

NEW JERSEY COURT OF ERRORS AND APPEALS.

THE MORRIS CANAL AND BANKING COMPANY,
JOHN J. PALMER, ZEBEDEE COOK, and THE-
ODORE DEHON, appellants,

v.

SAMUEL F. FISHER, appellee,

}
On bill, &c.

To the Honorable O. S. Halsted, Chancellor of the State of New Jersey.

Humbly complaining, showeth unto your Honor your orator, Samuel F. Fisher, of the city of Philadelphia and state of Pennsylvania, that the Morris Canal and Banking Company, a corporation under and by virtue of a law of the state of New Jersey, for the purpose of raising money to pay off their debts, incurred in improving, enlarging, and repairing their canal, and for raising money to be expended in further improving and perfecting the same, did, under the corporate seal of said company, attested by A. Whitney, president, and John J. Bryant, cashier thereof, duly make, execute, and issue certain bonds, for sums which in the whole amounted to \$700,000, or some other large sum of money, of which said bonds, your orator is informed and believes, three hundred and fifty were for \$1000 each, marked and numbered, respectively, from number "one" to number "three hundred and fifty," inclusive; five hundred of which were for \$500 each, numbered, respectively, from "three hundred and fifty-one" to number "eight hundred and fifty," inclusive; two hundred and fifty of which were for \$250 each, numbered, respectively, from number "eight hundred and fifty-one" to number "eleven hundred," inclusive; three hundred and seventy-five of which were for \$100 each, numbered, respectively, from number "eleven hundred and one" to number "fourteen hundred and seventy-five," inclusive; which said several bonds, or the part thereof herein after more particularly mentioned, were dated the 31st of March, 1848, and payable at the Bank of the State of New York, in the city of New York, to John J. Palmer or to bearer, on the first of April, 1856, with interest thereon at the rate of six per cent. per annum, payable at the said Bank of the State of New York semi-annually, on the first days of October and April, in each and every year,

until the said principal money be paid, on delivery of the dividend warrants thereunto annexed. And it was further certified on the face of said bonds, that the holders were entitled to the security of a first mortgage (being the same herein after referred to), and that each bond would be identified by the signature of the trustees, herein after named, and that the whole amount to be issued would not exceed the sum of \$700,000, as by reference to said bonds will more distinctly appear, and to which, for greater certainty, your orator refers himself.

- 10 And your orator further showeth unto your Honor, that, for the better security of said bonds, issued as aforesaid, and the interest annually due thereon, and for the further consideration of one dollar to them paid, the said the Morris Canal and Banking Company, by their board of directors, resolved to mortgage, pledge, and hypothecate their said canal (of which they allege themselves seized and possessed), with its appendages, appurtenances, and the annual revenues, chartered rights, and properties of the said company, herein after mentioned and described, and did thereupon, on the 28th of March, 1846, for the consideration aforesaid, by their
- 20 certain deed or indenture of mortgage, duly made and executed under corporate seal of said company, and by order of the board of directors, signed by Benjamin Williamson, the then president, attested by John J. Bryant, the then cashier thereof, and in pursuance of the powers and authority vested in said company by the law of the state of New Jersey, grant, bargain, sell, assign, transfer, and set over unto John J. Palmer, Zebedee Cook, and Theodore Dehon, their heirs, executors, administrators, and assigns, as joint tenants, and not as tenants in common, for the benefit of said bondholders, all and singular the Morris Canal, so called, being the
- 30 canal authorized by the laws of the state of New Jersey, as the said canal has been laid out through the several counties of Warren, Sussex, Essex, Morris, Passaic, and Hudson, in the said state, and as the same then was or might thereafter be laid out or completed from the Delaware to the Hudson river, together with all and singular the dams, aqueducts, locks, planes, culverts, bridges, towing paths, embankments, basins, wharves, docks, waters, water-courses, machinery, privileges, appendages, and appurtenances thereto belonging or appertaining; and also all the chartered rights of said company, and all the tolls, incomes, revenues, and profits
- 40 accruing, or which at any time thereafter should or might accrue or arise from the said canal; and also all the lands, tenements, and other properties of them, the said the Morris Canal and Banking

Company, whatsoever and wheresoever, and the reversion and re-
 versions, remainder and remainders, rents, issues, and profits
 thereof, and of every part and parcel thereof; and all the estate,
 rights, titles, interest, property, claims, and demands, as well at
 law as in equity, of them, the Morris Canal and Banking Company,
 of, in, and to the same, and every part and parcel thereof, to have
 and to hold all and singular the above granted and assigned pre-
 mises unto the said John J. Palmer, Zebedee Cook, and Theodore
 Dehon, their heirs, executors, administrators, and assigns, in joint
 tenancy, not as tenants in common, to their proper use and benefit, 10
 as fully and effectually, to all intents and purposes, as they, the
 Morris Canal and Banking Company, are seized, possessed of, en-
 titled unto, or can in any manner grant, convey, assign, and transfer
 the same: upon trust, nevertheless, for the benefit and behoof of
 the said several bondholders, their respective executors, adminis-
 trators, and assigns, in proportion to the sums contained in the said
 several bonds by them respectively held; provided always never-
 theless, the said indenture of mortgage was therein declared to be
 upon the express condition, that if the said party of the first part,
 their successors and assigns, should and did well and truly pay, or 20
 cause to be paid, unto the person or persons, bodies corporate or
 politic, who should become the holders of the said bonds to be is-
 sued as aforesaid, the several and respective sums for the payment
 whereof the said bonds should be issued on the first day of April,
 1856, together with lawful interest for the same, according to the
 tenor of the said respective bonds, without any deduction, defalca-
 tion, or abatement to be made for any thing for or in respect of
 any taxes, charges, or assessments whatsoever, then and from
 thenceforth, as well the said indenture, and the estate thereby
 granted, as the said bonds, should become void and of no effect, 30
 any thing therein contained to the contrary in any wise notwith-
 standing. And it was thereby further declared and agreed, by and
 between said parties, that if default should at any time be made in
 the payment of the said bonds, or any or either of them, or of any
 interest thereon, according to the tenor and effect thereof, then and
 in such case, and as often as such default should be made, it should
 be lawful for the said parties of the second part, their heirs, execu-
 tors, administrators, or assigns, to enter upon and to have, hold,
 use, and enjoy the said canal, with its appendages and appurte-
 nances, and the chartered rights and privileges of the said com- 40
 pany and every the premises hereby granted and assigned, and to
 take and receive the revenues; tolls, rents, issues, and profits

thereof, in as full and ample a manner, to all intents and purposes, as they, the Morris Canal and Banking Company, or the stockholders thereof, could or might have, hold, use, take, enjoy, and receive the same; and it was therein and thereby further agreed and declared, that in case the said John J. Palmer, Zebedee Cook, and Theodore Dehon, or either of them, die or become incapable of acting during the continuance of the said trust, or should be legally discharged therefrom, then and in that case it should be lawful for the said party of the first part to nominate and appoint
 10 a person or persons to supply the place of said trustee or trustees so dying or becoming incapable or so discharged from the said trust, and thereupon such conveyances should be executed by all necessary parties as would vest the premises in the said new trustees or in the said remaining trustees or trustee together with said new trustee or trustees, their heirs, executors, administrators, and assigns, as joint tenants, and not as tenants in common, upon the said trust, and with the same powers, and subject to all the stipulations and conditions of said indenture, in as full a manner and to the same extent, in all respects, as were therein contained and im-
 20 posed in regard to the said parties of the second part, and the like nominations and appointments, subject to the same provisions, should and might be made, carried into effect in like manner, as often, from time to time, as there might be occasion therefor, as by the said mortgage, a copy of which, duly certified, is now in possession of your orator, and to which, for greater certainty he refers himself, will more fully and at large appear.

And your orator further showeth unto your Honor, that after the execution of said mortgage, the same was, on the said 28th of March, 1846, duly proved before Jos. C. Hornblower, esq., the
 30 then chief justice of the Supreme Court of New Jersey, by John J. Bryant, the attesting witness, and recorded, on the seventh of April, 1846, in the clerk's office of the county of Hudson, as by a certificate thereof, duly certified, will appear. And your orator avers that the same, according to his information and belief, on or about the same time, was duly recorded in the several clerks' offices of the other counties through which the line of the said canal passes, though the precise date of such several recordings is at present unknown to your orator.

And your orator further showeth unto your Honor, that the said
 40 the Morris Canal and Banking Company having, for the purposes aforesaid, duly executed and issued the said several bonds herein before mentioned, and the same being in public market, your ora-

tor, on the day of A. D. 1848, for a valuable consideration, in public market as aforesaid, purchased six of said bonds, for the payment of \$500, each, of the date and contents aforesaid, marked and numbered, respectively, 785, 786, 787, 788, 789, and 790, which said several bonds were duly delivered to your orator, and are now, with their respective dividend warrants, in his possession ready to be produced, as this honorable court shall direct, and to which your orator, when produced, for greater certainty refers himself.

And your orator further showeth unto your Honor, that the interest money semi-annually due on said several bonds from the said the Morris Canal and Banking Company to your orator, from the first day of April, 1848, up to the filing of this bill, were duly demanded in his behalf, according to the tenor and effect of said several bonds, but that neither the said the Bank of the State of New York, nor any other person or persons in their behalf or in behalf of the said the Morris Canal and Banking Company, did or would pay the same, but, on the contrary, the said the Morris Canal and Banking Company have wholly refused to pay any thing now due or to become due on said bonds to your orator, or to any other person or persons holding the same; and on express request made by the holder of said bonds to the said last named company for the payment of the interest moneys due on said bonds, said application was denied, and Ephraim Marsh, president of said company, and in behalf of said company, on the first of December, 1849, disclaimed and denied all liability upon the part of said company for the payment of said bonds, or any part thereof. 10 20

And your orator further showeth, that on the margin of the face of each of the said bonds so held by your orator there is a certificate that the said bonds are included in a mortgage on the Morris Canal, executed to John J. Palmer, Zebedee Cook, and Theodore Dehon, as trustees for the benefit of said bondholders, and which said certificate is duly signed by said trustees, said mortgages being the same herein before mentioned and set forth. 30

And your orator further showeth, that the interest money on said several bonds, from the first day of April, 1848, is due and unpaid to your orator, and that the said trustees were by him duly notified of the default of the company in not paying said interest moneys on said bonds held by your orator; and they were requested to file a bill in this court upon said mortgage for the benefit of your orator, one of the said bondholders, or to permit the use of their names for that purpose to your orator, he offering to indemnify 40

them against all costs and charges, with which said request, or one of them, they, as trustees, were bound, as your orator charges, to comply; yet said trustees have wholly neglected and refused to file such bill, or to permit your orator, at his own expense, to file the same in their names, and thus have failed and neglected their duties in this behalf, and your orator, by such neglect and refusal upon the part of said trustees to discharge their duties in this behalf, is compelled to make them defendants to this his bill of complaint.

10 And your orator further showeth, that the said the Morris Canal and Banking Company, since the execution and delivery of said mortgage to the said trustees for the benefit of said bondholders, have continued in the possession and enjoyment of said mortgaged premises, with the appurtenances and every part thereof, and have at all times received, and still do receive, the tolls, rents, issues, and profits thereof, &c.

And your orator further showeth, that he has frequently and in a friendly manner applied to said company, and requested payment of the moneys due to him as aforesaid, or that they would suffer
 20 your orator or his said trustees to enter upon said premises, and take and receive the tolls, rents, issues, and profits thereof, &c. And your orator well hoped that the said defendants would have complied with such reasonable requests, as in justice and equity they ought to have done; but now so it is, may it please your Honor, that the said defendants, combining and confederating together and to and with other persons unknown to your orator, but whose names, when discovered, your orator prays may be inserted herein, and they made parties thereto, with proper and apt words to charge them, how, to injure and aggrieve your orator, not only re-
 30 fuse to comply with such requests, or any of them, but sometimes pretend, and give out in speeches, that no such bonds were ever executed and issued, or if issued, that your orator does not legally hold the same, the contrary of which your orator expressly charges to be true, &c. All which actings and pretences are contrary to equity and good conscience, and tend to the manifest wrong and injury of your orator; and inasmuch as your orator is remediless by the strict rules of the common law, and can have relief only in this court, where matters of this nature are properly cognizable—
 40 to the end, therefore, that the said defendants and their confederates, when discovered, may upon their several oaths or affirmations full, true, and perfect answers make to all and every the matters aforesaid, and as fully as if the same were herein again re-

peated, and they thereto particularly interrogated paragraph by paragraph, and particularly whether the said company have not executed and issued such bonds, and have not wholly denied your orator's rights to said bonds, and refused to pay said bonds, or any interest thereon, to the holders thereof, and that they may be decreed to pay to your orator the amount of said interest moneys due to him as aforesaid, together with costs, expenses, and charges in this behalf expended; and that, on failure thereof, they and all the persons claiming by, from, or under them, or any of them, may be barred and foreclosed for ever of and from all rights, title, and equity of redemption of, in, or to said mortgage premises and every part, and may deliver up possession thereof to your orator, or, if the court shall so decree, to the trustees before named, for the benefit of your orator, together with all deeds, papers, and other muniments of title in reference thereto. 10

Or if your Honor shall think it more equitable and just, then that the said canal, with its appendages and appurtenances, be sold to pay to your orator the sums due to him as aforesaid, with his costs and charges in this behalf expended, or so much and such parts thereof as the court shall deem just and proper, or that the revenues, tolls, issues, and profits of said canal, with its appendages and appurtenances, sequestered, in such form and for such time as to the court shall seem meet, and that your orator's debt, expenses, costs, and charges be duly paid therefrom. 20

And that your orator may have such further and other relief in the premises as may be agreeable to equity and good conscience, may it please your Honor, the premises being considered, to grant unto your orator a writ of subpœna of the state of New Jersey, to be directed to the said the Morris Canal and Banking Company and John J. Palmer, Zebedee Cook, and Theodore Dehon, trustees 30 as aforesaid, therein and thereby commanding them, and each of them, that at a certain day and under a certain penalty, therein to be expressed, that they be and appear before your Honor, in this honorable court, then and there to answer the premises, and to stand to, abide, and perform such decree as to your Honor shall seem meet, &c. And your orator, as in duty bound, will ever pray, &c.

WM. L. DAYTON,
Solicitor and of counsel with complainant.

The answer of the Morris Canal and Banking Company, defendants, to the bill of complaint of Samuel F. Fisher, complainant.

These defendants, now and at all times hereafter saving and reserving to themselves all and all manner of exceptions to the many uncertainties and errors in the said bill of complaint contained, for answer thereto, or to so much thereof as they are advised it is material or advisable to make answer unto, answering say—

That they admit it to be true, as stated in said bill, that the said
 10 the Morris Canal and Banking Company did, on or about the thirty-first day of March, one thousand eight hundred and forty-six, cause to be executed, under their corporate seal, certain bonds for the payment of money, but deny that the amount of such bonds so at that time executed exceeded the sum of four hundred and fifty thousand dollars, or thereabouts, which said bonds bore date the day and year aforesaid, and were payable at the Bank of the State of New York, in the city of New York, to John J. Palmer or bearer, on the first day of April, one thousand eight hundred and fifty-six, with interest, and that it was expressed and certified on
 20 the face of said bonds that the holders were entitled to the security of a first mortgage, and that each bond would be identified by the signature of said trustees in said bill of complaint named, and that the whole amount to be issued would not exceed the sum of seven hundred thousand dollars; but the defendants deny that the said bonds were attested by the signature of A. Whitney, president, or that all the said bonds were payable with interest at six per cent. per annum, or that the said bonds were then issued by said defendants to the amount stated in said bill, or any such amount.

And these defendants further answering admit it to be true, that
 30 the said defendants did, as stated in said bill, under their corporate seal and by order of the board of directors, in and by virtue of the power and authority vested in them by the law of the state of New Jersey, bargain, sell, assign, transfer, and set over unto John J. Palmer, Zebedee Cook, and Theodore Dehon, their heirs, executors, administrators, and assigns, as joint tenants, and not as tenants in common, for the benefit of said bondholders, all and singular the chartered rights and property set forth in said bill of complaint, to have and to hold the same unto said John J. Palmer, Zebedee Cook, and Theodore Dehon, their heirs, administrators,
 40 and assigns, in joint tenancy, and not as tenants in common, as fully and effectually to all intents and purposes as the said defendants

are seized or possessed of, or could in any manner grant the same; upon trust, nevertheless, for the benefit and behoof of the said several bondholders, in proportion to the sums contained in their respective bonds, and with the provisoes and covenants in the said bill of complaint recited.

And the said defendants further admit, that the said mortgage was proved and recorded as in the said bill of complaint is stated.

And these defendants further answering say, that they have no knowledge, except from the statement of the complainant in his said bill, that he is the holder of any of the bonds therein mentioned, 10 or that he purchased the same, or any of them, in public market, or in what manner or for what consideration he became, if so he be, possessed of the same, and these defendants can, therefore, neither admit nor deny the allegations contained in the said bill of complaint in that behalf, and leave the complainant to identify and prove the bonds by him mentioned in said bill of complaint, and the mode and consideration whereby he obtained the same, in such manner as he may be advised is necessary and proper.

And these defendents further answering say, that at a meeting of the stockholders of the said Morris Canal and Banking Com- 20 pany, convened on the tenth day of March, one thousand eight hundred and forty-six, it was recommended, by a resolution of said stockholders, that money should be raised by issuing bonds, secured by mortgage, of the said canal, its property and appurtenances, in order to pay the existing floating indebtedness of said company, and to be expended in further improving and perfecting the same, and that it was not by said stockholders recommended or contemplated that money should be raised as aforesaid for any other purpose.

And further these defendants say, that thereupon and in pursuance of said resolution of said stockholders, and in obedience 30 thereto, the board of directors of said Morris Canal and Banking Company did, at a meeting held at Jersey City on the twenty-eighth day of March, one thousand eight hundred and forty-six, by certain resolutions then and there by them passed, direct the mortgage and bonds aforesaid to be executed and issued, in order to the raising an amount of money for the purposes recited in said mortgage, to wit, to pay off the debt of the defendants incurred in improving, enlarging, and repairing their canal, and of raising money to be expended in further improving and perfecting the same, and for no other intent or purpose whatsoever, and the said board of 40 directors did, at their said meeting, resolve and direct the president and cashier of said company, under the supervision of the

loan committee, to execute and deliver the bonds of said company in such sums as are designated in said mortgage and set forth in said bill of complaint; but it was expressed in the resolution of said board that the aggregate amount of bonds then to be issued should be equal to the amount of the loan then, or then about to be, negotiated, and that the amount of bonds to be issued should not exceed the sum of four hundred and fifty thousand dollars, without further action of the said board; and accordingly these defendants further show, no more bonds were then issued by the said cashier
 10 and president, or otherwise by said defendants, than amounted in the whole to the sum of two hundred and fifty-one thousand four hundred dollars.

And the defendants further answering show, that no bonds bearing such numbers, as are mentioned in the said bill of complaint as being held by the said complainant, were issued by the said defendants at the said time of executing said mortgage as aforesaid, nor for a long time, to wit, for the space of two years afterwards.

And defendants further answering say, that the bonds marked with such numbers as are mentioned in said bill of complaint as
 20 being held by said complainant, which were mentioned and referred to in said mortgage, were never issued by said president and cashier of said company, or otherwise by said defendants, in order to raise money to pay off the debt incurred by defendants in improving and perfecting their canal, or to be expended in further improving and perfecting the same, nor for any of the purposes contemplated by the resolutions and recommendations of the stockholders or the resolutions of the board of directors, as recited in the said mortgage, and that the same were, as these defendants are advised and submit, for purposes not contemplated by the said
 30 resolutions, or any of them, or the said mortgage, and that the holders thereof are not entitled to share in the benefit of the said mortgage.

And these defendants thereupon, further answering thereupon, show, that the said company, on or about the seventeenth day of March, one thousand eight hundred and forty-eight, being temporarily in want of money to pay the interest on the bonds by them already issued as aforesaid, and which was coming due on the first day of April thereafter, and to pay the expense of putting the canal in order for navigation for the year then present, the president of said com-
 40 pany for the time then being, in order to raise the said moneys, or part thereof, borrowed from one George F. Lewis, of Philadelphia, the sum of fifteen hundred dollars, and to secure the same, with

interest, did make and deliver to him the note of said company for fifteen hundred and sixty dollars seventy-five cents, payable ——— from date, and did deposit with the said George F. Lewis bonds bearing numbers identical with those stated in the bill of complaint, to be held by complainant, being to the amount of twice the principal sum borrowed from said Lewis, as security for the payment of said note.

And these defendants further show, that the said George F. Lewis, when he received said bonds, was fully acquainted with the reasons of borrowing said money from him, and that the same was 10 to be used, as aforesaid, to pay said interest and current repairs : and these defendants submit to this court, that the said bonds, so deposited with said Lewis, as aforesaid, were not lawfully issued or delivered, and are not entitled to share in the security or proceeds of said mortgage, nor is the complainant entitled to the relief prayed for in the said bill, by reason of his holding the same, or any of them.

And these defendants respectfully insist, that the said bonds are not commercial paper, and that the said bonds and notes, being both nothing more than the chose in action or contract of the said 20 the Morris Canal and Banking Company, cannot be legally considered to create a liability on the part of the said defendants to pay more than the sum loaned by the said Lewis to the said the Morris Canal and Banking Company, and legal interest thereon ; and if it was the intention of the parties then acting for and on behalf of the Morris Canal and Banking Company to create, under any circumstances, any liability for any greater sum, that the said contract was and is entirely void, in consequence of the same being usurious, and that the said Lewis had no right to sell the said bonds for any less than the full amount of the same, and that 30 any person purchasing the same holds them as any other mere chose in action in the same manner that the said Lewis held them, and subject to all equities which might exist against them in his hands.

And these defendants further answering say, that they are informed, and believe it to be true, and charge that the said George F. Lewis, on or about the nineteenth day of December, one thousand eight hundred and forty-eight, without the consent, and against and contrary to the express will and desire of these defendants, exposed the said bonds to him delivered as afore- 40 said to sale at vendue in the Exchange, in the city of Philadelphia ; but these defendants, having no knowledge on the subject, excepting as derived from the allegations of complainant and in his

said bill, do not admit that the said complainant then, or at any other time, purchased the said bonds in public market, nor do they admit that he paid a valuable consideration therefor, but leave the said complainant to make such proof in relation to said matters as he may be advised; and, to the contrary thereof, these defendants say, that they are informed, and believe it to be true, and charge, that no consideration whatever was paid for said bonds, or either of them, by said complainant, and that they were not purchased in public market or otherwise by him, and that he is not the real
 10 holder of the same, or that, if he is the holder thereof, that he holds the same not for his own benefit, but for the benefit of the said George F. Lewis, either alone or jointly with some other person or persons, and that he had full knowledge, at the time of the sale of said bonds and since, that said George F. Lewis had no right to hold the same, or use them, except as security for the said money borrowed of him for the purpose aforesaid.

And these defendants show, and charge it to be true, that said George F. Lewis was, at the time of the sale of said bonds as aforesaid, and since, the partner in business of said complainant,
 20 and that the said bonds were sold at said sale, if sold at all, really and in truth unto said George F. Lewis, and that for a small and very inadequate sum, and that the pretended sale and purchase thereof were but a fraudulent device and scheme whereby the said Lewis had sought and is seeking to extract from these defendants money to which he is not entitled.

And these defendants further show, that the said Lewis has frequently, since the alleged sale of the said bonds, negotiated with one or more of the officers of the said the Morris Canal and Banking Company as if he was the owner of said bonds, not pretending
 30 that the ownership of said bonds had changed, but representing himself as still holding the same.

And these defendants further answering say, that ever since the alleged sale of said bonds, they have tendered, and do hereby tender themselves ready and willing to pay to said George F. Lewis the amount due from said defendants to him, on his surrendering to them the said bonds, which were as aforesaid deposited in his hands as security for said debt, and that they have so tendered, and do tender themselves ready to pay said debts, if the complainant will surrender said bonds to them, but that the said Lewis has
 40 refused, and still does so refuse to do.

And these defendants further show, that said Lewis did not endeavor to collect said debt due him previous to selling said bonds, but that since such pretended sale thereof, the said Lewis has

obtained judgment in the Supreme Court of New Jersey against these defendants for the sum of five hundred and fifty dollars twenty-three cents, besides costs, being the assessed balance due upon said note, after deducting therefrom the amount for which said bonds were pretended to be sold, so that the said defendants will, if the claim of the complainants be allowed by this court, be obliged to pay more than two thousand, over and above the fifteen hundred dollars, by them borrowed on deposit of said bonds, by reason of and through the fraud and device of said Lewis and the said complainant. 10

And these defendants submit to this court, that said George F. Lewis had no right to sell the said bonds at public market or otherwise to hold the same, except for the discharge of the debt for which they were lodged in his hands as collateral security, and that if the said complainant holds the said bonds, or either of them, in trust for said Lewis, or acquired possession of the same, or any of them, with notice and knowledge of the nature of the title of said Lewis thereto, that he is not entitled to recover thereon, except as security for the amount actually loaned by said Lewis thereon.

And these defendants deny all and all manner of unlawful combination and confederacy charged in the said bill, without that, that there is any thing therein contained material or effectual in the same for these defendants to make answer, and not herein and hereby well and sufficiently confessed or avoided, traversed or denied, is true to the knowledge or belief of these defendants—all which matters and things these defendants are ready to aver, maintain, and prove, as this honorable court shall direct, and humbly pray to be hence dismissed, with their reasonable costs and charges in this behalf wrongfully and unjustly sustained. 20

The Morris Canal and Banking Company, by 30

E. MARSH,

President of said company.

FREDERICK T. FRELINGHUYSEN,

*Solicitor and of counsel with the Morris
Canal and Banking Company.*

STATE OF NEW JERSEY, Essex county, ss.—Personally appeared before me, Charles R. Waugh, a master in chancery in and for said state, Ephraim Marsh, president of the Morris Canal and Banking Company, who, being duly sworn, deposeth and saith, that the matters and things set forth and described in the foregoing answer, either as president or in his individual capacity, so far as 40

they respect his own acts and deeds are true, and so far as they respect the acts of any other person or persons he believed them to be true.

EPHRAIM MARSH.

Subscribed and sworn before me, this 21st day of May, A. D. 1852, at Newark.

C. R. WAUGH, M. C.

The joint and several answer of John J. Palmer, Theodore Dehon, and Zebedee Cook, defendants, to the bill of complaint of Samuel F. Fisher, complainant.

10 These defendants, now and at all times saving to themselves all and all manner of benefit and advantage to the many errors, uncertainties, and imperfections in the said bill of complaint contained, for answer thereto, or to so much thereof as they are advised it is material or necessary for them to make answer unto, answering say—

That they admit it to be true, as stated in said bill, that the Morris Canal and Banking Company did, on or about the day therein stated, cause to be executed, under their corporate seal, certain bonds for the payment of money, bearing date, payable to the person, at the place and time, in said bill stated, with interest, and that it was expressed and certified on the face of said bonds, that the holders were entitled to a security of a first mortgage, and that each bond would be identified by the signature of these defendants, as trustees for the purposes in said bill set forth, and that the whole amount to be issued would not exceed the sum of seven hundred thousand dollars; and these defendants further admit, that the said Morris Canal and Banking Company did, as stated in said bill, under their corporate seal and by order of the board of directors, in and by virtue of the powers and authority vested

20 in them by the law of the state of New Jersey, bargain, sell, assign, transfer, and set over unto John J. Palmer, Zebedee Cook, and Theodore Dehon, these defendants aforesaid, their heirs, executors, administrators, and assigns, as joint tenants, and not as tenants in common, for the benefit of said bondholders, all and singular the property and chartered rights in said bill of complaint

30 alleged—to have and to hold the same unto these defendants, as

aforesaid, upon trust, nevertheless, for the benefit and behoof of the said several bondholders, in proportion to the sums contained in their respective bonds and with the provisions and covenants in the said bill of complaint recited.

And these defendants further answering say, that they admit it to be true, as stated in said bill of complaint, that an application was made to these defendants, on behalf of said complainant, previous to filing the said bill of complaint, to permit the suit for the foreclosure of said mortgage, on account of the alleged non-payment of interest on said bonds alleged to be held by said complainant, to be instituted in the name of said defendants, as complainants therein, and that the said defendants declined giving said permission—and thereupon these defendants say, that, on receiving such application, they inquired of the officers of the said the Morris Canal and Banking Company as to the reason why the interest on said bonds, alleged to be held by complainant, was not paid, and thereupon were informed that the said company refused payment of said interest because they deemed the said complainant not entitled in law or equity to receive the same; and further; that the said bonds had not been issued for the purposes contemplated at the making thereof and of the said mortgage, and recited in the said mortgage, and that to permit the holders thereof to share in the security of said mortgage would be a fraud upon the rights of the holders of bonds issued for the purposes contemplated at the making of said mortgage, and recited therein. 10 20

And the said defendants further answering say, that such facts and circumstances were detailed to these defendants, by and on behalf of the officers of the said company, touching the premises, as, in the judgment of these defendants, were sufficient to satisfy them that a good and *bona fide* defence existed against the claims of said complainant to share in the security afforded by the mortgage aforesaid, executed to these defendants as trustees as aforesaid, and that these defendants were not, in reality, trustees of the said mortgage for the benefit of said complainant; wherefore these defendants, under the advice of counsel consulted by them, declined permitting the use of their names by the complainant, as such trustees, for his benefit, and they submit to this court that they were right in so declining. 30

And the said defendants further submit to this court, whether the said complainant can rightfully, and according to the rules of this court, file a bill for the foreclosure of said mortgage in his own name, without the order of this court first obtained therefor. 40

And these defendants further answering say, that they have no knowledge, except from the statement of the complainant in his said bill, that he is the holder of the bonds therein stated, or that he purchased the same in public market, or in what manner or for what consideration he became, if so he be, possessed of the same; and these defendants, therefore, can neither admit nor deny the allegations contained in the said bill of complaint in that behalf, and leave the complainant to identify and prove the bonds by him mentioned in said bill of complaint, and the mode and consideration
 10 whereby he obtained the same, in such manner as he may be advised is necessary and proper.

And these defendants further answering say, that they are informed and believe, that at a meeting of the stockholders of said Morris Canal and Banking Company, convened on the tenth day of March, one thousand eight hundred and forty-six, it was recommended, by a resolution of said stockholders, that money should be raised by issuing bonds secured by mortgage of the said canal, its property and appurtenances, in order to pay the existing floating indebtedness of said company, and to be expended in further
 20 improving and perfecting the same, and that the said mortgage was executed and delivered, as aforesaid, in pursuance of certain resolutions of the board of directors of the said the Morris Canal and Banking Company, founded on and in obedience to such recommendations, passed at a meeting held at Jersey City on the twenty-eighth day of March, one thousand eight hundred and forty-six, in order to raise an amount of money for the purposes recited in said mortgage, to wit, to pay off the debt of the defendants incurred in improving, enlarging, and repairing their canal, and of raising money to be expended in further improving and perfecting
 30 the same, and for no other intent or purpose whatsoever, and that the said board of directors did, at their said meeting, resolve and direct the president and cashier of said company, under the supervision of the loan committee, to execute and deliver the bonds of said company in such sums as are designated in said mortgage; but it was expressed in the resolution of said board, that the aggregate amount of bonds then to be issued should be equal to the amount of the loan then or there about to be negotiated, and that the amount of bonds to be issued should not exceed the sum of four hundred and fifty thousand dollars, without further action of
 40 the said board; and accordingly these defendants, further answering, show no more bonds were then issued by the said cashier and president, or otherwise by the said company, than amounted in the

whole to the sum of two hundred and fifty-one thousand four hundred dollars.

And these defendants, on further information and belief say, that no bonds bearing such numbers as are mentioned in the said bill of complaint as being held by the said complainant were issued by the said company at the said time of executing said mortgage as aforesaid, nor for a long time, to wit, the space of two years afterwards.

And these defendants further answering say, that they are informed and believe that bonds bearing such numbers as are stated 10 to be held by the complainant, and mentioned and referred to in said mortgage, were never issued to raise money to pay off the debt incurred by the defendants in improving or perfecting their canal, or to be expended in further improving and perfecting the same, nor for any of the purposes contemplated by the recommendation of the stockholders or the resolutions of the board of directors or recited in the said mortgage, and that the same were, as these defendants are advised and submit, issued for purposes not contemplated by the said resolution or the said mortgage, and that the holders thereof are not entitled to share in the benefit of the 20 said mortgage.

And these defendants, on like information and belief, further answering show, that the said company, on or about the seventeenth day of March, one thousand eight hundred and forty-eight, being temporarily in want of money to pay the interest on the bonds by them already issued as aforesaid, and which was coming due on the first day of April thereafter, and to pay the expenses of putting the canal in order for navigation for the year then present, the president of said company for the time then being did, in order to raise the said moneys, or part thereof, borrow from one George 30 F. Lewis, of Philadelphia, the sum of fifteen hundred dollars, and, to secure the same with interest, did make and deliver to him the note of said company for the sum of fifteen hundred and sixty dollars seventy-five cents, payable ————— from date, and did deposit with the said George F. Lewis bonds, numbered as stated in the said bill of complaint, being to the amount of twice the amount of the money borrowed from said Lewis, as collateral security for the payment of said note.

And these defendants further answering submit to this honorable court, that the said bonds so issued and deposited with the said 40 George F. Lewis, which bonds bear the same numbers with the bonds set forth by said complainant, as held by him, were not law-

fully issued or delivered, and are not entitled to share in the security or proceeds of said mortgage, nor is the complainant entitled to the relief prayed for in the said bill by virtue of holding the same, the same not being issued for the purposes contemplated by the stockholders or the board of directors by whom said mortgage was directed, as evidenced by the resolutions by the said stockholders and directors respectively passed as aforesaid, but for purposes entirely different from and foreign thereto.

And these defendants, on like information and belief, further answering say, that they are informed, and believe it to be true, and charge that the said George F. Lewis, on or about the nineteenth day of December, one thousand eight hundred and forty-eight, without the consent, and against and contrary to the expressed will and desire of said company, exposed the said bonds to sale at public vendue, at the Exchange, in the city of Philadelphia; but these defendants having no knowledge on the subject, excepting as derived from the allegations of the complainant in his said bill, do not admit that the said complainant then, or at any other time, purchased the said bonds in public market, nor do they admit he paid
 20 a valuable consideration therefor, or is in law or equity a *bona fide* holder of the same, but leave the said complainant to make such proof in relation to said matters as he may be advised; and, to the contrary thereof, these defendants say, that they are informed and charge that no consideration whatever was paid for said bonds, or either of them, by the said complainant, and they were not purchased in public market or otherwise by him, and that he is not the real holder of the same, or that if he is the holder thereof, that he holds the same not for his own benefit but for the benefit of the said George F. Lewis, either alone or jointly with some other person or persons, and that he had full knowledge at the time of the
 30 sale of the said bonds, and since, that the said George F. Lewis had no right to hold or use the same, except as collateral security.

And these defendants charge it to be true, that said George F. Lewis was, at the time of the sale of said bonds in the Philadelphia Exchange as aforesaid, and since, the partner in business of said complainant, and that the said bonds were sold at the said sale, really and in truth unto said George F. Lewis, and for a small and very inadequate amount, and that the said sale and purchase were but a fraudulent device and scheme whereby the said Lewis has
 40 sought and is seeking to extort from the said company money to which he is not entitled.

And these defendants further answering say, that they are in-

formed and believe that said company have tendered, and do tender themselves ready and willing to pay to said George F. Lewis the amount due to him from said company, on his surrendering to them the said bonds as security for which the same were deposited in his hands; and that they have tendered, and do tender themselves ready to pay said debt, if the complainant will surrender the said bonds to them, but that the said Lewis and the said complainant have refused, and still do refuse so to do.

And these defendants are further informed, that the said Lewis made no effort whatever to collect the said debt due by the said 10 company to him previous to selling said bonds, but that since the sale thereof, the said Lewis has obtained judgment in the Supreme Court of New Jersey against said company for the sum of five hundred and fifty dollars seventy-three cents, besides costs, being the asserted balance due upon said note, after deducting therefrom the amount brought by said bonds, so that the said company will, if the claim of the complainant be allowed by this court, be obliged to pay at least two thousand dollars over and above the fifteen hundred originally borrowed by them, by reason and through the alleged fraud and device of said Lewis and the said complainant. 20

And these defendants submit, that the said George F. Lewis had no right to sell the said bonds in public market or otherwise, nor to hold the same, except for the discharge of the debt for which they were lodged in his hands as collateral security, and that if the said complainant holds the said bonds, or either of them, in trust for said Lewis, or acquired possession of the same with notice and knowledge of the title of said Lewis thereto, that he is not entitled to recover on the same, nor resort to the mortgage aforesaid as security.

And these defendants further submit to this court, that the said 30 George F. Lewis had no right to resort to the bonds deposited with him as collateral security, until he had first brought action upon the said promissory note so as aforesaid given to him for such money by him loaned to said company, and that no sale of said bonds, or either of them, could give any title thereto to the purchaser of said bonds, unless action had been first, as aforesaid, brought on said promissory note, and proved ineffectual for the recovery of the money due thereon.

And these defendants deny all and all manner of combination and confederacy wherewith they are by the said bill charged, without this, 40 that there is any other matter, cause, or thing in the said bill of complaint contained material or necessary for these defendants to make

answer unto, and not herein and hereby well and sufficiently answered, confessed, traversed, or avoided or denied, is true to the knowledge or belief of these defendants; all which matters and things these defendants are ready and willing to aver, maintain, and prove, as this honorable court shall direct, and humbly pray to be hence dismissed with his reasonable costs and charges in this behalf most wrongfully sustained.

CORTLANDT PARKER,

Solicitor and of counsel with said defendants.

10 STATE OF NEW YORK, city and county of New York.—John J. Palmer, Zebedee Cook, and Theodore Dehon, the defendants above named, being duly sworn, do humbly say, that the matters and things in the foregoing answer contained, so far as they relate to their own acts, are true, and so far as they relate to the acts of others, they believe them to be true.

JOHN J. PALMER,
ZEBEDEE COOK,
THEODORE DEHON.

Sworn and subscribed, this 17th day of May, A. D. 1852, before me.

RICHARD GOODMAN, *Com'r.*

Examination of witnesses in the above stated case, taken at my office, in the city of Camden, on Thursday, the third day of December, in the year of our Lord one thousand eight hundred and fifty-two (1852), before James B. Dayton, one of the masters and examiners of the said court, in the presence William L. Dayton, esquire, solicitor and of counsel for the said complainant, and Frederick T. Frelinghuysen, esquire, solicitor and of counsel for the said defendants.

30 *John R. Thomas*, of the city of Philadelphia, a witness produced on the part of the aforesaid complainant, being duly sworn deposeth and saith—I am a licensed auctioneer of the city of Philadelphia—sell stocks, real estate, and other securities; our firm do business under the name of M. Thomas & Sons, at No. 93 Walnut street; our house has been long and largely engaged in this busi-

ness.—Paper being shown to witness, marked Exhibit A, says that it is in my handwriting, and on account of sale of bonds therein named, in December 19th, A. D. 1848. I sold the bonds there mentioned and numbered for George F. Lewis, by his order. Mr. Lewis is a citizen of Philadelphia, doing business there.—And being shown bonds, says that I only know them as they correspond with our printed advertisement, said bonds marked Exhibits B, C, D, E, F, G. The said sale was by public notice published in newspapers and pamphlets, and in at least four daily papers, one of which pamphlets, marked Exhibit H, I hold in my hand. 10

The sale was made at the Merchants Exchange, Philadelphia.

It was a large sale, and large attendance at the sale. We received the full market value for these securities sold at that time. Samuel F. Fisher purchased those securities at this public sale, and we received his check for the money; done in the ordinary course of such business; check was regularly paid.

And being cross-examined on part of the defendants by Frederick T. Frelinghuysen, says—This sale was at seven o'clock in the evening; at that sale we sold stocks and real estate; we sold regularly every Tuesday evening in business season real estate and 20 stocks. My father was the auctioneer at that sale.

He called the securities bonds of the Morris Canal and Banking Company; I was present at the sale; these bonds were sold early in the evening, at the early part of the sale—nearly the first thing sold. The number of persons present increased as the sale progressed; sale commenced precisely at seven o'clock; we commence promptly our sales at the hour advertised, whether there are many persons present or not.

I have no particular recollection whether there were many persons present at the commencement of said sale; can't say whether there were few or many at the commencement of the sale. I 30 know the sale was made to Mr. Fisher by the entry on our books—this is the only means of information I have. I have no recollection of seeing Mr. Fisher there when these bonds were sold—I took it for granted he was there. Do not recollect whether George F. Lewis was at that sale; I do not recollect whether or not George F. Lewis gave us the check of Samuel F. Fisher; can't recollect whether more than one person bid on these bonds; I can't say whether these bonds were sold by the lump or per cent. 40

We had Mr. Lewis' instructions to sell the bonds. I got at this fact by reference to our books—in that way only. I have no

knowledge of the amount the bonds brought, or who the purchaser was, except by our books. Paper marked Exhibit A is a mere copy from our books. I am one of the firm of Messrs. Thomas & Sons; I do not keep the books; I do not know what the mortgage bonds of the Morris Canal Company are worth at this time.

I do not know what the bonds sold for in 1847, or in 1849, or in 1848, except from our own sale, what they then brought. I know personally George F. Lewis and Samuel F. Fisher. I don't know that Mr. Fisher was in any business in 1848; Mr. Lewis was a
10 manufacturer of white lead. I don't know Mr. Fisher being in business at any time.

I have no recollection of having sold any of the bonds of the Morris Canal in 1848, besides these mentioned, although we may have done so; we may have sold them half a dozen times—sell so much stock and securities.

And being re-examined in chief, says—The evening is our usual time for these sales. I spoke from our general habit when I mentioned our promptness in commencing sales. These securities were sold in the order in marked catalogue, Exhibit H. I have
20 no other knowledge, except from the catalogue—that is our habit; they were set up in the order mentioned in the catalogue; I have no doubt they were set up as mortgage bonds, as described in the catalogue.

It is admitted by Mr. Frelinghuysen that Exhibit A is a true and legal copy from the books, and is to have the same force as the books themselves.

Having seen the books, I have no doubt of the correctness of this entry.

I have no reason to suppose that Mr. Lewis gave us Mr. Fisher's
30 check, any more than Mr. Frelinghuysen had done it. I know that Mr. Fisher and Lewis are not partners. Don't think Mr. Fisher had ever been in business; he is a man of large means from his father's estate.

And being again cross-examined.—I do not know of Mr. Fisher and Mr. Lewis having any speculations together; I know they are intimate.

And being again examined in chief says—That we always sell our stock at the commencement of our sales, and when we have sales of stocks the company is usually as large as at any time dur-
40 ing the sale.

JOHN R. THOMAS.

Sworn and subscribed, this third day of December, A. D. 1852,
before me.

JAMES B. DAYTON, *M. C.*

Henry B. Rianhard, of the city of Philadelphia, a witness produced on the part of the aforesaid complainant, being duly sworn, deposeth and saith—I am the clerk of J. P. Morris & Co., of Philadelphia, who are steam engine manufacturers, as well as manufacturers of machinery; their establishment is a large one. During the year A. D. 1848, there was a correspondence between Judge Marsh and J. P. Morris & Co. in relation to the bonds of 10 the Morris Canal Company held by J. P. Morris & Co. in the year A. D. 1848. I have the letter book here of J. P. Morris & Co. The first letter to Judge Marsh from J. P. Morris & Co. is dated 6th month 21st, 1848; the second letter is dated the 24th of the same month; third letter is dated 7th month 19th, 1848; the fourth letter is dated 9th month the 11th, A. D. 1848. I have examined the copies of the letters shown me, marked Exhibits I, J, K, L, with the press copies, and they are true copies from the letter book.

Letters shown to witness, marked Exhibits M, N, O, P, says 20 that they are the original letters from Judge Marsh to J. P. Morris & Co., in reference to subject matter of correspondence in the letters of J. P. Morris & Co. mentioned.

It is admitted by Mr. Frelinghuysen that these letters are in the handwriting of Mr. Marsh.

The entire examination of this witness is objected to by Mr. Frelinghuysen.

H. B. RIANHARD.

Sworn and subscribed this third day of December, A. D. 1852, 30
before me.

JAMES B. DAYTON, *M. C.*

Thomas Hale, of the city of Philadelphia, a witness produced on the part of the complainant, being duly sworn deposeth and saith—I was engaged in the business of a broker in the year 1848, and have been so engaged off and on since the year 1836. Forty per cent. was the amount bid at the board of brokers for seven per cent. Morris Canal and Banking Company mortgage bonds in the year 1848—that was the highest.

I do not know of any offers and sales of six per cent. bonds of said company.

And being cross-examined by Mr. Frelinghuysen, says—I do not know that there are any such thing as six per cent. mortgage bonds of said company. I never dealt in any bonds of the Morris Canal and Banking Company.

THOMAS HALE.

Sworn and subscribed this third day of December, A. D. 1852, before me.

10

JAMES B. DAYTON, *M. C.*

Complainant's solicitor offered in evidence twenty-four bonds of the Morris Canal and Banking Company, of one hundred dollars each, in amount, and each dated the third day of September, eighteen hundred and forty-seven, signed "John J. Bryant, cashier," and "A. Whitney, president," numbered from fourteen hundred and three (1403) to fourteen hundred and twenty-six (1426), inclusive, of which Exhibit Q is a copy on the part of the complainant; likewise six several bonds, of like date and signature, for five hundred dollars, each, numbered 679, 680, 737, 738, 739, 746, of 20 which Exhibit marked R, by the master, is a copy, on the part of the complainant, a mortgage, marked Exhibit S, of the Morris Canal and Banking Company to John J. Palmer, Zebedee Cook, and Theodore Dehon, dated the twenty-eighth day of March, eighteen hundred and forty-six (1846), duly certified by Robert Gilchrist, clerk of Hudson county, state of New Jersey, &c.

No other witness in testimony being produced before me, this examination is closed. All of which is respectfully submitted.

JAMES B. DAYTON, *M. C.*

December 3d, A. D. 1852.

Exhibits on part of Complainant.

Exhibit A.

Sale by order of George T. Lewis, esq., for account of whom it may con- cern. 6 Bonds (No's 785, 786, 787, 788, 789, and 790,) for \$500, each. 6 per cent. mortgage loans Morris Canal and Banking Co., Commission and duty,	}	Philadelphia, Dec. 19, 1848, by, M. Thomas & Sons, auctioneers.
		\$1050.00 10.50 <hr style="width: 50%; margin-left: auto; margin-right: 0;"/> \$1039.50 10
	[PAID.]	

Exhibit H.

Extra valuable real estate, stocks, &c.—Thomas & Son's sale, December 19th, 1848.

Catalogue of the property to be sold at public sale on Tuesday evening, December 19th, 1848, commencing at 7 o'clock precisely—No postponement on account of weather.—M. Thomas & Sons, auctioneers.

Also, without reserve, for account of whom it may concern, 6 bonds (No's 785, 786, 787, 788, 789, and 790,) for \$500, each, 6 per cent. mortgage loan Morris Canal and Banking Company. 20

Exhibit I.

PHILADELPHIA, 6 month 21, 1848.

The note of the Morris Canal Company for \$1357.28, received by us for machinery furnished on the line of canal, fell due on the 18th inst., and not being paid, has returned to us under protest.

A collateral security for the payment of this note, the bonds of the company to double the amount of note, were deposited in our hands.

We propose to place these bonds in the hands of a broker, with directions to sell a sufficient amount to cover the amount of note 30 and expenses, of which course we presume the company can have

no reasonable objection to offer. We shall, however, await a return mail before we take any action upon it.

We are, very respectfully,

J. P. MORRIS & Co.

To E. Marsh, Pres't Morris Canal and B. Company.

I have compared the above, with the "press copy" of original, and found it a correct transcript.

F. B. RIANHARD,
December 3, 1852.

10

Exhibit J.

PHILADELPHIA, 6 mo. 24, 1848.

Your favor of 22 inst. reached us last evening, but not until we had passed the bonds from our hands, having waited the arrival of two mails without hearing from you.

Our broker has just informed us that he offered the bonds in question at the board yesterday, and that the highest bid he received was \$35. We limited him at \$50. We have requested him not to take any further action upon it until Thursday morning after the meeting of your board, which you write us will occur 20 on Wednesday.

We are respectfully,

J. P. MORRIS & Co.

To E. Marsh, Pres't M. C. & B. Company.

I have compared the above with "press copy" of original, and found it a correct transcript.

H. B. RIANHARD,
December 3, 1852.

Exhibit K.

PHILADELPHIA, 7 month 19, 1848.

30 We are this morning advised that the second note of the Morris Canal Company has been noted for protest.

We entertained some hopes that you would have been able to meet this note, which would have encouraged us to extend the

time on the other note, if required. We now infer that all prospect of your liquidating our debt is at an end, and we are strengthened in this belief by having communicated with some persons, who you supposed would be subscribers to the proposed loan, but who gave us no reason to expect were at all prepared to enter into such an arrangement.

We propose to await your answer by return mail, if any you have; and if we do not hear from you, we then propose to advertise them, and expose them to public sale to the highest bidder, or if you have any other mode to suggest, we shall be pleased to have your views.

We are, respectfully,

J. P. MORRIS & Co.

To E. Marsh, President of the Morris Canal and Banking Co.

I have compared the above with "press copy" of original, and found it a correct transcript.

H. B. RIANHARD,
December 3, 1852.

Exhibit L.

PHILADELPHIA, 9 mo. 11, 1848.

Fearing that you may not be apprised that we have felt called upon to dispose of the bonds of the Morris Canal and Banking Company, which we hold as collateral security for the claim we have on the company, we have therefore to inform you that they will be sold on the 15th inst., by public sale at the Exchange in this city, to the highest bidder, and if we do not realize from them sufficient to pay our claim, we shall then look to the company for any deficiency that may arise from the transaction. Please to receive annexed a copy of M. Thomas & Son's advertisement in the United States Gazette of this city.

We are, very respectfully,

30

J. P. MORRIS & Co.

To E. Marsh, Pres't of the Morris Canal & B. Co., Jersey City.

I have compared the above with "press copy" of original, and found it a correct transcript.

H. B. RIANHARD,
December 3, 1852.

Exhibit M.

MORRIS CANAL OFFICE, Jersey City, 9th June, 1848.

J. P. Morris & Co.

Sirs,—Our note, held by you, for \$1357.25 falls due 15th June, inst. We find that it will not be convenient for us to pay it then, and hope it may suit your convenience to extend the time of payment for 60 or 90 days upon the securities now held by you. We hope to be able to pay it then, and do assure you that our purpose is to pay it at the earliest possible period. A like extension of the
 10 note falling due on the 15th July will probably be desired by us.

Respectfully, &c.,

E. MARSH, Pres't M. & Canal B. Co.

Exhibit N.

MORRIS CANAL OFFICE, Jersey City, 22d June, 1848.

J. P. Morris & Co.

Sirs,—Your favor of yesterday is just received. We cannot, I believe, offer any reasonable objection to the course you propose to pursue in reference to the bonds left with you as security for the payment of your note against this company; and yet I could
 20 hope that some other method might be devised to meet it than that. I have just directed notices to be sent for a meeting of the board of directors on Wednesday next, and have some hopes that measures will be adopted then to meet your demand more satisfactory to all parties. I would therefore make the request, that you defer any further proceedings in reference to the bonds until after that meeting, the result of which I will apprise you of as soon as practicable.

Very respectfully, &c.,

E. MARSH, Pres't M. C. & B. Co.

Exhibit O.

30

MORRIS CANAL OFFICE, Jersey City, 28th June, 1845.

MESSRS. J. P. MORRIS & CO.

Sirs,—Your favor of the 24th inst. was duly received, and I answer now at the close of the meeting of the board of directors.

The board have fully considered the position of the business be-

tween your firm and this company, and I regret the necessity of saying, that we are not provided at present with the means to pay your claim, but are greatly encouraged with the prospect of effecting a loan of \$250,000, in which case your note, and some others similarly situated, will be promptly paid. Under these circumstances, I trust you will be willing to defer any further action upon the bonds until the result of the present effort to effect the loan is known, which must be decided within 30 days. You cannot be worse off by such delay, and you may be very considerably better. You may rely, sirs, upon an honest effort to raise the money and 10 upon the disposition of the company to pay you at the earliest possible period.

Mr. Whitney will return to Philadelphia soon, and will confer with you upon this subject.

Very respectfully, &c.,

E. MARSH, Pres't M. C. & B. Co.

Exhibit P.

SCHOOLEYS MOUNTAIN, 22d July, 1848.

J. P. Morris & Co.

Sirs,—Your favor of the 19th inst. is received, and I greatly re- 20 gret the inability of our company to meet your claim at the present time; but, notwithstanding the discouragement in the matter of the loan mentioned in your letter, we have confident expectations of success, in which case all your demands would be promptly paid. I have only to suggest, that a further delay of the resort to a sale of bonds might be much more agreeable, and I trust more advantageous to your company. You will, however, decide upon your own course, while I have only to repeat, that no effort shall be wanting upon our part to meet yours and all other claims upon us.

Very respectfully, &c.,

30

E. MARSH, Pres't M. C. & B. Co.

Exhibit Q.

[This is to certify, that the annexed bond, No. 1403, is included in a mortgage on the Morris Canal, executed to us, as trustees, for the benefit of the bondholders.

JOHN J. PALMER, }
 ZEBEDEE COOK, } *Trustees.*
 THEODORE DEHON, }

United States of America.—State of New Jersey.

No. 1403.

\$100.

10 Morris Canal and Banking Company, 1844, extending from Jersey City, opposite the city of New York, to Easton, on the Delaware river.—Mortgage loan.

The Morris Canal and Banking Company acknowledge themselves indebted to John J. Palmer, of the city of New York, in the sum of one hundred dollars, lawful money of the United States, which they promise to pay at the Bank of the State of New York, in the city of New York, to the said John J. Palmer or to bearer, on the first day of April, which will be in the year of our Lord one thousand eight hundred and fifty-six, with interest thereon at the rate of six per centum per annum, payable at the said Bank of the State of New York, semi-annually, on the first days of October and April, in each and every year, until the said principal money is paid, on the delivery of the annexed dividend warrants.

20 The holder of this bond is entitled to the security to be derived from a first mortgage on the estate and chartered rights of the company, dated the twenty-eighth day of March, in the year of our Lord one thousand eight hundred and forty-six, authorized by the board of directors, at a meeting held on the tenth day of March, in the year last aforesaid, and duly recorded, executed, and delivered to John J. Palmer, Zebedee Cook, and Theodore Dehon, of the city of New York, as trustees, in trust to secure the full payment of such bonds as are issued under the same, bearing the signature of the trustees, the whole amount of bonds to be issued not to exceed the sum of seven hundred thousand dollars, money of the United States.

30 In witness whereof, the said company have caused this bond to be attested in their behalf by the president and cashier, and their

common seal to be hereunto affixed, this first day of September, in the year of our Lord one thousand eight hundred and forty-seven.

Attest.

JOHN J. BRYANT, *Cashier.*

A. WHITNEY, *Pres't.*

Twenty-three other bonds, all of the same amount, tenor, and date, numbered, respectively, from 1404 to 1426, both inclusive.

Exhibit R.

[This is to certify, that the annexed bond, No. 679, is included in a mortgage on the Morris Canal, executed to us, as trustees, for 10 the benefit of the bondholders.

JOHN J. PALMER, }
 ZEBEDEE COOK, } *Trustees.]*
 THEODORE DEHON, }

United States of America.—State of New Jersey.

No. 679.

\$500.

Morris Canal and Banking Company, 1844, extending from Jersey City, opposite the city of New York, to Easton, on the Delaware river.—Mortgage loan.

The Morris Canal and Banking Company acknowledge themselves indebted to John J. Palmer, of the city of New York, in the sum of five hundred dollars, lawful money of the United States, which they promise to pay at the Bank of the State of New York, in the city of New York, to the said John J. Palmer or to bearer, on the first day of April, which will be in the year of our Lord one thousand eight hundred and fifty-six, with interest thereon at the rate of six per centum per annum, payable at the said Bank of the State of New York, semi-annually, on the first days of October and April, in each and every year, until the said principal is paid, on the delivery of the annexed dividend warrants. 30

The holder of this bond is entitled to the security to be derived from a first mortgage on the estate and chartered rights of the company, dated the twenty-eighth day of March, in the year of our Lord one thousand eight hundred and forty-six, authorized by the board of directors, at a meeting held on the tenth day of March, in the year last aforesaid, and duly recorded, executed, and deli-

vered to John J. Palmer, Zebedee Cook, and Theodore Dehon, of the city of New York, as trustees, in trust to secure the full payment of such bonds as are issued under the same, each bond, clearly to identify the same, bearing the signatures of the trustees; the whole amount of bonds to be issued not to exceed the sum of seven hundred thousand dollars, money of the United States.

In witness whereof, the said company have caused this bond to be attested, in their behalf, by the president and cashier, and their common seal to be hereunto affixed, this first day of September, 10 in the year of our Lord one thousand eight hundred and forty-seven.

Attest.

JOHN J. BRYANT, *Cashier.*
A. WHITNEY, *Pres't.*

Five other bonds, of same amount, tenor, and date, numbered, respectively, 680, 737, 738, 739, and 746.

Reports of Morris Canal and Banking Co.

20 *Examinations of witnesses, taken on the part of the Morris Canal and Banking Company, on the eleventh day of May, A. D. 1853, at twelve o'clock in the forenoon, at Jersey City, at the office of the said company—present Frederick T. Frelinghuysen, esquire, solicitor for the Morris Canal and Banking Company and others, defendants, and William L. Dayton, esquire, solicitor for and of counsel with the complainant. Due notice admitted before the undersigned, master and examiner in Chancery in New Jersey.*

T. FRELINGHUYSEN, Jr., *M. C.*

30 *George E. Safford, a witness produced, sworn, and examined on the part of the Morris Canal and Banking Company and others, defendants, on his oath deposeth and saith—I am the secretary of the Morris Canal and Banking Company; have been so since the twelfth of March, A. D. 1852. John D. Poe preceded me as secretary of said company. Mr. Nathan McVickar preceded him as se-*

cretary. I believe Mr. Poe became secretary immediately after the death of Mr. McVickar. John D. Poe was made secretary of the company on the first of February, A. D. 1850.

John J. Bryant was cashier of the company from 1844, appointed October 21st, 1844, up to the time of McVickar's appointment. Mr. McVickar was appointed secretary April 28th, 1848. He died in the fall of 1849, as I am informed and believe.

Ephraim Marsh, the president, and William H. Talcott, engineer of the company, were both stockholders in the company. There are no other persons besides them who were employed in the office of the company in December, 1848. There are no officers nor clerks, connected with the company as officers or clerks, that have been in the office as long as I have, except Judge Marsh and Mr. Talcott, as above named.

Witness being shown a letter book, marked Exhibit F, on the part of the defendants, says—I found this book in the safe of the company, among the books of the company; I believe this to be a book containing the copies of letters written on the business of the company in the regular course of business; this book is filled with copies of Judge Marsh's letters to various individuals, on the business of the company, from the fourth of April, A. D. 1848, to the seventh of March, A. D. 1851. The majority of the letters in this book are Judge Marsh's, president of the company; this is one of a series of letter books of like character.

The letter dated December 14th, 1848, to George T. Lewis is in Judge Marsh's handwriting. After letters are copied in this book, they are folded, put in an envelope, and directed to the person to whom they were written, and put in the post office, postage paid.

Said letter is marked Exhibit F, No. 2, on part of the defendants, and it is consented by the counsel for the complainant that the same is to have the same efficacy as if the original was produced.

A letter in the book aforesaid, dated November 13, 1848, directed to George Bird, esquire, is also in the handwriting of Judge Marsh, and the same to have the same efficacy as if the original was produced (by the like consent of the counsel of the complainant), and which is marked Exhibit F, No. 3, on the part of the defendants.

It is agreed by the counsel for the parties, that Exhibits F, No. 4, and F, No. 5, on part of defendants, are to have the same efficacy as if the original were produced.

Cross-examined by Wm. L. Dayton, esq.

I have no knowledge of the letter book, except that it was on

file among the papers of the company; I presume I have seen it before frequently in the rack; I have no knowledge of the letters therein referred to having been sent.

Witness being shown a paper writing, purporting to be a note, marked Exhibit D, on part of the complainant, says—that “A. Whitney,” signed to the same, is in the handwriting of Asa Whitney, then president of the Morris Canal and Banking Company, and the endorsement of “John J. Bryant,” thereon, is in the handwriting of said John J. Bryant. I have seen Mr. Whitney make
10 his signature. The memorandum on the face of the note is in the handwriting of McVickar.

Witness, being shown the reports of the company, marked Exhibits D 2, D 3, D 4, on part of complainant, says—I believe them to be the board of directors’ reports to the stockholders of the company for the years 1848, 1849, and 1850.

The board of directors are in the custom of making reports yearly to the stockholders, I believe. Those reports are made by the sanction and direction of the board of directors. The reports marked as exhibits, as above, were made under the same sanction
20 and direction, I believe.

I am not aware that there are any entries made in the books of the company of bonds issued as collateral to those notes.

I am not aware that there are any entries made in the books of the company of bonds issued as collateral to notes.

Question. Do not the board of directors know the amount of bonds issued? and if so, what is their source of knowledge?

Answer. They probably do know the amount of bonds issued, and their knowledge would be the resolution authorizing the issuing of them.

30 [Objected to by Mr. Frelinghuysen.]

I am not aware that there is among the books of the company any record of the bonds issued; think there is not.

Question. Do the statements of the board of directors to the stockholders give a correct statement of the money transactions of the company?

Answer. I believe they do.

[Objected to by Mr. Frelinghuysen.]

Question. Was the issue of these bonds, as collateral to this paper, reported to the stockholders in the usual form?

40 *Answer.* I have no knowledge of my own that they ever were.

I mean I am not sufficiently conversant with the transaction to say whether they were or not.

Re-examined.—The book containing the minutes of this company, from its organization in 1844, is, I believe, before me.

It has been here during the whole of this examination, and subject to the examination of the counsel of the complainant.

I believe every letter copied in that letter book, Exhibit F, on part of complainant, was written and sent to the parties to whom they purport to have been written.

The counsel for the complainant admits notice given him at this time to produce the original letter to George F. Lewis, dated December 14th, 1848. 10

Cross-examined.—There is nothing, I believe, in the books of the company impeaching or invalidating these bonds now in controversy.

Re-examined.—There is nothing, that I know of, on the books of the company authorizing the issuing of those bonds as collateral security or in any other way.

Cross-examined.—The resolution of March 17, 1848, being read to witness, he says—that is a resolution for the issuing of bonds; but whether for the issuing of the bonds in question, I am unable to answer. 20

Question. If for the issuing of the bonds in question, it was sufficient authority for doing so, was it not?

Answer. Undoubtedly.

GEO. E. SAFFORD, *Sec'y.*

Taken, sworn, and subscribed, May 11th, 1853, before me, at Jersey City, N. J.

T. FRELINGHUYSEN, Jr., *M. C.*

Exhibits on the part of Defendants.

Exhibit F, No. 2.

MORRIS CANAL OFFICE, Jersey City, 14th Dec., 1848. 30

George F. Lewis.

Dear sir,—Your favor of the 12th inst. is received, in which you give notice “that the six bonds, No’s 785 to 790, inclusive, for \$500, each, held as collateral security for the payment of a note

drawn by Asa Whitney, president, for \$1560.75, will be sold at public sale on the 19th inst., Tuesday, at 7 o'clock P. M., at the Philadelphia Exchange, by M. Thomas & Sons, auctioneers, and that you will be held accountable for any deficiency, should there be any, between the net proceeds of said sale and the amount of said note, with interest."

In answer to this communication, I would most respectfully say, that the bonds referred to were not left to be used in the way mentioned in your letter; being deposited as collateral, they can only
 10 be used upon our inability to pay the note. That inability is not established by the note not being paid at maturity. We confidently expect to pay the note within ninety days, and when we do pay the note we shall expect to have returned to us the bonds left as collateral security, or the full amount of them in money.

With this view of the case, I feel called upon to protest against the proposed sale of the bonds, and request that you will receive this as notice that you will be held responsible to this company for their full amount, in case such sale should be made.

I greatly regret the course you have thought proper to pursue in
 20 this matter, for we have regarded you as one of the best friends of this institution, and had supposed that your investigation of its affairs had brought you to this conclusion, that it was not only able to pay all its liabilities, but would ultimately be among the most prosperous works in the country. The business of this year has been more than a third larger than last, and its revenues about \$80,000, and we are now employing our best efforts to procure the means to construct ten more new planes, to give the canal the capacity of carrying 500,000 tons, and producing an annual revenue of at least \$250,000. To do this, we only require the sum of
 30 \$300,000, and this, I trust, we shall get very soon, either in the way of a loan or by the issue of a preferred stock. With such prospects before us, we could hope that you would defer any proceedings to collect your note, until we have had a reasonable opportunity to accomplish this desirable object.

I am, sir, very respectfully,

E. MARSH, Pres't M. C. & B. Co.

Exhibit F, No. 3.

MORRIS CANAL OFFICE, Jersey City, 13th Nov., 1848.

George Bird, esq.

Dear sir,—Your communication to me of the 4th instant, in reference to the note past due of the Morris Canal and Banking Co., given to the Ames Manufacturing Co., was duly received, from which I learn, as well as from an interview had with you to-day, that your instructions are to sell the mortgage bonds of this company hypothecated as collateral security at public auction, as soon as practicable. You will allow me to say, that the bonds referred 10 to were not left to be used in that way, being deposited as collateral, they can only be used upon our inability to pay the note; that inability is not established by the note not being paid at maturity. We regret the necessity of delaying payment so long, but hope to be able to pay it ere long; and when we do pay the note, we shall expect to have returned to us the bonds, or the full amount of them in money. With this view of the case, I feel called upon to protest against the proposed sale of the bonds, and request that you will receive this as notice that you, or those you represent, will be held responsible to this company for their full amount, in case such 20 sale should be made.

I am, sir, very respectfully, &c.,

E. MARSH, Pres't M. C. & B. Co.

Exhibit F, No. 4.

MARCH 28, 1846.

Mr. Green, in behalf of special committee, reported—that subscription to the amount of \$103,150 had been obtained on account of the loan, which amount, according to the terms of the subscription, made the same binding. 30

Mr. Frelinghuysen reported the following resolutions, which were considered and adopted:

Resolved, Whereas the committee to whom was submitted the superintendence of the loan contemplated by the resolutions of the 10th and 13th March, instant, have reported that John J. Palmer, Zebedee Cook, and Theodore Dehon, of New York, have agreed

to take upon themselves the duties of trustees for the benefit of the bondholders under such loan, and that a considerable portion of such loan has been negotiated—therefore be it

Resolved 1st, That the president be, and hereby is authorized and directed forthwith, on behalf of this corporation, duly to execute to the said trustees, for the benefit of those who shall become the bondholders under said loan, a mortgage on the Morris Canal, its appendages, appurtenances, and chartered rights, which mortgage shall be to secure the sum of \$700,000, and not more, and be 10 in the form now submitted to the board, to wit:—[Copy of mortgage follows.]

Resolved 3d, The president and cashier be, and hereby are duly authorized and directed, under the supervision of the said loan committee, to execute and deliver the bonds of this company for the said loan, payable to John J. Palmer or bearer, on the first day of April, in the year of our Lord one thousand eight hundred and fifty-six, in such sums as are designated in said mortgage; that the aggregate amount of bonds now to be issued shall be equal to the amount of the said loan now, or now about to be negotiated; 20 provided however, that such amount of bonds to be issued shall not exceed the sum of \$450,000 without further action of this board.

Resolved 4th, That the president and cashier, together with the said loan committee, be, and hereby are authorized and directed to cancel such outstanding bonds or certificates of this company as may be surrendered up for payment, and that they from time to time report to the board.

Exhibit F, No. 5.

At a meeting of the stockholders of the Morris Canal Company, of 1844, held, pursuant to previous notice, at the Phoenix Bank, in 30 the city of New York, March 11th, 1846, Zebedee Cook, of New York, was called to the chair, and M. McMartin, of Jersey City, appointed secretary.

The chairman, after briefly stating the objects of the meeting, presented and read a statement, prepared by the board of directors, showing the amount expended since the organization of the present company in enlarging and repairing the canal; the sources from which the necessary funds had been realized; the amount of floating debt; the amount necessary to be raised immediately to pay off the floating debt, and to put the canal in navigable condi- 40 tion the present season.

A proposition was also submitted, from the board, to raise, by subscription from stockholders, bondholders, and others, on the bonds of the company, the sum of \$119,000, agreeably to the requirements of Wm. H. Talcott, engineer, and the sum of \$96,000 to pay off the floating indebtedness of the company, to be secured by giving therefor, as also for certificates already issued, a mortgage upon the canal, its tolls, appurtenances, and chartered rights; the bonds to be at ten years' date, interest and principal payable in New York; the mortgage to be in favor of three trustees, to be selected by the parties taking the bonds, and to be payable and to 10 be for \$500,000.

The statement of the board was accepted, and the proposition to mortgage the canal adopted with an amendment, embraced in the following resolution, which was moved by Mr. Soutter, seconded by Mr. E. Post, and unanimously carried by the meeting.

Resolved, That this meeting have entire confidence in the ultimate success of the Morris Canal Company, provided that ample funds can be raised to complete its works on a permanent basis, and that, therefore, the board of directors be, and they are hereby recommended to insert in the mortgage the sum of \$700,000, if 20 practicable so to do, instead of the sum of \$500,000, and that the trustees be at once appointed by the board of directors, and their names embraced in said mortgage.

On motion, the meeting adjourned.

P. McMARTIN, *Sec'y.*

At a meeting of the board, March 13th, 1846, it was

Resolved, That, in accordance with the resolution of stockholders at their meeting held the eleventh of March, the proposed mortgage be increased from \$500,000 to \$700,000, the reserve fund being 30 \$250,000, instead of \$50,000.

MORRIS CANAL OFFICE, March 28th, 1846.

Board met at rooms—present Messrs. Williamson, Green, Dehon, Frelinghuysen, Biddle, Varnum, Strong, Leroy, Soutter, McMartin, Southmayd, Cook, and Bryant, (14).

Minutes of last meeting read and approved.

Mr. Green, in behalf of special committee, reported that subscriptions to the amount of \$103,150 had been obtained on account

of the loan, which amount, according to the terms of the subscription, made the same binding.

Mr. Frelinghuysen reported the following resolutions, which were considered and adopted :

Resolved, Whereas the committee to whom was submitted the superintendence of the loan contemplated by the resolutions of the 10th and 13th March, inst., have reported that John J. Palmer, Zebedee Cook, and Theodore Dehon, of New York, have agreed to take upon themselves the duties of trustees for the benefit of the
10 bondholders under such loan, and that a considerable portion of such loan has been negotiated, therefore be it

Resolved 1st, That the president be, and hereby is authorized and directed forthwith, on behalf of this corporation, duly to execute to the said trustees, for the benefit of those who shall become the bondholders under said loan, a mortgage on the Morris Canal, its appendages, appurtenances, and chartered rights, which mortgage shall be to secure the sum of \$700,000, and not more, and be in the form now submitted by the board, to wit :

This indenture, made this 28th March, in the year of our Lord
20 one thousand eight hundred and forty-six, between the Morris Canal and Banking Company, a corporation under and by virtue of the laws of the state of New Jersey, of the first part, and John J. Palmer, Zebedee Cook, and Theodore Dehon, of the city and county of New York, of the second part, witnesseth ; that whereas the party of the first part, *for the purpose of raising money to pay off their debt incurred in improving, enlarging, and repairing their canal, and of raising money to be expended in further improving and perfecting the same, are about to make, execute, and issue certain*
30 bonds, for sums not to exceed in the whole seven hundred thousand dollars, which bonds are to bear interest in accordance with the law of the state or county where the same may be negotiated, and are to be payable on the 1st April, in the year of our Lord one thousand eight hundred and fifty-six, and which bonds are to be identified by the signatures of the parties hereto of the second part, and are to be as follows, namely : three hundred and fifty bonds for one thousand dollars, each, to be marked and numbered, respectively, from number one to number three hundred and fifty, inclusive ; five hundred bonds for five hundred dollars, each, to be numbered, respectively, from number three hundred and fifty-one
40 to number eight hundred and fifty, inclusive ; two hundred and fifty bonds for two hundred and fifty dollars, each, to be numbered, respectively, from eight hundred and fifty-one to number eleven

hundred, inclusive; three hundred and seventy-five bonds for one hundred dollars, each, to be numbered, respectively, from number eleven hundred and one to number fourteen hundred and seventy-five, inclusive; and whereas, with a view to enable the said company to raise the said moneys, and thereby secure the continued progress and operation of their said canal, and obtain further time finally to discharge the expenses of the improvements by them already made, the said company, by their board of directors, have resolved to secure the payment of the said moneys by the pledge and hypothecation of the said canal, with its appendages, appurtenances, and 10 the actual revenues, chartered rights, and properties of the said company.

Resolved 5th, That the president and cashier be, and hereby are duly authorized and directed, under the supervision of the said loan committee, to execute and deliver the bonds of this company for the said loan, payable to John J. Palmer, or bearer, on the 1st day of April, in the year of our Lord one thousand eight hundred and fifty-six, in such sums as are designated in said mortgage; that the aggregate account of bonds now to be issued shall be equal to the amount of the said loan now, or now about to be 20 negotiated; provided however, that such amount of bonds to be issued shall not exceed the sum of \$450,000 without further action of this board.

Resolved 4th, That the president and cashier, together with said loan committee, be, and hereby are authorized and directed to cancel such outstanding bonds or certificates of this company as may be surrendered up for payment, and that they from time to time report to this company.

Resolved 5th, That so great an amount of the bonds, now or hereafter to be issued under the said loan, as will be sufficient for 30 the purpose of securing the said trustees the commission of half of one per cent., each, on the amount of bonds issued so retained in the hands of the company; and the committee to be paid at the time fixed upon by the resolution of the 13th March, inst.; but in case of the death or removal from the trust of any of such trustee, then his estate or he shall receive his ratable proportion of such commission at the time of the decease or removal of such trustee, under discount for the residue of the term.

MORRIS CANAL OFFICE, April 20th, 1846.

Board met at rooms—present Messrs. Williamson, Coddington, 40

Southmayd, McMartin, Soutter, Leroy, Frelinghuysen, Green, Dehon, Biddle, Strong, Varnum, Cook, and Bryant (14).

Minutes of the last meeting read and approved.

The cashier reported that he has issued bonds of the \$700,000 loan, as follows :

For certificates of deposit returned to the company,	\$155,401.76
Interest on same to April 1st,	3,448.24
	<hr/>
	\$158,850.00
To sundry persons for cash loaned the company, per	
10 subscription,	52,550.00
	<hr/>
	\$211,400.00
To Cammann, Whitehouse & Co., as collateral loan	
for \$25,000,	40,000.00
	<hr/>
	\$251,400.00

MORRIS CANAL OFFICE, March 17th, 1848.

Board met at company's room—present Messrs. Bryant, Whitney, Dickinson, Valentine, Soutter, Varnum, Brooks, Marsh, McMartin, Van Sanford, Southmayd, Biddle, and Coddington.

Minutes of the last meeting read and approved.

- 20 *Resolved*, That the president be, and is hereby authorized to make a loan of \$30,000, to pay the interest coming due on the 1st of April, and the expense of putting the canal in order for navigation for the present year, and to give the company's notes for such time as he may deem consistent with the interest of the company, and deposit with said company's notes the company's mortgage bonds for twice the amount of the notes.

MARCH 17, 1848.

- 30 At a meeting of the board, the president submitted a report to the stockholders, briefly reviewing the history of the company from its original organization, and showing its present condition and prospects ; which, after being read was accepted, and ordered to be printed, and distributed among the stockholders.

Exhibit D, on part of complainant.

OFFICE OF THE MORRIS CANAL AND BANKING COMPANY,
Jersey City, April 1st, 1848.

\$1560.75.

Eight months after date, for value received, the Morris Canal and Banking Company promise to pay to their own order fifteen hundred and sixty .75 dollars, without defalcation or discount.

A. WHITNEY.

The following words are written over the face of the said note:
"Deposited with this note, as collateral, 6 bonds Morris Canal, of \$500, numbered 785 to 790, inclusive." Endorsed "the Morris 10 Canal and Banking Company," by John J. Bryant, cashier.

~~~~~

**DECREE.**

This cause coming on to be heard in the presence of William L. Dayton, solicitor and of counsel with the complainant, and of Frederick T. Frelinghuysen and Cortlandt Parker, esquires, of counsel with the defendants, and the pleadings, proofs, and exhibits having been duly read, and the arguments of the counsel thereupon heard and considered, and it appearing, to the satisfaction of the court, that a reference to a master of this court to compute the amount of interest due upon the six bonds, of five hundred dollars 20 each, referred to in the complainant's bill, is waived, and that the actual amount thus due and unpaid upon said bonds, from the first day of April, eighteen hundred and forty-eight, to the first day of October, eighteen hundred and fifty-three, is nine hundred and ninety dollars, as appears on an agreement between the solicitors of the said complainant and of the said the Morris Canal and Banking Company, respectively, bearing date February 8th, 1854, and duly filed in this cause; and it further appearing, to the satisfaction of the court, that the complainant is entitled to have and 30 receive of the said the Morris Canal and Banking Company the amount of money now due and hereafter to become due on said several bonds, and that he is further entitled to have, receive, and enjoy all the benefit and security which may arise from the mort-

- gage in said bill mentioned and set forth, and that he is entitled to full relief in the premises; and it further appearing that, under the circumstances, it will be for the interest of the said the Morris Canal and Banking Company not to sell and dispose absolutely of the said mortgaged premises, or any part thereof, but to sequester the revenues, tolls, issues, profits, and dividends of the said company issuing out of said mortgaged premises, to raise, satisfy, and pay off the said sum of money due upon said bonds and mortgage, with the costs—it is now, on this twentieth day of February, A. D.
- 10 1854, by Benjamin Williamson, esquire, Chancellor of the state of New Jersey, ordered, adjudged, and decreed, and the said Chancellor, by virtue of the power and authority vested in said court, doth hereby order, adjudge, and decree, that the said the Morris Canal and Banking Company pay to the said complainant the said sum of nine hundred and ninety dollars, with interest thereon from the date of this decree, with costs upon the part of the complainant, to be taxed immediately upon service of a copy of this decree; and that in default thereof process do forthwith issue from and out of this court, directed to the sheriff of the county of Hudson,
- 20 son, for the immediate sequestration of all the revenues, tolls, issues, profits, and dividends of the said the Morris Canal and Banking Company, accruing from or issuing out of their said canal, extending from the Delaware to the Hudson river, through the counties of Warren, Sussex, Morris, Essex, Passaic, and Hudson, with all the privileges, appendages, and appurtenances thereto belonging or appertaining; and that the said sheriff keep the same under sequestration in his hands until the said sum of nine hundred and ninety dollars, with the interest thereon and the costs aforesaid, be duly paid and satisfied to the complainant or his solicitor.
- 30 And it is further ordered, adjudged and decreed, that the complainant have and enjoy all the benefit and security of the said mortgage on the said canal and its appurtenances for the payment of the said several bonds in the said pleadings mentioned, and the interest thereupon, as it shall become due: and that upon default in the further payment thereof, the complainant have leave to apply for such order, to be made in reference thereto at the foot of this decree, as to the court shall seem equitable and just.

B. WILLIAMSON, C.

## NEW JERSEY COURT OF ERRORS AND APPEALS.

THE MORRIS CANAL AND BANKING COMPANY,

appellants,

and

SAMUEL F. FISHER, appellee,

} *Petition of appeal.*

*To the Honorable the Court of Errors and Appeals in the last resort  
in all causes.*

The humble petition of the Morris Canal and Banking Company, 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 the state of New Jersey, bearing date — day of February, in the year of our Lord one thousand eight hundred and fifty-four, wherein the said Samuel F. Fisher was complainant and the said the Morris Canal and Banking Company were defendants, in this respect, to wit, that the said decree grants to the said complainant the relief prayed for by the said bill of complaint, to which 10 he was not entitled.

And your petitioners humbly appeal from that part of said decree of the Chancellor which decrees as aforesaid, upon the ground that the same is erroneous, for that said complainant was not entitled to the relief granted by said decree. Your petitioners therefore pray that the said decree of the said Chancellor may be reversed, set aside, and for nothing holden, and that your petitioners may have such relief in the premises as to this honorable court shall seem meet.

FRED. T. FRELINGHUYSEN, 20

*Solicitor and counsel with appellant.*

Dated February 28th, 1854.

## OPINION OF MASTER.

The Chancellor, having been of counsel with the company in reference to the matters in controversy, called to his assistance James Wilson, one of the masters of the court, to advise with upon the hearing of this cause.

The stockholders of the Morris Canal and Banking Company, by resolutions of 10th March, 1846, authorized their directors to mortgage their canal and its appendages, tolls and revenues, in order to raise money for certain purposes on bonds of the company, to be secured by the mortgage, which was to be executed to three trustees, to be appointed by the board. The directors, by resolutions of 13th March and 28th March, 1846, appointed John J. Palmer, Zebedee Cook, and Theodore Dehon, of New York, trustees for that purpose, and authorized the president and cashier to execute the mortgage to them, and also to issue the bonds. The mortgage was executed accordingly, 28th March, 1846, and duly acknowledged and recorded, and bonds to a large amount were soon after issued. Afterwards, by resolutions of 17th March, 1848, the directors authorized the president to borrow \$30,000 on the notes of the company, and to deposit with the notes, as collateral security, the company's mortgage bonds to twice the amount of the notes. This loan was for the purpose of raising money to pay interest on the mortgage bonds which had been before issued, and to put the canal in order for navigation for that season. The president accordingly borrowed of George F. Lewis, on 1st April, 1848, the sum of \$1500.75, and gave him the company's note for that amount at eight months, and deposited with Lewis the company's mortgage bonds to the amount of \$3000.

The note was not paid at maturity, and Lewis, after notice to the company, advertised the bonds for sale, and had them sold at public auction in the city of Philadelphia. The complainant bought them at that sale, and paid the purchase money. The company having refused to pay him the interest on the bonds, and the trustees having declined to take proceedings to compel them to do it, the complainant filed this bill for foreclosure and sale or sequestration of the canal and its income and tolls. The company and the trustees filed separate answers. They admit the execution of the mortgage, and the issuing under it of bonds to a large amount. They also admit that the resolution of 17th March, 1848, was passed by the board, and that the amount of \$1500.75 was bor-

rowed by the president of Lewis, and the giving of the note for the loan, and the depositing of the six bonds as collateral security; but they say that the bonds were not issued for any of the purposes authorized by the stockholders, and are therefore not binding on the company, but are void; that if legally issued, yet they were not legally deposited with Lewis as collateral, and he, therefore, had no right to them, and could convey none to the complainant; that Lewis was bound to sue for his debt, and had no right whatever to sell the bonds; that the complainant knew this, and had notice of the character in which Lewis held the bonds; that the sale was not *bona fide*, and that there was collusion between Lewis and the complainant, and that complainant ought to give up the bonds upon the company's paying the amount of the note, which they are ready to do. 10

The answer of the trustees takes the ground that the complainant could not rightfully file this bill without leave of the court first obtained. But this point was not mentioned in the argument, and is therefore supposed not to be relied on.

*Dayton*, for complainant.

The case made by the bill is sustained by the proofs, and the complainant has, therefore, shown himself entitled to relief according to his prayer. The bonds were issued to raise money to pay interest on the former bonds and repairs on the canal. These purposes are among those for which the company had authorized the bonds to be issued, as appears by the resolutions and the mortgage. 20

Defendants say that Lewis had no right to sell the bonds. But that is a question between him and the company. If he held them as mere agent or trustee of the company, and sold them to a *bona fide* purchaser without notice would hold them, and the remedy of the company is against Lewis. *Hart v. Ten Eyck*, 2 *Johns. C. R.* 99. 30

But we say Lewis had a right to sell the bonds after notice to the company. 2 *Kent's Com.* 582.

This is treating the bonds as if they were held by Lewis as a pawn or pledge, though some of the cases go farther, and would give him greater rights than belong to him in that character. But we claim that he held them as a pledge for payment of the note, and that therefore he had a right to sell them on notice to the company. *Story & Barl.* § 308-9-10-11, and case cited in note. 40

The letters which passed between the president of the company

and J. S. Morris & Co. show that the company wish the same view. They there admit the right of J. S. Morris & Co. to sell the bonds held by them. Those bonds are, like complainant's bonds, dated at the same time, and issued for a like purpose, and deposited as collateral security for a note of the company.

But defendants say, that if it is contended that the bonds left with Lewis were meant to secure him for an amount beyond the amount of the note, then the transaction was usurious, and therefore void. But Lewis has not received any more than the principal and interest of his loan. There is, therefore, no usury in the case.

The complainant being the purchaser of the bonds at a public sale, made on due notice to the company, now holds the full and absolute title to them. The defendants cannot follow them into his hands, and have them delivered up on paying the debt for which they were pledged to Lewis. *Little v. Barker*, 1 *Hoffman's Ch. R.* 487; 2 *Story's Eq.* § 1030-35; 4 *Watts* 141-2; *Cooté on Mortgages* 138; 18 *Law Library* 321, and notes; 1 *Salk.* 154; 2 *Atk.* 53-4.

20 The purchaser of a bond takes as of course the mortgage given to secure it. Fisher, as the purchaser and present holder of the bond, is therefore entitled to the benefit of the mortgage.

*F. T. Frelinghuysen* and *C. Parker*, for defendants.

The bonds in question in this case were not legally issued, and are therefore not binding on the company. By a resolution of the board, of 28th March, 1846, the mortgage bonds to be issued were not to exceed \$150,000 without the further action of the board. It is not pretended that these bonds are any part of that sum; they are, therefore, without authority.

30 They were issued for purposes not authorized by the stockholders nor expressed in the mortgage; they were issued under the resolution of 17th March, 1848, and for the purposes there mentioned, which were unauthorized. That resolution and the issuing of the bonds deposited with Lewis were a fraud upon the rights of the old bondholders, for it lessened their security under the mortgage. The issuing of the bonds being illegal, the whole transaction is void *ab initio*. Lewis took no title in the bonds, and should convey none to the complainant.

40 But if legally issued, the bonds were not legally deposited with Lewis as collaterals. The directors had no right to deposit them in that way, at the rate of two dollars for one dollar, and borrow.

Lewis knew, or ought to have known this; for the mortgage was on record, which showed the purposes for which the bonds were to be issued; and the depositing of them as collaterals was not one of those purposes.

Lewis had no right to sell the bonds; they were not deposited with him as a pledge, but merely as collateral security, which is a distinct thing from a pledge. *Cumber v. Hayne*, 2 *Smith's Leading Cases* 146, shows this distinction. He ought, therefore, to have sued on the bonds if necessary to recover his claim, but he could not sell them. 10

The bonds were not deposited with Lewis as a pledge; for to constitute the compact of pledge there must be a delivery of the pledge; and bonds are choses in action, and do not pass by delivery, but only by assignment in writing. So also of the mortgage. 2 *Hilliard on Mortgages* 343-5. Neither can a man give his own promise to pay money as a pledge for another promise of his own to pay money. It would lead to usury and extortion. It might also, by collusion of parties in buying and selling a pretended pledge, be used to evade the statute relating to confession of judgment; it is, therefore, against the policy of the law to permit it. But 20 even if the bonds were given in pledge, they cannot be sold. The pledgee must not sell them, but sue on them to recover his debt. This is the rule with regard to commercial paper, and it must be the same with bonds. See case of *Wheeler v. Newbold*, decided by Judge Oakley in the city of New York, lately reported in newspapers, and also in *Hunt's Merchants Magazine*.

But even if Lewis had a right to sell the bonds, the complainant stands in no better position than Lewis the vendor. He must hold them subject to all the equities which existed against them in the hands of Lewis. These bonds are not commercial paper, and do 30 not enjoy the privileges of such paper in passing from hand to hand; they are mere choses in action, which can only pass by assignment in writing, so as to give the assignee a right to sue in his own name. The complainant being merely the assignee of Lewis, all equities which existed against the bonds in Lewis' hands still exist against them. *Clute v. Robinson*, 2 *J. C. R.* 595, 612; *Norton v. Rose*, 2 *Wash. Rep.* 248.

Lewis would have been bound to deliver up the bonds on payment of the amount due on the note, and the complainant must do the same. 40

The complainant's counsel makes a distinction in favor of these bonds, because they are payable to bearer; but we deny that they

are commercial paper. We deny that any title is given to them by delivery. *Clark v. Woollen Manufacturing Co.*, 15 *Wend.* 256.

The legal title to bonds, as distinguished from the equitable, cannot pass by delivery. *Barry v. Merchant's Exchange Co.*, 1 *Sanford's R.* 313.

But even if suit might be brought on these bonds in name of the bearer, still they are subject to the equities existing against the assignor, for they are still *bonds*, and not commercial paper. Sound policy requires that the privileges enjoyed by commercial paper, 10 of passing by delivery, should be restrained to that class of paper. *Baldwin v. Ely*, 9 *Howard's Rep.*

The complainant must, therefore, be considered as standing in Lewis' shoes; and if Lewis were the plaintiff here, he could recover no more than his debt, interest, and costs. *Hartshorne v. Allaire*, 1 *Zab.* 671.

The letters which passed between J. P. Morris & Co. and the president are not admissible. But if they are, then the letter from the president to George Bird is also admissible for defendants; and he there denies the right of Bird to sell the bonds, which 20 counterbalances any supposed admissions in his letter to Lewis.

The construction of this transaction, by which these bonds were deposited with Lewis, ought to be governed by the intention of the parties; and it was never the intention of the company that Lewis should have \$3000 for \$1500 borrowed of him.

Since the sale, Lewis has recovered in our Supreme Court a judgment against the company for a difference between the sum for which the bonds were sold and the amount of the note.

To allow the complainant to recover the amount of the bonds, is to compel the company to pay more than twice the sum they 30 borrowed. This would be unjust, and a court of equity ought to prevent it.

The complainant ought to have charged in his bill that he bought the bonds without notice of the character in which Lewis held them. A defendant to a bill of disusury, who claims to be a purchaser without notice, must state want of notice. *Story's Eq. Pl.* § 805.

The rule is the same in regard to a complainant. Complainant may amend his bill in regard to new matters stated in the answer. We have in our answer charged him with notice, and he ought 40 now to amend his bill and allege want of notice. *Story's Eq. Pl.* § 918, 884-5.

But even if complainant has any title to the bonds, he has none

to the mortgage, or any part of it. A mortgage is a chose in action, and cannot pass by delivery, but only by assignment in writing.

*Dayton*, in reply.

The issuing of the bonds in question here, and the depositing of them as security, was done by the directors and officers; they had authority for it, and they reported their proceedings to the stockholders. It was not a fraud.

The question pending in this case does not affect the old bondholders,—their security is not in any way lessened. 10

It is said that the bonds in the hands of the complainant are subject to all the equities which existed against the original obligees. But the three trustees are the obligees, and they are the company's own agents: the company can, therefore, have no equities against them.

These bonds are negotiable on their face, being payable to Palmer or bearer. It was the intention of the company to make them negotiable. Bonds of this sort have been issued by many different companies, and they have been uniformly treated as negotiable. A contrary doctrine would not be tolerated. Whether a 20 security is negotiable or not, does not depend on whether it is commercial paper; but if payable to bearer, it will pass by delivery. As to the distinction between negotiable and assignable paper, see *Miller v. Race*, 1 *Smith's Leading Cases* 258, and notes. Defendants say that there is no such thing as a sale of a chose in action which has been deposited as collateral. We answer, that however that may be, it does not affect the complainant, for he bought without notice that it had been deposited as collateral.

But *Story on Bail*, § 322-3, speaks of negotiable security as among the things sold. *Cortleyou v. Lansing*, 2 *Caines' Cas.* 200, 30 shows that a negotiable security may be sold, though that is not the point of the case.

*Garlick v. James*, 12 *Johns.* 146, treats a promissory note as a thing which may be pledged and sold.

*Tucker v. Wilson*, 1 *P. Wms.* 261, shows that an annuity, which is a chose in action, may be given in pledge and sold.

*Evans v. Darlington*, 5 *Blackford's Rep.* 320, maintains that a negotiable security may be pledged and sold. This case turns on the fact that the sale which had been made was *without notice*.

In the case of *Wheeler v. Newbold*, cited from the newspapers, 40 Judge Oakley, who decided it, does not cite a single authority in

support of his opinion; and he suspended the entry of judgment upon his decision until the point could be argued before a full bench at the general term. Besides this, the counsel who argued before him against the validity of the sale of the commercial paper which had been pledged, took no objection to it, except only that the sale had been a private one, while they insisted that it should have been a public sale. In addition to this, it must be remarked that newspaper reports of law cases are often so imperfect and inaccurate as to be unreliable.

10 Complainant is not bound to allege in this bill that he bought the bonds without notice. How could he allege want of notice of facts which may have just been made known to him by the defendants' answer? If the defendants wished to put the complainant on oath upon that point, they could have done so by exhibiting interrogatories to him.

Defendants say that complainant is not entitled to benefit of the mortgage. But he bought the bonds and the mortgage. Security, *pro tanto*, follows as an incident. But even if he is not entitled to the security of the mortgage, he is still entitled to a decree for the  
20 amount of the bonds under the general prayer for relief.

By the Master.

The complainant in this cause is the holder, and claims to be the owner by a full and absolute title, of six bonds of the Morris Canal and Banking Company, purchased by him at public sale for a valuable consideration. They are dated 31st March, 1848, and are for the payment of the sum of \$500, each, payable on 1st April, 1850, to John J. Palmer or bearer, with interest payable half yearly, and having coupons for the interest annexed. In the body of each bond it is stated as follows: "the holder of this bond is  
30 entitled to the security to be derived from a first mortgage on the estate and chartered rights of the company, dated 28th March, 1846, authorized by the board of directors, at a meeting held on the 10th day of March, in the year last aforesaid, and duly recorded, executed, and delivered to John J. Palmer, Zebedee M. Cook, and Theodore Dehon, of the city of New York, as trustees, in trust to secure the full payment of such bonds as should be issued under the same; each bond, to clearly identify the same, bearing the signature of the trustees; the whole amount of bonds to be issued not to exceed the sum of \$700,000."

40 Upon the margin of each bond is a certificate, signed by these three trustees, whereby they certify that the bond is included in

the mortgage upon the canal, which had been executed to them in trust for the bondholders.

Before the filing of this bill, the complainant applied to the company to pay him the interest which had become due upon these six bonds held by him, which they refused to do. He then applied to the trustees to take the proper measures to compel the company to pay him the interest; but the trustees declined to do so. He then filed this bill for the foreclosure of the equity of redemption in the mortgaged property, praying a sale of the canal and its appendages, or a sequestration of its tolls and revenues, in order to satisfy 10 his claim. The mortgage is in proper form, and is executed under the seal of the company, and appears to be a valid lien upon the property described in it for the benefit of the holders of the bonds which it was intended to secure.

If, then, the bonds held by the complainant are valid bonds of the company, and are entitled to the benefit of the security of the mortgage, and if the complainant is the owner of the bonds by a complete and absolute title, he is entitled to the relief which he seeks.

The defendants insist that the bonds were not issued for any of 20 the purposes authorized by the stockholders and directors, and that therefore the bonds are not binding upon the company, but are fraudulent and void. The resolution of the stockholders authorizing the execution of the mortgage, and the bonds to be secured by it, was passed 10th March, 1846, and the resolutions of the board of directors directing the president and cashier to execute and deliver the bonds were passed 28th March, 1846. The form of the mortgage, which was afterwards executed, was fixed by these resolutions of the board, and is therein recited at length, and the purposes for which the bonds to be secured by it were to be 30 issued are set forth in the mortgage. The mortgage recites that the company, "for the purpose of raising money to pay off the debts incurred in improving, enlarging, and repairing their canal, and of raising money to be expended in further improving and perfecting the same, are about to make, execute, and issue certain bonds for sums not to exceed in the whole \$700,000." And further, that with a view to enable the said company "to raise the said moneys, and thereby secure the continued progress and operation of their said canal, and obtain further time finally to discharge the expenses of the improvements already made, the said company, 40 by their board of directors, have resolved to secure the payment of said moneys by the pledge and hypothecation of their said canal,

with its appurtenances, and the actual revenues, chartered rights, and properties of the said company," &c.

By the resolutions passed at the same meeting of the board, the president and cashier were authorized and directed to execute and deliver the said bonds mentioned in the mortgage. But it was provided that the amount of the bonds to be issued should not exceed the sum of \$450,000, without the further action of the board. One of these resolutions also fixed the salary of the three trustees, for the service to be rendered by them, at one half of one per cent.,  
 10 each, on the amount of bonds to be issued, and directed that a sufficient amount of the bonds to pay the salary should be retained in the hands of the loan committee, to be paid to the trustees at a time fixed by previous resolutions.

This shows the authority under which the bonds were to be executed by the president and cashier, and the purposes for which they were to be issued and used. It also shows that the trustees were appointed by the company, and were to be paid by the company for their services. Soon after these resolutions were passed, bonds were, in pursuance of this authority, executed and issued to  
 20 a large amount.

Afterwards, on the 17th March, 1848, the company were in need of money to pay the interest on those bonds and to put the canal in order for navigation for the season then approaching, and the board of directors, at a meeting held on that day, adopted a resolution, by which it is declared that the president is authorized to borrow \$30,000 to pay the "interest coming due on the first of April, and the expense of putting the canal in order for navigation for the present year; and to give the company's notes, at such time as he may deem consistent with the interest of the company,  
 30 and deposit with said company's notes the company's mortgage bonds for twice the amount of the notes."

Under this last resolution, the president of the company, on the 1st of April, 1848, borrowed of George F. Lewis, of Philadelphia, the sum of \$1500.75, and gave him the company's note, bearing date on that day, for that sum, and at the same time deposited with him, as collateral security, six of the company's mortgage bonds, of \$1500 each. The note is made payable to the company's own order eight months after date, is signed by the president, and endorsed by the cashier, and there is a certificate across the face of  
 40 the note not signed, but proved to be in the handwriting of the secretary of the company, which states that the said six bonds were deposited with the note as collateral security. These are the

bonds in controversy in this suit. I think that the defendants' objection, that these bonds were not issued for any of the purposes authorized by the stockholders or mentioned in the mortgage, and are therefore void, is not well taken. The money borrowed of Lewis was to pay interest on the mortgage bonds which had been before issued, and which it is not denied were properly issued, and also for the purpose of putting the canal in order for the season then approaching. These purposes for which this money was borrowed are, in my opinion, clearly included within those for which money was to be raised on the mortgage, and the bonds to be issued under it, as expressed in the mortgage itself. It is there recited that the bonds to be secured by the mortgage were to be issued for the purpose of raising money to pay off "the debt incurred in improving, enlarging, and repairing the canal, and of raising money to be expended in further improving and perfecting the same."

Now the bonds which had been issued, and on which the interest was coming due, were issued to raise money for the purposes just mentioned. To borrow money to pay that interest, and to give as security for that loan other bonds also secured by the mortgage, was surely no departure from the design and purpose with which the mortgage was given. It did not increase the debt under it, nor was the money raised by the loan perverted to unauthorized purposes, but was still applied to pay the debt secured by the mortgage. The interest on the debt was a part of the debt itself, and, as to so much of the loan as was to be applied to putting the canal in order for navigation for that season, it was plainly within the authority "to raise money to be expended in further improving and perfecting the same," as expressed in the resolutions of the stockholders and in the mortgage.

It is objected further by the defendants, that even if it be admitted that the money raised by this loan from Lewis was for purposes mentioned in the mortgage, yet that the directors and officers of the company had no authority to deposit the bonds as collateral security, at the rate of two dollars for one dollar borrowed; and that, in so doing, they transcended their powers, and moreover committed a *fraud upon the other bondholders*, by lessening their mortgage security, and that therefore the bonds in question in this suit are not binding upon the company, but are void, and that this court ought to protect the other bondholders against such fraud. The objection is not that the bonds were not properly executed, nor that the money raised on them was raised or used for an im-

proper or unauthorized purpose for the the bonds were executed by the officers of the company, in whom full authority for that purpose was vested; and it is admitted, for the purposes of this argument upon this point, that the money raised on them was for purposes mentioned in the mortgage and authorized by the stockholders. The objection, therefore, goes only to the *mode* and *manner* in which the directors and officers of the company disposed of the bonds in raising money for purposes for which they were authorized to raise it upon those bonds. The stockholders, in authorizing those bonds to be executed and delivered, and money to be raised upon them for the purposes mentioned, did not prescribe the manner in which it should be done. They left the bonds in the hands of their directors and officers without any restrictions or directions upon that point, having, no doubt, full confidence that they would, according to their best judgment, so use them for the end proposed as would most advance the interests of the company; and I think it must be considered that it was the intention of the stockholders to leave the matter to the discretion of the directors and officers.

20 But further on this point, the officers of a bank are held out to the public as having authority to act according to the general usage, practice, and course of business of such institutions, and their acts within the scope of such usage, practice, and course of business will bind the bank in favor of third persons having no knowledge to the contrary. The cashier of a bank is usually intrusted with all the funds of the bank in cash, notes, bills, and other choses in action, to be used from time to time for the ordinary and extraordinary exigencies of the bank. He is considered as the executive officer of the bank, *through whom* and by whom the money trans-  
30 actions of the bank, in paying or receiving debts and discharging or transferring securities, are to be conducted. *Story on Agency*, § 114; *Fleckner v. U. S. Bank*, 8 *Wheaton's R.* 338.

Now the stockholders had authorized the execution of these bonds, and the borrowing of the money upon them, and left them in the hands of the officers of the company, with no instructions upon them as to the mode of their using the bonds for that purpose.

Then in borrowing money, and giving those bonds as security for it, they had authority to use them, according to the course of business, in such transaction; they had a right to deposit them as  
40 collateral, for that mode of using bonds and other such securities is within the usual course and usage of business, both of incorporated companies and individuals; and if it had been done by the

cashier alone, it would have been the law of agency, as laid down in the authority just cited, and have been binding on the company.

But it was not done by him alone; it was authorized by an express and formal resolution of the board of directors, under which the note was given, and the bonds deposited as collateral security for its payment; the note was signed by the president and endorsed by the cashier; the secretary of the company certified, upon the face of the note, that the bonds were deposited as collateral security for it, and the three trustees, who in this were acting as the agents of the company, certified that the holder of the bonds 10 was entitled to the security of the mortgage. The directors and all the officers of the company, therefore, appear to have participated in this transaction; and if it were now held that it is not binding upon the company, but is fraudulent and void, there would be no safety in dealing with the officers of a corporation.

But it was insisted, on the argument, that even if they had the right to deposit the bonds as collateral security for the loan, yet that they had no right to do it at the rate of two dollars for one borrowed. I think that that was a matter fairly within their discretion. The amount of collateral is usually greater than the debt 20 which it is intended to secure; how much greater it shall be must depend upon the circumstances of each particular case. By the annual report of the directors to the stockholders, dated 17th March, 1848, a printed copy of which is in evidence, it appears that the credit of the company had become so much depressed that its mortgage bonds could not be negotiated at par. That may have been the reason why they deposited them at the rate of two dollars for one, as collateral security for the money borrowed of Lewis, which was obtained two weeks after the date of that report; and if so, it can hardly be said that such security was so extravagant 30 and unreasonable as to amount to a fraud and a breach of authority on the part of the persons making it. But it is not necessary to examine into their reasons; it is enough that that matter was in the discretion of the directors and officers, and that there is no evidence that they abused their trust.

In addition to what I have already said on this part of the case, there is much reason to believe that this mode of using the company's bonds was sanctioned by the stockholders. Copies of some of the annual reports made by the board of directors to the stockholders are in evidence in the case. In the report dated 17th March, 40 1848, page 25, it is stated that it "became necessary, to enable the company to meet pressing demands, again to negotiate further loans,

for which it gave its note to the amount of \$77,806.50, to secure the payment of which there was deposited with them notes \$155,650 six per cent. mortgage bonds as collateral."

And in the report dated 2d April, 1849, page 6, it is stated as follows: "About the first of April last there was borrowed the sum of \$15,323.59 on the company's notes at six and eight months, with which was deposited, as collateral security, the mortgage bonds of the company for twice the amount of the notes." The time of this first mentioned loan (the 1st of April, 1848,) is the  
 10 date of the note given to Lewis, and for which the six bonds in controversy here were deposited as collateral security, and it is a note at eight months. It is not unreasonable to conclude, therefore, that the loan from him was a part of the sum of \$15,323.59 mentioned in the report, and secured in the manner there stated.

This mode of using the company's mortgage bonds as collateral security to notes given for loans, and to twice the amount of the notes, appears, therefore, to have been resorted to at different times, and to have been regularly reported by the directors to the stockholders, and the making of the loans of which the money obtained  
 20 from Lewis was probably a part, and which was secured in the same way, was also reported to them. There is no evidence that the stockholders ever objected to that mode of using the bonds, or laid any restraint upon it; and I think it must be considered to have received their silent acquiescence, if not their express approbation. So far as the *company* is concerned, therefore, this objection must fail. Nor do I think it can prevail for the *bondholders*, for they took their bonds knowing that the mortgage by which they were to be secured was intended to cover the bonds to an amount not exceeding \$700,000. If the bonds issued to raise mo-  
 30 ney for the purposes mentioned in the mortgage do not exceed that amount, they cannot complain that their security is lessened. The money raised on the bonds held by the complainant was for such purposes; and there is no evidence that the bonds which have been issued, including the bonds of the complainant, amounting to the sum of \$700,000, nor is there any evidence that the property covered by the mortgage is not sufficient to pay them all.

I consider, therefore, that the bonds in question in this suit were legally and properly issued under the authority given by the stockholders, and that the depositing of them with Lewis, as collateral  
 40 security for the loan obtained from him, was and is binding upon the company, and is not a fraud upon the other bondholders. The company's note, given to Lewis for the loan, was not paid at ma-

curity, and he thereupon, on 12th December, 1848, gave notice to the president of the company that the six bonds held by him as collateral security to the note would be sold at public sale on the 19th of that month, at 7 o'clock P. M., at the Philadelphia Exchange, by M. Thomas & Sons, auctioneers, and that the company would be held accountable for the deficiency, if any, between the proceeds of the sale and the amount of the note. The president acknowledged the receipt of this notice, in a letter to Lewis, and at the same time stated to him that the bonds were not left to be used in the way he proposed; that, being deposited as collateral, 10 they could only be used upon the inability of the company to pay the note, and that that inability was not established by the note not being paid at maturity; that the company protested against the proposed sale, and that Lewis would be held responsible to the company for the full amount of the bonds in case such sales should be made. The sale, however, was proceeded with. It had been advertised in pamphlets and in at least four daily papers in the city of Philadelphia, and at the time and place mentioned in the advertisements, and in the notice sent to the president of the company, the bonds were sold at public sale, by the auctioneers before named, 20 to the complainant.

It does not appear that Lewis was present at the sale, nor did it appear by the advertisements, or in any other way to the persons attending it, that he had any interest in the bonds, or was in any way connected with the sale. The bonds were merely advertised to be sold "without reserve, for account of whom it may concern."

On the part of the complainant, it is insisted that the bonds were deposited with Lewis, as a pawn or pledge for the payment of the note at maturity, and on the note not being so paid, he had a right to sell them at public sale, on due notice to the company; and that, 30 by the sale, the title to the bonds passed to the complainant, and that he is entitled to the amount of them, and to the benefit of the security of the mortgage.

The defendants, on the other hand, say that the bonds were not deposited as a pawn or pledge, but as a collateral security, and that that is a distinct and different thing from a pledge; that a man is not permitted to give his own promise to pay money as a pledge for another promise of his own to pay money, since it would lead to usury and extortion, and might, by collusion of parties, be used to evade the statute relating to confession of judgments; that bonds 40 cannot, from their very nature, be given in pledge, because it is essential to the making of a pledge that there be a delivery of it,

and bonds, it is insisted, cannot pass by delivery, but only by assignment in writing; that Lewis was bound first to sue on the note, and, if he failed to recover his debt in that way, then to sue on the bonds, and not to sell them; that, for these reasons, Lewis had no right to sell the bonds at all, and that the sale passed no title or interest in them to the complainant.

I do not think that the position of the defendants, that these bonds were deposited as collateral security, and that that is a distinct and different thing from a pawn or pledge, can be maintained. 10 I find no authority for that distinction; on the contrary, the reported cases show that notes, bonds, and other things deposited as collateral security have been frequently regarded as pawns or pledges. *Vanderzee v. Willis*, 3 Bro. C. R. 21; *Garlick v. James*, 12 Johns. 146.

Nor do I see the soundness of the objection, that a man is not to be permitted to give as a pledge his promise to pay money as security for another promise of his own to pay money, on the ground that it would lead to usury and extortion and an evasion of the statute relating to confession of judgments. How does it lead 20 to usury? The lender of the money would not and could not get more than his loan and interest. In the present case Lewis does not and cannot get more than his debt and interest. I do not see in such a transaction any temptation to parties to resort to it with the hope of obtaining usurious interest or of extorting money from the necessities of others; neither do I perceive how it could be used to evade the statute relating to confession of judgments without a resort to fraud and collusion. If these were practised they would make the transaction void. And the same thing may be said of many other proceedings which are in themselves honest and 30 lawful. There is no pretence of any fraud or collusion on the part of any of the parties to the transaction now under consideration, and it would never do to lay it down as a rule, that an act done with fair and honest purposes shall be void because other parties might do a like act with a fraudulent intent to evade the laws.

The defendant is not correct in saying that bonds cannot pass by delivery, but only by assignment in writing. Bonds may pass by delivery, and without written assignment.

The delivery of a bond for a valuable consideration is a good assignment of it without writing, and passes the bond, and the debt 40 due upon it, to the assignee. *Hutchings v. Low*, 1 Green 246, and *Allen v. Pancoast*, *Spencer's Rep.* 68, and the cases there cited.

Are bonds, then, a species of personal property which may be

pledged? Story, in speaking of the things which may be the subject of a pledge, says, "these are ordinarily goods and chattels, but money, debts, negotiable instruments, choses in action, and indeed, any other valuable thing of a personal nature, such as patent rights and manuscripts, may, by the common law, be delivered in pledge." *Story on Bail*, § 290. And his text appears to be fully sustained by the authorities which he cites.

Kent also says, "all kinds of personal property that are vested and tangible, and also negotiable paper, may be the subject of a pledge; and choses in action resting on written contract may be assigned in pledge." 2 *Kent's Com.* 577. Among the things here mentioned as the subject of pledge bonds are certainly included.

In *Vanderzee v. Willis*, 3 *Bro. C. R.* 21, bonds were, with other things, pledged for the security of a promissory note; and no doubt seems to have been entertained by any of the counsel who argued the case, nor by the Lord Chancellor who decided it, that they could be so pledged.

In *Hart v. Ten Eyck*, 2 *Johns. C. R.* 100, and in 2 *Kent's Com.* 582, bonds are mentioned as among those things for which bills to redeem were frequently filed in chancery. That bonds may be given in pledge, therefore, is a doctrine which seems to be well sustained by authority.

The bonds in question in this case were delivered by the company, through its officers, to Lewis, as security for the payment, at maturity, of the note given to him for the loan, and he had a right to keep them until that debt was discharged.

This was, I think, plainly the intention of the parties to that transaction; and I am therefore of opinion that the bonds were delivered to him as a pledge. A pledge is a bailment of personal property as security for some debt or engagement. *Story on Bail*, § 286. It is also defined by Kent to be a bailment or delivery of goods by a debtor to his creditor, to be kept until the debt be discharged. 2 *Kent's Com.* 577. See, also, *Garlick v. James*, 12 *Johns. Rep.* 146; *Cortleyou v. Lansing*, 2 *Caines' Ca.* 200. The deposit of these bonds with Lewis comes strictly within the definition of a pledge, as laid down by these and other authorities.

The note was not paid at maturity; the company, therefore, failed to perform the engagement for which the bonds had been pledged. The defendants have agreed that Lewis, in order to recover his debt, was bound to sue first on the note; but I find no authority for that position. He had his election to do so or to resort to his remedy upon the bonds, by having them sold under a

decree of foreclosure or by selling them himself on due notice to the company.

Story, on this subject says: "Another right resulting by the common law from the contract of pledge, is the right to sell the pledge when there has been a default in the pledger in complying with his engagement. Such a right does not divest the general property of the pawner, but still leaves in him a right of redemption. But if the pledge is not redeemed within the stipulated time, by a due performance of the contract for which it is security, the  
 10 pawnee has then a right to require a sale to be made thereof, in order to have his debt or indemnity. The common law of England existing in the time of Glanville seems to have required a judicial process to justify the sale, or at least to destroy the right of redemption. But the law, as at present established, leaves an election to the pawnee. He may file a bill in equity against the pawner for a foreclosure and sale, or he may proceed to sell *ex mero motu*, upon giving due notice of his intention to the pledger. In the latter case, if the sale is *bona fide* and reasonably made, it will be equally as obligatory as in the first case." *Story on Bail*, §  
 20 309-310.

The same doctrine is laid down in 2 *Kent's Com.* 582, and in *Parker v. Brancker*, 22 *Pick.* 40. But the defendants have argued, that although this is the general rule in regard to property given in pledge, yet that bonds form an exception to it. I do not, however, find any authority or any well considered case which sustains such exception, or which shows that bonds given in pledge are not subject to the same rules as other property which has been pledged. The weight of the authorities and the whole current of decisions are directly the other way.

30 In 4 *Kent's Com.* 139, it is said, "the pawnee, by bill in chancery, may bar the debtor's right of redemption, and have the chattels sold. This has frequently been done in the case of stock, bonds, plate, or other personal property pledged for the payment of debts. But without any bill to redeem, the creditor, on a pledge or mortgage of chattels, may sell at auction, on giving reasonable opportunity to the debtor to redeem, and apprising him of the time and place of sale, and this is the more convenient and usual practice." So that the right of the pledger to sell *bonds* is here expressly maintained. And why, it may be asked, should such  
 40 bonds as are in question here be an exception to the general rule. They are, as has been stated, made payable to bearer, with coupons for interest annexed. Bonds of this description are, in point

of fact, often sold, and the market or current price of some classes of them is frequently advertised and quoted. To sell them, is therefore not an extraordinary proceeding, but one usual among individuals in their private transactions.

I consider, therefore, that Lewis had a right, on the failure of the company to pay the note at maturity, to proceed to sell the bonds in one of the two modes already mentioned. He chose to sell on his own authority without judicial process, and that is said by Kent to be "the more convenient and usual practice."

Certain letters, which passed between the president of the com- 10  
pany and J. P. Morris & Co., of Philadelphia, were offered in evidence by the complainant, in order to show that the company had admitted that J. P. Morris & Co., with whom the company's mortgage bonds had been deposited as security for a note, had the right to sell them on the failure of the company to pay the note. The defendants objected to this evidence as inadmissible, but offered, on their part, in case it should be admitted, another letter from the president of the company to George Bird, with whom like bonds had, under like circumstances, been deposited as security, and who proposed to sell them, on which the company protested 20  
against his right to do so. These letters were all read at the hearing, subject to the exception taken. I am in doubt as to the admissibility of this evidence, and I do not consider it necessary to examine or decide the question; for, in the conclusion I have come to, I have not given any weight to these letters either way. In my view of the case, Lewis had, by force of the rules of law relating to pledges, a right to sell the bonds in the manner before stated, and that right is not in any wise affected by any admissions or protests on the part of the company.

When Lewis proceeded to sell, he gave notice to the company 30  
of the time and place of the intended sale. The notice seems to have been a proper one, and no objection has been made to its reasonableness or sufficiency. The sale was advertised in a full and ample manner; it was made by established auctibneers, at a public place, and seems to have been fairly and openly conducted. It is charged, in the answers of the company, that, in buying the bonds, the complainant acted in collusion with Lewis, who, it is charged, was to have an interest in the purchase; but there is no evidence whatever to sustain this allegation. The complainant appears to have acted fairly in the matter, and to have purchased 40  
on his own account, without any connection with Lewis or any knowledge that he had right or interest in the bonds. The com-

plainant is therefore to be considered as the *bona fide* purchaser of the bonds for a valuable consideration, at a public sale fairly made and authorized by law, and whereof due notice had been given to the company.

It is further insisted by the defendants, that even if Lewis had a right to sell the bonds in the way he did, and even if the complainant bought them *bona fide*, yet that he cannot hold them with any other or higher right or title than Lewis had in them; that he must stand in Lewis' shoes, and take the bonds subject to all  
 10 equities existing against them in the hands of Lewis; and various authorities were cited, on the argument, in order to show that where bonds have been assigned, the assignee takes them subject to all equities which existed against them in the hands of the obligee or assignor.

And it is argued that the same rules must apply to these bonds in the hands of the complainant; that Lewis held them only as collaterals, and subject to be delivered up on payment of the principal and interest due on the note; and it is argued that the complainant is merely his assignee, and must hold them subject to the  
 20 same claim, and must deliver them up on payment by the company of the amount of the note.

By the delivery of the bonds to Lewis, in pledge for the payment of the note, he acquired only a *special* property in them, the *general* property remaining in the company. *Story on Bail*, § 287; *Cortleyou v. Lansing*, 2 *Caines' Ca.* 202.

And the effect of the default in the payment of the note at maturity was not to vest the entire property in the bonds in Lewis, but to give him a power to sell them, he accounting to the company for the surplus remaining, if any, after paying the note.  
 30 *Story on Bail*, § 308; *Coggs v. Barnard*, 1 *Smith's Leading Ca.* 99, and notes. So that at the time of the sale by Lewis, there was in him only a special property in the bonds, the general property in them still remaining in the company.

Now I consider that the sale of the bonds at public auction to the complainant did not operate simply as a transfer to him of the right which Lewis had in them at that time. It was not merely an assignment by Lewis of his right in them to the complainant, it was much more. It was a sale of the whole interest in the bonds, and conveyed the whole property and title in them to the  
 40 complainant. If this were not so, and if the sale operated merely as a transfer or assignment to the complainant of the special property which Lewis had in them, there would be no need of a sale

at all, for the same thing might be much more easily accomplished by a more private assignment in the ordinary way. The sale made by Lewis, of his own authority, was without application to any court; was, as it is laid down by the authorities already cited, equally as obligatory as if it had been made under the authority of a decree of foreclosure. Now if the complainant had bought these bonds at a sale made under such decree, it would not be pretended that the company would have the right to follow them into his hands, and have them given up on paying the debt for which they had been pledged. How, then, can they follow them now? This case, being in my view very different from that of a mere ordinary assignment of bonds in the way usual in private transactions, and the complainant standing not as the assignee of Lewis' right, but as the purchaser of the whole title and property in the bonds, I do not consider that the cases which had been cited to show the rules of law respecting the rights of parties upon an assignment of bonds as applicable here. The defendants' objection under this head is in effect the same as saying, that the right which the company had to redeem the bonds while they were in the hands of Lewis upon paying the amount of the note still exists after the sale, and that they have the same right against them now in the hands of the complainant. But this is manifestly unreasonable, and opposed to the very idea of a sale of the bonds. Where is the necessity or propriety of a sale, if such is the case? What is the inducement to any person to become a purchaser, if he must at any time give up the bonds on these terms? And when does this alleged right end? Does it follow the bonds into the hands of the purchaser, and, if he resign them, does it go with them into the hands of his assignee, and so on without end? All the authorities which I have examined speak of the right to redeem the pledge as existing until the sale, and they plainly consider it as existing no longer. Whether the sale be made under the decree of foreclosure or by the pledgee of his own authority without any previous application to the courts. *Story on Bail*, § 309, 310; 4 *Kent's Com.* 139. 10 20 30

Under this view of the case, it is of no consequence whether the complainant had notice or not that the bonds had been deposited with Lewis as a pledge; for if the pledgee had a right to sell the pledge absolutely, the knowledge of the right and authority by which he does it cannot destroy nor affect the title of the purchaser.

The defendants insisted that the complainant ought to have charged in his bill that he bought without notice. But I do not think so; the case made by the bill is complete without it. If he 40

had notice, and the defendants thought that his rights were thereby affected, it was competent for them to prove it; but I do not think that it was necessary for the complainant to aver want of notice in this bill.

But there is another view of this case, which in my opinion forbids that any right to redeem, or any other equitable claim which the company may have had upon these bonds should follow them into the hands of the complainant. These bonds must, I think, be regarded as negotiable security, and capable of passing by  
 10 delivery in the same way as a promissory note payable to bearer or a bill of exchange endorsed in blank.

The bonds are payable to John J. Palmer or bearer, with coupons annexed for interest payable half-yearly. Bonds of this description were unknown to the ancient common law; they are of comparatively modern origin. They have been issued in this country in very large amounts, and have entered extensively into the business operations of the community, and by the corporations which have issued them, and among all persons who in the course of business have had occasion to receive them or to pass them to others,  
 20 or to deal with them in any way, they have always been considered and treated as securities which pass from hand to hand by delivery. This was asserted upon the argument, and not denied, and cannot, I think, be controverted. The usage in regard to them must have been understood by the company when they issued these bonds. By the terms of them, they are payable to the bearer; and it was, no doubt, the intention of the company, in making and issuing them, that the bearer, whoever he might be, should be entitled to the amount. I think, therefore, that to hold these bonds to be negotiable is to construe them according to the intention of the  
 30 maker and the general usage in regard to securities of this description.

The case of *Gorgier v. Micville et al.*, 3 *Barn. & Cress.* 45, was the case of a bond of the king of Prussia, in which he declared himself and his successors bound to every person for the time being holder of the bond for the payment of the principal and interest. The plaintiff had deposited the bond in the hands of Agassig & Co., to hold for his benefit, and recover the interest upon it. Agassig & Co., being in want of money, pledged the bond to the defendants, and this was an action of trover to recover the  
 40 bond.

It was proved, at the trial, that bonds of this description were sold in the market, and passed from hand to hand daily, like ex-

change bills, at a reasonable price, according to the state of the market. The opinion of the court was against the plaintiff, and under its direction the jury found a verdict for the defendants. On a rule *nisi* for a new trial, the case was fully argued, and it was decided by the court that the rule must be discharged, and judgment entered for the defendants. In delivering the opinion, Abbott, Chief Justice, said: "This instrument, in its form, is an acknowledgment, by the king of Prussia, that the sum mentioned in the bond is due to every person who shall for the time being be the holder of it, and the principal and interest is payable in a certain mode and at certain periods mentioned in the bond. It is, therefore, in its nature precisely analogous to a bank note payable to bearer or to a bill of exchange endorsed in blank. Being an instrument, therefore, of the same description, it must be subject to the same rule of law, that whosoever is the holder of it has the power to give title to any person honestly acquiring it." 10

The case of *Clark v. Farmers Manufacturing Co.*, 15 *Wend.* 256, was cited by the defendant's counsel as holding a contrary doctrine. But I do not so understand it. It was an action on a sealed bill of the defendants in that case, which was declared on as a promissory note. Chief Justice Nelson delivered the opinion of the court, and held that it could not be so declared on, and that it was not a negotiable instrument. In referring to the case of *Gorgier v. Micville et al.*, he spoke of the decision there as resting upon usage and the nature of the security. And though he does not assent to all the reasonings of the case, he does not deny nor seem to doubt that the decision was right, and was rightly placed upon that ground. The case of *Gorgier v. Micville* was fully argued and deliberately considered, and its reasonings and conclusions appear to me to be sound and just. I think that the rule there laid down is applicable to the present case, and that the bonds in question must be considered negotiable. To hold a contrary doctrine, and to make such bonds, in the transfer from one person to another, subject to all the rules which apply to ordinary bonds would be contrary to the intention and terms of the instruments, and the usage in relation to them, and might unsettle many most important transactions and produce great mischief and confusion. 30

Holding these bonds of the complainants, therefore, to be negotiable, they are, under the authorities already cited, the subject of 40 pledge, and having been pledged, and the pledgee having carefully

sold them, that sale is binding upon all parties, and conveys a perfect title to the purchaser. *Story on Bail*, § 290, 300.

Defendants, however, have insisted that they were not pledged to Lewis, and, therefore, he had no right to sell them. But the holder of negotiable paper, even though he be not the owner, may sell or transfer it to another person, who, if he takes it without notice of the fraud acquires a good title against the owner. The complainant, as has been already shown, bought these bonds without notice of the character in which Lewis held them, and the  
10 transaction is therefore binding upon the company, and the complainant had a good title against them. This depends on well settled principles of law. *Story on Bail*, § 296; *Grant v. Vaughn*, 3 *Burr.* 1516; *Bay v. Coddington*, 5 *Johns. C. R.* 54.

It was earnestly urged, upon the argument, by the defendants' counsel, that if the complainant should be held to be entitled to recover the amount of the bonds, that the company will be compelled to pay almost double the amount they borrowed of Lewis, and that this would be a hard result, and one which a court of equity ought to prevent; but when property, which has been given  
20 in pledge for the payment of a debt or the performance of an agreement, is sold in default of the pledge to perform his contract, it must often happen that it will be sold at what he considers a great sacrifice. This must be so in the very nature of things, and it is one of the risks which he incurred when he made the pledge. But if it was fairly sold he has no cause of complaint. Such sale must be maintained or the law of pledge must be abolished. Suppose, in the present case, that the purchase by the complainant had proved to be a bad one, and that he had given much more for the bonds than they were worth, and must be the loser to a large  
30 amount, he could not call on any one to refund to him; he must abide by his contract, and bear whatever burthens it might impose. If, then, his purchase will prove a good one, shall he not also have its benefits? There would be great injustice in laying down a rule which would compel a purchaser in such case to bear all the loss if he made a bad purchase, and to surrender all the advantages of it if it turned out to be a good one.

It is a circumstance worthy of consideration, and entitled to weight in this case, that the company, though fully apprised of the sale, took no measures to be represented there, and gave no notice  
40 whatever to the public or to the purchasers attending the sale that they had any claim upon the bonds, or any objection to their being sold. When notice of the intended sale was given to the company,

they took no steps to warn purchasers. They merely protested to Lewis against the sale, and informed him that they would hold him responsible. If they considered that they had a remedy against him, and meant to rely upon that, it is still open to them. But why did they not notify *purchasers* of their claim? They knew the nature of the bonds, that they were securities which in the usual course of business were considered and treated as negotiable, and which constantly passed from hand to hand as negotiable paper. The sale of such instruments, both in private and at public sale, was of frequent occurrence. There was nothing in the bonds them- 10  
selves, nor in the fact or manner of their being sold, to warn purchasers that their title would be impeached or to put them on their guard against any claims on the bonds from any quarter whatever. It was reasonable that they should believe that whoever bought the bonds would be the owner of them by a complete and legal title. Under these circumstances, is it just and equitable for the company now to come forward and set up claim upon them? Ought they not rather to be considered as standing silently by, having a full knowledge of the sale, and acquiescing in the proceeding, at least so far as it concerned purchasers. 20

In every view which I have been able to take of the case, it seems to me clear that the complainant is the absolute owner of the bonds, and of the debt secured by them, free from all claim upon them on the part of the defendants.

It is further contended by the defendants, that even if the complainant is the owner of the bonds, yet that he is not entitled to the benefit of the mortgage security, because the mortgage was not assigned to him, and, being a chose in action, it cannot pass by delivery, but only by assignment in writing.

But it has been decided in this, as well as in other states, that a 30  
mortgage may pass by delivery without written assignment. *Hutchings v. Low*, 1 *Green* 246; *Allen v. Pancoast*, *Spencer* 68, and cases there cited.

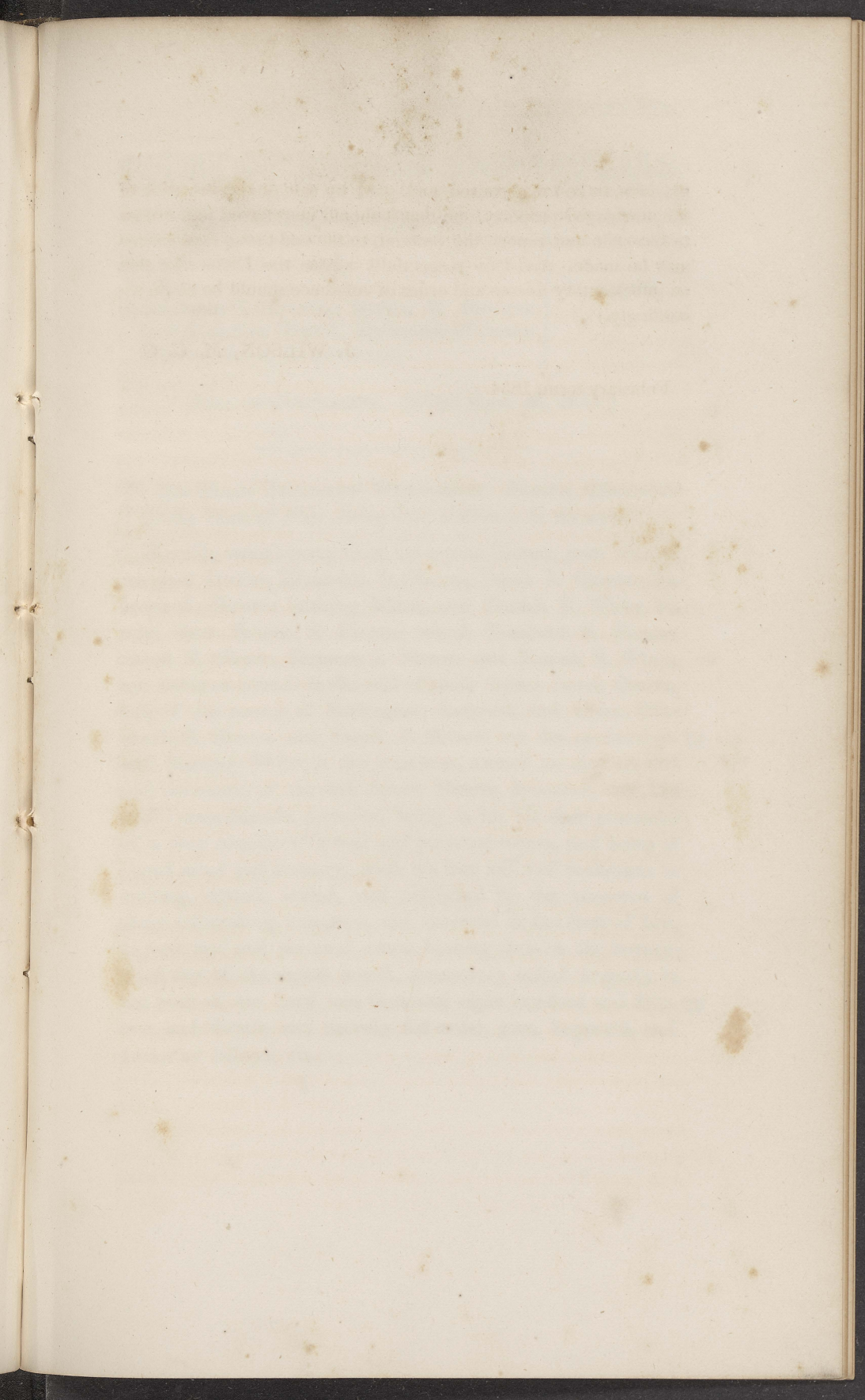
It is also well settled that the debt secured by a mortgage is only an incident to the debt, and passes with the debt. *Martin v. Moulin*, 2 *Burr.* 978; *Green v. Hart*, 1 *Johns. C. R.* 580; *Langdon v. Buel*, 9 *Wend.* 80; *Stevenson v. Black*, *Saxton* 343; *Bolles v. Wade et al.*, 3 *Green's C. R.* 460.

I am, therefore, of opinion that the complainant is entitled to the benefit of the mortgage to the extent of the bonds held by 40  
him; that he is entitled to have the amount due upon them, with

his costs, to be taxed, raised, and paid by sale or sequestration of the mortgaged property, and that it should be referred to a master to ascertain and report the amount, to the end that a final decree may be made. And I do respectfully advise the Chancellor that an interlocutory decree and order of reference should be made accordingly.

J. WILSON, M. C. C.

February term, 1854.



COURT OF COMMONS

IN SENATE  
THE 10th DAY OF FEBRUARY 1850

REPORT OF THE COMMISSIONERS OF THE LAND OFFICE

IN ANSWER TO A RESOLUTION PASSED BY THE HOUSE OF COMMONS

ON THE 12th DAY OF FEBRUARY 1849

BY THE COMMISSIONERS OF THE LAND OFFICE

AND BY THE COMMISSIONERS OF THE LAND OFFICE

IN ANSWER TO A RESOLUTION PASSED BY THE HOUSE OF COMMONS

ON THE 12th DAY OF FEBRUARY 1849

BY THE COMMISSIONERS OF THE LAND OFFICE

AND BY THE COMMISSIONERS OF THE LAND OFFICE

IN ANSWER TO A RESOLUTION PASSED BY THE HOUSE OF COMMONS

ON THE 12th DAY OF FEBRUARY 1849

BY THE COMMISSIONERS OF THE LAND OFFICE

AND BY THE COMMISSIONERS OF THE LAND OFFICE

IN ANSWER TO A RESOLUTION PASSED BY THE HOUSE OF COMMONS