

# In Chancery of New Jersey.

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*Between*

*SAMUEL S. HARTWELL, Admin-  
istrator, pendente lite, of Henry  
Vanderveer, deceased,*

*Complainant,*

*and*

*HENRY VAN DOREN et als.,  
Defendants.*

} On Bill, &c.

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## Order of Publication.

[Filed June 25, 1869].

The complainant having filed his cross-bill in the above cause, and process of subpœna having been issued and returned to according to law—

And it being made to appear, by affidavit, that the defendants, Charles P. Holcombe and Sarah, his wife, reside out of the state of New Jersey, and that process could not be served upon them, it is, on this 25th day of June, 1869, on motion of S. B. Ransom, solicitor of the complainant, ordered, 10 that the said absent defendants do appear, plead, demur, or answer to the complainant's bill, on or before the 26th day of

August next, or that, in default thereof, such decree be made against them as the Chancellor shall think equitable and just.

And it is further ordered, that the notice of this order prescribed by the rules of this court, shall, within twenty days hereafter, be served on the said absent defendants, either by actual service upon said defendants, personally, or by leaving the same at their residence, with a person of the family; or in default of such service, that said notice be published within the said twenty days in "The Somerset Unionist," a  
 10 newspaper printed at Somerville, in this state, and continued therein for six weeks, successively, at least once in every week, and that a copy thereof be also mailed, within the same time, to the said absent defendants, directed to their post office address, if the same can be ascertained.

A. O. ZABRISKIE, C.

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Answer of Defendant, Charles P. Holcombe,  
 to Cross Bill.

[Filed June 23, 1870].

20 *The answer of Charles P. Holcombe, one of the defendants to the bill of complaint of Samuel S. Hartwell, administrator, pendente lite, of Henry Vanderveer, deceased, complainant.*

This defendant, now and at all times hereafter, saving and reserving to himself all manner of benefit and advantage of exception to the many errors, uncertainties, and other imperfections in the said complainant's bill of complaint, for answer thereto, or unto so much and such parts thereof as this defendant is advised is material for him to make answer unto, this defendant answering says, that this defendant admits it to be true that this defendant on or about the day  
 30 named in said bill, did execute and deliver unto the said Henry Vanderveer, deceased, a bond or obligation of the date, and in the penal sum mentioned in said bill, conditioned for the payment by this defendant, his heirs, execu-

tors, or administrators, unto the said Henry Vanderveer, his executors, administrators, or assigns, of the sum of \$2,500, with lawful interest thereon, on or before the 24th day of April, 1861, being a condition similar to that set out in said bill, except as to the interest on said sum, of which the said bill makes no mention; and this defendant also admits it to be true that this defendant, and Sarah his wife, did make, execute, and deliver unto the said Henry Vanderveer, deceased, an indenture of mortgage of the date mentioned in said bill, conveying the premises therein mentioned in the 10 manner, and upon the proviso and condition therein mentioned, and that the same was acknowledged and recorded in the manner and at the time specified in said bill.

And this defendant further says, that said bond and mortgage were made, executed, and delivered under the following circumstances, *viz.* That before the making of the said bond and mortgage, and in the lifetime of said Henry Vanderveer, deceased, that is to say, on the 24th day of April, in the year of our Lord 1860, at Bedminster, in the county of Somerset, it was corruptly and against the form of the 20 statute in such case made and provided, agreed by and between this defendant and the said Henry Vanderveer, deceased, that the said Henry Vanderveer, deceased, should loan and advance unto the said Charles P. Holcombe, this defendant, the sum of \$2,500, lawful money of the United States, and that the said Henry Vanderveer, deceased, should forbear and give day of payment thereof to this defendant until and upon the 24th day of April, in the year of our Lord 1861, and that this defendant, for the loan of the said sum of \$2,500, and for giving day of payment thereof as afore- 30 said, for the time aforesaid, should give and pay to the said Henry Vanderveer, deceased, on the said 24th day of April, in the year of our Lord 1861, the sum of \$7 on each \$100 of the said \$2,500, together with the said sum loaned of \$2,500, so to be loaned, and that for securing the payment of the said sum of \$2,500, with lawful interest thereon, this defendant should make and seal, and as his act and deed, deliver to the said Henry Vanderveer, deceased, a certain bond, and should thereby bind himself in the penal sum of \$5,000, conditioned for the payment of the said sum of 40

\$2,500, with lawful interest thereon, by this defendant unto the said Henry Vanderveer, deceased, on or before the 24th day of April, in the year of our Lord 1861, and that this defendant, together with his said wife, should make, execute, and deliver to the said Henry Vanderveer, deceased, a mortgage on the premises described in said bill of complaint, securing the payment of the said money according to the condition of the said bond. And this defendant says, that in pursuance of said corrupt and unlawful agreement, so  
10 made as aforesaid, the said Henry Vanderveer, deceased, afterwards, and in his lifetime, to wit, on the day and year, and at the place last aforesaid, and upon the agreement and terms aforesaid, lent and advanced to this defendant the said sum of \$2,500; and that for the securing the re-payment thereof, with the lawful interest thereon, this defendant, in further pursuance of the said corrupt and unlawful agreement, then and there made and sealed, and as his act and deed delivered to the said Henry Vanderveer, deceased, his  
20 writing, obligatory in the penal sum, and with the condition annexed, above mentioned, being the bond above mentioned in said bill of complaint; and this defendant did likewise, together with his said wife, make, execute, and deliver the mortgage, in the said bill of complaint first mentioned, in pursuance of the said corrupt and unlawful agreement, and for the purpose aforesaid, and did, at the same time, promise the said Henry Vanderveer, deceased, to pay him the said sum of \$1 on every \$100 of the said money so loaned, in addition to the sum so loaned, and the legal interest  
30 at the time when the said principal sum, and the legal interest thereon, should fall due, according to the condition of the said bond. And this defendant avers, that the said agreement for the sum of \$7, for the forbearance, and giving day of payment of each \$100 so loaned, was contrary to the form of the statute in such case made and provided, by means whereof, and by force of the statute aforesaid, the bond and mortgage, in the said bill of complaint first mentioned, were and are wholly void in law. And this defendant says, that at the time of making the said  
40 said bond and mortgage in pursuance thereof, this defendant and his wife, and the said Henry Vanderveer, deceased,

were residents of the said county of Somerset, in this state. And this defendant further says and shows, that on or about the 24th day of April, in the year of our Lord 1861, when a year's interest became due on the said bond and mortgage first mentioned in said bill of complaint, this defendant called upon the said Henry Vanderveer, deceased, then living, to pay him the year's interest then due on said bond and mortgage; and, thereupon, the said Henry Vanderveer, deceased, in pursuance of said corrupt and usurious agreement, demanded of the said Charles P. Holcombe seven per cent. 10 interest on the said bond and mortgage for one year, then elapsed; and, thereupon, this defendant paid to the said Henry Vanderveer, deceased, the sum of \$175, as and for one year's interest on the said loan of \$2,500, secured by the usurious bond and mortgage above mentioned.

And this defendant further says, and shows that on or about the 1st of May, in the year of our Lord 1862, when a second year's interest became due on the said bond and mortgage of complainant, this defendant again called upon the said Henry Vanderveer, deceased, to pay him the year's in- 20 terest then due on said bond and mortgage; and, thereupon, the said Henry Vanderveer, deceased, being then living in pursuance of said corrupt and usurious agreement, again demanded of this defendant seven per cent. interest on said bond and mortgage for the year then elapsed, and this defendant then protested to the said Henry Vanderveer, deceased, against paying more than legal interest on said bond and mortgage, and, thereupon, the said Henry Vanderveer, deceased, consented to take six and a half per cent. interest for the year then elapsed, on the sum loaned as afore- 30 said, and secured by said usurious bond and mortgage, instead of seven per cent. before agreed upon, and this defendant then paid to the said Henry Vanderveer, deceased, the sum of \$1,062.52, as and for the year's interest then due on the said bond and mortgage for \$2,500.

And this defendant further answering admits, that the said Charles Wyckoff, in said bill named, did make and execute a mortgage of such date, and of such purport and effect as in the complainant's said bill mentioned and set forth, and also that the said Charles Wyckoff, since the exe- 40

cution and delivery of the same, departed this life, leaving the said John M. Man: , in said bill named, his sole executor, and that said John M. Maun, as such executor, on on about the day mentioned in the said bill, assigned the said mortgage to Henry Vanderveer, of the township of Bridgewater, in the county of Somerset, and that the last mentioned mortgage is prior to the mortgage of the said complainant; but this defendant says, that the sum of \$2,500 of principal has been paid upon said last mentioned mortgage, and that  
10 only the sum of \$2,500, together with an arrear of interest, to this defendant unknown, is due upon the last mentioned mortgage. And this defendant admits, that this defendant and his wife executed a mortgage to the Bound Brook Building, Loan, and Savings Association, of such date and such purport and effect as in said bill mentioned and set forth; but this defendant is informed and believes that Alonzo DeCamp, one of the defendants, paid the amount due upon said mortgage to said association or their agent, and that the same is not a lien or encumbrance upon the said premises. And  
20 this defendant further admits, that this defendant and wife executed a mortgage to Caleb F., improperly called Cellip F. Fisher, in said bill named, of such date and such purport and effect as in said bill mentioned and set forth; but this defendant says, that the said mortgage was paid off by this defendant at or about the 18th day of February, 1869, and that the same is no longer a lien or encumbrance upon said premises or any part thereof. And this defendant further admits, that the said William S. Cook and Lewis D. Cook, in said bill named, on or about the time therein named recovered a judg-  
30 ment against this defendant for the sum and in the manner therein mentioned; but this defendant is informed and believes that the said Alonzo DeCamp, on or about the 1st day of April, 1869, paid to said Lewis D. Cook the amount due on said judgment, and that the same is not a lien upon the said premises in said bill of complaint mentioned, or any part thereof.

And this defendant further answering admits and says, that this defendant and his said wife, on or about the time mentioned in said bill, did execute unto the said Alonzo DeCamp, in said bill named, a deed for part of the premises described in  
40 the complainant's mortgage, and that the same was given sub-

sequent to the date of the said complainant's mortgage, and with full notice thereof; but this defendant denies that the title of the said Alonzo DeCamp, under said deed, is subject to the lien of the complainant's mortgage, for the reason that the said mortgage of complainant is usurious, illegal, and not a lien or encumbrance upon the premises described therein, or any part thereof.

And this defendant further answering admits, that the said Henry Vanderveer, deceased, departed this life on or about the time mentioned in the said bill of complaint, and 10 that the said complainant has been appointed in the manner and under the circumstances mentioned in said bill of complaint, administrator, *pendente lite*, of the estate of said deceased, and has taken upon himself the burden of the administration thereof.

And this defendant further answering admits and says, that the said Henry Vanderveer, of the township of Bridgewater, in the county of Somerset, on the day mentioned in said bill, exhibited and filed his bill of complaint in this court against the person mentioned in said bill, for the fore- 20 closure and sale of the said mortgaged premises, to pay and satisfy the amount due to him upon the mortgage assigned to and held by him as aforesaid, and therein stating that this defendant, and his said wife, on or about the 24th day of April, 1861, executed a mortgage on the premises described in his said mortgage, to Henry Vanderveer, to secure the sum of \$2,500, or some other sum, and charging that the said mortgage was executed and recorded subsequent to his mortgage, and with full notice thereof, and if any encum- 30 brance at all on said premises, that it was subsequent to his said mortgage; and also stating in said bill that this defendant, Charles P. Holcombe, had become the owner of the said premises, and was then the owner thereof. And this defendant further says, that this defendant and his said wife filed and put in their answer to the said bill of the said Henry Vanderveer, of Bridgewater, admitting the execution of the mortgage to the said Henry Vanderveer, deceased, as alleged in the said bill, and setting up and alleging that the same, together with the bond it was given to secure, was made, executed, and delivered by this defendant, and his 40

wife, in pursuance of a corrupt and unlawful agreement, made on or about the 24th day of April, 1860, at Bedminster, in the said county of Somerset, between this defendant and the said Henry Vanderveer, deceased; that said Henry Vanderveer, deceased, should loan and advance to this defendant the sum of \$2,500, and should give day of payment thereof to this defendant until and upon the 24th day of April, 1861, and that this defendant, for the loan of said sum of \$2,500 and for giving day of payment thereof as aforesaid, 10 for the time aforesaid, should give and pay to the said Henry Vanderveer, deceased, on the said 24th day of April, in the year 1861, the sum of \$7.00 on each \$100 of the said \$2,500, so to be loaned, and alleging that the said bond and mortgage *in* were usurious and void, being the bond and mortgage of the complainant in this suit, said Samuel S. Hartwell. And this defendant further says, that the said Henry Vanderveer, deceased, filed his answer to said bill of Henry Vanderveer, of Bridgewater, and therein alleged that this defendant had become indebted to him in the sum \$2,500, 20 and in order to secure the payment thereof to him, executed and delivered a bond, bearing date on the 24th day of April, 1860, conditioned for the payment of the said sum on or before the 1st day of April, 1861, and that this defendant and his said wife made, executed, and delivered to him a mortgage to secure the payment of the said sum, with interest thereon, (being the mortgage of the complainant, Samuel S. Hartwell,) and praying that a decree might be made by the court for a sale of the lands and premises mentioned in his mortgage, and out of the moneys thence arising, that he 30 might be paid the full amount of principal and interest moneys due him on his said mortgage, with costs of suit.

And this defendant further says, that the said Henry Vanderveer, deceased, defendant in said suit, did not in his answer aforesaid, deny said allegations of this defendant in his said answer; that his said mortgage was delivered in pursuance of a corrupt and unlawful agreement and was usurious and void, and that the said cause was heard upon the bill and answers of this defendant and wife, and Henry Vanderveer, deceased, without replication or proofs; and that upon 40 such hearing, the answer of this defendant and wife was

taken as true in all points, and on the 7th day of February, 1865, an interlocutory decree was entered and made in said suit of the purport and effect set out in the bill of the said complainant, Samuel S. Hartwell.

And this defendant further says, that the said Henry Vanderveer, deceased, defendant, appealed from the said interlocutory decree to the Court of Errors and Appeals in the last resort in all causes of this state; and that upon such appeal the said decree was in all things affirmed, and the cause remitted to this court to be proceeding on therein; and that 10 the same, at the time of the filing of the bill of said complainant, Samuel S. Hartwell, was pending in the court, as by the bill, answers, records, and proceedings in the said suit on file and of record in this court, will more fully appear; and this defendant insists that the rights of the said Henry Vanderveer, deceased, under his said mortgage as defendant in that suit, and of the other defendants in that suit, were adjudged and determined by the said interlocutory decree therein, and that the said complainant has no right to file his bill of complaint for relief against such interlocu- 20 tory decree; and this defendant submits to this court and respectfully insists, that if the said Samuel S. Hartwell, administrator as aforesaid, complainant, shall attempt to enforce his said bond and mortgage, by his bill exhibited in this honorable court, that this defendant has the right to set up and insist upon the said usurious agreement and the statute in such case made and provided, as a defence thereto, and also to set up and insist upon the said interlocutory decree.

And this defendant denies all unlawful combination and 30 confederacy wherewith he is by the said bill charged; without this, that there is any other matter, cause, or thing, in the said complainant's bill of complaint contained, material or necessary for this defendant to make answer unto, and not herein and hereby well and sufficiently answered, traversed, confessed, and avoided, or denied, is true to the knowledge or belief of this defendant.

All which matters and things this defendant is ready and willing to aver, maintain, and prove, as this honorable court shall direct, and humbly prays to be hence dismissed with 40

his reasonable costs and charges, in this behalf most wrongfully sustained.

RICHEY & EMERY,

*Solicitors for the defendant, Chas. P. Holcombe.*

A. G. RICHEY,

*Of counsel with the defendant Chas. P. Holcombe.*

New Jersey, Mercer County, ss.—Charles P. Holcombe, the defendant above named, being duly sworn according to law, on his oath says—that the matter and things set forth in  
10 the above answer, so far as relates to his own acts, are true, and so far as relates to the acts of others, he believes them to be true.

CHARLES P. HOLCOMBE.

Sworn and subscribed, this twenty-fourth day of August, A. D. eighteen hundred and sixty-nine, before me.

JOSEPH H. HOUGH, *M. C.*

# In Chancery of New Jersey.

*Between*

*SAMUEL S. HARTWELL, ad-  
ministrator of HENRY VAN-  
DERVEER, deceased,*

*Complainant,*

*and*

*HENRY VANDERVEER,  
CHARLES P. HOLCOMB et  
ux and others,*

*Defendants.*

Cross-Bill.

Cross Bill.

[Filed Feb. 3, 1869.]

*To his Honor Abraham O. Zabriskie, Chancellor of the state of  
New Jersey.*

Humbly complaining, showeth unto your Honor your orator, Samuel S. Hartwell, administrator, *pendente lite*, of the goods and chattels, rights and credits, which were of Henry Vanderveer, of the township of Bedminster, county of Somerset, state of New Jersey, deceased, of the township of,

in the county of Somerset, and state of New Jersey, that 10  
on or about the twenty-fourth day of April, in the year one thousand eight hundred and sixty, Charles P. Holcomb, of the township of Bridgewater, in the county of Somerset, and state of New Jersey, became and was justly indebted unto Henry Vanderveer, of the township of Bedminster, county and state aforesaid, in the sum of two thousand five

hundred dollars; and being so indebted, the said Charles P. Holcomb, in order to secure the payment of the said sum of money, with interest, did make and execute, under his hand and seal, and deliver unto the said Henry Vanderveer, a certain bond or obligation, bearing date the same day and year last aforesaid, in the penal sum of five thousand dollars, lawful money of the United States, with a condition there underwritten, that if the said Charles P. Holcomb, his heirs, executors, or administrators, should well and truly pay, or  
10 cause to be paid, unto the said Henry Vanderveer, his executors, administrators, or assigns, the just and full sum of two thousand five hundred dollars, lawful money aforesaid, on or before the twenty-fourth day of April, one thousand eight hundred and sixty-one, then the said obligation should be void, otherwise to remain in full force and virtue, as in and by the said bond or obligation and the condition thereof, reference being thereunto had, will more fully and at large appear.

And your orator further shows, that the said Charles P.  
20 Holcomb and Sarah his wife, in order to secure the payment of the said sum of money above mentioned, together with the interest which should accrue or become due thereon, executed and delivered unto the said Henry Vanderveer a certain indenture of mortgage, bearing date the same day and year last aforesaid, made by the said Charles P. Holcomb and Sarah his wife, of the first part, and the said Henry Vanderveer, of the second part, in and by which said indenture of mortgage the said party of the first part did grant, bargain, sell, alien, release, enfeoff, convey, and confirm unto  
30 the said Henry Vanderveer, the said party of the second part, his heirs and assigns, all the following described parcel of land and premises, situate, lying, and being in the township of Bridgewater, Somerset county, and state of New Jersey, *viz.* "All that certain tract or parcel of land and premises, situate, lying, and being in the township of Bridgewater, Somerset county, and state of New Jersey. First lot lies in the village of Bound Brook, on the north side of the turnpike, and begins at a stake on the south side of the well, and runs from thence south twelve degrees west, one chain and four links  
40 to a stake in the south line of said turnpike; thence south seventy-nine and a quarter degrees east, one chain and

twenty-nine links; thence north eleven and a half degrees east, five chains and twenty links to a stake; thence eighty-four and a quarter degrees west, one chain and four links to a stake; thence south fourteen and a half degrees west, four chains and nine links, crossing said well to the place of beginning, containing sixty-one hundredths of an acre of land.

The second lot lies between the railroad and the Raritan river, and begins at a stake at said river, and southwest corner of lands of Benjamin B. Giles, running with the line of said Giles, north nine and a half degrees east, five chains and sixty-six links to a stake in the south line of the railroad lot; thence with the course of the same, north eighty-eight and a half degrees west, sixteen chains and sixty-six links to a stake in the line of lands belonging to Henry C. Brokaw, (now Joseph B. Mollison); thence with said line, south twenty degrees west, six chains and thirty-eight links to a stake at said river; thence down said river, and bounding thereon, to the place of beginning, containing nine acres and forty-five hundredths of an acre of land. See Book K, No. 2, of Deeds, pages 577 and 578.

The third lot or parcel of land and premises, beginning at a point in the south line of the turnpike, distant twenty-five feet in a westerly direction from the line of lands of John H. Voorhees, (deceased); thence north eighty-two and one half degrees west, ninety-eight feet five inches along the line of said highway, to a stake and corner of lands of Hiram Bush; thence with his line south eleven and three quarters degrees west, one hundred and fifteen feet six inches; thence south eighty-two and a half degrees east, and parallel to the highway, ninety-eight feet five inches, to a point distant twenty-five feet from a stone and southwest corner of lands of (late) John H. Voorhees; thence parallel with the line of said Voorhees, and twenty-five feet distant from the same, north eleven and one half degrees east, one hundred and fifteen feet six inches, to the place of beginning. See deed, Clerk's office, Book I, No. 2, page 357.

The fourth lot lies on the east of second lot, beginning at the abutment, on the west side of the small culvert, between the railroad and river bridge; thence north seventy-eight degrees west, four chains and twenty-nine links to a post for a corner in Holcom's line; thence south ten degrees

west, four chains and twenty links to Raritan river; thence down said river south seventy-nine degrees east, four chains and ten links to the abutment of the river bridge; thence with the line of the turnpike, north thirteen degrees east, four chains and twenty-nine links to place of beginning. See Book O, No. 2, of Deeds, 394 and 393.

Together with all and singular the tenements, hereditaments, and appurtenances thereunto belonging or in any wise appertaining, and the reversion and reversions, remainder and remainders, rents, issues, and profits thereof; and also all the estate, right, title, interest, use, property, possession, claim, and demand whatsoever, as well in law as in equity, of the party of the first part to the said indenture of mortgage, and every part and parcel thereof, with the appurtenances: to have and to hold the therein above granted and described premises, with the appurtenances, unto the said part of the second part, his heirs and assigns, to his and their own proper use, benefit, and behoof forever: provided always, and the said indenture of mortgage was therein declared to be upon this express condition, that if the said party of the first part to the said indenture of mortgage, his heirs, executors, or administrators, should well and truly pay, or cause to be paid, unto the said party of the second part, his certain attorney or attorneys, executors, administrators, or assigns, the said sum of money mentioned in the condition of the aforesaid bond or obligation, with the interest thereof, at the time and in the manner mentioned in the said condition, according to the true intent and meaning thereof, that then the said indenture of mortgage, and the estate thereby granted, should cease, determine, and from thenceforth be null and void.

And your orator further shows, that after the execution of the said indenture of mortgage, the same was in due form of law acknowledged by the said Charles P. Holcomb and Sarah his wife, before Robert S. Smith, one of the commissioners for taking acknowledgement and proof of deeds and other instruments of writing for said county, and duly recorded in the office of the clerk in and for the said county of Somerset, in Book V of Mortgages, page 306, on the twenty-fifth day of April, in the year one thousand eight

hundred and sixty, as by the certificate of the clerk of the said county, endorsed on the said indenture of mortgage, more fully appears, and to which your orator, for greater certainty, begs leave to refer, if it be necessary so to do.

And your orator further shows, that on or about the twenty-first day of October, in the year one thousand eight hundred and forty-four, one Charles Wyckoff, who was then the owner of the said lots or parcels of land aforesaid, and Elizabeth H. his wife, executed a mortgage on the same premises, or some part thereof, to one Cornelius Vanderveer, 10 to secure the payment of the sum of five thousand dollars or some other sum. And your orator further shows, that the said Cornelius Vanderveer, has departed this life since the execution and delivery of the said indenture of mortgage, leaving one John M. Mann, of the county of Somerset, his sole executor. And your orator further shows, that the said John M. Mann, as such executor, did, on the fifth day of October, A. D. eighteen hundred and sixty-three, assign and transfer the said indenture of mortgage to one Henry Vanderveer, of the township of Bridgewater, in the said county 20 of Somerset, by virtue of which said mortgage and the said assignment thereof, the said Henry Vanderveer claims to have some lien upon the said premises, or some part thereof, and your orator admits that the said mortgage is an encumbrance prior to your orator's said mortgage; but your orator shows that the sum of two thousand five hundred dollars, or some other sum, has been paid on the said mortgage— but what amount remains still due and unpaid, your orator has no knowledge, and for greater certainty that reference may had to the said mortgage and amount distinctly 30 ascertained.

And your orator further shows, that on or about the sixteenth day of December, in the year one thousand eight hundred and fifty-four, the said Charles P. Holcomb and Sarah his wife, executed a mortgage on the same premises, or some part thereof, to the Bound Brook Building, Loan, and Savings Association, to secure the sum of one thousand dollars, or some other sum, by virtue of which said mortgage, the said Bound Brook Building, Loan, and Savings Association claims to have some lien upon said premises, and your orator admits 40

that the said mortgage is an encumbrance prior to your orator's said mortgage, but whether the said amount, or any part thereof, remains still due and unpaid, your orator has no means of knowing, but prays that for greater certainty reference may be had to the said mortgage, and the said amount remaining due on said mortgage, if any thing, distinctly ascertained.

And your orator further shows, that on or about the twenty-seventh day of March, in the year eighteen hundred  
10 and sixty-three, the said Charles P. Holcomb and wife, executed mortgage on the same premises to one Cellip F. Fisher, to secure the sum of three thousand five hundred dollars or some other sum, by virtue of what said mortgage the said Cellip F. Fisher claims to have some lien upon the said premises. But your orator charges that the said last mentioned mortgage was executed and recorded subsequent to your orator's said mortgage, and with full notice thereof, and if an encumbrance at all upon said premises, is subsequent to the mortgage of your orator.

20 And your orator further shows, that on or about the third day of April, in the year eighteen hundred and sixty-three, as your orator has been informed and believes to be true, one William S. Cook and Lewis D. Cook, then lately trading and doing business under the name, style, and firm of W. S. & L. D. Cook, recovered a judgment in the Supreme Court of Judicature of the state of New Jersey against the said Charles P. Holcomb, for the sum of two thousand five hundred and forty-nine dollars and forty-nine cents, or some  
30 other sum, by virtue of which said judgment the said William S. Cook and Lewis D. Cook claim to have some lien upon the said premises; but your orator charges that the said judgment was obtained subsequent to the execution of your orator's said mortgage, and with full notice thereof, and if a lien at all upon the said premises, is subsequent to the encumbrance of your orator's said mortgage.

And your orator further shows, that on or about the nineteenth day of February, in the year of our Lord one thousand eight hundred and sixty-nine, as your orator is informed and believes to be true, the said Charles P. Holcomb

executed to one Alonzo DeCamp a deed for the said premises described in your orator's said mortgage, or some part thereof, by reason of which the said Alonzo DeCamp now claims to have some interest in the said mortgaged premises; but your orator expressly charges that the said deed was given subsequent to the date of your orator's said mortgage, and with full notice thereof, and if said deed vests any title to said premises in the said Alonzo DeCamp, the same is subject to the encumbrance of your orator's said mortgage.

And your orator further shows, that afterwards, to wit, on or 10  
about the twenty-second day of May, in the year one thousand eight hundred and sixty-eight, the said Henry Vanderveer, of the township of Bedminster, in the county of Somerset aforesaid, departed this life, leaving a paper purporting to be his last will and testament, which said paper having been offered in the Prerogative Court of the state of New Jersey for probate therein, before the Ordinary or Surrogate General of the state of New Jersey, and caveats having been filed against the same, and the validity of the said will being contested before the Ordinary, where the same is now pending 20  
undetermined, your orator has been appointed by the said court administrator of the goods, chattels, and credits which were of the said Henry Vanderveer, deceased, at the time of his death, during the pendency of the said suits which trust he has accepted.

And your orator further shows, that he has taken upon himself the burthen of the administration of the estate of the said Henry Vanderveer, during the pendency of the said suit, pursuant to the said appointment of the said Prerogative Court, and that he is entitled to have and receive, as such ad- 30  
ministrator, *pendente lite*, the moneys now due and owing for principal and interest upon the said bond or writing obligatory, and in the proviso of redemption of the said deed or indenture of mortgage contained.

And your orator further shows, that the said sum of two thousand five hundred dollars the principal money mentioned in the said bond or obligation to be given by the said Charles P. Holcomb to the said Henry Vanderveer, now deceased, and secured thereby and by the said indenture of

mortgage, with large arrears of interest, still remains due and owing to your orator as administrator, *pendente lite*, of the said Henry Vanderveer, deceased, no part thereof having been paid to the said Henry Vanderveer in his lifetime, or to your orator, since his death, so that your orator is greatly disappointed and delayed in the receipt of the said moneys, by means of which several premises, the said indenture of mortgage and the estate thereby mortgaged as aforesaid, have become absolute in your orator as administrator of the said

10 Henry Vanderveer, deceased.

And your orator further shows, that the said Henry Vanderveer, of the township of Bridgewater, in the county of Somerset, and state of New Jersey, on or about the seventeenth day of November, in the year of our Lord one thousand eight hundred and sixty-three, brought his bill in this honorable court against the said Charles P. Holcomb and Sarah his wife, the Bound Brook Building, Loan, and Savings Association, the said Henry Vanderveer, deceased, Cellip F. Fisher, William S. Cook and Lewis D. Cook, partners as

20 W. S. & L. D. Cook, and others, for the foreclosure and sale of the said mortgaged premises; that the said Henry Vanderveer, deceased, and the said Charles P. Holcomb and wife, severally filed answers to the said bill of complaint; that an interlocutory decree in said cause was, on or about the seventh day of February, in the year of our Lord one thousand eight hundred and sixty-five, made by the Chancellor in this honorable court, decreeing that the said complainant in the said suit was entitled to the relief sought and prayed for by him in his said bill of complaint, and referring it

30 to your orator, one of the masters of this court, to ascertain and report the amount due to the said complainant in said cause for principal and interest upon the mortgage held by him upon the premises mentioned and described in the said bill of complaint, and also the amount due, if anything, to the Bound Brook Building, Loan, and Savings Association, and to the said Cellip F. Fisher, for principal and interest on their respective mortgages, and what was due, if anything, to the said William S. Cook and Lewis D. Cook, late partners, &c., upon their said judgment, and also to ascertain and report the

40 order and priority of the said several mortgages and judg-

ment; and whether they all embraced the same, or what part of the said mortgaged premises, and whether the whole or a part, and what part, of the said mortgaged premises should be sold for the payment and satisfaction of the said several claims, and, if all the said premises should be sold, whether they should be sold together or in parcels, and if in parcels, in what order.

And your orator further shows, that although the said Henry Vanderveer, now deceased, was made a party defendant in said suit, yet the said master was not directed by the said 10 decree to ascertain and report the amount of principal and interest money due upon the said mortgage of the said Henry Vanderveer, now deceased, or to ascertain its proper position among the said several encumbrances upon the said mortgaged premises.

And your orator shows, that by reason of such omission in the said interlocutory decree of the said mortgage of your orator, your orator can have no relief in said cause, and if a decree should be made for a sale of the said mortgaged premises in said suit, your orator would lose the security of his said 20 mortgage, and all the proceeds of such sale would be applied in said suit to the payment of the encumbrances upon said premises which are subsequent to the encumbrance of your orator's said mortgage.

And your orator further shows, that the said Charles P. Holcomb and wife, the Bound Brook Building, Loan, and Savings Association, the said Henry Vanderveer, of Bridge-water aforesaid, Cellip F. Fisher, William S. and Lewis D. Cook, Alonzo DeCamp and Laurretta C. DeCamp, his wife, or some one of them, since the execution of your orator's said 30 mortgage, have possessed and enjoyed, and that they do still possess and enjoy, the said mortgaged premises, with the appurtenances, and that they have always received, and do still receive, the rents, issues, and profits thereof.

And your orator further shows and expressly charges that the said mortgaged premises are a slender and scanty security for the payment of the said principal and interest moneys so due to your orator as administrator of the said Henry Vanderveer, deceased, aforesaid, and that he, or some other person or persons for him, have frequently and in a 40

friendly manner applied to the said Charles P. Holcomb and wife, the Bound Brook Building, Loan, and Savings Association, Henry Vanderveer, of Bridgewater aforesaid, Cellip F. Fisher, William S. Cook, and Lewis D. Cook, or one of them, and requested them, or one of them, to pay and discharge the said principal and interest moneys so due to your orator as administrator as aforesaid, on the said bond or obligation and deed of mortgage, as in equity and good conscience they ought to have done. But now so it is, may it

10 please your honor, that the said Charles P. Holcomb and Sarah his wife, the Bound Brook Building, Loan, and Savings Association, Henry Vanderveer, of Bridgewater aforesaid, Cellip F. Fisher, William S. Cook and Lewis D. Cook, combining and confederating with divers persons at present unknown to your orator, but whose names when discovered, he prays may be inserted herein, with proper and apt words to charge them as parties defendant hereto, and contriving how to injure and aggrieve your orator in the premises, and to defraud him of the said principal and interest moneys so as aforesaid due to your orator, as administrator of the said Henry Vanderveer, deceased, as aforesaid, on the said bond or obligation and deed of mortgage hereinbefore mentioned, sometimes give out and pretend that although your orator's estate in the said mortgaged premises may have become absolute at law, yet that your orator cannot dispose of the same to any purchaser in any manner, and that the same will be subject to an equity; whereas, your orator expressly charges the contrary thereof to be true.

20 And at other times they give out and pretend, that the whole of the principal and interest moneys so due upon the said bond or obligation and indenture of mortgage, so as aforesaid given by the said Charles P. Holcomb and Sarah his wife, have been paid to the said Henry Vanderveer, of Bedminster aforesaid, in his lifetime, and to your orator since his decease; whereas, your orator expressly charges that neither the whole, nor any part of the said sum of two thousand five hundred dollars, mentioned in the condition of the said bond or obligation, and in the proviso of redemption of the said indenture of mortgage, have been paid

30 or in any way satisfied, either to the said Henry Vanderveer,

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of Bedminister aforesaid, in his lifetime, or to your orator since his death. All which actings and doings of the said confederates are contrary to equity and good conscience, and tend to the manifest wrong, injury, and oppression of your orator, as administrator as aforesaid. In tender consideration whereof, and inasmuch as your orator has not a complete and safe remedy in the premises at and by the strict rules of the common law, nor can foreclose the equity of redemption of the said mortgaged premises, or safely sell the same, for the payment and satisfaction of the said principal and interest moneys so as aforesaid due to your orator, as administrator as aforesaid, on said bond or obligation, and indenture of mortgage without the aid and decree of this Honorable Court— 10

To the end, therefore, that the said Charles P. Holcomb and Sarah his wife, the Bound Brook Building, Loan, and Savings Association, Henry Vanderveer, of the township of Bridgewater aforesaid, Cellip F. Fisher, William S. Cook, and Lewis D. Cook, Alonzo DeCamp and Lauretta C. DeCamp his wife, and their confederates, when discovered, 20 may, upon their several and respective corporal oaths, true, full, and perfect answers make to all and singular the premises, as fully and particularly as if the same were here again repeated, and they and each of them particularly interrogated, according to best of their respective knowledge, information, remembrance, and belief, and that the said defendants, or some of them, may be decreed to pay to your orator the said principal sum so due to him on the said bond or obligation and deed of mortgage hereinbefore mentioned and set forth, and all the interest money now due or to grow 30 due thereon, together with all your orator's costs and charges in this behalf sustained, by a short day to be appointed by this honorable court, and in default thereof, that the said defendants and each of them, and all persons claiming or to claim under them or any of them, may be foreclosed of and from all equity of redemption of, in, and to the said mortgaged premises, and every part and parcel thereof, with the appurtenances, and may deliver over unto your orator, as administrator of the said Henry Vanderveer, deceased, all deeds, demises, and writings, whatever relating to or con- 40

cerning the same, or that all and singular the said mortgaged premises, with the appurtenances, may, by the order and decree of this honorable court, be sold, and out of the moneys arising from the sale thereof, your orator may be paid the full amount of the said principal sum of money so due to your orator, as administrator of the said Henry Vanderveer, deceased, on the said bond or obligation and indenture of mortgage as aforesaid, and all the interest now due and to grow due thereon, together with all your orator's

10 costs and charges in this behalf sustained, and that your orator may have such further and other relief in the premises as to your Honor may seem meet and shall be agreeable to equity and good conscience. May it please your Honor, the premises considered, to grant unto your orator a writ or writs of subpœna, issuing out of and under the seal of this honorable court, to be directed to the said Charles P. Holcomb and Sarah his wife, the Bound Brook Building Loan, and Savings Association, Henry Vanderveer, of the township of Bridgewater aforesaid, Cellip F. Fisher,

20 William S. Cook, and Lewis D. Cook, Alonzo DeCamp and Laurretta C. DeCamp his wife, therein and thereby commanding them and each of them, on a certain day and under a certain penalty therein to be inserted, to be and appear before your Honor in this honorable court, then and there to answer all and singular the said premises, and to stand to and abide by and perform such order and decree therein as to your Honor shall seem meet and shall be agreeable to equity and good conscience; and your orator as in duty bound will ever pray, &c.

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S. B. RANSOM,

*Solicitor for, and of counsel with the complainant.*


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### Demurrer to Cross-Bill.

[Filed August 26, 1869.]

The demurrer of Charles P. Holcomb, one of the defendants to the bill of complaint of Samuel S. Hartwell, administrator, *pendente lite*, of Henry Vanderveer, deceased, complainant.

This defendant, by *protestatum*, not confessing or acknowledging all or any of the matters and things in the said complainant's bill to be true in such manner and form as the same are therein set forth and alleged, doth demur thereto, and for cause of demurrer showeth, that the said bill purports to be a cross-bill to the bill of complaint exhibited in this court by Henry Vanderveer, of the township of Bridgewater, in the county of Somerset, against said Henry Vanderveer, deceased, this defendant and Sarah his wife, the Bound Brook Building, Loan, and Savings Association, Cellip F. 10 Fisher, William S. Cook, and Lewis D. Cook, partners as W. S. & L. D. Cook, and others, upon which said bill of complaint of said Henry Vanderveer, of the township of Bridgewater aforesaid, and the answers thereto of this defendant, and said Henry Vanderveer, deceased, an interlocutory decree was made on or about the seventh day of February, A. D. eighteen hundred and sixty-five, and before the exhibiting of the said bill of the complainant, Samuel S. Hartwell, of the tenor and effect set out in said bill of said Samuel S. Hartwell, administrator as aforesaid; and this defendant says, 20 that according to the practice of this court, a cross-bill cannot be filed by said complainant after the making of an interlocutory decree of the nature set out in his said bill.

And this defendant, for further cause of demurrer, showeth, that the said bill of the said complainant appears to be filed and exhibited for the purpose of obtaining relief against a certain interlocutory decree, made by this court, on or about the seventh day of February, A. D. eighteen hundred and sixty-five, in a certain cause depending in this court, in which Henry Vanderveer, of the township of Bridgewater, 30 in the county of Somerset, was complainant, and this defendant, the said Henry Vanderveer, deceased, and others, defendants, and set out in said bill; and this defendant says, that according to the practice of this court, no relief can be granted against an interlocutory decree, upon a bill or cross-bill.

And this defendant, for further cause of demurrer showeth, that the said complainant, by his said bill, bases his right to exhibit his said bill, and to have the relief therein prayed, upon an alleged omission made in an interlocutory 40 decree made by this court on or about the seventh day of

February, A. D. eighteen hundred and sixty-five, and set out in said bill, but does not, in his said bill, allege that the said omission was wrong or erroneous, or allege or show any facts or circumstances from which it appears that said omission was improper or erroneous.

And this defendant, for further cause of demurrer showeth, that it appears by the complainant's bill, that an interlocutory decree has been made by this court, of the date set out in said bill, adjudicating and determining the rights of the  
 10 said Henry Vanderveer, deceased, as against this defendant, upon the mortgage which complainant's bill is filed to foreclose, and that said complainant, Samuel S. Hartwell, administrator of said deceased, has no right as against this defendant, to set up and insist upon said mortgage, in this suit, after said decree.

Wherefore, and for divers other good causes of demurrer appearing in the said bill, this defendant does demur thereto, and he prays the judgment of this honorable court whether  
 20 the said bill, and he humbly prays to be hence dismissed with his reasonable costs in this behalf sustained.

RICHEY & EMERY,

*Solicitors for the defendant, Charles P. Holcomb.*

A. G. RICHEY,

*Of counsel with the defendant, Charles P. Holcomb.*

I, Augustus G. Richey, do hereby certify that I have perused the bill of the complainant, Samuel S. Hartwell, administrator, *pendente lite*, of Henry Vanderveer, deceased, and that the above demurrer thereto is well founded in point  
 30 of law.

A. G. RICHEY,

*Of counsel with defendant, Charles P. Holcomb.*

State of New Jersey, Mercer county, ss.—Charles P. Holcomb, the defendant above named, being duly sworn according to law, on his oath saith—that the above demurrer is not interposed for delay, but in good faith.

CHARLES P. HOLCOMB.

Sworn and subscribed, this 24th day of August, A. D. 1869,  
before me.

JOSEPH H. HOUGH, *M. C.*

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### Order Overruling Demurrer.

[Filed May 31, 1870.]

The Chancellor having heard the arguments of the counsel for the respective parties, on the demurrer filed in the above cause—It is, on this thirty-first day of May, in the year of our Lord one thousand eight hundred and seventy, on motion of Stephen B. Ransom, of counsel with the com- 10  
plainant, ordered that the said demurrer be overruled, with costs to be paid by the defendants, and that the said defendants file their answer to the complainant's bill in forty days, and if they fail so to do, that the said bill be taken as confessed.

A. O. ZABRISKIE, *C.*

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### Order Suppressing Answer.

[Filed October 3, 1870.]

It appearing to the court that the defendant, Charles P. Holcomb, has filed a paper writing in this case purporting to be 20  
his separate answer to the complainant's said cross-bill, and has not joined with him in his said answer the said defendant, Sarah Holcomb his wife, and that the said Sarah Holcomb, wife of the said Charles P. Holcomb, has not in any way answered the said bill—It is, on this third day of October, in the year of our Lord one thousand eight hundred and seventy, on motion of Stephen B. Ransom, of counsel with the complainant, ordered that the said paper writing purporting to be the separate answer of the said defendant, Charles P. Holcomb, be suppressed and stricken from the files of this court, 30

with costs to be taxed. And it is further ordered, that the said defendant, Charles P. Holcomb and Sarah Holcomb his wife, have leave to file an answer to the complainant's bill, which shall set up an equitable defence only, within thirty days from the date of this order.

A. O. ZABRISKIE, C.

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### Order to Show Cause.

[Filed October 28, 1870.]

This matter coming on to be heard in the presence of S.  
 10 B. Ransom, esq., of counsel with the complainant, and Richey & Emery, of counsel with the defendant, Charles P. Holcomb, and the court having heard and considered the arguments of counsel—

It is, thereupon, on this twenty-eighth day of October, eighteen hundred and seventy, ordered and directed that the order made in this cause bearing date on the third day of October, eighteen hundred and seventy, be modified by striking out of the same the words following, *viz.* "And it is further ordered, that the said defendants, Charles P. Hol-  
 20 comb and Sarah Holcomb his wife, have leave to file an answer to complainant's bill, which shall set up an equitable defence only, within thirty days from the date of this order." And it is further ordered, that the said defendants, Charles P. Holcomb and Sarah Holcomb his wife, have leave to file an answer to complainant's bill within thirty days from the date of this order.

A. O. ZABRISKIE, C.

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### Appeal.

[Filed November 9, 1870.]

30 The complainant hereby appeals from so much of the interlocutory order made in this court in the above stated cause, bearing date the twenty-eighth day of October, in the

year of our Lord one thousand eight hundred and seventy, as orders and directs that the order made in this cause, bearing date on the third day of October, eighteen hundred and seventy, be modified by striking out of the same the words following, viz. "And it is further ordered, that the said defendants, Charles P. Holcomb and Sarah Holcomb his wife, have leave to file an answer to the complainant's bill, which shall set up an equitable defence only, within thirty days from the date of this order;" and also from so much of the said order as orders that the said defendants, 10 Charles P. Holcomb and Sarah Holcomb his wife, have leave to file an answer to the complainant's bill within thirty days from the date of the said order.

Dated November 9th, 1870. S. B. RANSOM,  
*Solicitor for and of counsel with the complainant.*

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

S. B. RANSOM,  
*Of counsel with complainant.*

Petition of Appeal.

20

[Filed November 16, 1870.]

NEW JERSEY COURT OF ERRORS AND APPEALS.

Between

Samuel S. Hartwell, administrator, *pendente*  
*lite* of Henry Vanderveer, deceased,

Appellant,

and

Charles P. Holcomb and Sarah Holcomb,  
his wife,

Appellees.

} *Petition of*  
*Appeal.*

30

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

The honorable petition of Samuel S. Hartwell, administrator, *pendente lite*, of Henry Vanderveer, deceased, the appellant in the above stated cause, respectfully shows, that

your petitioner finds himself aggrieved by an interlocutory order, made in the Court of Chancery, by His Honor, Abraham O. Zabriskie, Chancellor of the state of New Jersey, bearing date the twenty-eighth day of October, in the year of our Lord one thousand eight hundred and seventy, wherein the said Samuel S. Hartwell, administrator as aforesaid, was complainant, and the said Charles P. Holcomb and Sarah Holcomb his wife, were defendants, in this respect, to wit, that the said order adjudges that the order made in the said

10 cause, bearing date the third day of October, eighteen hundred and seventy, be modified by striking out of the same the words following, *viz.* "And it is further ordered, that the said defendants, Charles P. Holcomb and Sarah Holcomb his wife, have leave to file an answer to the complainant's bill, which shall set up an equitable defence only, within thirty days from the date of this order," and also adjudges that the said Charles P. Holcomb and Sarah Holcomb his wife, have been to file an answer to the complainant's bill within thirty days from the date of the said order. And

20 your petitioner humbly appeals from that part of the said interlocutory order which adjudges as aforesaid, upon the ground that the same is erroneous, for that the said defendants, Charles P. Holcomb and Sarah Holcomb his wife, having failed to answer the complainant's bill within the time limited by law, and the rules of the said Court of Chancery, at the time the said order appealed from was made, ought not to have been granted further time to put in an answer, setting up usury or any other inequitable defence, but should have been confined in their answer to an equitable defence

30 only. Your petitioner therefore prays that the said interlocutory order of the said Chancellor may be, in the particulars aforesaid, reversed, set aside and for nothing holden, and that your petitioner may have such relief in the premises as to this honorable court shall seem meet.

S. B. RANSOM,

*Solicitor for and of counsel with the appellant.*

## N. J. Court of Errors and Appeals.

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*Between*

*SAMUEL S. HARTWELL, Administrator, pendente lite, of Henry Vanderveer, deceased,*

*Appellant,*

*and*

*CHARLES P. HOLCOMB and*

*SARAH HOLCOMB, his wife,*

*Respondents.*

On Cross-Bill, &c. Appeal from Interlocutory Decree of Chancellor,

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*Brief and Points for Appellant, by S. B. Ransom, of counsel with Appellant.*

### CASE.

The original bill in this case was filed by Henry Vanderveer, of Bridgewater township, in Somerset county, N. J., against the defendants, Charles P. Holcomb and wife and others to foreclose a mortgage he held on certain premises owned by Holcomb, in Bridgewater township, Somerset county.

The bill was filed November 17th, 1863. To this bill 10

Henry Vanderveer, now deceased, was made a defendant, because he held a second mortgage on the same premises.

To this bill Holcomb and wife filed a joint answer, on the 30th of January, 1864. In this answer they charged that defendant's Vanderveer mortgage was usurious and void and as the law then stood the whole debt was forfeited.

Defendant, Vanderveer, answered, setting up his mortgage and asking to have it paid in its proper place among the encumbrances. This answer was filed March 24th, 1864.

10 No replication was filed by the complainant to either answer, as both answers admitted complainant's mortgage to be a valid encumbrance and the first lien.

The case was set down on bill and answer, and an interlocutory decree taken, referring it to a master to report the several amounts due on the complainant's mortgage, and on the securities of the other defendants, with the exception of Dr. Vanderveer's mortgage. This mortgage was entirely ignored in the interlocutory decree, no reference whatever being made to it, the case being treated as if Dr. Vander-  
20 veer was no party to it.

From this interlocutory decree the defendant, Vanderveer, appealed. The Court of Appeals affirmed the interlocutory decree of the Chancellor; but held that Dr. Vanderveer was not without remedy, but that he could have his claim brought in among the other encumbrances by filing a cross bill. [See opinion of Court of Appeals, in this case. 2 C. E. Green 547.]

The case was remitted to the Court of Chancery, and a final decree made in favor of the complainant and the other  
30 defendants, and all their claims were subsequently paid off without a sale.

Soon after the decision in this court, Dr. Vanderveer died, and his will being contested, the appellant in this case, Samuel S. Hartwell, was appointed administrator, *pendente lite*.

On the 3d of February, 1869, Mr. Hartwell filed this cross-bill for the purpose of foreclosing his mortgage and having it paid out of the proceeds of the property.

Holcomb and wife, having removed from the state, they  
40 were brought into court by order of publication in the usual

way. This order was made June 25th, 1869, and expired August 26th, 1869.

It is the usual order requiring Charles P. Holcomb and Sarah his wife, to demur, plead, or answer to the complainant's bill on or before the 26th day of August, then next.

Holcomb and his wife never pleaded, answered, or demurred to the bill, but Holcomb alone filed a demurrer to the bill on the last day, the 26th of August, 1869. [See this demurrer—case, page 12.]

This demurrer was overruled as irregular and on the 10 merits by an order made May 31st, 1870. [See order—case, page 15.]

This order directs the defendants to answer in forty days, and that on failure so to answer, that the bill be taken as confessed.

The time for defendants to answer under this order expired on July 10th, 1870.

On the 23d day of June, 1870, Charles P. Holcomb, without appearing for his wife, or in any way answering for her, filed his separate answer, without joining his wife with him in 20 such answer. [See answer in printed book.]

On the 3d of October, 1870, the Chancellor made an order suppressing Holcomb's answer as irregular, and directing it to be stricken from the files of the court, and also requiring Holcomb and his wife to answer in thirty days, but restricted them to setting up an equitable defence only. [See order, pages 15 and 16.]

On the 28th of October, 1870, on motion of Holcomb's counsel, the Chancellor made another order, modifying the order of October 3d, 1870, by striking out of the said order 30 the following clause, *viz.* :

“And it is further ordered, that the said defendants, Charles P. Holcomb, and Sarah Holcomb, his wife, have leave to file an answer to complainant's bill, which shall set up an equitable defence only, within thirty days from the date of this order;” and directing that Holcombe and wife have leave to file an answer to complainant's bill within thirty days from the date of that order. [See this order, case page 16].

This last order is the one now appealed from.

## POINTS.

I. The first point I make is this. Where a defendant fails to answer the complainant's bill within the time limited by law or by an order of the court, and he is permitted by the court, after being in laches, to answer, he will in all cases be confined to an answer which sets up an equitable defence only, whether the order permitting him to answer confines him to such defence in terms or not. See

- Collard v. Smith and wife*, 2 *Beas.* 43.  
 10 *Bremer v. Shaw*, 4 *Halst. C. R.* 355.  
*Marsh v. Lasher and wife*, 2 *Beas. C. R.* 253.  
*Champion v. Rille*, 2 *McCarter* 476.  
*Shed v. Garfield*, 5 *Vet.* 39.  
*Beach v. The Fulton Bank*, 3 *Wend.* 585.

II. Where a defendant demurs to a bill and his demurrer is not well taken, but is overruled, and he is permitted to answer, he is confined in such answer to an equitable defence.

III. Where husband and wife are made defendants to a  
 20 bill and are called upon to answer, the husband cannot answer alone; he must joint his wife with him in his answer; if he answers alone, the proceeding is irregular, and his answer will be stricken from the files of the court and suppressed as irregular.

- Collard v. Smith*, 2 *Beas. C. R.* 43.  
*Wyatts Prac. Reg.* 37, 53.  
 1 *Newl. Prac.* 109.  
 1 *Daniels' Ch. Prac.* 284, 392, 548, 569.  
 1 *Bash. Ch. Pr.* 82.  
 30 *Perrine v. Swaine and wife*, 1 *Johns. C. R.* 24.  
*Robbins v. Abrahams and wife*, 1 *Halst. C. R.* 16.  
*Leavitt v. Cruger*, 1 *Paige* 421.  
*Gee v. Cottle*, 3 *Mylne & Craig* 180.  
*Bitton v. Bennett and wife*, 4 *Simons* 17.  
*Story's Eq. Pl.* 71.

IV. Where the defendant's answer is suppressed and

stricken from the files of the court, he stands in the same position as if he had not answered it at all, and the complainants are entitled to a decree against him unless the court, as a favor, grant him further time to answer. He can put in no new answer without leave of the court, and in granting him leave the court ought to confine him to an equitable answer. [See authority cited on IIIId point.]

V. Usury is an inequitable defence, and courts of equity will not allow a defendant, after his regular time for answering has gone by, to set up the defence of usury without introducing into his answer an offer to pay the sum he actually did receive. 10

[*Collard v. Smith*, 2 *Beas. C. R.* 43. See also original papers on file in clerk's office, Court of Chancery.]

*Remer v. Shaw*, 4 *Halst. C. R.* 355.

*Marsh v. Lasher*, 2 *Beas. C. R.* 253.

*Champion v. Rille*, 2 *McCurter* 476.

*Shed v. Garfield*, 5 *Vet.* 39.

*Utica Insurance Company v. Scott*, 6 *Com. R.* 607.

... from the bill of the court, be made to the same  
... be put out of account, it is all the same  
... to a decree against him unless the  
... grant him further time to answer. He can  
... without leave of the court, and in  
... the court ought to confine him to an  
... authority cited on 11th point.]

... is an inalienable privilege and courts of equity  
... will not allow a defendant after his regular time for answer  
... on the ground of his failure to answer without in-  
... to pay the sum he actually

... also original

... Court of Chancery

... C. R. 255

... C. R. 255

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NICHOLSON, Printer, Trenton, N. J.

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# N. J. Court of Errors and Appeals.

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BETWEEN

SAMUEL S. HARTWELL, ADM'R, PENDENTE  
LITE OF HENRY VANDERVEER, DEC'D.,

APPELLANT,

AND

CHARLES P. HOLCOMBE AND WIFE,

RESPONDENTS.

} *On Appeal.*

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POINTS UPON WHICH THE RESPONDENTS MEAN TO RELY.

1. The order or decree in question is not appealable.
2. The order or decree is according to the practice of the Court of Chancery, and is right and proper.

RICHEY & EMERY,

*Of counsel with respondents.*

