson in record.

Sept. 2/1886, First sale of the road for $75,000 to Reed.

September 9, 1886, Report of sale.

September 27, 1886, Sale confirmed.

Oct. 8, 1886, Resale ordered to be had, October 24, 1886.

October 28, 1886, assignment of Thomas P. Simpson claim by Harriet N. Simpson, executrix, to Charles S. Wallace *et al.* filed.

October 24, 1886, resale had, the road bought by Johnson.

October 27, 1886, Order confirming sale. Exceptions.

December 11, 1886, second sale set aside.

Dec. 11, 1886, order for resale Jan. 12, 1887.

January 12, 1887, 3d sale bid in by Johnson for $30,000.

January 14, 1887, order confirming sale.

January 19, 1887, appeal to the United States Court dismissed on consent of appellant.

January 28, 1887, application of Johnson to set off Simpson's claim against bid for purchase of road.

January 29, 1887, order confirming 3d sale.

February 11th, 1887, order allowing set off on application of Johnson until further order.

April 8th, 1887, order allowing Johnson *et al.*, purchasers of Simpson's judgment, to set off the Simpson judgment against balance of purchase money due on bid on road, on giving a bond.

April 8, 1887, Bond approved and filed.

April 16, 1887, Order receiver to deliver deed to Johnson *et al.*

January 8, 1889, Final order for distribution of funds.

Q. (Paper shown to witness.) Did you send a letter, of which that is a copy, to Mrs. Simpson by mail?

A. Yes, sir.

Q. Postmarked where?

A. In New York.

Q. And directed to her where?

A. At Montclair.

Q. Read it?

A. (Witness reads copy of letter dated New York, September 15, 1885, signed "James S. Negley.")

Q. Is McNeish the executor?

A. I was under the impression at that time that he was. He informed me that he was charged with making settlements. I met him on the street one day.

Objected to. Objection sustained, and the answer ordered to be stricken out.

Q. You mailed it to Mrs. Simpson?

A. Yes, sir.

Letter offered in evidence and marked "Exhibit P 14.

Q. (Paper shown to witness.) Did you send a letter, of which that is a copy, to your knowledge, to Mrs. Simpson?

A. Yes, sir.

By the Court: Q. Just read the letter?

A. In my handwriting at the top is "A copy sent by mail October 12, 1886," addressed to Mrs. Thomas P. Simpson, executrix of Thomas P. Simpson, and signed James S. Negley. The following is a copy of the letter written October 12, 1886.

(Copy sent by mail.)

96 Broadway, New York, October 12, 1888.

Mrs. Thomas P. Simpson, Executrix, Thos. P. Simpson, Decd., Montclair, N. J.:

Madame—You will please take notice that I shall take the necessary legal steps to require the payment of the moneys due me in the matter of the New Castle and Northern Railroad Company, according to the terms of a certain agreement made between the late Thos. P. Simpson and myself, of which you have full knowledge.

If you will have the kindness to refer me by note to your attorney, it may save necessary trouble and expense.

Yours very truly,

Jas. S. Negley.

Letter offered in evidence, and marked "Exhibit P15."

Q. (Paper shown to witness.) Will you look at that paper and state whether that was the letter you received in answer to that letter?

A. Yes, sir.

By the Court: Q. Read it.

A. (Witness reads paper, dated October 16, 1886, addressed to James S. Negley, and signed John W. Taylor, of which the following is a copy:)

"JOHN W. TAYLOR,
Attorney and Counsellor at law,
Office, 757 Broad Street,

NEWARK, N. J., Oct. 16, 1886.

GEN. JAS. S. NEGLEY:

DEAR SIR—Mrs. Thomas P. Simpson has forwarded to me, as her attorney, your note to her of the 12th inst.

As her attorney, I shall be glad to receive from you any communication you may be pleased to make.

Yours truly,
JOHN W. TAYLOR."

BY PLAINTIFF'S COUNSEL: Q. That refers to the letter you have just read, Exhibit 15?

A. Yes, sir.

Letter offered in evidence, and marked "Exhibit P16."

Q. (Paper shown to witness.) Did you receive a second letter from Mr. Taylor, shortly after that one, and, if so, is that the letter?

A. Yes, sir; I received this letter.

Q. Read it?

A. (Witness reads paper dated October 20th, 1886, addressed to James S. Negley and signed John W. Taylor of which the following is a copy):

"NEWARK, N. J., Oct. 20, 1886.

"GEN. JAS. S. NEGLEY:

"DEAR SIR—Yours of the 19th inst., in the matter of your claim against the Simpson estate, was duly received. I have a copy or duplicate of the contract to which you refer, and I presume your claim is founded on the concluding paragraph, which provides that, in case of a settlement by Mr. Simpson of his claim, 'the amount

THE COURT: I won't nonsuit until I understand this case. There are considerations that arise in my mind, and they are indicated in one of these papers.

CROSS-EXAMINATION BY DEFENDANT'S COUNSEL:

Q. Has there been a settlement of this claim?

A. My information was that there was.

Q. You don't know?

A. I know, as we know anything in that case, by the statements of parties interested.

Q. Have you heard Mrs. Simpson say so?

A. Pardon me. Do you mean a settlement between Mrs. or Mr. Simpson and myself?

Q. I mean a settlement of Mrs. Simpson as executrix between Mr. Simpson and the railroad company?

A. From information, I believe there was a settlement.

Q. You have only information on that topic?

A. Only information; yes, sir.

Q. Have you seen any writings in relation to an adjustment and transfer of Mrs. Simpson's claim?

A. I have not.

Q. Haven't you seen the writing between Mrs. Simpson and Mr. Rennie, Mr. Johnson, Mr. Kimberly, Mr. Marx and Mr. Wallace?

A. I was not aware that such a paper existed till this moment.

Q. Who were these people?

A. Parties who were associated with Charles Wallace—persons that were associated with the Wallace faction.

Q. Were they directors of this company, or any of them?

A. They were all so, I believe, latterly.

Q. Do you know when the original settlement was made?

A. In the fall, I think, of 1886—1885 or '6.

Q. Was the claim extinguished at the date of settlement?

A. I have stated that I was not aware that any such paper was written, and my information was that Mrs. Simpson had received a considerable sum of money, and had settled her claim.

Q. That was merely on information ?

A. It came from Mr. McNeish, who represented himself as being the agent of Mrs. Simpson. He informed me on Broadway, in a conversation, and subsequently in my office, that a settlement had been made.

Q. You know as a fact, from the papers that are offered in evidence here, that the proceedings in that suit went on from September 2 until January or February of the following year, don't you ?

A. I do not, sir.

Q. Was not the sale in January or March, 1887 ?

A. I ceased having any connection with the litigation—

Q. (Question repeated.)

A. I do not know excepting by report. When I made the contract with Mr. Simpson—

Q. I don't care about that, General. Didn't you receive a certificate of indebtedness, or some bonds, or some pecuniary value, from the company in part payment of your right of way conveyed to them ?

A. No, sir ; I did not receive any value.

Q. Didn't you get a certificate of indemnity ?

A. No, sir.

Q. Are you sure ?

A. There was an award made by a special committee of the railroad company that awarded me certain bonds ; but they were taken possession of and canceled by the Court ; consequently, they couldn't be delivered.

Q. You didn't get them ?

A. No, sir.

Q. Didn't you get a certificate of indebtedness from the company ?

A. No, sir ; not from the company under its corporate seal.

Q. Didn't you get something in the nature of a cer-

tificate of indebtedness in part payment of your claim against the railroad company?

A. No part payment; an acknowledgment of the claim.

Q. Have you got that here?

A. No, sir.

Q. Where is it?

A. I presume it is among my papers.

Q. Well, what was it?

A. A committee was appointed by the board to determine the value of the right of way.

PLAINTIFF'S COUNSEL (showing paper to witness): Is this the paper referred to as the certificate of indebtedness?

BY THE COURT: Q. Is that what you got to show for the money?

A. Yes, sir; that is all that I have got.

BY DEFENDANT'S COUNSEL: Q. Won't you read it?

A. (Witness reads paper purporting to be copy of the minutes of the Board of Directors of the New Castle Northern Railway Company, held March 9, 1883, accepting the proposition of plaintiff to sell said right of way for $14,560, together with copies of resolutions adopted at said meeting, and subsequently adopted by the stockholders.)

BY THE COURT: Q. Did you ever get the bonds?

A. No, sir.

Q. You say they were made out, and some Court canceled them?

A. The Court decided that they were not a valid issue, and consequently they became worthless.

Q. Was that all you got?

A. There was a meeting held by the Executive Committee of the company, that passed upon the indebtedness to me and to other parties, preliminary to a suit brought by me against the railroad company. I had had only a suit against them for the value of this right of way.

By Defendant's Counsel: Q. You don't seem to answer my question. Didn't you receive from the company, in part payment for that right of way, a certificate of indebtedness—what have you to say to that?

A. I did not. I know what you mean.

Q. What do I mean?

A. There was a portion of these Wallace directors issued a lot of certificates to different people, and they sent me one. It was a sort of a division of swag, and I returned mine.

Q. Didn't you get one from the company?

A. No, sir.

Q. Wasn't it issued by the company?

A. I suppose it was.

Q. And you got it?

A. I absolutely refused it, and I have made oath to that effect on three or four occasions. I returned it to the company.

Q. Why did you refuse it?

A. Because it was illegal and unauthorized.

Q. Why illegal?

A. This was a party of directors who sat down and undertook to divide up the right of way.

Q. Were you not present when that transaction took place?

A. No, sir.

Q. Why not?

A. Because they held the meeting in New Castle, and I was in Pittsburgh at the time?

Q. Didn't you have notice?

A. I don't remember.

Q. Through whom did you receive this certificate of indebtedness?

A. I am unable to answer that question.

Q. Can't you tell when that was?

A. No; it was the eventuation of this litigation. It went into court eventually. Steps were taken to have these certificates canceled.

Q. It wasn't the eventuation, because proceedings were carried on long after?

of such settlement shall also include all moneys actually expended by said James S. Negley, as shown by his vouchers therefor.'

"Mrs. Simpson (as I am informed), when she settled her claim, had no knowledge of your claim, and she is yet without the slightest information as to the amount of it.

"As I understand the clause referred to, Mr. Simpson was to settle your claim in connection with the settlement of his own, not to pay your claim if and when his own was settled.

"I do not see that you have lost your claim by the omission of Mrs. Simpson to effect a settlement of it in connection with her own; and it seems to me doubtful, to say the least, whether the provision referred to applies to a settlement not made by Mr. Simpson himself in his lifetime.

"Yours truly,

"JOHN W. TAYLOR,
"757 Broad St."

Offered in evidence and marked "Exhibit P 17."

Q. (Paper shown to witness.) Was this another letter you received from Mr. Taylor?

A. Yes, sir.

Q. Kindly read it?

A. (Witness reads paper dated October 22, 1886, addressed to James S. Negley and signed John W. Taylor, of which the following is a copy:)

"NEWARK, N. J., Oct. 22, 1886.

"GEN. JAS. N. NEGLEY:

"DEAR SIR—Yours of yesterday is received. My information from Mrs. S. is that she was not aware of your claim when she settled. By referring to my letter again you will see that I did not allege or suggest that Mr. S. had settled the claim in his lifetime. I had no information on that subject. I do not think Mrs. S.

will under the circumstances, especially, in the absence of any specification of the amount by you, be able to agree on any settlement. I cannot, for the reasons stated to you before, admit that she is legally liable. If you desire to have the matter judicially passed upon by any of the Courts in this State (State or Federal), I shall be glad to facilitate you, by appearing for her and otherwise.

"Yours truly,

"JOHN W. TAYLOR."

Offered in evidence and marked "Exhibit P 18."

It is admitted that Thomas P. Simpson is dead, and that Mrs. Simpson, the defendant, is the executrix of said Simpson.

DEFENDANT'S COUNSEL: This alleged settlement was made in Pittsburgh. She went out there, and while she was there I received a letter from her lawyers as to the amount she would get. I supposed she had sold. The receipt is here for the money, and a release is incorporated in the Master's report. Mrs. Simpson ought not to suffer from my assumption that it was a settlement. Afterwards, I found that it was a formal instrument.

THE COURT: It won't make any difference, except as a matter of form. The papers that relate to the settlement are here?

DEFENDANT'S COUNSEL: Yes, sir.

THE COURT: Offer them in evidence.

PLAINTIFF'S COUNSEL: I think there is no real dispute as to the facts, and I will accept Mr. Taylor's statement without his going on the stand. All I insist upon is that he will put in evidence and show that the form of this transaction was not the substance.

DEFENDANT'S COUNSEL: Wasn't the settlement in writing?

PLAINTIFF'S COUNSEL: That is admitted.

A. I said the eventuation of the litigation between these directors and myself.

Q. Oh, the faction ?

A. Yes, sir.

Re-direct Examination by Plaintiff's Counsel:

Q. Was this certificate of indebtedness that was sent to you a first mortgage bond or any number of first mortgage bonds of this company ?

A. O, no; it was simply a certificate gotten up between these parties, in which they agreed to a certain division as to the amount due me. It had no validity in law, and was an insult to me, and I returned it to them immediately.

Q. Did that rail transaction involve a personal transaction between you and Thomas P. Simpson ?

A. No, sir; it was between his engineer and myself.

Objected to.

The Court: I guess we will leave that out.

It is admitted that James S. Negley, the plaintiff, through his counsel, Mr. Clarke, made a demand upon Mrs. Harriet P. Simpson on April 20, 1887, at which time a sworn proof of claim was submitted, which is offered in evidence, and the vouchers for the amounts mentioned were produced.

Marked "Exhibit P 19."

The following is an extract:

To Harriet N. Simpson, as Executrix of Thomas P. Simpson, deceased:

Madam—The Hon. James S. Negley claims that the estate of Thomas P. Simpson is indebted to him in the sum of Eight thousand two hundred and twelve dollars and sixty-five one-hundreths, and states the following as the particulars of his said claim.

Heretofore and on the 5th day of June, 1884, the

said Thomas P. Simpson and James S. Negley, executed and delivered each to the other a certain contract in writing, of which the following is a true copy (Copy of Exhibit A, annexed to complaint).

That thereafter the said Thomas P. Simpson did not become the owner of said railroad property and franchises by judicial sale or otherwise, but thereafter he died, and you as his executrix obtained a settlement of the claim of the said Thomas P. Simpson against the said New Castle Northern Railway Company.

That thereupon, and by reason of such settlement, there became due and owing from the said Thomas P. Simpson, or his estate, to the said James S. Negley the following moneys actually expended by the said James S. Negley as moneys advanced or expended by him on account of said Railway Company or the construction thereof, and including costs of litigation and extraordinary expenses occasioned by the contests then pending in the Courts of Lawrence County and the United States Courts for the Western District of Pennsylvania, for which the said Negley was liable and for which the said James S. Negley tenders vouchers. * * *

STATEMENT of moneys paid by General J. S. Negley, to and on account of the New Castle Northern Railway Company, a corporation organized under the laws of the State of Pennsylvania, which payments are properly included in his account and claim against the estate of Thomas P. Simpson, deceased :

April 24, 1883, Cash paid on account of right of way	$3,920 00
With interest at the rate of 6% :	
April 25, 1883	82 90
May 11, 1883	137 50
July 6, 1883	137 50
September 14, 1883, Expense in New York	55 00
September 14, 1883, hire of instruments, horse and buggy, and fare to Harrisburgh	9 00

September 18, 1883	1,100 00	
September 20, 1883, 30 Tons of 35lb/ rails for construction purposes, with fastenings, at the rate of $25 per ton	750 00	
October 11, 1883, Expense	4 25	
October 17, 1883, Expense	1 50	
November 7, 1883, Expense	5 00	
December 26, 1883, Expense	10 00	
February 26, 1884, paid Townsend & Chittenden	100 00	10
December 22, 1885, and amount paid Chas. F. Calhoun, Clerk & Typewriter, for said Co.	250 00	
1886 Printing account, notice of meetings, Bills in equity, and paper books	250 00	
January, 1886, Attorney's fees paid J. S. Negley, Jr.	500 00	
January, 1886, Attorney fees and legal expenses paid on account of the numerous suits in equity and in other courts of the Counties of Alleghany and Lawrence	400 00	20
Legal expenses costs, Attorney fees, etc., still to be paid, about	500 00	
	$8,212 65	

Here follows another claim not included in this action.

30

I further say that the said claims above stated are justly due, that no payments have been made thereon, and that there are no offsets against the same, to my knowledge.

I submit to you the above proof of claim, and notify you that I claim and demand from you, as executrix of Thomas P. Simpson, deceased, the following sums now justly due and owing from his estate to me.

First. The sum of eight thousand two hundred and twelve and sixty-five one hundreths dollars, with 40

interest on the same, from and after the date of the settlement made by you of the claims of Thomas P. Simpson against the New Castle Northern Railway Company.

SECOND. (2d claim).

I have fully and fairly performed all the conditions and covenants to be performed by me under the agreement dated the 5th day of June, 1884.

JAS. S. NEGLEY.

(Verification.)

Plaintiff's counsel offers in evidence the deposition of Charles S. Wallace and others taken at New Castle, Pennsylvania, to show that factions existed in the said Board of Directors, and that the alleged settlement was practically a settlement with the other party.

Adjourned until Tuesday, December 23, 1890, at ten o'clock A. M.

First order appointing James M. Swords Commissioner to take testimony of witness *de bene esse*, at Newcastle, Penn. Dated September 24th, 1889.

Certified by Clerk of Court.

Clerk's certificate certified by Judge of Court, with certificate of Clerk as to Judge's signature and Court seal.

Depositions of Witnesses Before Commissioner, 25th Day of September, 1889, and Days Subsequent Thereto.

JAMES S. NEGLEY AGAINST HARRIET N. SIMPSON, Executrix of Thomas P. Simpson, deceased.	On Contract.

CHARLES S. WALLACE, being duly called on the part of the plaintiff, and being duly sworn, deposeth and saith :

Q. State where you reside, your occupation and whether you know the plaintiff James S. Negley ?

A. I reside in Newcastle, Penn. ; occupation, a clerk ; am acquainted with the plaintiff James S. Negley.

Q. State whether you were a stockholder and director in the New Castle and Northern Railway ?

A. I was.

Q. State the names of the original directors the first year ?

A. James S. Negley, James S. Negley, Jr., Frank Hummings, David H. Wallace, Forbes Holton, A. G. Negley, Noble Holton, Charles S. Wallace and Charles F. Calhoun.

Q. State how many shares each of these persons held of the original stock of the company ?

A. James S. Negley, Jr., held one thousand shares, and the balance five hundred each.

Q. What was the date of the organization of the company ?

A. Sometime in 1883—in February is my recollection.

Q. Did you attend the meeting of this Board of Directors, and, if so, up to what time ?

A. I think I attended every meeting held in 1883.

Q. State whether or not the board took any action in regard to a contract for building the road with Thomas P. Simpson, and, if so, when, where and at what time, at what meeting?

A. A contract was made with Thomas P. Simpson sometime in 1883—in October—but whether pursuant to a regular resolution of the board I cannot recollect.

Q. State whether or not immediately after this contract was made dissensions arose in the board, and, if so, who constituted the opposite parties?

A. Dissensions arose between what is known as the Negley party and the New Castle party. The Negley party consisted of James S. Negley, Jr., Frand Hummings and James S. Negley. The New Castle party were Noble Holton, Forbes Holton, A. G. Negley and Charles S. Wallace, J. S. Newell, Daniel H. Wallace.

Q. What was the subject matter of the dispute between these two parties?

Question objected to by defendant's counsel on the ground that it is immaterial and irrelevant to the issue.

Q. The New Castle party wanted to rescind or modify the contract with Simpson of 1883. The Negley party objected.

Q. At about what date did this dispute arise?

A. It commenced about the latter part of October or first of November, 1883. I mean by the Simpson contract, the construction contract, for the construction of the road.

Q. State whether the board held meetings after October, 1883, and prior to the election of the new board, at which the subject of the Simpson contract was brought up and what action taken thereon, if any?

Defendant's counsel objects to testimony as to the action of the board as incompetent for that

reason ; that the action of the board should be evidenced by its minutes, which would be the better evidence, and for the further reason that it is immaterial and irrelevant.

A. The matter was discussed among ourselves repeatedly, but whether there was any formal action taken by the board or not I don't remember.

Q. State whether any action was taken by the board in regard to legal proceedings on the part of the company to cancel Simpson's contract ?

A. I do not recollect whether there was anything authorized by the board or not.

Q. Have you ever testified in a prior suit that such proceedings were authorized by this board ?

Objected to by defendant's counsel—the question is leading, and the proposed testimony is incompetent and immaterial ; further, the question does not refer to the suit or proceeding in which the testimony was taken, nor if the proposed testimony was taken, the time, the place, and before whom.

Q. Are you friendly to the plaintiff, James S. Negley, plaintiff in this suit ?

Objected to as incompetent and immaterial.

A. I am neither friendly nor unfriendly to James S. Negley.

Q. Have you been on opposite sides in litigation in regard to this railroad ?

A. I have, or we have, rather.

Q. How many years did these litigations last ?

A. Some of them not ended yet.

The question above unanswered is repeated, and objection repeated.

A. I don't recollect that I ever so testified ; but, if I did, that was the fact.

Q. When was the first election had for a new board?

A. In the early part of 1884. I don't remember the month or the day of the month. I attended that election.

Q. Where was it held?

A. There were two elections—one held in Pittsburgh, the other at New Castle. I attended the election held at New Castle.

Q. At that election, who were elected directors of the company?

Objected to by defendant's counsel as incompetent and immaterial.

A. The New Castle board consisted of Daniel H. Wallace, Forbes and Noble Holton, A. G. Negley, J. D. Newell, Charles S. Wallace. There were two others; I don't recollect their names.

Q. After this election, state whether or not other persons claimed to be the duly elected new board of the New Castle Northern Railway Company?

Objected to by defendant's counsel as immaterial and incompetent.

A. The board elected at the election held in Pittsburgh claimed to be the board. I don't recollect their names.

Q. Did the New Castle board elect officers?

A. Secretary and treasurer were elected by the New Castle Board.

Q. State their names?

A. Forbes Holton was elected secretary, and Charles S. Wallace treasurer.

Q. Did you attend the meetings of this New Castle board?

A. I did.

Q. State who was counsel for this New Castle board?

A. R. B. McComb acted as attorney for the com-

pany, but I don't know whether he was employed by the board, by resolution passed at that time, shortly after the reorganization of the company in 1883. R. B. McComb was appointed solicitor of the company by a resolution passed by the board.

Q. As a director of this company, were you aware that legal proceedings in the name of the company were pending against Thomas P. Simpson to cancel his contract ?

A. I had knowledge of that fact.

Q. Did Mr. McComb report to the Newcastle board from time to time the steps taken in that proceeding ?

A. I do not recollect of McComb ever making any report to the board.

Q. Was the fact of the pendency of this proceeding discussed by the Newcastle board ?

A. I do not know of its being discussed by the Board as a board, but I know of it being discussed by members comprising the board, probably not in an official manner.

Q. The pendency, then, of this suit was then a matter of common talk among the members of the board ?

A. It was.

Q. What was the attitude assumed by the members of the Newcastle board in regard to the Simpson contract ?

A. Antagonistic ; they wanted it rescinded.

Q. What was the attitude of the Negley Pittsburgh board in 1884 to Simpson contract ?

This question objected to by defendant's counsel on the ground that the proposed testimony is incompetent, irrelevant and immaterial. It has not been shown that the witness knew the attitude of the Pittsburgh parties, and if he had knowledge of the subject, and whether it was in writing or not.

A. I have no knowledge of the Pittsburgh board in the matter one way or the other.

Q. Was any action taken by the Newcastle board in regard to the suit against Simpson in 1884 ?

A. I don't recollect of any.

Q. Were other suits pending between the rival boards and the members of them ?

A. Yes.

Q. Did each board use the name of the company in those suits ?

A. They did.

Q. On the 5th day of June, 1884, state what suits were pending in the courts of Lawrence County, Pa., and the United States Courts for the Western District of Penna. ?

Objected to by defendant's counsel as not the best evidence.

A. I do not recollect the title of any of them or how many suits were pending.

Q. Do you recollect whether any suits were pending in regard to these matters ?

A. There were suits pending.

Q. State whether the New Castle board, in 1884, passed a new resolution to authorize a new contract for the building of the road in place of the Simpson contract, and were you present at the meeting at which that resolution was passed ?

Defendant's counsel objects. Proposed evidence is incompetent and immaterial. The minutes of the board should be produced to show what action was taken.

A. There was a contract entered into in 1884 with A. C. Weaver & Co., but whether by resolution of the directors I am unable to state.

Q. Look at the document shown you, and state whether that is the Weaver contract?

A. That is the Weaver contract.

Q. Do you know the seal of that company ; the seal

of the New Castle Northern Railway Company, and, if yea, is that the seal of that company?

A. I know the seal. That is the seal.

Q. Is Daniel H. Wallace your father?

A. He is; and was the president of the company. This is his signature on the document shown me. I know his writing. I know the signature of Forbes Holton. I have seen him write; that is his genuine signature to the document shown me. He was then secretary of the company.

Plaintiff offers document shown witness in evidence, and is marked "Exhibit No. 1." This document is objected to by defendant's counsel as irrelevant.

Q. What was done with reference to transfer of shares in order to meet the stock payments of the Weaver contract?

Defendant's counsel objects to parol evidence to transfers of stock; that the stock book with written transfers would be better evidence.

Q. Were transfers of stock made in order to meet payments of stock under the Weaver contract?

Defendant's counsel objects to the evidence and proposes the following question:

Q. Did the company at that time have a stock-book containing the names of members and the amount held by each?

A. They did.

Q. Did the company at that time have a certificate book or transfer book?

A. The company had a stock-certificate book and stock-transfer book, for keeping account of stock issued and also an account of the transfers.

Defendant's counsel objects to the proposed evidence of transfers of stock as incompetent.

Q. (Question " X " above repeated.)

A. They were. Those transfers were entered on the stock-transfer book and certificates were issued from the stock-certificate book.

Q. Where are those stock-books?

A. I don't know.

Q. When did you last see those books?

A. The last time I saw them was in W. L. Chalfant's office in Pittsburgh. He was Master in Chancery appointed by the United States Court. I had control or possession of the books and took them there, as a witness.

Q. Have you since that date asked Mr. Chalfant for them?

A. I have not.

Q. State how this transfer was effected and whose shares were transferred?

Defendant's counsel objects to all evidence relevant to the Weaver contract; and of the transfer of stock or payment thereon, or otherwise as wholly immaterial and irrelevant.

A. The transfers were made as follows: The following parties transferred their shares to Weaver, the following amounts: Forbes Holton, 480 shares; Noble Holton, 480 shares; F. Hummings, 480 shares. The balance of the two thousand eight hundred and eighty shares was made up by the transfers of Chas. S. Wallace, C. R. McFarland and W. C. Harbison.

Q. State what afterwards became of the shares placed in the hands of A. C. Weaver & Co.?

A. Transferred to John C. Wallace as trustee for a syndicate.

Q. State what afterwards became of this stock?

A. It was transferred to Chester R. McFarland.

Q. State whether certificates representing these shares so transferred to John C. Wallace, representing a syndicate, were ever actually written out for distribution to the following named parties: George W. Johnston, 510 shares; E. A. Wheeler, 100 shares; L.

Raney, 100 shares; P. L. Kimberley, 100 shares; J. N. Fallis, 400 shares; J. C. Stanton, 10 shares; Norman Martin, 10 shares; H. A. McGoun, 10 shares; J. H. McClure, 100 shares; Daniel Egan,40 shares?

A. These certificates were written out, but never delivered to the parties.

Q. How long did the New Castle board of 1884 continue in office?

A. Sometime in the spring of 1885. I was present at the new election; at that election the new board consisted of D. H. Wallace, Forbes Holton, A. G. Negley, Noble Holton, J. D. Newell, Charles S. Wallace; I don't remember who the other two were.

Q. State the date of the issuance of the stock to Weaver, on his contract.

A. Latter part of October or the first of November, 1884.

Q. What was the date of the transfer from Weaver to John C. Wallace, trustee?

A. There were two different certificates; one was transferred in the spring, and the other in the summer of 1885.

Q. Who composed the syndicate of which John C. Wallace was trustee?

A. Chester R. McFarland and myself.

Q. State the date of the transfer from John C. Wallace to Chester R. McFarland?

A. It was either 1885 or 1886.

Q. State how long the New Castle board of 1885 continued in office?

A. They continued in office until the spring of 1886.

Q. State whether a meeting of stockholders was held in New Castle in January, 1886, for electing president and directors?

Defendant's counsel objects to all evidence relative to the stockholders' meeting mentioned, and of what was done at such meeting, or in pursuance of it, as incompetent and irrelevant to this case.

A. A meeting of part of the stockholders, consisting of Chester McFarland and myself.

Q. State what was done in regard to the election of officers and directors on January 11th, 1886?

A. There was an election held, there were tellers appointed; George W. Johnston was elected president. L. Raney, M. S. Marquis, P. L. Kimberly, Chester R. McFarland, Chas. S. Wallace and three others elected directors.

Q. State whether at the time of this election George W. Johnston, P. L. Kimberly, L. Raney, M. S. Marquis and C. S. Wallace were stockholders of the company?

Defendant's counsel objects to parol evidence as to who were stockholders of company at that time; the witness testified that company kept a stock book, a transfer stock book and certificate book, which books are still in existence, and are, therefore, the best evidence who the stockholders were; therefore irrelevant and incompetent.

A. Charles S. Wallace was the only stockholder of the company at this time.

Q. State whether the others became stockholders, and how soon?

Objected to for reasons of objections last made.

A. They became stockholders, but I don't remember how soon after the election.

Q. At the time they were elected was there an understanding between you and them that they should become stockholders, and, if so, give the substance of the understanding of the contract?

Defendant's counsel objects to question as illegal and improper in so far as it asks for the understanding of the witness—as mere inference of the witness; and as to any contract to that effect, if any, to state with whom it was made,

and whether the same was in writing, and, further, it is immaterial.

A. There was no contract, either written or oral. The only thing that bears at all on that subject—Mr. Johnston told me that he was willing to do what he could to assist me, provided he could do so in a legal way, and that he had no doubt that Raney, Marquis, Wheeler and Kimberly would do the same; under that statement I elected them directors of the company.

Q. State whether the Johnston New Castle board of 1886 held meetings?

Objected to as irrelevant and immaterial by defendant.

A. My recollection is they held one meeting in New Castle on the 16th day of January, 1886, the day they were elected; can't remember who of the new board were present; there was a quorum present; they elected Chester R. McFarland, secretary.

Q. Did the Johnston New Castle Board of 1886 keep minutes of their proceedings?

A. I think not. I don't know of any minute book.

Q. State whether all the times with regard to which you have testified the litigation between the company and Simpson was still pending?

A. The original suit for the cancellation of the contract and questions growing out of it was still pending.

Q. State whether A. C. Weaver & Co. contract was ever assigned to any one, and to whom?

A. There was no assignment. I have no recollection of any assignment.

Q. State whether you were one of the parties interested in the purchase of the claim of Harriet N. Simpson, as Thomas P. Simpson's executrix, against the company?

A. I was. The other parties interested were George W. Johnston, Milton S. Marquis, Leander Raney and Peter L. Kimberly.

Q. Give the date and consideration paid?

Defendant's counsel objects and proposes Question, "Was the purchase and transfer in writing?"

A. It was.

Objection renewed.

Q. Was there any writing beside the assignment in writing?

A. There was a contract agreeing to assign, and the term of the conditions of the assignment.

Q. Where are those writings?

A. The last time I saw them was the day they were made. I think they were in possession of Marshall Brown.

Q. Who negotiated this purchase on behalf of Mrs. Simpson?

A. Mrs. Simpson in person and her counsel. I was present at some of these negotiations.

Q. State whether the pendency of an appeal in the Supreme Court of the United States from the judgment of the Circuit Court for the Western District of Pennsylvania in favor of Simpson for fifty-six thousand dollars, and the delay in bringing it to a hearing, was mentioned in their negotiations as a reason why Mrs. Simpson should see her claim at less than par?

Defendant objects as immaterial.

A. No recollection of any such a thing being brought forward. I am not willing to swear positively that it was not, but I have no recollection of it.

Q. How much did you pay for the claims?

Defendant's counsel objects for same reasons as last objection offered.

A. Twenty-five thousand dollars and assumed cer-

tain liabilities against Simpson estate, amounting to seven or eight thousand dollars.

Q. State whether the New Castle board of 1884 and 1885 held meetings from time to time, and assumed to do business for and in behalf of the company?

A. They did.

Q. State whether, in 1885, other parties claimed to be the directors?

A. Other parties did so claim.

Q. During the years 1884 and 1885, what was the claims of each board.

A. Each claimed to be the true board, and our board wanted to rescind or cut down the Simpson contract.

Q. After the judgment rescinding that contract, which of the boards carried on the fight against Simpson before the Master against his claims for compensations?

Objected to by defendants' counsel as immaterial.

A. The New Castle Board.

Q. After the judgment in favor of Simpson for $56,000, which board appealed to the United States Circuit Court?

A. The New Castle Board.

CROSS-EXAMINATION CONDUCTED BY D. B. KURTZ, ESQ., ATTORNEY FOR DEFENDANT:

The Circuit Court rescinded the Simpson contract in 1884.

Q. Do you remember when the Simpson case was removed into the Circuit Court?

A. That was early in 1884.

By agreement of counsel it is admitted that the bill by the New Castle Northern Railway Company against Thomas P. Simpson is filed in the Common Pleas of Lawrence County in December, 1883; it was removed on application of defendants to United States Circuit Court, February 25th, 1884, on April 2d, 1884, on application of defendant that Court appointed a Receiver of the

plaintiff's property. On August 28th, 1884, the Court decreed a rescission of the Simpson contract, and appointed a Master to ascertain the amount due him for the work done. After hearing, the Master made a report in favor of Simpson for upwards of sixty-one thousand dollars, to which exceptions were filed by the plaintiff. Upon argument the Court entered a decree in favor of Simpson, March 20th, 1885, for fifty-six thousand six hundred and $\frac{47}{100}$ dollars, from which decree the New Castle and Northern Railway entered an appeal to the Supreme Court of the United States, which appeal was subsequently, on January 17th, 1887, on application of counsel for appellant, was dismissed. From the appointment of the Receiver, D. W. C. Carroll took possession of the roadbed and assets of the company, and retained them until after the final sale of the roadbed and property, when it was turned over to the purchasers at the last sale. On application of Simpson and other creditors the Circuit Court ordered the Receiver to sell the roadbed property rights and franchises of the plaintiff company at public sale on September 2d, 1886, at which sale it was bid off by W. W. Reed for seventy-five thousand dollars. He failed to comply with his bid, whereupon the Court ordered it to be resold on the 23d day of October, 1886, when it was bought by George W. Johnston for twenty thousand dollars, which sale, upon exceptions, was set aside by the Court, and a resale ordered on the 12th day of January, 1887, at which time it was sold to G. W. Johnston for thirty thousand one hundred dollars, which sale was subsequently confirmed by the Court, and by order of Court a deed was made from the Receiver to the purchaser. Upon the sale G. W. Johnston paid ten thousand dollars of his bid to the Receiver, and upon his application and upon his giving his bond and that of his associates to the Receiver for the balance of his bid the Court permitted him to retain the residue of his bid until the final order of the Court or the final distribution of the sum. The ground of this application was that G. W. Johnston and

his associates, to wit, P. L. Kimberly, M. S. Marquis, L. Raney and C. S. Wallace as transferees of the Simpson claim had a prior lien and were entitled to the fund, after the paying of the costs, *i. e.*, after the payments of the costs and the receivership. This suit of the company was against Thomas P. Simpson originally ; subsequently an amended bill was filed introducing James S. Negley as a party, and thenceforth the case proceeded without further notice of Negley and against Simpson alone, and that Negley by counsel or in person did not appear.

CROSS-EXAMINATION RESUMED :

Q. Did the Board of Directors elected in Pittsburgh early in 1884 ever have possession, control or management of the road bed, right of way, property or assets of the New Castle and Northern Railway Company ?

Objected to by plaintiff's attorney as incompetent and irrelevant and improper cross.

A. They did not, nor did Pittsburgh board of 1885.

Q. Did the New Castle Board of Directors or any Court in any litigation that was had ever recognize either of these Pittsburg boards as lawful officers of the company ?

Objected to by plaintiff's counsel as incompetent, irrelevant and immaterial as to the decision of the Court.

A. They did not.

Q. Do you remember of a case in which James A. Gardner was appointed as Examiner and Master in which the parties. The New Castle and the Pittsburgh parties. Each contended that they were the legitimate representatives of the company, in which connection the Pittsburgh party introduced the proceedings of the minutes of their board and of their stockholders' meetings to show that they were legally elected, and in

which the New Castle party introduced proceedings of their legitimacy, the latter party claiming that the office of the company was at the People's Savings Bank in New Castle, and the other parties claiming that the office of the company was at the McCance Block in Pittsburgh, and state what was the decision?

Plaintiff's counsel objects on the ground of the above exception.

A. I remember the case and the decision, and the Court decided the office of the company to be at New Castle, and that the New Castle board was the legal board.

Q. Will you state whether this railroad company ever employed any other counsel than R. B. McComb?

A. It did not.

Q. In the contention between the New Castle and the Pittsburgh boards did you see the minute book kept by James S. Negley, Jr., as secretary, of the proceedings of the company for the year 1883, and state whether that minute book was offered in evidence before the Master?

A. I saw the minute book, and it was offered in evidence before the Master.

Q. Were the minutes as recorded in it true or were they false?

Objected to by plaintiff's counsel. Same objection as above, and that the minute book should be produced, and the witnesses' attention called to such parts as were claimed to be erroneous.

A. Some parts of them were false and not a correct minute of the board.

Q. Had you been at all meetings of the board of which the minutes spoken of purported to be a record?

A. I had been. D. H. Wallace was treasurer of the company in 1883, and I was elected treasurer of the New Castle Board in 1884.

Q. Did the company have any money in the treasury?

Objected to by plaintiff's attorney. Same objection as above.

A. It had not.

Q. State whether the stock assigned to Weaver on his contract was stock paid for, or simply stock subscribed for?

A. Stock subscribed for and not paid.

Q. Will you state whether the certificates for the shares of the Weaver stock, mentioned in your direct examination, made to George W. Johnston for 51 shares to E. A. Wheeler for 100 shares to L. Raney, for 100 shares; J. N. Fallis, 400 shares; P. L. Kimberly, 100 shares; J. C. Stanton, 10 shares; Norman Martin, 10 shares; H. E. McGown, 10 shares; J. H. McClure, 100 shares; and Daniel Eagan, 40 shares, or either of them, delivered to either of them, receive any of this stock or negotiate for it, or request a certificate for it, or solicit it in any way?

A. They did not.

Q. State whether or not you offered this stock to any of them, and whether they declined to receive it?

A. I never offered it, but I was told by Norman Martin that they could accept it.

Plaintiff objects and moves to strike out from the word "but," as irresponsive, incompetent, irrelevant and immaterial.

Q. How many shares of stock were subsequently transferred to the said Johnston, Wheeler, Raney, Kimberly, Marquis and Eagan each, and was any of it the stock that never had had?

A. There were three shares transferred to each after the election and prior to September 2d, 1886; this was full paid stock, and not any of it Weaver stock.

Q. Did Johnston, Kimberly, Marquis, Wheeler,

Raney, *et al.*, elected directors in January, 1886, ever hold any other meeting or do any other business, except the business and the meeting you have suggested in your examination-in-chief?

Objected to by plaintiff as incompetent; minute book should be produced.

A. They held but one meeting, and did no other business.

Q. Did they ever have possession of the roadbed, property or management, and, if not, why?

A. They did not, because there was no other board elected, and this board recognized them as the legal board and abandoned the organization of the board.

Plaintiff objects, and moves to strike out all of the answer from the words "they did not" as inconsistent, immaterial and irrelevant. The witness should state the facts, not his inferences.

Q. Did this board take counsel as to the legality of their election? What were they advised, and what did they do in consequence?

Objected to that part of the question as advice given the board as incompetent and irrelevant.

A. They took counsel and were advised that they were illegally elected, and they then abandoned the office.

Plaintiff moves to strike out the word "abandoned," and also to strike out the word "abandoned" as a conclusion of law, irresponsive, incompetent. The witness should state the facts.

Q. What did the members of the board do? Was the transfer by Mrs. Simpson to you and others on the first day of sale, and, if so, was it before or after the sale?

A. It was made on the first day of the sale—the first sale—and before the sale.

Q. The liabilities of Simpson's estate that you assumed, were they general or specific liabilities for materials for the work on this road.

Q. They were only for the Utes Bridge claim and for ties furnished not exceeding $2,000.

RE-DIRECT EXAMINATION BY PLAINTIFF'S ATTORNEY:

Q. Where did this stock you have testified issued in three full-paid lots to the parties named above—from whom was it transferred?

A. It was part of fifty shares issued to Charles S. Wallace and paid for in cash to the treasurer of the company, for which I held a full-paid certificate.

Q. Who made out these certificates, the larger blocks of stock mentioned, in the names of Rancy, Johnston *et al.?*

A. I did; they were in my handwriting.

Q. Did the New Castle board, after the appointment of the Receiver, have any possession or control of the road and roadbed—supplies and materials as supplies of the Co.?

A. They did not; the Receiver had possession.

Q. State whether Geo. W. Johnson, yourself *et al.*, the purchasers of the road, formed a new company?

Objection and question by defendant.

Q. Was the formation of the new company by written articles of association, filed in the office of the Secretary of State at Harrisburg, and the subsequent proceeding had in relation thereto, all evidenced by the record of the Court of Common Pleas of Dauphin Co. in equity at the suit of the Commonwealth?

A. It was.

The proposed question objected to as incompetent and irrelevant.

A. We did form a new company.

Q. Did you transfer the New Castle and Northern Railroad bought at that sale to the new company?

A. Johnston made a deed to the new company.

Q. State what was the consideration of the transfer agreed upon; whether cash, stock, bonds, and how much.

A. There was no consideration given. The recited consideration was $250,000, and when the transfer was made the owners of the old road by the purchase were to receive and distribute among themselves $250,000 in stock of the new company, the parties agreeing to complete the road. We estimated the franchise acquired by the purchase at the Receiver's sale, as also that acquired by the new organization by the purchasers.

(Signed) CHAS. S. WALLACE.

Witnesss above signature:

JAMES M. SWORD,
Commissioner.

Adjourned this 25th day of September, 1889, by consent of the respective counsel, till September 26, 1889, at 9 A. M.

Parties appeared by counsel on September 26th, 1889.

FORBES HOLTON, a witness examined on behalf of the plaintiff, who, being duly sworn, testifies as follows:

Q. Name, age, residence and occupation?

A. Forbes Holton; age, forty-nine years; New Castle, Pa.; not in business at present.

Q. Do you know Jas. S. Negley, Thos. P. Simpson and Harriet N. Simpson.

A. I do.

Q. State whether you had a conversation with Harriet N. Simpson in regard to her claim against the New Castle Northern R. R. Co. as executrix of Thos. P. Simpson.

A. Yes, sir.

Q. State when and where that conversation occurred?

A. At the office of Mr. John W. Taylor, her attorney, Newark, N. J. I think it was in the early fall of 1886.

Q. State the substance of that conversation?

Defendant's counsel objects to the witness stating substance of conversation unless he first states that he cannot give the conversation as it occurred.

Q. State the conversation?

A. There was very little conversation. I met Mrs. Simpson by engagement at Mr. Taylor's office, and offered her $50,000 of first mortgage bonds of a reorganized company for her judgment. They wanted cash, and they left the matter open for a week—that week I spent in New York in effort to raise the money to pay cash for the judgment. My stay with the parties in the office was very brief—not more than half an hour.

Q. State whether there was any reference made to the claim of Jas. S. Negley against Thos. P. Simpson in that conversation?

A. There was not.

Q. State whether you ever had a conversation with Harriet N. Simpson in which reference was made to the claim of Jas. S. Negley against Thos. P. Simpson?

A. No, sir.

Q. State whether, in any negotiation had by you with a person, the agent, or person representing himself to be the agent, of Harriet N. Simpson, reference was made to the claim of Jas. S. Negley against Thos. P. Simpson?

Defendant's counsel objects that the proposed testimony, so far as the evidence now appears, is incompetent, and cannot affect Mrs. Simpson; the proposed evidence of the statement of an alleged agent cannot affect her.

A. I met the brother-in-law of Mrs. Simpson in Montclair, N. J.; it was he that arranged the inter-

view. He stated that Gen. Negley and Mr. Simpson were at variance. I did not inquire into the matter, because I desired peace. The trouble was between The inference I got was that Gen. Negley and Mr. Simpson was at war, and that now there was difficulty between Gen. Negley and Mrs. Simpson in the settlement of the estate.

Q. At the time of this conversation with Mrs. Simpson did you not make your offer to pay the $50,000 in bonds, above testified to, conditional, and did you not state to her that the offer was conditional upon him taking care of the claims of Jas. S. Negley under his contract with Thos. P. Simpson?

Defendant's counsel objects to the question as leading, and also that the proposed testimony is incompetent, immaterial and irrelevant. Witness can't answer this question without referring to a memorandum of that date.

A. (After referring to memorandum.) No, sir.

Q. Mr. Holton, will you look at the book now shown you, and state whether you recognize the handwriting. What book is that?

A. This is the minute-book of the New Castle and Northern R. R. Co.

Q. In whose handwriting is this book up to page 34?

A. James S. Negley, Jr. I have seen him write and know his writing.

Q. In whose handwriting is this book, from page 34 up to page 55?

A. I don't know. The signature on page 43 is the true and genuine signature of Jas. S. Negley, Jr.

Q. Were you a director in the New Castle and Northern Railway the first year of its organization?

A. Yes, sir.

Q. Is seal stamped upon the pages of the book the seal of the New Castle and Northern Railroad?

A. That is the seal.

The plaintiff offers the minute book in evidence,

and is marked "Plff.'s Exhibit 2, James M. Sword, Commissioner." Defendant's counsel requests the plaintiff's counsel to state the purpose of this evidence. Plaintiff's counsel states the purpose of the offer is to prove the resolutions contained on pages 6 and 7 and 15 offer is especially to prove page 27, resolution as to J. S. Negley, Jr. Also page 18, page 48 and page 47. Also to show the election of Pittsburgh board and their action and action of company with reference to right of way bought from Negley.

Defendant's counsel objects to the proposed evidence as incompetent, immaterial and irrelevant under the proposition of plaintiff.

Q. Were you the secretary of the New Castle board of the New Castle Northern Railroad from 1884 to 1886?

A. Yes, sir.

Q. Look at the book now shown you, and state if that is the book kept for minutes as secretary?

A. Some of these minutes I kept as assistant secretary, and the balance as secretary.

Q. Is that the minute book of the New Castle board?

A. Yes, sir.

Q. Turn to page 98 of that book (plaintiff offers book for identification, and is marked "Exhibit 3 for Identification. James M. Sword, Commissioner")—

Q. Turn to page 98 of that book, and state whether you find a resolution in regard to appealing from Simpson's judgment?

Defendant's counsel objects to question as incompetent and irrelevant.

A. Yes, sir; there is a resolution there to that effect.

Q. State whether that resolution was passed at a meeting of the New Castle Board of Directors in your presence on April 17, 1885?

A. Yes, sir.

Plaintiff's counsel offers resolution on page 98

of said book. Defendant's counsel objects as immaterial. The resolution reads as follows:

"A. G. Negley offers the following preamble and resolution:

"Whereas, according to the contract entered into between this company and A. C. Weaver & Co., A. C. Weaver & Co. agree to pay Thos. P. Simpson the amount awarded to him by the Circuit Court of the United States, and whereas, the said A. C. Weaver & Co. have failed to pay said award according to contract, after being requested by this board to do so, thereby placing the interests of this company in jeopardy, and liable to be sold in said award; therefore, be it resolved that the solicitor of this company be directed to take an appeal in said case." W. W. Reed and Noble Holton seconded the preamble and resolution, and the same was unanimously adopted.

Q. State whether the seal stamped on this book is the seal of the New Castle Northern Railway Co. This book markek "Exhibit 3"?

A. It is.

Q. State whether books marked Exhibits 2 and 3 are now in your possession as secretary?

A. They are.

Q. State whether you know of any cash advances made by Gen. Jas. S. Negley to the New Castle Northern Railway Co?

A. Yes, sir.

Q. When and to what amounts?

Defendant's counsel objects to proposed evidence as incompetent and immaterial.

A. In the early organization of the company, several times, in the neighborhood of $1,000 to $1,500.

Q. Were you familiar with the value of real estate in and near New Castle in the year 1883?

A. I believe I was.

Q. Had you bought and sold real estate prior to that time?

A. I had bought considerable.

Q. Look at the document shown you and marked the title of this case, Exhibit "P. 2," May 7, 1889, Rymer J. Wortendyke, Master—state whether you know the real estate mentioned in that deed?

A. Yes, sir.

Q. State, in your opinion, what was the reasonable value of the right of way and canal bed therein mentioned in 1883?

Defendant's counsel asks the purpose of this testimony. Answer of plaintiff: "To prove value of the premises mentioned in deed." Defendant's counsel objects to the purpose of the testimony offered as immaterial and irrelevant and is incompetent to this issue.

A. $100,000.

Q. State what, in 1883, was the fair and market value of these lands?

Defendant objects on same grounds as last proposition.

A. The same.

(Signed) FORBES HOLTON.

Witness the above signature:

JAMES M. SWORD,
Commissioner.

The further examination of this witness (Forbes Holton) is continued by consent of plaintiff's and defendant's attorneys this 26th day of September, 1889, until October 1st, 188 , at 7 P. M.

Plaintiff's counsel calls R. B. MCCOMB, a witness on part of plaintiff, who, being duly sworn, testifies as follows:

Q. What is your residence and occupation?

A. Newcastle, Pa. I am an attorney, admitted to practice in the State Courts and Supreme Court of the United States.

Q. State for what board—for the N. C. & N.—whether for the N. C. or Pittsburgh board—you acted during 1884, 1885 and 1886, during the pending of the suit by the company against Simpson, the hearing before the Master as to the value of Simpson's work, and the appeal taken from the appeal, then from the decree in his favor?

A. I represented the New Castle board in all those matters; and wherever Jas. S. Negley, Jr., appeared in those litigations he always was on the opposite side from me. During the entire pendency of this Simpson litigation I was solicitor of the New Castle board—was fighting the Simpson contract and Simpson claim.

CROSS-EXAMINED BY DEFENDANT'S ATTORNEY:

Q. Was Thos. P. Simpson a party in any suit or litigation of the N. C. & N. R. R. Co. except that of the company against him commenced in Lawrence County and removed to the Circuit Court?

Plaintiff objects as incompetent.

A. He was not. The suits mentioned and brought by Jas. S. Negley, Jr., were suits in the name of the company by the Pittsburgh Board of Directors, and were resisted by the N. C. board.

R. B. MCCOOMB,
Witness.

JAS. W. SWORD,
Commissioner.

Plaintiff puts in evidence the minute book Exhibit "No. 2," and offers especially from that book the pages mentioned above, and requests that in case Mr. Holton refuses to allow it to go

out of his possession the Commissioners have copied the following resolutions:

As to right of way, pages 6 and 18; and as to the appointment of Jas. S. Negley as assistant solicitor, page 27; as to the appointment of McCoombs solicitor, page 7; as to invalidity of action of other board, page 47; as to the resolution affirming Simpson contract, page 48; and certify the copies as true copies under his hand and annex the same to the testimony.

Adjourned till October 1st, 1889, at 7 P. M.

Now October 1, 1889. The cross-examination of FORBES HOLTON commenced at 7 P. M.

COL. R. B. MCCOMB, ESQ., appears for plaintiff, and D. B. KURTZ, ESQ., for defendant.

Q. The bonds proposed to be given to Mrs. Simpson were bonds not yet made or executed, but bonds contemplated of a company not yet organized, were they not?

A. Yes, sir.

Q. Do you not know that the minutes made by James S. Negley, Jr., as secretary of the N. C. & N. R. R. Co. were not all correct and true?

Plaintiff's counsel objects to this question for the reason that the examination in-chief was simply to identify the minutes of the company, and if the defendant wishes to attack the minutes he do it by cross-examination.

A. Yes, sir.

Q. Do you not know that what has been designated as the Pittsburg Board of Directors of the N. C. & N.

R. R. Co. had a seal for said corporation independent of the seal of the N. C. board?

Plaintiff's counsel objects to question for reason above.

A. Yes, sir.

Q. Was not your conversation with Mrs. Simpson at Taylor's office prior to her visit to New Castle?

A. Yes, sir.

Q. Was the interview you had with Mrs. Simpson at Taylor's office in Mr. Taylor's presence?

A. Yes, sir.

Q. What was the name of the alleged brother-in-law of Mrs. Simpson whom you met at Montclair?

A. Can't recall his name.

A. Was it not McNish?

A. That's the name.

Q. Do you know that Jas. S. Negley bought the real estate he conveyed to the N. C. & N. R. R. Co., from either W. L. Scott or W. W. Reed, at the price or sum of $10,000.

A. About that.

Q. When and about what time?

A. Some time prior to the organization of the N. C. & N. Ry. Co.

Q. Was not the deed from Scott to Negley delivered to the N. C. Ry. Co., contemporaneously with the deed from Jas. S. Negley and wife to said company for the same property?

A. It was.

Q. Was not the consideration or the most of it mentioned in the deed from Negley to the railroad company paid by the certificate of indebtedness of said company; if so, how much?

Objected to by plaintiff's counsel as not proper cross-examinntion, and, in addition, the certificates themselves, if any, would be the best evidence.

A. Yes; over $100,000.

Q. Was not $100,000 or more of that consideration arranged to be divided between five persons, of whom Jas. S. Negley was one?

Plaintiff's counsel objects to question; not proper examination.

A. Yes.

Q. In pursuance to that arrangement was the certificate of indebtedness of the company attested by its corporate seal made and delivered to Jas. S. Negley, and, if so, for what amount?

Plaintiff's counsel objects. Not proper cross-examination.

A. It was for about—in the neighborhood of $22,500. I can't give you the exact amount.

Q. State as nearly as you can the time this was done?

A. Some time in the spring of 1883.

Q. Was Jas. S. Negley then the president of N. C. & N. Ry. Co.?

A. He was.

Q. Can you state about the several dates and the several amounts advanced by Jas. S. Negley as mentioned in your answer in your direct examination?

A. I believe the money was all paid in 1883, but I can't give you the months or amounts.

Q. Was not some of that money, and, if so, how much, advanced to W. W. Reed while he, Reed, had a contract for the construction of the road, the said railroad?

A. Can't state.

Q. Do you know to whom Mr. Negley paid or advanced said money of your own personal knowledge?

A. To Daniel H. Wallace, treasurer.

Q. Was that the money not paid in for the purpose of raising a fund to enable W. W. Reed to prosecute his contract for the construction of the road?

A. I can't say as to that.

Q. Under what arrangement was the money so advanced by Gen. Negley?

A. There was assessments made, and these assessments were made on Gen. Negley, as on the rest of the stockholders.

Q. Did not W. W. Reed then have a contract with the company for the construction of the entire road in his own name, and was not Gen. Negley interested in that contract under and that he was to have a certain share or proportion of the profits of the contract?

Plaintiff's counsel objects. Not proper cross-examination.

A. Yes, sir.

Q. Was not the arrangement that Gen. Negley and others interested in that contract with Reed were to advance the money necessary to push the work until from the proceeds from the sale of stock and bonds, or either, the funds could be realized to complete it.

Plaintiff's counsel objects. If such an arrangement was in writing, it only could be proven by the writing itself.

A. I don't recollect it.

Q. Was the money so paid by General Negley at the time credited on his stock subscriptions, and, if so, by whom and where was such entry made?

A. I can't say how it was credited; Daniel H. Wallace kept the books. Daniel H. Wallace was treasurer.

Q. Do you know whether it was credited at all on the books of the company, and, if so, what account?

A. I do not.

Q. Do you know personally whether the money mentioned was paid to D. H. Wallace, and, if so, how? Whether in cash, by check, note or otherwise.

A. Daniel H. Wallace, as treasurer, drew a draft on

General Negley on the Pennsylvania Bank in Pittsburgh; it was paid—$1,200—I think.

Q. At the time that W. W. Reed had the contract for the construction of the road, was General Negley the president of the railway company?

A. He was.

EXAMINATION IN CHIEF RESUMED BY COL. R. B. MCCOMB:

Q. You have stated, Mr. Holton, that a certificate for $22,500 was delivered to Gen. Negley. How do you know that?

A. I was told so.

Q. Did you see it delivered?

A. No, sir.

Q. Where was it delivered?

A. I can't say.

Q. Did you ever see the certificate?

A. Yes, sir.

Q. In whose hands was it?

A. It was returned to me as secretary by Gen. Negley by the hands of Jas. S. Negley, Jr.

RE-CROSS-EXAMINATION BY D. B. KURTZ, ESQ.:

Q. Was not the time when the certificate was so returned to you, as secretary, after difficulty or dissension had arisen between Gen. Negley, D. H. Wallace, yourself and others, who were afterwards known as the N. C. board?

A. Yes, sir; about that time.

FORBES HOLTON.

Attest:

JAMES M. SWORD,
Commissioner.

The following is an abstract of the substance of the resolutions in the minute books of the New Castle Northern Railway Company above referred to :

Minute Book No. 1, by Jas. S. Negley, Jr., secretary, Pittsburg minutes, pages 6 and 7.

On motion of Daniel H. Wallace, seconded by Forbes Holton, the New Castle Northern Railway Company accepted the proposition of Jas. S. Negley to sell to it the right of way above mentioned for $114,560, payable $14,560 in cash, and the balance in first mortgage bonds of the railway company at par on demand, and requested Gen. J. S. Negley to execute and deliver a deed for the same to the railway company, to enable it to proceed with the construction of its road, " with the understanding and upon the express condition, however, that no advantage shall be taken of said Negley or his assigns by the New Castle Northern Railway Company, its successors and assigns, by reason of the execution and delivery of said deed, and of said Negley's acknowledgment of the receipt of said purchase money, which said purchase money shall be paid said Negley, and the same is hereby declared due and payable to him upon the execution and delivery of said deed to this company." Motion put and carried.

Page 7—R. B. McComb appointed solicitor of the company in Lawrence County.

Pages 24, 25 and 26—Resolution accepting proposition of Thomas P. Simpson to build the road (substantially similar to building contract between Simpson and the company which is abstracted above).

Page 27—Jas. S. Negley, Jr., appointed assistant solicitor of the company.

Pages 32, 33, 37 and 39—Resolutions passed by New Castle men, including Albert G. Negley, Dan. H. Wallace and Chas. S. Wallace, under objections and dissent of Jas. S. Negley, Jr., and another in regard to the Simpson contract. The New Castle men passing resolution for its rescission and Jas. S. Negley, Jr., and another objecting and protesting.

Pages 47 to 50—Meeting of stockholders of the com-

pany at Pittsburgh. Thomas P. Simpson present as a stockholder, and moving and seconding resolutions as a stockholder.

Page 48—January 14, 1884, resolution passed at this meeting affirming the Simpson contract, and declaring the minutes of the Board of Directors, known as the New Castle board, invalid.

Minute book No. 2, Forbes Holton, Secretary, or the New Castle minutes.

Pages 14 and 15—Statement to the board at the meeting in New Castle made by Daniel H. Wallace, to the effect that he could not obtain any satisfaction from Simpson or Negley as to their shares (the share of the Newcastle directors) of the profits of the Simpson building contract. Present—Albert G. Negley, Chas. S. Wallace, Forbes Holton and others.

Page 48—Resolution stating facts as to Simpson's action in appointing arbitrators to settle disputes under his contract, and that Negley is acting with him in his interest and repudiating the action of Negley as president and authorizing injunctions to be brought. Date of resolution, January 5, 1884. Present—Chas. S. Wallace, Forbes Holton and others.

Page 57—Election of directors of new Board of Directors, including Charles S. Wallace, January 17, 1884.

Page 59—R. B. McComb made solicitor. Date, January 21, 1884.

Page 62—Assignment of 490 shares of stock by Albert G. Negley to Charles S. Wallace, and of three shares from Albert G. Negley to Harbison, ratified and confirmed by resolution of the board.

Page 64—Authorizing officers to make new building contract.

Page 66—October 29, 1884. Resolution authorizing mortgage of $250,000 with bonds.

Page 69—Resolution authorizing Charles S. Wallace to execute Weaver building contract, October 31, 1884.

Page 73—Charles S. Wallace elected treasurer.

Page 85—Resolution in regard to obtaining injunctions against arbitration of the Simpson contract.

Page 87—Charles S. Wallace elected director again.

Pages 91-92—Resolution proposing a compromise with Negley.

Pages 94-95—Resolution authorizing Weaver contract to be canceled.

Page 95—Resolution authorizing deposit of mortgage bonds or road to secure the bond on appeal to be given on appeal from Simpson judgment to the U. S. Supreme Court.

Page 98—Resolution authorizing company's solicitor to appeal from the Simpson judgment to the U. S. Supreme Court, dated April 24, 1885.

Page 100—Resolution canceling Weaver contract, and directions to Charles S. Wallace to hold stock assigned from Albert G. Negley to him for future building contract.

TUESDAY, December 23, 1890.

It is admitted that James S. Negley, Jr., is dead.

Plaintiff's counsel offers and reads in evidence various further depositions.

Defendant's counsel offers in evidence copy of Master's report in the suit in the United States Circuit Court for the Western District of Pennsylvania. The New Castle Northern Railway Company, plaintiff, against Thomas P. Simpson, defendant, as to distributions of proceeds of sale. The following are extracts from the same.

The Master finds the following facts :

By agreement dated the second day of September, 1886, Mrs. H. N. Simpson, executrix of Thomas P. Simpson, deceased, agreed to assign to Peter L. Kimberly, Leander Raney, G. W. Johnson, M. S. Marquis and C. S. Wallace all the claim of the estate of Thomas P. Simpson, in the decree against the New Castle Northern Railway Company entered in No. 14, May Term, 1884, of the United States Circuit Court for the Western District of Pennsylvania, which decree was

entered on the 20th day of March, 1885, and was for the sum of $56,643.77.

This agreement ("Exhibit No. 25") is as follows:

"AGREEMENT executed this 2d day of September, A. D. 1886, between Mrs. H. N. Simpson, executrix of Thomas P. Simpson, deceased, of the first part, and Peter L. Kimberly, of Sharon, Pa., Leander Raney, G. W. Johnson, M. S. Marquis, and C. S. Wallace, of New Castle, Pa., of the second part, as follows:

"The party of the first part agrees to assign and transfer to the parties of the second part all the interest, claim and right of the estate of Thomas P. Simpson, deceased, in the decree and claim against the New Castle Northern Railway Company in the Circuit Court of the United States for the Western District of Pennsylvania, at No. 14, May Term, 1884, in Equity. In which case an appeal to the Supreme Court of the United States is now pending, the said party of the second part taking the place of the said Simpson and his estate in said proceeding. In consideration of which the party of the second part jointly and severally agree to pay and assume the following considerations:

FIRST. To pay said Mrs. H. N. Simpson's executors, as aforesaid, twenty thousand dollars ($20,000) in cash.

SECOND. To pay D. B. Kurtz and Marshall Brown, her solicitors, $2,500 each in cash, aggregating the sum of $5,000.

THIRD. To indemnify, save and keep harmless the estate of said Thomas P. Simpson of and from all costs, fees and charges to which he or his estate is now or may be subject to or liable for in said case and proceedings thereunder. And also from all liability for the William Youtz bridge claim. Also of and from all claims for ties furnished to said Thomas P. Simpson, whether in judgment, in suit, or otherwise, not, however, exceeding the sum of $2,000.

FOURTH. The parties of the second part agree to procure the release to the Simpson estate by the 1st day of January, A. D. 1887, of the Youtz and tie claim above indemnified against.

In Witness Whereof said parties have hereunto set their hands and seals the day and year aforesaid.

(Signed) H. N. Simpson, Exr. [seal.]
L. Raney, [seal.]
G. W. Johnson, [seal.]
Peter L. Kimberly, [seal.]
M. S. Marquis, [seal.]
Chas. S. Wallace, [seal.]

Attest:

Marshall Brown as to Simpson, Raney, Johnson, Marquis and Wallace.

Received payment of twenty thousand dollars above mentioned.

September 2, '86.

H. N. Simpson.

Attest:

Marshall Brown.

By assignment dated the second day of September, 1886, H. N. Simpson, Executrix, assigned to G. W. Johnson and others the decree in favor of Thomas P. Simpson, and of which assignment the following is a copy:

"For value received, I hereby sell, assign, and transfer the decree in favor of Thomas P. Simpson in the above case, and all money secured thereby, to G. W. Johnson, P. L. Kimberly, M. S. Marquis, L. Raney and C. S. Wallace.

Witness my hand and seal this 2nd day of September, 1886.

(Signed) H. N. Simpson,
Executrix of Thomas P. Simpson, deceased.

Attest:

John W. Taylor.

At the date of said last recited agreement an appeal from the decree of said Circuit Court was pending in the Supreme Court of the United States.

* * * * * *

The Master submits the following:

Schedule of Distribution.

By the Certificate of the Clerk of Court, hereto attached, there remains in the Registry of the Court from sale of New Castle, Northern R. R. Co.....		$4,094 50	
Amount in hands of G. W. Johnson, purchaser of said Railroad Company, in pursuance of order of Court filed the 8th day of April, 1887, to be paid with interest when and as directed by Court.....		20,100 00	
		$24,194 50	
Deduct Expenses of this Audit, viz. :			
The "Daily City News" of New Castle, for adv. of meeting of Master.....	$6 40		10
The "Guardian" of New Castle, for adv. of meeting of Master.....	6 40		
The "Pittsburgh Commercial Gazette," for adv. of meeting of Master.....	20 00		
Stenographer's Bill.....	136 70		
The Master claims an allowance of.....	1,000 00		
		$1,169 50	
Balance for distribution.....		$23,025,00	
Balance for distribution.....		$23,025 00	
Claim allowed in full by foregoing report, viz. :			20
Safe Deposit Company.....	$125 00		
D. W. C. Carroll, Receiver.....	606 03		
R. B. McCombs, Esq.....	350 00		
($200 of which is assigned to G. W. Johnson.)			
Judgment: Shields & Sheriff vs. Thos. P. Simpson, New Castle Northern R. R. Co., Garnishee. $406 32			
Interest from June 22d, 1885, to January 12, 1887, date of third sale..... 40 92			
Costs..... 13 25	$460 49	$1,541 52	
Balance for distribution.....		$21,483 48	30
Pro rata—			
To Albert Pander.....	$2 51		
To Leander Raney, Peter L. Kimberly, G. W. Johnson, M. S. Marquis and Charles S. Wallace, Assignees of the Simpson decree, and which dividend is to be paid to them less the costs in this case.....	$21,480 97		
		$21,483 48	

Respectfully submitted,

WM. L. CHALFAUT,
Master.

PLAINTIFF RESTS. 40

Defendant's counsel moves that plaintiff be nonsuited on the ground that the liability sought to be enforced stands on a contract, in which there is a stipulation that, if Negley and Simpson shall become the owners of said railroad property and franchises, they are to enter into a partnership; that there is no provision for any assignment of the claim; that unless Simpson disabled himself from making a transfer instead of settling it with the company, he had a right so to do; that the provision in the contract that his claim against the company shall remain intact is good against the company still unless he lost it by laches; that it does not appear that there was any such settlement by Simpson with the company as would be required, under the contract, to include the settlement of the claim of Negley; that there was merely a transfer of the claim to other parties; that plaintiff has failed to show that he had a well-founded claim and lost it by the assignment of the Simpson claim.

THE COURT: According to the best of my understanding of this case it is a matter of such detail that it is very possible that some features of it may not be within my comprehension, and I have turned my attention to the two points that are fundamental in the case —first, the construction of this agreement; and secondly, the question as to whether, in what was done by the executrix, there was a breach of that agreement. Only incidentally has the question as to what accounts were to be considered as expenses, and only incidentally as to what the measures of damages would be, formulated in some rule, has the case arisen in my mind. My impressions now are quite decided.

This agreement is to be considered in all its parts, and with reference to the situation of the parties, Simpson and Negley, respectively, and the nature of their relations to this corporation.

Now, these facts appear in the case as showing the situation of these parties. In the first place, Negley was the owner of the right of way that was conveyed to the company for the consideration of $114,000. That

consideration was unpaid. It was a claim that he had against this corporation. In addition to that, it appears from the evidence that Negley had advanced to the company for expenses the sum of $3,900 for which he held the bond of the company. The date of that paper was April 23, 1883. Both of these claims were antecedent to the agreement now in controversy.

Simpson, in October 5, 1883, had entered into a contract with this company for the construction of a railroad on this right of way. The contract contained a provision somewhat unusual, which is not to be overlooked in the construction of this agreement. I refer to the ninth subdivision :

(The Court reads from the paper and continues :)

This shows that at the time of the contract between Simpson and the railroad company it was contemplated that, in case the money was required, the company might be required to raise funds ; and Simpson undertook, in the language I have quoted, the providing of a certain amount of funds for the purpose of liquidating those claims that might be presented. This was the situation of the two parties to this agreement.

It also appears in evidence (and we must look at the situation of this corporation at the time) that a controversy had arisen between different stockholders, or persons interested in the company, having relation to the control of the company. And it also appears that prior to the making of this agreement in June, 1884, a litigation had been commenced, the object of which was to annul and set aside the Simpson contract. That litigation is given a prominent position at the very threshold of the agreement between the parties, and seems to have been a moving cause of the agreement that was subsequently made. The recital is :

" Whereas litigation is now pending in which " certain parties, stockholders in said rail- " road company, are seeking the cancellation " of said contract (that is, the contract be- " tween Simpson and the railroad company for the con- " struction of this railroad), and it is believed that

" either in the event of an affirmance of said contract " or a cancellation thereof, the claim of the said " Thomas P. Simpson for the contract price for the " construction of said railroad will be followed by " judicial sale of said property and franchises."

Now, these facts are all facts preceding this agreement relating to the status of Simpson and Negley, and also of the company, which are to be considered in construing this agreement.

Then it recited the claim that these two parties had in view. The next recital is :

" Whereas, it is the purpose and intention of the " said Thomas P. Simpson, if said property can be " purchased for a reasonable amount, to buy the same " to secure not only his own claim, but to provide for " other claims, as hereinafter set forth."

That was the principal object the parties had in view, a sale ; and if sold, the purchase of this railroad with a view of the rights of those parties that are referred to.

The next recital is :

" Whereas, General James S. Negley * * * has " furnished to said railway company a certain valuable " right of way (that is the right of way for which $114,- " 000 was unpaid), purchased by the said James S. " Negley * * * and transferred by the said " James S. Negley and wife to the said New " Castle Northern Railway Company for the " consideration therein named, to wit, $114,000, which " said deed has been delivered, &c."

Now, this is the recital of this original indebtedness. The next stipulation is :

" Whereas, it is the desire of the said Thomas P. " Simpson in consideration of the valuable right of " way transferred as aforesaid, and in consideration of " the payment by the said James S. Negley of certain " sums of money to and on account of the said New " Castle Northern Railway Company, to secure to the " said James S. Negley the amounts thereof, and in " further consideration of the sum of one dollar, * * * " the receipt whereof is hereby acknowledged ; now,

" therefore, this agreement, made this fifth day of " June, 1884, witnesseth."

Now, we have all the preliminaries. We have the situation of the parties to the incorporation, the litigation what was proposed; and on the basis of these facts this agreement was made:

" That it is mutually understood and agreed by and " between the said Thomas P. Simpson and the said " James S. Negley that, if the said Thomas P. Simpson " shall become the owner of said railroad property and " franchises as aforesaid, by judicial sale, or otherwise, " then and in that event the said Thomas P. Simpson " shall bear the relation of trustee to the said James " S. Negley for the purpose of securing him a fair " and reasonable compensation or consideration for " the said right of way transferred to said railroad " company as aforesaid, it being agreed and under- " stood that after the completion of said railroad and " the payment therefor, and after the said Thomas P. " Simpson shall receive payment in full of the proceeds " either of the sale of said railroad or of securities is- " sued thereon, and after the said James S. Negley " shall receive all moneys advanced or expended by " him on account of said railway company or the con- " struction thereof, which amount shall include all costs " of litigation and extraordinary expenses (there the " parties have put in one sum the different claims that " might arise in case of the purchase) occasioned by " the contests now pending in the Courts of Lawrence " County and the United States Court for the Western " District of Pennsylvania, and for which either party " hereto shall be liable, which said payments shall be " made on the presentation of vouchers and the settle- " ment of accounts thereon, showing actual payment " by each party hereto (that is, the preferred claims " included in that classification), then the net profits " arising out of the construction of said railroad, the " sale or lease thereof, or by negotiation of securities " thereof, whether in the shape of bonds, stocks or

" moneys, shall be divided between the parties hereto " in the proportion following, to wit."

It is necessary for me to refer to this, because the purpose was expressed and there was a provision for grouping together these debts in priority to be paid out of this property to be purchased, and to be held by the trustee, in priority to the declaration of their interest after such debts were paid. In other words, they were the preferred claims.

Then, it is also agreed: " That the claim of " said James S. Negley against said railroad company " as now constituted on account of the said right of " way or moneys advanced as aforesaid, shall remain " intact until the happening of the contingency afore- " said," &c.

Then there is a provision with respect to suits to recover for unpaid stock, with details that I need not refer to. Neither need I refer to the clause with regard to the sale and disposition of the road by lease. Then we come to the alternative agreement :

" It is also agreed that, if a settlement of the claim of " the said Thomas P. Simpson against said company " shall be made with or without suit, judicial sale or " otherwise, the amount of such settlement shall also in- " clude all moneys actually expended by said James S. " Negley, as shown by his vouchers therefor."

That I construe, as the plaintiffs' counsel seems to construe, not to include $114,000, which was not money actually expended; but the consideration for lands that were conveyed—a debt created by the conveyance of lands to the company.

The suit is upon this last agreement.

Now, the evidence further shows that this litigation, in view of which this agreement was made, was continued, and it resulted in a decree for $56,644.73 in favor of Simpson—a debt decreed to Simpson. The evidence further shows that on the 2d of September, 1886, an adjustment was made—a settlement, I can't call it anything else—or a compromise was made between Mrs. Simpson, the executrix, and these persons

who were connected with the litigation that was then pending; and the result of that arrangement was the transfer of this decree to these assignees for the sum of $25,000—$20,000 cash received by Mrs. Simpson and $5,000 the expenses of her counsel in the course of the litigation. The effect of that assignment was to put in the hands of these assignees the control of this decree for $56,644, and the evidence further shows that, having the control of this decree, an appeal that was then pending was dismissed.

But it appears from the Master's report (and I look upon that as a considerable importance in this case) that the Master construed the arrangement between these parties and Mrs. Simpson as a compromise, and, in recommending a decree, they allowed to the parties holding this assignment the sum of $20,100 (I refer to the decree of distribution), which dividend is to be paid to them, less the costs of the case.

Now, it seems to me that that is a breach of this agreement; that the result of that assignment was to put it in the power of these other parties, and to put it within their control to discharge the obligation of Simpson against this company. And, in my judgment, it was, if not a breach of this agreement, such evidence as would justify and warrant a call for a finding that the agreement was broken, sufficient to lay the foundation for this action.

So far my mind is quite settled; but from that point on, with regard to what is to be done in case of that finding, I am unable at this time to determine. I have had an opportunity of thinking the matter over, but I have had no opportunity of looking at it. I am very seriously perplexed as to what the measure of damages to this case shall be. I am very much inclined to think that the measure of damages would be nominal; and that which inclines my mind in that direction is this: That there was no assignment of the Simpson claim to Negley; no assignment of any interest in the claim to Negley; no transfer which would enable Negley to share in any

part of the moneys that might be realized out of his claim against the company in the course of this litigation in view of which this agreement was made. I look at that as not only throwing light on the language of the agreement, but as very largely entering into and controlling and giving application to the covenants and agreements that are contained in this paper.

The result of that litigation was a decree in favor of Simpson. That was a judicial determination of the amount of his claim. If Mrs. Simpson had received that $56,000 that was due her, I am at a loss to find any principle that would enable the Court to say that out of that $56,000 General Negley was to be paid anything. By that judicial determination—compromise—a settlement of the company was put out of the question; and while I have regarded this assignment as a disablement to continue the controversy in dispute, and with some hesitation have come to the conclusion that it is a breach of this agreement, I can't see how it amounts to anything more than a sale of the $56,000—a compromise of that. And I can't see, as at present advised, how General Negley can call upon Mrs. Simpson to share in that which is not the result of any voluntary act either on her part or on the part of her husband, but the result of a judicial determination which extinguished the whole subject matter of controversy between these parties and prevented any such thing as a voluntary settlement between Mrs. Simpson and the company.

Now, I have told counsel what my views in this case are. I have expressed them as clearly as I could, and I have expressed them precisely as I have at this moment felt. If I am wrong, I am perfectly willing to take it all back. What I propose to do, if counsel desire it, is to refer this case with a view of having an account stated, and with a view of having such an inspection and investigation into this account as would present this legal question ultimately to be decided by this Court, and decided in such a way as to give parties a bill of exceptions and dispose of it.

I have expressed these views more with a view of notifying counsel of what I consider to be the situation of this case, than with a view of deciding it. I think you may accomplish by a reference what can't be accomplished here, because I don't know what is in these papers, and I don't think this jury does.

I will now say what I consider it meant by questions in this litigation.

I don't intend that the Referee shall decide this question that I have now decided. I intend that he shall find the facts. My first view was that the $114,000 was included; and I was inclined to that view for the reason that they have put these claims into hotch-potch; they have put them all together. But subsequent examination and reflection showed me that the agreement wouldn't bear that construction; that that construction would arise in case this project had been executed; that then the $114,000 was made an element; but it wasn't included in the covenant, in the portion of the agreement that relates to the condition of affairs that would arise where the parties didn't accomplish their principal purpose. What they wanted was to buy this railroad and put in their claims, and do the best they could with it; and then they made an alternative arrangement. They made provision for another thing.

"It is also agreed that if a settlement of a claim of "the said Thomas P. Simpson against the said com- "pany shall be made with or without suit, judicial sale "or otherwise, the amount of such settlement shall "also include all moneys actually expended by said "James S. Negley, as shown by his vouchers therefor."

And earlier in the agreement there was a sentence that throws light on what is meant:

"Whereas, it is the desire of the said Thomas P. "Simpson, in consideration of the valuable right of "way transferred as aforesaid, and in consideration of "the payment by said James S. Negley of certain "sums of money to and on account of the said New "Castle Northern Railway Company, to secure to the

" said James S. Negley the amounts thereof, and in " further consideration," &c.

And again: " And after the said James S. " Negley shall receive all moneys advanced or ex- " pended by him on account of said railway com- " pany or the construction thereof, which amount " shall include all costs of litigation and extraordinary " expenses occasioned by the contests now pending in " the Courts of Lawrence County," &c.

Now, I have regarded that provision between these parties, and the classification and distinction between the expenses and the amount due for right of way as throwing light on the words " all moneys actually expended by said James S. Negley as shown by his vouchers therefor and for which either party hereto shall be liable, which said repayments shall be made on the presentation of vouchers."

I think that the word " expenses " in the last clause of the agreement is to be interpreted in the sense of the language that I have just read; and when the Referee states his account, he will state it in accordance with the view that is now expressed by the Court; and when the Referee's report comes in (both parties dissenting of course), if I change my mind, and think that the measure of damages is different from what I have expressed now, I can do so after hearing counsel.

I won't conclude you, Mr. Clarke, from argument; but as this case is, I would be perfectly unwilling to trust myself now to sum it up. I would be so afraid of misapprehending or misstating, or misquoting, that I would be compelled to say to the jury, " Take the papers and find out for yourselves."

If you agree on a Referee, I will name the gentleman upon whom you agree. If you don't agree, I will select the Referee myself. I will make the order that the testimony taken in open court shall be considered as evidence taken before the Referee, and the depositions as well. I presume what you want is a speedy determination. I hope the case will be heard this week.

What I have said this morning may be read to the Referee.

I, DAVID A. DEPUE, the Judge holding the Circuit Court before whom the above case came on to be heard without a jury, finding the same a case of doubt and difficulty, direct this case be made and stated, and do hereby certify the same to be argued at the bar of the Supreme Court.

Dated October 1, 1892.

DAVID A. DEPUE,
Justice of the Supreme Court Holding the
Essex County Circuit Court.

N. J. SUPREME COURT,

JUNE TERM, 1893.

JAMES S. NEGLEY

v.

HARRIET N. SIMPSON, Executrix of Thomas P. Simpson, deceased.

On Cont.

Simpson and Negley having separate claims against the same corporation, which were contested by certain stockholders who had control of the corporation, Simpson covenanted with Negley that, in any settlement which might be made of Simpson's claims, Negley's claim should be included. Held:

1. That the covenant bound Simpson's executrix.

2. That an assignment of Simpson's claim by his executrix to the contesting stockholders or their representatives, for a cash consideration, was a settlement within the meaning of the covenant.

3. That on such settlement Negley became entitled to recover from Simpson's executrix the amount of his claim against the corporation, although it had not been included in the settlement.

On case certified by the Essex Circuit Court.

Argued February Term, 1893, before the Chief-Justice and Justices REED, MAGIE and DIXON.

MR. R. FLOYD CLARKE, of New York, for plaintiff.

MR. J. W. TAYLOR, for defendant.

The opinion of the Court was delivered by DIXON, J. On June 5th, 1884, Thomas P. Simpson and James S. Negley entered into a contract under seal, which among other things, recited that Simpson was then engaged in the construction of the railroad known as the New Castle Northern in the State of

Pennsylvania; that litigation was then pending, in which certain stockholders of said railroad company were seeking the cancellation of Simpson's construction contract, and it was believed that Simpson's claim would be followed by a judicial sale of the railroad property and franchises; that Negley had furnished to said company a certain valuable right of way for $114,000; that it was the desire of Simpson, in consideration of said right of way so transferred, and of the payment by said Negley of certain sums of money to and on account of the said company, to secure to the said Negley the amounts thereof; and, therefore, it was agreed that if Simpson should become the owner of said property, he would bear the relation of trustee to said Negley for certain specified purposes, and "that "if a settlement of the claim of said Simpson against "said company shall be made, with or without suit, "judicial sale or otherwise, the amount of such settle- "ment shall also include all moneys actually expended "by said Negley, as shown by the vouchers therefor."

On August 28, 1884, the litigation referred to in the above-mentioned contract resulted in a decree that Simpson's construction contract should be canceled, but that he was entitled to compensation for the work done under it, and on March 20, 1885, a decree was made, awarding him $56,643.77 for such compensation. On May 13, 1885, Simpson's adversaries appealed from the decree of March 20. On July 13, 1886, a decree was made for the sale of the railroad, the proceeds to be held in court to abide the appeal.

On July 25, 1866, Simpson died, and Harriet N. Simpson became his executrix. On September 2, 1886, the executrix assigned to G. W. Johnson and others the above mentioned decree in favor of Thomas P. Simpson and all money secured thereby, for the sum of $20,000 cash, paid to her, and certain covenants made by the assignees. The assignees represented the stockholders who, according to the recital in the Simpson-Negley contract, had sought the cancellation of the Simpson construction contract.

The present suit is brought by Negley against the executrix to recover the amount of money actually expended by Negley on account of said railroad company, which amount is fixed by the stipulation of the parties at $5,000.

The first objection made against a recovery by the plaintiff is that the facts do not show "a settlement" of Simpson's claim against the company, within the meaning of the contract; that having been merely transferred to Johnson and others it was not settled, but remained in full vigor against the corporation.

We think, however, that by the term "settlement" the parties meant any arrangement between Simpson and his opponents in the pending litigation, by which Simpson's concern in the litigation should end. It was their design that in making any such arrangement Simpson should not only be empowered, but should also be bound, to include Negley's claim for money expended, so that Negley might have, as an additional security, the likelihood that Simpson and his adversaries would adjust their differences. Perhaps, if Simpson's adversaries had paid him the full amount of his decree, that would not have been a "settlement made" within the meaning of this contract, for, in that event, Simpson would have had no power to include Negley's claim, and it is hardly to be supposed that he contracted to do what it was evident he could not possibly do; but, under any other conditions, where his consent was necessary for a settlement, it was his duty to withhold consent, unless Negley's claim was paid. Whether his settlement was made directly with the corporation or indirectly with the stockholders behind the corporation, who were contesting his claims, could not have been deemed important by either Negley or Simpson.

The second objection urged against the plaintiff is that Simpson's covenant was one for his personal services, and, therefore, was extinguished by his death.

We see no reason for thinking so. There was certainly no express covenant for his personal services,

and it is to be implied that an agent or representative, empowered to settle Simpson's claim, could properly examine Negley's vouchers and include their amount in such settlement.

The last position of the defendant to be noticed is that Negley's claim remans unaffected by the settlement of Simpson's claim, and, therefore, his loss is only nominal.

The general rule for the measurement of damages on the breach of contract is that the damages shall be such as will put the party in the same situation pecuniarily as he would have occupied if the contract had been performed. For this, the defendant's contention seems to substitute a rule which will only leave the plaintiff no worse off than he would have been if the contract had not been made. Such a rule would deny to the plaintiff the benefit of his contract. It leaves out of view the right of the plaintiff to performance. If Simpson had performed his express covenant with Negley he would have received the amount of Negley's claim for money expended, and the law would then have imposed upon him the duty of paying that amount to Negley. Negley can now be put in the same situation only by the law's laying upon Simpson's executrix the same duty.

The Essex Circuit Court should be advised that the plaintiff is entitled to recover against the defendant the sum of five thousand dollars, with interest from January 15, 1891, pursuant to the stipulation of the parties.

NEW JERSEY SUPREME COURT.

JAMES S. NEGLEY AGAINST HARRIET N. SIMPSON, Executrix of Thomas P. Simpson.	On Case Certified from Essex Circuit Court. Order.

This cause having been duly argued at the February Term of this Court by R. Floyd Clarke, of counsel with the plaintiff, and John W. Taylor, of counsel with the defendant, and the Court having inspected the case of doubt and difficulty made, stated and certified by the Judge of the Essex Circuit Court to the bar of this Court and considered the same, and being of opinion that the plaintiff is entitled to recover from the defendant upon the contract sued upon ;

It is thereupon ordered, that the Essex Circuit Court be advised that the plaintiff is entitled to recover against the defendant the sum of five thousand dollars, with interest from January fifteenth, eighteen hundred and ninety-one, pursuant to the stipulation of the parties, and said Essex Circuit Court is advised to enter judgment thereof accordingly.

Entered September 15, 1893, on motion of

WALLIS, EDWARDS & BUMSTED,
Attorneys.

ESSEX CIRCUIT COURT.

JAMES S. NEGLEY

AGAINST

HARRIET N. SIMPSON, Executrix, &c., of Thomas P. Simpson, deceased.

On Contract. On Certified Opinion of Supreme Court.

Judgment on opinion of Supreme Court in the above-entitled action on contract was rendered on the twenty-first day of September, A. D. eighteen hundred and ninety-three, in favor of the said plaintiff James S. Negley and against the said defendant Harriet N. Simpson, executrix of the last will and testament of Thomas P. Simpson, deceased, for the sum of five thousand eight hundred and four dollars and sixteen cents damages, and one hundred and six dollars costs of suit.

Judgment entered and signed September 21st, A. D. 1893.

DAVID A. DEPUE,
Judge.

NEW JERSEY, ss. : The State of New Jersey to DAVID A. DEPUE, Esquire, Judge of our Circuit Court, in and for the County of Essex, Greeting :

[L. S.]

Because in the record and proceedings, and also in the giving of judgment in a plaint which was in our Circuit Court, holden at Newark, in and for the said County of Essex, between James S. Negley, plaintiff, and Harriet N. Simpson, executrix of the last will and testament of Thomas P. Simpson, deceased, defendant,

of an action upon contract, manifest error hath intervened, to the great damage of the said defendant, as it is said; we being willing that the error, if any there be, should in due manner be corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, that if judgment be given thereupon, then, without delay, you distinctly and openly send, under your seal, the record and proceedings aforesaid, with all things touching the same, to our Court of Errors and Appeals, to be held at Trenton, on the eighteenth day of April next, together with this writ; that the record and proceedings aforesaid being inspected, we may further cause to be done thereupon what of right and according to law ought to be done.

Witness, Alexander T. McGill, Esquire, our Chancellor, at Trenton aforesaid, the thirty-first day of March, eighteen hundred and ninety-four.

HENRY C. KELSEY,
Clerk.

HENRY B. TAYLOR,
Attorney.

COURT OF ERRORS AND APPEALS.

HARRIET N. SIMPSON, Executrix &c. of Thomas P. Simpson, deceased,

AGAINST

JAMES S. NEGLEY.

On Error to Essex Circuit Court. Assignment of Errors.

Afterwards, that is to say, on the eighteenth day of April, A. D. eighteen hundred and ninety-four, before the Court of Errors and Appeals of the State of New Jersey, comes the said plaintiff, by Henry B. Taylor, her attorney, and says that in the record and proceedings aforesaid, and also in the giving the judgment aforesaid (rendered in conformity to the advisory opinion of the New Jersey Supreme Court, in the premises), there is manifest error in this, to wit: 1. That in and by the said opinion it was declared and advised that the supposed covenant alleged to have been made by the said Thomas P. Simpson with the said James S. Negley, and in the declaration in said action alleged to have been broken, bound, and was applicable to, the said Harriet N. Simpson, executrix as aforesaid, whereas the said Circuit Court should have been therein and thereby advised that the said covenant did not bind, and was not applicable to, the said executrix.

2. There is also error in this, to wit, that in and by the said opinion it was further declared and advised that there had been a "settlement" (according to the intent and meaning of the alleged contract in the said declaration mentioned and set forth) of the claim, also therein mentioned, of the said Thomas P. Simpson against the New Castle and Northern Railroad Company; whereas the said Circuit Court should have been therein and thereby advised that no settlement of the said claim had been made, according to the true intent and meaning of the said alleged contract.

3. There is also error in this, to wit, that in and by the said opinion it was further declared and advised that on such supposed settlement the said James S. Negley became entitled to recover from the said executrix the amount of his said supposed claim against the said New Castle and Northern Railroad Company, although such claim had not been included in such settlement; whereas the said Circuit Court should have been therein and thereby advised that the said James S. Negley had never become entitled to recover the same, or any part thereof, from the said executrix.

4. There is also error in this, to wit, that in and by the said opinion it was further declared and advised that the said James S. Negley had sustained more than nominal damages by the alleged breach by the said executrix of the said covenant; whereas, the said Circuit Court should have been therein and thereby advised that the damages (if any) thereby by him sustained were only nominal.

5. There is also error in this, to wit, that the judgment aforesaid, by the record aforesaid, appears to have been given for the said James S. Negley against the said Harriet N. Simpson, executrix as aforesaid; whereas, by the law of the land, judgment ought to have been given for the said Harriet N. Simpson, executrix as aforesaid, against the said James S. Negley.

And the said plaintiff prays that the judgment aforesaid, for the errors aforesaid, and for other errors in the record and proceedings aforesaid, may be reversed, annulled, and for nothing holden, and that the said Harriet N. Simpson, executrix as aforesaid, may be restored in all things which she has lost by occasion of the judgment aforesaid, &c.

HENRY B. TAYLOR,
Attorney for Plaintiff in Error.