

# IN CHANCERY OF NEW JERSEY.

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BETWEEN

PHILIP R. UNDERHILL, *Complainant,*

AND

WILLIAM ATWATER

AND

MARGARET A. ATWATER, *Defendants.*

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ON BILL, & C.

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F. B. OGDEN, Solicitor for Complainant.

E. MERCER SHREVE, Solicitor for Defendants.

With whom is B. F. WATSON of Counsel.

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A. O. EVANS, PRINTER, 56 WASHINGTON STREET, HOBOKEN, N. J.,

1870.

IN CHARACTER OF NEW JERSEY

1871

1872

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1876

THE HISTORY OF NEW JERSEY

FROM THE FIRST SETTLEMENTS TO THE PRESENT TIME

BY JOHN H. COOPER, ESQ.

NEW YORK: PUBLISHED BY G. P. PUTNAM'S SONS, 245 NASSAU ST.

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BETWEEN

Philip R. Underhill,

*Complainant,*

and

William Atwater

and

Margaret A. Atwater,

*Defendants.*

} Bill to Foreclose.

TO HIS HONOR, ABRAHAM O. ZABRISKIE, Esquire,  
*Chancellor of the State of New Jersey :*

HUMBLY COMPLAINING, showeth unto your Honor your orator, Philip R. Underhill, of the town of New Rochelle, in the county of Westchester, and State of New York, that on or about the eleventh day of January, in the year one thousand eight hundred and sixty-eight, William Atwater and Margaret A. Atwater, of the township of Harrington, in the county of Bergen, and State of New Jersey, became and was justly indebted unto 10

one Gaston Lemercier, in the sum of eight thousand dollars ; and being so indebted, the said William and Margaret A. Atwater in order to secure the payment of said sum of money, with interest, did make and execute, under their hands and seals and deliver unto Gaston Lemercier a certain bond or obligation, bearing date the same day and year last aforesaid, in the penal sum of sixteen thousand dollars, lawful money of the United States, with a condition thereunder written, that  
 10 if the said William Atwater and Margaret A. Atwater, their heirs, executors, or administrators, should well and truly pay, or cause to be paid, unto Gaston Lemercier, his executors, or administrators, or assigns, the just and full sum of eight thousand dollars, lawful money aforesaid in one year from the date thereof, with interest thereon at the rate of seven per cent. per annum, 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, refer-  
 20 ence being thereunto had, will more fully and at large appear.

And your orator further shows that the said William and Margaret A. Atwater 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 Gaston Lemercier, a certain indenture of mortgage, bearing date the same day and year last aforesaid, made by the said William and Margaret A. Atwater of the first part, and Gaston  
 30 Lemercier of the second part ; in and by which said indenture of mortgage the said parties of the first part did grant, bargain, sell, alien, release, enfeoff, convey, and confirm unto Gaston Lemercier, said party of the second part, his heirs and assigns, all the following described parcel of land, premises, situate, lying and being in the Township of Harrington, county of Bergen, and State of New Jersey, bounded and described as follows, viz. : Beginning at the south-west corner thereof, and the south-east corner of the land of Rachel Van Buskirk and  
 40 Bridget Banta, at the north side of the brook running

out of the Tappan meadow ; from thence, running  
 along the land of the said Rachel Van Buskirk and  
 Bridget Banta, north thirteen and three-quarter degrees ;  
 west twenty-seven chains and seventy-seven links ;  
 thence north thirteen and one-quarter degrees ; west  
 seventeen chains and seventy-three links to the public  
 road leading from Schraalenberg, to Tappantown ;  
 thence north forty-seven and one-quarter degrees ; east  
 three chains and six links ; thence north forty-one and  
 one-half degrees ; east four chains and sixty links ; 10  
 thence north thirty-two and one-quarter degrees ; east  
 four chains and fifty-three links ; thence north thirty-  
 two degrees ; east one chain and thirty-one links to the  
 northwesterly corner of the school house lot ; thence  
 south forty-eight and one-quarter degrees ; east one  
 chain and twenty-four links ; thence north fifty-eight  
 and three-quarter degrees ; east one chain and forty-  
 seven links to the public road leading from Tappan to  
 Closter ; thence south fourteen and one-quarter degrees ;  
 east thirty-four chains and five links ; thence south 20  
 twelve and three-quarter degrees ; east sixteen chains  
 and seventy-one links to the Tappan meadow brook ;  
 thence along said brook to the place of beginning, con-  
 taining sixty-three acres and eighty-three one-hun-  
 dredths of an acre of land, excepting therefrom the  
 following described plot, viz.: Beginning in the Tap-  
 pan meadow brook at the intersection of same with the  
 road leading from Closter to Tappan, running thence  
 along the said road north  $12\frac{3}{4}$  degrees ; west 16.71 chains ;  
 thence along the said road north  $14\frac{1}{4}$  degrees ; west 30  
 22.75 chains to a stake ; thence along other land of the  
 party of the first part south  $75\frac{1}{2}$  degrees ; west 98  
 chains to a stake ; thence south  $13\frac{1}{4}$  degrees ; east 41.58  
 chains to the aforesaid meadow brook at an Elm tree,  
 and thence along said brook to the place of beginning ;  
 containing without the road, 25 24-100 acres of land  
 more or less. Together with all and singular the tene-  
 ments, hereditaments, and appurtenances thereunto be-  
 longing or in any wise appertaining, and the reversion  
 and reversions, remainder and remainders, rents, issues, 40

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 part 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 Gaston Lemercier, the said party of the second part, his heirs and assigns, to his and their own proper use, benefit,  
 10 and behoof for ever: Provided always, and the said indenture of mortgage was therein declared to be upon this express condition, that if the said parties of the first part to the said indenture of mortgage, their heirs, executors, or administrators, should well and truly pay or cause to be paid unto Gaston Lemercier, or to 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  
 20 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 William Atwater and Margaret A. Atwater, before Peter T. Searing, Esq., a Master in Chancery of New Jersey, and duly recorded in the office of the clerk in and for said  
 30 county of Bergen, in Book V of Mortgages, page 72, on the thirteenth day of January, in the year one thousand eight hundred and sixty-eight, 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 the said Gaston Lemercier on the sixteenth day of March, in the year

of our Lord, one thousand eight hundred and sixty-eight, assigned the said bond and mortgage to your orator, Philip R. Underhill.

And your orator further showeth that eight thousand dollars, principal money mentioned in the said bond or obligation, and secured thereby, and by the said deed of mortgage with large arrears of interest still remains due and owing to your orator, no part thereof having been paid to your orator, so that your orator is greatly delayed and disappointed in the receipt of the said 10 monies, by means of which said several premises, the said deed of mortgage and the estate thereby mortgaged as aforesaid hath become absolute in your orator and his heirs. And your orator further shows that the said defendants, since the execution of your orator's said 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 still do receive the rents, issues and profits thereof. And your orator further shows 20 and expressly charges that the said mortgaged premises are a slender and scanty security for the payment of the said principal monies and arrears of interest so due to your orator as aforesaid, and that he or some other person or persons for him hath frequently and in a friendly manner applied to the said defendants, or one of them, and requested them or one of them to pay and discharge the said principal and interest monies so due to your orator on the said bond or obligation and deed of mortgage given by the said defendants, 30 and your orator well hoped that the said defendants or one of them would have complied with such reasonable requests of your orator, and would have paid to him the said principal monies and arrears of interest, so as aforesaid due to your orator 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 please your honor, that the said defendants combining and confederating together, and to, and with divers other persons at present unknown to your orator 40

but whose names when discovered he pray may be  
 10 inserted herein, and that they may be made parties  
 hereto, with proper and apt words to charge them how  
 to injure and aggrieve your orator in the premises and  
 to defraud him of the said principal and interest monies  
 so as aforesaid due to your orator on the said bond or  
 obligation and deed of mortgage hereinbefore men-  
 tioned, and assigned to your orator as aforesaid, some-  
 times give out and pretend, that although your orators'  
 estate in the said mortgaged premises, contained in the  
 mortgage to as aforesaid, may have become absolute at  
 20 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 of redemption and at other  
 times the said confederates pretend that the said mort-  
 gaged premises are charged or chargeable with other  
 incumbrances prior to your orator's said mortgage, but  
 when and to whom given, and for what consideration,  
 they refuse to discover; whereas your orator charge  
 and insist that if any such pretended incumbrances do  
 exist, they are fraudulent and void, and given for no  
 30 good or valuable consideration, or are paid and satisfied,  
 and kept on foot by fraud, to injure and aggrieve your  
 orator, and ought to be delivered up to be cancelled,  
 or declared to be of no effect against your orator who  
 had no notice of any such pretended incumbrances.  
 All which actings and doings of the said defendants,  
 and their confederates are contrary to equity and good  
 conscience, and tend to the manifest wrong, injury and  
 oppression of your orator. In tender consideration  
 whereof, and forasmuch as your orator has not a com-  
 40 plete 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 monies and arrears of interest so  
 as aforesaid due to your orator on the said bond or  
 obligation and deed of mortgage given to him as afore-  
 said, without the aid and decree of the Honorable  
 Court. To the end therefore, that the said defendants,

and their confederates when discovered, 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 are each of them thereto particularly interrogated according to the best of their respective knowledge, information, remembrance, and belief; and that the said defendants, or some one of them may be decreed to pay to your orator the said principal sum of eight thousand hereinbefore mentioned and expressed, and 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, and to grow due thereon, together with all your orator's costs and charges, both at law and in equity, 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 or either of them, may be foreclosed of and from all equity of redemption or claim of, in, and to the said mortgaged premises, and every part and parcel thereof with the appurtenances, and may deliver over unto your orator all deeds, demises, and writings whatever, relating to, or concerning 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 monies arising from the sale thereof, your orator may be paid the full amount of the said principal sum of money hereinbefore mentioned and expressed, and so due to your orator on the said bond or obligation and deed of mortgage assigned to your orator as aforesaid, and all the interest now due and to grow due thereon, together with all your orator's costs and charges both at law and in equity, 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 William Atwater and Margaret A. Atwater 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  
 10 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.

FREDERIC B. OGDEN,  
*Solicitor for Complainant.*

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The Joint and several Answers of WILLIAM ATWATER, and MARGARET A. ATWATER, defendants, to the Bill of Complaint of PHILIP R. UNDERHILL, complainant.

These defendants saving and reserving to themselves, and each of them, all and all manner of benefit or ad-  
 20 vantage of exception to the many errors, untruths, uncertainties, and other imperfections in said bill of complaint, contained for answer thereunto or unto so much thereof, as these said defendants are advised, is material for them, or either of them, to make answer unto. They severally answering, say, that they admit that the said William Atwater and Margaret A. Atwater, his wife, in the complainant's said bill named, did make and execute unto one Gaston Lemercier, an indenture of mortgage, of such date, and of such purport and effect as  
 30 in the complainant's said bill is mentioned and set forth, and these defendants further severally answering, say, that they deny that the said bond and mortgage in the complainant's said bill mentioned, have been heretofore duly or lawfully assigned by due form of law or otherwise, to the said complainant, as in his said bill is alleged, and herein and hereby expressly deny that the

said complainant has any right, title, or claim to the said bond or mortgage, to be sued upon, enforced, or brought in this Honorable Court.

And these defendants further severally answer and say, that they deny that the said principal money, together with lawful interest, or any part thereof, mentioned in said bond and mortgage yet remains due and unpaid, but charge the truth to be, that said bond and mortgage have long ago been paid off and satisfied, and ought to be given up to these defendants for cancella- 10  
tion from off the records. And these defendants further severally answering, say that they deny that the said estate morgaged has become absolute in the said complainant, subject only to the equity of redemption in this Honorable Court, or that the said complainant has any right, title, or claim, whatever to or upon the said mortgaged premises. And these defendants further severally answer and say, that at the time of the giving of the said mortgage in the complainant's bill referred to the said Margaret A. Atwater, was possessed 20  
and still is possessed in her own name and right of the said premises in the said bill of complainant named, and were her sole and separate property, and consented to the execution of the said mortgage, and did act really with her said husband, William Atwater, execute and deliver the said mortgage only as an act of friendship towards James B. Atwater, (a brother of said William Atwater) and in order to secure the payment of eight thousand dollars at the time of the giving of the said bond and mortgage, owned by the said James B. Atwa- 30  
ter to the said Gaston Lemercier, and no part of the said eight thousand dollars were ever received by either of the said defendants, nor did any other consideration, except the natural affection for the said James B. Atwater ever pass to the said defendants. And these defendants further severally answer and say that some- time in the month of March, A.D., eighteen hundred and sixty-eight, the said indebtedness of eight thousand dollars, which James B. Atwater owed to the said Gaston Lemercier, and which was the real consideration 40

of the mortgage as above stated, was paid off, and extinguished by Gaston Lemercier at that time, March, eighteen hundred and sixty-eight or thereabouts, buying out and taking possession of the stock of dry-goods, and property of the said James B. Atwater, by means of which said purchase and sale the said mortgage become paid off and satisfied, the said mortgagee receiving payment of the money, it was made to secure, and at that time agreeing to the cancellation of the same,  
 10 and this defendant, Margaret A. Atwater, further severally answering, says she denies, and this defendant, William Atwater, believes such denial to be true, all knowledge of any assignment of the said bond and mortgage to the said complainant or any one else, and charges that if the said assignment, as is alleged in said bill of complaint was made, it was done in violation of the rights of this defendant, Margaret A. Atwater, and after payment and satisfaction as aforesaid, and cannot be held as conveying, or in any way disposing of the  
 20 said bond and mortgage, or any right, title or interest thereunder to the said complainant. And these defendants deny all, and all manner of unlawful combination and confederacy wherewith they are charged, without this that there is any other matter, cause, or thing in the said complainant's 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 and avoided, or denied, is true to the knowledge or belief of these de-  
 30 fendants.

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 their reasonable costs and charges in this behalf most wrongfully sustained.

E. MERCER SHREVE,

*Solicitor for and of Counsel with the Defendants.*

New Jersey, ss. :

William Atwater and Margaret A. Atwater, the de-  
 40 feudants named in the foregoing, answer being duly

sworn according to law on their oaths depose and say that the acts, matters and things set forth and contained in the foregoing answer, so far as they relate to their own acts and deeds are true, and so far as they relate to the acts and deeds of other persons they believe them to be true.

Sworn and subscribed to before me the fifteenth day of June, 1869.	}	WILLIAM ATWATER, MARGARET A. ATWATER.	10
David Naugle, Commis- sioner of Deeds.	}		

This repliant, saving and reserving to himself all and all manner of advantage of exceptions to the manifold insufficiencies of the said answer, for replication thereunto saith, that he will aver and prove his said bill to be true, certain and sufficient in the law to be answered unto, and that the said answer of the said defendants is uncertain, untrue and insufficient to be replied unto by this repliant; without that,—that any other matter or thing whatsoever, in the said answer contained, material 20 or effectual in the law to be replied unto, confessed and avoided, traversed or denied, is untrue; all which matters and things this repliant is and will be ready to aver and prove as this Honorable Court shall direct; and humbly prays as in and by his said bill he has already prayed.

FREDERIC B. OGDEN,

*Solicitor for and of Counsel with Complainant.*

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Examination of witnesses, &c., in a cause depending in the Court of Chancery of the State of New Jersey, 30 wherein Philip R. Underhill is complainant, and William Atwater and wife are defendants, taken at the office of J. Harvey Lyons, in the City of Hoboken, on the 12th day of November, in the

year of our Lord one thousand eight hundred and sixty-nine, before J. Harvey Lyons, one of the Masters and Examiners of the said Court, in the presence of Frederic B. Ogden, Esquire, solicitor and of counsel for the said complainant, and of E. Mercer Shreve, Esquire, solicitor and of counsel for the said defendants, with whom is B. F. Watson.

The counsel for the complainant offered in evidence  
10 an assignment dated March 16th, 1868, made by Gaston Lamercier to Philip R. Underhill, of the bond and mortgage mentioned in the complainant's bill.

Objected to be received in evidence by the solicitor of the defendants, which said assignment is marked Exhibit No. 3 on the part of complainants. See page /.

The solicitor of the complainant also offered in evidence the bond and mortgage mentioned and set forth in the complainant's bill of complaint.

The solicitor of the defendants objected to the intro-  
20 duction of said bond and mortgage in evidence on the ground that said bond has been cancelled and the seals erased.

Which said bond and mortgage are marked Exhibits 1 & 2 on the part of the complainant. See page

PHILIP R. UNDERHILL, a witness produced on the part of the said complainant, being duly sworn according to law, deposed as follows :

I live at New Rochelle, Westchester county, in the State of New York. This bond and mortgage and assign-  
30 ment marked No. 1, 2 & 3 on the part of complainant belong to me. The bond and mortgage were assigned to me by Mr. Lemercier. There were two official acts about it ; first they were assigned to me as collateral. Then afterwards they became mine out and out. Sometime last summer, it was assigned as collateral for James B. Atwater's note and Mr. Gaston Lemercier's indorsement for \$4,000.

Defendants' counsel objects to the testimony by the witness concerning assignments and promissory notes without producing the papers.

At the time it was assigned as collateral, I paid to Mr. Lemercier \$4,000—the note for which the assignment was given as collateral has never been paid nor any part of it. I have paid Mr. Lemercier more money than the \$4,000—on that mortgage, I have paid him the balance of the mortgage. There is now due to me of principal on that mortgage \$8,000. The seals 10 were on that bond when I received it, so far as I know. I will tell you how they came off, I kept it in my iron safe which was so damp that I called the maker of it and he changed it. Many of my papers perished, they became wet and perished by the dampness. The place where seals are on papers seem to be the place most affected by the dampness. I never authorized any person to take the seals off that bond. That bond has never been paid and satisfied to me.

(Paper shown witness). This is the promissory note 20 for which the bond and mortgage were given to me as collateral security. This is the signature of James B. Atwater to this note, and the endorsement on the back of it is the signature of G. Lemercier. The complainant's solicitor offered the said promissory note in evidence.

Defendants' solicitor objected to the introduction of said note in evidence.

The note is marked Exhibit No. 4 on the part of the complainant. See page 30

I received this note from Mr. Lemercier in the winter of 1868, at the same time I received the bond and mortgage, I received all the papers together on the ground that this was given me as collateral. Mr. L. Underhill did the business for me; he is a relation of mine.

I let Mr. Lemercier have the balance of the mortgage over the \$4,000 this last summer. At the time I let him have the last payment of the balance on the

mortgage, I had no knowledge of an answer having been put in this case.

Q. At the time that note became due (marked Exhibit No. 4), did Mr. Lemercier give you his individual note at four months for \$4,000, as a further security for the payment of Atwater's note ?

A. It occurs to me he did. Mr. L. Underhill knows, he did the business, I don't.

*Being Cross-examined* the witness says :

- 10 I gave Mr. Lemercier \$4,000 for this note marked No. 4. I paid him in money or check, I don't recollect which, but I gave him the equivalent of it. I don't recollect where I paid it to him. I don't recollect whether I gave it to him personally, I gave it to him within two weeks. I could not say whether I sent it to him or met him. I cannot recall the transaction. I gave it to him within two weeks of the date of it, I suppose. I think the date of the note is in February 1868. Mr. Lemercier did not come to see me. Mr. Underhill wrote me. I have not Mr. Underhill's letter. I expect it is destroyed. I think it was destroyed. I look over my papers and when the thing is past, they then go to demolition. The negotiations about the bond and mortgage were carried on through Mr. R. H. Bowne, No. 9 Pine street ; he is a lawyer there. I have no recollection whether the money was paid at his office.

- 30 The note marked Exhibit No. 4 was not paid when it fell due. About interest, I don't know about that. I received no principal of that note when it became due ; don't know whether I received any interest. I waited on Mr. Lemercier and Mr. Atwater and his brother before it became due, to see about whether it would be paid, and if I could depend upon it. The best that could be done was done. I don't know what was done, except that Mr. Atwater was anxious to know if some friend of Mr. Lemercier's alluded to, could not be found to raise the \$4,000.

Q. At this time when the note became due, was not Mr. Lemercier's note given in lieu of it?

A. It was not given in lieu of it.

Q. Was it given in addition to it?

A. If it was given at all it was given in addition to it.

I have made two payments of money to Mr. Lemercier amounting to the face of the mortgage equivalent for the whole. The last payment I made him was some time during the summer; think it was in June, 1869. I forget about it, how I paid, or when I paid it; it was the equivalent for the mortgage, so that it became mine out and out, then Mr. Lemercier called on me.

Q. If you did not pay money but its equivalent, then what equivalent did you give, or what was that equivalent?

A. Mr. Lemercier will tell you better than I can. I don't recollect what it was, whether it was a check or money. I did not care so long as I became the owner of the bond and mortgage.

Q. Was it either check or money that you gave him?

A. Mr. Lemercier can tell you better than I can. I cannot recall the transaction.

Q. Did you act personally or through an agent in the negotiation of the bond and mortgage?

A. Personally and through Mr. Lindley Underhill both. I would write to him, Mr. Lindley Underhill, when I wanted any information without coming down to the city. Mr. Ogden is my solicitor in this cause. Mr. Bowne put me in communication with him. He officially disposed of the thing in that way.

*Re-examined in chief.*

A. That note which Mr. Lemercier gave me has not been paid. No note has been paid.

Q. What do you mean by saying that note was given in addition to the first note?

A. To have more time for the payment of the first note.

*Recross-examination.*

Q. Where is Mr. Lemercier's note which was given as last above referred to ?

A. If there is one—I am under the impression there was, but cannot say—it is with the papers. One thing there is about the first note, it was fully stamped, and the other note sets forth that the first one was fully  
10 stamped ; this note is in Mr. Ogden's possession with the papers I suppose.

Complainant's solicitor admits that this note is in his possession.

Defendants' solicitor asks for leave to inspect, or for an inspection of the same.

Complainant's solicitor refused such inspection until it shall be offered in evidence.

PHILIP R. UNDERHILL.

Sworn and subscribed before me, this 12th day of 20 November, 1869.

J. H. LYONS,

*Master in Chancery of New Jersey.*

LINDLEY UNDERHILL, a witness produced on the part of the complainant, being duly affirmed, deposes and says (he alleging himself to be conscientiously scrupulous of taking an oath) :—

My residence is at Elizabeth, New Jersey, at No. 154, Morris avenue. I am a clerk with Mr. Beard, No. 457, Broadway, N. Y. I was an agent and assistant  
30 therein, and cognizant of the transaction of this assignment of this mortgage from Lemercier to Underhill. I was clerk with Mr. Lemercier at the time of the transaction ; he stated to me he wanted some money.

I asked him what security he had to offer for it, and he produced the note of James B. Atwater (exhibit No. 4), in addition to which he produced as collateral security a bond and mortgage for \$8,000, of Margaret A. Atwater (the one produced here). I then wrote to Philip R. Underhill and stated the case to him; a few days after which Philip R. Underhill called on Mr. Lemercier at his office, 54, Howard street, N. Y. Mr. Lemercier then offered the note of James B. Atwater with the collaterals. Mr. Underhill stated that he 10 could accommodate Mr. Lemercier. I took the bond and mortgage to Richard H. Bowne, of the firm of Wetmore and Bowne; think he had charge of it. An assignment of the bond and mortgage was made to Philip R. Underhill. The bond and mortgage, and the note and assignment of the bond and mortgage, were left with Mr. Bowne, and a check was rendered or given over to me, I think by Mr. Bowne, less the discount. I don't think that it was Underhill's check that was given. I don't know whether it was or not. 20

Being shown Exhibits No. 3 and 4, he says:

These are the papers given at that time. That completed the transaction at that time. I know the Atwater's. I was in Mr. William Atwater's employ for four or five years; his place of business was at 54, Howard street, the same as Mr. Lemercier's.

At or about the time the note matured, I asked Lemercier if the note would be paid at maturity, as I had initiated the proceedings for Mr. Underhill I felt anxious to have it come out right. He said he did not 30 think it would be, and would like Mr. Underhill, to extend the time. I wrote to Mr. Underhill, stating the facts and position of the case, asking for further time. Mr. Underhill called in answer to my letter, and Mr. Lemercier asked for six months delay, at or near which time the mortgage would mature. Mr. Underhill wanted the time set so that he could know definitely

and depend upon it. Mr. Underhill granted the application, the securities to remain the same. Mr. Lemerrier gave another note, I think, then for \$4,000 for six months, there had been nothing paid on the other one at all. That's the whole story, I believe.

I had nothing to do with the payment or any payment on the mortgage after that.

I have had conversation with William Atwater in relation to the payment of this mortgage about the 10 time the second note matured. Mr. Atwater stated distinctly that the mortgage was a genuine mortgage, legitimate and *bona fide*; he said he would never oppose it after the mortgage became due. Mr. William Atwater has said nothing to me about the bond and mortgage.

*Cross-examined.*

Mr. Philip Underhill and I are cousins. At the time of the assignment I was in the employ of Mr. Lemerrier. I think Lemerrier commenced business for himself on the 5th of March, 1868. I think my engagement commenced with him as clerk at that time; his business was dealing in millinery goods at 54 Howard street, that same business had been previously carried on there; his immediate predecessor was James B. Atwater. James B. Atwater and the defendant are brothers I believe. I think Mr. James B. Atwater commenced the business there in the spring of '67; the predecessor of James B. Atwater was the assignee of William Atwater at the same place; previous to March 5th, 1868, I had been in the employment of James B. Atwater in the same capacity as I was subsequently with Lemerrier. James B. Atwater sold out there I think to Lemerrier. The books will show that, these books are not here. I think the sale was reduced to writing. Mr. Lemerrier bought that stock at 54 Howard street from James B. Atwater, in connection with other assets, and I think Mr. Lemerrier was to pay James B. Atwater's la-

bilities. There was not stock enough to pay his liabilities. Lemercier became then the owner of that stock, and sold it as any other stock; there was no sale of it separately; they got at the amount of that stock by taking an account of stock after the agreement was made, the account of stock was taken at the time; that was part and parcel of the agreement. It was known then what the stock was worth. I cannot tell the amount, that is a matter of record. Mr. Lemercier took the book debts and book assets. Mr. Atwater refused 10 to convey the property unless Mr. Lemercier would see him harmless in this matter. James B. Atwater had no interest in the business, although his name was used and he did not want any notes to be held against him, he wanted to be clear of all obligations, he appeared to be willing to help his brother William. The stock, book, debts and notes conveyed to Lemercier, if all good, would have been sufficient to pay James B. Atwater's debts. I don't know what in that bargain were considered the debts of James B. Atwater, I don't know that 20 the bond and mortgage marked No. 1 & 2, were considered paid by the transfer of the stock of James B. Atwater, I know that Lemercier did not agree to give this bond and mortgage up to James B. Atwater or William Atwater. I never heard James B. Atwater and William Atwater and Mr. Lemercier talk together about this bond and mortgage as to its having been paid. It was distinctly agreed at the time by Mr. Atwater and Mr. Lemercier, in presence of Mr. Johnson and myself, that the bond and mortgage should remain in Lemer- 30 cier's hands and possession; he was the owner of it until sufficient money should be realized out of the assets of James B. Atwater to Mr. Lemercier, to pay James B. Atwater's liabilities which he had assumed. I think the bond and mortgage were to be cancelled, provided enough had been raised from the assets of James B. Atwater to pay his liabilities, which Lemercier had assumed. I know it was understood and agreed that the mortgage should be retained as a security for these debts of Mr. Atwater's. Mr. Lemercier has made ef- 40

forts, abundant efforts to collect these book debts conveyed to him by James B. Atwater. I have written to them to come and pay up. There is more loss on these book accounts than the amount of this mortgage. I am not positive as to this.

Affirmed and subscribed before }  
me this 12th day of November, } LINDLEY UNDERHILL  
1869. }

J. HARVEY LYONS,  
*Master in Chancery.*

10

The further examination in this cause adjourned to Wednesday, 17th November, 1869, at 1 P. M.

The parties appeared before me, and further adjourned the said examination to Friday, 19th day of November at 12 o'clock noon.

November 19th.—The examination of witnesses in this cause was further adjourned to Saturday, the 27th day of November, instant, at 11 o'clock A. M.

20 November 27th, 1869.—The respective solicitors above named, and B. F. Watson appearing also for defendants as counsel, appeared before me, and examination proceeded.

GASTON LEMERCIER, a witness produced on the part of the complainant, being duly sworn on his oath, deposes and says :

I live in New York City. I don't do any business now. I live at 204 East 30th street, New York. I was in millinery goods, in business at 54 Howard street, in  
30 January 1868.

Being shown Exhibits 1 & 2 on the part of complainant, he says : In January 1868, I owned this bond and mortgage. They were executed to me by William Atwater and wife.

Being shown Exhibit 4, on the part of the complainant, he says : I owned that note ; James B. Atwater

gave it to me. I afterwards pledged the bond and mortgage and that note to Philip Underhill.

Being shown Exhibit 3 on the part of complainant, he says: I executed that assignment to Philip Underhill. At the time of the assignment I received from Mr. Underhill four thousand dollars. Exhibit 4 was not paid at maturity. When that note was not paid at maturity I went to Mr. Underhill.

Q. What did you and Mr. Underhill next do ?

(Question objected to by defendants' counsel). 10

A. Mr. Underhill said he would extend it, provided the interest would be paid.

(The answer was objected to by defendants' counsel).

I then gave my individual note for \$4,000 to Mr. Underhill.

(Note shown witness).

That is the note.

Complainant's solicitor then offered the note in evidence marked, Exhibit No. 5 on the part of complain- 20  
ant. See page

Q. For what purpose was this Exhibit No 5 given ?

(Objected to by defendants' counsel).

A. To secure the first one, sir.

Exhibit No. 4 on the part of complainant being shown witness, he is asked :

Q. What endorsement is that ?

A. Mine sir ; it is my handwriting, I endorsed it at the time I gave it to Mr. Underhill. The money on Exhibit 4 has not been paid to me. I was paid the 30 principal of the bond and mortgage by Mr. Underhill, at two payments ; first when I gave him the mortgage, \$4,000, and in June 1869, \$3,500.

Q. By the payment of that \$3,500 by Mr. Underhill to you, did you or not intend to transfer all the interest you had in that mortgage to Mr. Underhill?

(Objected to by defendants' counsel).

A. Yes sir ; I sold it to him for \$3,500.

*Being Cross-examined* by defendants' counsel, the witness says :

Q. Did you receive just \$4,000, and allow no discount?

10 A. No discount at all, sir ; it was just \$4,000.

Q. Who gave it to you, was it in check or money?

A. It was a check, sir. Mr. L. Underhill gave it to me. It was the check of Philip R. Underhill or his agent.

Q. Was the amount of that check entered in the books of your business?

A. Yes, sir.

Q. Have you those books present?

A. Yes, sir.

20 Q. How was the \$3,500 paid to you, and by whom?

A. It was paid to me by Philip Underhill by Mr. Bowne's check.

Q. Did you ever receive any cash on that check of \$3,500, or credit in any bank?

A. I received the cash.

Q. From whom, when, and what amount?

A. From the bank, I cannot name the bank ; it was in June, 1869 ; and the amount \$3,500. The bank was near Pine street.

30 Q. What bank ; name or describe it, and give exact date?

A. I believe it was a bank somewhere near Pine street ; I cannot specify the exact date, but I believe it was the 6th, it was the first part of June. The bank was on Broadway. I cannot give any more definite description. I believe it was near Pine street. The amount of that check was entered in my business books

at the time of the receipt of the money. Those books are here present. I believe they will disclose the use I put the \$3,500 to.

Q. Did you pay or return, either directly or indirectly, any part of that \$3,500 to Philip Underhill, or any person to his use?

A. Not a cent.

Q. Did you not know, at the time of the receipt of this \$3,500, that the defendants had refused to pay to Philip R. Underhill, his demand under the bond and 10 mortgage and assignment?

A. No, sir, I did not.

Q. Did you not then know that this action had been commenced?

A. No, sir, I did not. I only knew that Mr. Ogden was going to foreclose, to advertise it for sale. Mr. Ogden told me he was going to foreclose; he told me it would be advertised for sale.

Q. Did you buy out the business of James B. Atwater, at 54, Howard street, New York, on or about 20 March 5th, 1868?

(Objected to by complainant's solicitor).

A. I bought the business at that time.

Q. Are the books referred to by you hereinbefore, the same books used by James B. Atwater in his said business, and did you in your business continue to use the same books?

(Objected to by complainant's counsel).

A. Yes, sir.

Complainant's solicitor objects to any investigation made in reference to the business of James B. Atwater with the witness.

Q. Will you exhibit those books or such parts of any of them as relates to the consideration paid by you to J. B. Atwater for his business, and to the receipt and disposal of the \$4,000, and \$3,500 before testified.

The solicitor for the defendants offered the day-book, and ledger, and cash-book in evidence, and are marked Exhibits No. 1, 2. and 3 on the part of the defendants, on the request of the defendants' counsel.

A. I will produce them, and refer to day-book, pages 5, 14, and to cash-book, pages 2, 8, 10, 18, 20, 22, 32, 66 70, 31, 53, 67, 69, 71, and ledger, page 43, these pages refer to the consideration paid for the business; and relating to the \$4,000, cash-book, pages 76, 77; and as 10 to the \$3,500, pages 150 and 151, cash-book, and on the day-book, page 47, and bond and mortgage account, ledger, page 41, and the pages on other books therein referred to, and the foregoing are all the references in the books produced, so far as I know, relating to the question.

Q. Will you produce any books showing your deposits in bank or elsewhere of the \$4,000 and \$3,500 or any part of either?

A. Oh, yes sir; certainly, to be sure.

20 Q. Was there an agreement in writing passing from you to J. B. Atwater at the time of the purchase of his business?

A. I believe so.

Q. Have you got it and will you produce it?

A. Yes, sir, here it is. Agreement produced and offered in evidence by defendants' solicitor, marked No. 4 on the part of defendants. See page

Sworn and subscribed before me, }  
this 27th day of November, 1869. } G. LEMERCIER

30

J. HARVEY LYONS,  
*Master in Chancery.*

The solicitor of the complainant, here declares, that the testimony on the part of the complainant is concluded.

J. HARVEY LYONS,  
*Master in Chancery.*

Examination of witnesses, &c., in the above entitled cause on the part of the defendants, before me, Isaac Romaine, a Master and Examiner of said Court, at my office, No. 7, Exchange Place, Jersey City, N. J., on Wednesday, December 8th, 1869, at ten o'clock in the forenoon, in the presence of E. Mercer Shreve, solicitor for, and B. F. Watson of counsel with the defendants, and Frederic B. Ogden, solicitor of the complainant. The whole examination in chief being conducted by the counsel of defendants.

STEPHEN RITTER, a witness produced on the part of the defendants, being duly sworn on his oath saith :

I reside at 229 South Ninth street, Williamsburg. My present business is clerk. On the fifth day of March, 1868, I was in the employ of James B. Atwater, in the millinery business, No. 54, Howard street, New York.

Mr. Lemercier succeeded to that business immediately after J. B. Atwater. Prior to March 5th, 1868, I had been in Mr. J. B. Atwater's employ since the 1st of June, the year before. Mr. Lemercier had been around that place for two or three months prior to the 5th of March, 1868. He had been absent very seldom. Lindley Underhill had been in the employ of Mr. Atwater since I had been there, and up to March 5th, 1868. He then went in the employ of Mr. Lemercier. I did not. Mr. Lemercier bought out Mr. Atwater's business on or about March 5th, 1868. 30

I knew, prior to the purchase being made by Mr. Lemercier, that the trade was about being made. \*

I had conversation quite a number of times with Mr. J. B. Atwater about the consideration Mr. Lemercier paid him for the business.

All questions in relation to the consideration of the mortgage, or the business transactions between Lemer-

cier and James B. Atwater, objected to by counsel for complainant.

At the time of the purchase by Lemercier from J. B. Atwater, I knew of the existence of a mortgage for \$8,000 from William Atwater and wife to Lemercier. At about that time I learned the fact that Lemercier had loaned to the business of Atwater about \$8,000; I also learned the fact that this mortgage was collateral to that loan.

10 I also learned that the agreement of Lemercier with James B. Atwater, was that Lemercier should collect all Atwater's assets and pay all his debts, including the \$8,000 indebtedness. I learned this from Atwater, Lindley Underhill, and Lemercier.

At the time of the sale, I heard Lindley Underhill say, both before and after the sale, that it was the best thing that could be done for both the Atwaters; that James B. Atwater would be free from all debts, and could go into business again, and William's place  
20 would be free from incumbrance, and that now William should see and have the mortgage cancelled. This last was the day after the sale.

(This conversation objected to by complainant's solicitor).

At the time they drew this paper up, I told James B. Atwater to be careful and read the paper over well before he signed it. It was a paper containing the proposed terms of sale.

He came and went into the office and looked over  
\*30 the paper; he came out and said, I am not going to sign that.

I asked him what was the matter; he said he was nervous, and was going round to the hotel.

The reason he gave for not signing the paper was, that it left him to pay the \$8,000 and did not leave him clear.

He said he wanted a paper that would clear him from that mortgage and all his business debts, before he would sign it.

In consequence of his objection they drew up a new paper, which was the one he signed. I understood from Underhill, Atwater, and Lemercier that he was to be relieved from all his business debts.

I did not hear from any of the parties that the mortgage was to be retained by Lemercier for any purpose whatever. 10

I knew of the subsequent loan of \$4,000 obtained from Lemercier by Philip R. Underhill. I don't know that I ever saw Philip R. Underhill; Lindley Underhill was acting as agent for him.

This purchase was talked of and pretty well known in the store.

I expect to get away from the state by next Monday and be absent therefrom.

*And being cross-examined, he says:*

After Mr. Lemercier bought the business, I was not 20 in his employ. I was around the store for four or five days, then I left entirely. I was out and in the store up to the fifteenth, every day or two, trying to get a settlement.

Mr. Lemercier discharged me because he had as much help as he could get along with.

As near as I can recollect, it was a month before I left that I heard this mortgage was held by Lemercier as collateral.

I did not hear any conversation between Lindley 30 Underhill and Lemercier about disposing of the mortgage to Philip R. Underhill, but I did hear a conversation between them about disposing of the mortgage to other parties. I went once, about the 6th or 7th, with the mortgage for Lemercier to a friend of mine to see if I could get the money on it, as Mr. Underhill said it was merely a temporary thing (I mean Lindley), and Mr. Lemercier said he had a place in Europe, France,

I think, which he was going to sell, and he would have money and it would be paid off, and they were going on swimmingly; they were going in a larger business.

Q. At the time you went to your friend to see if you could get money on that mortgage, did you tell him that certain business arrangements had been made between James B. Atwater and Lemercier, by which that mortgage was to be considered as paid.

10 (Question objected to.)

I told him that Lemercier would pay it out of the business, that he would have money coming from the sale of his place in Europe, and this was merely held as collateral security, and Lemercier would pay it off. I heard Mr. Lindley Underhill say that William Atwater ought to have the mortgage cancelled, that was immediately after the sale. I cannot tell whether that was after or before Lemercier had been trying to raise money on it. I think it was the same time that I went  
20 to my friend to get money on the mortgage. I can't say that I heard either of the Atwaters even ask Lemercier for that mortgage so they might take it and get it cancelled.

Exhibit No. 4 on part of the defendants being shown, the witness says: I could not say whether that was the paper or not, although Atwater showed me a copy of the one he signed.

30 (Counsel agree that this is the paper that was finally signed by the parties, but cannot agree that it was the paper referred to by the witness, as he did not see the last paper).

I was present at the store when the last paper was executed. Mr. Johnson, Lemercier, both the Atwaters, and a man named Pierson, and myself, and Lindley Underhill were present in the store when that paper

was signed. I know nothing about either of the Atwaters asking Lemercier for the bond and mortgage at that time. I asked James Atwater to read the paper carefully before he signed it, because I did not want him to get into any trouble by which he would have anything hanging to his shoulders, and I told him to be sure and see that everything was in. After the sale to Lemercier, James and William were both about the store, at least I saw them there every time that I was there. James was hired at the rate of \$1,200 a 10 year by Lemercier. James B. Atwater was a clerk there when I left, hired to commence April 1st.

*And being again examined in chief, he says :*

I heard a conversation between Lindley Underhill and Lemercier about his obtaining this \$4,000 loan ; Mr. Lemercier made several attempts to get the loan, and finally succeeded in getting it of the complainant, who I understood to be a relative of Lindley. James B. Atwater had consulted me several times about the terms of his selling out to Lemercier, and it was dis-20 tinctly understood by him that he would not sell out unless he was relieved of all his debts and liabilities by Lemercier, including this \$8,000 mortgage debt. After he signed the paper, he said he was relieved and felt free again, and he said he could then go into business again. This attempt to obtain the \$4,000 loan commenced before the sale of Atwater, and continued after. I had been in the habit of going in and out of the store for a month or two after the sale. I think Lindley Underhill and myself were both trying to obtain the 30 loan at the same time.

*And being again cross-examined, he says :*

Q. Where did this conversation between Lemercier and Lindley Underhill, relative to the \$4,000 loan, take place.

(Question objected to).

A. In the store, No. 54, Howard street. Mr. Underhill and Lemercier were present. Mr. Underhill and myself were therē. It was talked of a great number of times. I couldn't tell you whether either of the Atwaters were in the store at any of the times when this \$4,000 loan was talked of.

*And being examined a third time, he says :*

I should judge the length of this store was sixty or seventy feet.

10 Taken, sworn to, and sub- }  
 scribed this 8th day of Decem- }  
 ber, A. D., 1869, at Jersey City, } STEPHEN RITTER.  
 before me, }

ISAAC ROMAINE,  
*Master in Chancery.*

WILLIAM ATWATER, a witness produced on the part of the defendants, being duly sworn on his oath, saith :

I am the husband of Margaret Atwater, and one of  
 20 the defendants in this suit. I am one of the grantors in the mortgage for \$8,000, referred to in this suit, my wife is the other defendant in this suit, and the other grantor in the mortgage. She is the owner in her own right of the property described in the mortgage. I was formerly in the millinery business in New York City, and afterwards transferred that business to Lemercier, as assignee, and Lemercier transferred it, as assignee, to J. B. Atwater. The transfer was made  
 30 about February 1st, 1867. J. B. Atwater carried on the business from that time until March 5th, 1868. During that time I was his principal managing agent, and during that time Mr. Lemercier had his office in the same store. I assisted Mr. Lemercier somewhat in settling up the assignee affairs. About March 5th, 1868, Mr. Lemercier bought out this business of J. B. Atwater, that was the day the transfer was made,

negotiations had existed probably two weeks before the sale was made. The negotiations for J. B. Atwater with Lemer cier were mostly conducted by myself. It was the same business and the same store that I transferred to Lemer cier as assignee, and that Lemer cier transferred to J. B. Atwater, and which J. B. Atwater sold to Lemer cier on or about March 5th, 1868. During the year 1867, Lemer cier loaned J. B. Atwater \$8,000 or \$10,000 between February and July. These loans were solicited by me, and made to me by Lemer cier on 10 behalf of J. B. Atwater.

Witness refers to ledger, folio 43, of J. B. Atwater's books, G. Lemer cier's account, and says :

I find the loans referred to credited there, 1867, as follows: February 20, \$3,500 ; September 10, 2,000 ; September 22, \$1,000 ; May 22, \$500 ; May 24, \$200 ; May 28, \$1,700 ; June 5, \$1,000 ; July, 18, \$500.

There are certain charges, during the same period, made against Lemer cier, including the year 1867, 20 amounting to about \$2,530. The present \$8,000 in suit was substituted for a former one of the same consideration. The first of these mortgages was given, I think, in July, 1867. Mr. Lemer cier was absent then, and the mortgage was given to his wife. It was given as collateral for a loan of \$8,000, included in the amounts I have just given, this was in accordance with an agreement made by Margaret Atwater and myself with Mr. Lemer cier. We gave a bond at the same time.

There was no other consideration for said mortgage 30 except that it was to stand as collateral security for Lemer cier's said loans to J. B. Atwater to the amount of \$8,000.

The first mortgage was exchanged for the present one because the interest clause was left out in the first one. It was exchanged the 10th or 11th of January, 1868, at Mr. Lemer cier's request ; he having returned from Europe in the meantime. There was no other

reason that I know of for cancelling the first mortgage and giving the other. The second mortgage had the same consideration expressed as the first one; there was no change. The first mortgage was cancelled. Margaret Atwater and myself received no other consideration whatever for that mortgage, except the accommodation to J. B. Atwater.

I made the sale to Lemercier of J. B. Atwater's property principally. I conducted the negotiation. The  
10 terms of that sale were, Mr. Lemercier agreed to buy the stock in that store, take the assets of J. B. Atwater's business, and pay all the liabilities. The assets included the book accounts, and the lease and transfer of the whole business, and he agreed to pay all the liabilities of J. B. Atwater in his business, which consisted of notes and open accounts and this \$8,000 indebtedness.

J. B. Atwater did not participate with me in talking of those terms, he was in the country. I consulted  
20 with him in regard to the sale before he came down, and at the time he came down to execute the terms of the sale. I don't know that J. B. Atwater had any conversation with Lemercier in regard to it.

The agreement was distinctly understood by Lemercier, and myself and brother, to be, that by this purchase, Lemercier was to pay every dollar of indebtedness including this \$8,000 mortgage. I don't remember of seeing an other paper, but I know my brother went out of the store, and I was told by Mr. Ritter, that he,  
30 my brother wanted to see me. I saw my brother, and he stated that under that agreement (the first one), he was not released in full. He insisted strongly that he should be fully released from all liabilities. I was present at the time of the execution of Exhibit No. 4 on part of defendant. That agreement was drawn with a view to release my brother from all liabilities, including the \$8,000 mortgage. It was so understood between myself and Lemercier. Myself and my wife understood by that agreement between J. B. Atwater  
40 and Lemercier, the \$8,000 mortgage was released, and

I so communicated to my wife. Mr. Lemercier must have so understood it, because it was one of the debts for payment of which the sale was made. I know Mr. Lemercier so understood it, by what he said at the time, and by what he has since said, that the mortgage debt was paid by that transaction. I think it was in the month of November, 1868, that I last heard Lemercier say that he considered that \$8,000 mortgage debt paid by that transaction. The \$8,000 for which that mortgage was given appears in J. B. Atwater's books, 10 in Mr. Lemercier's account, page 43, to the credit of Mr. Lemercier, and therefore to the debit of J. B. Atwater. At the time of the consummation of the negotiations for this sale of the store, Lemercier's account on J. B. Atwater, showed J. B. Atwater to be indebted to Lemercier, including this \$8,000 mortgage, to be \$9,000. I saw the books and knew that fact myself.

Q. Up to and at the time of the agreement to sell, was the entry, under date of March 4th, in J. B. Atwater's books to the debit of J. B. Atwater of \$11,465.57 20 for merchandise made.

A. By the books that entry was made the 4th of March. I did not see the books. I don't know.

Q. Was that entry made the last time you saw the books prior to the time you saw the entry itself?

A. No, sir. It was not made at any time prior to or on the 5th day of March, 1868, with my knowledge or consent. That charge of merchandise covers the stock of goods sold to Lemercier on the 5th day of March, 1868. It is the amount at which that stock was esti-30 mated at that sale.

Mr. Lemercier did not purchase that amount of merchandise from J. B. Atwater at any other time or in any other way than at that sale.

Prior to the completion of that sale, there was nothing by which Mr. Atwater could be debited to Mr. Lemercier for that amount. I am accustomed to books; that charge could not properly have been made there until after the completion of that sale. At the time of the completion of that sale, I, acting 40

for J. B. Atwater and Lemercier, understood that J. B. Atwater's books showed J. B. Atwater to be indebted to Lemercier over \$8,000. The agreement for the sale was intended to oblige Lemercier to assume that indebtedness, as shown by the books.

Q. Did the liabilities of J. B. Atwater, including the \$8,000 mortgage debt assumed by Lemercier as the consideration for said purchase and sale, nearly or quite equal or balance the estimated amount of assets 10 conveyed to Lemercier by J. B. Atwater by such sale?

A. The amounts about balanced the assets, exceeded by about \$200 or \$300.

Lemercier in the same agreement assumed to pay to himself, as assignee, from J. B. Atwater the sum of \$4,424.25.

Whereupon the examination was adjourned to Friday, December 10th, 1869, at twelve o'clock, M., at the same place. At which 20 time and place the examination was resumed in the presence of the counsel of the respective parties.

Lindley Underhill, to my knowledge, understood that that place was intended by Mr. Lemercier and me, as J. B. Atwater's agent, to cancel the original mortgage debt of \$8,000.

During the sale, I had several conversations with Lindley Underhill about it. He said it was the best thing they could do; that it was necessary to have 30 some money to carry on the business, and Mr. Lemercier was going to furnish it. This mortgage was talked of, and he knew that by the sale that mortgage was to be cancelled.

Before this sale was made, I had a conversation with Lindley Underhill; I told him about selling out to Mr. Lemercier, and that Mr. Lemercier agreed to buy the stock and the debts, book accounts, including this \$8,000 mortgage, and agreed to pay all his liabilities,

all J. B. Atwater's liabilities. He said it was the best thing that J. B. Atwater could do, and it was the best thing I could do, as it would release the mortgage of myself and wife in suit here.

After the sale was effected he made the remark to me, "Now you want to have your mortgage cancelled," referring to this mortgage. I don't know whether it was the day of the sale or the day after. It was after the negotiation with Philip R. Underhill for the assignment of this mortgage on a loan of \$4,000. 10

Lemercier and I were intending to go into business together; we had talked of it frequently. Lindley Underhill took an interest in having J. B. Atwater to sell out. The business would have had to be closed had it not been for this sale. J. B. Atwater was short of funds. Mr. Lemercier was also anxious to have that change effected; he made a proposition to buy.

Mr. J. B. Atwater refused to sell out his business unless all his business liabilities were paid off; he was very positive about it. I knew of the negotiations to 2) obtain this loan of \$4,000 of Philip R. Underhill; that loan was purely for Lemercier's benefit; Margaret Atwater and I had no interest in it whatever.

At the time of this sale of Atwater to Lemercier, I made no other condition whatever respecting that mortgage, except what I have before testified, except to have the mortgage cancelled.

I had no authority from Margaret Atwater to make any use of that mortgage, except its being cancelled subsequent to that sale. 30

Q. Did you have any conversation with your wife respecting this mortgage subsequent to the sale?

(Objected to).

A. I did.

Q. In the making and originally negotiating that mortgage, and in its payment, were you your wife's agent?

A. Yes, sir. Immediately after the sale to Lemer-

cier, I informed my wife how I had disposed of the mortgage, either that day or the day after.

Since the time I so informed her, I have not received from her any authority to act for her in assigning, transferring, pledging, or otherwise disposing of that mortgage.

After this sale Mr. Lemercier said to me, "Supposing these accounts are not all paid." I told him to hold the mortgage as security. It was not referred to in  
 10 any other manner before or after. This conversation was on the same day as the sale, just after Mr. Johnson was present. I don't think Mr. Underhill was present, because he afterwards told me I ought to have my mortgage cancelled.

About two weeks after, Mr. Lemercier wanted to raise some money; he spoke about using this mortgage; he said he thought he could get the money from Mr. Philip Underhill. He said that in the following month he expected \$15,000 in gold from the sale of  
 20 some property in Paris, and he thought he would pay off this \$4,000 loan. It was understood that this was to be paid out of his business. We talked of going in business together, and it was understood that when I could get a release from my debts we would go into business. We went to look at stores together. It was under this influence that I left this mortgage with Lemercier. He has made no offer to go into business with me since that time. There was no other consideration offered to induce me to leave that mortgage  
 30 there. I am positive that both of these arrangements to use this mortgage were subsequent to the completion of the sale from Atwater to Lemercier.

My wife knew nothing of these arrangements to allow Lemercier to hold or use this mortgage. She never authorized either of them. I think she first learned of it in December, 1868, at the time Mr. Lemer-

cier and Lindley Underhill gave me a paper for my wife to sign.

(Witness being shown a paper, says this is the paper I refer to).

(Said paper is offered in evidence and marked Exhibit No. 5 on part of defendants. See page ).

(Solicitor for complainant objects to the Exhibit being offered).

My wife did not sign that paper, she refused to sign 10 it. This took place on the day of the date of the paper as nearly as I can recollect, December 29th, 1868. That was the first time she was informed that the mortgage was not cancelled.

Lindley Underhill was acting as agent for Philip R. Underhill in the negotiation of the \$4,000 loan. I saw Philip R. Underhill there.

I was informed of the receipt of the money and the assignment of Philip R. Underhill. I was in the office when Lindley Underhill brought in the check. I saw 20 the check.

I can't tell the amount of money Lemercier received on the note, the amount of money Lemercier actually received was \$3,677.12, as appears in cash-book, folio 77 (Exhibit 3 for defendants), the amount of \$322.88 being paid by Lemercier as discounts.

Philip R. Underhill was not present at the time the money was paid over. Lindley Underhill paid it.

I first heard of a purported subsequent loan on that mortgage from Philip R. Underhill to Lemercier, on 30 the occasion of the taking of the testimony of the two Underhills in this cause.

Mr. Lemercier never spoke to me of selling that mortgage, or of having sold or disposed of it, or of receiving any money on it. I have no reason to

believe that he *bona fide* received any money on that purported loan of \$3,500.

During this time I was acting with Lemercier, preparing suits for him and transacting the old business.

About June 8th, 1869, the time of this purported loan of \$3,500, Mr. Lemercier was in embarrassed circumstances in his assignee account. I don't know about his private accounts. I know he had been embarrassed. If he had paid the \$3,500 on the assign-  
 10 ment I should have been likely to have heard of it. He was my assignee, and, as such, indebted to my creditors. He is still my assignee, and is still so indebted.

At the time of the purported loan of \$3,500, my wife and I had put in an appearance in this action.

Margaret Atwater did not personally authorize Lemercier, or empower me, as her agent, to authorize him to charge against Margaret A. Atwater compromises and loses of any kind whatever met with by  
 20 Lemercier in settling up J. B. Atwater's business, as shown on Lemercier's books, introduced as evidence in this case, ledger account of Margaret A. Atwater, folio 41, and the pages in the other books therein referred to.

I never informed her that any such an arrangement had been made.

I was not authorized by J. B. Atwater to make any such arrangements on his account, or to use, pledge or assign the mortgage on his account.

30 I think in some cases, Mr. Lemercier did not use due diligence in the collection of J. B. Atwater's accounts. I know he has collected claims against parties for his own individual business, against whom he has failed to collect claims due J. B. Atwater, due prior.

In day book, folio 24, the stock account is an account of the liabilities and assets of the new business of Lemercier, after buying out J. B. Atwater, the date is March 5, 1868. I find there among the liabilities, a mortgage debt of \$8,000, which is the debt in dispute.  
 40 I also find there, that Lemercier assumed to pay to him-

self, as one of the considerations of the purchase, a debt of \$4,424 25, as assignee of William Atwater.

I think the item of Mr. Goodman, of \$1,600 in said account, as well as \$100 for Formes Stetcher on the asset side, and an item of \$8,000 mortgage as assets, were not included in the transaction with J. B. Atwater, all other items in that account, both liabilities and assets were included in that transaction.

It was J. B. Atwater's note on which the \$4,000 loan was obtained under the assignment. I think I saw J. B. Atwater sign that note. Mr. Lindley Underhill said get J. B. Atwater's note—he thought he could obtain the money easier. It appeared as business paper. This note was dated back a month, and really signed about March 17, 1868, at the solicitation of Lindley Underhill. It was not a business note. It was an accommodation note. J. B. Atwater was not owing him a dollar, and did not receive a dollar's consideration. Neither Margaret Atwater or myself have ever received a dollar's consideration for the note. It was dated back 20 at the solicitation of Lindley Underhill.

*And being cross-examined, he says :*

After J. B. Atwater bought the property of the assignee, he did not take the property for my benefit. I remained there as clerk.

(Question objected to.)

After the sale, or about that time, J. B. Atwater did not to my knowledge, execute a paper to me, declaring that he was doing the business for me, and not for himself. I never saw such a paper. 30

(Question objected to.)

I had the first mortgage cancelled. I had several

conversations with Lemercier about this sale of Atwater to him, for two weeks before we were talking about it.

The first conversation that took place was, Mr. Lemercier made a proposition to me to buy out the business, and he agreed to take the property there, the stock, the bills receivable, and pay the liabilities.

In that conversation, it was stated that this mortgage was to be included in that sale, and was to be paid off.  
10 It stood on the books as J. B. Atwater's debt, and never was settled by the mortgage.

The conversation in November, 1868, between Lemercier and myself was: Mr. Lemercier was in embarrassed circumstances. He called on Mr. Watson to advise with him what to do. I called with him. He made a statement of his affairs to Mr. Watson, mentioned this mortgage of \$8,000 as holding it, and how he held it; stated that he had bought out J. B. Atwater and in that purchase this mortgage was paid,  
20 but that he held it as security for the payment of J. B. Atwater's debts. I don't know that I made any reply to that.

While I was making the arrangements for that sale I knew there were some debts due James B. Atwater which could not be collected; Mr. Lemercier knew it also.

I also knew there were some debts that were doubtful, Those debts are included in the amount for which the sale was made.

30 Q. Was there not an agreement made by you acting for your brother for the sale to Lemercier different from that which was finally executed.

(Question objected to).

A. There was not.

That paper, Exhibit No. 4, was delivered to Lemercier in the morning of March 5th, 1868, at about twelve o'clock; it may have been before.

The conversation between Lemercier and myself relative to retaining the mortgage unless the bills were paid was immediately after signing the paper before we left the office. Mr. Lemercier and Mr. Johnson were present at that conversation.

Q. When that mortgage was executed by yourself and wife did you tell her for what purpose it was wanted?

A. Yes, sir. I told her it was to secure Mr. Lemercier for money put into the business of J. B. Atwater. 10

My wife never inquired of me if that mortgage had ever been cancelled.

I never told Lemercier that I had no authority to act for my wife.

Whereupon the examination was adjourned to Saturday, December 11th, 1869, at twelve o'clock, M., at the same place. At which time and place the examination was resumed in the presence of the counsel of the respective parties. 20

When J. B. Atwater signed the \$4,000 note I presume he knew how it was to be used, he knew that it was to be used to raise money.

Q. At about that time did he say anything about the mortgage having been paid?

A. No, sir. At about the time he signed the note he did not say anything about it. It was about the time of signing the note, not the date of the note.

I do not think I ordered the charges against Mrs. Atwater made in the books to be made. 30

The charge against Margaret Atwater in Lemercier's

books, page 43 were not made by my orders that I recollect.

Q. How does that account on ledger folio 41 happen to appear in the name of Margaret Atwater?

(Question objected to).

A. That is an entry in Lemercier's books. It was entered there by the bookkeeper I presume.

Margaret Atwater had no business transactions personally with Lemercier; the business transaction she 10 had was about the mortgage.

After March 5th, 1868, I may have made charges in the book as losses against Margaret Atwater. If I did make such charges it was without my wife's knowledge.

Q. Referring to page 43, Atwater's book, Lemercier's account, did you not request Lemercier's bookkeeper to make the \$8,000 mortgage appear as a debit in this sale?

A. I have no recollection of anything of the kind.

Q. State in what cases Lemercier did not use due 20 diligence in collecting debts of Atwater (J. B.)

A. I can't recollect of any particular accounts now without reference.

Q. Were not a great many accounts placed in the hands of counsel in New York for collection?

A. Yes, sir.

There were some returned without the money being realized.

I think there were some returned without anything being realized on them.

30 The counsel employed to do that business were able, reliable men.

My wife has owned the property included in this mortgage about nine or ten years. I was at that time in business.

Q. With whose money was the property purchased?

(Objected to).

A. With my money.

When the contract Exhibit No. 4 was signed Mr. Lemer cier and Mr. Johnson were present. Mr. Underhill may have been present, I can't say for certain.

I left Mr. Lemer cier's store February 1st, 1869. From the time of the sale to Lemer cier by J. B. Atwater to February 1st, 1869, the time I left, the books were open to me at all times.

I knew of this account of Margaret Atwater being in the books.

*And being again examined in chief he says.*

10

Margaret Atwater did not know there were any accounts in those books against her, and she did not authorize me to allow it to be done.

I know of a paper having been given to Lemer cier by J. B. Atwater, which is probably the one referred to in the cross.examination. I do not recollect that I ever saw that paper, I never requested it to be made. I have not got the paper or a copy of it. I never had.

My wife never inquired of me if the mortgage had been cancelled, but I informed her that it was paid at 20 the time it was paid.

During the negotiations which resulted in the payment of the mortgage, I frequently consulted with my wife, and advised with her on the subject. She authorized me to sanction the payment of the mortgage debt in that way. There was not a word said upon the subject to my wife of repledging or assigning that mortgage before it was done, and she had no knowledge or intimation that it was to be done.

My wife had owned that property in her own right 30 for nine years, more or less, and had full authority to mortgage it to Mr. Lemer cier for \$8,000. My wife still owns that property.

If I had possession of Lemer cier's books, as assignee of J. B. Atwater, I think I could point out instances where due diligence had not been used in the collection of J. B. Atwater's claims.

Counsel and I, over a year ago, had a consultation,

in which it was proposed to put the whole accounts in the hands of a lawyer for collection, that was agreed to between myself and Lemercier, as being the best thing that could be done, but it has not been done.

I know that there are some of those debtors now carrying on business on their own account.

Taken, sworn to, and sub-  
scribed this 11th day of Decem-  
ber, A. D. 1869, at Jersey City, } WILLIAM ATWATER.  
10 before me, }

ISAAC ROMAINE,  
*Master in Chancery.*

JAMES B. ATWATER, a witness produced on the part of the defendants, being duly sworn, on his oath saith :

I do business in New York. My home is at Norwood, N. J. I am a brother of William Atwater, the defendant.

I purchased the business of William Atwater from 20 Lemercier, as assignee of William Atwater, in 1867, at 54, Howard street.

I carried on that business until March 5th, 1868, when I sold out to Lemercier. I still am employed in the same kind of business.

My brother, as agent for me principally, controlled and managed that business for me while I was proprietor.

During the time I was proprietor, I received a loan of \$8,000 from Lemercier, for which the mortgage in 30 question was given as collateral security, and up to the time of the sale that loaned money had not been repaid to Lemercier. That sale to Lemercier took place March 5th, 1868.

I had a conversation with Lemercier about the consideration of the sale to him, and a good deal of talk with my brother about it.

Mr. Lemercier proposed the sale to me. I think it may have been my brotraer, I myself did not move in

the matter. At that time I was owing Lemercier a good deal of money above the mortgage, and was embarrassed for means to carry on the business, and Lemercier knew it.

The consideration of the sale was, that Lemercier agreed to take it and pay off all liabilities connected with the business, it included everything, that was my understanding, and, so far as I know, it was his.

I won't say that the mortgage was spoken of to Lemercier at the time, but it was a debt of the business. 10 I had talked with my brother about my being released from the mortgage debt. There was a paper made out as a bill of sale, which I think did not release the \$8,000 mortgage debt, and I refused to sign it; there was another made out which it was understood by myself released me from all liabilities, including the mortgage debt. I think it was so understood by all. They all said that the last paper released me from all liabilities, including this mortgage; this was at the time I signed it. 20

(Exhibit No. 4 being shown the witness, he says, that was the paper I signed at the time, and I considered it released me from all liabilities, including the mortgage debt).

I was in New York about a week consulting about the terms of sale.

I carried out my part of the bargain, and made over all the assets of the concern to Lemercier.

I did not authorize or sanction any agreement that 30 myself or the mortgage should be liable for any discounts or losses Lemercier might meet with in settling up my accounts. That was not any part of the condition of sale, nor did I hear the subject mentioned until after I had completed the sale.

I never heard for months that Lemercier claimed to hold that mortgage to secure him against any losses in the collection of the J. B. Atwater's accounts.

I never authorized or sanctioned any assignment of that mortgage to secure to Philip R. Underhill the loan of \$4,000.

About two weeks after the sale, I signed a note for \$4,000 for Lemer cier's accommodation.

(Exhibit No. 4 on part of complainants being shown the witness, he says, that is the note I signed).

I am positive it was after the sale that I signed that  
10 note.

At the time I signed that note I did not owe Lemer-  
cier anything.

I received no consideration for signing the note, I did it purely for Lemer cier's accommodation. I never expect to receive any consideration for signing the note.

Mr. Lemer cier and I are on good terms, and I would do anything to accommodate him.

I was with my brother and his wife while the nego-  
20 tiations for the sale were going on, and talked with them about the mortgage being paid off by the sale.

The witness explains that, prior to the signing of the agreement for sale, he had a conversation with his brother about his refusing to sign the first agreement; his brother urged him to complete the sale, as it would release the witness from all liability and release his brother's place from incumbrance, and thereupon he executed the new agreement of sale.

(Conversation between the witness and his  
30 brother objected to by complainant).

Q. Did Mr. Underhill (Lindley) speak with you prior to the sale?

A. He did not, but he did after the sale. I don't recollect that he said it would be a benefit to me and my brother to have the place cleared. All I recollect

that he did say was that it was a good thing for me as it released me from my liabilities.

Lindley Underhill was a managing and active clerk under William Atwater, and after Mr. Lemercier came in I had nothing to do with the books while I was proprietor. I am not a bookkeeper, I always was a salesman.

*And being cross-examined, he says :*

I signed that bill of sale at 54 Howard Street. Mr. Lemercier, my brother, and Mr. Johnson were present 10 I think when I signed it.

Taken, sworn to, and sub- scribed this 11th day of Decem- ber, A. D. 1869, at Jersey City, before me.	}	JAMES B. ATWATER.
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ISAAC ROMAINE,

*Master in Chancery.*

Whereupon the examination was adjourned to Thursday, December 16th, 1869, at twelve o'clock, M., at the same place. 20 At which time and place the examination was resumed in the presence of the counsel of the respective parties.

MARGARET A. ATWATER, a witness produced on the part of the defendants, being duly sworn, on her oath saith :

I am the wife of William Atwater and one of the defendants in this action. I reside at Norwood in this State, upon the mortgaged premises involved in this suit, which I own in my own right. I have owned the 30 property about nine years. I consented to join in a mortgage in 1867 to Lemercier for money loaned J. B. Atwater, and did sign the mortgage.

That mortgage was made for the accommodation of J. B. Atwater for money loaned him by Lemercier, to

be used in his business. I received no consideration for that mortgage other than the accommodation to James B. Atwater. He was my husband's brother.

I heard of the sale of J. B. Atwater to Lemercier of the stock about March 5th, 1868. My husband, J. B. Atwater, and myself had a talk about the sale before it was made. I had considerable talk with James B. Atwater about the terms of the sale before it took place.

10 Q. State all that was said about the sale and the terms of it prior to the sale.

(Objected to).

A. I don't remember any of the conversation particularly, except the fact that James B. Atwater said he wouldn't sign off only to release the place from the mortgage debt; the place should be clear when he signed the paper, that affecting me particularly made me remember it. I understood also from my husband that that was to be one of the terms of the sale between  
20 Lemercier and J. B. Atwater, that the mortgage was to be paid off, and he had authority from me as my agent to accept payment of the mortgage, and discharge it in that way.

I did not at any time before the sale in any way authorize my husband to repledge or assign that mortgage or make any other use of it.

(Objected to by complainant).

I never heard before that sale that the mortgage was to be used in any other way.

30 I first heard that the mortgage had been or was to be repledged or assigned about a year ago when William Atwater brought a paper for me to sign.

Exhibit No. 5 for defendant being shown the witness, she says that is the paper which was brought me.

It was brought about the time it is dated. I refused to sign that paper.

I heard of the sale from J. B. Atwater to Lemercier at about the time it took place.

I was informed after the sale that the mortgage had been paid off by the sale.

Q. Have you ever at any time or in any manner given authority to any person to assign, repledge, or make any use of that mortgage after the payment of it, that you have testified to, or sanctioned any such as-10 signment, repledging, or other use of that mortgage?

(Question objected to).

A. I have not.

Q. Did you give your husband any authority to make any use of that mortgage after its payment as you have testified to?

(Objected to).

A. No, sir.

Q. Have you ever received any benefit or consideration in consequence of repledging or assigning that 20 mortgage?

(Objected to).

A. No, sir.

Q. Do you owe Philip R. Underhill, Lemercier, or J. B. Atwater, or either of them anything?

(Objected to).

A. No, sir, not to my knowledge.

Q. Have you yourself since the payment of the mortgage you have testified of, repledged, assigned, or made any use of that mortgage?

(Objected to).

A. I have not.

I have never myself allowed or authorized any person to allow Lemer cier to charge against me any losses incurred in settling up the business of J. B. Atwater.

I don't remember that I heard before the commencement of this suit that Lemer cier was charging against me losses incurred in settling up J. B. Atwater's business.

If I had heard of it I would have remembered it.

I have never given my husband any general authority to act for me in disposing of or pledging my estate. I had not given him any authority to dispose of or pledge my estate.

Taken, sworn to, and subscribed, this 16th day of December, A. D. 1869, at Jersey City, before me. } M. A. ATWATER.

20 ISAAC ROMAINE,  
*Master in Chancery.*

December 28th, 1869.—The counsel for the respective parties appeared before me, J. Harvey Lyons, and the counsel for the defendants' offered as a witness on the part of the defendants,

ROBERT A. WILLIAMS, who being duly sworn according to law, deposes and says :

I am salesman to Ira Beard, at No. 457, Broadway, New York City. I was formerly in the employ of William Atwater and J. B. Atwater, at 54, Howard street, New York, and afterwards in the employ of G. Lemer cier at the same place. I had no personal knowledge of the terms of the sale from J. B. Atwater to G. Lemer cier at the time of the sale. I know Lindley Underhill, he was a fellow clerk with me. I have recently had a conversation with Lindley Under-

bill with reference to the sale from J. B. Atwater to G. Lemercier, it was in the basement of 457, Broadway, about a month ago.

Q. What was that conversation?

(Objected to by the complainant's solicitor).

A. I don't remember the words particularly, but I asked him if the understanding of the business of the sale from J. B. Atwater to Lemercier was not, that this was to include the mortgage also as well as to include his other debts. He said that was the first understanding, but afterwards, that Mr. Lemercier was to hold the mortgage for the bad debts; that is the way I understood it.

Q. Do I understand you to say, that Mr. Underhill said to you, that at the time of the trade of the stock from J. B. Atwater to Lemercier, as a part of the consideration of that trade, Lemercier agreed to pay all J. B. Atwater's debts, including the mortgage debts, but that afterwards another arrangement was made, by which Lemercier was to hold the mortgage to secure 20 him for losses to him in the collection of J. B. Atwater's debts?

A. Yes.

(Complainant's solicitor objected to the question and answer).

I don't remember anything he stated in regard to the matter, except what I have stated.

By the expression "that was to include the mortgage also as well as his other debts," I mean that the first arrangement was, that Lemercier was to pay the mortgage as well as his other debts, as I understood Underhill.

Sworn and subscribed before }  
me, this 28th day of December, } R. A. WILLIAMS.  
1869.

J. HARVEY LYONS,  
*Master in Chancery.*

The defendants' counsel here declared their testimony to be concluded.

J. HARVEY LYONS.

The complainant then, in the presence of the parties, proceeded with rebutting testimony on the part of the complainant, and produced

HENRY C. JOHNSON, who being duly sworn on his oath, deposes and says :

I live at No. 184, Ninth avenue, New York. My  
10 business is a dealer in fancy goods, at No. 649, Sixth  
avenue. I was in the employ of William Atwater. I  
first went into his employ on the 1st day of August,  
1866, at No. 54, Howard street, New York, in the  
capacity of book-keeper. I ceased to be book-keeper  
in that building about the 1st of February, 1869. I  
was there at the time William Atwater made his  
assignment to Mr. Lemercier, and when Lemercier  
assigned and sold to J. B. Atwater, and when J. B.  
Atwater sold to Lemercier. From August 1st, 1866,  
20 to February 1st, 1869, I was principal book-keeper  
there. I had an assistant from the 1st of September,  
1868, to the 1st of January, 1869.

Q. Is the handwriting of the books which appear as  
Exhibits 1, 2, and 3 on the part of the defendants chiefly  
in your handwriting?

(Objected to as assuming that to be the fact,  
which is not in evidence, the defendants  
never having introduced the said books, but  
only specified parts of said books).

30 A. It is.

Q. State what those books are?

(Objected to by defendants' counsel).

A. Day-book ledger and cash-book used by J. B.  
Atwater in his business, and afterwards by G. Lemer.

cier in continuing the business. The assignment from William Atwater to Lemercier was made on the 13th of November, 1866.

Q. At that time, had William Atwater failed in business?

(Objected to by defendants' counsel).

A. He had.

Q. At the time that Lemercier, as assignee, sold the business to James B. Atwater, what was the financial condition of William Atwater? 10

(Objected to by defendants' counsel).

A. He was bankrupt as far as I know.

Q. At that time, had Lemercier, as assignee, succeeded in paying off William Atwater's debts?

(Objected to by defendants' counsel as to form and substance).

A. He had not.

Q. At that time, was William Atwater in such a solvent condition that he could carry on business in his own name. 20

(Objected to by defendants' counsel as to form and substance).

A. No, sir, he was not; William Atwater so informed me himself.

Q. In February, 1867, when the sale was made by Lemercier, assignee to J. B. Atwater, for whose benefit was that sale made?

(Objected to by defendants' counsel).

A. For the benefit of William Atwater.

Q. State all the facts you know in relation to that 30

sale, and how you know it was for the benefit of William Atwater.

(Objected to by defendants' counsel).

A. When the goods were offered for sale to various parties, the price bid was so very low that Mr. William Atwater and Mr. Lemercier thought it advisable to buy the stock for the benefit of William Atwater. Mr. Atwater (William Atwater), and Mr. Lemercier so informed me, and requested me to let my name be used  
 10 as proprietor to carry on business for the sole benefit of William Atwater; this offer was made to me twice, and I refused each time. William Atwater stated to me, if I did not consent to this arrangement the business would have to be carried on in his brother's name, J. B. Atwater; he did not wish it to be carried on in his brother's name, as it would not look well. That is the whole answer.

(Answer objected to by defendants' counsel).

Q. After you declined to have your name used, was  
 20 it or was it not proposed to you to use any other name than J. B. Atwater's in the business?

(Objected to by defendants' counsel as to form and substance).

A. I do not remember of any other name.

Q. When the sale was made to J. B. Atwater, did he, J. B. Atwater, pay anything for the stock?

(Objected to by defendants' counsel).

A. He gave two notes in payment.

Q. What became of those two notes?

30 (Objected to by defendants' counsel).

A. They were paid when due.

Q. After the sale to J. B. Atwater and before his sale to Lemercier, what position did he, J. B. Atwater, hold in that store ?

(Objected to by defendants' counsel as to form and substance).

A. He held the position as proprietor, and was paid a salary as a clerk.

Q. In what capacity did he act then ?

(Objected to by defendants' counsel).

A. Salesman.

10

Q. What amount of salary did he receive ?

(Objected to by defendants' counsel).

A. I think it was fifteen hundred dollars a year. I could tell definitely by referring to the books.

Q. Refer to the books and state from them what the amount was ?

(Objected to by defendants' counsel).

A. By referring to James B. Atwater's day-book, page 14, and ledger, page 36, I find him credited with a salary at the rate of \$1,500 a year.

20

Q. By whom were those entries made ?

A. By me.

Q. When were they made ?

A. At the time the date appears on the books.

Q. State what authority you had for making those entries.

(Objected to by defendants' counsel both as to form and substance).

A. They were made by direction of William Atwater.

30

Q. During the time the business was in the name of J. B. Atwater, who had the management and control of it?

(Objected to by defendants' counsel).

A. William Atwater bought all the goods and made all the credits, and acted as general superintendent.

Q. During that period did J. B. Atwater act in any other capacity in the store than as an ordinary salesman?

10 (Objected to by defendants' counsel as to form and substance).

A. Yes, sir. He signed and endorsed checks and notes and other papers for the business.

Q. By whose direction did J. B. Atwater sign checks and other papers referred to by you in the previous answer?

(Objected to by defendants' counsel both as to form and substance).

A. By direction of William Atwater.

20 Adjourned to Thursday, the 6th of January, 1870. Thursday, January 6th, the parties appeared before me, and by consent adjourned the said cause to the 12th of January, 1870. January 12th, 1870, the parties appeared before me and proceeded with the examination. Henry C. Johnson being further proceeded with in his examination on the part of the complainant.

30 Q. During the time J. B. Atwater's name was used as proprietor of that store, was any money borrowed for him from Mr. Lemercier—and about how much?

A. Yes, sir. There was about ten thousand dollars borrowed.

Q. Are those the sums which appear in J. B. Atwater's ledger, folio 43—G. Lemercier's account?

A. Yes, sir, those are the amounts.

Q. Was or was not any of that money used to pay the two notes given by J. B. Atwater at the time of his purchase?

(Objected to by defendants' counsel as to form and substance. 10

A. It was.

Q. Where did the balance of the money come from to pay those notes?

(Objected to by defendants' counsel).

A. From the sales of goods in the store.

Q. Were the books of account above referred to correctly kept by you as to the transactions that occurred, and the time of their occurrence?

A. They were.

Q. State what you know in reference to the sale of 20 the store from J. B. Atwater to G. Lemercier on the 4th and 5th of March, 1868, and what disposition was agreed to be made in relation to the \$8,000 mortgage?

A. On the 4th day of March Mr. Lemercier agreed to buy the stock of merchandise with William Atwater, and the price being determined on, Mr. William Atwater directed me to enter the sale on the sales book on that day; the object of this sale was to pay Mr. Lemercier the amount loaned by him to J. B. Atwater's business. J. B. Atwater was not present at that time. 30 On the 5th day of March J. B. Atwater came to the store, and was informed of the sale, but refused to ratify it. Mr. J. B. Atwater said he would not sell the merchandise unless the whole business was taken off his hands. He then left the store, and Mr. Lemercier came to me for advice. Mr. Lemercier said that

he would not assume the responsibility of the business unless he was guaranteed that he would meet with no loss. The face of the assets was about \$3,000 less than the liabilities. I told him, Mr. Lamerrier, that he had better pay \$3,000 more for the merchandise than the price agreed upon the day before, and to assume the business, provided William Atwater would let the \$8,000 mortgage before referred to remain with Mr. Lamerrier as a security for the collection of the assets.

10 Mr. William Atwater then came in and M. Lamerrier referred my proposition to him, and the following agreement was made between William Atwater and Mr. Lamerrier for the sale of the business.

J. B. Atwater was to make over to Mr. Lamerrier all the assets of his business, and Mr. Lamerrier was to pay all the liabilities of said business. The mortgage of \$8,000 being retained by Mr. Lamerrier as security for the collection of the book accounts and notes due to J. B. Atwater. When the bargain was completed, Wil-  
 20 liam Atwater called Mr. Lindley Underhill into the office and informed him of the terms of the sale substantially as I have given them. Mr. Underhill approved of it and asked Mr. William Atwater if he did not want some writing to show that Mr. Lamerrier held the mortgage as security. Mr. Atwater replied that he did not; that it was a matter of honor between him and Mr. Lamerrier, and that he thought that they could trust each other, besides he had Mr. Johnson and Mr. Underhill as witnesses to the bargain. Mr. William  
 30 Atwater then directed me to prepare a paper, transferring the business from J. B. Atwater to Mr. Lamerrier on the terms above stated. I prepared the paper, which being shown to J. B. Atwater met with his approval, and he and Mr. Lamerrier signed it. The paper marked Exhibit No. 4. on the part of defendants, being shown witness, he says that is the paper. That completed the matter of the sale.

(Defendants counsel objects to the last answer in all its parts where it gives the

inferences, or conclusions of the witness where it states facts not within the personal knowledge of the witness, and where it states conversations not in the presence of the defendants, and particularly that one between the witness and Lemercier or Underhill, and to all testimony of verbal statements of the terms of the bargain and sale made and concluded between Lemercier and J. B. Atwater by the paper already introduced in this case and marked exhibit No. 4, on the part of the defendant).

Q. For what amount was the merchandise agreed to be sold under the arrangement of the 4th of March.

(Objected to by defendants' counsel).

A. \$8,468.22.

Q. Who was present at the making of that agreement?

(Objected to by defendants' counsel).

A. Mr. William Atwater, Mr. Lemercier and myself. 20

Q. Who was present at the agreement made on the 5th of March between William Atwater and Lemercier?

A. Mr. William Atwater, Mr. Lemercier and myself. Mr. Underhill was called in at the conclusion and informed of it.

Q. Do you know Stephen Ritter?

A. Yes sir.

Q. Was he present at any of these conversations or at the time exhibit No. 4 on the part of the defendants was executed? 30

A. No sir.

Q. Was any other paper than Exhibit No. 4 on the part of the defendants presented to James B. Atwater to be executed by him for the sale of this merchandise or his interest in the store?

A. Not that I know of.

Q. When James B. Atwater came to the store on the morning of the 5th of March did you have any conversation with him in relation to the agreement of the 4th of March?

A. Yes sir.

Q. Was anybody present?

A. I think William Atwater was in the office at the time.

Q. State what that conversation was?

10 A. I told him that his brother had sold the stock of merchandise to Mr. Lemercier for the sum specified. He asked me whether Mr. Lemercier intended to assume his business. I told him he did not. Mr. Atwater said he would not sell the merchandise unless Mr. Lemercier took the whole business off his shoulders. That is the substance of the conversation as near as I can recollect.

Q. Immediately after that conversation did J. B. Atwater remain in the store or leave.

20 A. He left immediately, appearing to be much excited.

Q. When did he come to the store again?

A. When he came to sign the article Exhibit No. 4, on the part of the defendant.

Q. State as near as you can what time of the day of the 5th of March you drew up this Exhibit No. 4 on the part of the defendants and when it was executed?

A. I drew it late in the afternoon of the 5th of March and it was executed next morning.

30 Q. State how the charge of merchandise in G. Lemercier's account ledger, folio 43, of \$11,465.57 appears under the date of March 4?

(Objected to by defendants' counsel).

A. William Atwater sold the stock of merchandise on the 4th day of March and the sale was entered in the sales-book on that day by direction of William Atwater for the sum of \$8,468.22. This sale J. B. Atwater would not agree to when he came to the store on

the 5th. The merchandise was again sold on the 5th for the sum of \$11,465.57. The amount was altered on the sales-book to correspond with this but the date remained unchanged.

(The last answer objected to by defendants' counsel).

Q. By whose direction are these loses charged in the books to Margaret A. Atwater ?

(Objected to by defendants' counsel).

A. By direction of William Atwater. 10

Q. Refer to the day-book of G. Lemercier, page 33, and state in whose hand-writing the entry of August 13th is, and state what that entry is ?

(Objected to by defendants' counsel as to form and substance).

A. The hand-writing of William Atwater charging M. A. Atwater with loss by compromise on the account of Mrs. A. E. Burke.

(Answer objected to by defendants' counsel).

Q. Have all the liabilities assumed by G. Lemercier 20 in his purchase from J. B. Atwater for which the mortgage was held as collateral security been collected ?

(Objected to by defendants' counsel).

A. I cannot answer the question for it was not held as security for any liability. All the debts have not been paid.

Q. State what was done towards the collection of these debts, so far as you know, by Lemercier ?

A. Some of them were given to Attorneys for collection and some were tried to be collected without law-30 suit.

A paper being shown to witness, he is asked

Q. State what that paper contains ?

(Objected to by defendants' counsel).

A. It contains a list of the assets in J. B. Atwater's business remaining unpaid December 27th, 1869, and the amount of losses and expenses incurred in settling other accounts.

Q. In whose handwriting is that paper ?

A. In mine.

10 Q. From what are those items taken ?

(All questions and answers in reference to said paper objected to by defendants' counsel).

A. From the ledger of J. B. Atwater and G. Lemerrier.

(Complainant's solicitor then offered the said papers in evidence).

(Defendants' counsel objected to the introduction of the said paper).

20 (Paper marked No. 6. on the part of the complainant. See page )

Adjourned to Monday January 17th, 1870, at 12 o'clock.

Monday, January 17th, 1870, the parties, appeared before me and further adjourned the said cause to Saturday, January 22d 1870, at 11 o'clock, A. M. Saturday, January 22d, 1870, the parties appeared before me and proceeded with the examination of Henry C. Johnson on his direct examination.

30

Q. Are those assets enumerated in Exhibit No. 6,

on the part of the complainant a portion of those for which the \$8,000 mortgage was given as collateral security?

(Objected to by defendants' counsel as to form and substance).

A. They are.

Q. Since March 5th, 1868, have attempts been made to collect these assets?

(Objected to by defendants' counsel as to form and substance).

10

A. Yes, sir.

Q. By whom have they been made?

(Objected to by defendants' counsel as to form and substance).

A. By myself, William Atwater, and Lindey Underhill.

Q. From March, 1868, until the first of January, 1869, was William Atwater constantly in the store, and had he the liberty to examine the books of J. B. Atwater at all times?

20

A. He was in the store, and had free access to the books.

Q. Did he or not take an active part in trying to collect the assets?

A. He did.

Q. By doing what?

A. By frequently looking over the accounts, writing letters to the debtors, instructing me to write to different parties and make drafts for money on them, and he always decided which accounts should be given to 30 attorneys for collection.

Q. During the time of the attempts to collect those accounts did you ever hear him complain that Mr.

Lemercier was not using sufficiently active measures for their collection?

A. No, sir. I did not.

Q. In Exhibit No. 6, on the part of complainant, there appears a charge against Mrs. R. W. Perkins of \$1,156.17, did William Atwater ever give you any instruction in relation to the collection of that account, and if yes, state what it was?

10 (Objected to by defendants' counsel as to form and substance).

A. I consulted Mr. William Atwater a great many times about this account, and I urged him to give it to an attorney for collection. He always said he did not think it worth while, as he did not think he could recover anything from it, and he would have to pay the expenses. One time when she was on in New York buying goods I wanted her goods to be seized, but he did not think it best to do anything in the matter.

20 (Answer objected to by defendants' counsel).

Q. Do you know of any instance in the collection of those debts in which Mr. Lemercier did not use due diligence.

(Objected to by defendants' counsel).

A. No, sir.

Q. Who were the counsel employed in New York to collect such debts as were placed in lawyers' hands?

A. John H. Watson & Co.

30 Q. From your knowledge of those gentlemen are you not satisfied that proper endeavors were made by them to collect such assets as were placed in their hands?

(Objected to by defendants' counsel).

A. I am.

Q. Were not many claims placed in their hands returned, some as bad and some settled by a compromise?

(Objected to by defendants' counsel as to form and substance).

A. They were.

Q. Are they included in this Exhibit No. 6 on part of complainant?

A. Yes.

10

Q. From your knowledge of the assets remaining and set forth in Exhibit No. 6 on the part of complainant, and of the attempt made for their collection, what is your opinion as to their being good or bad?

(Objected to by defendants' counsel).

A. I think that nearly all if not quite all are worthless.

Q. William Atwater states in his testimony that Mr. Lemercier has collected claims against parties for his own individual business against whom he has failed to collect claims due J. B. Atwater prior—state what, if anything, you know about that matter?

A. I only know of two cases where J. B. Atwater and G. Lemercier held claims against the same party, in which Mr. Lemercier collected the full amount due him and not the full amount due J. B. Atwater. These two claims of Mr. Lemercier together amounted to less than \$50; in every other case where there was a loss on J. B. Atwater's accounts Mr. Lemercier also made a loss.

30

Q. In December, 1868, did you have any conversation with William Atwater in relation to this mortgage?

A. Yes sir. He told me then it was a *bona fide* mortgage, and it would not be disputed.

Q. In May, 1869, did you have any conversation with him about that mortgage?

A. Yes, sir. Mr. William Atwater was bargaining with Mr. Lemercier for the purchase of an account. I was present and figured out what the amount would be, and asked Mr. Atwater how he would pay for it, he answered charge it to my wife and take it out of the mortgage. Mr. Lemercier refused to comply with this, as the mortgage was more than covered by claims  
10 already.

(The question and answer before the last, and the last question objected to by defendants' counsel).

Adjourned by consent of counsel to January 28th instant, at 11 o'clock, A. M.

January 28th, 1870.—The examination was adjourned until February 4th, 1870, by me, on account of other business?

February 4th, 1870.—The parties appeared and pro-  
20 ceeded with the examination.

HENRY C. JOHNSON being recalled to the stand, was proceeded with in his direct examination.

Q. State what amount of the claims in Exhibit No. 6 on the part of the complainant you consider not to be worthless?

A. Less than one hundred dollars.

*Cross-examination of the witness by B. F. Watson.*

Q. Were you present during the cross-examination of Mr. Lemercier in this case?

30 A. I was.

Q. Did you hear Mr. Lemercier asked if he would

exhibit those books of his, or such parts of any of them as related to the consideration paid by Lemercier to J. B. Atwater for his business, and such parts as relate to the receipt and disposal of the \$4,000 and \$3,500 claimed to have been received from the complainant?

A. I heard the same in substance. I do not know the exact words.

Q. Have you any doubt that the last question is exactly like the one put to Mr. Lemercier on his cross-examination? 10

A. I have no reason to doubt it. I could not testify positively, for I don't remember the exact words.

Q. Did you, in aid of Mr. Lemercier in answer to said question, exhibit the part of the books called for by the question?

A. Yes, sir.

Q. Were you requested at the same examination, by counsel for defendants, to make a copy of such parts of said books as he had in said cross-examination called for, and furnish it to be used as an exhibit in this case 20 to avoid the inconvenience of removing and producing the books?

A. I was requested to make such copies for convenience. I do not remember about anything being said about their being used as exhibits.

Q. Will you say that you do not remember hearing anything said of the inconvenience of using the books as evidence, and the convenience of using copies of them?

A. Yes, sir, I heard of the convenience of using 30 copies of them. I understood that the books themselves were to be used as the real evidence, the copies being made to save the trouble of looking the books over so often. The copies were to be used as evidence.

(The portion of the answer of the witness giving his understanding objected to by defendants' counsel as not responsive).

Q. Did you present to counsel for defendants, in response to said request, the papers now placed in your hands?

A. Yes, sir, with others. The papers are identified by the letters J. H. L.

Q. Is the paper now shown you one of the others referred to?

A. It is identified by the same letters. It refers to the receipt of the \$3,500 by Mr. Lemercier from  
10 Philip Underhill.

Q. Did not the other paper presented by you to defendants' counsel, in answer to his request, contain extracts from G. Lemercier's books relative to charges against Margaret A. Atwater—a bond and mortgage account and nothing else?

A. It contained those accounts and the entries referred to in it, those entries being the items posted from other books of the same account.

Q. Were you ever requested by defendants' counsel  
20 to produce copies of entries in Margaret A. Atwater's account, or bond and mortgage account, to be used in evidence in this case?

A. I was.

Q. Were you ever requested to produce copies other than those referred to heretofore in this cross-examination; if so, when; give the language?

A. I was not requested to make copies of other than those referred to in the last question.

Q. Explain your last answer but one—the answer  
30 before the last?

A. I was to give copies of the accounts on certain pages in the ledger referred to in Mr. Lemercier testimony, and, to the best of my memory, everything of which I furnished, a copy was referred to in Lemercier's testimony.

Q. Did you not, in answer to the question herein before referred to as put to Mr. Lemercier in his cross-examination, calling upon him to exhibit such portion of such books as related to the consideration paid by  
40 him to J. B. Atwater for his business, and as related

to the loan of \$4,000 and \$3,500 ; yourself turn to pages in the day-book 5 and 14, and in the cash-book, pages 2, 8, 10, 18, 20, 22, 32, 66, 70, 31, 53, 67, 69, 71, ledger, page 43, and say the pages mentioned relate to the consideration paid for the business, and then turn to cash-book, pages 76 and 77, and say these relate to the \$4,000 loan, and then turn to page 150 and 151, cash-book, day-book 47, and say these relate to the \$3,500 cash loan ?

A. I did turn to the pages referred to, and did say 10 that certain of them referred to the \$4,000 and the \$3,500. I said that the others referred to the consideration for the mortgage. I do not remember saying that these entries showed the consideration paid for the business.

Q. Were you asked at that time, or at any other, by defendants' counsel anything about the consideration of the mortgage ; but were you not asked to show such portions as showed the consideration paid for the business ; and will you swear that in exhibiting the books 20 any mention of Margaret A. Atwater or the mortgage was made ?

A. I do not think I was asked as to the consideration of the mortgage ; as to the consideration for the business, I stated that I could not show entries in the books covering that transaction. The name of Margaret A. Atwater was not mentioned, but I turned to the page on which that account and the mortgage account were, and I think the defendants' counsel requested the numbers of those pages to be put down, 30 but cannot swear that he did so.

Q. To avoid the necessity of stopping to make any examination of said portions of said books called for, were you not then asked to make the copies referred to ; and, thereupon, was not said cross-examination proceeded with without any examination of said books or the pages referred to in them by defendants' counsel ?

A. I was requested to make copies of those pages, and the examination proceeded without any further examination of the books by defendants' counsel. I 40

explained to the counsel at that time the contents of the accounts referred to.

Q. Will you swear that any explanation, or information, or mention of the account against Margaret A. Atwater, or the bond and mortgage account was given by you or anybody during that examination within the hearing of the defendants' counsel?

A. Yes, sir.

Q. Were not the books containing said pages within  
10 your or Mr. Lemercier's possession and control up to the time of said cross-examination; and had not William Atwater been refused access to them?

A. They were in the control of Mr. Lemercier and myself, and Mr. William Atwater had access to them while he was in Mr. Lamercier's employ, but he has been refused access to them since that time.

Q. Other than you have now on this cross-examination testified of, has the defendants' counsel introduced  
20 any part of said books in evidence in this case?

A. Yes, sir.

Q. Have you been present during every part of each session held thus far in this case?

A. No, sir.

Q. How many sessions have you been absent from, and how many present at, as near as you can tell?

A. I think I have been present at all but one. I cannot say positively how many I was present at, but think from eight to ten.

30

(Defendants' counsel here claims to introduce and does introduce the copies of accounts identified by witness as the only evidence he has during this case attempted or intended to introduce from the books of G. Lemercier, J. B. or William Atwater, and asks that they may be numbered Exhibit 1, 2 and 3 on the part of the defendants' instead of the books aforesaid, which he claims are incorrectly numbered as defendants' exhibits 1, 2 and 3).

(The complainant's solicitor objects to the marking of these exhibits as Nos. 1, 2 and 3 on the part of the defendants, because the books above referred to have been already offered in evidence and marked as such Exhibits).

(For Exhibit No. 1, on part of defendants,' see page ).

(For Exhibit No. 2, on part of defendants,' see page ). 10

(For Exhibit No. 3, on part of defendants,' see page ).

Q. Was it not understood and agreed in the agreement made between Lemercier and J. B. Atwater, dated March 5th, 1868, that Lemercier should assume and pay the indebtedness of J. B. Atwater to him for borrowed money indicated in defendants' exhibit No. 1, credit side, of G. Lemercier's account?

(Objected to by complainant's solicitor).

A. Yes, sir. 20

Q. Was it so understood by Lemercier, J. B. Atwater William Atwater, yourself, and Lindley Underhill, according to your best knowledge and belief?

A. Yes, sir.

Q. Did you not as Mr. Lemercier's book-keeper, at the opening of his business as successor of J. B. Atwater, charge the \$8,000 mortgage debt upon Lemercier's books as a liability of Mr. Lemercier?

A. I did, sir.

Q. Was not that mortgage debt made up or composed of the aforesaid items on the credit side of G. Lemercier's account in J. B. Atwater's books in Exhibit No. 1, before referred to?

A. Yes, sir.

Q. Were not those items for money loaned J. B. At-

water by Lemercier at various times between February 20th, 1867, and the date of the mortgage.

A. Yes, sir.

(Adjourned by consent of counsel on both sides to Wednesday, 9th inst., at 11 o'clock, A. M.).

10 Wednesday, February 9th, 1870. The examination was further adjourned by consent of counsel on both sides, on account of the sickness of the witness Johnson, to Feb. 19th, 1870, at 11 o'clock, A. M.

Feb. 19th, 1870, the parties appeared before me, and B. F. Watson, proceeded with the cross-examination of the witness, Johnson. Henry C. Johnson being called to the stand was proceeded with on his cross-examination.

Q. Do you remember whether the amount paid by Mr. Lemercier to J. B. Atwater on the 20th day of February, 1867, was in bills or check?

A. I don't remember.

20 Q. Do you remember its amount?

A. No, sir.

Q. It is represented in the account to be \$3,500, do you remember whether or not it was deposited in bank at or about that date, and when and for what purpose it was all drawn out?

A. I do not recollect what was done with that identical sum.

30 Q. Have you such present recollection of the amount of cash paid to J. B. Atwater by Mr. Lemercier on the 10th day of April, amounting to \$2,000, or that paid on the 22d day of April, amounting to \$1,000, or that paid on the 22d day of May, amounting to \$500, or that paid on the 24th day of May, amounting to \$200, or that paid on the 28th day of May, amounting to \$1,700, or that paid on the 4th day of June, amounting to \$1,000, or that paid on the 18th day of July, amounting to

\$500, or that paid on the 25th day of January, 1868, amounting to \$300, or either of said payments, so as to be able to swear whether they were received in cash or check; whether they were deposited, and when, in J. B. Atwater's bank, when they were drawn out, and to whom paid?

A. I cannot remember the particulars of either of them.

Q. Was it not the custom to deposit all of said moneys with other moneys received in J. B. Atwater's business in J. B. Atwater's bank daily to his credit?

A. Yes, sir.

Q. Did not Mr. Lemercier allow or pay to the plaintiff as a discount or interest on the purported loan of \$4,000 a greater amount than seven per cent. per annum, if yes, what amount as near as you can remember?

A. Mr. Lemercier only paid Philip Underhill seven per cent. interest. There was a commission of \$250 paid Lindley Underhill for negotiating the transaction.

Q. Did you enter the transaction in the books of J. B. Atwater at the time of its occurrence?

A. I entered the transaction.

Q. Did you in said books anywhere in connection with said transaction make any entry of money paid or allowed to Lindley Underhill?

A. Not in connection with his name.

Q. Did you not in entering said transaction credit cash account with \$3,677.12 and debit said account 30 with the amount of \$4,000?

A. No, sir. I made no such credit entry, but made such debit.

Q. Was not the credit entry you made \$322.88?

A. It was about that amount, I don't exactly remember the figures.

Q. Was not that item of credit made under the head of interest and allowance?

A. It was.

Q. Was not the note given for said loan renewed? 40

A. Yes, sir.

Q. At said renewal did not Mr. Lemercier pay or allow for six months' interest on the amount of said note the sum of \$240 ?

A. I do not remember.

Q. Were you directed and did you make an entry of the payment of interest on said renewal ?

A. I made an entry, but I do not remember of the amount of it.

10 Q. According to your best recollection did you not enter said amount at \$240 ?

A. I have no recollection whatever of the amount, but upon examination of the cash book I find such an entry.

Q. In keeping the books for G. Lemercier, Mr. William Atwater, J. B. Atwater, were you instructed by them, or either of them, as to the form of entries in the books as to the designation of accounts, or as to the language used in said entries in any single case  
20 that you can now remember of ?

A. Not in any particular case that I can now remember, although I was instructed to use such forms generally.

Q. Were you at the time referred to in the last question a professional bookkeeper, and were you by said parties so employed ?

A. Yes, sir.

Q. Were either of said gentlemen, your employers, professional or expert bookkeepers ?

30 A. Yes, sir. William Atwater professed to be an expert bookkeeper.

Q. What, if any, orders or directions do you now remember receiving from William Atwater as to the designation or language of any charges or accounts in the books of J. B. Atwater different from what you would have made said entries without such interference ?

A. I do not know that I made any objection to the mode of keeping J. B. Atwater's books ; it was Wil-  
40 liam Atwater's books that I requested to keep differ-

ently. I refer to the time before J. B. Atwater assumed the business.

Q. Did you not in J. B. Atwater's books, when charging cash to him drawn for personal account, use the language "for services," and in the same books, when charging William Atwater for money drawn for personal use, use the language "for salary?"

A. I don't think I used either of the terms in that connection. I simply used the words, on account.

Q. Did you not use the language, "J. B. Atwater for 10 services" to date, \$625, and use the language, "J. B. Atwater for salary to date," \$750, in keeping your accounts for J. B. Atwater?

A. Yes, sir, I did.

Q. Did you not use the same or similar expressions, "for salary," "for services," in J. B. Atwater's books for money paid to William Atwater for personal use and credits given to William Atwater for services?

A. Yes, sir, I did.

Q. Did you not in J. B. Atwater's books, in the 20 account of William Atwater closing March 5th. 1868, and containing a debit of \$904.17, credit William Atwater by expense account for services rendered J. B. Atwater the sum of \$500?

A. I did.

Q. At what rate was the salary of William Atwater estimated per annum while he was employed by J. B. Atwater: was it not \$3,600?

A. It was to the 1st of January, 1868.

Q. What, if any, change in said salary was made for 30 the time included between January 1st. 1868 and March 5th, 1868?

A. It was at the rate of \$3,000 a year.

Q. When was that change made?

A. I cannot state exactly.

Q. Were you present at any time after the date of the commencement of this action when any money was paid by the complainant to Mr. Lemercier on account of the mortgage in question, if so, when was it and where was it, and who was present.

A. I cannot tell, for I do not know when this action was commenced. I do not know the date of the commencement of this action. I was not present at any time when money was paid by Philip Underhill to Mr. Lemercier.

Q. Did you receive and deposit in bank the sum of \$3,500 purporting to have been paid to Mr. Lemercier on said mortgage. If yea, in what was it when received and where deposited?

- 10 A. I received from Mr. Lemercier on the 8th day of June, 1869, some money in bills which he represented came from Philip Underhill. I think the amount of cash he put into my hands amounted to \$2,600, of which I deposited in the People's Bank, corner of Canal and Thompson streets, on that day, \$2,500. The balance of the \$3,500 Mr. Lemercier said he had loaned to some friend of his, which sum was paid to me about one week afterwards, and I deposited on June 15, \$1,790 of this money in the same bank. The balance of the  
20 money was used for store expenses.

(Adjourned to Saturday, 26th, 1870, at 11 o'clock, A. M.).

March 11, 1870.—Examination resumed by consent of both parties and all present.

HENRY C. JOHNSON was proceeded with on his cross-examination by B. F. Watson,

Q. Do you remember a payment by Mr. Lemercier to one Mr. Goodman on or about the 8th day of June, 1869, of \$210?

- 30 A. No sir, I do not.

Q. Do you remember of such an entry on your cash book, made by yourself?

A. I do not remember this particular entry. On referring to the book I find I made such an entry.

Q. Do you know for what that payment was made to said Goodman?

A. I do not know directly. I understood it was for borrowed money. I understood it from Mr. Lemercier.

Q. For what amount of borrowed money?

A. I do not know.

Q. State according to your best recollection what he said the amount was?

A. I do not think he mentioned any other amount than the \$210.

Q. Had not Mr. Goodman formerly loaned \$1,600 to Mr. Lemercier? 10

A. I cannot tell without referring to the books.

Q. Did you not enter that amount among the liabilities of G. Lemercier on assuming the business of J. B. Atwater?

A. Yes sir.

Q. Was not that for money loaned to Mr. Lemercier on or about March 3d, 1868, afterwards paid May 3d, 1868, by Lemercier?

A. I do not remember. On referring to the books I find it was paid on May, 9th. 20

Q. Can you now tell from referring to any entry heretofore made by you what the \$210 before inquired of was paid by Lemercier to Goodman for?

A. No sir, I do not think there is any other reference to it than the one stated.

Q. Had the \$1,600 loan before testified of, anything to do with the trade between Lemercier and J. B. Atwater on or about March 4th, 1868?

A. Not that I know of.

Q. Please to give me the amount of the assets of G. Lemercier as made up by you in his books on the opening of his business as successor to J. B. Atwater after deducting the entry bond and mortgage of Margaret A. Atwater to G. Lemercier due January 13th, 1869, \$8,000, day-book, folio 24? 30

A. \$28,384.34.

Q. Please to give me the amount of Lemercier's liabilities as made up by you at the time and in the account referred to in the last interrogatory, after deducting the entry to "Mr. Goodman this amount due 40

him \$1,600," and the entry, "To stock account for balance, \$6,173.64" ?

A. \$28,610.70.

Q. Was not the amount fixed upon and entered in books by you on date of March 4th, for the merchandise on the first floor of J. B. Atwater's store stated at \$11,798.82, and taken at \$8,896.76, and on the basement floor stated at \$7,706.42, taken at 2,568.81, making an aggregate of amount the stock was taken at by Lemer-  
10 cier of \$11,465.57 ?

A. Yes, sir.

Q. When in an answer to a former interrogatory, you answered that the sale by Lemercier, assignee to J. B. Atwater for the benefit of William Atwater, did you only intend to give your opinion that William Atwater would be benefited by any profits which might arise from said business ?

A. No, sir, I mentioned it as a fact.

Q. When William Atwater failed in business to  
20 whom was his stock assigned ?

A. To Mr. Lemercier.

Q. Did Mr. Lemercier for a while, as assignee, carry on said business, if so how long ?

A. He carried on the business for nearly three months.

Q. During that period when Lemercier, assignee, owned the business, who was his principal business manager of said business ?

A. I think William Atwater was.

30 Q. Have you any doubt of that fact ?

A. No, sir.

Q. Was William Atwater a clerk to Lemercier, as-  
signee ?

A. Yes, sir, I believe he was.

Q. Did you open and keep books for, and in the name of, G. Lemercier, assignee ?

A. Yes, sir.

Q. To whom did G. Lemercier, assignee, sell said business, and when ?

A. He sold the stock of goods and stand to J. B. Atwater in February, 1867.

Q. Were you present at the sale?

A. Yes, sir.

Q. Was there an account of stock taken, and a bill of sale made by Lemercier?

A. Yes, sir.

Q. Did you write the bill of sale?

A. Yes, sir.

Q. Did you immediately thereupon open and there-<sup>10</sup> after keep for and in the name of J. B. Atwater all the transactions of said business up to the fourth day of March, 1868.

A. Yes, sir?

Q. Were Mr. Lemercier and Lindley Underhill familiar with the facts that said business transactions were carried on in the name of J. B. Atwater?

A. They were.

Q. During said period to whom did you give credit for money paid yourself and the other employees of the <sup>20</sup> concern for services?

A. I gave the credit to cash in J. B. Atwater's books.

Q. To whom did you take a receipt during said period for the payment of rent?

A. Received from J. B. Atwater.

Q. During said period were any bills payable given, if so by whom were they signed?

A. They were given and signed by J. B. Atwater.

Q. Was there any borrowed money, if so, whose note or due bill, if any, was given for it, and whose, if <sup>30</sup> any, for any purchases made?

Q. There was borrowed money, but I do not think there was any notes given for it. The notes given for purchases were signed by J. B. Atwater.

Q. In whose name was the money borrowed referred to in your last answer?

A. J. B. Atwater.

Q. In whose name was the bank account of said business, if any kept?

A. In J. B. Atwater's name.

Q. Who invariably signed the checks ?

A. J. B. Atwater.

Q. To whom did J. B. Atwater sell the business ?

A. Mr. G. Lemercier.

Q. Was it by an instrument in writing, and under seal, and written by yourself ?

A. Yes, sir.

Q. And immediately upon said sale of J. B. Atwater to G. Lemercier on or about March 4th, 1868, did you  
10 open and then after, in the name of G. Lemercier, keep the books of said business ?

A. Yes, sir.

Q. How long did Lemercier continue said business ; and why, if you know, did he cease to carry it on ?

A. He carried on the business for nearly a year, and ceased because he was unable to continue business.

Q. Do you mean that he failed ?

A. Yes, sir.

Q. During said period, who was Mr. Lemercier's  
20 principal business manager ?

A. William Atwater.

Q. For said services, was he paid the same salary as formerly by J. B. Atwater ?

A. No, sir, the amount was less.

Q. How much less, and when was it changed ?

A. The amount was less than when he commenced with J. B. Atwater, and the same as when he closed with him.

Q. Prior to the sale, on or about March 4th, had not  
30 negotiations tending to said sale for some time before been going on between the parties ?

A. I do not know how long negotiations had been going on, as I was absent from the store till only a few days previous.

Q. Where were you when absent, and how long before said sale did you return to the store ?

A. I was confined to the house by sickness for about three weeks, and returned to the store about one week before the sale.

40 Q. Were not negotiations for said sale going on for

most of said week referred to in your last answer?

A. I believe they were.

Q. At the time of said negotiations and sale, was not J. B. Atwater residing with his brother William Atwater on the premises covered by the mortgage in suit?

A. Yes, sir.

Q. What proportion of the bills payable and checks issued in the business of J. B. Atwater were signed when William Atwater was present in the store or on 10 the premises.?

A. I cannot say.

Q. Have you any means of fixing it?

A. No, sir.

Q. When was the first time J. B. Atwater was in the store or on the premises after your return to business from sickness?

A. I do not remember.

Q. Are you able to say that he was not daily in the store during the three weeks prior to your return to 20 business?

A. I know nothing of his whereabouts during that time.

Q. Are you able to say that he was not daily in the store or on the premises during the week prior to said sale?

A. I know he was not there on the day when the first bargain was made between William Atwater and Mr. Lemercier. I do not know whether he was there on the other days or not. 30

Q. What time did you go to the store, and at what time did you leave on the day referred to in your last answer?

A. I do not remember what time I arrived there on that day, but I left about dark in the evening.

Q. Are you able to say what portion of that day, if any, you were absent from the store?

A. I was absent about half an hour at noon.

Q. Do you fix the time from memory, or by reasoning from your custom? 40

A. I do not specially remember the fact.

Q. Are you then willing to swear positively the length of time you were absent from that store on that day?

A. I am certain I was not absent from that store that day more than one hour between the hours of ten in the morning and five in the afternoon.

Q. How are you able to swear positively to a fact that you have sworn you don't remember?

10 A. Because my going out of the store during business hours, except for lunch, was of such rare occurrence, that I would be certain to remember it if I had gone out.

Q. You are willing then to swear positively to a fact which you have sworn you do not remember, because you reason such to be the fact, are you?

A. I swear to the best of my knowledge and belief.

(Answer objected to as not responsive).

Question repeated.

20 A. I did in this case.

Q. Can you positively state from memory who, if any, of the persons usually employed in said store were absent on said day, and how long, if at all, they were absent?

A. I can state positively as to J. B. Atwater, but as to the others I cannot state positively whether they were present or absent.

Q. What day of the week was that?

A. I do not remember.

30 Q. When did you first undertake to remember the incidents of that day?

A. I cannot say exactly, but it was some time afterwards.

Q. Since the commencement of this suit?

A. No, sir, it was long previously; as near as I can now recollect, I conversed about it sometime December, 1868.

Q. Are you willing to swear positively to the lan-

guage between Lemercier and William Atwater on that day with reference to the sale of said stock, and the order in which that language was used?

A. I do not remember the exact words used.

Q. Was there any writing made between the parties at that conversation?

A. None that I know of.

Q. Was J. B. Atwater's name used during that conversation?

A. Yes, sir.

10

Q. Was there anything said about releasing him from his liability from the mortgage debt, or anything with reference to the mortgage debt?

A. Yes, sir, the sale, if completed, would pay the debt.

Q. Are you able to give the conversation that occurred that day on the subject in the exact order in which it occurred?

A. No, sir.

Q. What was the first thing on that subject which you heard either of the parties say, and which said it, on that day?

A. I cannot tell exactly.

Q. How long did that conversation continue?

A. I cannot say.

Q. Did any one excepting William Atwater and Lemercier join in it, if so, who, and what did he first say?

A. I do not remember that any one else joined in that conversation while I was there excepting William Atwater and Lemercier.

Q. Who was present and within hearing of the whole of that conversation beside yourself?

A. I do not remember that any one was.

Q. Do you understand me in the last questions to have referred to the whole of the conversations about sale between William Atwater and Lemercier which you heard as you think on the 4th day of March 1868?

A. Yes, sir.

40

Q. When did the actual sale between J. B. Atwater and Lemercier take place—I mean what date?

A. The actual signing of the papers which terminated the sale was on the 6th day of March, 1868.

Q. State the first thing you remember was said of that conversation on the 4th of March, 1868.

A. The first I definitely remember was William Atwater informing me that he had made a bargain with Mr. Lemercier to sell the stock of goods of J. B. Atwater's at a price upon which they had agreed.

Q. Was there anything said during that conversation about the mortgage remaining as a security to Mr. Lemercier?

A. No, sir, not that I know of.

Q. What day of the week was the next day to that conversation?

A. I really don't know.

Adjourned to Tuesday, March 15th, 1870.

March 15th, 1870. The parties appeared before me and proceeded with the cross-examination of Henry C. Johnson by B. F. Watson.

Q. What time did you arrive at the store on the morning inquired of in the last interrogatory, which I understand to be on the day you fix on which the actual sale took place—please confine your answer to actual memory?

A. It was not later than half-past nine.

Q. Do you remember the exact time of your arrival?

30 A. Not to an exact moment.

Q. Do you remember of consulting any time-piece that morning for the purpose of fixing the time of your arrival?

A. No, sir.

Q. Have you any memory of any fact that enables you now to fix the precise time of your arrival that morning?

A. I remember of a fact by which I know I was there early that morning, but not to state the exact moment.

Q. Will you swear positively that you were in that store that morning before ten o'clock?

A. I will not swear to any exact time.

Q. What persons were in that store upon your arrival that morning?

A. I cannot tell.

Q. Can you not swear to any one positively? 10

A. No, sir.

Q. Aside from the transactions involved in this suit, is there a single incident, business or social, that occurred in that store on that day that you now from memory can testify of?

A. Nothing.

Q. When was the first time after the occurrences of that day you were called upon to remember said occurrences?

A. The first time I can now recollect was some 20 time in December, 1868.

Q. Do you mean to be understood, notwithstanding your want of memory of all other occurrences on that day, that you are willing now to swear positively to all the conversation that took place on that day respecting transactions involved in this suit?

A. I do not pretend to remember the whole of any conversation.

Q. As a matter of memory can you positively say the length of time you were absent from that store on 30 that day, and the precise hour when you left it at night?

A. I cannot give the precise time to the hour of either of those questions.

Q. At what hour of that day did you prepare the agreement for sale?

A. It was late in the afternoon, and it was some time after dark when I finished it; I remember distinctly finishing the agreement by gaslight.

Q. Do you also remember distinctly that it was not 40

signed until the day after it was written?

A. Yes, sir.

Q. How long in point of time did the conversation between William Atwater and Lemercier, which you have stated occurred on this day, continue?

A. I do not remember that those two alone held any special conversation on that day.

Q. What is your memory upon that point. Did those two have conversation together upon the sale on that  
10 day?

A. I do not remember of them having any conversation except the ones in which I took part.

Q. How long did the conversation on that day about the sale between Lemercier and William Atwater, continue?

A. I know nothing whatever of any conversation those two may have had together except as I have heretofore stated?

Q. Do you mean to say that those two did not have  
20 a conversation on that day together respecting the sale?

A. They may have had several conversations together. I only state that I do not remember any.

Q. What hour of that day did you first see J. B. Atwater?

A. It was in the morning when he first arrived at the store.

Q. I asked you what hour?

A. I cannot say the exact minute, but I think it was  
30 about ten o'clock.

Q. I asked you to swear to the hour and did not call for your impressions?

A. I did not consult any time piece and therefore do not know the exact time.

Q. What was the first thing you heard spoken to, or spoken by, J. B. Atwater that day?

A. I cannot say whether he spoke to me first or I to him, but I can give the purport of what passed between  
us.

Q. Who was present and within hearing of what passed between you at that time?

A. William Atwater is the only one that I remember of.

Q. Did not William Atwater and J. B. Atwater, come from their home and in together on that morning?

A. Yes, sir.

Q. What was said between you and J. B. Atwater at that time. Give it in the order and in the language as it occurred?

A. I will give it as near as I can. I remember of Mr. James B. Atwater's coming into the office, my opening the sales-book and showing him the entry and informing him that Mr. Lemercier had bought the stock, and I asked him to make a bill of sale. Mr. Atwater (J. B. Atwater) asked me if Mr. Lemercier was going to pay all his debts. I told him he was not. J. B. Atwater then said that he would not sign any papers unless Mr. Lemercier would take the whole thing off his shoulders. He said he did not derive any benefit from the business and that he would not dispose of the goods unless he should be clear of the whole thing. That is all I remember of the conversation held on that day.

Q. What was replied to J. B. Atwater's last remark given in your last answer, if anything and by whom?

A. I do not remember any reply to that.

Q. How long did that conversation continue?

A. I should say about five minutes.

30

Q. Did you see J. B. Atwater in the store again that day?

A. I do not remember seeing him again that day.

Q. Did you hear him say anything or anything said to him excepting what you have stated?

A. Not that I remember of.

Q. Will you swear positively you did not?

A. No, sir.

Q. Was not J. B. Atwater informed in that conversation that Lemercier proposed to assume certain debts 40

for which he had in some way become obligated, and that he was not to assume certain others for which he was in no way bound, or that in substance?

A. Not by me, nor by any one else in my hearing that I remember of.

Q. Was there not, at some time during the negotiations, a proposed distinction made between the debts to be assumed and not to be assumed?

A. I think I heard some talk about such a distinction, but my remembrance is so slight that I can afford no clue to what it was.

Q. What next took place on that day about the sale between either of the Atwater's and Lemercier?

A. The next I remember is a conversation between William Atwater, Mr. Lemercier, and myself.

Q. State where that conversation occurred, at what hour of the day, and who was present?

A. The conversation took place in the office in the store, No. 54, Howard street; at the greater part of it 20 Mr. William Atwater, Mr. Lemercier, and myself were the only ones present. Before the conversation closed, Mr. Lindley Underhill took part in it; it took place sometime during the afternoon, but I cannot tell the hour.

Q. How long did it continue?

A. I should say from half an hour to three-quarters.

Q. How soon after its conclusion did you commence making the written agreement?

30 A. I cannot say how many minutes; I commenced fixing the details up immediately, but did not commence the writing until some time afterwards.

Q. State, as near as you can, the length of time before you commenced writing the agreement?

A. About half an hour.

Q. How long were you engaged in writing the agreement?

A. I cannot tell exactly how long; I should say a couple of hours.

40 Q. Give the conversation that took place at the

interview last referred to in the order in which it occurred?

A. I cannot give the exact words of the conversation.

Q. Can you state who spoke first?

A. Not positively.

Q. Can you state what was first said?

A. No, sir.

Q. Was Mrs. Atwater's name mentioned in that conversation?

10

A. I do not think it was.

Q. What is the first thing you do remember was said?

A. I told William Atwater that Mr. Lemercier was willing to buy the stock and assume the business, provided the \$8,000 mortgage, referred to in this suit could be held by Mr. Lemercier as a guaranty for the collection of the assets of the business; that Mr. Lemercier would give about \$3,000 more for the business for the stock of goods than he had agreed to the day 20 before, so as to make the face of the assets and liabilities exactly equal. Mr. William Atwater said he was willing that Mr. Lemercier should assume the business on these terms, and directed me to prepare an agreement, transferring the business from James B. Atwater.

Q. Have you now stated the whole of that conversation, and, as nearly as you now recollect, the language of it?

A. This was only the purport of it, but I have given as nearly as I could recollect the words that were used, 30 but not the whole of the conversation that was used.

Q. Give the remainder of it?

A. After Lindley Underhill joined the conversation, he asked Mr. William Atwater if he did not want some writings to show that Mr. Lemercier held the mortgage as security for the collection of the assets. Mr. William Atwater replied that he did not, that it was an affair of honor between gentlemen, and that he thought he and Mr. Lemercier could trust each other, besides, he had Mr. Underhill and Mr. Johnson for 40

witnesses. This is the only other part of the conversation I recollect anything like the words that were used.

Q. Have you now stated the whole of that conversation, and in the language used, that you remember?

A. Yes, sir.

Q. Was it for the purpose of completing that agreement that you made the writing afterwards, signed by  
10 Lemercier and J. B. Atwater, paper No. 4 on the part of Defendant?

A. Yes, sir.

Q. Are you any better able to fix the day of the week, the hour of your arrival and departure, the time you were absent from the store, the occurrence of any event in the store outside of the transactions in this suit, happening on the next day than you have been of the day last testified of?

20 A. No, sir.

Q. What, if any, conversation did you have with J. B. Atwater on the day referred to in the last interrogatory as the third day inquired of?

A. I informed him that I had prepared two articles of agreement, transferring the business from himself to Mr. Lemercier; I gave him one copy to read and I read the other aloud to him. He said that he would sign those papers, and did sign them.

30 Q. Have you now stated all that took place between you and J. B. Atwater on the day referred to in your last answer?

A. He also signed another paper I presented to him at that time; that is all that I remember of any transactions with him of that day.

Q. Did you understand William Atwater at any time as declining, on his own part, to carry out your first alleged agreement for sale?

A. No, sir.

Adjourned to March 22d, 1870, at 11 o'clock,  
A. M.

March 22d, 1870, the parties appeared before me and proceeded with the re-direct examination of Henry C. Johnson, examined by the solicitor of the complainant.

Q. When you proposed to William Atwater the conditions of sale between him and Mr. Lemercier, which included the holding of the mortgage as a collateral security for the payment of the debt, how did you know that Mr. Lemercier would accept that proposition?

10

(Objected to as incompetent, immaterial, leading, and introducing new matter, by defendants' counsel).

A. I stated the proposition to William Atwater at Mr. Lemercier's request.

A paper being shown witness, he is asked :

Q. State what that paper is, by whom made, and from whence the accounts were taken?

(Question objected to as to form and substance).

20

A. The paper is a conveyance of all the notes and book accounts due to James B. Atwater to Mr. Lemercier; it was made by myself, and the accounts were taken from the books of J. B. Atwater.

Q. By whom was that paper signed?

(Question objected to by defendants' counsel).

A. By J. B. Atwater.

Q. Is that the other paper referred to in your cross-examination as having been signed by James B. Atwater on the day he signed the agreement, Exhibit 30 No. 4 on the part of the defendant?

A. It is.

(A paper offered in evidence by complainant's counsel, and marked Exhibit No. 7 on the part of the complainant, see page ).

(Objected to by defendants' counsel).

(A paper being shown to witness, he is asked):

Q. Who made that paper, who drew it up, and from whence were the accounts taken?

10 (Objected to by defendants' counsel).

A. The paper was drawn up by myself, and the accounts were taken from G. Lemercier's books.

Q. Is the account upon it of Margaret A. Atwater correctly taken from ledger, folio 41, of G. Lemercier's books?

(Question objected to by defendants' counsel).

A. It is.

20 (Paper offered in evidence by complainant's solicitor, marked Exhibit No. 8 on the part of the complainant, see page ).

Q. Before writing the agreement did you or not know that the mortgage was to be held as collateral for the payment of the debts?

(Objected to by defendants' counsel).

A. I knew it before writing the agreement.

Q. Did you or not write the agreement with that idea in view?

(Question objected to as to form and sub-

stance by the defendants' counsel).

A. Yes, sir.

Q. Turn to day-book, folio 24, and state what items in the account of G. Lemercier form a part of that sale?

(Objected to by defendants' counsel).

A. Bills receivable, \$2,406.46 personal accounts, \$13,779.99 on the side of the assets, and bills payable, \$10,442.90, and personal accounts; \$5,743.55 on the side of liabilities. 10

(The answer objected to by the defendants' counsel).

A. State how it happens that the mortgage appears both as an asset and liability in that account?

(Question objected to by defendant's counsel).

Q. On the opening of Mr. Lemercier's books Mr. William Atwater requested me to make it appear on those books that Mr. Lemercier had the mortgage in his possession. To do this I opened an account on the side of assets with bond and mortgage, and on the side of 20 liabilities I opened an account with Margaret A. Atwater to balance the other account?

Q. Had the Goodman liability or the G. Lemercier assignee liability any connection at all with this sale?

A. No, sir.

(The question objected to, and the answer next before last, objected to by defendants' counsel).

Q. How did you know the fact of the business being for the benefit of William Atwater when J. B. Atwater 30 was acting as proprietor?

(Question objected to by defendants' counsel).

A. By being told so by both William Atwater and J. B. Atwater.

Q. In day-book, folio 5, under date of June 29th, state what entry is made against James B. Atwater and William Atwater ?

(Objected to by defendants' counsel).

A. William Atwater is credited for services to date and James B. Atwater is credited the same.

10 Q. On page 14 of day-book December 31st, in J. B. Atwater's day-book, state what the credits are against J. B. Atwater and William Atwater ?

(Question objected to by defendants' counsel).

A. James B. Atwater is credited for salary to date. William Atwater is credited the same.

*Being re-cross examined by defendants' counsel the witness further says :*

Q. When Mr. Lemercier assumed the business, what, if any, amount of cash on hand stood to his credit ?

20 A. \$632.32.

Q. What amount was the stock estimated at ?

A. \$11,465.57.

Q. Were there any bills receivable or other evidence of indebtedness received by Mr. Lemercier from J. B. Atwater, if so, to what amount ?

A. There were bills receivable to the amount of \$2,406.46.

Q. Was there any book accounts received by Mr. Lemercier from J. B. Atwater at the same time, if so, to what amount ?

30 A. There were personal accounts, or look accounts, due to J. B. Atwater amounting to \$13,779.99 which were received by Mr. Lemercier.

Q. To what amount, if any, at the time of the transfer of said business to Lemerrier was J. B. Atwater in said business indebted on bills payable?

A. He was indebted on bills payable to the amount of \$10,442.90.

Q. At the same time what amount of open book accounts owed by J. B. Atwater for merchandise and other business considerations were assumed by Mr. Lemerrier?

A. \$5,743.55. 10

Q. At the same time did not Mr. J. B. Atwater on account of his said business owe Mr. Lemerrier as assignee some amount, if so, what amount?

A. I cannot tell the exact amount without figuring from the books. It is included in the items of personal accounts.

(The last part of answer objected to as not responsive).

Q. Was not the amount due Lemerrier as assignee, inquired of in the last interrogatory, \$4,424.25? 20

A. No, sir.

Q. Was not the mortgage debt of \$8,000, due by J. B. Atwater to Lemerrier at the time of said sale, separate and distinct to any indebtedness of said business to Lemerrier as assignee?

A. Yes, sir.

Q. At the time of said sale did not said business of J. B. Atwater owe to Mr. Lemerrier as assignee the sum of \$4,424.25, and did not said Lemerrier assume by said trade himself to pay or cancel said amount? 30

A. The business of J. B. Atwater did not owe to Mr. Lemerrier as assignee that amount.

Q. Have you not stated or represented in some form that one of the liabilities assumed by said Lemerrier in said sale was a debt of \$4,424.25 due to said Lemerrier as assignee?

A. No, sir.

Q. Was there any debt due by J. B. Atwater or his

business to Lemercier as assignee at the time of said trade, if so, state the amount as near as you are able to?

A. There was a sum of money due to Mr. Lemercier as assignee from J. B. Atwater, and as near as I can recollect the amount was about \$2,700. I could tell the exact amount by referring to the books, I mean at the time of said sale.

Q. Was the indebtedness spoken of in your last 10 answer at the time of said sale assumed by Mr. Lemercier?

A. It was.

Q. On what day did you make the opening entries in Lemercier's books?

A. I cannot say definitely.

Q. Is there anything that enables you to testify to any fact, transaction, or occurrence on the day when you opened said books?

A. No, sir.

20 *Being again examined in chief the witness is asked:*

Q. Are not the notes and accounts set forth in Exhibit No. 7 on the part of complainant the assets for which the mortgage was retained after said sale as collateral security?

(Question objected to by defendants' counsel).

A. Yes, sir.

Sworn before me and sub- } HENRY C. JOHNSON.  
scribed as aforesaid,

J. HARVEY LYONS,

30

*Master in Chancery.*

(Adjourned to April 1st, 1870, at 11 o'clock  
A. M.).

The examination of the witness Johnson was taken in the foregoing form of question and answer at the request of the defendants' counsel, and with the consent of the complainant's counsel.

LINDLEY UNDERHILL a witness on the part of the complainant having been heretofore duly affirmed and examined as a witness in this cause being recalled and examined, says :

I think I commenced my engagement with William Atwater on the 1st of January, 1863, at 94 Chambers 10 street and went with him to 54 Howard street. I continued in his employ until November, 1866, when William Atwater assigned to Gaston Lemercier who attended to his duties as assignee until James Atwater succeeded to the business. At what exact date I don't remember. It was in the spring of 1867. I then became a clerk of James Atwater from that time until he sold out to Mr. Lemercier, in March, 1869. I remained with Mr. Lemercier from 5th March, 1868, 'till the close of the year which ended my engagement with him. I 20 was not present at any of the conferences between James B. Atwater and Mr. Lemercier in regard to the sale of the stock.

(Counsel for defendants objects to the witness being recalled and testifying to any portion of the transaction of sale on or about March 5th, 1868; he having been formerly examined fully upon that transaction; such testimony not being in rebuttal).

On the 5th of March, 1868, Mr. Johnson, William At-30 water and Mr. Lemercier had a conference in the afternoon, at the close of which Mr. William Atwater called me to them and stated they had agreed to transfer to Mr. Lemercier all the merchandise, stock, notes, book accounts, and assets of every kind belonging to or held in the name of James B. Atwater to Mr. Lemercier, in

consideration of which Mr. Lemercier had agreed to pay all the liabilities of James B. Atwater, and that he, Mr. William Atwater, agreed that the mortgage of \$8,000 held by, and belonging to Mr. Lemercier should remain in his hands as collateral security for the accounts and be liable for any deficiency in the collection thereof. I asked Mr. Lemercier in the presence of William Atwater if he consented to this. He said that he had consented and did consent, and had agreed to give \$3,000  
 10 more for the stock than its estimated value in order to bring up the nominal amount of the assets to the nominal amount of the liabilities. I then said that I thought an agreement should be drawn setting forth the facts of the case and character of the case. The remark was rather directed to Mr. Atwater. Mr. Atwater said no paper of the kind was necessary. The possession of the mortgage was sufficient. That it was a matter of honor and that Mr. Johnson and myself were witnesses to it. I think there was nothing further took place at that  
 20 time. I don't remember anything else. Mr. James Atwater was not there at the time. He came down the next morning and I told him that the business was to be transferred to Mr. Lemercier, including all the assets and that Mr. Lemercier had agreed to pay all his liabilities and that if the debts all came in right and could be collected, the mortgage held by Mr. Lemercier against his brother's place would be cancelled and surrendered. He said there had been some talk about transferring the stock only to Mr. Lemercier.

30 (Counsel for the defendants' objects to any conversation between the witness and any party in the absence of the defendants' not shown to have been their agent).

But that he, James Atwater, would not agree to that unless Mr. Lemercier would agree to pay all his liabilities. As he had no interest in the business he would not consent to any transfer that did not release him from his obligations. I stated that I hoped the ac-

counts would come in all right so that his brother's place would be released. I don't think there was anything more said.

(Defendants' counsel objects to all this conversation as immaterial).

Stephen Ritter was not present at the conversation between me and William Atwater on the 5th day of March. I never said to William Atwater or Stephen Ritter or to any one else that that mortgage ought to be cancelled. I have repeatedly said it ought to be re-10 moved or in some way got rid of.

I did not at any time from 5th March to the time of the assignment of the mortgage to Philip R. Underhill, or at any other time know that that mortgage had been satisfied. I received the \$250 commissions myself in the assignment of the mortgage to Philip R. Underhill.

(The last answer objected to by defendants' counsel).

There was no agreement to my knowledge at the time of that assignment that Philip R. Underhill should 20 receive more than legal interest. I never paid any of that commission of \$250 to Philip R. Underhill as commissions. I don't mean to say he did not get the \$250. I owed him \$1,000. I sent the \$250 to him and charged it on account of the note which I owed him. I paid him that much on account of what I owed him.

(The last answer objected to by defendants' counsel).

Exhibit No. 5 on the part of defendants being shown to witness, he says : 30

I don't recollect ever having seen this paper before. I recollect of a paper being prepared in December, 1868, to be sent to Mrs. Atwater, in relation to, I think,

with a view to get her consent to the mortgage being used as security for the note, but I don't recollect distinctly what the paper was.

(The answer objected to by defendants' counsel as the paper is not produced or attempted to be produced).

About two weeks before the note of December 23rd matured, Philip Underhill called at the store. Mr. Lemercier was not in and he had a conversation with  
 10 William Atwater. I was not a party or present at the conversation but as he was going out of the store I walked with him to the door. He came again within a day or two before the maturity of the note of the 23rd December. After he had gone out, perhaps a day or two afterwards, I stated to William Atwater and Mr. Lemercier that perhaps Mr. Underhill could be induced to still further extend the payment, and they authorized me to write to him to see if he could extend it still further, and I did so.

20 (Defendants' counsel objects to any statement of the letter and asks for its production).

Philip Underhill came to the store soon after that and consented to a further extension ; I can't say who was present, I know that Mr. Lemercier was there, but I can't say either of the Atwaters were there. Mr. Underhill and Mr. Lemercier both consented to the extension. After Mr. Underhill had gone Mr. Lemercier said that he had heard—neither of the Atwaters were then present—that William Atwater had been  
 30 advised to resist the foreclosure ; I told him I would have nothing to do with it, as I had been distinctly and repeatedly assured by Mr. Atwater that there would be no resistance in case it became necessary. Mr. Lemercier stated that it would not make any difference ; that no objections could be advanced. I asked Mr. Lemercier on what ground any resistance was to be predicated, on what ground they intended to

resist it, he stated he did not know of any grounds ; then I told Mr. Lemercier that I would not have anything more to do with it without Mr. Atwater's wife's consent. So I drew up a paper and gave it to Mr. William Atwater, and asked him to get his wife to sign it. I told William Atwater that Mr. Lemercier had intimated that the mortgage would be resisted, and that he had told me it was a *bona fide* mortgage. I asked him if he had any idea of resisting it, he said he had not. I asked him if he would get his wife to sign the paper which I gave him, a copy of which has been shown me here to-day, or what purports to be a copy.

Mr. Atwater took the paper, received it from me. Next morning he brought the paper down : it was not signed, he said there was no necessity of having her signature, that Mr. Lemercier held the mortgage with her signature and that was sufficient. I then asked him again if he still wanted the note still further extended notwithstanding what had taken place ; he said he did, giving as a reason that his property would be worth more in the spring than it was then, and he might be able so sell it. He then assured me again that there would be no resistance to the foreclosure of the mortgage, and I renewed my efforts to extend the time but unsuccessfully. I believe that's all.

(Defendants' counsel here renews the objections which he has stated to any part of the foregoing testimony as to the reasons and motives of the witness as to any and all conversations testified of by him in the absence of the defendants, and that the testimony is immaterial, incompetent, and irrelevant).

The reason why no paper of this kind was got before was because nothing had occurred, been said, or intimated that would lead me to believe there was any doubt or question as to the liability of the mortgage

for the debts according to the original agreement. Previous to that everything had been clear and bright, no question or doubt had been intimated in the matter.

(Defendants' counsel repeats to the foregoing his last objection).

I did not, in December, 1868, or at any other time, give William Atwater any other paper for his wife to sign.

10 (Adjourned to April 9th. 1870, at eleven o'clock, A. M).

April 9th, 1870. The parties appeared and proceeded with the direct examination of Lindley Underhill.

At the time of the transfer from Lemercier's assignees to James B. Atwater several names were mentioned to whom applications were intended to have been made, that their names should be used for the purpose of carrying on the business, among which were  
20 Mr. Lemercier's son, Mr. Johnson, the kookkeeper, James Atwater, and myself.

I am not certain whether it was Mr. Lemercier or Mr. Atwater who applied to me, they were both present when the application was made.

(The testimony objected to by defendants' counsel as incompetent and immaterial).

*Being Cross-examined* by B. F. Watson the witness says :

30 I can't state the exact time when I first knew that this suit was commenced, or intention to commence this suit for foreclosure, it was in the last six months of 1869.

I was not aware that any bill had been filed until Mr. Lemerrier told me that it had been filed.

I continued my efforts to obtain a renewal of the note due in December, 1868, until the close of the year and no longer. The plaintiff did not refuse to renew it.

I was the agent of neither party, merely attending to it for both. I never acted for the plaintiff in obtaining loans prior and subsequent to this loan.

I never had anything to do with such loans from the 10 plaintiff. I acted as an agent for the plaintiff in obtaining the assignment of this mortgage, and obtaining the loan of \$4,000.

I commenced acting as agent for the plaintiff in this transaction in February, 1868, and continued acting for him until the final failure to extend in January, 1869.

The note of \$4,000 of James B. Atwater's was made about at the time of the assignment of the mortgage in suit, March 16th

I have no recollection of having advised J. B. Atwater to make that note of the date of 17th February prior. I have no recollection of having suggested that the note should be dated to make it look like business paper.

I am not willing to swear that I did not suggest so to William or J. B. Atwater, according to my best impressions I infer that the note was what we call an accommodation note. I infer he did not owe him any thing. I do not know it.

I am not positive that the note was not made, prepared, and dated at my own suggestion, to be used in that transaction; I do not know of any consideration passing for that note to the maker. I don't recollect distinctly whether the note was received by me from Mr. Atwater.

I don't recollect, to my knowledge there has been application to collect that note when it became due; I was not aware of any legal application made to collect it. There was no legal effort made to collect it—none to my knowledge.

About the time it became due Mr. Lemercier gave a new note for it, it was not given to me. I had something to do with getting that new note. I did not arrange with Mr. Lemercier to give it. I wrote to Philip Underhill that Mr. Lemercier wanted to give a new note. Philip R. Underhill did not authorize me to receive a new note. I was not present with them at the time Mr. Lemercier gave the new note. I was in the store, but not present with them. That note of Lemercier  
 10 was given in June, 1868; it became due in December, that Lemercier note. I never heard that it was paid. It was not paid at maturity. I do not know of any attempt being made to collect that note. I can personally testify that Mr. Lemercier received the amount of \$4,000, for which the J. B. Atwater note was made, less the deductions. I got the check from Underhill myself, through Edward Strong. I do not know of my own knowledge if the plaintiffs ever payed another dollar to Mr. Lemercier on that mortgage.

20 I was not present at the alleged interview between Lemercier and J. B. Atwater for affecting the sale on the 4th March. I do not remember the transactions of the 4th day of March in that store any more than of any other day. I would not undertake to testify of anything that was said or done on that day.

I was not present at any negotiations between Lemercier and J. B. Atwater, or William Atwater, on the 5th day of March. I never at any time made any special effort to recollect what was said or done on the  
 30 5th day of March. I can state who were present in the store on the 5th day of March from recollection, but the absentees would be negative.

I have no distinct recollection of seeing James B. Atwater there on that day. I was there all that day. I don't remember whether Stephen Ritter was there on that day or not. I noticed to see the time of day I was called upon to be present at an interview between Lemercier and William Atwater on that day, it was toward the close of the day, that I give from my  
 40 present recollection. It was toward sunset; I don't

recollect what hour it was. I noticed to find out by that the gas was lit at the time or soon after, it was lit immediately after for the purpose of Mr. Johnson making some paper. My part of that interview lasted not over five minutes. I should think I was not present at the interview at all.

I was sitting at a little desk in the office near by when I was called to take part in that interview. I was writing; I don't know what I was writing. I cannot tell how long precisely I continued to write. I would not now be willing to say how long I continued to write. I don't know that I wrote at all after I was called. I can't tell how long prior I had been writing there. I can't tell within an hour. I cannot tell a single thing what I had been writing there, or what I wrote about. I was writing at a small desk in the office, about ten feet from where the three persons were standing—Lemercier, Johnston, and William Atwater; it was a counting-room.

I was not distinctly within hearing of what they were talking. It was within hearing of ordinary conversation, so that if they had talked in an ordinary voice I could have heard all that was said at that interview. I am positive that I noticed that at the time they talked low, and that I could not hear what they were saying, only now and then a word. There was nobody else in that counting-room but us four at the time.

Mr. Atwater first called me by name—I mean Mr. William Atwater—and stated that James B. Atwater was to transfer all the stock, notes, book accounts, and assets of every kind held by him or in his name, to Mr. Lemercier, and that Mr. Lemercier was to assume and pay all the liabilities of James B. Atwater, and that he, William Atwater, had agreed to let the mortgage, held by Mr. Lemercier, remain with him as collateral security for the accounts due to him, and be liable for any deficiency in their collection. Mr. Lemercier heard this.

I asked Mr. Lemercier if he agreed to that, he said

that he did, and he added that he had given \$3,000 more for the stock than its estimated value, in order that the nominal amount of the assets might equal that of the liabilities.

I then asked William Atwater if it would not be better to have a paper drawn, by which it should be shown, that if Mr. Lemercier was successful in realizing upon the claims of the house, that he, Mr. Lemercier, agreed to cancel and surrender the mortgage.  
 10 Mr. Atwater stated that he did not want any paper of the kind, that it was a matter of honor between them, and that Mr. Johnson and myself were aware of the agreement, or cognizant of the agreement. I don't remember the words. I think that terminated the interview. I don't believe I have stated just the exact language of that interview, but as near as I can recollect.

In this statement just given, I have stated the whole of that interview, as near as I now recollect. I made  
 20 no memorandum at the time. That conversation was on the 5th day of March, instead of any other day, and I depend entirely upon my present recollection in fixing the date. I testify that it was on the 5th day of March, notwithstanding I can't recollect what I was writing before or after the interview, or whether J. B. Atwater was in that store on that day or not.

There is no occurrence which took place on the 6th day of March, aside from the transactions involved in this suit, that I can testify to. I cannot, from present  
 30 recollections, tell the hour of my arrival at the store, and the hour of my departure from it, or whether I was out that day, 6th March.

I cannot recollect the conversation I had with any person on that day, except with James B. Atwater. I made no memorandum whatever of it, or of the date of it. I can give the conversation in the words, or in substance, as I had it with James B. Atwater.

As soon as he arrived in the morning of the 6th, I  
 40 told him that an arrangement had been made, by which he was to transfer to Mr. Lemercier all his stock and

assets of every kind, and that he, Mr. Lemercier, was to assume all his liabilities, and that an arrangement had been made by which, I was in hopes, his brother's place would be released from incumbrance or mortgage.

He stated that some plan had been proposed by which he was to convey the stock only, but he would not consent to that, for as he had no interest in the business he did not wish to be responsible for the obligations of the business; that's all I think of now, 10 to the best of my recollection; that's all the conversation that occurred, and as near the language as I can give it.

He appeared to be very much pleased with the news which I gave him of the contemplated arrangements; there is no reason why I should recollect this conversation now any better than when I first testified, excepting that during the pendency of these proceedings, I have endeavored to refresh my memory by thinking the facts over again. 20

I have not heard the other witnesses testify, but all of the testimony has been read over to me. I think I, myself, have read the most of the testimony in the whole case.

I am not now able to testify more clearly what took place on the 6th day of March from Johnson's testimony, but from pondering the matter over in my own mind. I am no more certain I am more correct to-day in stating that conversation than I was when I testified formerly in the case that he said that he 30 would not convey the stock unless Lemercier would assume the debts, as he was going out of the business and did not wish to leave his name floating around, and wanted no notes to be held against him.

He was willing to assist his brother William. While I was in that store I was not generally the adviser of Lemercier and the Atwaters in all their business transactions. I think I was frequently so.

I did not know and understand at the time of the

sale from J. B. Atwater that the original mortgage debt was to be paid by that transaction.

I did not understand at or about that sale, or within a week thereafter, that as a condition of that sale Lemercier was to pay to himself or assume that mortgage debt owed to him by J. B. Atwater.

When I testified that I told J. B. Atwater on the morning of the 6th of March that an arrangement had been made by which Lemercier was to assume all his  
 10 liabilities, I meant to repeat to him what I was informed at the interview the day before between myself, Johnson, Lemercier, and William Atwater, and that's all I meant by it.

I did not see the written instrument drawn up by Mr. Johnson affecting the sale, and did not know until this action was commenced that there had been one drawn up.

I knew that negotiations had been going on for several days for that sale; I think the stock had been  
 20 taken with that view.

I did not state to William Atwater, J. B. Atwater, or Mr. Ritter, or either of them, within a week or thereabouts after the sale of the stock, that that mortgage ought to be discharged, nor anything in substance like that; at the conclusion of the interview between myself and the other three in the counting room, I understood that Mr. Atwater wanted no written agreement.

Mr. Johnson commenced writing some paper, but  
 30 what it was I don't know.

I am certain that my statement made to you on this cross-examination of the conversation at the interview between myself and the three others is as correct as the statement I have heretofore made of the said conversation in my examination in this case; if there is any difference I should prefer the last, because my memory has been refreshed.

I did not have any interview or communication with Philip Underhill in regard to the \$4,000 indebtedness

after January, 1869, and prior to the commencement of this action.

I did not notify him that Mrs. Atwater refused to sign the paper I sent her. I presume I notified Mr. Lemercier.

I have seen Mr. Underhill since that time at different times. I do not visit his family ; he visits me at the store. He is my cousin.

I will testify without hesitation I did not see him a dozen times between the months of January and 10 May, 1869, or half a dozen of times. I will not testify that I did not see him three times during that time. He was not in the habit about that period of frequently seeing me in the year 1868 and first part of 1869, nor communicating with me.

Sworn before me the 1st  
of April, and subscribed } LINDLEY UNDERHILL.  
April 9th, 1870.

J. HARVEY LYONS,

*Master in Chancery.*

20

The further examination of witnesses was resumed by the consent of both parties on this 28th day of May, 1870, and in the presence of the counsel for the respective parties was proceeded with.

GASTON LEMERCIER was recalled by the complainant and re-examined upon his oath, deposes and says :

I, as assignee of William Atwater, in February, 1867, owned the store No. 54 Howard street, and on the first day of that month sold the same to James B. At-30 water.

Q. For whose benefit did James B. Atwater purchase it?

(Objected to by defendants' counsel as incom-

petent, and immaterial, and leading).

A. It was for the benefit of William Atwater.

A paper being shown to witness he is asked :

Q. State whose signature is upon it, and from whom you received it, and when you received it.

A. This is the signature of James B. Atwater. I received it from James B. Atwater on the 19th of February, 1867.

10 Paper offered in evidence, and marked Exhibit No. 9 on the part of the complainant.

(Objected to by defendants' counsel as irrelevant, incompetent, and immaterial).

Q. State how you came to receive that paper from James B. Atwater.

(Objected to by defendants' counsel as immaterial and incompetent).

A. I told to James B. Atwater that he knew very  
20 well that the business was still William Atwater's, and I told James it would be proper for him to give me a paper to that effect, in case of death that his wife might claim the business. James Atwater told me that he was perfectly willing to do so, knowing that he had no interest whatever in that business. William Atwater was not present, I believe, at that conversation.

(Conversation objected to by defendants' counsel as incompetent).

30 In March, 1868, Jams B. Atwater sold this business to me.

Q. State what the conditions of that sale were ?

(Objected to as incompetent. The terms of sale having been reduced to writing).

A. I was to take the stock and assume all the debts. I have paid all the debts and William Atwater agreed to leave the mortgage to secure debts that would not be paid on the debts owed to James B. Atwater. Exhibit No. 4 on the part of defendants was executed by James B. Atwater and myself upon making that sale. It was before this paper was executed that Mr. William 10 Atwater agreed to let the mortgage stand as the collateral security. I paid \$3,000 more for the stock to let the mortgage remain as security. I did not at any time agree with William Atwater or James B. Atwater to buy out all the stock and assume all the debts without having that mortgage stand as collateral security. At the time that agreement was signed by me and James B. Atwater, I had the mortgage in my possession. I always had it. William Atwater did not ask me for it to deliver it up to him. 20

Q. Did William Atwater ever tell you he had no authority to use that mortgage except to have it paid ?

(Objected to by defendants' counsel as incompetent and leading).

A. No, sir—never.

Before this final purchase by me on the 5th day of March, 1868, I had agreed with William Atwater to buy the stock in that store and was not to assume the liabilities.

(Defendants' counsel objects all verbal agree-30  
ments for sale and to any conversation in  
the absence of the defendants).

It was not carried out because I wanted something to secure me for the debts owed to James B. Atwater.

(The question asked to which the last answer was given was "Why was that agreement not carried out," which was objected to by defendants' counsel).

Mr. Underhill and Johnson first suggested the idea of that mortgage remaining as collateral security.

(Answer objected to by defendants' counsel as incompetent).

They did so before the agreement between me and  
 10 James B. Atwater was signed. I believe William Atwater was present and in hearing when they made that suggestion. I never had any conversation with James B. Atwater about that sale before the agreement was signed—never. I did not myself ever give to William Atwater any paper to take to his wife to sign in relation to that mortgage. I knew of the fact of the paper marked No. 5, on the part of the defendants, being given to William Atwater to take to his wife. I do not  
 20 know of any other paper being given to William Atwater to take to his wife for that purpose during the year 1868. I did not at any time propose to William Atwater to take him into business with me. I did not go with William Atwater to look up a store for me and him to go into business together. During the year 1868 Mr. William Atwater came to my store to make a purchase and have the same charged against that mortgage. When something was falling short Mr. William Atwater always said charge it to the mortgage to Margaret Atwater. Well, I said we would charge it to  
 30 Mrs. Atwater, that's all, I believe, sir. Mr. William Atwater came there in May 1869, to make a purchase. He had disposed of a title to a piece of property situated in Mississippi, I believe. I asked Mr. Atwater in May 1869, I believe, how he would settle for it. He said charge it to the mortgage. I said I would not because the mortgage was absorbed by the debts.

*Being cross-examined, the witness says :*

I say I have paid all of the debts of J. B. Atwater. I loaned J. B. Atwater sums of money to carry on his business. These sums are credited to me in my account in J. B. Atwater's ledger, and the mortgage in suit was given to me to secure me for the money I had loaned to J. B. Atwater. It was originally given for that. At the time of making the negotiation of the sale from J. B. Atwater to me, that mortgage debt was due to me by the sale of J. B. Atwater to me. I did not intend to release J. B. Atwater from that mortgage debt. 10 After the sale from J. B. Atwater to me, I considered that he owed still the mortgage debt, and as a consideration for that sale, I did not agree to release him from that debt and assume it myself. I never showed the paper marked Exhibit No. 9, on the part of the complainant, to either William Atwater or his wife. At the time I had the talk with J. B. Atwater about the paper, and at the time it was delivered to me, neither William or his wife were present. I neither gave to Mr. Underhill security for the payment of the \$3,500, 20 nor guaranteed it. About the time I bought the store of J. B. Atwater, the witness Johnson and Mr. Lindley Underhill were my confidential advisers. I had not very much to do with the management of the business personally. In making the sale of the stock to J. B. Atwater, I acted for the creditors of William Atwater. J. B. Atwater does not owe me anything now. He owed me at the time of the sale. After his sale to me James B. Atwater owed me nothing personally. It was in the morning that the bill of sale was signed between 30 J. B. Atwater and me. Mr. Johnson, Lindley Underhill, and I believe William Atwater, were present in the store when it was signed. I believe all the clerks were there. I cannot tell the names of any of the clerks who were there at the time it was signed. Mr. Johnson was there and saw it signed. Lindley Underhill was present and saw it signed.

The first I had with William Atwater about J. B. Atwater's selling out to me, was not that I was to take the stock and pay the mortgage debt. The first talk 40

was, that I was to take the stock, and that was to pay what J. B. Atwater owed me.

Mr. Underhill, and Mr. Johnson, and William Atwater were present there at that talk, no one else was there present that I recollect of. Mr. J. B. Atwater was not present. When J. B. Atwater came to hear it he went out. I believe he did not want to sign the first agreement. J. B. Atwater refused to sign the first agreement, and then we had to make a new one, and Exhibit No. 4 on the part of the defendants is the new one. J. B. Atwater refused to sign any agreement unless he was released from all liability, I believe, and after he refused to sign the first agreement the one (No. 4) was written, and he signed it.

The conversation that took place between me and William Atwater on the day this agreement was signed and before it was signed, was, William Atwater told me that I bought the stock too cheap, and I said that I would be willing to pay more, provided I would be secured for the debts owed to James B. Atwater. Mr. Atwater said, you have got the mortgage of \$8,000, you keep it as security, and then I said I would pay \$3,000 more for the stock; that is all, I believe. I never said a word about the sale on the day of the sale and before the sale to James B. Atwater—never. I have given, in my last answer, all the conversation I had with James B. Atwater or William on the day of the sale and before the signing the paper. In the conversation I have just spoken of, I changed my price about \$3,000 more for the stock.

The day before the conversation with William Atwater about holding the mortgage for security, we had very little conversation about the terms of sale. I don't recollect any of the conversation the day before.

I believe the agreement which J. B. Atwater would not sign, and which we abandoned, was a day or two before the one we did sign.

At the time the mortgage in suit was given originally, J. B. Atwater did not owe me only on book

account, and borrowed money, and not on notes. At the time the mortgage was negotiated to Mr. Underhill, J. B. Atwater gave a note for \$4,000. That note was given to me to raise the money from Mr. Underhill. That note was for my accommodation ; he did not owe me anything at the time.

The agreement of William Atwater with me was, that I should continue to hold the mortgage as security against any loss that I might incur in consequence of having purchased the business of J. B. Atwater, and of 10 having to pay his debts. J. B. Atwater nor Mrs. William Atwater were not present at that agreement, and did not hear it, nor either of them. I did not tell it to either of them before the signing of the paper (No. 4). When J. B. Atwater refused to sign the first agreement, I then agreed to save him from all liability as an inducement to get him to sign the second agreement (Exhibit 4).

I said to William Atwater, near the time of this trade, that I was expecting money from France, but 20 did not say that I recollect saying, with that money I would go into business with him. I am willing to swear that at or about the time of the trade, I did not talk with William Atwater about going into business with him.

I am positive I gave no guaranty or promise of any time, at the time of obtaining the \$3,500 of Mr. Underhill, that it should be paid back to him in case he did not get it from the mortgage, nor to anybody else for Mr. Underhill or on his behalf. I cannot tell to whom 30 I paid the \$3,500, nor any part of it. I paid \$700 of that money to Messrs. Wilmerding, Hoguet & Co. I cannot swear to anybody else that I paid any of it to. The rest was put into the bank, I believe.

I got a check from Mr. Bowne, No. 7, Pine street, for \$3,500 ; it was sometime in June, 1869, which was on the assignment of the mortgage to Mr. Underhill. I went alone to get the check. Philip Underhill told me to go there and get it, and I did so.

I went to the house of Philip Underhill in the first 40

part of June, 1869. I told him, as he had already given \$4,000 for the mortgage, that I would like to sell him the balance of the mortgage. He asked me how much I would take for the balance, I told him I would take \$3,500; he told me very well, I will do it. I will go to New York next Monday; I will meet you between 10 and 11 o'clock, and then we will go to Mr. Bowne. Mr. Bowne told me, before he would pay the \$3,500, I had to go to see Mr. Ogden for him to pre-  
 10 pare the papers. Mr. Ogden gave me the requisite papers, and I went back to Mr. Bowne, and he gave me a check for \$3,500.

This all took place on the same day—the conversation with Mr. Bowne, the getting the papers from Mr. Ogden, and getting the check.

I have not, since getting that check, paid to Mr. Underhill or transferred to him any money or property. I did not give him my note.

I received \$3,500 from Mr. Goodman, which he  
 20 loaned me on diamonds a long time ago. I am sure at or about June, 1869, I did not have borrowed money from him.

*Being re-examined in chief:*

30 Complainant's counsel offered in evidence a paper writing, purporting to be an assignment of mortgage made by Gaston Lemercier to Philip R. Underhill, dated June 7th, 1869, and which is marked Exhibit No. 10 on the part of the complainant, and which being shown to the witness, he says:

This is the assignment executed by me in Mr. Ogden's office, on the 7th June, 1869.

(Objected to by defendants' counsel).

Subscribed before me this 28th } G. LEMERCIER.  
day of May, 1870.

J. HARVEY LYONS,  
*Master in Chancery.*

The further examination of witnesses was then adjourned to the 11th day of June, and on that day the counsel for the respective parties appeared before me, and adjourned the examination to 18th 10 June, and thence further adjourned to 25th June, and thence further adjourned to the 28th June, 1870, at 11 o'clock A. M.

June 28th, 1870. The parties appeared before me and proceeded with the examination.

WILLIAM ATWATER, a witness on the part of the defendants, being recalled by the defendants, testified as follows :

When the agreement of sale, Exhibit No. 4 on the 20 part of defendants, was executed, Mr. Ritter was present in the store.

The purchase of the place that was mortgaged was made in 1859, the title was taken in the name of my wife ; I think I paid \$1,000 at that time, I think about one year after that about \$4,000. That is all that has been paid on it ; there are some mortgages on it.

I was at that time doing a successful business, and so for years afterwards. I paid all the debts I owed at that time and for years afterwards. 30

If Mr. Lemercier, in the month of June, 1869, had received \$3,500 I would have been likely to have known it.

Mr. Lemercier was my assignee, and there were claims still unpaid ; the parties were very urgent ; there were claims from him as assignee due to my

creditors, and some of the creditors threatened to arrest him unless the claims were paid.

I knew these claims were not paid at that time. I don't know what efforts he made to get money. I believe these claims were subsequently paid, but am not certain.

I know that Mr. Lemercier had been in the habit of borrowing money from Mr. Goodman some \$2,000 or \$3,000 at a time, and paying bonuses for it.

10 I have examined the books to see if there was anything that would account for the payment of \$210 to Goodman on June 8th, 1869, and I do not find anything.

Exhibit No. 4 on the part of the defendants was signed on the 5th of March, 1868, the day it is dated. I would say about 11 o'clock, as near as I can recollect. I am positive of that.

My brother came down from my place in the country, where he resided, for the purpose of executing  
20 this sale, and he was dissatisfied with the agreement that was drawn up; there was another paper drawn which was executed the next day.

He did not go home with me the night of the 4th; he stayed that night in Williamsburg with Mr. Ritter.

I am sure the paper, Exhibit No. 4 on the part of defendants, was executed on the day of its date—the 5th of March.

The transfer has always been treated by the parties  
30 as of the 5th of March, and the books and business treated as transferred from the 5th of March. The 5th of March 1868, was Thursday.

Myself or wife had no consideration for giving the mortgage of \$8,000 to Mr. Lemercier excepting friendship for my brother.

The books of Mr. Lemercier show what discount was paid on the loan obtained by Mr. Lemercier of \$4,000 on the mortgage.

The entries in the cash book of Lemercier show on  
40 the date of March 17th, 1868:

"Bills payable, due June 20th, discounted by Philip Underhill, \$4,000."

"March 17th. Discount and exchange on note due June 20th. Interest, \$72.88. Allowance, \$250 ; \$322.88."

This is from cash book, folio 77.

The books also show—June 19th. Discount and exchange, interest on Philip Underhill's note renewed at six months from June 20th, \$240.

Cash book, folio 103.

10

I find no entry in the books that discount was paid or allowed to any one except Philip R. Underhill. I have examined the books for that purpose.

At about the time of obtaining that loan, Lindley Underhill said to me that the money could not be obtained of Philip Underhill at 7 per cent., and that he could use all his money at the rate of 10 per cent. or more, and that he would have to pay him a bonus.

I was familiar with the obtaining of that loan and never heard until this trial that any part of that money 20 went to Lindley Underhill for his services

The note for \$4,000 was an accommodation note of Mr. Lemercier as an accommodation for obtaining that \$4,000 on ; that was an accommodation note purely for Mr. Lemercier's benefit, and without any consideration to my brother or myself.

There never has been any attempt to collect that note of my brother to my knowledge. I heard that Mr. Lemercier guaranteed the payment of the alleged \$3,500 he received on the balance of the mortgage. 30 I have heard it from Lindley Underhill one day on the ferry boat returning from the trial.

Prior to the production of the paper, Exhibit No. 9 on the part of the complainant, here before the examiner, I never saw that paper nor knew of its contents.

My brother was proprietor of that business up to March 5th, 1868, the time of the sale to Lemercier. At the time of the sale to Lemercier, March 5th, 1868,

I had no interest in that business either secret or otherwise.

It is not true that I tried to procure Mr. Johnson or any other person to act as a cover for me in transacting that business.

At the time of the purchase of the business from Lemer cier, assignee, by J. B. Atwater, he paid for it by two notes, and at the time of the maturity of these notes they were paid out of the resources of J. B. At-  
10 water.

I never gave any direction to Mr. Johnson to enter the amount drawn by J. B. Atwater under the head of salary or for services.

J. B. Atwater, during that time acted as proprietor of that business by signing notes, checks, and acting as proprietor generally.

It is not true that he only signed such papers by my direction ; a considerable portion of them must have been signed in my absence—a large portion of  
20 them.

It is not true that there was an original separate agreement for sale, having for its object the payment to Lemer cier of the money he had loaned to J. B. Atwater.

There was not two distinct agreements for that sale as represented by Mr. Johnson.

The negotiation for the sale had been going on between me and Mr. Lemer cier for some two or three weeks prior to that time of sale, and during the whole  
30 of that negotiation, and up to the time of sale, my brother was residing with me in the country on the property mortgaged.

The terms of the sale, as finally agreed upon, were fixed on the 4th day of March.

About the middle say of February, Mr. Lemer cier proposed to me, my brother was absent at the time, to buy out the business, and to carry it on himself. He agreed to take the stock of goods, and bills, and ac- counts on the sales book, and pay all the liabilities.  
40 I told him I would propose it to my brother, which I

did that night when I went home, and after considering the matter for a while, he agreed to it.

This arrangement included the \$8,000 mortgage debt.

Negotiations went on from that time to the conclusion of the sale. There never was one word said about making a separate sale of stock—never any intimation made of holding the mortgage as security for the payment of the debts till after the sale was completed—I mean by that until the papers were executed and 10 delivered.

That was so understood and known by Mr. Lemercier and Mr. Underhill, and why it is more strongly impressed on my mind that he, Lemercier, knew that was the arrangement in the month of November—the latter part of November of that year—I called with him on Mr. Watson; he called for the purpose of making a statement of his affairs; he was then in an embarrassed condition, and among other statements that he made, he stated that he held a mortgage of 20 Mrs. William Atwater of \$8,000, which was given him to secure that amount loaned to J. B. Atwater when J. B. Atwater went into business, and that that mortgage had been paid; that when he bought out J. B. Atwater's business on the 5th of March, he stated that he had bought the stock of goods and taken the book accounts and bills receivable, and had agreed to pay the liabilities, of which this mortgage was a part; that a short time after the purchase there was a verbal agreement between William Atwater and himself that 30 he should hold the mortgage to secure him against any losses he might meet with in the collection of the accounts of J. B. Atwater.

This statement was taken down by Mr. Watson in writing in Mr. Lemercier's and my presence.

Mr. Watson said those being the facts that he could not count that mortgage as part of his assets. The mortgage had been satisfied and was void. I believe that is all on that subject.

There was no such interview or transaction as testi-40

fied to by Mr. Underhill when I called him up to state to him the terms of agreement of sale of the stock to Lemercier on the 5th of March, or at any other time. Mr. Underhill, two or three days after the sale I think it was, said that I ought to have my mortgage cancelled. I told him I left it with Mr. Lemercier to secure him against any loss in the collection of J. B. Atwater's accounts; he said I ought to have a receipt to that effect. I told him I did not need a receipt, that Mr.

10 Johnson knew all about it; that's all that was said at that time.

Prior to that conversation I did not have any conversation with Mr. Underhill about that transaction. There was not a word said or intimation of retaining that mortgage in any way, or its retention entering into the consideration of that sale or trade.

I would state that J. B. Atwater is owing to Mr. Lemercier quite a large amount, some \$16,000 or \$17,000, and the trade was for the purpose of securing

20 this debt as I understood, it was not so said directly, but as I understood.

Previous to the 4th of March, and for the purpose of affecting this sale, an account of stock had been taken, and it was intended by the parties to make the liabilities assumed by Mr. Lemercier, including the mortgage, equal to the value of the stock, and the bills and accounts receivable. They were so estimated to be about the same.

There was an estimate put on the stock at a certain

30 per centage, and when they came to add up the list of receivables they found that the amount of the stock and receivables fell short of the liabilities. Mr. Johnson made the remark to me that we might as well add that difference to the stock as one was to pay the other. The difference was added to the stock, making the stock from \$8,468.22 to \$11,465.57.

There was not one word said by anybody in my hearing about retaining the mortgage as a consideration for that advance in the value of the stock.

40 The loss of Lemercier in making the purchase in

that way was less than if J. B. Atwater had gone on with the business.

In that trade there was no consideration of any kind presented to me or to my wife as an inducement to repledge the mortgage, to answer any deficiency that might occur to answer J. B. Atwater's assets in the hands of Mr. Lemercier.

The talk of repledging the mortgage was on the same day, and after the execution of Exhibit No. 4 on the part of the defendants. I think Mr. Johnson and 10 Mr. Lemercier were present and heard the conversation; he did not offer me any inducement for it at that time except going into business with him.

We had been together several times before looking for stores, and he expected a large sum of money from France, and we were to go into business together, and that was the only inducement he offered to me.

Mr. Lemercier made the remark, suppose these accounts are not all collected, and I told him he could hold the mortgage as security, that was all that was 20 said on the subject, that ended there.

My brother was kept constantly advised of the negotiations by me every night, and when, on the morning of the 6th, as Lindley Underhill says, he told him as news the sale had actually been completed, and my brother knew all about it.

It was soon after Mr. Watson gave his opinion that the mortgage was void that the paper was presented to me for my wife to sign.

I did not say at or about that time to Johnson or 30 Underhill that it was a *bona fide* mortgage, and that it would not be contested.

About the time the paper was presented to me to get my wife to sign, Mr. Underhill asked me if I was going to oppose the collection of the loan on that mortgage, I told him that I had not thought anything about it, that I had not any idea of doing anything about it one way or the other, that I had not thought about it then.

I don't recollect of anything being said about the 40

mortgage being a *bona fide* one, and with Mr. Johnson I had no conversation at all in regard to it.

I told Mr. Underhill that my wife declined to sign the paper. He said, then we may as well tear it up, it is of no account. I told him I hadn't it with me, I left it at home, that was all that was said at the time.

I have attended all of the hearings of this examination. I believe Mr. Lemercier has attended all of them. Philip R. Underhill has attended one only I  
10 think. I have heard the whole of the examinations and cross-examinations of Mr. Lemercier and of Mr. Johnson.

I heard Mr. Watson ask Mr. Lemercier to let Mr. Johnson show him the pages of his books relating to the consideration paid for J. B. Atwater's business, and of the receipt and disposal of the loan of \$4,000 and of \$3,500. Mr. Johnson turned to the books and gave Mr. Watson a list of the pages which purported to have on them those accounts that were asked for. Mr. Watson  
20 did not examine them. They were not explained by Mr. Johnson. Only a list of the pages.

(Adjourned to July 8th, 1870, at 11 o'clock  
A. M.)

July 8th, 1870.—The parties appeared and proceeded with the direct examination of William Atwater.

Mr. Johnson did not say anything at that time about those pages containing the mortgage account, and the account of Margaret A. Atwater. I heard Mr. Watson request to have copies of those accounts he had called  
30 for to be used here as exhibits, to save the trouble of using the books and of bringing the books to court. I understood that to be assented to, and the copies were afterwards made and produced. Other than what I have now testified to, my counsel has not put those books in evidence in the examination.

(The witness here requests to make an ex-

planation of some matters heretofore testified to by him.)

I stated that J. B. Atwater was owing Mr. Lemercier \$16,000 or \$17,000. The actual amount was between twelve and thirteen thousand dollars. Part of it was for a liability as endorser for J. B. Atwater.

Mr. Johnson did not at any time prior to the execution and delivery of Exhibit No. 4 on the part of the defendants, say to me anything about Mr. Lemercier being willing to assume J. B. Atwater's business, providing the \$8,000 mortgage would be left with him as a guaranty for the collection of J. B. Atwater's assets, and that in such a case he would give \$3,000 more for the stock than he had agreed to do the day before, nor any part of it in substance. I had no such conversation with Mr. Lindley Underhill as testified of by Mr. Johnson to the effect that the mortgage was to be left as security, and that there was no necessity of reducing that agreement to writing, because it was an affair of honor between gentlemen, nor anything in substance of that kind. Nor did I have any talk with Lindley Underhill about the mortgage being held as collateral for the collection of J. B. Atwater's assets until several day's afterwards as heretofore testified to by me.

I never told either Johnson, Lemercier, or Lindley Underhill that the business was carried on for my benefit, or anything like it. There was an indebtedness of J. B. Atwater to Lemercier, as assignee, distinct from the indebtedness to Lemercier personally, which assignee indebtedness, Lemercier assumed to pay himself as one of the considerations of the trade with J. B. Atwater, and that amount is stated by Mr. Johnson in the books as \$4,424.25.

I would say now I was in error when I stated that I believed the Lemercier assignee claims were paid as I have been informed they have not been paid.

(The complainant's solicitor objects to so much of the testimony of the witness as refers

10 to any matters contained in his previous examination, to any conversation between him and Mr. Johnson or Mr. Lemercier or Mr. Lindley Underhill, or to any reference to the manner, time, or purpose, for which the mortgage was given to Lemercier as security or reference to the purpose for which the \$4,000 note was given or as to any bonus paid to complainant, or as to any consideration offered to witness or his wife for repledging the mortgage.)

Subscribed before me this 8th }  
day of July, 1870. } W. M. ATWATER.

J. HARVEY LYONS,  
*Master in Chancery.*

JAMES B. ATWATER, a witness produced on the part of the defendants, being recalled by the defendants, testified as follows :

I gave to Mr. Lemercier, the paper marked Exhibit 20 No. 9, on the part of complainant, dated February 19th, 1867. It was given to him on the day of its date, some three weeks after I bought him out. To my knowledge, Mr. William Atwater never knew of that paper, or its contents, before this trial, nor did Mrs. Atwater either.

It is not true that Mr. Lemercier told me I knew very well the business was William Atwater's, nor that he told me it would be proper for me to give him a paper to that effect, because in the event of the death 30 of J. B. Atwater, his wife might claim the business. I did not tell him I had no interest whatever in the business. I knew that my brother and Lemercier were going into business. I did not want Mr. Lemercier to think I would stand in the way in the future in case the business went on and prospered, and I gave him this paper, that in case they wanted to go into business together that I would re-convey and not stand in the way

of their going into business together. That was the whole purpose of that paper. I gave it voluntarily of my own free will.

(The complainants counsel objects to the last answer relating to the purpose for which Exhibit No. 9 was given).

I never told Lindley Underhill or Mr. Johnson that the business was not mine, or anything in substance of that. I never heard that there had been two bargains made of the sale, or trade, between me and Lemercier 10 as testified to by Mr. Johnson. During the negotiations of the sale to Mr. Lemercier, I resided with my brother. I came to the city with my brother on the 4th day of March for the purpose of carrying out the sale to Lemercier, which had been negotiated to Lemercier. After refusing to sign the paper that had been drawn on the 4th day of March, I went to Williamsburgh that night to stay, and staid there that night with Mr. Ritter, and came in with him the next morning on the 5th March, and that morning of 5th March 20 when I came in with Mr. Ritter, I signed the Exhibit No. 4 on the part of the defendants. The exhibit No. 4 on the part of the complainant was signed on the day of its date, March 5th. I came down with my brother on the 4th and signed it the next day. I gave up my business and Mr. Lemercier assumed it on that day. It was towards the last of the week, I think it was Thursday.

It is not true that on the morning of 6th, when I came to the store, I saw Lindley Underhill, and that he 30 told me as news that there was going to be a trade, and that if the business would be successful the mortgage would be paid off. He, Lindley Underhill, never said a syllable like that. I don't recollect a word of that kind.

During the time I was proprietor of that business, my sign was up as proprietor, and nobody's else.

I am not a professional bookkeeper. I know but

very little about it. I never gave Mr. Johnson any instructions how to make his entries in the books.

(The complainant's solicitor objects to so much of the testimony of the witness as refers to any matters contained in his previous examination, and as to the time when Exhibit No. 4 on the part of the complainant was signed by him).

Subscribed before me this }  
10 8th day of July, 1870. } JAMES B. ATWATER.

J. HARVEY LYONS.

*Master in Chancery.*

STEPHEN RITTER, a witness produced on the part of the defendants, being recalled by the defendants, testified as follows :

On or about the 4th and 5th of March, 1868, the position I occupied in Atwater's store was near the railing of the counting-room, in sight and within hearing of all that was going on there on either of those  
20 days.

I did not see William Atwater, Lemercier, and Johnson, together with Lindley Underhill in conversation or consultation together. I did not hear any such conversation as testified to by Mr. Johnson and Mr. Underhill, that the mortgage was to be held as security, and that there ought to be a writing to that effect, nor anything of the kind, nor Mr. Atwater's alleged answer that it was an affair of honor, and that it need not be reduced to writing.

30 The position I occupied on the 4th and 5th of March, 1868, in that store, was within full hearing of ordinary conversation in any part of that counting-room, and in full view of any person occupying any part of that counting-room. I was not over three feet from the centre of the counting-room. That was the only counting-room in that store, and the one occupied by Mr. Johnson with his books.

I was in that store all day. I always carried my lunch, and did not go for my dinner.

I know of J. B. Atwater coming on the 4th of March, 1868, and examining the paper and refusing to sign it, and of his coming in on the morning of the 5th and signing Exhibit No. 4 on the part of the defendant. I was there and saw both of those transactions.

If Mr. William Atwater had called Lindley Underhill into a conference and conversation in that counting-room on either of those two days, and the conversation had taken place, as testified to by Johnson and Lindley Underhill, I should have been certain to have seen and heard it. I did not hear any such conversation. I did not see Lindley Underhill in conversation with the parties named on either of those two days in the counting-room.

I fix those two dates because it was Wednesday night that J. B. Atwater stayed at my house, and I have got those dates fixed upon my mind as confidently as I can have, and the night he stayed at my house was the night of the day he refused to sign the paper, and the morning after the night he stopped at my house was when he signed the paper. And I fix the time also from the fact, that I ceased to be employed there after that time. It was in the middle of the week. I am very sure he came down and stopped at my house on Wednesday night.

I never heard before this trial that that paper was not signed on the day of its date.

The business was transferred on the 5th of March. I should judge, as near as I can recollect, that it was along in the afternoon of the 4th, that James B. Atwater refused to sign the paper. I am very sure it was.

I should judge we went home together that afternoon somewhere about 4 o'clock. He went out a little while before then to the hotel.

William Atwater was in the habit, at that time, of leaving the store about half-past 3, and taking the 4 o'clock train.

It was in the forenoon of the 5th of March the paper was signed.

I never heard or seen anything to indicate that J. B. Atwater was not the proprietor of that store; he was so regarded by everybody.

It is not true that Lindley Underhill repeatedly said to me that the mortgage ought to be removed or got rid of. He has repeatedly said to me that it ought to be cancelled; that was the day after the sale. He  
10 spoke of it first the next morning.

I knew there was talk, about that time, of Mr. William Atwater going into business with Lemercier, after William Atwater succeeded in getting a settlement with his creditors.

I knew of William Atwater and Mr. Lemercier going up Broadway and looking at a store, and Mr. Lemercier said he was going to start a wholesale and retail business there—he and William Atwater—and got me to go and see the agent of the store to see how long a  
20 lease of the store to let, and what terms it could be got for. I went down to Morgan. I think it was in Pine street.

Since Lemercier bought out J. B. Atwater he, Lemercier, failed, and he has not been in business since he failed.

(The complainant's solicitor objects to the whole testimony of this witness).

*Being cross-examined the witness says:*

I am the brother-in-law of James B. Atwater. We  
30 married sisters. I saw James B. Atwater writing at the desk. I could not say I saw him write his name on Exhibit No. 4 on the part of the defendants.

I can't say for certain whether I read Exhibit 4 before it was executed or not. I am under the impression that I did read it.

I am speaking of the first paper now, the one that

was signed. I don't think I did see it to read it before it was signed.

I was discharged from Lemercier's employ the 6th of March.

Subscribed before me this 8th }  
day of July, 1870. } STEPHEN RITTER.

J. HARVEY LYONS,  
*Master in Chancery.*

The counsel for the respective parties hereto, hereby stipulate and agree to waive all objections to the order 10 of any testimony, or the time when it was given, or any other formal objection excepting as noted herein, and excepting such objections as have been made during the progress of the examination, and therein noted, and that the testimony on both sides has been closed.

J. HARVEY LYONS,  
*Master in Chancery.*

## APPENDIX.

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The following Exhibits were offered in evidence by the solicitor of the complainant, as heretofore referred to.

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### EXHIBIT NO. 1.—*For Complainant.*

A bond made by Margaret A. Atwater and William Atwater to Gaston Lemercier, dated January 11th, 1868, in the penal sum of \$16,000, conditioned for the payment of \$8,000 in one year from the date thereof, with interest thereon, at the rate of seven per cent. 10 per annum, payable semi-annually.

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### EXHIBIT NO. 2.—*For Complainant.*

A mortgage made by Margaret A. Atwater and William Atwater to Gaston Lemercier, dated January 11th, 1868, given to secure the payment of the above mentioned \$8,000, upon property situated in Bergen County, acknowledged before Peter T. Haring, a Master in Chancery, January 13th, 1868, registered in the Bergen County Clerk's office, January 13th, 1868, in 20 liber V. of Mortgages, pages 72 and 73.

EXHIBIT NO. 3.—*For Complainant.*

Know all men by these presents, That I, Gaston Lemercier, of the City, County, and State of New York of the first part, in consideration of the sum of one dollar, lawful money of the United States, to me in hand paid by Philip R. Underhill, of New Rochelle, Westchester County, State of New York, of the second part, at or before the ensembling and delivery of these presents, the receipt whereof is hereby acknowledged have granted, bargained, sold, assigned, transferred, 10 and set over, and by these presents do grant, bargain, sell, assign, transfer, and set over, unto the said party of the second part, a certain indenture of mortgage, bearing date the eleventh day of January, in the year one thousand eight hundred and sixty-eight, made by Margaret A. Atwater, of the Township of Harrington, County of Bergen, and State of New Jersey, to me, and recorded in the office of Clerk of Bergen, in liber V. of Mortgages, pages 72 and 73, January 13, 1868. Together with the bond or obligation therein described, 20 and the money due and to grow due thereon with the interest. To have and to hold the same unto the said party of the second part, his executors, administrators, and assigns, forever: subject to the condition hereinafter mentioned, and subject to the proviso in the said indenture of mortgage mentioned: And I do hereby make, constitute, and appoint the said party of the second part my true and lawful attorney, irrevocable, in my name or otherwise, but at his proper costs and charges, to have, use and take, all lawful ways and 30 means for the recovery of the said money and interest, and in case of payment to discharge the same as fully as I might or could do if these presents were not made. Upon condition, however, that this assignment shall be void if a promissory note, dated January 17th, 1868, made by James B. Atwater to my order, and by me indorsed, for four thousand dollars payable four months after date, shall be well and truly paid at its maturity, or in case of a renewal of said note in whole

or in part, or in case of the exchange of another note, then the assignment to be void in case such renewal or exchange note shall be paid.

In witness whereof, I have hereunto set my hand and seal, the sixteenth day of March, in the year one thousand eight hundred and sixty-eight.

G. LEMERCIER. [SEAL.]

Sealed and delivered in the }  
 presence of }  
 10 THOS. J. McCAHILL.

N. B. The note within mentioned and to secure the payment of which the assignment has been made has been duly stamped.

STATE OF NEW YORK, }  
 CITY AND COUNTY OF NEW YORK. } ss :

Be it remembered that on this 27th day of January, A. D. 1869, before the subscriber a commissiener for the State of New Jersey, for taking the acknowledgment and proof of deeds, personally came Thomas J. 20 McCahill, of full age, who, being by me duly sworn according to law on his oath, saith that he saw the said Gaston Lemercier, the within named grantor, sign, seal, and deliver the within instrument on his voluntary act and deed, and that he, the said Thomas J. McCahill, subscribed his name to the same at the same time as an attesting witness.

[L. S.]

FRED'K R. ANDERSON,  
*Commissioner for New Jersey,  
 In New York City, County and State.*

EXHIBIT NO. 4.—*For Complainant.*

\$2.00	\$4,000.	New York, Feb. 17th, 1868.	
revenue		Four months after date I promise to pay	
stamp		to the order of G. Lemercier four thousand	
cancell d.		dollars, at 54 Howard street. Value re-	
		ceived.	(signed),
			JAMES B. ATWATER.
		(Indorsed),	
		G. LEMERCIER.	10

EXHIBIT NO. 5.—*For Complainant.*

No	\$4,000.	New York, June 20th, 1868.	
revenue		Six months after date I promise to pay to	
stamp.		the order of myself four thousand dollars,	
		at 54 Howard street. Value received, with	
		current exchange on New York.	(signed),
			G. LEMERCIER.
		(Indorsed),	
		G. LEMERCIER.	20

Also indorsed as follows: A note of James B. Atwater of the same amount, due June 20th, 1868, is held as collateral for this note, security properly stamped.

EXHIBIT NO. 6.—*For Complainant.*LIST OF J. B. ATWATER'S ASSETS REMAINING UNPAID  
DECEMBER 27, 1869.—NOTES.

M. L. Pritchard, due June 18, 1867,	\$268 46	
M. L. Pritchard, due July 18, 1867,	268 45	
C. A. Wright, due July 3, 1867,	230 25	
M. Manning, due Dec. 30, 1867,	84 69	30
Stallings & Walton, due Jan. 20, 1868,	323 20	

R. W. Perkins, due Jan. 4, 1868,	300 00
S. Adler, due March 30, 1868,	172 91
Wm. B. Rogers, due May 4, 1868,	150 00
Wm. B. Rogers, due June 4, 1868,	102 36
Wm. B. Rogers, due July 4, 1868,	100 00
Samuel Chadwick, due Aug. 11, 1868,	90 00
	\$2090 32

## ACCOUNTS.

	Real Estate, Mrs. Mary Pulliam, Agt,	\$143 22
	C. H. F. Ahrens & Co.,	29 25
10	George I. Sanger,	58 81
	Worthington & Smith,	12 33
	Loomis Ballard,	1 25
	Mrs. N. Davis,	240 70
	“ M. J. Owsley,	82 00
	W. T. Taliaferro,	8 88
	C. D. Arcambal,	4 00
	Phil. Gilbert,	5 00
	Mrs. S. A. Jones,	13 72
	“ J. L. Huestis,	8 50
20	“ E. T. Hall,	35 00
	“ E. L. Chamberlin,	15 50
	“ M. L. Pritchard,	114 88
	“ Eliza Powers,	3 03
	“ W. Dann,	600 00
	Miss. M. A. Munn,	33 38
	Mrs. R. W. Perkins,	1,156 17
	Miss Grace Craig,	6 01
	Mrs. J. Condit,	54 16
	“ J. W. Dempsey,	155 16
30	Mr. C. W. Paine,	21 00
	Miss. Alla Russell,	2 75
	Mrs. Jane Fulton,	49 18
	“ M. J. Bigsby,	5 17
	“ A. C. Pickell,	2 08
	“ Powless,	18 84
	“ A. Mason,	37 35
	“ S. L. Ausman,	167 44
	“ M. Shepard,	147 10

" J. Wagley,	108 53	
" M. Manning,	4 85	
Mrs. Olive Vincent,	4 62	\$3,349 86
Expenses and losses in settlement,		\$2,719 84

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EXHIBIT NO 7.—*For Complainant.*

In consideration of full value received, I hereby sell and convey to G. Lemercier all my right, interest and title in the following notes and accounts now due me as shown by my books at this date. 10

NOTES.

M. L. Pritchard, due June 18, 1867,		\$ 268 46
M. L. Pritchard, due July 18, 1867,		268 45
Samuel Chadwick, due July 29, 1867,	207 05	
	50 00	
	<hr/>	157 05
C. A. Wright, due July 3, 1867,		230 25
C. A. Rogers, due July 27, 1867,		156 70
C. A. Rogers, due Nov 19, 1867,		100 00
L. R. Hoff, due Nov. 15, 1867,	28 44	20
	10 00	
	<hr/>	18 44
S. S. Taylor, Agt., due Dec. 20, 1867,	438 85	
	150 00	
	<hr/>	288 85
H. Bussey, due Dec. 21, 1867,		153 62
M. Manning, due Dec. 30, 1867,	117 69	
	33 00	
	<hr/>	84 69
Ichabod Davis, due January 16, 1868,		56 75 30
Stallings & Walton, due Jan. 20, 1868,	646 40	
	323 20	
	<hr/>	323 20
R. W. Perkins, due Jan. 4, 1868,		300 00

## ACCOUNTS.

	Wm. Atwater,	\$ 404 17
	G. Lemercier,	2,502 43
	Geo. I. Sanger,	58 81
	M. Bleha,	332 72
	Worthington & Smith,	12 33
	Miss L. M. Kniffen,	2 50
	Loomis Ballard,	1 25
	Goldsticker, Strauss & Agnew,	139 63
10	J. Benswanger & Co.,	258 10
	Liles & Little,	3 25
	Mrs. N. Davis,	240 70
	" M. J. Owsley,	82 00
	" Martha Perry,	55 75
	W. T. Taliaferro,	8 88
	N. Perkins,	133 94
	Mrs. M. J. Buck,	8 50
	C. D. Arcambal,	4 00
	Phil. Gilbert,	5 00
20	A. Alden & Co.,	9 90
	Miss M. J. Kirkpatrick,	3 11
	Mrs. J. P. Thirds,	139 82
	C. A. & D. B. Walling,	11 62
	S. Adler,	172 91
	Miss S. E. Rumyan,	3 31
	Mrs. S. A. Jones,	112 09
	Miss T. E. Gorman,	70
	Mrs. J. Compton,	210 47
	" H. L. Stephens,	211 80
30	" J. L. Huestis,	8 50
	" E. T. Hall,	35 00
	" C. Sharts,	49 04
	" E. L. Chamberlain,	15 50
	Miss E. D. Renwick,	27 15
	Mrs. Mary Pulliam, Agent,	143 22
	" M. A. Horsfall,	38
	J. Munson,	362 41
	Mrs. M. J. Higgins,	9 00
40	" M. L. Pritchard,	114 88

" Eliza Powers,	3 03
" W. Dann,	600 00
" Wm. H. Lee,	432 64
S. S. Taylor, Agent,	168 12
Miss M. A. Nunu,	33 38
" S. Anderson,	18 87
Mrs. L. A. Mattison,	13 13
" R. W. Perkins,	1,156 17
" M. A. Dunlop,	3 25
" C. H. Read & Co.,	1 00 10
" S. A. Barker,	181 00
" G. T. Reeder,	1 13
" E. Palmer,	279 71
" L. Vosburgh,	57 13
" Dale & Young,	5 90
" Dale & Paramore,	21 93
Miss Grace Craig,	6 01
Mrs. J. Condit,	54 16
" Aaron Betts,	45 55
" M. M. Frost,	83 61 20
" A. Beemer,	156 36
" J. W. Dempsey,	257 26
" C. W. Paine,	21 00
Alla Russell,	2 75
Mrs. C. A. Rogers,	145 66
" E. J. Lincoln & Co.,	481 25
" Jane Fulton,	49 18
Wm. Gibboney & Son,	50 00
Mrs. M. J. Bigsby,	5 17
Miss Lydia Baylor,	136 13 30
Mrs. A. C. Pickell,	2 08
" L. M. Shaw,	110 50
Miss L. A. Huson,	192 33
Mrs. C. Danley,	19 42
" N. C. Simonson,	43 48
Wm. Bond,	118 23
Miss Annie E. Van Duzer,	38 09
Samuel Chadwick,	110 60
Miss Mary Chadwick,	49 88
Mrs. Powless,	18 84 40

	Mrs. A. Mason,	37 35
	J. C. Lewis,	3 13
	Ward B. Grey,	1 88
	L. Binns,	5 63
	H. A. Matthews,	22 74
	A. W. Jones,	845 94
	Mrs. S. L. Ansman,	167 44
	Mrs. M. Shepard,	147 10
	“ L. A. Lloyd,	187 90
10	“ A. E. Burke,	537 73
	“ N. E. Bartholomew,	11 63
	“ H. P. Daniels,	3 75
	“ A. M. Nogle,	90 57
	Misses Morse & Burwell,	280 89
	Geo. J. Cave,	9 13
	Miss. V. L. Stevens,	100 00
	Mrs. J. Wagley,	211 53
	Miss M. Manning,	4 85
	Mrs. Olive Vincent,	4 62
20	Mrs. E. Osborn,	31 63
	Wm. B. Smith,	133 62
	Miss Jane A. Moore,	32 23

JAMES B. ATWATER.

New York, March 5th, 1868.

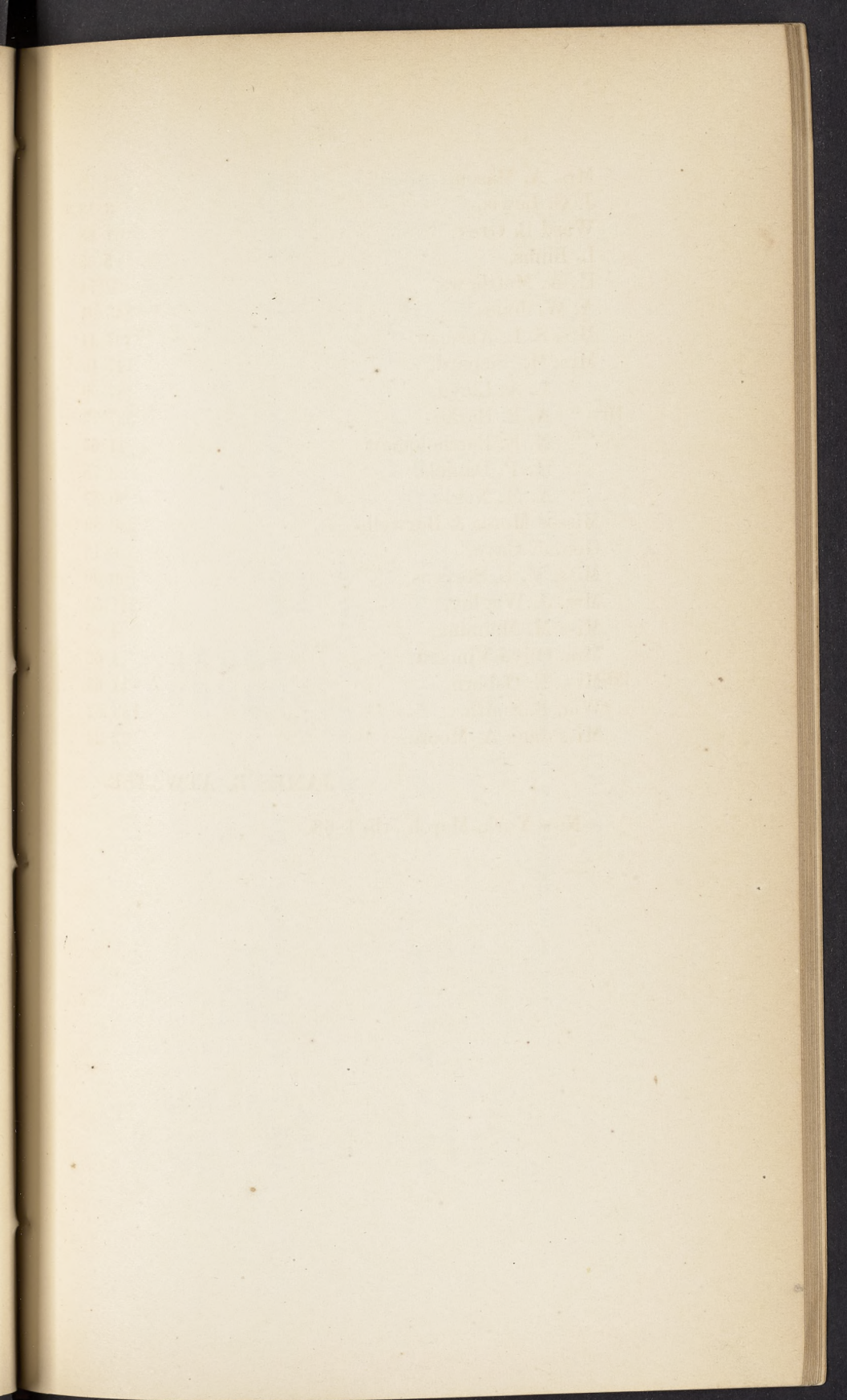


EXHIBIT No. 8.—*For Complainant.*

COPIES OF ENTRIES ON G. LEMERCIER'S BOOKS. LEDGER, FOLIO 41.

*Bond and Mortgage.*

1868.				1869			
March 5.	To Sundries.	D-b. 24.	\$8,000 00.	June 8.	By cash.	A. 150.	3,500 00.
				"	" sundries.	A. 47.	4,500 00.

MARGARET A. ATWATER.

1868.				1868.			
April 2.	To J. W. Dempsey.	D-b. 26.	67 00.	March 5.	By sundries.	D-b. 24.	8,000 00.
" 30.	" sundries.	" 27.	255 03.				
" "	" cash.	A. 85.	10 00.				
June 27.	" "	105.	10 00.				
July 31.	" S. A. Jones.	D-b. 31.	35 35.				
	" balance.		7,618 62.				
			<u>\$8,000 00.</u>				<u>\$8,000 00.</u>

1868.				1868.		
Aug. 13.	To A. E. Burke.	D-b. 33.	265 73.	Aug. 1.	By balance.	7,618 62.
" 21.	" cash.	A. 115.	27 20.			
Oct. 2.	" "	121.	1 50.			
Dec. 12.	" "	137.	44 11.			
" 14.	" sundries.	D-b. 41.	818 80.			
	" balance.		6,461 28.			
			<u>\$7,618 62</u>			<u>\$7,618 62</u>

1869.				1869.		
April 1.	To cash.	A. 149.	46 10.	Jan. 2.	By balance.	6,461 28.
" 16.	" Z. P. Thirds.	D-b. 46.	83 32.	Jan. 22.	" cash.	A. 142. 97 00.
May 6.	" Lydia Baylor.	47.	46 13.	April 1.	" "	148. 5 06.
July 31.	" sundries.	48.	1,005 57.			

*Day Book, folio 24.*

1868.	
March 5.	Sundries to sundries.
	For opening the following accounts.
	Cash, this amount on hand, 632 32
10	Merchandise, this amount on hand (lot of J. B. Atwater), 11,465 57
	Bills receivable, as per J. B. Atwater's trial balance, 2,406 46
	Personal accounts. 13,779 99
	Bond and mortgage of Margaret A. Atwater to G. Lemercier, due January 13th, 1869, 8,000 00
20	J. Formstecher, this amount due me, 100 00
	To bills payable, as partial balance of this date, 10,442 90
	To personal accounts, as per trial balance, 5,743 55
	To G. Lemercier, assignee, this amount due to him, 4,424 25
30	To Margaret A. Atwater, for mortgage of this amount, 8,000 00
	Mr. Goodman, this amount due to him, 1,600 00
	To stock account, for balance, 6,173 64

*Cash Book, 150.*

1869.	
June 8.	Bond and mortgage, sold to Philip R.

Underhill, 3,500 00

*Day Book, 47.*

June 8.	Sundries to bond and mortgage,	4,500 00
"	Bills payable; note due December 23rd, 1868,	4,000 00
"	Profit and loss,	500 00

*Day Book, 26.*

1868.		10
April 2.	Sundries to J. W. Dempsey,	88 00
"	Expense account, 3 loads coal, as per invoice,	21 00
"	Margaret A. Atwater, 10 loads coal, as per invoice,	67 00

*Day Book, 27.*

	M. A. Atwater, to sundries,	255 03	20
April 1.	To H. Bussey, compromise March 10,	53 62	
" 3.	To J. Benswanger & Co., compromise,	193 57	
" 30.	To L. Vosburgh, cost of collecting,	5 96	
" 7.	To Ward B. Grey, this was paid December 19, 1867, and entered as cash sale,	1 88	30

*Cash book 85.*

1868.  
April 30. M. A. Atwater, paid J.

H. Watson & Co.,  
for costs on H. Bussey, 10 00

*Cash Book 105.*

June 27. M. A. Atwater, gave  
W. A. to settle with  
Sheriff, 10 00

*Day Book 31.*

July 31. Sundries to Mrs. S. A.  
Jones, 98 37  
10 Merchandise account,  
\$98 37 a 60 per cent, 59 02  
M. A. Atwater, \$98 37  
a 40 per cent, 39 35  
For goods bought of J.  
B. Atwater received  
on account.

*Day Book 33.*

Aug. 13. M. A. Atwater, 265 73  
20 To Mrs. A. E. Burke. 265 73  
Balance of account  
compromised.

*Cash Book, 115.*

1868.  
Aug. 21. Margaret A. Atwater,  
paid J. H. Watson &  
Co., services on claim  
against Mrs. Burke, 27 20

*Cash Book, 121.*

Oct. 2. M. A. Atwater, ex-  
30 pense on suit against  
N. Perkins, 1 50

*Cash Book, 137.*

Dec. 12.	M. A. Atwater, paid J. H. Watson & Co.		
	Costs in suit against Rogers,	21	18
	"          "	21	18
	Costs in suit against Benswanger,	5	00
		<hr/>	
		47	36
	Less interest from A. E. Burke,	3	25
		<hr/>	
			44 11
			10

*Day Book, 40.*

1868.			
Dec. 14.	Margaret A. Atwater,	818	80
"	To William Atwater's account, due J. B. At- water,		509 32
"	To E. J. Lincoln & Co., compromised,	281	25
"	To William Bond, com- promised,		20
			28 23

*Cash Book 149.*

1869.			
April 1.	M. A. Atwater, paid J. H. Watson & Co., costs on S. Adler,	21	10
	Half costs on M. Bleha,	25	00
		<hr/>	
			46 10

*Day Book 46.*

1869.			
April 16.	M. A. Atwater,	83	32
	To J. P. Thirds,		30
	Compromise on this account.		83 32

*Day Book 47.*

May 6.	M. A. Atwater,	46 13	
	To Lydia Baylor,		46 13
	Compromise on this account.		

*Day Book, 48.*

	M. A. Atwater to sun- dries,	1,005 57	
July 8.	To N. Perkins, loss on this account,		108 94
10	" To A. W. Jones, loss on this account,		656 65
" 1	To J. Munson, loss on this account,		239 98

*Cash Book, 142.*

1869.

Jan. 22.	M. A. Atwater, re- ceived from sale of 15 counters,	97 00
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20. *Cash Book, 148.*

April 1.	M. A. Atwater, in- terest on Burke's note, less expense,	5 06
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EXHIBIT NO. 9.—*For Complainant.*

New York, 19th Feb., 1867.

MR. G. LEMERCIER ;

DEAR SIR—In consideration of Wm. Atwater having been unfortunate in business, and unable to make a settlement to go on with the same, I hereby agree to 30 take charge and carry on the same for his sole use and

benefit, and do hereby agree to transfer said business to Wm. Atwater whenever he may require the same.

(signed),

JAMES B. ATWATER.

EXHIBIT NO. 10.—*For Complainant.*

Assignment of the above referred to mortgage from Gaston Lemercier to Philip R. Underhill, dated June 7, 1869, acknowledged same day, before Frederic B. Ogden, a Master in Chancery.

Consideration, \$3,500.

10

The following Exhibits were offered in evidence by the counsel for the defendants, as heretofere referred to.

EXHIBIT N. 1.—*For Defendants.*

COPIES OF ENTRIES ON J. B. ATWATER'S BOOKS.

*Day Book, folio 5.*

1867.

June 29.	Discount and exchange	\$155 45	
	To G. Lemercier		155 45
	For interest to July 1st.		20

*Day Book, folio 14.*

1867.

Dec. 31.	Discount and exchange,	340 27	
	To G. Lemercier,		340 27
	Interest on account to date.		

*Cash Book, folio 2.*

1867.

Feb. 20.	To G. Lemercier,	3,500
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*Cash Book, folio 8.*

April 10.	To G. Lemercier on account	2,000
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*Cash Book, folio 10.*

April 22.	To G. Lemercier on account,	1,000
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*Cash Book, folio 18.*

May 22.	To G. Lemercier on account,	500
" 24.	To G. Lemercier on account,	200

*Cash Book, folio 20.*

May 28.	To G. Lemercier on account,	1,700
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10	<i>Cash Book, folio 22.</i>	
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June 4.	To G. Lemercier on account,	1,000
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*Cash Book, folio 32.*

July 18.	Borrowed from G. Lemercier,	500
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*Cash Book, folio 66.*

1868.

Jan. 25.	To G. Lemercier, Clyde & Black's check,	300
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*Cash Book, folio 70.*

20	March 3.	To G. Lemercier, paid Daniels & Hubbard,	502 04
	" 3.	To G. Lemercier, paid for use of money,	50 00
	" 4.	To G. Lemercier, paid Ira Beard,	352 00

*Cash Book, folio 31.*

1867.

July 2.	By G. Lemercier on account.	In-	
	terest,		60 00

*Cash Book, folio 53.*

Nov. 8.	G. Lemercier, on account,		2,444 00
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*Cash Book, folio 67.*

1868.

Jan. 25.	G. Lemercier, as per ticket.		112 00
" 29.	G. Lemercier, on account (bills),		100 00 10

*Cash Book, folio 69.*

Feb. 8.	G. Lemercier, paid Smith, lawyer,		5 00
" 20.	G. Lemercier, paid J. Formsticher,		100 00
" 29.	G. Lemercier to balance error,		
	Clyde & Black's chk., 300 } 25		
	Less charged, 50 { Jan.	250 00	
" 29.	G. Lemercier on account, as per ticket		10 44

*Cash Book, folio 71.*

March 5.	G. Lemercier, to balance account,		35 64 20
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*Sales Book, folio 151.*

G. Lemercier, from memorandum book.

1867.

June 28.	1 piece ribbon,	2 00	
"	1 piece No. 4 ribbon,	1 50	
"	1 bunch flowers,	1 25	
"	1 piece velvet ribbon,	50	
"	1 hat,	1 25	
"	1 hat,	2 00	
"	1 flower,	50	30
"	Velvet,	75	
		—	9 75

*Sales Book, folio 158.*

G. Lemer cier, from memorandum book.

July 1.	Ribbon,		2 50
" 3.	1 piece ribbon,		1 60
" 11.	2 yards silk,	1 00	2 00
" 18.	2½ yards silk,	62½	1 56
" 18.	2½ yards black maline,	30	75
" 18.	1 frame,		25
			<hr/> 8 66.

10

*Sales Book, folio 164.*

G. Lemer cier, from memorandum book.

Aug. 10. 1 yard pink crape, 1 13

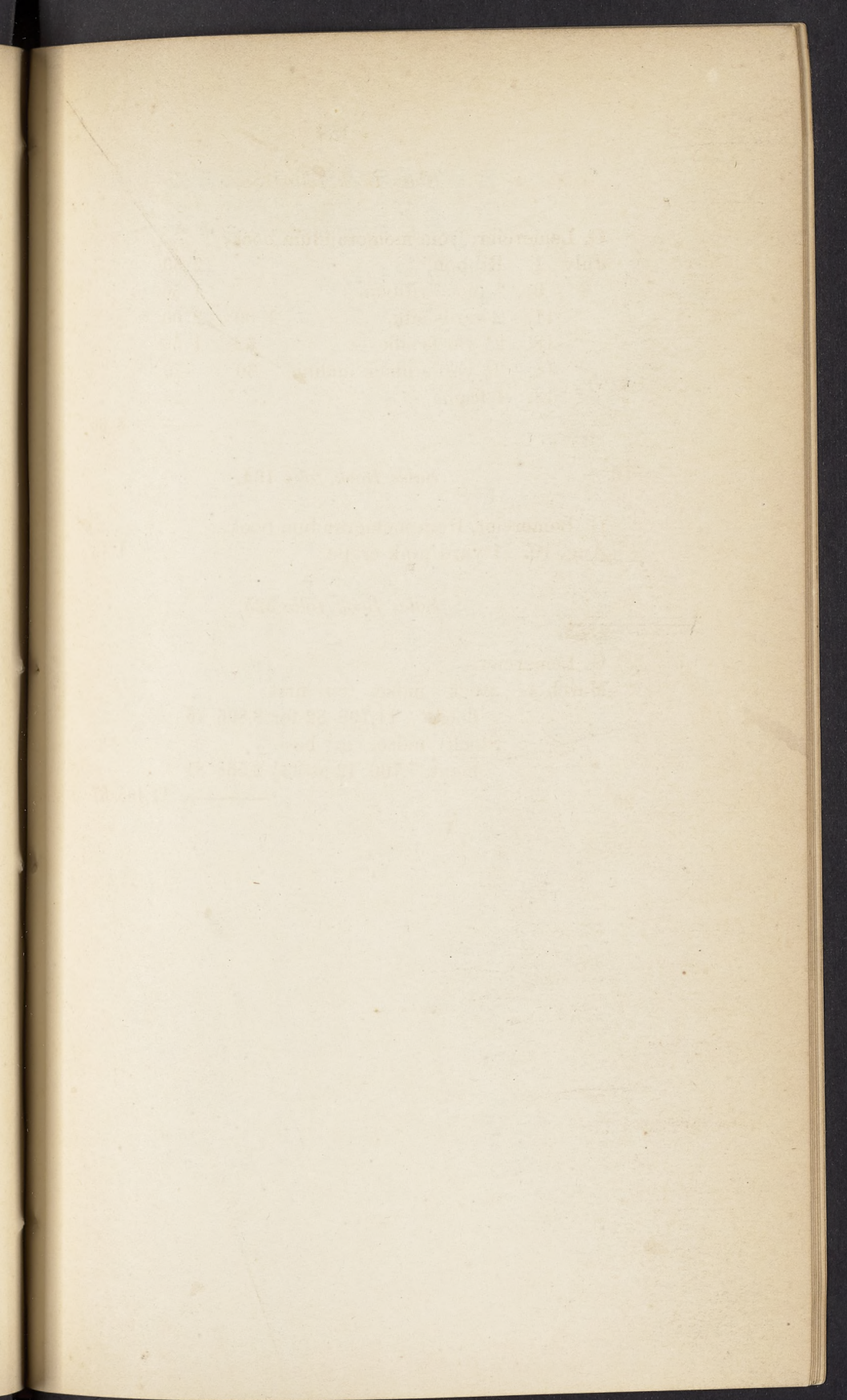
*Sales Book, folio 325.*

1868.

G. Lemer cier.

March 4. Stock mdse. on first  
 floor, 11,798 82 for 8,896 76  
 Stock mdse. in base  
 ment, 7,706 42 at 33½ 2,568 81  
 \_\_\_\_\_ 11,465 57

20



Ledger, folio 43.

G. LEMERCIER.

1867.				1867.			
June 28.	To merchandise,	A, 151	9 75	Feb. 20.	By cash,	A. 2	3,500 00
" "	To balance,		10,045 70	April 10.	" "	8	2,000 00
				" 22.	" "	10	1,000 00
				May 22.	" "	18	500 00
				" 24.	" "	"	200 00
				" 28.	" "	20	1,700 00
				June 4.	" "	22	1,000 00
				" 29.	By interest,	D-b. 5	155 45
			<hr/>				<hr/>
			10,055 45				10,055 45
July 2.	To cash,	A. 31	60 00	July 1.	By balance,		10,045 70
" 1, 18.	To merchandise,	A. 158	8 66	" 18.	By cash,	A. 32	500 00
Aug. 10.	" "	164	1 13	Dec. 31.	By interest,	D-b. 14	340 27
Nov. 8.	To cash,	A. 53	2,444 00				
	Balance,		8,372 18				
			<hr/>				<hr/>
			10,885 97				10,885 97

1868.			1868.			
Jan. 25.	To cash,	A. 67	112 00	Jan. 2.	By balance,	8,372 18
" 29.	" "	"	100 00	" 25.	By cash,	A. 66 300 00
Feb. 8.	" "	69	5 00	March 3.	" "	70 502 04
" 20.	" "	"	100 00	" 3.	" "	" 50 00
" 29.	" "	"	250 00	" 4.	" "	" 352 00
" "	" "	"	10 44		By stock account,	2,502 43
March 4.	To merchandise,	A. 325	11,465 57			
" 5.	To cash,	A. 71	35 64			
			<hr/>			
			12,078 65			<hr/>
						12,078 65

EXHIBIT NO. 2.—*For Defendants.*

COPIES OF ENTRIES ON G. LEMERCIER'S BOOKS.

*Cash Book folio 76.*

1868.

March 17.	Bills payable due June 20th, discounted by Philip Underhill,	\$4,000
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*Cash Book folio 77.*

1868.

March 17.	Discount and exchange on note due June 20th.	Interest,	72 88	
10		Allowance,	250 00	
			————	\$322 88

*Cash Book folio 151.*

1869.

June 8.	G. Lemercier on account paid Mr. Goodman,	\$210 00
" 9	W. G. Vander Rout 40 per cent. in settlement,	52 10
" 9	G. Lemercier, Assignee, paid Chas. Miles in settlement,	130 00
20	" 9 R. T. Wilde 40 per cent in settlement,	55 50
" 11	D. P. Baker & Co., 20 per cent in full settlement,	28 22
" 11	C. F. Danubman & Co., 20 per cent in full settlement,	228 65
" 11	Townsend, Montant & Co.,	425 35
" 11	Cooper, Smith & Co., 20 per cent in full settlement,	74 08
30	" 11 H. Bacharach & Co., 20 per cent in full settlement,	65 70
" 11	C. A. Auffmordt & Co., 20 per cent in full settlement,	549 20
" 11	E. C. Cowdin & Co., 40 per cent in full settlement,	117 91
" 14	Wilmerding, Hognuet & Co., on account in settlement,	700 00

" 14	Expense account paid Mr. Ogden for services,	14 00
" 14	Expense account paid Mr. Seixas,	25 00

*Folio 153.*

June 15	Expense account, H. Johnson, salary to date,	37 50
" 15	G. Lemercier on account to remit to Europe,	300 00
" 16	G. L., assignee, paid J. H. Stephens on account,	50 00 10
" 17	Ira Beard, deposit,	36 75
" 17	Strauss, Bianchi & Co., in full,	75 00
" 17	A. Picaut, in full,	76 04
" 17	Weisker Bros., in full,	50 63
June 20	G. L., assignee, paid J. H. Stephens in full,	50 00
" 29	Bills payable, E. S. Jaffrey & Co., due this day,	306 60
" 30	Discount and exchange, Kinyon,	10
" 30	G. Lemercier, for ticket books,	129 00 20
" 30	Expense account, office rent to date,	40 00
" 30	Expense account, H. Johnson, salary to date,	37 50
		77 50
" 30	Expense account, petty cash,	25 47
" 30	Profit and loss, cash short since Jan- uary 1st,	4 18
July 7	Discount and exchange on Chadwick,	10
" 8	Discount and exchange on Huson,	38 30
" 14	Discount and exchange on Saunders,	50

*Folio 155.*

July 20	Discount and exchange on Palmer,	30
" 13	Ira Beard, loan,	500 00
" 14	Ira Beard, loan,	49 50
" 20	Ira Beard, loan,	99 70

	" 28	Borrowed and lent, loaned Johnson and Thompson,	200 00
	" 31	N. Peirson, loaned July 12,	15 00
	" 31	G. Lemercier, per Tickets,	201 05
	" 31	Expense, petty cash,	2 25
Aug.	2	G. Lemercier, for rent,	250 00
	" 10	G. Lemercier, tickets,	16 00
			<hr/> 266 00
Sept.	11	G. Lemercier, on account,	60 79
10	" 11	Expense, office rent,	20 00
	" 11	Expense, H. Johnson, services,	15 00
			<hr/> 35 00

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EXHIBIT NO. 3.—*For Defendants.*

COPIES OF ENTRIES ON G. LEMERCIER'S BOOKS.

*Cash Book, folio 150.*

1869.			
	June 1.	To balance brought forward,	131 08
	"	C. C. Atwater in full,	90 25
	"	H. L. Stephens "	19 48
20	"	F. S. Williams "	77 38
	"	H. Kinyon, on account,	15 00
	"	A. Frost "	30 00
	" 5.	W. H. Lee, in full,	121 54
	"	Bills receivable, S. E. Kinyon, due June 4,	200 00
	" 7.	D. W. Morris, in full,	40 00
	" 8.	Bond and mortgage sold to Philip R. Underhill,	3,500 00
	" 9.	William B. Smith, on account,	50 00
30	" 10.	E. Palmer,	30 00
	" 12.	A. Brodie (February 8), on account by R. A. W.,	15 00
	"	A. Brodie (February 8), on account by G. L.,	10 00
	" 15.	A. Peirson (February 8), on account,	50 00
	"	H. C. Simonson, in full,	20 10

*Folio 152.*

" 15.	S. Anderson, in full,		39	42
" 25.	S. E. White	"	36	26
" 29.	Ira Beard, returned,		306	60
" 30.	H. Kinyon, in full,		25	00
July 1.	J. Munson to J. B. A., in full, com- promised,		22	43
"	J. Munson to G. L. in full, com- promised,		16	35
" 7.	Mary Chadwick, on account,		15	00 10
" 8.	N. Perkins to J. B. A., in full, 23 7-10 per cent.,	34	41	
	Less costs,		9	41
			25	00
"	A. W. Jones to J. B. A., in full, 25 per cent.,	201	48	
	Less costs,		22	19
			189	29
"	L. A. Huson to J. B. A., in full,		42	83
"	Mr. Marsh, in full,		50	00 20
" 14.	J. H. Saunders,		50	00

*Folio, 154.*

" 20.	Bills receivable, E. Palmer, due July 18,		100	00
" 22.	J. H. Goodrich, on account,		31	28
" 23.	J. H. Goodrich, in full,		100	00
Aug. 26.	Wm. B. Smith	"	50	00

EXHIBIT NO. 4.—*For Defendants.*

This agreement, made this fifth day of March, one thousand eight hundred and sixty-eight, between James B. Atwater, of the Town of Harrington, in the County of Bergen, and State of New Jersey, of the first part, and G. Lemercier of the City, County, and State of New York of the second part.

Witnesseth: That the said James B. Atwater, in consideration of the covenants on the part of the party of the second part hereinafter contained, doth covenant and agree to and with the said G. Lemercier that he will give and make over to the said party of the second part, all the assets of the business now carried on by the said party of the first part at No. 54 Howard street, in the City of New York, whether merchandise, notes, or open accounts, and the said G. Lemercier, in  
 10 consideration of the covenants on the part of the party of the first part doth covenant and agree to and with the said James B. Atwater, that he will be responsible for and pay all the business debts now owing by the party of the first part, whether notes or open accounts as shown by his books at this date.

In witness whereof we have hereunto set our hands and seals the day and year first above written.

JAMES B. ATWATER. [SEAL.]

G. LEMERCIER. [SEAL.]

20 Sealed and delivered in }  
 the presence of, }

HENRY C. JOHNSON

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EXHIBIT NO. 5.—*For Defendants.*

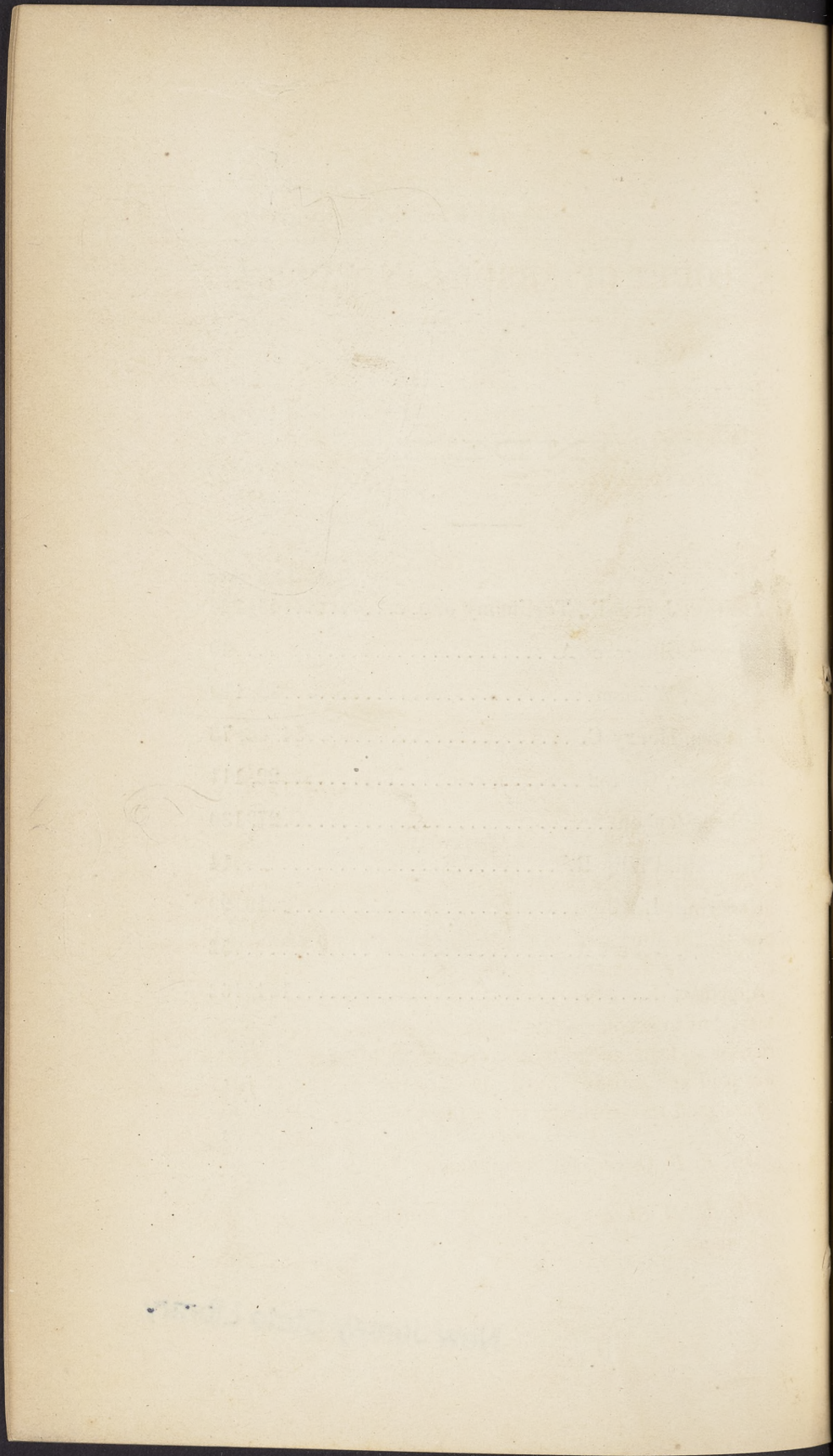
This is to certify that I consent, of my own free will, that a certain mortgage made by me to Gaston Lemercier for the sum of eight thousand dollars, due on the thirteenth day of January, 1869, is to be used as security for the payment of a certain note, made by G. Lemercier to his own order, payable four months  
 30 from Dec. 23d, 1868, for the amount of four thousand dollars with interest, and also as security for the collection of all the claims of James B. Atwater, which were assigned to G. Lemercier on March 5th, 1868.

Dec. 29th, 1868.

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COURT OF ERRORS AND APPEALS.

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*Between*

*Philip R. Underhill, Com-  
plainant,*

*and*

*William Atwater and Mar-  
garet A. Atwater, Defend-  
ants.*

---

IN CHANCERY, MAY TERM, 1871.

**Opinion.**

This suit was for the foreclosure of a mortgage given by the defendant, William Atwater, and Margaret his wife, upon the premises of Margaret, to Gaston Lemercier, for \$8000; this was assigned by Lemercier to the complainant. The defendants claim that this mortgage was given without consideration to them, but to accommodate James B. Atwater as collateral security for a loan made by Lemercier to him, and that this loan was paid and satisfied by J. B. Atwater to Lemercier, before 10 he assigned the mortgage to the complainant.

*Mr. F. B. Ogden*, for complainant.

*Mr. E. M. Shreve* and *Mr. B. F. Watson*, of New York, for defendants.

THE CHANCELLOR.—The defendant, William Atwater, was engaged in mercantile business in New York, and in November, 1866, being embarrassed, assigned all his business and effects to Gaston Lemercier, for the benefit of his creditors. In February, 1867, Lemercier sold and transferred the whole of the property, with the store and business, to James B. Atwater, the brother of William; James paid the full consideration of the sale and became the legal owner of the property. He continued to hold it, and continued the business in the store until March 10 5th, 1868, when he sold the stock, business, and assets to Lemercier. Although James was the lawful and actual owner of the store and business, without any express or resulting trust, or any other trust, for William, and had at any time the power to dispose of the whole at his own pleasure and for his own benefit, yet there was evidently an understanding that he was continuing the business with the intention of passing it over to William, if he should become free from his debts. James, while he was the real owner, and acted as such, allowed William to direct and control the business, and received out of the proceeds 20 a salary of \$1500 as salesman, and performed the duties of a salesman. And on the 19th of February, 1867, James gave to Lemercier a written declaration that he agreed to carry on the business for the use of William, who had been unfortunate, and by which he agreed to transfer the business to William whenever he might require it.

James, whilst he carried on the business, needed money, which he borrowed at different times from Lemercier, and which, in the whole, exceeded \$11,000. In July, 1867, Margaret Atwater, with her husband, William, executed to Lemercier 30 a mortgage upon her residence in Bergen county, a farm of about forty acres, conditioned for the payment of \$8000, which was given as security for the money advanced by Lemercier to carry on the business. Lemercier, who was in Europe at the receiving of this mortgage, upon his return was dissatisfied with it, because it had not in it the usual interest clause; on that account it was given up; and on the 11th of January, 1868, the mortgage set out in the bill was given by Mrs. Atwater and her husband, conditioned for the same sum as the first mortgage, and including the same premises. This was delivered to Le- 40 mercier for the same object, that is, as collateral security for the

loans of money made to James by Lemercier, for the purpose of this business.

In March, 1868, the business of this store not having been prosperous, was again embarrassed. The liabilities exceeded the assets by several thousand dollars, and the advances by Lemercier exceeded the mortgage to him by more than \$3000, and James was not disposed or not able to advance any more money for the object. In this situation, William acting for James, but without his knowledge or authority, began a negotiation with Lemercier to sell out the concern to him. A bargain seems to have been agreed upon by them on the 4th of March, 1868, that Lemercier should take the whole stock of goods at the valuation of \$8000, and take the other assets of the firm and out of them pay the debts as far as they would extend. James, when this agreement was communicated to him, refused to agree to it, and said that he would not transfer the property and business at all, unless he should be entirely freed from all debts and liabilities on account of it. A new agreement was thereupon made between him and Lemercier, which was reduced to writing, and executed by them under their hands and seals, and is dated March 5th, 1868. By this James assigned and transferred to Lemercier all their property and assets of that business, including the notes and book accounts, and Lemercier agreed to pay all the debts which James owed on account of that business. So far, there is no dispute about facts.

Lemercier says that he refused, in his negotiation with William, to assume the debts, unless it should be agreed that he might retain the mortgage as collateral security for the payment of the debts due to James, which were to be transferred to him, and that William agreed that he might retain the mortgage for that purpose, provided the valuation of the merchandise was increased by about the sum of \$3000. That James took no part in this arrangement about the mortgage, and did not, so far as he was aware, know of it. Lemercier says under this understanding he signed the agreement with James, and that without it he would not have signed it.

William denies all this, and says that there was no agreement or understanding whatever about retaining this mortgage before the agreement between James and Lemercier was signed and fully executed. He says that after the sale on the same

day, Lemercier remarked to him, "suppose these accounts are not all paid," and that he then told Lemercier to hold the mortgage as security. And that this is the only authority he gave to hold the mortgage.

The question, whether the agreement that Lemercier might retain the mortgage as collateral security, was made during the negotiations for the transfer, and was part of that arrangement, or whether it was only a volunteered suggestion by William after the sale was completed, and without consideration moving  
10 to him or his wife, may be an important one. It is a mere question of the credibility of evidence. On the one hand, Lemercier, Henry C. Johnson, and Lindsley Underhill, who were present at the negotiation, say positively that this was part of the bargain for the transfer agreed upon by William Atwater and Lemercier before the execution of the agreement between James and Lemercier. They are contradicted by William Atwater, and by him only—no other witness has any knowledge of the fact. Johnson at least is entirely disinterested, and beyond any known influence or bias. And his manner of giving  
20 in his testimony inclines me to give him credit. There is nothing, so far as I can discover, in the attending circumstances to throw doubt upon or discredit the story of these three witnesses. On the contrary, it seems to me to be the most probable version of the transaction. I feel compelled to believe the statement of these three witnesses, and to assume as a fact for the decision of the case, that William agreed with Lemercier, pending the negotiations for the transfer, that this mortgage should remain as security for the payment of the accounts and notes assigned, and that this agreement was a consideration  
30 which induced Lemercier to enter into the agreement.

There can be no doubt but that a mortgagor may again use or negotiate a mortgage which has been satisfied and paid off and delivered to him, except as against intervening securities. The delivery of any instrument by the grantor gives it efficacy, and if he take a paper, executed and once used, for another purpose, its re-delivery gives it again vitality. But such re-delivery must be by the mortgagor or grantor, and as in this case, the real mortgagor is Mrs. Atwater, the owner of the mortgaged premises, the re-delivery or re-pledging must have been by her,  
40 or some one authorized by her. Neither her husband or any

else could take this or any other security which was paid or extinguished, and without her authority put in circulation and thus give it vitality.

This matter involves two questions: first, whether this mortgage was paid or discharged, and if it was, whether her husband had authority, express or implied, to authorize Lemercier to retain it or re-pledge it.

The mortgage was never cancelled or delivered up. There was no agreement that it should be considered paid or surrendered. On the contrary, the agreement was that it should be retained as an existing security, and that substantially for the debt for which it was originally given. It was given to secure the money loaned by Lemercier; that money was not paid, it is not yet paid. He agreed to take the assets of James, including the accounts and notes, in payment of all the debts due to him from James, provided this mortgage remained as security for those accounts and notes. That is, if enough was not realized from those accounts and notes actually to pay the debt, the mortgage should still be liable; James only was to be discharged. The mortgage was not taken up, nor was it re-pledged. Nor was it pledged for a different debt, but it remained pledged for the same debt on other terms and conditions. But these altered conditions essentially changed the substance of the contract on which it was pledged. When pledged for the debt of James, he was the principal, and the mortgage the security. And Mrs. Atwater, if she had to pay, could look to James, the brother of her husband, for re-payment. As it was when changed, she could look for repayment only to a great number of small debtors to the concern, probably for the most part unknown to her, and also irresponsible. The party for whom she was security was entirely different. This change in the object for which the mortgage was given, was material, and could not be made by her husband without her authority.

Mrs. Atwater and her husband both testify that she never authorized him to re-pledge this mortgage in any way; their evidence is uncontradicted and must be believed. I have no doubt that no express authority was given by her to pledge this mortgage for any new object. The only authority given to him was that originally given when she executed the mortgage, and handed it to him to pledge to Lemercier for moneys advanced

and to be advanced by him to James in this business. To ascertain that authority we must look both to the testimony and to the circumstances under which the mortgage was made and given. Mrs. Atwater had received from her husband a valuable property in her own name. He failed, and had no property and no business, his brother James fairly bought his store and business, the title was in James, but he, out of kindness to his brother, was willing to assume it and all the risks and liabilities for the purpose of preserving it for William, and if successful, transferring it to him when he should be in a condition to assume it in his own name. Money became necessary, and this mortgage was given to procure the necessary money. Mrs. Atwater executed it and entrusted it to her husband to negotiate for that purpose. He testifies that in making and originally negotiating that mortgage he was the agent of his wife. This was evidently so and is nowhere denied. And it does not appear in the evidence that this general agency for negotiating that mortgage was limited to any particular terms; or that if he had negotiated it to Lemercier as the sole security for moneys advanced to that business without any personal liability of James, it would have been against his instructions, or in excess of his authority. The only question in this part of the case seems to be whether William had authority to agree that this mortgage should continue after James was personally discharged. It was equitable when James, at the request of William, transferred a business into which he had entered for his benefit, that he should ask to be freed from the debts of the concern, so as to go out free from embarrassment. There was no injustice in having the mortgage of Mrs. Atwater, which was already liable for these debts, and could not be extricated otherwise, as the concern was insolvent, still liable for any deficiency of the assets to pay these debts. Lemercier, in assuming the debts of the concern, then insolvent, was in equity entitled to retain this mortgage as security for the debts for which it was originally given.

And William, who was the agent of his wife in negotiating that mortgage and arranging for its payment, made arrangement within his power when he permitted it to be continued as security for the debt to Lemercier, providing that all the assets of the business shall be first applied before the mortgage was called upon. Whether this was a more beneficial arrangement

than to permit her to retain her recourse to James, does not appear.

The agreement with James cannot be affected; he had nothing to do with that, concerning the retention of the mortgage, the agreement of Lemercier, in effect, discharged his debt; and by discharging the debt for which the mortgage was collateral, would have discharged that, had it not been for the agreement that it should be retained. And it would not be equitable to permit Mrs. Atwater to claim that her mortgage is discharged by an agreement, or by the legal effect of an agreement, of 10 which one of the stipulations was that it should be retained. If she claims the benefit of this agreement, made by her agent, she should not be allowed to repudiate its conditions.

But irrespective of this equity, I am of opinion that the whole evidence, and the circumstances surrounding the transaction, show abundantly that Mrs. Atwater confided the whole matter of negotiating this mortgage to her husband, and that without any specific limitations, and that continuing it as collateral security for Lemercier's advances after James was discharged, was within the scope of that authority. 20

Of course the complainant only can hold the mortgage for the deficiencies in the payment of the notes and accounts assigned by James B. Atwater to Lemercier.

Lemercier at first assigned the mortgage to complainant as security for \$4000, for which he had given his note. This was the only interest of the complainant at the time of the filing of the bill. Since then the mortgage has been assigned to him unconditionally, for a valid consideration.

But in this suit the complainant can now have relief only upon his interest in the mortgage, as stated in the bill, and as it 30 existed at the commencement of the suit. The decree can be only for the \$4000, to secure which the mortgage was assigned to him. If he desires to have a decree for the residue of the mortgage assigned to him pending the suit, it can be had upon a supplemental bill filed for that purpose. Or if the whole premises should be sold on a decree in this suit as it is, he might have adequate relief upon application for the surplus.

## Interlocutory Decree.

[Filed June 12, 1871.]

This cause coming on to be heard before the Chancellor, in the presence of Frederick W. Ogden, of counsel with the complainant, and of E. Mercer Shreve, of counsel with the defendants, and the pleadings and proofs in the cause having been read, and the arguments of counsel heard thereon, and the court having considered the same—

It is thereupon on this twelfth day of June, in the year of our Lord one thousand eight hundred and seventy-one, ordered, adjudged, and decreed, by the Chancellor, that the mortgage given by the said defendants to the said Gaston Lemercier, and assigned by him to the said complainant, and set forth in the said complainant's bill of complaint in this cause, is a valid and subsisting lien and encumbrance to the amount of the principal and interest money purporting to be secured thereby upon the lands and premises, with the appurtenances therein, and in the said bill described, and that the said complainant is entitled to the relief prayed in his said bill of complaint, to the amount of 20 four thousand dollars of the principal of the said mortgage, together with the interest which shall have accrued thereon.

A. O. ZABRISKIE, C.

## Notice of Appeal.

[Filed June 15, 1871.]

The defendants hereby appeal from so much of the interlocutory decree made in this court in the above stated cause, as declares that the mortgage given by the said defendants to the said Gaston Lemercier, and assigned by him to the said complainant, and set forth in said complainant's bill of complaint in 30 this case, is a valid and subsisting lien and encumbrance, to the amount of the principal and interest money purporting to be secured thereby, upon the lands and premises in the said bill described, and that said complainant is entitled to the relief

prayed in his said bill of complaint, to the amount of four thousand dollars of the principal of the said mortgage, together with the interest which shall have accrued thereon, to the Court of Errors and Appeals in the last resort in all causes of law.

E. MERCER SHREVE,

*Solicitor and of counsel with defendants.*

Dated June 13th, 1871.

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

E. MERCER SHREVE, 10

*Of counsel with defendants.*

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### Petition of Appeal.

[Filed June 19, 1871.]

Between

William Atwater and Margaret Atwater, appellants,

*and*

Philip R. Underhill, appellee.

} *Petition of Appeal.*

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

20

The humble petition of William Atwater and Margaret Atwater, the appellants in the above stated cause, respectfully shows, that your petitioners find themselves aggrieved by an interlocutory decree, made in the Court of Chancery by the Honorable Abraham O. Zabriskie, Chancellor of New Jersey, filed June 12th, A. D. 1871, in a suit wherein the said William Atwater and Margaret Atwater were defendants, and the said Philip R. Underhill was complainant, in respect that the said decree declared and adjudged that the mortgage given by the said William Atwater and Margaret Atwater to one Gaston 30 Lemercier, and assigned by him to the said complainant, and set

forth in the said complainant's bill of complaint in this cause, is a valid and subsisting lien and encumbrance to the amount of the principal and interest money purporting to be secured thereby, upon the lands and premises in the said bill described, and that the said complainant is entitled to the relief prayed in his said bill of complaint, to the amount of four thousand dollars of the principal of the said mortgage, together with the interest which shall have accrued thereon.

And your petitioners humbly appeal from each and every 10 part of said decree of the Chancellor, upon the ground that the same is in all respects erroneous, for that the said complainant's mortgage is not a valid and subsisting lien and encumbrance to the amount set forth in said decree, or to any other amount, as the same has been paid off and satisfied.

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.

E. MERCER SHREVE,

*Solicitor and of counsel with appellants.*

20

Dated June 19th, 1871.

### Answer.

[Filed July 6, 1871.]

*The answer of Philip R. Underhill, respondent, to the petition of William Atwater and Margaret A. Atwater, appellants.*

The respondent, not confessing or acknowledging all or any of the matters and things to be true, as in and by the said petition of appeal are contained and set forth, for answer thereunto says—that he believes it to be true that such decretal 30 order and decree as are complained of by the appellants, was and were made by the Court of Chancery, as in the said petition of appeal is set forth, but as to the date, substance, and contents thereof, this respondent humbly craves to refer thereto when the same shall be produced. And the said respondent is advised and believes that the said decretal order and decree are

agreeable to equity and justice, and are sustained by the law, the equity, and the true facts of the case, and he therefore humbly prays that the same may be affirmed, and that the said petition of appeal may be dismissed this honorable court, with costs to be adjudged to this respondent.

FRED'K B. OGDEN,

*Solicitor for respondent and of counsel with respondent.*

Dated July 6th, 1871.

Part of the ...

PHILIP ...

The following facts are published:

That in the year 1800 ...

The ...

That in the year ...

It is ...

The ...

# Court of Errors and Appeals.

Between  
WILLIAM ATWATER and  
MARGARET ATWATER,  
*Appellants,*  
And  
PHILIP R. UNDERHILL,  
*Appellee.*

*On Appeal.*  
*Points on the part*  
*of the Respond-*  
*ents by F. B.*  
OGDEN, *of*  
*Counsel.*

## The following Facts are undisputed :

THAT in the year 1859 William Atwater purchased the mortgaged premises with his own money, and placed the title in his wife's name.

That on the 13th of November, 1866, William Atwater failed, and assigned his business to Gaston Lemercier.

That in February, 1867, Lemercier, assignee of William, sold to James B. Atwater, the brother of William. **March 1868, James sold to Lemercier.**

That in this last sale Lemercier became the owner of the mortgage in dispute, to be held by him as collateral security for the payment of the claims assumed by him in that sale.

That claims, amounting to more than the mortgage, still remain unpaid.

That in July, 1867, a mortgage was executed by William Atwater and wife to *Mrs.* Lemercier, to secure the payment of \$8,000, loaned during that year by Lemercier to James B. Atwater; which mortgage on the 11th of January, 1868, was exchanged for the present one, executed to *Gaston* Lemercier.

That on the 16th of March, 1868, *Gaston* Lemercier gave complainant the note of James B. Atwater, endorsed by Lemercier, for \$4,000; which he secured by assigning to complainant the mortgage in question.

That note was dishonored, and on the 20th of June, 1868, Lemercier gave his own individual note for six months, making it fall due the same time as the mortgage.

Neither notes have been paid.

That on the 7th of June, 1869, Lemercier assigned the balance of his interest in the mortgage to complainant.

### **First Point.**

That from November, 1866, to March, 1868, the whole business was being transacted for the sole benefit of *William* Atwater, the mortgagor. Until February, 1867, Lemercier, as his assignee, acted for him. After that the name of James B. Atwater was used.

*William* was bankrupt, and could not carry on the business in his own name.

*William* made the negotiations with Lemercier for the loan of the \$8,000.

*See Exhibit 9, on the part of complainant, page 150.*

## Second Point.

James B. Atwater made over to Lemercier March 5, 1868, all the assets of the business, and Lemercier was to assume Atwater's liabilities.

The mortgage of \$8,000 was to be retained by Lemercier as security for the collection of the book accounts and notes due to James B. Atwater.

This arrangement was made upon the suggestion of *William Atwater*.

By the agreement the debt due Lemercier was to be paid by the bills due James B. Atwater, if collected, otherwise by the mortgage.

## Third Point.

This agreement did not essentially change the original purpose for which the mortgage was given.

The mortgagors had the right to keep the mortgage alive in that way.

*Robinson vs. Urquhart*, 1 *Beasley*, pages 523, 524, 540 ;

*Hoy vs. Bramhall*, 4 *E. C. Green*, page 567.

## Fourth Point.

William had the right to dispose of the mortgage in the manner he did. He was the general agent of his wife in all these transactions.

Mrs. Atwater never asked for the mortgage, or inquired if it was cancelled. When Exhibit No. 5, on the part of the defendants, page 162, was shown to her, she did not demand the mortgage, or inform the parties interested, that her husband had no power to use the mortgage in the manner he did.

*See Story on Agency, sec. 126, 127, 139.*

### **Fifth Point.**

There is no injustice in holding this mortgage liable for these debts.

### **Sixth Point.**

If the complainants' version of the transaction be true, and William had no power to give the mortgage to Lemercier, to be held as a collateral security for the payment of James B. Atwater's debts, then the whole sale was void.

The contract must be an entirety.

If Mrs. Atwater claims the benefit of the agreement, she must be bound by all the terms upon which it was made.