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New Jersey Court of Errors and Appeals.

In Chancery of New Jersey.

Between

Oakes Ames, complainant,

and

The New Jersey Franklinite Company and others, defendants,

Bill for foreclosure, &c.

STATE OF THE CASE.

The bill in this cause was filed October seventh, eighteen hundred and fifty-six, for the foreclosure of a certain indenture of mortgage, duly executed, acknowledged, and recorded, made by the said the New Jersey Franklinite Company to the said Oakes Ames, dated the second day of November, in the year one thousand eight hundred and fifty-three, upon certain premises, situate in the township of Hardiston, in the county of Sussex, and state of New Jersey, the description of which appears in *Exhibit No.* , on the part of the complainant— the said mortgage being given to secure the payment of the condition of a certain bond between the same parties, bearing even date therewith, and conditioned for the payment of fifty thousand dollars, in the manner following, *viz.* $5000 on the 1st of January, 1855, $5000 on the 1st of January, 1856, $10,000 on the 1st of January, 1857, $10,000 on the 1st of January, 1858, $10,000 on the 1st of January, 1859, and $10,000 on the 1st of January, 1860, with interest thereon semi-annually, on the first day of July, and the first day of January, in each and every year, commencing from the first day of July, 1854, said interest to run from the date of the mortgage; with a further condition, that if any payment of inter-

est remained unpaid for thirty days, the whole principal sum to become due.

Ashbel Green, John G. Tappan, and Asahel Huntington, trustees, were made defendants to the said suit, because, on the 1st day of September, in the year 1855, the said the New Jersey Franklinite Company executed a certain mortgage, or deed of trust, on the same premises to them, as trustees, to secure the payment of certain bonds or coupons, amounting to the sum of $274,000.

William J. I. Kimble, Levy B. Hiles, Henry S. Terbell, William S. Jennings, Andrew I. Millspaugh, David Wagstaff, Simon V. Vedder, for the use of William H. DeCamp, and George Brodhead were made defendants, because it is alleged that they have recovered judgments, respectively, against the said the New Jersey Franklinite Company, and by virtue thereof, respectively, claimed to have some lien upon the said premises.

The bill alleges that the principal sum mentioned in the said bond, and intended to be secured by the said mortgage, and remains due and unpaid, with interest, at the rate of six per cent. per annum, from the 1st day of July, 1854; that the said the New Jersey Franklinite Company have and do possess and enjoy the said premises; that no proceedings at law have been had on the said bond and mortgage; that certain buildings were sold to the New Jersey Zinc Company by the defendants, and that they threaten to remove and sell the same.

The bill prays for an injunction restraining the removal of the said buildings, and that the said complainant may be pa the amount due him, or that the said defendants may be foreclosed of and from all right, title, and equity of redemption of, in, and to the said mortgaged premises, or that the same may be sold to pay to the said complainant the said sum of money.

The defendants, the New Jersey Franklinite Company, and the said trustees filed separate answers.

ANSWER OF THE NEW JERSEY FRANKLINITE COMPANY.

The said company admit the execution, acknowledgment, and delivery of the said bond and mortgage, and its record; also the execution of the said mortgage, or deed of trust, to the said trustees; also the recovery of the said judgments and the sale of the said building. They deny that the whole amount claimed in the bill of complaint is due; and say that, on account of certain proceedings commenced by one Scott against the complainant, they were advised that it was unsafe to pay the instalment due on the said bond. They allege that the said bond and mortgage were given as a part of the consideration of the purchase of the mortgaged premises, which were sold and conveyed by the complainant to these defendants by deed dated November first, 1853; that the defendants purchased the same of the complainant for the sum of $75,000, which was paid as follows, to wit, $5000 in cash, $20,000 in the stock of the said the New Jersey Franklinite Company, accepted by the said complainant in payment of said amount, and the bond and mortgage was given for the residue of the said purchase money, to wit, $50,000. They allege that the deed of conveyance was made in pursuance of an agreement entered into between the said Oakes Ames and James L. Curtis, at that time president of the said company, which said agreement was in writing, and dated July the 7th, 1853, and by which the said Ames agreed to convey to the said Curtis, president, the property known as the Franklin Furnace property, as will more fully appear by the said agreement, marked *Exhibit No.* , on the part of the said defendants. They allege that the said Ames neglected to convey a part of the property contemplated by the said agreement.

They allege that, before the making of the said deed by the said Oakes Ames and wife to these defendants, there had been conveyed to Cyrus Alger, of Boston, Samuel Fowler, of Port Jervis, and James L. Curtis, of the city of New York, certain ores on or within the said lands; that these ores were not conveyed by the said Oakes Ames and wife to these defendants, but were expressly excepted in said deed; that the said exception was interlined after the said deed was prepared for execution; but before the execution thereof by the direction of

the said Oakes Ames, and is in these words, to wit, "excepting those heretofore conveyed to Cyrus Alger, of Boston, Samuel Fowler, of Port Jervis, and James L. Curtis, of the city of New York," and which interlineation is in the 1st line of the 10th page, and again in the 17th line of the 19th page, as appears by the said deed, marked *Exhibit No.* 2, on the part of the said defendants.

And they allege that they are now the owners of the said ores and rights conveyed to Cyrus Alger, Samuel Fowler, and James L. Curtis, as aforesaid, by purchase from other persons than the said Oakes Ames, and that the said ores and rights, not being part of the property conveyed, were not intended to be included in the said mortgage given to secure part of the purchase money; and that the said exception was not mentioned in the said mortgage, but that the defendants, through mistake, executed the said mortgage upon the whole of the said premises, and upon all the ores therein, whereas it was the intention of the said parties that the said ores excepted in the said deed should also have been excepted in the said mortgage.

And they allege that they are the owners of certain minerals upon other lands, in the county of Sussex and state of New Jersey, which were not conveyed to them by the said Ames, but which they have heard he claims as included and embraced in the said mortgage; but they aver and charge that, if the same are embraced therein, they were included by and through error and mistake, and are not subject to the lien of the said mortgage.

And they allege that they are the owners of valuable mining privileges in the county of Sussex, and that the said mining privileges, ores, and minerals were not conveyed to them by the said Oakes Ames and wife, and were not intended to be included in the said mortgage, and if included therein, it was by and through error and mistake, and that the same are not subject to the lien of the said mortgage.

And they allege that the said Oakes Ames and wife, by deed dated November 1st, 1853, remised, released, and quitclaimed unto James L. Curtis certain ores on or within any lands owned by Samuel Fowler in September, 1836, and a portion of which the said James L. Curtis conveyed to these de-

fendants by deed dated March 1st, 1854, which they have heard the said Ames claims, are included in the said mortgage; but they charge and aver that, if so included therein, it was through error and mistake, and that the same are not subject to the lien of the said mortgage.

And they allege that the said premises conveyed to them by the said Ames and wife were not free and clear, discharged and unencumbered, of and from all former charges, judgments, and encumbrances, according to the covenants of the said deed.

Filed December 20th, 1856.

ANSWER OF ASHBEL GREEN, JOHN G. TAPPAN, AND ASAHEL HUNTINGTON.

They say that the said the New Jersey Franklinite Company, on the 1st day of September, in the year of our Lord 1855, made and executed a mortgage, or deed of trust, and conveyed to these defendants all the premises conveyed to the said the New Jersey Franklinite Company by Oakes Ames and wife by deed, recorded in Book O 4 of Deeds, page 610, in the county of Sussex, subject to all the exceptions and reservations in said deed contained, and also all the reserved Franklinite and other ores and metals, and all rights and privileges which were conveyed to the said the New Jersey Franklinite Company by James L. Curtis and Daniel H. Curtis, trustees, by deed, recorded in the clerk's office of Sussex county, in Book O 4 of Deeds, page 510, and by the said James L. Curtis and wife by deed, recorded in the clerk's office of Sussex county, in Book 84 of Deeds, page 239, and also all the engines, boilers, shafting, belting, gearing, machinery of all kinds, tools, fixtures, buildings, forges, water-powers, saw mills, dams, houses, blast furnaces, founderies, furnaces, coal houses, iron buildings, blacksmith shops, taverns, Franklinite zinc, and all other ores, minerals, and metals whatsoever (except as above excepted) in or upon or in any way appertaining to the premises therein before conveyed, or intended to be

conveyed, or in any way used by the said the New Jersey Franklinite Company in manufacturing or exploring operations, together with all the appurtenances and hereditaments thereunto belonging, and the reversions and remainders, and all the estate, right, title, interest, property, claim, and demand whatsoever of the said the New Jersey Franklinite Company of, in, and to the same, in trust, to secure the principal and interest of certain coupon bonds to be executed in the name of the said the New Jersey Franklinite Company, by the president and treasurer thereof, in pursuance of resolutions of the stockholders and directors of the said company, amounting, in the aggregate, to a sum not exceeding $300,000, dated September the 1st, 1855, and made payable to the holder or holders thereof to the bearer, payable on the 1st day of September, 1856, in the city of New York, bearing interest at the rate of six per cent. per annum, payable semi-annually on the first days of September and March of each year, in the said city of New York, on the presentation and delivery of the proper coupons annexed to the said bonds, as will appear by said mortgage, or deed of trust, marked *Exhibit No.* on the part of these defendants; and also that the same was duly acknowledged and recorded.

They allege that the said Ames, at the time of executing the said mortgage, or deed of trust, was a stockholder of the said company, and that the said mortgage, or deed of trust, was executed under a resolution of the stockholders, and that they, the trustees, were given to understand, at the time of accepting the trust, that the mortgage executed to the said Ames was no lien upon the excepted ores not conveyed by said Ames and wife.

Filed December 31, 1856.

The other allegations and charges of the answer of the said trustees are similar to those of the answer of the company.

January 13th, 1857. Replication filed May term, 1858. Order of reference to Thomas S. McCarter, esq.

This bill, filed by the complainants, a company incorporated by act of the legislature of New Jersey, approved the 23d day of February, 1848, and supplement thereto, approved January 26th, 1853, shows that the defendant, on the 7th day of July, 1853, under his hand, made the agreement mentioned in the answer of the said company to the bill of Ames; that in pursuance of the said agreement, the said Ames and Evelina his wife conveyed to the complainants, by deed dated November 1st, 1853, certain property in Hardiston, in the county of Sussex, and state of New Jersey; that they paid, according to the terms of the said agreement, the sum of $5000, and transferred to said Ames $20,000 of the capital stock of the said company, and, on the 2d day of November, 1853, executed and delivered the bond, or obligation, to pay the residue of the purchase money, *viz.* $50,000, as set forth in the original bill of the said Ames and in the answer of the said company, the payment thereof secured by a mortgage bearing even date therewith upon the property.

The interest due July 1st, 1854, has been paid.

The deed of conveyance from Oakes Ames and wife to the complainants was prepared in the city of New York; but before the execution thereof, by the direction, request, and advice of the said Oakes Ames, the following words, *viz.* "excepting those heretofore conveyed to Cyrus Alger, of Boston, Samuel Fowler, of Port Jervis, and James L. Curtis, of the city of New York," were interlined in the said deed, in the 1st line of the 10th page, and the same words were added to and interlined in the 17th line of the 19th page of said deed—the said words so interlined and added referred to certain iron, zinc, and other ores, on or within any of the lands of Samuel Fowler in the said county of Sussex, or on or within any lands and premises before sold and conveyed by the said Samuel Fowler in the said county of Sussex, from and out of which he has reserved the mines and minerals, together with mining privileges, and which, before the execution of the said deed by Oakes Ames and wife, had been conveyed to Cyrus Alger, of Boston, Samuel Fowler, of Port Jervis, and James

L. Curtis, of the city of New York, and of the greater part of which said ores, metals, mines, minerals, and privileges the complainants have been and are the owners, having derived their title by purchase from other persons than the said Ames, and that they were no part of the purchase from the said Ames and wife; that the said mortgage was drawn with the same description of premises as the said deed, as originally prepared, and was executed by the officers of the said company without the said exception interlined, as aforesaid, in the said deed being incorporated or interlined in the said mortgage, by virtue whereof the said Ames claims to have some lien upon the premises, rights, mines, minerals, metals, ores, and privileges so excepted in his said deed, and which were conveyed to the said company by other persons than the said Ames, and not included in the premises to secure part of the consideration whereof the said mortgage was executed and delivered as aforesaid; whereas the said company charge that the said mortgage is no lien, except upon that part of the premises, rights, ores, mines, minerals, metals, and privileges contained therein, as was conveyed by the said Ames and wife to the said company by and in his said deed, or if any lien at all upon the same, that the said mortgage was executed by the said company, in reference thereto, through error and mistake, and that it was the intention of the parties that the exception interlined in the said deed should also have been excepted in the said mortgage.

And the said bill further shows, that the said company, for the purpose of paying their liabilities and furnishing means for the further prosecution of the object of their incorporation, issued their bonds, amounting in the aggregate to $300,000, the payment of which was secured by a mortgage, or deed of trust, executed by them under their corporate seal, to Ashbel Green, John G. Tappan, and Asahel Huntington, trustees, dated September 1st, 1855, upon the whole of their real and personal estate, including the ores, mines, minerals, rights, privileges, and premises contained in the exception to said deed, which said mortgage, or deed of trust, they supposed was the first encumbrance upon the said ores, mines, minerals, metals, rights, privileges, and premises, and charge that, through the representations of the said Ames, that his said

mortgage was a prior lien upon the whole of the property of the company, they were unable to sell said bonds in market. And further, that the said ores, mines, minerals, metals, rights, privileges, and premises, so excepted in said deed, and purchased by the said company from other persons than the said Ames, are of the value of $300,000.

The bill prays that the mortgage may be reformed, by excepting from the mortgaged premises the said excepted property, or that it may be excepted from such decree of foreclosure and sale as may be made in the original suit.

Filed May 13th, 1857.

ANSWER.

The answer admits the execution of the said agreement, but prays proof thereof.

It admits the execution of the said deed, and says that the said company were not then able to pay $5000 on the delivery of the deed, and wanted the said Ames to take the drafts of the said company upon six months' time, with the privilege of renewal for four months longer for that payment; that although he consented to take in part payment of said premises $20,000 of the stock of the company, he then considered it, and has ever considered it, as it was and always has been, of little or no value, and that he mostly depended, at the time of the sale, upon the payment of the $5000 and the security he was to have on the premises conveyed and stipulated, as in the condition of the said bond, that in default of any payment of interest for thirty days, the whole principal should become due immediately, so that he might proceed immediately upon the property without delay in the recovery of the same, and repossess himself of it upon default of payment.

The answer further shows, that the said deed and mortgage were prepared at the instance and by the procurement of the said company, or their attorneys or agents, and that he, the said Ames, had nothing to do with the getting up or pre-

paring the same; that the complainants well knew, by their officers, that they were the owners, by prior purchase, of the said iron, zinc, and other ores, conveyed to Cyrus Alger, Samuel Fowler, and James L. Curtis, and excepted out of said deed; that the same were included in the said mortgage, as he had a right to believe, with the full knowledge of the said company and their officers; that nothing was said, at the time, to the contrary, or of any contrary intention than to give the said Ames the additional security; and inasmuch as no payment was not made down, and they wanted time thereon, it was no more than just and proper that, on being let into possession of the said premises, they should give such additional security as they might and did, and which he does not consider of much value, and of no such value as they have placed thereon, which he considers fanciful, and not real.

It admits that the company gave the said drafts, certificate of stock, and bond and mortgage, and says that he always relied upon the said mortgage from the time of the giving of the same thenceforward as a bona fide security and lien upon all the premises, ores, and minerals conveyed by the same, and had no reason to question or doubt the same, and knows of no reason why he should not hold the same according to the terms thereof, and denies any knowledge or belief of any mistake in the drafting or execution thereof, or of any intention of the parties that the mortgage should be executed only on the property conveyed by him, or of any intention other than evidenced by the mortgage.

It denies that he was ever applied to, to release the said property.

It admits the payment of interest on July 1st, 1854, but says that no further payment has been made.

It admits that an attachment was taken out in Connecticut, but denies that anything was realized therefrom, or will be.

It admits that one Caleb R. Scott took out an attachment against him, but says it was set aside.

Filed August 25th, 1857.

EVIDENCE.

Depositions taken before me, Washington B. Williams, one of the masters and examiners of the Court of Chancery of New Jersey, at the office of Isaac W. Scudder, esq., Jersey City, in pursuance of notice, service of which was admitted in presence of Isaac W. Scudder, of counsel with petitioners, and Robert Hamilton, of counsel with the complainant.

James H. Holdane, a witness produced and sworn on the part of petitioner, deposes and says—I am president of the New Jersey Franklinite Company, and have been so for three years next May; was elected two years ago last May or June. I know Mr. Oakes Ames, the complainant in the foreclosure suit—have known him by sight a good many years; the first I had any conversation with him was, I think, two years ago last summer; he is a director of the New Jersey Franklinite Company—he was elected such director in June, 1857, and continues a director at this time. I have had a conversation with Mr. Ames in relation to the delay of the proceedings of his foreclosure against the New Jersey Franklinite Company; the conversation took place at the last meeting of the directors, on January 12th, 1858, at the office of the Jersey City Fire Insurance Company in Jersey City; there were present at that meeting Charles Thompson, of Boston, Benjamin F. Cheney, of Boston, Mr. Ames, Mr. John H. Brown, George W. Savage, Jonathan Trotter, and myself; I don't recollect of any others. The subject of the foreclosure was a matter of discussion at this meeting of the directors—it was a matter of conversation among the directors; Mr. Ames said he did not want to press this matter, and spend money on both sides—he had got tired of this law business. He then stated that, in order to give the company time to turn around and carry out some negotiations, which they thought they could, he would give us three months' time to carry out this negotiation; I understood him to say that the matter should rest for three months—that's what I understood; he then said, if it assumed, at the expiration of three months, such a shape that the company could put its works in operation, he would give a further twelve months to

pay off what might be due on the mortgage. I then asked him whether he claimed the whole as due; and he said, it would leave the last instalment due in 1860. I believe there was nothing further said on that subject by Mr. Ames at that time.

No committee was raised by the board, at that time, with reference to taking action on the proposition made by Mr. Ames; it was just before the board adjourned. I communicated this agreement of Mr. Ames to delay to the solicitor of the company.

The mortgage given to Oakes Ames (the one in controversy) covers property which has also been mortgaged by the said company to secure certain bonds of the company; the amount of the bonds now issued, secured by the mortgage last referred to, is one hundred and eighteen thousand one hundred dollars ($118,100).

On cross-examination by counsel for complainant, the witness says—at the said meeting of the board, I could not state who introduced the subject of the delay; the persons nearest to Mr. Ames, at the conversation, were myself and Mr. Cheney; my impression is, that there were others around, but farther off. Mr. Ames did not ask the company to do any act, or give him any consideration as an inducement to the delay, on his part, further than to make an effort to raise the money in the three months; they were not bound or obliged to pay him any part of the money to be raised in the three months, as a condition of his delay; they were not to withdraw their opposition to the foreclosure suit, and permit him to take a decree.

Quest. Did not Mr. Ames, in connection, say if the company would withdraw their opposition to prevent any further delay and cost, and if the property should be sold under his foreclosure, he would give them twelve months to redeem the property in?

Ans. He did; but we declined; I declined; the conversation was addressed to me at that moment.

Quest. Was anything said about twelve months, except in reference to time, for redemption of the property?

Ans. There was.

Quest. Had not Mr. Ames, at that time, a suit pending in the Sussex County Circuit Court on the bond secured by the mortgage to him?

Ans. I think he had.

Quest. Was there not a notice of motion then pending to set aside the proceedings in that suit?

Ans. I could not tell, it was mixed up so.

Quest. Was not that motion heard before the judge of the Circuit Court after this meeting of the directors, and on or about the 15th or 16th January?

Ans. I could not state positively—I don't know.

Quest. Do you know that that suit is now progressing, or whether any proceeding has been had in it since the 12th January?

Ans. I do not know.

Quest. Have you not been conferred with by the attorney or solicitor of the company, by letter or otherwise, in reference to that suit, or to the foreclosure suit being in progress since 12th January, one or both?

Ans. I don't know whether I have seen Mr. McCarter, the attorney of the company, in the suit on the bond since then or not; I have had a letter from him in reference to the suit—in reference to some action in it; I have conferred with Mr. Green, the solicitor of the company, in the foreclosure suit on the mortgage since January 12th, more than once, in reference to the foreclosure suit being in progress.

Quest. Have you not been informed, by Mr. Green, that it was pending before a master, to ascertain the amount due on the mortgage since January 12th?

Ans. I could not state with certainty that he said it was pending before a master; all the conversation with him has been within a very few days; he has called on me to furnish a statement of the amount of bonds due on the second mortgage, and I furnished it to him within two weeks last past, I think; he called upon me for that information, I think, the same day that I furnished it; I don't think he called on me, or wrote to me for that information prior to that time.

I communicated to the solicitor of the company what Mr. Ames said about the delay very soon after the meeting—I communicated it to him verbally, I think. No money has been raised by the company for the purpose of paying Mr. Ames, but negotiations have been on foot for it, but nothing has been closed; the negotiation has been a failure so far—nothing has

been consummated yet; the reason is, that there has seemed to be some doubt, within a short time, what Mr. Ames was going to do; from reports which reached us, we did not know what to do. There has not been any meeting of the board since January 12th.

Being re-examined in chief, the witness says—I was not served with process in the suit on the bond in Sussex County Circuit.

The negotiations for raising money have not succeeded, because there is an apprehension in the minds of capitalists about this mortgage being in suit.

Mr. Ames was made a director at the solicitation of some of the Boston directors and stockholders.

On re-cross-examination, the witness says—

Quest. Will you give us the name of any capitalist who has refused to advance money on the ground just stated by you?

Ans. I had an interview with a negotiator, who said he knew some capitalists who would like to go into it, but they were afraid of the mortgage; I have had no interviews with capitalists, who have refused since January 12th—they usually act through their brokers.

Quest. Since the 12th January last, have you not written to Mr. Oakes Ames, requesting him to give three months' delay, in order that you might carry on negotiations?

Ans. No, I wrote to him asking him to put his bargain, or what he had stated to the meeting, in black and white—it was a few days after the meeting; he did not answer the letter at all—at least I received none.

With reference to my answer to the question, whether I knew of any proceedings having been taken in the Circuit Court suit on the bond after January 12th, I wish to state, that I made an affidavit in that case for an application to open the judgment, but am not certain whether it was before or after January 12th.

I reside in the city of New York, and formerly resided in New Jersey.

JAMES H. HOLDANE.

Subscribed and sworn to, before me, at Jersey City, March 8th, 1858.

WASHINGTON B. WILLIAMS, *M. C.*

Robert S. Green, a witness produced on part of petitioner, being sworn, says—I am solicitor for the New Jersey Franklinite Company. I have taken no depositions to show the grounds of defence set up in the answer in that cause. I took an order for commissions for examination of foreign witnesses in different states, and on going to New York to settle the interrogatories, I was informed by Col. Curtis, I think, that either negotiations were on foot to admit Mr. Ames into the board of direction, or that he had been elected a director, I forget which, for the purpose of settling all these matters amicably, and to let the matter rest as it was at that time. I afterwards received a notice from Mr. Hamilton, I think, of the taking of depositions and marking exhibits—I think it was the notice at Newton. I saw Mr. Hamilton, I think, upon the steps of the hotel at Newton, where I was in answer to the notice, and he said, either that he had written to me, or that the matter was postponed, giving as a reason these negotiations that were going on. I afterwards received a letter from Mr. Hamilton, mentioning that negotiations were going on between Mr. Ames and the New Jersey Franklinite Company, and requesting that I would give him further time to file an answer to the cross-bill filed in this case; the letter now produced, and marked *Exhibit* 1, is the letter I refer to, dated July 16th, 1857. I answered that letter, giving the time he requested; and never having received from him any notice that he had filed his answer, I supposed this negotiation was still pending, and never thought anything more about it until, I think, in December last, to the best of my recollection. I think that the matter which brought it to my notice was hearing of the suit at law in Sussex Circuit; and after talking the matter over with some of the directors and Col. Curtis, I took measures to obtain an injunction to stay those proceedings at law; and some day, it must have been after the 12th January, I went to New York in reference to the matter, and met Col. Curtis at the office of Cummings, Alexander, and Green, and he told me that it was no matter about it now, as Mr. Ames had agreed to stop all proceedings, and to give the company three months.

Had it not been for the letter of Mr. Hamilton, and the information I received after the 12th January, I should have

gone on in the defence of the foreclosure suit; (and the information I received generally from my clients that these negotiations were pending).

I received information from Mr. Holdane about what took place at the meeting on 12th January, on the same day, I think, on which I heard it from Col. Curtis.

I was very much surprised, on going to Trenton to attend the Supreme Court, to find that a decree had been taken; I informed Mr. Holdane, the president, and the present proceedings were then instituted.

On cross-examination, witness says—According to the best of my recollection, I signed and sent the agreement to give thirty days' time, referred to in the letter marked *Exhibit* 1.

I think I was not served with a notice to close testimony in fifty days after the filing of the answer to the cross-bill by Mr. Hamilton—I have no recollection of it now.

I obtained a copy, from the clerk, of the answer filed to the cross-bill; but I think it was in December last.

My recollection is, that the time I was at Newton, and met Mr. Hamilton, was a day or two after July 4th, 1857; I think I can't at present answer whether I received a notice from Mr. Hamilton afterwards of taking depositions without reference to my docket; I was served with a master's summons to attend on the reference in the foreclosure suit before Thomas N. McCarter, the master. I cannot now state where this was served; I cannot now say when the order for commission was taken.

In reference to the conversation in July, I was in a hurry to leave, and have not a very distinct recollection of it, but my impression is that it was as above stated.

Rob't S. Green.

Subscribed and sworn to, before me, at Jersey City, March 8th, 1858.

Washington B. Williams, *M. C.*

Jonathan Trotter, a witness produced on part of petitioner, being sworn, says—I reside in Brooklyn, New York, and am a director of the New Jersey Franklinite Company; have been one since the last election, I think, in June, 1857. I am ac-

quainted with Mr. Oakes Ames; I was present at a meeting of the directors in January, 1858; Mr. Ames was present. Mr. Ames said something, at that meeting, about giving time on this foreclosure suit; I understood Mr. Ames was willing to give three months; I understood Mr. Ames to say he would give three months for negotiations to pay a portion of his claim; there was a conversation had, in which he proposed to give a year to pay up the balance.

On cross-examination, witness says—A conversation grew up among the board generally relative to this foreclosure suit which was pending, and relative to an amount of money that was to be raised by the Boston directors to pay off the debts of the company and to commence working. There seemed to be some misunderstanding about the conditions on which the money was to be raised among the old directors of the company. Mr. Ames, who seemed to understand all about the arrangement, Mr. Cheney, particularly also, and Mr. Thompson, explained the position of the Boston directors, and the plan that they had adopted to raise money from those who could not respond in cash. The conversation was on the business of the board, and to the members of the board relative to the business of the company.

Ans. To whom did Mr. Ames address himself when he said he would be willing to give three months' delay?

Ans. To the members generally; he might have been conversing with one, but I understood it as addressed to the board.

Quest. Was he, or not, holding a conversation with Mr. Cheney at the time?

Ans. He was sitting near Mr. Cheney; but I did not understand the remark as being addressed exclusively to Mr. Cheney, but to the members generally.

Quest. On what terms did he say he would be willing to give a delay of three months?

Ans. I think the first time it was mentioned, it was in answer to a joking question I made to him—a remark I made to him, that he didn't want money, he had plenty of money: when he answered that money was scarce; that he did want money, but he would give time, if it could be adjusted or arranged. It ought to be stated, that after this explanation of the plan of the Boston directors, before referred to, I asked

if the old arrangement could not be revived. The answer made by Mr. Cheney, more particularly, was that he thought it could; and stated that if we could get a certain amount, I think ten thousand dollars, raised in New York, the Boston directors would still carry out the original plan, and raise sixty thousand dollars more. And it was my understanding that the remark of Mr. Ames was made with the expectation that some arrangement of this kind would be carried out, and the money paid.

Quest. Was any action or resolution taken by the board, as a board, at that time in reference to the remark of Mr. Ames about giving time?

Ans. I don't think there was any resolution passed at that time; but there was action taken by the New York members of the board immediately after. [Last answer objected to by counsel for complainant.]

It was referred to us to take action, by the assent and at the request of the Boston directors, or one of them, at all events. [This also objected to.]

Mr. Ames, at that meeting, asked that the board should pass a resolution consenting to his foreclosure suit, which was not done; and he stated that he had told the Boston directors that he would give the company a year to redeem the property in; and he repeated it there at that meeting to the board.

On re-examination, witness says—The board did not accept this last offer.

Quest. When you left that meeting, was it, or not, your understanding of Mr. Ames' intention, from his conversation, to delay his foreclosure for the period of three months? [Question objected to.]

Ans. Such was my understanding.

Quest. You have spoken of action being taken; state what you mean by action being taken immediately afterwards?

Ans. I reported the proposition to one of the largest stockholders in the company, Col. Curtis, and advised that the necessary amount should be raised here, and some one should communicate, or go in person to Boston to close the arrangement for the money with the Boston directors; and I think I also mentioned to him that Mr. Cheney had requested me to see what could be done here, and then go to Boston, where,

he had no doubt, the matter could be closed, if the arrangement could be made here.

JONA. TROTTER.

Subscribed and sworn to, before me, at Jersey City, March 8th, 1858.

WASHINGTON B. WILLIAMS, *M. C.*

Oakes Ames, the complainant, a witness produced on part of complainant, being sworn, says—[This deposition being taken subject to all legal exception and objection] I reside in Easton, Massachusetts; I received notice of this proceeding on Friday last, about 10 o'clock; I was present at a meeting of directors of the Franklinite Company in Jersey City in January last, the only meeting I have attended.

Quest. Did you, at that meeting or any other meeting, agree to delay proceedings in your foreclosure suit in this case?

Ans. No.

The conversation had at the meeting in relation to the foreclosure suit was something like this: I offered the Boston directors, some time last summer or fall, that if they would let me go on and foreclose the mortgage, I would give them a year to redeem it in, they paying principal, interest, and cost. At the meeting here, that offer was brought up, or alluded to, by I don't know who first. I was asked, I think by Mr. Holdane, if I would still make the offer. I assented to it; but I did not agree or assent to discontinuing or putting over the suit for foreclosure—all I asked was the money due; and I told them I thought they either ought to give me my property or pay me my money.

On cross-examination says—I was informed that I was elected a director in June, I think by Mr. B. T. Reed, of Boston or its vicinity; he is a director. I had notice to attend this meeting of the board of directors—I don't recollect who gave me the notice.

Nothing was said, at that meeting, about a delay of three months of the proceedings in the suit, in my hearing.

Mr. Holdane asked me if I would not give them three months longer for redemption.

Quest. Was anything said about giving a year's time on one of the instalments?

Ans. I have no recollection of it.

The mortgage was payable by instalments; the last one falls due in 1860, I think, and its amount is five or ten thousand dollars, I think ten.

Quest. Do you know whether your mortgage covers any property owned by the New Jersey Zinc Company?

Ans. No, I don't know that it does.

Quest. Do you know how many tracts of land are covered by your mortgage?

Ans. No, sir.

Quest. Can you state the amount of the instalments of your mortgage, and when they fall due?

Ans. No, sir.

Quest. Was there anything said, at this meeting of the board of directors, as to taking steps to raise money to pay your mortgage?

Ans. There was something said about raising money to put the works in operation, and pay the mortgage, but no plan of action marked out, and nothing done about it.

Quest. Do you know whether the directors took any action after that meeting, and made any effort to raise money?

Ans. I don't know that they did.

Quest. When were you first informed of the decree in the Chancery suit?

Ans. I got notice of it last Friday, and of taking depositions.

Quest. When did you give instructions to bring an action on the bond?

Ans. I don't know—a year or two ago.

Quest. Did you communicate to Mr. Brown your intention to bring an action on the bond?

Ans. I don't know—I presume so; I have generally done my business through him, as he resided in New Jersey.

Quest. How long has Mr. Brown acted as your agent?

Ans. For ten years or more, I should think.

Quest. Is Mr. Brown one of the directors of the company?

Ans. I have been so informed.

Quest. Did you request that he should be made a director?

Ans. No, sir.

Quest. Was the action brought on the bond by serving process on Mr. Brown?

Ans. I can't tell you.

Quest. Did you communicate frequently with Mr. Brown about your business in New Jersey in relation to this mortgage?

Ans. Not very frequently in relation to that.

Quest. With whom did you communicate most frequently, Mr. Brown or Mr. Hamilton?

Ans. With Mr. Brown.

Quest. When was your last communication with Mr. Brown on this mortgage?

Ans. I cannot tell; I don't recollect writing to him within two or three months about it, or of hearing anything about it; I have no recollection of hearing anything about it since January 12th, until the notice I got last Friday by Mr. Hamilton's letter.

Quest. When did Mr. Hamilton communicate to you prior to last Friday?

Ans. I can't tell you; I have no recollection of having received a letter from him for a considerable time.

Quest. What is the date of the last letter from Mr. Brown in relation to this bond and mortgage?

Ans. I can't tell you—I have no recollection.

Quest. Has it been within six months?

Ans. I presume so—it was less than that.

Quest. Has it been within three months?

Ans. I should hardly think so—I am not sure that I have.

Quest. Have you received a letter from him within two months in relation to that?

Ans. I don't think I have—I have no recollection of it.

Quest. Can you tell, within a period of two months of the time, when you received any communication from Mr. Hamilton in relation to that bond and mortgage, independent of the letter you received last Friday?

Ans. I am very bad at remembering dates, but I can remember things.

Quest. Can you state the directors who were present at this meeting?

Ans. I can. Mr. Holdane, Trotter, Brown, Cheney, Thomp-

son, Savage, and myself, seven in all—just a quorum; I have attended a meeting of the directors held in Boston since that time—an informal meeting of what there was there—not a meeting regularly called. At that meeting there were present Rodman, Thompson, Cheney, and myself. The New York directors did not have notice of that meeting, nor the New Jersey directors, I presume; it was held at Cheney's office; there was a letter addressed to Mr. Reed or Thompson, and one to Mr. Cheney, from somebody in New York, in relation to raising money; the directors met to consider them, and have an answer made, and Mr. Rodman was directed to answer them.

OAKES AMES.

Subscribed and sworn to, before me, at Jersey City, March 8th, 1838.

WASHINGTON B. WILLIAMS, *M. C.*

John H. Brown, a witness produced on part of complainant, being sworn, says—

I am a director of the New Jersey Franklinite Company, and have been since last June. I was at a meeting of the directors in Jersey City at about the 12th January last. I did not hear any agreement, on the part of Mr. Ames, to delay for three months the proceedings in his foreclosure suit against the company. Soon after the meeting was organized, some one of the Boston gentlemen remarked that Mr. Ames had made a proposition, that if the company would allow him to get possession under his foreclosure, he would allow them a year to redeem it in. Then Mr. Trotter or Mr. Holdane asked him if he would still do the same thing—to which he assented. He added, that he thought they ought not to object to his having the property, if they could not pay him the money. This conversation was, I think, within the hearing of all, or of all who paid any attention to it, though it was not brought directly before the board for the board to act upon. I was present during the entire meeting, until the board adjourned. No action was taken by the board that day in relation to Mr. Ames' claim.

On cross-examination, the witness says—I reside in Sussex county, New Jersey; I have acted as agent of Mr. Ames the greatest portion of the time for seventeen or eighteen years;

I was served with process in the action on the bond; at the time of that service, Mr. Holdane was president, and Mr. Savage secretary of the company; Mr. Savage, at that time, resided in New Jersey, I believe; I think Mr. Holdane, at that time, resided in New York; I did not communicate that service to Mr. Savage or to Mr. Holdane.

Nothing was said at the meeting in January, in my hearing, in relation to any delay, stoppage, or postponing of the proceedings in the foreclosure suit for three months—I speak of the board—I can't say what conversation was had between one or two. The object of the meeting, as I understood it, was to make some arrangement with Mr. Savage, or settlement of his claim for services; there was no other object stated, I think; everything else came up incidentally. It was not one of the avowed objects of the meeting to raise funds to start the works—I heard no such suggestion.

I first heard that this decree was entered a little more than a week ago, from Mr. Hamilton. The last time I communicated with Mr. Hamilton about the suit, prior to that, was about three weeks previously to that; the last time I communicated to Mr. Ames about it, was last Saturday; prior to that, I don't think I have communicated anything to him since the meeting in January, in writing. I have corresponded with Mr. Holdane in relation to the business of this company, both before and since the time of the service of the process on me in Sussex county. I attended here to-day at Mr. Hamilton's request.

There was a talk among the members of the board of directors, at the meeting in January, about raising money to start the works; plans were talked over for that purpose; those plans also included, I suppose, plans for raising money to satisfy Mr. Ames' mortgage.

On re-examination, witness says—I have charge of the company's works in Sussex county—of their property.

I don't think I made known to any one of the directors in Boston that the process had been served on me.

John H. Brown.

Subscribed and sworn to, before me, at Jersey City, March 8th, 1858.

Washington B. Williams, *M. C.*

DEPOSITIONS ON PART OF DEFENDANTS.

Examinations of witnesses and proofs taken and made in the above stated cause, pending in the Court of Chancery of New Jersey, before me, Washington B. Williams, one of the masters and examiners of said court, at the office of Isaac W. Scudder, esq., in Jersey City, on the twenty-fourth day of March, in the year eighteen hundred and fifty-eight, at ten o'clock in the forenoon, in the presence of Robert Hamilton, esq., of counsel with the complainant, and of Robert S. Green, esq., of counsel with the New Jersey Franklinite Company, in pursuance of notice, the due service whereof is admitted before me, given by the defendants above named to the complainant, the decree heretofore made in said cause having been opened by the court.

James L. Curtis, a witness produced on the part of defendants, being sworn, on his oath says—I am acquainted with Mr. Ames, the complainant. I was president of the New Jersey Franklinite Company in the year eighteen hundred and fifty-three; I did, in that year, make an agreement with Mr. Ames, on behalf of the company, to purchase what I understood to be all of the Franklin furnace property, excepting what he had previously conveyed to Samuel Fowler, of Port Jervis, and Cyrus Alger, of Boston; that property, as I understood it to be, was the property conveyed originally by Samuel Fowler and wife to Nathaniel Wetherell, jun., and William L. Ames, and also including a piece of property owned by Mr. Ames upon Brooklyn pond; I understood the property on Brooklyn pond to be about forty acres, and valued at about two thousand dollars. The price for the whole property agreed to be paid was seventy-five thousand dollars; that agreement was committed to writing on the part of Mr. Ames, in his own handwriting; I am acquainted with the handwriting and signature of Mr. Ames, the complainant.

Being shown the paper writing marked *Exhibit No.* 1, on part of defendants, the witness says—The agreement contained in this paper is in the handwriting of Mr. Ames, the complainant, and the signature signed to said agreement is his signature.

The terms of that agreement were accepted by the company, and certain property was conveyed by Mr. Ames to the company, on the first day of November, 1853.

Being shown the deed marked *Exhibit No.* 2, on part of defendants, the witness says—This is the deed given by Mr. Ames, conveying the said property to the company.

Five thousand dollars was paid by the company to Mr. Ames by drafts—one upon the late Samuel T. Jones, of New York, for twenty-six hundred and fifty dollars, drawn by the president of the New Jersey Franklinite Company, dated November 1st, 1853, at six months; one on Francis Alger, of Boston, dated the 15th of November, 1853, payable in six months, for twenty-six hundred and fifty dollars, which drafts were received by Mr. Ames as payment for that amount, and his receipt taken on the contract.

The payment of twenty thousand dollars, mentioned in the contract, was paid by the issue of the company's stock; sixteen hundred shares, of twelve dollars and a half per share, (being par) were issued to Mr. Ames, who received them as payment, and a receipt was taken therefor.

Being shown *Exhibit No.* 1, on part of defendants, he says —The signatures to the receipts, written on this paper, are the signatures of Mr. Ames, the complainant.

The company did, in pursuance of the contract, make, execute, and deliver their bond to Mr. Ames for the balance of the purchase money for said lands; they also made, executed, and delivered to him a mortgage to secure the payment of the money mentioned in the condition of the said bond. The intention of the parties was, that that mortgage should cover the property which Mr. Ames conveyed to the company—that was the meaning of the words "on the property," contained in the agreement, as I understood it. No other security was to be given for the payment of the balance of the purchase money.

I was present at the time the mortgage was executed; it was prepared in the office of Cummings, Alexander and Green, and was executed there also; it was executed on the part of the company by the treasurer, George W. Savage. I called at the office of Cummings, Alexander and Green, and asked them the question whether the bond and mortgage had been pre-

pared, andwhether the mortgage had been compared with the deed, and corresponded with it, according to the terms of the agreement; the answer was, that they did so correspond. They were not read over in my presence, the descriptions being so lengthy; and believing them to be correct, I requested the treasurer, Mr. Savage, to sign them; the mortgage was signed at that time.

The company, at that time, were the owners of the Franklinite ore on a portion of Mine-hill, as described in a deed made by James L. Curtis and Daniel H. Curtis, trustees of the Franklinite Mining Company, to the New Jersey Franklinite Company, and which deed is the one marked *Exhibit No.* 3, on the part of defendants, dated February 26th, 1853. The ores and metals conveyed by this deed, marked *Exhibit* 3, were understood to be part of those which were conveyed by Mr. Ames to Cyrus Alger and Samuel Fowler, of Port Jervis; I believe them to be so.

[Being shown *Exhibit No.* 2, on part of defendants, says]—they are part of those mentioned in the interlineation in this deed, on the first line of the tenth page, and seventh line of the nineteenth page.

I am familiar with the mineral deposits of Mine-hill, in Sussex county, New Jersey. The ores conveyed by the deed, marked *Exhibit* 3, are those lying, found, or to be found, upon Mine-hill. The estimated value of the ores of the Franklinite conveyed to the company by the deed marked *Exhibit* 3, at that time, was four hundred thousand dollars. By understanding between Francis Alger, of Boston, an iron founder, and myself, he was to give me two hundred thousand dollars in cash for one half the interest. That agreement was, I think, fulfilled entirely, or nearly so, by the payment of the money. Mr. Alger sold stock of the company, and paid me the money.

The company have expended upwards of sixty thousand dollars, I think, on the property purchased from Mr. Ames—on a blast furnace, collecting house for collecting the vapors of zinc, a dam, small zinc furnaces, buildings for workmen, and other things—they are permanent improvements.

Mr. Alger stated to me that Mr. Ames had a great knowledge of iron, and would exercise great influence upon the

capitalists of Boston, and he advised the purchase, as Mr. Ames would aid him, Alger, in getting up what we called the company's working stock, amounting to about four hundred thousand dollars. [This conversation of Mr. Alger objected to.]

Mr. Ames appeared anxious to sell the property, and told me, that if I would purchase, he would use his influence and time to aid us to raise the necessary money, then contemplated, to carry on the works of the company and to pay off this mortgage.

There was no absolute necessity that the company should own the property conveyed to them by Mr. Ames for the purpose of carrying on their operations—on the contrary, Col. Samuel Fowler and others, interested in the Franklinite Company, protested against the purchase, on the ground that the property was not worth the valuation named in the contract. It subsequently transpired that Mr. Wm. L. Ames, the brother of Oakes Ames, had offered to Col. Samuel Fowler to give him twenty-five thousand dollars, if he would sell this property to the company. [Last answer objected to.]

The original name of the company was the Sussex Zinc and Copper Mining and Manufacturing Company, which was changed by an act of the legislature of New Jersey to the New Jersey Franklinite Company.

The Sussex Zinc and Copper Mining and Manufacturing Company made a conveyance to the New Jersey Zinc Company, and the ores and metals conveyed by that deed, if any are conveyed, are, it is my impression, embraced in the exceptions interlined in the deed, marked *Exhibit* 2, before mentioned.

About two years after the execution of the mortgage, as near as I recollect the time, I was at Boston, and had a conversation with Mr. Ames. He stated, in reply to an inquiry of mine, that his mortgage covered Mine-hill. He admitted that it was a mistake in the execution of the papers; but that, as he had it, he intended to hold it, and would not release, except upon the payment of money. His refusal to release prevented, at that time, the negotiation of our bonds, as he claimed that he had the first lien. I understood, from Mr.

Francis Alger, that Mr. Ames had also made this admission to him. [Last answer objected to.]

I have a letter from Francis Alger, of Boston, dated June 25th, 1856, in which Mr. Alger says that Mr. Ames told him, that although Mine-hill may have been inserted by mistake, he will not release it, unless a payment is made to him of five thousand dollars. [Objected to.]

On cross-examination by counsel for complainant, the witness says—I cannot give the date when I had the conversation about the mistake with Mr. Ames in Boston; there were several discussions about it; it was in 1855 or 1856, I think in the fall of 1855 or spring of 1856; I think it was before the date of the letter I have mentioned from Mr. Alger to me; I think it was not after Mr. Ames had commenced proceedings on his bond or mortgage; I think Mr. Alger was present with us at this conversation—no other person that I recollect; he took part in the conversation, and heard the same as I did; it is my impression it was in his counting room; I discovered the mistake for the first time there, from Mr. Ames telling me; I had not believed there was any previously—had known nothing of any mistake. The inquiry made by me of Mr. Ames, in this conversation, was whether his mortgage covered Mine-hill, as I had understood he had stated to some other parties; I had heard such a rumor in Boston, after I arrived there. Mr. Stevens, of the Globe Bank, told me that Mr. Ames had told him that the bonds we were offering were not the first liens upon Mine-hill; that he held the first lien. This was before I saw Mr. Ames. To my inquiry, Mr. Ames answered, as I have before stated, that his mortgage did cover Mine-hill; and I told him it was not intended to cover Mine-hill, knowing that the board of directors had not authorized the execution of such a mortgage. Mr. Ames admitted to me that it was a mistake.

Quest. State correctly, as near as you can remember, the conversation that took place?

Ans. I told Mr. Ames that it was never intended to give him a lien upon Mine-hill; that he knew it was never so intended; that these papers had been prepared by Cummings, Alexander and Green, Mr. Ames, and Mr. Brown, his agent, being present from day to day, and giving to those gentlemen

the information, in connection with the preparation of the deed and the mortgage. Mr. Ames said, although the lien was created by mistake (for I charged that it had been done intentionally), he would not release upon my demand, unless upon the payment of a certain sum of money; and I think the amount named was five thousand dollars. I think there was nothing further; this was after the date of the deed of trust to secure the bonds.

I am the largest stockholder of this company.

Quest. Do you not feel a large interest in this question in controversy?

Ans. I feel an interest in having all these matters adjusted according to equity and right between man and man.

Quest. Do you not feel a deep personal interest in this controversy?

Ans. I have a personal interest in the matter, as a shareholder and a bondholder.

Quest. How many bonds have been issued under the trust deed or mortgage?

Ans. I think one hundred and eighteen thousand dollars of bonds; I do not know the time when—the books will show. I hold upwards of thirty thousand dollars of the bonds; I cannot tell who holds the other bonds, or to whom they were issued, without referring to the books; some were issued to Francis Alger and some to Peter C. Brooks, but I cannot state the amount—some to John G. Tappan, James H. Holdane, B. P. Cheney, Mr. Rodman, George W. Savage, and some other gentlemen in Boston, whose names I don't recollect. The bonds issued to me were for a settlement of my accounts with the company. [This answer objected to.]

I won't be positive, but I think they were issued to me in the fall of 1855.

The mortgage given by the company to Mr. Ames was delivered at the same time with the deed from him; the mortgage and deed were both prepared by the counsel of the company.

Quest. Where and when were the exceptions which are interlined in the deed put in?

Ans. I don't know personally; I was present when the mortgage and deed were exchanged; I did not look at or ex-

amine the deed, that is, I did not read it or hear it read, and did not know that the exceptions were in the deed; I do not know in whose handwriting the exceptions are. The president was the person who had charge of the due preparation and execution of the papers on the part of the company; the president had the charge of it; I was the president at that time; I did not personally superintend the preparation of the papers; the solicitors, Cummings, Alexander and Green, had charge of it. It was the day on which the papers were executed, at the time of the execution, that I called on them to ascertain whether the papers were prepared; it was either Mr. Ashbel Green or Mr. Alexander who answered to me that the papers were correct—the Mr. Alexander to whom I refer is the subscribing witness to the papers.

Quest. Was not the subject matter of the exceptions in the deed talked of at the time of the delivery of the papers?

Ans. I have no recollection of hearing anything about it.

Quest. Did you, or not, at that time insist that the exception ought not to be in to the extent it was, and contend that Mr. Ames had some right to Franklinite ore, which he had not previously conveyed?

Ans. I did not. He gave me a quit-claim of some rights, some mineral rights, on the same day, I think, that these papers were delivered; the quit-claim was looked upon as a confirmatory deed. The deed mentioned in the exception in *Exhibit No.* 2, on part of defendants, as made to James L. Curtis, of the city of New York, is the quit-claim I speak of.

J. L. Curtis.

Subscribed and sworn to before me, at Jersey City, March 24th, 1858.

Washington B. Williams, *M. C.*

The defendants, the New Jersey Franklinite Company, offered in evidence the following documents:

An agreement, executed by Oakes Ames, the complainant, referred to in the testimony of James L. Curtis, with the receipts written thereon, which was marked by me *Exhibit No.* 1, on part of defendants.

A deed, dated November 1st, 1853, made by Oakes Ames and wife to the New Jersey Franklinite Company, duly ac-

knowledged, and which I have marked *Exhibit No.* 2, on part of defendants.

A deed, dated February 26th, 1853, made by James L. Curtis and Daniel H. Curtis, trustees, to the New Jersey Franklinite Company, duly proved, which I have marked *Exhibit No.* 3, on part of defendants.

An abstract of title, offered subject to all legal exceptions, which I have marked *Exhibit No.* 4, on part of defendants.

An abstract of title, offered subject to all legal exceptions, which I have marked *Exhibit No.* 5, on part of defendants.

The examination was then, by consent of parties, adjourned until Friday, the 2d April, 1858, at the same place, at 10½ A. M., at which time the parties appeared, and proceeded with the examination, the same counsel being present.

George W. Savage, a witness produced on part of defendants, being sworn, says—On November 2d, 1853, I was secretary and treasurer of the New Jersey Franklinite Company; I executed the mortgage by the company to Oakes Ames, marked *Exhibit No.* 2, on part of complainant. It was a consideration mortgage, made to secure part of the purchase money of property.

Being shown the deed from Oakes Ames to the Franklinite Company, marked *Exhibit* 2, on part of defendants, says—I am quite confident that this deed was in the possession of Mr. Alexander, at his office in the city of New York, at the time of the execution of the said mortgage.

Quest. Did you intend, when you executed that mortgage in behalf of the company to Oakes Ames, to mortgage any more lands or ores than were conveyed by the deed of Oakes Ames to the company, dated November 1st, 1853?

Ans. No; it was understood at that time that Mr. Ames was to take back a mortgage for part of the consideration of his deed on the property conveyed by the deed.

Quest. Did you receive authority from the company to mortgage more land to Oakes Ames than he conveyed to the company?

Ans. I did not understand that the board gave me any authority to execute a mortgage on other land than that con-

veyed by him; and my understanding was based on the resolutions of the board and on the conversations I heard in reference to this transaction from time to time. I did not read, or hear read, the deed made by Ames, or the mortgage executed by me, at the time of the execution.

Col. Curtis, who was then president of the company, called on me, at my office in the city of New York, to go to the office of Mr. Alexander, and execute a mortgage to Mr. Ames. I was very much pressed for time, and he said it would take me but a few minutes. On going to Mr. Alexander's office, I found Mr. Alexander there, and Mr. Ames, to whom I was introduced. The papers were ready, and the question was asked, either by me or by Col. Curtis, are the papers all correct. It was stated that they were, and had been carefully compared. I then inquired whether any personal responsibility could attach to me for signing this bond and mortgage, and, on being informed that there was not any, I signed it. The reason why I did not compare them myself was, because the papers were voluminous; I was pressed for time, and I had confidence in the representation made to me that they had been carefully compared, and found correct.

I wish to state, by way of explanation, that looking at the mortgage brings to my mind the fact, that there are two acknowledgments on it. I acknowledged the execution of it at the time it was executed before Mr. Alexander, who was a commissioner for New Jersey in New York. Some time afterwards a gentleman called on me and stated that he would like to have the mortgage re-acknowledged in New Jersey to satisfy the whim or caprice of some persons in Boston. After consulting with Col. Curtis, who was president of the company, who said he saw no objection to gratify them, I acceded to his request. When I made the re-acknowledgment in New Jersey, I had not discovered the mistake in the mortgage; I did not hear that Mr. Ames claimed that his mortgage covered the Mine-hill property until after that.

On cross-examination, the witness says—I am a stockholder of the company, and hold some of the bonds of the company secured by the trustee deed or mortgage; I hold them as security for a debt from the company to me, and they have

the right of redeeming them. The bonds I hold amount to eight thousand dollars.

Quest. Who superintended the preparation of the deed and mortgage, spoken of in your direct examination on the part of the company?

Ans. I do not know; but presume Col. Curtis did, as he was president of the company, and the most active man in its affairs at that time. He was present at the execution of the mortgage. I did not remain any longer than to execute the papers, and acknowledge them; I was not there, probably, more than five or ten minutes. The terms of the agreement, or arrangement, with Mr. Ames were not talked over at that time; they were stated to the board of directors previously, and acted on by the board.

Mr. Hamilton, counsel for complainant, desired that a copy of the minutes of the meeting of the directors of the company, of the 23d October, 1853, as far as relates to the purchase of the property from Mr. Ames, and giving the mortgage back, be marked as *Exhibit No.* 6, on part of defendants.

Being shown the bond marked *Exhibit No.* 1, on part of complainant, the witness says—I believe this is the bond which was executed by me at that time on behalf of the company, and that the seal affixed to it is that of the company.

G. W. Savage.

Subscribed and sworn to before me, at Jersey City, April 2d, 1858.

Washington B. Williams, *M. C.*

Samuel Fowler, a witness produced on part of defendants, being sworn, says—The attention of the witness being called to the deed from Ames to the New Jersey Franklinite Company, and to that clause in the deed excepting those heretofore conveyed to Cyrus Alger, of Boston, Samuel Fowler, of Port Jervis, and James L. Curtis, of New York, is asked—

Quest. Do you know the tracts referred to in that exception?

Ans. I do.

Quest. On the 2d November, 1853, did the New Jersey Franklinite Company own the ores in those several excepted lands?

Ans. They did not own all the ores in any of the lands ex-

cepted; they were owned by several individuals, myself being the largest holder, so far as all the ores were concerned, excepting iron ore, other than Franklinite iron ore. There are the following ores there: the red oxide of zinc, Franklinite iron ore, ordinary magnetic iron ore. I owned the Franklinite and zinc, and any others that might be discovered, but not the magnetic iron ore.

Being shown the deed made by Ames to the Franklinite company, dated November 1st, 1853, witness says—Mr. Ames conveys by this deed the mountain tract, excepting certain lands thereout. (The original mountain tract contained 4268.-51) forty-two hundred and sixty-eight, and fifty-one hundredths acres. The land conveyed by the deed amounts, by reason of the exceptions, to only three thousand and eighty-six acres and eighty-four hundredths of an acre in the mountain tract. The difference between 4100 acres and 3086.84 acres, named in the deed, is 1013.16.

Part of the ores described in the exceptions interlined in the deed as those heretofore conveyed to Cyrus Alger, of Boston, Samuel Fowler, of Port Jervis, and James L. Curtis, of the city of New York, are situate and lying in land known as Mine-hill. The exceptions are not written in the mortgage—so that the mortgage purports to convey the ores described in the exceptions, and which were not actually owned by the Franklinite company at the time, excepting the Franklinite ore which they owned on a part of the hill, and the magnetic iron ore conveyed to them by Mr. Ames.

The defendants offered in evidence a deed, made by Oakes Ames and wife to Samuel Fowler, dated January 15th, 1849, which is marked *Exhibit No.* 7, on part of defendants.

Also a deed, made by Oakes Ames and wife to Samuel Fowler, dated November 1st, 1849, which is marked *Exhibit No.* 8, on part of defendants.

On cross-examination, the witness says—Besides the mountain tract, above mentioned by me, there is another mountain tract, conveyed by the deed from Ames to the company, called the Sharp mountain tract, and containing, after all the deductions, one thousand and ninety-one acres and twenty-four hundredths of an acre (1091.24.

SAM. FOWLER.

Subscribed and sworn to before me, at Jersey City, April 2d, 1858.

WASHINGTON B. WILLIAMS, *M. C.*

Francis Alger, a witness produced on part of defendants, being sworn, says—I have had a conversation with Mr. Ames in reference to the lien which his mortgage created upon the ores of Mine-hill. This conversation arose with reference to obtaining money to carry on the operations of the company, and to pay Mr. Ames the interest and sums due on his mortgage, as I supposed the ores of Mine-hill were clear of encumbrance at the time of the issuing of the bonds, excepting the Trustee deed made to secure those bonds. Mr. Ames told me that there was more property reconveyed to him than he sold to the company, and that it was conveyed to him without his asking for it; and I understood from him that he was satisfied with the property originally conveyed by him to the company—I mean that he would have been satisfied with the property conveyed by him, as his security, if he had known it at the time; and I further understood from him, that as it *was* conveyed to him, he should hold it until he was paid. I don't know, from anything Mr. Ames said, that he was ignorant, at the time the mortgage was given, that the property excepted in the deed was included in the mortgage.

The embarrassment was so great in getting the bonds negotiated, that I advised Mr. Ames to release the Mine-hill ores, if not without a consideration, with one. The sum finally spoken of was five thousand dollars; that if I could raise that sum, he would release it. The ores contained in Mine-hill are very valuable. This conversation between me and Mr. Ames was in April or May, 1856, in my office at Boston; we had several conversations on the subject.

Quest. Did you, or not, gather from these conversations with Mr. Oakes Ames, that his mortgage covered more property than it was understood by the arrangement between him and the Franklinite company, at the time of the sale, that it should cover?

[Question objected to by the complainant.]

Ans. Yes, sir.

On cross-examination, witness says—The five thousand dol-

lars spoken of for releasing was to be a payment on account of the mortgage, and not a bonus. Mr. Ames offered to release his lien on the ores, as desired, if the company would pay him five thousand dollars on account of his mortgage.

I hold some of the bonds issued by the company, and intended to be secured by the trust deed, I think to the amount of about six or seven thousand dollars.

FRANCIS ALGER.

Subscribed and sworn to before me, at Jersey City, April 2d, 1858.

WASHINGTON B. WILLIAMS, *M. C.*

Robert S. Green, a witness produced on the part of defendants, being sworn says—The interlineation on page marked as 19 in the deed marked as *Exhibit* 2, on part of defendants, is in my handwriting; I think Mr. Alexander asked me to make it. It is my recollection of it, that the deed was entirely engrossed and ready to be executed when I made the interlineation; the note of the interlineation at the foot of the deed is in my handwriting. I think the interlineation was made at the time of the execution of the deed, and that Mr. Ames and his wife were present. I find several interlineations and note thereof, in the mortgage made in my handwriting; I did not compare the deed and mortgage together.

Ashbel Green, my brother, is one of the firm of Cummings, Alexander and Green. I heard of him about a week ago, and he was in England. I have heard that the company generally consulted him as their counsel. I don't recollect seeing him at the office when I made these interlineations, or when the papers were executed, and do not think he was there.

ROB'T S. GREEN.

Subscribed and sworn before me, at Jersey City, April 2d, 1858.

WASHINGTON B. WILLIAMS, *M. C.*

EXHIBIT No. 1, *on part of defendants.*

Agreement between Oakes Ames, of North Easton, Mass., on the first part, and James L. Curtis, of the city and state of New York, on the second part, witnesseth that said Oakes Ames, in consideration of the payment herein after specified, agrees to convey said J. L. Curtis, president of New Jersey Franklinite Company all that property situated in Sussex county, in the town of Hardiston, and state of New Jersey, known as the Franklin furnace property, and now owned by me.

1st. To have a refusal of the property for four months from July 1st, 1853, for the sum of one thousand dollars.

2d. If at the expiration of four months J. L. Curtis buys the property, said Oakes Ames agrees to deed to said J. L. Curtis the whole said Franklin property, of which a schedule is hereunto annexed, for the sum of seventy-five thousand dollars, twenty thousand dollars to be paid in the stock of the New Jersey Franklinite Company, five thousand dollars to be paid, or secured to be paid, on delivery of papers, five thousand dollars in July, 1854, and five thousand dollars in July, 1855, and thence ten thousand dollars annually until paid. Interest to be paid semi-annually on the principal due, until the whole is paid; the payment to be secured by bond and mortgage on the property.

Received, Boston, November 2d, 1853, from James L. Curtis, president of the New Jersey Franklinite Company, the company's draft on Sam'l J. Jones for two thousand six hundred and fifty dollars, dated 1st November, 1853, at six months, payable at the Merchants Bank, city of New York.—I hereby agree to renew the same for four months after maturity, if required by the company so to do.—The above draft is on account of the contract—which contract is to be closed so soon as the deeds and other papers can be prepared to convey the property, &c.

OAKES AMES.

Schedule of Franklinite property.

4100 acres of land,	$32,800
108 " " furnace tract,	5,400
Doland farm and buildings,	3,000
John Fowler's place,	350
Forge lot and water power,	2,500
Saw mill, water power, and houses,	2,000
Blast furnace, foundry, coal houses, barns sad-iron shop, foundry, tin shop, 16 dwellings houses, blacksmith, wheelwright shops, tin shop, &c.,	25,000
Tavern house and lot on turnpike,	400
Iron mines, Franklinite, &c., &c.,	10,000
Store, dwelling house, and land for agents,	3,000
	$84,450

Boston, July 7th, 1853.

OAKES AMES.

Received, New York, Nov. 12th, 1853, from J. L. Curtis, president of the New Jersey Franklinite Company, the company's draft, dated 15th Nov., 1853, on Francis Alger, esq., of Boston, payable in six months, for twenty-six hundred and fifty dollars, on account of the annexed contract, which I agreed to extend for a period of four months, if required by the company aforesaid. Also, I have received certificate No. 4 for sixteen hundred shares of the capital stock of the New Jersey Franklinite Company at par, as twenty thousand dollars, on account of the within contract, which I agree not to sell for a period of twelve months for less than par, unless the sale is made by approbation of James L. Curtis.

OAKES AMES.

EXHIBIT No. 6, *on part of defendants.*

On motion, it was resolved, that whereas it has been contemplated to conclude a contract with Oakes Ames for certain property in Sussex county, New Jersey, and that a refusal of

said property had been given to James L. Curtis—therefore resolved, that the president be and is hereby authorized to conclude the said contract with said Ames, by obtaining a conveyance of said property, and by issuing to the said Ames, in part payment, sixteen hundred shares of the capital stock of this company, at par value, being twenty thousand dollars, and causing a bond and mortgages to be given for fifty thousand dollars, payable as follows:

$5000	on the	1st	January,	1855,
5000	"	"	"	1856,
10,000	"	"	"	1857,
10,000	"	"	"	1858,
10,000	"	"	"	1859,
10,000	"	"	"	1860,

with interest thereon, payable semi-annually on the 1st day of July and the 1st day of January, in each and every year, commencing from the first day of July, 1854; said interest to run from date of mortgage, which is to be November 2d, 1853.

And also to cause a draft to be drawn on Samuel T. Jones, at six months from the 1st of November, for twenty-six hundred and fifty dollars, and a draft for the same amount to be drawn on Francis Alger, of Boston, dated 15th of November, 1853, at six months, the above drafts being on account of the above purchase from said Ames.

On motion resolved, that the treasurer, under the direction of the president, be and is hereby authorized to sign the above bond and mortgage, and affix the corporate seal to the same, and also to sign the above drafts.

JAS. S. GREEN, *Chairman*,
GEO. W. SAVAGE, *Sec'y*.

Extract from deed from Oakes Ames and wife to the New Jersey Franklinite Company.

1st line, 10th page, "all the iron, zinc, and other ores, *excepting those theretofore conveyed to Cyrus Alger, of Boston, Samuel Fowler, of Port Jervis, and James L. Curtis, of the*

city of New York, on or within any of the lands of the said Samuel Fowler," &c.

19th page, "all Franklinite, zinc, and all other ores, metals, minerals whatsoever in or upon or in any way appurtenant to the premises in this deed conveyed, or intended to be conveyed, *excepting those heretofore conveyed to Cyrus Alger, of Boston, Samuel Fowler, of Port Jervis, and James L. Curtis, of the city of New York*," &c.

Extracts from mortgage.

"All the iron, zinc, and other ores [here exception should have been inserted as in the deed, as alleged by the company,] on or within any of the lands of the said Samuel Fowler," &c.

"All Franklinite, zinc, and all other ores, metals, minerals, whatsoever in or upon or in any way appurtenant to the premises in this deed conveyed, or intended to be conveyed." [Here exception should have been inserted as in the deed, as is alleged by the company.]

ROB'T S. GREEN,
Sol'r and counsel of appellants.

ROB'T HAMILTON,
Sol'r and of counsel with respondents.

Master's report filed February 3d, 1858.
Final decree filed February 3d, 1858.
Order opening decree filed March 10th, 1858.
Order to vacate order for opening decree filed February 2d, 1859.
Execution issued February 4th, 1859.
Appeal filed February 15th, 1859.

PETITION OF APPEAL.

COURT OF APPEALS IN THE LAST RESORT, &c.

Between

THE NEW JERSEY FRANKLINITE COMPANY AND ASHBEL GREEN, ASAHEL HUNTINGTON, and JOHN G. TAPPAN, trustees, appellants,

and

OAKES AMES, appellee,

On bill.

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

The humble petition of the New Jersey Franklinite Company and Ashbel Green, Asahel Huntington, and John G. Tappan, trustees, appellants in the above stated cause, respectfully shows, that your petitioners find themselves aggrieved by a final decree, made in the Court of Chancery by his Honor Benjamin Williamson, Chancellor of New Jersey, bearing date the third day of February, in the year of our Lord one thousand eight hundred and fifty-eight, wherein the said Oakes Ames was complainant, and the New Jersey Franklinite Company and Ashbel Green, Asahel Huntington, and John G. Tappan, trustees, and others were defendants, in this respect, to wit, that the said decree adjudges that the mortgage given by the said the New Jersey Franklinite Company to the said Oakes Ames, in the pleadings in the cause mentioned, was and is an existing encumbrance upon such ores in the mortgaged premises as had been, before the first day of November, in the year of our Lord one thousand eight hundred and fifty-three, conveyed to Cyrus Alger, of Boston, Samuel Fowler, of Port Jervis, and James L. Curtis, of the city of New York. And your petitioners humbly appeal from that part of the said decree of the Chancellor which decrees as aforesaid, upon the ground that the same is erroneous, for that the said mortgage is not an encumbrance on the said property and ores. Your petitioners therefore pray that the said

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

Dated February 16th, 1859.

ROB'T S. GREEN,
Sol'r of and of counsel with appellants.

OPINION OF THE CHANCELLOR.

The complainant's bill is for the foreclosure of a mortgage, which covers several tracts of land in the county of Sussex. The property embraced in the mortgage, with the exception of certain ores on or within the mortgage property, was conveyed to the New Jersey Franklinite Company by the complainant. By the agreement of purchase, the company were to secure a part of the purchase money upon the property conveyed to them. The mortgage in question was executed for that purpose, in pursuance of the agreement. By mistake of the scrivener, it embraced not only the property which the complainant had conveyed to the company, but the excepted ores also, which were not conveyed by the deed, but expressly excepted in it. These excepted ores at that time belonged to other parties, who, after the execution of the mortgage, conveyed them to the company. The company afterwards conveyed them, together with the property embraced in the complainant's mortgage, to Ashbel Green and two others, in trust, as a mortgage security for certain coupon bonds to be issued by the company, not to exceed in amount three hundred thousand dollars. The company and trustees have answered separately. They set up, in their answers, and claim that, by reason of the mistake, it should be decreed that the complainant's mortgage does not embrace the *excepted ores*, and that they should not be subjected to a sale to satisfy the mortgage debt.

The company filed a cross-bill, praying that the mortgage might be reformed. I do not consider the cross-bill necessary.

If, under the circumstances, the defendants are entitled to have the mistake corrected, there is no difficulty in accomplishing that object by a decree upon the original bill, declaring that the complainant, by reason of the mistake, is not entitled to have the property in dispute sold to pay his debt. A cross-bill was not necessary for the purpose of relief; nor was it necessary for the purpose of discovery. Before the passage of the statute (*Nix. Dig.* 92, § 40,) which authorizes a defendant, after he has filed his answer, to exhibit interrogatories to the complainant, which shall be answered by him on oath, and which shall be evidence in the cause in the same manner and to the same effect as the defendants' answer to the complainant's bill, a cross-bill was necessary for the purpose of *discovery*, because, by a settled rule of equity, a complainant in a suit cannot be examined as a witness in that suit. *Story's Eq. P.* § 390; *Mayor of Colchester* v. ——, 1 *P. M.* 596.

A complainant may now be examined under the act of 1849. *Nix. Dig.* 887, § 22. But notwithstanding the statute, the party may still file a cross-bill, if he pleases. The court, however, ought not to encourage it, as it increases the expense of litigation.

The company, as far as they are concerned, are not entitled to have the mistake corrected. The mortgage has become forfeited. The company owe the debt. Although the complainant obtained a lien upon the property through the mistake of the scrivener, there is no reason why the creditor should be compelled to relinquish his security until his debt is paid. The maxim is, he who asks equity must do equity. The company must pay their debt. That will relieve the property, and the mistake will be corrected without the intervention of this court. It is certainly more equitable that the defendants should be relieved in this way than by a decree of the court.

The trustees are not entitled to any relief. It appears, by their answer, that the mortgage was executed to them as a security for such coupon bonds as the company might issue. They do not allege that any bonds have been issued. The trustees, therefore, hold the lands as mortgagees in trust for the company, and, as I have already said, there is no ground

for this court's correcting the mistake for the benefit of the company.

But even if there was a debt due secured by the mortgage, I am not clear that it would be equitable, as between the mortgage creditors, that the mistake should be corrected. The debt is due to the complainant, and it ought to be paid out of the defendants' property. If the complainant has acquired a lien, although by mistake, upon what principle is he under any obligation to relieve it for the benefit of the other mortgagee?

The complainant's mortgage was upon record when the second mortgage was given. The creditors then under the second mortgage, if there are any, knew of the first mortgage, and what property it covered. The record was notice. They became creditors under the second mortgage, subject to the first mortgage, as it stood upon the record. They have no equity, therefore, which is superior to that of the complainant.

The complainant is entitled to a decree, and to have the mortgage premises which are embraced in his mortgage sold to pay his debt.