

## COURT OF ERRORS AND APPEALS.

Between

WILLIAM WARWICK,

Complainant,

and

BENJAMIN MARLATT et ux. et al.,

Defendants.

} On Bill to  
Foreclose.

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Bill of Complaint.

[Filed July 23, 1872.]

*To His Honor Abraham O. Zabriskie, Esquire, Chancellor of the State of New Jersey:*

Humbly complaining, showeth unto your Honor, your orator, William Warwick, of the borough of Hightstown, in the county of Mercer, and state of New Jersey, that on or about the tenth day of October, in the year one thousand eight hundred and sixty, Benjamin Marlatt, of the township of East Windsor, in the county of Mercer, and state of New Jersey, became and was justly indebted unto Samuel F. Butcher, in the sum of eight hundred dollars; and being so indebted, the said Benjamin Marlatt, in order to secure the payment of the said sum of money, with interest, did make and execute, under his hand and seal, and deliver

unto the said Samuel Butcher, a certain bond or obligation, bearing date the same day and year last aforesaid, in the penal sum of one thousand and six hundred dollars, lawful money of the United States, with a condition thereunder written, that if the said Benjamin Marlatt, his heirs, executors, or administrators, should well and truly pay, or cause to be paid, unto the said Samuel F. Butcher, his executors, administrators, or assigns, the just and full sum of eight hundred dollars, lawful money aforesaid, in one year from  
 10 the date thereof, with legal interest from the date thereof, then the said obligation should be void, otherwise to remain in full force and virtue, as in and by the said bond or obligation and the condition thereof, reference being thereunto had, will more fully and at large appear.

And your orator further shows, that the said Benjamin Marlatt, in order to secure the payment of the said sum of money above mentioned, together with the interest which should accrue or become due thereon, executed and delivered unto the said Samuel F. Butcher, a certain indenture  
 20 of mortgage, bearing date the same day and year last aforesaid, made by the said Benjamin Marlatt, and Emeline, his wife, of the first part, and the said Samuel F. Butcher, of the second part; in and by which said indenture of mortgage the said party of the first part did grant, bargain, sell, alien, release, enfeoff, convey, and confirm unto the said Samuel F. Butcher, said party of the second part, his heirs and assigns, all that certain tract or parcel of land and premises, situate in the township of East Windsor aforesaid, and is butted and bounded as follows, viz.: begin-  
 30 ning in the middle of the road leading from Hightstown to Freehold, seventy links from a white-oak tree on a course of north ten degrees and fifteen minutes east, thence (1), along the middle of said road north seventy-two degrees west, sixteen chains seventy-two links; thence, south ten degrees and fifteen minutes west, nine chains and sixty-seven links to a corner in line of Widow Applegate's land; thence, along her land south eighty-nine degrees and three-quarters west, seventeen chains and sixty  
 40 links; thence, north thirteen degrees east, sixty links; thence, north six degrees west, twenty-three chains

and sixty-five links to a corner; thence, north twenty degrees east, one chain and thirty-three links to a corner of Blauvelt land; thence, by the same south sixty-eight and a half degrees east, twenty-four chains and twenty links to a stone for a corner; thence, north ten degrees and a quarter east, six chains and sixteen links to a stone; thence, north sixty-eight degrees and a half west, twenty-two chains and ten links to a stone for a corner; thence, along old road north thirty-three degrees east, twelve chains and ninety-two links to corner to D. Applegate's land; thence, by the same south fifty-one degrees east, thirty-eight chains and ten links to a stone for corner; thence, along land of John Fisher, Jr., south ten degrees and a quarter west, fourteen chains and thirty links to the place of beginning, containing ninety-three acres of land, more or less, being a tract of land part of which was conveyed unto said Benjamin Marlatt by Andrew M. Duncan and wife and Selah Gulick and wife, and part by James Cook and wife and Sarah Giberson, Lydia Giberson, and others, together with all and singular the tenements, hereditaments, and appurtenances thereunto belonging or in any wise appertaining, and the reversion and reversions, remainder and remainders, rents, issues, and profits thereof; and also all the estate, right, title, interest, use, property, possession, claim, and demand whatsoever, as well in law as in equity, of the party of the first part to the said indenture of mortgage, and every part and parcel thereof, with the appurtenances; to have and to hold the therein above granted and described premises, with the appurtenances, unto the said Samuel F. Butcher, the said party of the second part, his heirs and assigns, to his and their own proper use, benefit, and behoof forever; provided always, and the said indenture of mortgage was therein declared to be upon this express condition, that if the said party of the first part to the said indenture of mortgage, their heirs, executors, or administrators, should well and truly pay or cause to be paid unto the said Samuel F. Butcher, 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

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mentioned in the said condition, according to the true intent and meaning thereof, that then the said indenture of mortgage, and the estate thereby granted, should cease, determine, and from thenceforth be null and void.

And your orator further shows, that after the execution of the said indenture of mortgage, the same was in due form of law acknowledged by the said Benjamin Marlatt and Emeline, his wife, before James B. Coleman, a master in chancery of New Jersey, and duly recorded in the office of  
 10 the clerk in and for the said county of Mercer, in Book M of Mortgages, pages 331 and 332, on the twelfth day of October, in the year one thousand eight hundred and sixty, as by the certificate of the clerk of the said county, endorsed on the said indenture of mortgage, more fully appears, and to which your orator, for greater certainty, begs leave to refer, if it be necessary so to do.

And your orator further showeth unto your Honor, that on the                    day of                    A. D. eighteen hundred and sixty-two, the said Samuel F. Butcher, by writing  
 20 under his hand and seal, dated on that day, assigned said bond and mortgage unto your orator.

And your orator further showeth unto your Honor, that the said Benjamin Marlatt and Emeline his wife, on the twenty-fourth day of April, A. D. eighteen hundred and sixty-one, mortgaged said lands to Joseph Cutter, to secure the payment of five thousand dollars, with interest; that the said Joseph Cutter has since died, and that Joseph W. Cutter and George I. Miller were duly appointed the executors of the said Joseph Cutter, deceased; that by a  
 30 final decree of this honorable court, bearing date                    day of                   , A. D. eighteen hundred and seventy-two, in a certain cause therein, wherein the said executors were complainants and the said Benjamin Marlatt and wife, and others, were defendants, your Honor did order, adjudge and decree, among other things, that the said mortgaged premises be sold to raise and satisfy the sum of money due to the complainants in said cause upon the mortgage last named; that a writ of *feri facias* do issue for that purpose  
 40 out of this court, directed to the sheriff of the county of Mercer, commanding him to make sale according to law of

the mortgaged premises; and that the defendant in said cause stand absolutely debarred and foreclosed of and from all equity of redemption of, in and to the said mortgaged premises when sold as aforesaid by virtue of this decree; that the said sheriff of Mercer county, by virtue of the said writ of *feri facias* to him directed, as in and by said decree did expose to sale said mortgaged premises on the twentieth day of July, A. D. eighteen hundred and seventy-two, according to law; that the said mortgaged premises at said sale were struck off and sold to John Dawes, who acknowledged himself the purchaser of the same, and who agreed in all things to comply with the conditions of said sale, among the conditions of which said sale was the condition that a deed for said mortgaged premises would be delivered to the purchaser on the thirtieth day of July, A. D. eighteen hundred and seventy-two, when the balance of the purchase money should be paid in cash.

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And your orator further showeth, that the mortgage last named was executed and recorded subsequent to the execution and recording of your orator's said mortgage; and that your orator's said mortgage is a prior lien upon the premises therein mortgaged, and that the lien of your orator's said mortgage is in no wise affected or disturbed by the sale of said mortgaged premises by the sheriff of the county of Mercer as aforesaid; that the said John Dawes claims to have some interest in said mortgaged premises by virtue of said sale, but your orator expressly charges that the said mortgaged premises were sold at said sale, subject to the encumbrance of your orator's mortgage, and was purchased at said sale by said Dawes, with full knowledge of your orator's said mortgage, and that it was claimed by your orator at said sale to be a prior lien upon said mortgaged premises.

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And your orator further shows, that the 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 except the interest thereon, up to the first day of April, A. D. eighteen hundred and seventy-two, so that your orator is greatly

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delayed and disappointed in the receipt of the said moneys, 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 Benjamin Marlatt and Emeline, his wife, since the execution of your orator's said mortgage, has 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  
10 still do receive, the rents, issues, and profits thereof. And your orator further shows and expressly charges, that the said mortgaged premises are a slender and scanty security for the payment of the said principal and interest moneys so due to your orator as aforesaid, and that he or some other person or persons for him, has frequently and in a friendly manner applied to the said Benjamin Marlatt and Emeline, his wife, and the said John Dawes, or one of them, and requested them, or one of them, to pay and discharge  
20 the said principal and interest moneys so due to your orator on the said bond or obligation and deed of mortgage herein before mentioned and set forth; and your orator well hoped that they would have complied with such reasonable requests of your orator, and would have paid to him the said principal and interest moneys so as aforesaid due to your orator on the said bond or obligation and deed of mortgage, as in equity and good conscience ought to have done. But  
30 now so it is, may it please your Honor, that the said Benjamin Marlatt and Emeline, his wife, and John Dawes, combining and confederating together, and to and with divers other persons at present unknown to your orator, but whose names, when discovered, he prays may be inserted herein, with proper and apt words to charge them as parties defendant hereto, and contriving how to injure and aggrieve your orator in the premises, and to defraud him of the said principal and interest moneys, so as aforesaid due to your orator on the said bond or obligation and deed of mortgage hereinbefore mentioned, sometimes give out and pretend, that although your orator's estate in the said mortgaged  
40 premises may have become absolute at law, yet that your orator cannot dispose of the same to any purchaser in any

manner, and that the same will be subject to an equity of redemption; and at other times the said confederates pretend that the said mortgaged premises are charged or chargeable with other encumbrances prior to your orator's said mortgage, but when and to whom given, and for what consideration, they refuse to discover; whereas your orator charges and insists, that if any such pretended encumbrances do exist, they are fraudulent and void, and given for no 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 canceled, or declared to be of no effect against your orator, who had no notice of any such pretended encumbrances. 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 hath not a complete and safe remedy in the premises at and by the strict rules of the common law, nor can foreclose the equity of redemption of the said mortgaged premises, or safely sell the same for the payment and satisfaction of the said principal and interest moneys so as aforesaid due to your orator on said bond and obligation and deed of mortgage without the aid and decree of this 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 and 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 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 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 moneys arising from the sale thereof,

10 your orator may be paid the full amount of the said principal sum of money so due to your orator on the said bond or obligation and deed of mortgage as aforesaid, and all the interest now due and to grow due thereon, together with all your orator's costs and charges in this behalf sustained; and that your orator may have such further and other relief in the premises as to your Honor may seem meet, and shall be agreeable to equity and good conscience; may it please your Honor, the premises considered, to grant unto your orator a writ or writs of subpœna, issuing out of and under

20 the seal of this honorable court, to be directed to the said Benjamin Marlatt and Emeline, his wife, and John Dawes, 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, abide by, and perform such order and decree therein as to your Honor shall seem meet and shall be agreeable to equity and conscience. And your orator, as in duty bound, will ever pray, &c.

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S. M. SCHANCK,

*Solicitor and of counsel with complainant.*

## Answer.

[Filed October 7, 1872.]

The answer of Benjamin Marlatt, Emline Marlatt, his wife, and John Dawes, defendants, to the bill of complaint of William Warwick, complainant.

These defendants now and at all times hereafter, saving and reserving to themselves all manner of benefit and advantage of exception to the many errors and insufficiencies in the complainant's said bill of complaint contained, for answer thereunto, or unto so much and such parts thereof as these 10 defendants are advised is or are material or necessary for them to make answer unto, say—that they admit that the said defendant, Benjamin Marlatt, did make, execute and deliver to one Samuel F. Butcher, the said bond or obligation, in the penal sum of sixteen hundred dollars, conditioned to pay the sum of eight hundred dollars, as mentioned and set forth in the complainant's said bill of complaint, and of the date, purport and effect therein stated; and they further admit that the said Benjamin Marlatt, together with his wife, did make and execute the mortgage 20 to secure payment of the said bond, as set forth in the said bill of complaint.

These defendants in further answering say, that they have been informed that the said Samuel F. Butcher made an assignment of the said bond and mortgage to the complainant, as alleged in said bill of complaint, but they are not acquainted with the fact of their own knowledge, and therefore they leave the complainant to such proof thereof as he may be able to make.

These defendants in further answering say, that they admit 30 that the said defendants, Benjamin Marlatt and wife, executed a mortgage on the same premises to Joseph Cutter, to secure the sum of five thousand dollars, as set forth in the said bill of complaint, and they further admit that the said Joseph Cutter has since died, and that Joseph W. Cutter and George J. Miller were the executors of said Cutter,

and they also further admit the entry of the final decree in this court's foreclosing said mortgage, and directing a sale of the said mortgaged premises, as set forth in the said bill of complaint.

And these defendants in further answering say, that they admit that a *feri facias* for the sale of said mortgaged premises did issue out of this court, and that the sheriff of the county of Mercer, by virtue thereof, did sell the said premises to the defendant, John Dawes, as set forth and  
10 described in said bill of complaint.

And the said defendant, John Dawes, in answering says, that the said mortgaged premises were struck off to him at the said sheriff's sale, and that having complied with the conditions of said sale, he received a deed for the said premises from the sheriff of the county of Mercer, on the thirtieth day of July, eighteen hundred and seventy-two, by virtue of which deed, this defendant has an estate in fee simple in said premises.

And these defendants in further answering say, that on or  
20 about the tenth day of October, eighteen hundred and sixty, the said Benjamin Marlatt, being greatly in want of money, applied to the said Samuel F. Butcher for the loan of eight hundred dollars; that the said Butcher agreed to loan him that amount, but that after the bond and mortgage had been executed and were ready for delivery, the said Butcher refused to make the loan unless the said Marlatt would pay him the sum of fifty dollars over and above the legal interest as a premium or consideration for the making of the said loan and the use of the said money; that the said Marlatt  
30 stated that he could not comply with the demands of said Butcher, because he had no money, but finally offered the said Butcher a gold watch of the value of sixty dollars, which he agreed to accept instead of fifty dollars in cash, as a consideration for said loan.

And these defendants say, that the said Marlatt finding that he could not procure the said loan upon more fair and just terms, and being greatly in want of money, finally acceded to the demands and exactions of the said Butcher and agreed to borrow of him the said money upon the  
40 terms aforesaid, and did thereupon deliver to the said

Butcher, the bond and mortgage in the complainant's bill mentioned; and that upon the delivery of the said bond and mortgage, the said Butcher paid to the said Marlatt the said sum of eight hundred dollars, and the said Marlatt, as an additional consideration for said loan, did give to the said Butcher the said gold watch, worth about sixty dollars, and so these defendants say and charge, that the said Samuel F. Butcher did receive and take from the said Benjamin Marlatt, a premium of the value of sixty dollars over and above the lawful interest for the loan of said money, 10  
contrary to the statute in such case made and provided.

And these defendants, in further answering say, that they are informed and believe, and therefore charge that the complainant, before and at the time of the assignment of the said mortgage to him, was fully aware of all the circumstances connected with the loaning of said money, and especially of the usurious character of said bond and mortgage, and that the same was illegal and void.

And these defendants submit, that for the reasons above stated, the said bond and mortgage are usurious and utterly 20  
void, under the statute in such case made and provided.

And the said defendant John Dawes, for himself, further answering says, that he bought the said premises at the said sale, and that he did so with the opinion and belief that the complainant's said mortgage was illegal and void, for usury in the original contract for the loan, payment of which was intended to be secured by said mortgage.

And the defendant John Dawes further says, that he is informed, and believes it to be true, that the complainant, William Warwick, declared, in presence of divers persons, 30  
immediately after the premises were struck off to this defendant, that he would now have the money for his mortgage out of John Dawes, and would not wait for it, either, but would foreclose if not paid immediately; that soon after this, defendant signed the conditions of sale as the purchaser of said premises, Joseph J. Ely, esq., spoke to this defendant and stated that Mr. Warwick wanted the money for his mortgage immediately. Defendant replied that as soon as he received his deed for the farm he would give Mr. Warwick a check for the amount of the mortgage. 40

Defendant further says, that the said sale took place on Saturday, the twentieth day of July last, and on Tuesday, the twenty-third day of July, the complainant's bill in this case was filed, and that on Tuesday, the thirtieth day of July, this defendant received his deed for the said premises from the sheriff.

And this defendant, John Dawes, further says, that he was then ready and willing to pay the amount due on said mortgage, but was unwilling to pay the costs of the proceedings in foreclosure thus unnecessarily incurred.

And these defendants in further answering say, that if the court shall be of the opinion that the said bond and mortgage are not utterly void during the law of this State against usury, approved April 10th, 1846, they respectfully submit that under the supplements to the act entitled "an act against usury," which supplement was approved April 12th, 1864, the complainant can recover in this suit the amount actually lent, without interest or costs of suit, and no more, and that the premium paid to the lender, Samuel F. Butcher, should be deducted from the eight hundred dollars so loaned as aforesaid, and recovery had for the balance only.

And these defendants deny all unlawful combinations, &c.

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.

30 KINGMAN & JOHNSON,  
*Solicitors and of Counsel with Defendants.*

New Jersey, ss.—Benjamin Marlatt, Emeline Marlatt, and John Dawes, the above named defendants, being duly sworn according to law, on their oaths severally say—that the matters and things set forth in the above answer, so far as relates to their own acts, are true, and so far as relates to the acts of others, they believe them to be true.

BENJAMIN MARLATT,  
EMELINE MARLATT,  
JOHN DAWES.

Sworn and subscribed, this 5th day of October, A. D. 1872,  
before me.

G. D. W. VROOM, M. C.

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Replication.

[Filed October 21, 1872.]

This repliant, saving and reserving to himself all and all manner of advantage of exception 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 10 that the said answer of the said defendant 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 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.

S. M. SCHANCK, 20

*Solicitor for and of Counsel with Complainants.*

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ORDER OF REVIVOR.

[Filed April 12, 1873.]

It appearing to the court by affidavit, that since the last stated term of the court, Benjamin Marlatt, one of the defendants to the above stated cause, has departed this life, and that by the death of the said Benjamin Marlatt, James Marlatt who is the heir-at-law of the said Benjamin Marlatt, deceased, hath become interested in this suit, and that the

complainant chose to make him a party defendant hereto; it is on motion of S. M. Schanck, of counsel with complainant, ordered that the said suit stand revived, and that the said James Marlatt, the heir-at-law of the said Benjamin Marlatt, deceased, be made a defendant thereto in the place and stead of the said Benjamin Marlatt, deceased. And it is further ordered that the said James Marlatt appear and put in his answer or signify his disclaimer of this suit and the matters in controversy therein, at or before the next

10 term of this court; and in case he fails so to do, that the complainant may cause his appearance to be entered, and the answer of the said Benjamin Marlatt heretofore put in, be deemed and taken as and for the answer of the said James Marlatt; and that the complainant and the said James Marlatt and the other surviving defendant in said cause, have leave to continue the taking of testimony therein. And the complainant shall cause a true copy of this order to be served personally on the said James Marlatt, defendant as aforesaid, within thirty days from the date hereof.

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A. O. ZABRISKIE, C.

Dated April 12th, 1873.

## EXAMINATION OF WITNESSES.

[Filed November 30, 1872.]

Examination of witnesses, &c., in a cause depending in the Court of Chancery of New Jersey, wherein William Warwick is complainant and Benjamin Marlatt and wife and others are defendants, taken in Freehold on the 11th day of November, 1872, before Charles A. Bennett, one of the masters and examiners in said court, at his office, in the presence of Samuel M. Schanck, solicitor and of counsel for the complainant, upon notice given to Kingman & Johnson, solicitors and of counsel for the defendants, the due service of which was duly acknowledged by their written acknowledgment of service on said notice. 10

*James B. Coleman*, a witness produced on the part of complainant, alleging himself conscientiously scrupulous to taking an oath, and being duly affirmed, saith—

I reside in Hamilton township, in the county of Mercer, about twenty-three miles from here by common road.

[Bond bearing date October 10th, 1860, made and executed by Benjamin Marlatt to Samuel F. Butcher, in the penal sum of \$1600, conditional to pay \$800 in one year from date, with interest, being shown witness, he says]— I drew that bond; I signed my name to this bond as the subscribing witness; I saw Benjamin Marlatt sign that bond as the maker of it, opposite the seal; and I was also the subscribing witness to the sealing and delivery of the same by Benjamin Marlatt. 20

[This bond is offered in evidence, and is marked *Exhibit A* on the part of the complainant in this cause.]

[The mortgage intended to secure said bond, bearing date October 10th, 1860, made and executed by Benjamin Marlatt and Emeline his wife, to Samuel F. Butcher, conditioned to pay \$800 in one year from date, with interest, and which 30

mortgage was acknowledged by said Benjamin Marlatt and wife before James B. Coleman, one of the masters in chancery, and recorded in the clerk's office of the county of Mercer, in Book M of Mortgages, page 331, &c., shown witness, he says]—I drew that mortgage, and have signed my name to it as a subscribing witness, and I saw the said Benjamin Marlatt sign his name opposite the first seal, and I saw his wife, Emeline Marlatt, sign her name to it opposite the second seal, as the maker of the mortgage; and I took  
 10 the acknowledgment of Benjamin Marlatt and wife to this mortgage, as a master in chancery, and I was a witness to the sealing and delivery of this mortgage.

[This mortgage is offered in evidence on the part of the complainant, and is marked *Exhibit B* on the part of complainant in this cause.]

JAMES B. COLEMAN.

Sworn to and subscribed before me, November 11th, 1872.  
 C. A. BENNETT, *M. C.*

[The solicitor of complainant offers in evidence the notice  
 20 of the taking of this examination, served on Kingman & Johnson, the solicitors of the defendants, the due service of which is acknowledged by written endorsement of the said solicitors, on the back of a copy of said notice. This copy of notice and acknowledgment is offered in evidence, and is marked *Exhibit C* on the part of the complainant.]

Adjourned to November 20th, 1872, at ten o'clock A. M., at the same place.

November 20th, 1872, S. M. Schanck, solicitor and of  
 30 counsel for complainant, appeared pursuant to adjournment. No person appearing for either of the defendants, and no witness appearing, I adjourned the examination until the 27th day of November, at ten o'clock A. M., at the same place.

November 27th, 1872, met pursuant to adjournment, at ten o'clock A. M. Present—S. M. Schanck, Esq., solicitor and of counsel for the complainant, no person appearing for the defendants. The examination was resumed.

*Joseph J. Ely*, a witness produced on the part of the complainant, being duly sworn, on his oath saith—

I reside in the township of Cranberry, in the county of Middlesex; I am acquainted with the complainant in this cause, and also with the defendant, Benjamin Marlatt; I once drew up an assignment of a bond and mortgage; the bond and mortgage was made by Benjamin Marlatt and wife to Samuel F. Butcher, and the assignment was from Samuel F. Butcher to William Warwick; this assignment now shown me was the one I refer to. 10

[This assignment, dated April 5th, 1862, made and executed by Samuel F. Butcher to William Warwick, and acknowledged on the same day by said Samuel F. Butcher before Joseph J. Ely, a master in the Court of Chancery of the state of New Jersey, shown witness, he says]—This is the assignment I refer to; it was drawn up by me, and I signed my name to it as the subscribing witness, and I saw Samuel F. Butcher sign the assignment opposite the seal, as the maker of it; I know that signature of Samuel F. Butcher to be the signature and handwriting of Samuel F. Butcher, and I took his acknowledgment of it as a master in chancery of the state of New Jersey. 20

[This assignment is offered in evidence, and is marked *Exhibit D* on the part of the complainant.]

JOSEPH J. ELY.

Sworn and subscribed before me, this 27th day of November, A. D. 1872.

C. A. BENNETT, *M. C.*

The complainant's counsel here rests his case.

November 27th, 1872.

C. A. BENNETT, *M. C.* 30

## DEPOSITIONS.

[Filed January 7, 1873.]

Examination of witnesses, &c., taken before the subscriber at his office, in the city of Trenton, on Friday, the 21<sup>th</sup> day of December, A. D. 1872, in the presence of Samuel M. Schanck, Esq., solicitor of the complainant, and Frederick Kingman, Esq., one of the solicitors of the defendants, on due notice given by the defendants' solicitors to the solicitor of the complainant, as appears by his acknowledgment of the service thereof.

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ISAAC W. LANNING, *M. C.*

And it being now, on the day above named, admitted that Benjamin Marlatt, one of the defendants, whose evidence is proposed to be offered on the part of the defendants, is sick and unable to attend at this time as a witness, the parties by their respective solicitors agree that the examination of witness be postponed, and that the parties meet at Hightstown, in the county of Mercer, on Saturday, the 21<sup>st</sup> day of December, instant at 9 o'clock in the morning at the hotel of E. C. Richardson, to proceed with the taking of evidence.

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Adjourned to December 21<sup>st</sup>, 1872, at nine o'clock, A. M.

December 21<sup>st</sup>, 1872. Parties met at Hightstown as above named, and examination proceeded.

*Benjamin Marlatt*, a witness offered on the part of the defendants, being duly sworn, saith—

I reside in Hightstown; have resided here about forty years; I have been quite unwell since last spring; I am acquainted with Samuel F. Butcher; have known him twenty years; he lives in Monroe township, Middlesex county; previous to the fall of 1860, I saw him; he said he would have some money to put out—about \$800; he said it was in the hands of James B. Coleman, Esq., and he did not know what time it would be paid to him; I told him I would like to have it when it was paid to him; would give

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him a bond and mortgage for it; he said I should have it; when Esquire Coleman was ready to pay over the money to Mr. Butcher, he and Esquire Coleman came together at my house; he told me he brought Mr. Coleman along to fix the writings; I saw him, Mr. Butcher, once or twice in the interim, and he had informed me of the day they would come with the money; they came to my house on the day appointed; Mr. Coleman said Mr. Butcher had brought him there to fix some writings for the loan of money; he, Coleman, went to work filling up the bond and mortgage; after Mr. Coleman got the papers made out, he went out doors and was gone maybe fifteen minutes; Mr. Butcher said to me, "Marlatt, I have been offered \$50 for the loan of this money;" said he thought I ought to give him the same as he had been offered for it; I said to Butcher that I did not calculate to pay anything extra for the loan of the money, as I was giving him a good bond and mortgage; he said he thought I ought to pay as much as he had been offered for it, as he was in need of all the money he could get. [The evidence as to the conversation between witness and Mr. Butcher, is here objected to on the part of the complainants.]

He then began to talk off as though I would not get the money unless I paid him that amount for the loan of it; I told him I had made arrangements for the money—\$800,—and I wanted it; I had a gold watch in my pocket; I pulled it out, and told him I could spare the watch better than I could the money; I told him if he thought well of it, the watch was worth \$60, I would let him have that for the loan of the money; he took the watch, looked at it, said it would suit him first rate—the very thing he wanted; and said he would let me have the money if I would let him have the watch—that the watch would suit him as well as the money.

*Quest.* What was the fair cash value of that watch?

*Ans.* It was cheap at \$60—it was an English lever gold watch; he put the watch in his pocket and by that time Mr. Coleman came in; Mr. Coleman said the papers were all ready for signing; I signed the mortgage and my wife also

signed it; the bond and mortgage were executed in the presence of James B. Coleman at that time.

[Papers marked *Exhibits A* and *B* on the part of the complainants in this cause being shown witness, he says]—  
 Paper *Exhibit A* is the bond, and *Exhibit B* is the mortgage, which were executed at that time, and these are the papers which I gave to Mr. Butcher, together with the watch, for the loan of that \$800; he paid me the money, or its equivalent, on that day, at the time, in my house; when he came  
 10 to count out the money he fell short \$18, and paid me \$782; said he would give his note for the balance for a short time; he gave me the note for \$18, which was afterwards paid; they took the papers and the watch with them and left; that was the end of the transaction, so far as I was concerned; I don't recollect having paid any interest to Samuel F. Butcher on this bond; I don't seem to recollect about the payment of the first years' interest on the bond; I understood that the bond and mortgage were afterwards assigned to  
 20 William Warwick, the complainant in this suit, and it strikes me that the \$18 note was deducted out of the first year's interest; I cannot, on further reflection, call to mind the particulars in respect to the payment of that \$18, but it strikes me very strong that it was deducted out of the interest.

Being cross-examined, witness says—

That watch I dealt for as a gold watch—it was a gold watch; I bought it for a gold watch, and it was a good one.

*Quest.* Is that the only way you know it was a gold watch?

30 *Ans.* I judged it was a gold watch from my own experience; I bought it for a gold watch; I think it was marked eighteen caret inside the case; I never went to a silversmith to have it examined—never did that with any watch—thought I knew enough about that myself; I am not a goldsmith, silversmith, or watchmaker by profession, but have handled gold watches enough to know about that; I carried that watch probably a year, probably more, before I let Mr. Butcher have it; it was a very good timer; I don't recollect of whom I got it; I never bought a gold watch of a pedler traveling around; I very seldom traded watches at that

time; I have handled two or three gold watches of my own, and have handled other peoples gold watches; Mr. Butcher did not complain to me that the watch was not a gold watch; he never said a word about it—good, bad, or indifferent; I said nothing to Esquire Coleman about what had taken place between me and Mr. Butcher about the watch at the time respecting my giving the watch to Mr. Butcher; I don't think that I ever afterwards named to any one that I had given a bonus of \$50 with the bond and mortgage for the loan of the money; I don't recollect that Mr. Butcher had brought me straw previous to the loan of that money; don't think I ever had any dealings with him previous to that transaction; James Wilson, Esq., of Trenton, has been my lawyer—I don't know that he is my lawyer now until I employ him again; he ceased to be my lawyer after my long law suit between myself and Smith and Warwick was ended; think that case wound up last March; since that time Mr. Wilson has not transacted any business for me of any account much. 10

*Quest.* Has the property covered by the mortgage in this cause been sold in a foreclosure suit in which the executors of Joseph Cutter, deceased, were complainants, and yourself and others were defendants—and if so, when did the sale take place? 20

*Ans.* It has been sold; was sold in the latter part of last July, I think.

*Quest.* In the bill of complaint in that cause, was not this mortgage set up in the bill of complaint as a lien or mortgage on the property described in this mortgage? [Question objected to on part of defendants, as irrelevant and incompetent, being an attempt to prove by parol the contents of a written document.] 30

*Ans.* I suppose it was; I don't know.

*Quest.* Did you not put an answer in the said foreclosure suit, in which you set up usury as a defence to the bond and mortgage is this cause? [Question objected to on the part of the defendants for the reasons above stated.]

*Ans.* I don't think there was any such answer filed for me in that cause; that defence was set up in this cause.

*Quest.* Did you not put in an answer in the foreclosure suit of Cutter's executors against yourself and others?

*Ans.* I don't know that I ever did; I had no reason to do so in the Cutter matter.

*Quest.* Did not Mr. James Wilson appear for you as your solicitor in that cause?

*Ans.* I don't know anything about that, because I never put up any defence; I had no defence to put up against the Cutter mortgage.

10 *Quest.* Do you mean to say that Mr. Wilson had no power to act for you in that cause?

*Ans.* I don't say but what he had; I was made a party to that suit as owner of the property; I do not know that Mr. James Wilson came down here to act for me at the sale of the property in that suit under the Cutter foreclosure; I think the Cutter foreclosure suit was pending last March; I cannot tell exactly when it was; I suppose that on the 14th day of last March Mr. James Wilson was acting for me as my solicitor.

20 *Quest.* At that time had not Mr. James Wilson full power to settle all matters in difference between yourself and William Warwick?

*Ans.* Not without consulting me, I suppose,

*Quest.* About that time, did not Mr. William Warwick pay Mr. James Wilson about \$2000 for you? [Question objected to as irrelevant.]

*Ans.* I don't know anything about it—how much money he paid him, nor at what time.

30 *Quest.* Had not Mr. Warwick paid James Wilson the amount which you claimed as usury on this bond and mortgage, for you?

*Ans.* Not that I know of.

[Paper *Exhibit A ex parte* complainant being shown witness, his attention is called to the endorsement dated March 14th, 1872.]

*Quest.* Had Mr. James Wilson authority to make that endorsement for you, as your solicitor?

*Ans.* He did that without my consent, or my knowing anything about it.

40 *Quest.* A day or two after that endorsement was made, did

not James Lawrence show it to you, and ask you if it was not all right, or words to that effect.

*Ans.* He, Lawrence, came to me with the bond with a lie in his mouth—told me that Mr. Wilson give him this bond to bring down for me to sign; I saw the endorsement on there and told him I would not sign the paper or put any writing on it; that is all I recollect saying to him.

I took the paper when Mr. Lawrence showed it to me—took it up home, showed it to my son, and afterwards returned the paper to Lawrence; did this in twenty minutes, 10 I suppose, after I received it from him; I did not show it to any one but my son; I told him when I handed it back to him that I was dissatisfied with that endorsement; I told Mr. Wilson afterwards that I was very sorry he had done a thing of that kind—told him this the first time I saw him afterwards; Mr. Wilson told me the reason he did it was, because Warwick was going to be easy with me, and wait a year for the money.

*Quest.* At the time of that endorsement, was not the interest paid on the bond up to April 1st, 1872, after taking out the amount claimed to have been paid as usury, or was you so informed? 20

*Ans.* I don't know anything about it; Mr. Lawrence did not so inform me; Mr. Wilson, when I saw him, informed me that he had paid so much money on that bond; that is all I know about it.

*Quest.* Did not Wilson tell you that Mr. Warwick had paid back \$50 of usury on that bond, or that he had kept it back at the time when that acknowledgment was endorsed on the bond? 30

*Ans.* Mr. Wilson never told me any such thing as that; this is the first I heard of that.

I was present at the sale of the mortgaged premises described in the mortgage, under the Cutter foreclosure; my former solicitor, Mr. Wilson, and my present solicitor, Mr. Kingman, were also present; I suppose I heard it announced at that sale, by the solicitor of the complainant, that this mortgage was an encumbrance on the property, and that it was sold subject to this mortgage; I think he mentioned the Hutchinson mortgage also; I think I stated myself that these 40

were the only two mortgages on the property ; I probably stated, also, that the interest on this mortgage had been paid up to April 1st, 1872.

*Quest.* Did you state at that time that this mortgage was void on the ground of usury ?

*Ans.* That question was not up at that time.

*Quest.* Was it not stated at that sale, by Mr. Joseph J. Ely, that Mr. Warwick wanted the amount of this mortgage paid ?

10 *Ans.* I did not hear that said.

Being re-examined-in-chief.

I understood that Mr. Warwick was fully informed of this usurious transaction before he took the assignment of this bond and mortgage. [Objected to on part of complainant as being hearsay, and not of witness' own knowledge.]

*Quest.* Did not Mr. Warwick testify before the master, in the suit between yourself and Smith and Warwick, that you had told him about this transaction with Butcher, in reference to the giving of the watch for the loan of this money ?  
20 [Question objected to, on the ground that it is not the best evidence, and not a proper re-examination.]

*Ans.* He did testify to something of that amount.

*Quest.* Do you not recollect whether you had told him, Warwick, about it before he took the assignment of the bond and mortgage ?

*Ans.* I do not remember.

Being again cross-examined.

I never said anything to Samuel F. Butcher on the subject of usury after executing the bond and mortgage.

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BENJ'N MARLATT.

Sworn and subscribed at Hightstown, December 21st, 1872, before me.

ISAAC W. LANNING, *M. C.*

Adjourned to Saturday, January 4th, 1873, to meet at the master's office at Trenton, at ten o'clock A. M.

Parties met, and examination proceeded.

*Joseph J. Ely*, a witness called on the part of the defendants, being duly sworn, saith—

I reside near Cranberry, Middlesex county, New Jersey; I have been examined as a witness on the part of the complainant in this cause; I was called to prove the assignment of the mortgage to the complainant.

[Witness being shown paper *Exhibit D* on the part of the complainant, says]—I drew this paper, the assignment of the mortgage; it was drawn at my office, then in Hightstown; 10 the bond and mortgage mentioned in this paper had been in my hands some time prior thereto, for collection.

[Witness being shown papers *Exhibits A* and *B* on the part of the complainant says]—These are the papers I refer to as having been in my hands; these papers were placed in my hands for collection by Samuel F. Butcher.

*Quest.* Why did you not proceed to foreclose the mortgages? [Evidence objected to on the part of the complainant as being irrelevant, and as being a violation of confidence between counsel and his client.] 20

[Question waived by defendants' counsel.]

*Quest.* State what took place between Mr. Warwick and Mr. Butcher in your office, at that time of the assignment of this mortgage—state the facts and circumstances fully?

*Ans.* The business was arranged mainly between them before the day of the assignment; I think the papers had been in my hands some two or three weeks before they were assigned over, and the conclusion arrived at between them, Mr. Butcher acting through me, was, that he, Butcher, would take \$750 for his mortgage—throwing off \$50 from 30 the mortgage. [Evidence objected to on the part of the complainant as being irrelevant.]

I called on Mr. Marlatt for the money before I did anything, not wishing to put him to costs; Mr. Marlatt gave me his statement about the alleged giving of the watch as a bonus for the loan of the money. [Evidence objected to as incompetent.]

Then Mr. Warwick called on me—I mean William Warwick, the complainant in this cause; he, Mr. Warwick, told

me that Mr. Marlatt said he gave a bonus of a watch worth \$50 for the loan of the money secured by this bond and mortgage; he said sometime during our interview respecting this matter, to me as the attorney of Mr. Butcher, that he Mr. Warwick, would pay the claim if he, Mr. Butcher, would throw off \$50; Mr. Warwick said I could not collect any of it for Mr. Butcher if I went on with a foreclosure, because Mr. Marlatt would set up usury as a defence; after I had a conversation with Mr. Butcher, he agreed to throw  
 10 off \$50 of the principal and take \$750 and the accrued interest; we were to reckon up the interest on the bond and take \$50 from the gross amount of principal and interest; the consideration expressed in the assignment—\$773.06—was the amount paid by Mr. Warwick to Mr. Butcher at the time.

*Quest.* What, if anything was said by Mr. Warwick at that time in reference to the payment of the mortgage to him by Mr. Marlatt?

*Ans.* Mr. Warwick said he could collect, or Mr. Marlatt  
 20 would allow it to him; I can't recollect his exact language, but am certain that was the the purport of it.

*Quest.* Did he or did he not state to you and to Mr. Butcher that you could not collect the mortgage of Mr. Marlatt? [Objected to on the part of the complainant.]

*Ans.* He did.

*Quest.* Did or did not he, Mr. Warwick, use that as an inducement for Mr. Butcher to make a deduction from the face of the bond at the time of the assignment? [Objected to on the part of complainant.]

*Ans.* I think Mr. Butcher was guided wholly by my instructions in that matter, and I thought it best, and advised  
 30 him to do it, and he did so.

*Quest.* Did or did not Mr. Warwick use the fact of the alleged usury as an inducement to you to advise the making of the assignment to him, Mr. Warwick?

*Ans.* He did.

Being cross-examined.

These conversations which I have detailed about the usury all took place before the assignment of the mortgage.

*Quest.* Has not the controversy between Mr. Benjamin Marlatt and William Warwick about the usury above spoken of, been settled by Mr. Warwick?

*Ans.* I thought it was all disposed of in such a shape that the question of usury would never be moved again.

[Paper *Exhibit A*, on part of complainant, being shown witness, and his attention called to a receipt or acknowledgment thereon, dated March 14th, 1872, says]—I met Mr. Warwick at Mr. James Wilson's office some time in March last; it was the time that receipt or acknowledgment was written on this bond; I was there doing business for Mr. Warwick; there were some costs due me, and I thought it a good time to collect them; I was there under an understanding with Mr. Warwick.

*Quest.* What did you and Mr. Warwick go there to do?

*Ans.* I had been acting as attorney in some suits against Mr. Marlatt; Mr. Warwick suggested that I had better meet him up at Mr. Wilson's office, for the purpose of looking over the figuring which was to be done between himself and Mr. Wilson, and to get my costs; Mr. Wilson was, as I understood, then acting as the solicitor of Mr. Marlatt. [This evidence objected to on the part of the defendants as being irrelevant, and not being a cross-examination.]

*Quest.* When you were there with Mr. Warwick, in Mr. Wilson's office, was not the question of usury, touching this bond and mortgage brought up?

*Ans.* I can't tell you about that; there was no disagreement between Mr. Wilson and Mr. Warwick that I recollect of; the interest on that bond, *Exhibit A*, was then paid by Mr. Wilson to Mr. Warwick, in my presence.

*Quest.* Was not the sum of \$50, then claimed to be usury on that bond, then deducted out of the interest, and the \$50 retained by Mr. Wilson?

*Ans.* I cannot answer that question in that form; I do not recollect about it, so as to answer that question in that form; I do not recollect that \$50 was retained out of the interest calculated on the bond by Mr. Wilson at that time; it may, or may not have been; I have no recollection on that subject; I dictated the language of the written acknowledgment on that bond.

*Quest.* What was your object in having that acknowledgment written in that way? [Question objected to on part of defendants as illegal, the writing itself expressing the meaning of the parties.]

*Ans.* To enable Mr. Warwick to get \$800 on the principal on the bond, which I understood the parties to agree to at that time, as the amount of principal money due on the face of that paper; Mr. Marlatt was not present at that interview at Mr. Wilson's office.

10

JOSEPH J. ELY.

Sworn and subscribed at Trenton, January 14th, 1873, before me.

ISAAC W. LANNING, *M. C.*

*John Dawes*, a witness produced on the part of the defendant, being duly sworn, saith—

I am one of the defendants in this case.

*Quest.* Prior to the purchase of the mortgaged premises by you, did you or not know of the usurious character of the bond and mortgage in this cause? [Question objected to on part of complainant as leading.]

20

*Ans.* I knew of it.

*Quest.* From what sources did you derive your information?

*Ans.* From reading the testimony taken in the case between Marlatt and Smith and Warwick in the Court of Chancery; I read all the testimony taken in that case; I read Mr. Warwick's testimony in the case on that subject; I had also from Mr. Marlatt a statement of the fact as afterwards testified to by him before the master in this cause.

30

Being cross-examined—

I promised to give Mr. Ely a check for the amount of the mortgage, after I should get my deed for the property; immediately after I signed the conditions of the sale, and gave my check for the ten per cent. of the purchase money; Mr. Ely came to me and said he had the papers, and had instructions from Mr. Warwick to proceed to collection.

Being re-examined—

The sale I speak of took place on Saturday—latter part July; the subpoena in this case was served on me before I received my deed for the premises; S. M. Schanck, Esq., acting as the solicitor for the complainant.

Being again cross-examined—

The subpoena was served on me after I bought the property.

JOHN DAWES.

Sworn and subscribed at Trenton, January 4th, 1873, 10 before me.

ISAAC W. LANNING.

Evidence closed on the part of defendants.

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### Depositions of Complainant.

[Filed June 12, 1873.]

Examination of witnesses taken before me, a master and examiner in chancery of New Jersey, at my office, in the city of Trenton, on Saturday, the 1st day of February, 1873, at ten o'clock A. M., pursuant to notice from the solicitor of the complainant to the solicitors of the defendants.

JAMES S. AITKEN, *M. C.*

By consent of the solicitors of the respective parties, I adjourn the examination until Saturday, February 8th, 1873, at ten o'clock, A. M.

February 8th, 1873. The respective parties appeared before me with their solicitors, and resumed the examination pursuant to adjournment.

*Samuel F. Butcher*, a witness produced on the part of the complainant, being duly sworn, on his oath says—

I reside in Monroe township, Middlesex county, New Jersey.

[*Exhibits A and B*, on the part of the complainant, being shown witness, he says]—

I am the person named in this bond and mortgage; this bond and mortgage was given to me by Benjamin Marlatt; I was in Hightstown one day with my sister, and Mr. Marlatt came to me and wanted to know if I had not some  
10 money to lend; I told him that I believed that I would have a little money on the 12th day of October next; he wanted to know if he could get it; I did not give him a decided answer; some time afterward I saw him in town again, I think it was, he asked me if he could have the money; I told him, I thought that he could—I would see; on Sunday morning, Mr. Marlatt came to my house; I promised him the money; he wanted to buy a load of straw, or some  
20 straw; it was a load of straw; he wanted it when he got the money; I took him the straw before he got the money, and he said he would pay me for the straw the day that I let him have the money; I took him \$551 of money; James B. Coleman had a balance of money that was due me; how much it was, I do not now exactly know, but when I went to Benjamin Marlatt's house, James B. Coleman was there at that time; had the papers nearly all drawn up; a deficiency of \$17, of making \$800, remained; I am not positive about the exact amount, but I gave Marlatt my note for that  
30 amount, whatever it was, to make up the \$800 for which the bond and mortgage were given; the amount of money I had, and what Mr. Coleman had, and this note I gave, made up the \$800; this money Mr. Coleman had belonged to me; Mr. James B. Coleman got to Mr. Marlatt's house before I got there, and had the papers drawn; the amount was put in before I got there, and that was the reason I had to give the note to make up the amount; these conversations with Mr. Marlatt that I have spoken of, took place before the day the bond and mortgage were given to me; the straw was delivered before the signing of the bond and  
40 mortgage; Mr. Marlatt never paid me for the straw until

that day, then he jumps up, goes out in the kitchen, I think it was, and gets a watch and hands me this watch; I asked Mr. Marlatt if this watch was for the straw; Mr. Marlatt nodded his head in a way to say, yes; James B. Coleman had paid the money about that time or a little before; I handed my money to Mr. Coleman, and he paid it over to Marlatt; this was about the time of the delivery of the watch that Coleman paid the money to Marlatt; there was nothing more took place in regard to it that I think of at present. 10

*Quest.* Did you, or did you not, ever receive anything from Mr. Marlatt for that loan?

*Ans.* No, sir, I did not; I think Mr. Marlatt owes me today.

*Quest.* Was there, or was there not, any usury received by you from Mr. Marlatt for that loan of \$800?

*Ans.* There was not.

*Quest.* Was, or was not, that watch received by you from Marlatt in part payment of that straw?

*Ans.* It was. 20

*Quest.* Was, or was not, that watch given to you for the loan of that money to Marlatt?

*Ans.* What he gave it to me for, I do not know; but what I took it for I know, and it was for what I have told you. [Mr. Kingman here objects to all the foregoing written questions.]

[Mr. Schanck insists that the questions should have been objected to when they were asked.]

*Quest.* What kind of a watch was that that Mr. Marlatt gave to you? [Question objected to in that form.] 30

*Ans.* I believe it was an oldish, galvanized watch; the plate commenced to wear off of it, and it smelt pretty coppery; it wouldn't run but very little; no dependence in the watch at all.

*Quest.* What was the watch worth? [Question objected to by Mr. Kingman.]

*Ans.* The watch, I suppose, to some men, might have been worth \$5 for to deal with; I don't think it was worth quite so much to me; I have not the watch now; John Norton got the watch; I got an old sleigh for it; that was worth, I 40

suppose, \$3 or \$4; I delivered to Mr. Marlatt from one hundred and fifty to two hundred bundles of straw; I never received any other watch from Mr. Marlatt; I never had any other dealings with him, except to receive one year's interest on this bond, and then I took up my note which I had given him; I took the note in part payment of the interest; since the giving of this bond to me by Mr. Marlatt, I have had conversation with him about the question of usury; he said the paper was good enough—meaning the bond and mortgage; he said that I ought to understand things; nothing would touch me; that he was doing it to work Warwick a little; I told him that was business of his own—it wasn't mine; there was nothing more then took place at that time; I can't rightly recollect whether I have had more conversations with him than that one, except that he told me in town one day that I was all clear of this thing; that was about all of it.

10  
 20 *Quest.* At these conversations with you, did Mr. Marlatt claim that there was any usury in this bond and mortgage? [Question objected to.]

*Ans.* I don't think he said anything about it.

On cross-examination, he says—

I assigned the bond and mortgage to Mr. Warwick. [This evidence objected to as not a cross-examination.] Joseph J. Ely was my attorney in that transaction. [Evidence objected to as not a cross-examination.] I placed this bond and mortgage in Mr. Ely's hands for collection. [Evidence objected to as not a cross-examination.] I did this before I assigned them to Mr. Warwick; somewhere about three weeks; I think Mr. Ely did not hand the bond and mortgage back to me before I assigned them. [Mr. Schanck here objects to this course of cross-examination as improper.]

30 *Quest.* Did he, Mr. Ely, not tell you he could not collect the bond and mortgage, before you assigned them to Warwick? [Question objected to.]

*Ans.* I don't remember of his telling me so.

*Quest.* Did he not tell you that it was usurious?

*Ans.* I do not remember of his telling me so.

*Quest.* Did he not say to you that you could not collect it

of Marlatt without committing perjury, if you should swear there was no usury in the transaction? [Question objected to.]

*Ans.* I don't remember of his ever saying so.

*Quest.* Did not Mr. Warwick tell you about the time you assigned the bond and mortgage to him, that you could not collect them of Mr. Marlatt on account of the usury? [Question objected to as not proper and irrelevant.]

*Ans.* He did not tell me so; he told Mr. Ely so.

*Quest.* Did Mr. Ely advise you to assign them to him, 10  
Warwick?

*Ans.* Yes, sir. [Mr. Schanck here objects to the last question.]

*Quest.* What did Mr. Warwick pay you for the bond and mortgage? [Question objected to.]

*Ans.* He took a shave off the bond and interest, I suppose, of \$50; he took \$50 off of what was due on it.

*Quest.* Did you converse with Mr. Warwick about the usury, or only with your attorney, Mr. Ely? [Question objected to.] 20

*Ans.* I did not converse with Mr. Warwick, I know, and I do not think I conversed with Mr. Ely about usury, but I will not be positive; not at that time.

*Quest.* Did you not state to Mr. Ely that Mr. Marlatt gave you that watch for the loan of that \$800?

*Ans.* I do not recollect of doing so.

*Quest.* What did you tell him, Mr. Ely, about the gift of the watch? [Question objected to.]

*Ans.* I told him as near as I could, as I have you here.

*Quest.* When did you tell him so? 30

*Ans.* At the time in a little room off from his law office, when Mr. Warwick took the claim; I said nothing to Mr. Warwick, as I remember.

*Quest.* Do you say that you then and there told Mr. Ely that Marlatt gave you the watch for the load of straw?

*Ans.* I think I did; I told him I received it for the load of straw.

*Quest.* Were you present at the examination of Joseph J. Ely as a witness in this cause, before Isaac W. Lanning?

*Ans.* Yes; I never rendered any bill to Mr. Marlatt for 40

that straw ; I delivered it on the homestead farm, where this bond and mortgage were given ; I put it in Mr. Marlatt's barn ; Mr. Marlatt was not there at the time ; I left word with the hired man that if Mr. Marlatt wanted to see me to come and see me, for I believed I should not run after him any more ; I had been hunting for him a part of the morning ; this was before the bond and mortgage were executed ; I am not positive, but I should judge about a week before ; I never gave Mr. Marlatt any receipt for the payment of the  
 10 straw ; he never asked me for a settlement, nor I him ; I had conversation with Mr. Marlatt about this usury matter in Hightstown, near the old bank, pretty close to a little bridge, somewhere about last election a year ago. [Mr. Schanck here requests that the master put down that the witness said that Mr. Marlatt seemed dreadful afraid that somebody should see him.]

*Quest.* Was this the first conversation you had with Marlatt about the usury in this case ?

*Ans.* I will not be positive, but I think it was.

20 *Quest.* State what he said ?

*Ans.* He said that I was all clear of this thing, and he was doing this to interfere with Warwick ; I can't remember of anything else now at present.

*Quest.* What did you say ?

*Ans.* I told him that I didn't want him to bother me any more with this thing.

*Quest.* What thing did you refer to ?

*Ans.* This bond and mortgage and the usury what they said was upon it ; that was all I said to him at that time,  
 30 that I remember.

*Quest.* When did you have your next conversation with him about the usury ?

*Ans.* I don't remember any more conversations with him ; I don't think the watch was worth enough to pay for the straw that I delivered to Marlatt, and that is what I mean when I say that Marlatt owes me still ; I rather expected when Mr. Marlatt bargained for the straw, to let the straw go in with the money ; that was what I expected ; I am not able to tell the name of the man who was present when I  
 4) delivered the straw at Marlatt's ; I have been trying a good many times to think of his name.

*Quest.* Did you say anything to Marlatt, at the time the money was paid, about including the straw?

*Ans.* I did not, because I thought he would be man enough to say something about it.

*Quest.* Did you ever speak to him about the straw afterwards?

*Ans.* I don't remember that I have.

On re examination, he says—

*Quest.* What do you mean when you say you expected the straw to go in with the money? 10

*Ans.* I thought it would make the bond and mortgage a little larger; I didn't expect to recover the money of Mr. Marlatt after I got fairly acquainted with him; I got pretty fairly acquainted with him about the time he got the money.

SAMUEL F. BUTCHER.

Sworn and subscribed this 8th day of February, A. D. 1873, before me.

JAMES S. AITKEN, *M. C.*

[Mr. Schanck offers in evidence a certified copy of the answer of Benjamin Marlatt and wife, in the case of George J. Miller, executor of Joseph Cutter, deceased, against Benjamin Marlatt and others, defendants, filed in the Court of Chancery October 11th, 1871, and marked *Exhibit F* on the part of the complainant.] 20

Adjourned to two o'clock P. M.

Examination resumed pursuant to adjournment.

*Charles H. Butcher*, a witness produced on the part of the complainant, being duly sworn, on his oath says—

I reside in Washington township, Mercer county, New Jersey; I am a farmer; I am a brother of Samuel F. Butcher; I had a conversation with Benjamin Marlatt about this alleged usury in this case; Mr. Marlatt said the bond and mortgage was good, and said he wanted—I don't know the expression he used—but he said he either wanted 30

to devil Warwick or give him hell ; I don't know which it was—one or the other, or maybe both ; it was at his house, and was about a year ago ; it will be a year in March.

On cross-examination, he says—

No one was present at the conversation but me and him ; we were standing in his yard ; I went up there to talk to him about the matter ; I went up at my own request ; I was a little interested.

CHS. H. BUTCHER.

10 Sworn and subscribed this 8th day of February, A. D. 1873, before me.

JAMES S. ATKIN, *M. C.*

*James Wilson*, a witness produced on the part of the complainant, being duly sworn, on his oath says—

I am a practising lawyer, residing in Trenton.

[*Exhibits A and B and F*, on the part of the complainant, being shown witness, he says]—

I was the solicitor of Benjamin Marlatt and wife, and filed an answer for them in this cause mentioned in this answer, *Exhibit F* ; I suppose the bond and mortgage—  
 20 *Exhibit A and B*, are the same referred to in this answer, *Exhibit F*, although in *Exhibit F*, they are mentioned as bearing date April 10th, 1860, and given to Samuel Butcher ; usury in this answer is set up on the bond and mortgage referred to in the answer ; I had not the bond and mortgage, *Exhibit A and B*, before me when I drew the answer ; I do not know, but I suppose *Exhibits A and B*, are the bond and mortgage to which I intended to set up in usury in the answer ; there was a controversy between William Warwick  
 30 and Benjamin Marlatt in the suit mentioned in this answer, that is, Mr. Marlatt in the answer alleged usury against the bond and mortgage—*Exhibits A and B* ; I suppose them to be the same referred to in the answer ; in a chancery suit, in which Benjamin Marlatt was complainant, and William Warwick and others were defendants, in which I was solicitor for Mr. Marlatt, there was, according to the decree, a certain sum of money to be paid by the defendants to the

complainants, and Mr. Warwick was arranging to pay one-half of it; in talking with me about it, Mr. Warwick said he had certain claims against Mr. Marlatt which he wanted to offset as far as they would go upon the money which he had to pay; among those claims was a bond and mortgage for \$800, which Mr. Marlatt had given to Samuel F. Butcher, which Mr. Warwick said had been assigned to him; after talking with Mr. Warwick about it, I told him I would allow him some of the claims as an offset, and some of them I would not, as I thought they ought not to be allowed; in regard to the Butcher bond and mortgage, I told him that he knew that was alleged to be usurious, and if it was he could not recover any of it; after considerable conversation had with Mr. Warwick at different times, I finally agreed to allow certain of his claims as offsets against the money he had to pay, and in regard to the Butcher bond and mortgage, I agreed to waive the objection against it on account of usury; Mr. Warwick seemed satisfied with this, and after deducting the claims which I agreed to allow as an offset from the moneys which he had to pay, he settled with me for the residue; Joseph J. Ely was with Mr. Warwick at my office at the time this settlement was agreed upon or carried out; in the settlement Mr. Warwick was allowed \$312 interest on the Butcher bond, and then Mr. Ely suggested that there should be endorsed on the bond a statement that there was at that date due on it the sum of \$800 principal; I made an endorsement on the bond to that effect, writing it as Mr. Ely dictated the words; Mr. Ely said that he thought that that would be sufficient to show what was the agreement between the parties, and as he represented Mr. Warwick, and was satisfied with it, I wrote it as he said; Mr. Marlatt was not present at this settlement; I was acting for Mr. Marlatt, and in waiving the claim for usury I supposed I had his authority for what I did; some little time after that Mr. Marlatt called at my office, and I told him what I had done in making a settlement with Mr. Warwick; he expressed himself as not satisfied with what I had done; said he thought I had gone too far in waiving or giving up the objection to the Butcher bond and mortgage on account of the usury; I told him

that I supposed from what he had previously said to me, that he was willing I should do so in making that settlement with Mr. Warwick, if I thought it best, and that if I had not supposed so, I would not have done it; the memorandum I refer to is the one signed by me as the attorney of B. Marlatt, under date of March 14th, 1872, on *Exhibit A*; Mr. Warwick, at the time of that settlement, gave me his check for \$2,000, which left due a balance of \$237, which he said he could not pay then, but was willing to  
10 give me his note for it; he did give me his note for it, and the note has since been paid; I think that by the decree in the case mentioned, the defendants were directed to pay \$5,441.58, with interest from August 1st, 1871, and costs of suit; by arrangement between the defendants, Mr. Warwick was to pay one half, and when he came forward to pay his half, it amounted at the time to \$3,161.12, as I figured it at that time; that was on the 14th of March, 1872; in that settlement the  
20 sum of \$312 was endorsed on the Butcher bond as being received of me acting for Mr. Marlatt, and being interest in full on the bond up to April 1st, 1872; Mr. Warwick was allowed, also, the sum of \$45.53 for one half of two years' interest endorsed as paid on a mortgage on a certain property at Hightstown, known as the Asher Moore lot, which lot Mr. Perrine and Mr. Marlatt owned together, and the mortgage on it had been assigned, as Mr. Warwick stated, to his (Warwick's) wife; there was further allowed to Mr. Warwick for a claim on two judgments against Mr. Marlatt, one recovered by the Central Bank, and one by Joseph  
30 J. Ely, which Mr. Warwick said had been assigned to him, the sum of \$566.69; those last three items, together with the \$2,000 check, and the note for \$237 before mentioned, making up in the whole the sum of \$3,161.12 above mentioned.

On cross-examination, he says—

According to my recollection, the alleged bonus given for the loan of the money mentioned in the Butcher mortgage, was a watch given by Mr. Marlatt to Mr. Butcher at the time, in order to obtain the loan; the watch being valued at

§50. [Mr. Schanck objects to this testimony.] The amount of this bonus was frequently spoken of in the presence of Mr. Warwick; Warwick and I conversed together about it at different times; Mr. Warwick said that Mr. Marlatt told him that it was given at the time when he went to get the assignment of it, and also think that Mr. Warwick told me that when he got the bond and mortgage of Butcher he made him throw off something on that account.

*Quest.* At the time of the settlement, March 14th, 1872, was the fact that such bonus was given disputed or denied? 10

*Ans.* I don't think it was; I think that in that settlement there was nothing said about allowing that bonus of \$50 in that settlement; it was during the progress of the suit in chancery which I have before referred to, wherein Mr. Marlatt was complainant, and Mr. Warwick and R. M. Smith were defendants, that I first heard Mr. Warwick speak of the alleged usury on this bond and mortgage; I think he spoke of it when he was examined as a witness in that case; in making the settlement of the 14th of March, 1872, I was acting under my general power as solicitor for Mr. Marlatt, 20 guided by what I understood him to say in the conversation I had with him, in view of a settlement with Warwick; that was the only power I had in reference to it; I am not able to say exactly how soon after the settlement I saw Mr. Marlatt, but I should think it probable about a week or ten days, not more than that; Mr. Marlatt's point of dissatisfaction with that settlement was that I had agreed to give up or waive the objection to the Butcher bond and mortgage on account of usury; I was asked and urged by Mr. Warwick to do this at different times before the day of settlement; 30 at these conversations with Mr. Warwick, the specific amount of the usury was spoken of, not on every one of them, but on several different occasions; I have no recollection that on any one of those occasions it was alleged by Mr. Warwick that that watch was given for anything else than as a bonus for the loan of that money; I feel satisfied it was not so alleged.

On re-examination, he says—

According to my recollection, but I state it as a matter

about which I am not entirely certain, in making the allowance of \$566.69, on the two judgments against Marlatt, one by the Central Bank and one by Joseph J. Ely, the allowance was not for the whole amount of the judgments, but for so much as Mr. Warwick had paid for them, together with interest on the amount he had paid; he having paid, as I understood, less than the face of the judgments; I was acting in that settlement as the solicitor of Mr. Marlatt, in the suit by him against Warwick and Smith, before mentioned; I don't recollect that I had in my mind the suit of the executors of Joseph Cutter against Benjamin Marlatt and wife and others; Warwick had filed no answer in this last mentioned suit, in order to bring forward any claim on his part on the Butcher bond and mortgage; the answer which I drew in that case was drawn in view of the fact that he might file his answer and set up such claim on that bond and mortgage; I attended the sheriff's sale of the property sold on foreclosure in this suit of Cutter's executors against Marlatt, and on executions in other cases; the sale was at one time on all the executions; I think it was on the 20th of July last; at that sale a farm was sold known as the Home Farm, which I understand that this mortgage, *Exhibit B*, covers, or a part of it; I have no recollection that it was announced at that sale that that farm was to be sold subject to this mortgage; it might have been, but if it was I did not hear it; I don't remember that I ever told Mr. Warwick that Mr. Marlatt was dissatisfied with that settlement; I don't remember whether I ever did or not.

J. WILSON.

20 Sworn and subscribed this 8th day of February, A. D. 1873; before me.

JAMES S. AITKEN, M. C.

Adjourned to Friday, February 21st, 1873, at ten o'clock A. M.

By written consent of the solicitors of the respective parties, the examination is adjourned to Wednesday, April 9th, 1873, at ten o'clock A. M.

Wednesday, April 9th, 1873, ten o'clock A. M. Examination resumed pursuant to the adjournment, in the presence of Samuel M. Schanck, solicitor of the complainant, and of F. Kingman, solicitor of the defendants.

*William Warwick*, the complainant, being duly sworn, on his oath says—

I reside at Hightstown, New Jersey.

[*Exhibit A ex parte* complainant, being shown witness, he says]—I recognize the endorsement of March 14th, 1872, on the back of this bond; I saw Mr. Wilson do that; it was done by him in his office; I went there to settle with him about Marlatt's matters—what he got against me and Smith's folks; I mean the decree obtained against us; the controversies on this bond, *Exhibit A*, were included in that settlement; we had arranged that about two weeks before; that arrangement was, that I was to pay my half of the decree and they were to allow me the mortgage after deducting out such claims as they asked me; they were to allow me \$800 and the interest on it; they endorsed the interest on it; then they were to make the bond good for \$800; they did so; Mr. Wilson I am speaking of; Mr. Ely was also there; this endorsement of March 14th, 1872, was what Mr. Wilson wrote on the bond; I asked them, Ely and Wilson, if that would make the bond good for \$800; they said yes. [This conversation is objected to by Mr. Kingman, Mr. Ely being the counsel of Mr. Warwick.]

The decree I speak of is the one referred to by Mr. Wilson in his testimony; the items in the settlement of that decree were the same as stated by Mr. Wilson; I thought they were right the day he gave it in here.

[Paper shown witness, marked *Exhibit*, he says]—These judgments mentioned in this paper belonged to me; I paid for them; these judgments were included in the settlement of that decree by me; the full amount of these judgments was not allowed by Mr. Wilson.

[Mr. Kingman here objects to the further taking of evidence, as Mr. Marlatt, one of the defendants, had died during the adjournment. Mr. Schanck thereupon stopped

the examination of the witness until the cause could be revived.]

Thursday, June 12th, 1873, ten o'clock A. M. Examination resumed in the presence of Samuel M. Schanck, Esq., solicitor of the complainant, and F. Kingman, Esq., solicitor of the defendant, pursuant to notice from the complainant's solicitor to the defendant's solicitor.

*William Warwick*, the complainant, being duly sworn, on his oath says—

10 I reside at Hightstown, New Jersey.

[*Exhibit A*, *ex parte* complainant, being shown witness, he says]—At the time of the endorsement of March 14th, 1872, on this bond, I was at the office of Mr. James Wilson, in Trenton; Joseph J. Ely and James Wilson and myself were all the persons that were there; I met them there to settle a decree in chancery against me and the Smith estate in favor of Benjamin Marlatt; also to settle two judgments and a dispute about usury on the bond and mortgage in question in this cause; we had a settlement; we settled the matter  
20 in question on this bond, *Exhibit A*, in this way; they were to pay me the mortgage; there was to be no more difficulty about it; there were two judgments that I had against Marlatt, which I allowed a deduction from of over \$200, I think about \$230; they allowed me what I gave for the judgments and six per cent. interest from the time I bought them up to the time of settlement; it was in 1862 that I bought them, and I paid \$300 for the two, and, I think, \$5 for the expense of transferring them; I have a memorandum of these two judgments, the amount of them and the  
30 date of entry; this is the memorandum, marked *Exhibit G*, *ex parte* complainant; I threw off the deduction from the judgments, so that I should have no difficulty about the mortgage in this case; the amount allowed me on these judgments and the interest due on this bond and mortgage up to April 1st, 1872, and also the interest on the Asher Moore mortgage, belonging to my wife, were all included in the amount which I paid to cancel the decree against me; there was writing put on the bond at that time to show this

settlement; I requested it done, and there was to be no more difficulty about it.

I was present at the sheriff's sale of this property, included in my mortgage in the foreclosure suit of Cutter's executors against Marlatt; it was in Hightstown; Mr. Benjamin Marlatt and John Dawes were both present at that sale; it was stated at that sale that the land then sold was sold subject to this mortgage of mine, and William Hutchinson's mortgage, too; Mr. Samuel M. Schanck stated that; Benjamin Marlatt stated it; Joseph J. Ely stated it; they stated 10 it just as the sale was opened; John Dawes inquired very particularly how the interest was on my mortgage; I said it was all paid up to last spring; Marlatt said so too; I authorized Joseph J. Ely to say so, and he did so state; the conversation with Dawes was just before they set the farm up for sale; in the year 1860, I recollect that Benjamin Marlatt got straw of Mr. Butcher, the man that owned this bond and mortgage before me; it was long rye straw to tie up peach trees; he brought him a load; I could not tell how much it was—more than that it was a load; I saw him 20 drive over to Marlatt's farm with it, and unload it there; he used it for tying up young peach trees; it was in the fall of the year, I think, but I cannot say certain; I recollect of Mr. Marlatt having a watch that he bought of some Jew that came from New York, and he gave his note for it, and I cashed the note; I bought a watch of him, too; several bought watches of him; Alfred Perrine got one; I think the man's name was Benedict, but I am not positive; this was two or three months before Butcher took the straw to Marlatt; Marlatt said he traded the watch to Butcher; he 30 told me so; Marlatt got stuck with the watch, and so did all the rest of us; the Mr. Butcher, Marlatt said he traded with, was the man that owned this mortgage before me; Mr. Marlatt gave his note for \$13 for that watch; I bought the note of the man he got the watch of.

No cross-examination.

WILLIAM WARWICK.

Sworn and subscribed, this 12th day of June, A. D. 1873,  
before me.

JAMES S. AITKIN, *M. C.*

Mr. Schanck announced that the testimony on the part of  
the complainant was closed.

JAMES S. AITKIN, *M. C.*

BOND FROM BENJAMIN MARLATT TO SAMUEL  
F. BUTCHER.

Know all men by these presents, that I, Benjamin Mar-  
10 latt, of the township of East Windsor, in the county of  
Mercer, and State of New Jersey, am held and firmly  
bound unto Samuel F. Butcher, of the township of Monroe,  
in the county of Middlesex, and state aforesaid, in the sum  
of one thousand six hundred dollars, lawful money of the  
United States of America, to be paid to the said Samuel F.  
Butcher, or to his certain attorney, executors, administra-  
tors, or assigns; to which payment well and truly to be  
made, I bind myself, my heirs, executors, and administra-  
tors, jointly and severally, firmly by these presents. Sealed  
20 with my seal and dated the tenth day of October, in the  
year one thousand eight hundred and sixty, (1860.)

The condition of the above obligation is such, that if the  
above bounden Benjamin Marlatt, his heirs, executors, and  
administrators, or any of them, shall and do well and truly  
pay or cause to be paid, unto the above mentioned Samuel  
F. Butcher, or to his certain attorney, executors, adminis-  
trators, or assigns, the just and full sum of eight hundred  
dollars, in one year from the date hereof, with legal interest  
30 from date, without any fraud or other delay, then this obli-  
gation to be void, or else to remain in full force and virtue.

BENJAMIN MARLATT.

Signed, sealed, and delivered, in the presence of

JAMES B. COLEMAM.

Received on the within one year's interest, up to October 10th, 1861.

SAMUEL F. BUTCHER.

Received, Hightstown, December 19th, 1867, the interest on the within bond from October 10th, 1861, to October 10th, 1865.

\$192.00.

WILLIAM WARWICK.

1872, March 14th, received of J. Wilson, (for B. Marlatt,) three hundred and twelve dollars, interest in full on this bond, up to April 1st, 1872.

\$312.00.

WILLIAM WARWICK.

10

1872, March 14th. I hereby acknowledge that there is due on the within bond, to the holder thereof, the sum of eight hundred dollars principal.

J. WILSON,  
*Att'y of B. Marlatt.*

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MORTGAGE—BENJAMIN MARLATT AND WIFE TO SAMUEL F. BUTCHER.

This indenture, made this tenth day of October, in the year of our Lord one thousand eight hundred and sixty, 20 between Benjamin Marlatt, of the township of East Windsor, in the county of Mercer, and State of New Jersey, and Emeline his wife, party of the first part, and Samuel F. Butcher, of the township of Monroe, in the county of Middlesex and State of New Jersey, aforesaid, party of the second part, witnesseth, that the said party of the first part, in consideration of the debt or sum hereinafter mentioned to be secured, and of the further sum of one dollar to them in hand paid by the said party of the second part, before the sealing and delivery hereof, the receipt whereof the 30 said party of the first part do hereby acknowledge, have granted, bargained, sold, enfeoffed, released and confirmed, and by these presents do grant, bargain, sell, enfeoff, release and confirm, unto the said party of the second part, his heirs and assigns, all that certain tract or parcel of land and

premises situate in the township of East Windsor aforesaid, and is butted and bounded as follows, viz.: Beginning in the middle of the road leading from Hightstown to Freehold, seventy links from a white oak tree on a course of north ten degrees and fifteen minutes east; thence (1) along the middle of said road north seventy-two degrees west sixteen chains seventy-two links; thence south ten degrees and fifteen minutes west nine chains and sixty-seven links, to a corner in line of Widow Applegate's land; thence along her land south eighty-nine degrees and three-quarters west 10 seventeen chains and sixty links, to a stone; thence north thirteen degrees east, sixty links; thence north six degrees west, twenty-three chains and sixty-five links, to a corner; thence north twenty degrees east one chain and thirty-three links, to corner of Blauvelt land; thence by the same south sixty-eight and a half degrees east twenty-four chains and twenty links, to a stone for corner; thence north ten degrees and a quarter east, six chains and sixteen links to a stone; thence north sixty-eight degrees and a half west, twenty-two chains and ten links to a stone for corner; thence along old road north thirty-three degrees east, twelve 20 chains and ninety-two links, to corner of D. Applegate's land; thence by the same south fifty-one degrees east, thirty-eight chains and ten links, to a stone for corner; thence along land of John Fisher, Jr., south ten degrees and a quarter west, fourteen chains and thirty links, to the place of beginning; containing ninety-three acres of land, more or less, being a tract of land, part of which was conveyed unto said Benjamin Marlatt by Andrew M. Duncan and wife and Selah Gulick and wife, and part by James Cook and wife, and Sarah Giberson, Lydia Giberson, and others; together with all and singular the appurtenances and the 30 reversions, remainders, rents, issues, and profits thereof, and all the estate, right, title, interest, use, possession, property, claim, and demand of them the said party of the first part, of, in, and to the same: to have and to hold the premises hereby granted, with all and singular the appurtenances, unto him the said party of the second part, his heirs and assigns, to the only proper use, benefit, and behoof of him, the said party of the second part, his heirs and assigns for-

ever; provided always, nevertheless, and it is the true intent of these presents, that if the said Benjamin Marlatt, party aforesaid of the first part, his heirs, executors, or administrators, do and shall well and truly pay, or cause to be paid, unto the said Samuel F. Butcher, party aforesaid of the second part, his executors, administrators, or assigns, the sum of eight hundred dollars, in one year from the date hereof, with legal interest from date, as contained in the condition of a bond, bearing even date herewith, from the said Benjamin Marlatt to the said Samuel F. Butcher, 10  
in the penal sum of one thousand six hundred dollars, as by reference to the same will appear, then and from thenceforth, as well the said obligation as also these presents, and everything herein contained, shall cease and become null and void, anything herein to the contrary in any wise notwithstanding; but, on failure of payment thereof, to be and remain in full force.

In witness whereof, the said party of the first part have hereunto set their hands and seals the day and year first above written.

BENJAMIN MARLATT, [L. s.] 20

EMELINE MARLATT. [L. s.]

Signed, sealed and delivered in the presence of—

JAMES B. COLEMAN.

State of New Jersey, Mercer county, *ss.*—Be it known, that on the tenth day of October, in the year of our Lord one thousand eight hundred and sixty, before the subscriber, one of the masters in chancery of the State of New Jersey, personally appeared Benjamin Marlatt, and Emeline his wife, who are, I am satisfied, the grantors in the foregoing deed of mortgage, and the contents thereof being by me 30  
first made known unto them, did thereupon acknowledge that they signed, sealed and delivered the same as their voluntary act and deed, for the uses and purposes therein expressed.

And the said Emeline Marlatt, on a private examination before me, separate and apart from her said husband, acknowledged that she signed, sealed and delivered the same

as her voluntary act and deed, without any fear, threats or compulsion of her said husband.

JAMES B. COLEMAN, *M. C.*

Received in the clerk's office of the county of Mercer, on the twelfth day of October, 1860, at o'clock, and recorded in Book "M" of Mortgages, pages 331 and 332.

R. C. BELVILLE, *Clerk.*

ASSIGNMENT OF MORTGAGE--FROM SAMUEL  
F. BUTCHER TO WILLIAM WARWICK.

10 Know all men by these presents, that I, Samuel F. Butcher, of the township of Monroe, county of Middlesex, and State of New Jersey, of the first part, for and in consideration of the sum of seven hundred and seventy-three dollars and six cents, lawful money of the United States, to me in hand paid by William Warwick, of the township of East Windsor, county of Mercer, and state aforesaid, of the second part, at and before the sealing and delivery of these presents, the receipt whereof is hereby acknowledged, have  
20 granted, bargained, sold, assigned, transferred, 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 on the tenth day of October, in the year of our Lord one thousand eight hundred and sixty, made by Benjamin Marlatt, and Emeline, his wife, party of the first part, unto me, said Samuel F. Butcher, party of the second part, therein named, conditioned for the payment of eight hundred dollars, in one year from the date thereof, with interest, which said mortgage covers a certain tract of land in East Windsor town-  
30 ship, Mercer county, New Jersey; which said mortgage is recorded in Mercer clerk's office, in Book M of Mortgages, pages 331 and 332, and the mortgaged premises therein described, with the appurtenances. Together with the bond or obligation in said indenture of mortgage mentioned, and

thereby intended to be secured, and all moneys due and to grow due thereon, to have and to hold the same, unto the said party of the second part, his heirs, executors, administrators, and assigns, to his and their proper use, benefit, and behoof, forever. Subject only to the proviso or condition of redemption in the said indenture of mortgage contained.

In witness whereof I have hereunto set my hand and seal, the fifth day of April, in the year of our Lord one thousand eight hundred and sixty-two.

SAMUEL F. BUTCHER. [L. s.] 10

Signed, sealed, and delivered, in the presence of  
JOSEPH J. ELY.

State of New Jersey, Monmouth county, ss.—Be it known, that on the fifth day of April, in the year of our Lord one thousand eight hundred and sixty-two, before me, Joseph J. Ely, a master in the Court of Chancery of the State of New Jersey, personally appeared Samuel F. Butcher, who is, I am satisfied, the grantor mentioned in the foregoing deed of assignment, and the contents thereof being by me first made known unto him, he did thereupon 02 acknowledge that he signed, sealed, and delivered the same as his voluntary act and deed, for the uses and purposes therein expressed.

JOSEPH J. ELY, M. C.

G

## ANSWER OF BENJAMIN MARLATT AND WIFE.

[Filed October 11, 1871.]

The answer of Benjamin Marlatt and Emeline, his wife, two of the defendants to the bill of complaint of Joseph W. Cutter and George I. Miller, executors of the last will and testament of Joseph Cutter, deceased, complainants.

10 These defendants, now and at all times hereafter, saving and reserving to themselves all benefit and advantage of exceptions to the many errors, uncertainties, and imperfections in the complainants' said bill contained, for answer thereto, or to so much and such parts thereof as they are advised it is material or necessary for them to make answer unto, they answer and say—that they admit that this defendant, Benjamin Marlatt, did, at or about the time in that respect in said bill mentioned, execute and deliver to said Joseph Cutter, since deceased, a bond in the penal sum of ten thousand dollars, conditioned for the payment of five thousand dollars, payable with interest in one year from the date thereof; and that to secure the payment of said bond, 20 these defendants executed a mortgage to said Cutter upon two farms, in said mortgage and in said bill described, one known as the "Home Farm," and the other as the "Cutter Farm," but for the particulars of said bond and mortgage, as to the date and amount, and other particulars thereof, these defendants pray leave to refer thereto when produced.

30 And these defendants further say, that sundry payments on account of the interest and principal of said bond and mortgage have been made—some to the said Joseph Cutter, in his lifetime, and some to the said complainants, since his decease—the full amount and particulars of which these defendants cannot now fully state, for want of information, but they hope to be able to show hereafter, that for several years last past, the management and control of said farms has been in the hands of other persons, and some of said payments have been made by them.

And these defendants say, that said farms are valuable, and are an ample security, as they believe, for the payment of all moneys remaining due for principal and interest on said bond and mortgage, after paying all prior liens and claims against the same.

And these defendants further say, that they admit that this defendant, Benjamin Marlatt, on or about the tenth day of April, eighteen hundred and sixty, made and executed his bond to Samuel Butcher, in the penal sum of sixteen hundred dollars, conditioned for the payment of eight hundred dollars, with interest, and that, in order to secure the payment of said bond, these defendants executed a mortgage bearing even date with said bond, to said Samuel Butcher, said mortgage being upon said Home Farm. 10

And these defendants further say, that the said bond was made and executed to said Butcher to secure a loan of eight hundred dollars, by him made to said Benjamin Marlatt at the time of the execution thereof; that, in order to obtain said loan, this defendant, Benjamin Marlatt, offered to deliver, and did deliver, to said Butcher, at the time of his negotiating with said Butcher for said loan, and as a bonus for the same, a watch valued at fifty dollars, and worth at least that sum, and said Butcher accepted said watch as a bonus for said loan, and then lent to this defendant, Benjamin Marlatt, the said sum of eight hundred dollars, and these defendants thereupon executed to him said bond and mortgage as above mentioned. 20

And these defendants therefore say, that the said bond and mortgage were, and are, usurious, and are inoperative and void. 30

And these defendants further say, that they have heard, and believe it to be true, that the said bond and mortgage have since been assigned to William Warwick, one of these defendants in this cause, and are now held by him. And these defendants say and charge the truth to be, that the said Warwick, before and at the time when he took an assignment thereof, knew of the terms on which the said loan had been obtained from said Butcher, as above stated, and that the said bond and mortgage were usurious and void. 40

And these defendants respectfully claim the benefit of this objection, and submit to this court that no decree ought to be made in this cause against the said mortgaged premises, nor against these defendants, or either of them, for the payment of said bond and mortgage.

And these defendants further say that it is true, that on or about the eleventh day of March, eighteen hundred and sixty-two, John Perrine obtained, before a justice of the peace, and afterwards docketed in the Common Pleas of  
10 Mercer county, a judgment against this defendant, Benjamin Marlatt, for the sum of fifty-three dollars and eighty-two cents, or thereabouts, and that said judgment has not been paid. But these defendants say that it is not true, as in the complainants' bill is charged, that the said Perrine has since died—and, on the contrary, these defendants say that the said Perrine is still living, and that he resides in the county of  
20 Middlesex, where he resided at the time said judgment was obtained. That the complainants, in making certain persons defendants in the said bill of complaint, to wit, Daniel Perrine, William Perrine, and Rebecca Lloyd, wife of John  
30 Lloyd, and Lydia Perrine, who are therein alleged to be heirs of said Perrine—have brought in improper and unnecessary parties, and that said bill is, in that respect, irregular, and that all costs which have been made, or may be made, by reason of such irregularity, or in consequence thereof, ought to be paid by the complainants, and ought not to be charged upon these defendants, or said mortgaged premises; and they pray that they may have the same benefit of this objection as if it had been made by plea or  
demurrer.

And these defendants further say, that the said complainants have also in their said bill made certain other persons defendants, who ought not to have been made defendants, and who are unnecessary and improper parties in this cause, and that the complainants have thus made unnecessary costs, and the same ought to be paid by them, and ought not to be charged upon or paid by these defendants, nor the said mortgaged premises; that in said bill it is charged that judgment was obtained by the Central Bank of New  
40 Jersey against this defendant, Benjamin Marlatt, and

Richard M. Job, and Archibald F. Job, on or about the fourteenth day of June, A. D. 1862, for two hundred and three dollars and twenty-seven cents, and that the Bank of New Jersey obtained a judgment on or about the twelfth day of February, A. D. 1861, against this defendant, Benjamin Marlatt, and William A. Bowne, for two hundred and seventy-one dollars and sixty-one cents, and that on or about the twenty-first day of January, A. D. 1862, Joseph J. Ely obtained a judgment against this defendant and Richard M. Job, for two hundred and ninety-seven dollars and 10  
seventy-four cents; that the complainants have in their said bill made the said Richard M. Job, Archibald F. Job, and William A. Bowne, defendants thereto, because they are, it is alleged, co-defendants in said judgments with this defendant, Benjamin Marlatt, which, as these defendants are advised, is no sufficient reason for making said persons defendants in this cause; and these defendants, admitting that said judgments were recovered as aforesaid, charge that said co-defendants of said Benjamin Marlatt therein 20  
are improperly made defendants herein, and that the complainants are thereby making unnecessary costs, and these defendants pray the same advantage and benefit from this objection as if it had been made by plea or demurrer.

And these defendants further say, that it is true Permelia Ann Ely, and Michael Ely, executors, &c., did recover a judgment in the Supreme Court of this state against this defendant, Benjamin Marlatt, at or about the time in that respect in the complainant's bill mentioned, and for about the amount therein stated; and this defendant, Benjamin Marlatt, says that said judgment was afterwards assigned to James C. Norris, and that this defendant 30  
has paid and satisfied the same.

And this defendant, Benjamin Marlatt, answering for himself, says that he admits that the Central Bank of New Jersey (now called the Central National Bank, of New Jersey), and the Bank of New Jersey, (since called the National Bank of New Jersey) and Joseph J. Ely, respectively, recovered a judgment against him for about the amount, and at or about the time in that respect in the complainant's bill mentioned; but this defendant prays 40

leave to refer himself to the proofs, which may be offered in respect to the amounts due thereon respectively, when the same shall be produced in this case.

- And this defendant, Benjamin Marlatt, further admits that Rescarrick M. Smith, James C. Norris, and William Warwick recovered a judgment against him in the Supreme Court on or about the twenty-second day of July, A. D. 1861, on a bond and warrant of attorney, to confess judgment thereon, for the sum of thirteen thousand nine hundred and forty-three dollars and eighty cents, (penalty of said bond) debt, besides costs of suit; and that the said Rescarrick M. Smith, on or about the twentieth day of January, A. D. 1862, in said court, recovered a judgment against this defendant on a bond and warrant of attorney to confess judgment thereon, executed to him by this defendant, for the sum of twelve hundred and forty-eight dollars, (the penalty of said bond) debt, besides cost of suit; that under executions issued upon the said last two judgments, or upon one of them, the sheriff of the county of Mercer levied upon the said mortgaged premises, covered by the complainant's mortgage, to wit, the "Home Farm," and the "Cutter Farm," and sold the same at public sale, and the same were struck off and sold to the said Rescarrick M. Smith; and the said sheriff afterwards, and on or about the tenth day of April, A. D. 1862, by deed bearing date on that day, conveyed the same to said Rescarrick M. Smith; that afterwards, and on or about the thirty-first day of December, A. D. 1863, this defendant, Benjamin Marlatt, filed in this court his bill of complaint against said Rescarrick M. Smith and William Warwick, who had obtained by assignment all the share and interest of said Norris in said judgment, praying, among other things, that the said sale and conveyance might be set aside and the defendants ordered to account for all the rents, proceeds, and profits by them received from said farms and from other property of this defendant and that after satisfying said judgments and making to said parties all just allowances, they might be decreed to pay over to this defendant the balance which should be found remaining, on the taking of such account.
- 40 That during the progress of said suit the said Rescarrick M.

Smith departed this life, intestate, leaving a widow and several children and heirs at law, who are named in the complainant's bill in this cause, surviving him, and that said suit was by order of this court revived against his said widow and heirs-at-law, and also against his administrators in the complainant's said bill named, and all of which said heirs and said administrators and also said widow are made defendants in this cause. That such proceedings were had in said suit, that by an interlocutory decree and order of reference made therein, dated the thirty first day of October, A. D. 1866, it was among other things ordered and decreed that the said purchase at said sheriff's sale, by Smith, of said two farms was made in trust, to permit this defendant to redeem the same on the terms mentioned in said order and decree, and that it be referred to Isaac W. Lanning, Esq., one of the masters of this court, to take an account as in said order and decree is mentioned, and that said master has since made his report to this court, bearing date on the first day of August, A. D. 1871, by which it appears that the said two judgments have been satisfied and more than satisfied, by the rents, proceeds, profits, and moneys received by said Smith and Warwick from said two farms and other property of this defendant, and that there was, at the date of said report, due from them to this defendant a large balance on that account, after deducting a sufficient sum to pay and satisfy said judgments and all other allowances which in and by said order and decree are directed to be made to them. That said defendants have filed exceptions to certain items in said report, which exceptions are still pending and undecided in this court. But even if all the items so excepted to should be disallowed and stricken from said report, (which this defendant believes ought not to be and will not be done,) yet that there would, as appears in and by said report, still remain due to this defendant a large balance, after deducting from the moneys received by said Smith and Warwick a sufficient amount to pay and satisfy the said two judgments last above mentioned.

And this defendant therefore says that there is nothing due to said Warwick and to the administrators of said

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Smith, or to either of them, on said judgments, or either of them, and that said mortgaged premises ought to be held and adjudged to be free from all claims or account thereof.

And this defendant, Benjamin Marlatt, further says, that Alfred Perrine did, as in the complainant's bill is mentioned, recover a judgment against him in the Supreme Court of this state, at or about the time in said bill stated, and for about the amount therein mentioned. That said judgment was entered upon a bond and warrant of attorney

10 to confess judgment thereon, executed by this defendant to said Perrine, and which was made and executed under the following circumstances: That about the time of the execution of the same, to wit, the twenty-fifth day of July, A. D. 1862, this defendant having met with reverses and losses in his business, was unable to meet promptly all demands against him, and there had been previously and through a space of several years, dealings between him and said Perrine, and there had not been for a long time any settlement of their accounts to ascertain how the balance stood and

20 which of them was on account thereof indebted to the other. That in this situation of things, the said Perrine told this defendant that he thought the balance was in his (Perrine's) favor, and he wished this defendant would, in some way, secure him for it, to which this defendant replied that he thought the balance would, on a settlement of their accounts, be found in his, (this defendant's) favor, but that he could not, just then, go into an examination and settlement of their accounts, to ascertain which way the balance stood; and the said Perrine then urged this defendant

30 to give him a judgment bond for some certain specified amount, and that he, Perrine, would hold the same as security for so much as should, upon an examination and settlement of their accounts, be found due to him, if anything were found due. That this defendant, having confidence in said Perrine, made and executed him said bond and warrant, upon that understanding, and in the belief that he would, as he had promised, hold the same for so much only as might on such settlement be found due him, if any amount were so found due.

40 And this defendant saith that no settlement of accounts

has yet been had between him and said Perrine, and that the said Perrine now denies that he ever agreed to take said bond and warrant on the terms above mentioned, and claims that the whole amount of the said judgment entered thereon is justly due him, which this defendant says is not the case, and that nothing should be allowed to said Perrine thereon, except so much as may, on a just examination and settlement of their accounts be found to be due to him.

And this defendant, Benjamin Marlatt, admits that other persons named in the complainant's said bill, to wit, the Bank of New Jersey, John Dey, Aaron Dawes, David B. Dey, William M. Cox, John Dawes, Charles Allen and John R. Ely, obtained judgments against him, but whether the dates and amounts thereof, are correctly set forth in said bill or not, this defendant is not now able to state; and in case the persons holding said judgments, should put in any claim for any amount as remaining due thereon, this defendant prays leave to refer thereto, and to offer further proof on his part, if the same be necessary. 10

And these defendants further say, that they have heard and believe it to be true, that the said Joseph Cutter, deceased, died leaving a last will and testament; and that the same has been proved, and that letters testamentary thereon, were granted to the complainants, but they have no knowledge thereof, except from general report; and they leave the complainants to make such proof in regard thereto as they may be advised. 20

And these defendants deny all and all manner of unlawful combination and confederacy wherewith they are in by said bill charged, without this, that there is any other matter, cause or thing in said bill contained, material or necessary for these defendants to make answer unto, and not herein and hereby well and sufficiently answered unto, confessed and avoided, traversed or denied, is true, to the knowledge or belief of these defendants; all which matters and things these defendants are ready and willing to aver and prove, as this court shall direct; and they pray to be 30

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

J. WILSON,  
*Solicitor for and of counsel with defendants.*

New Jersey, *ss.* Benjamin Marlatt and Emeline Marlatt his wife, the defendants in the foregoing answer named, being severally duly sworn according to law, do severally say—that the fact, matters and things in the foregoing answer set forth and contained, so far as they relate to his or her  
10 acts and deeds, are true, and so far as they relate to the acts or deeds of any other person or persons, they believe the same to be true.

BENJAMIN MARLATT.  
EMELINE MARLATT.

Sworn and subscribed this 11th day of October, A. D. 1871, before me.

WHITFIELD S. JOHNSON, *M. C.*

I, Henry S. Little, clerk of the Court of Chancery of the State of New Jersey, do hereby certify that  
20 the foregoing is a true copy of the answer of  
[L. s.] Benjamin Marlatt and Emeline his wife, in the cause wherein Joseph Cutter's executors are complainants and Benjamin Marlatt and others are defendants, now on the files of my office.

In testimony whereof, I have hereto set my hand and affixed the seal of said court, at Trenton, this twenty-third day of January, A. D. eighteen hundred and seventy-three.

H. S. LITTLE, *Clerk.*

NEW JERSEY SUPREME COURT.

IN CASE—MERCER COURT.

The Central Bank of New Jersey	}	Damages, \$169.94
vs.		Costs, 33.33
Benjamin Marlatt, Richard M. Job, and Archibald F. Job.		<u>\$203.27</u>

J. J. ELY, *Att'y.*

Judgment signed January 14th, 1862.

Judgment docketed in Circuit, December 26th, 1871.

Filed and docketed in Supreme Court, December 27th, 10  
1871.

IN CASE—BY DEFAULT.

Joseph J. Ely	}	Damages, \$252.38
vs.		Costs, 45.36
Benjamin Marlatt and Richard M. Job.		<u>\$297.74</u>

Entered January 21st, 1862.

M. BEASLEY, *Att'y.*

I, Benjamin F. Lee, clerk of the Supreme Court of the State of New Jersey, hereby certify, that I have searched 20 the records of said court, and do find made up of record, or docketed therein, the above stated judgments.

In testimony whereof I have hereto set my hand and the seal of said court, this ninth day of April, A. D. eighteen hundred and seventy-three, 9 A. M.

BENJ. F. LEE, *Clerk.*

## OPINION.

THE CHANCELLOR. This suit is brought to foreclose a mortgage given on the tenth day of October, 1860, upon land in Mercer county, by Benjamin Marlatt to Samuel F. Butcher, to secure the payment of \$800, with interest, and assigned by the latter to the complainant, on the fifth of April, 1862. The defence is usury. The property was sold by the sheriff to the defendant, John Dawes, in July, 1872, under a foreclosure of a subsequent mortgage, the holder of  
10 this mortgage not being a party to that suit.

At that sale the announcement was made that the property was sold subject to the mortgage now in suit, and Dawes was informed by the complainant before the sale was made, that there was due upon the mortgage, \$800 of principal besides interest. The usury set up in the answer was the delivery by Marlatt to Butcher, pursuant to an agreement made at the time of lending the money, of a gold watch of the value of \$60, as a premium over and above the lawful interest for the loan. Marlatt's account of the transaction  
20 is, that Butcher, having agreed to lend him the money, came with the scrivener employed to draw the bond and mortgage, to Marlatt's house for the purpose of completing the transaction; that after the papers had been drawn, the scrivener went out of the house and was absent for a few minutes; that during the scrivener's absence, Butcher told Marlatt that he had been offered \$50 for the loan of this money and added that he thought Marlatt ought to give him the amount which he had been offered for it. Marlatt  
30 says, that he replied to Butcher that he had not expected to pay extra for the loan of the money as he was giving him a good bond and mortgage; to which Butcher returned, that he thought Marlatt ought to pay him as much as he had been offered for it, as he was in need of all the money he could get. Marlatt says that Butcher then began to "talk off" as though Marlatt would not get the money unless he paid Butcher that amount for the loan of it; that

Marlatt then told him he had made arrangements for the money and he wanted it. Marlatt says he pulled a gold watch out of his pocket and told Butcher he could spare that better than he could the money, and that if Butcher thought well of it, the watch was worth \$60, he would let him have that for the loan of the money; that Butcher took the watch, looked at it, said it would "suit him first rate," that it was the very thing he wanted, and said he would let Marlatt have the money if the latter would let him have the watch; that the watch would suit him as well as the money. He swears that the watch was cheap at \$60; that it was an English gold lever watch, and that he gave it to Butcher and that Butcher received it under this agreement. 10

That on the occasion of this loan, a watch was delivered by Marlatt to Butcher is admitted, but Butcher swears that he did not receive it as a premium for the loan. His account of the transaction is, that before the negotiation for the loan, Marlatt had bought a load of straw of him—between one hundred and fifty and two hundred bundles— which he had delivered on the premises of the latter, but for which he had not been paid; that Marlatt never paid him for the straw until that day; and then while Butcher was at Marlatt's house, and after the bond and mortgage had been drawn, Marlatt jumped up, went out into the kitchen, as Butcher says he thinks it was, and got a watch and handed it to him; that he asked Marlatt if the watch was for the straw, and the latter "nodded his head in a way to say yes;" that the scrivener had paid the money about that time or a little before; that he handed the money to the scrivener and he paid it over to Marlatt about the time of the delivery of the watch. He says he received the watch in part payment for the straw. In answer to the question "was or was not, that watch given to you for the loan of the money to Marlatt?" he answers, "what he gave it to me for I do not know; but what I took it for I know, and it was for what I have told you." He admits in his cross-examination, that he never rendered Marlatt any bill for the straw, never gave him any receipt for it, and never asked him for a settlement, nor did Marlatt ever 40

ask him for any. He further says that he "expected, when Marlatt bargained for the straw, to let the straw go in with the money," and that he did not say anything to Marlatt at the time the money was paid, about including the straw, and never spoke to him about the straw afterwards. On his re-examination, when asked to explain what he meant by saying he expected the straw to go in with the money, he said, that he thought it would make the bond and mortgage a little larger. Marlatt swears he has no recollection that Butcher

10 brought him straw previous to the loan of the money, and adds, that he does not think he ever had any dealings with Butcher previous to the transaction of the loan. Opposed to this is the complainants' testimony that he recollects that Marlatt, in 1860, got straw of Butcher; that it was long rye straw, to tie up peach trees; that Butcher brought Marlatt a load, the witness cannot tell how much it was, except that it was a load; that he saw him drive over to Marlatt's farm with it and unload it there, and Marlatt

20 used it for tying up young peach trees. He adds, that it was in the fall of the year, he thinks, but cannot say certainly. This testimony was taken in June, 1873, about thirteen years after the alleged transaction to which it refers. The witness was in no way connected with Marlatt or his business. There appears to be no reason why he should have remembered such an occurrence at so great a distance of time, and under the circumstances, especially in view of his interest in the suit, the accuracy of his recollection may well be doubted. Butcher's testimony, on the subject of the delivery of the watch, is manifestly unworthy

30 of credit. At best, it leads to the conclusion that if a load of straw was delivered, as he alleges, it was merely as a cover for the contemplated usury. It may be remarked in this connection, that his account of the purchase of the straw is that on the day on which he promised Marlatt that he would let him have the money, Marlatt wanted to buy a load of straw of him; that he wanted it when he got the money; that he took the straw before he got the money; and that Marlatt said he would pay him for the straw the day he let him have the money. But it is insisted by the

40 complainant that the evidence shows that the watch was

not a gold watch of the value of \$60, but was a galvanized watch of the value of only \$3 or \$4. Marlatt swears it was a gold watch, an English lever gold watch—a good time-piece; that it was well worth \$60, and that Butcher was satisfied with it, and said it would suit him as well as the \$50 he had asked as premium for the loan. Butcher never complained to Marlatt that the watch was not as represented, and, indeed, he does not swear that it was not a gold watch. In answer to the question, What kind of a watch was it that Mr. Marlatt gave you? he says: “I believe it was an oldish, galvanized watch; the plate commenced to wear off of it, and it smelt pretty coppery; it wouldn’t run but very little; no dependence on the watch at all.” When questioned as to its value, he says: “To some men it might be worth \$5, to deal with; I don’t think it was worth quite so much to me; I have not the watch now; John Norton got the watch; I got an old sleigh for it, worth, I suppose, \$3 or \$4.” The only other testimony on this head, is that of the complainant, who swears that Marlatt bought a watch of a peddler for \$13, which Marlatt said he traded to Butcher. The witness says Marlatt was cheated in the watch. The inference is, that that was the watch which was delivered to Butcher. It is noteworthy that, though, according to the testimony of Butcher, the watch was given to him in payment for goods sold and delivered by him to Marlatt, he never made any complaint of the fraud which had been practised on him in giving him a worthless watch in payment for those goods.

And further, when Warwick proposed to buy this mortgage of Butcher, he sought and obtained a deduction of \$50 from the amount due on the mortgage, in view of the usury now claimed to have been taken. It is true, strict proof of the defence of usury is required, but it is no less true that the court is not at liberty to disregard the weight of evidence under the defence of usury, any more than under any other. The usury alleged in the answer appears to me to be proved. It is true, it is proved that on two different occasions, and in two different conversations since the commencement of this suit—one with Samuel F. Butcher, and the other with his brother, Charles H. Butcher, Mar-

latt said the bond and mortgage were good, and that he was making the defence to worry Warwick a little; but it is not to be forgotten that, before Warwick became the owner of the bond and mortgage, Marlatt told him of the usury to which Marlatt swears, and Warwick used the fact as the means of obtaining a deduction of \$50 from the amount due on the mortgage when he purchased it from Butcher.

10 But, it is urged by the complainants' counsel, that the defence of usury cannot avail Dawes, because he purchased the mortgaged premises at the sheriff's sale, subject to this mortgage. This position is untenable. *Brolasky v. Miller*, 1 *Stockt.* 807.

20 Again, it is insisted that if there was any usury in the loan which the bond and mortgage were given to secure, those instruments were purged of it by a settlement made in March, 1872, between the complainant and the then solicitor of Marlatt. That settlement was of the amount due to Marlatt on a certain decree of this court in his favor and against Warwick. Under that decree a large sum of money  
30 was due from the latter to the former. Warwick, besides this mortgage, held certain judgments against Marlatt, which he had obtained by purchase for less than the amount due upon them. Those he was willing to cancel, upon having the amount he had paid for them, with interest, (which was less than the amount due upon them by about \$235,) allowed him in the settlement, provided this mortgage should, in consideration of such deduction, be regarded as purged of usury. This was agreed upon between the solicitor and Warwick; the latter put in the judgments at what  
30 they had cost him, with interest, and the former, in consideration thereof, endorsed upon the bond, under date of March fourteenth, 1872, an acknowledgment that there was then due on the bond to the holder thereof the sum of eight hundred dollars principal, and signed this acknowledgment as attorney for Marlatt.

In the settlement, Warwick was credited with the interest due on the full amount of the bond up to April first, 1872.

40 The solicitor had no authority to agree with Warwick for his client, that the latter would waive the defence of usury; and besides, if he had had such authority, the bond

and mortgage would not have been, by this agreement and the payment or allowance in pursuance thereof, purged of the usury, so long as they remained in the hands of Warwick.

This mortgage, therefore, being still held by Warwick, is still tainted with usury, and there can therefore be no recovery upon it. The position taken by complainants' counsel, that the court might, if it found that there was usury in the loan for which the mortgage was given, give the complainant the benefit of the supplement of April twelfth, 1864, to the act against usury, cannot be main- 10  
tained. It is enough to say that the operation of that supplement is, by its terms, confined to suits upon notes, &c., thereafter to be made. The bill must be dismissed with costs.

#### DECREE OF DISMISSAL.

[Filed October 27th, 1874.]

This cause coming on to be heard at the Term of October, eighteen hundred and seventy-three, of the Court of Chancery of the state of New Jersey, held at the State House, in the city of Trenton, before the Chancellor, in the 20  
presence of Samuel M. Schanck, of counsel with the complainant, and Frederick Kingman, of counsel with the defendants, and the pleadings, depositions, exhibits, and proofs being read, and the arguments of the respective counsel being heard and considered, and the Chancellor having taken time to advise thereon, and now, on this twenty-seventh day of October, in the year eighteen hundred and seventy-four, it appearing to the Chancellor that the complainant is not entitled to the relief sought and 30  
prayed for by him in his said bill of complaint, it is ordered, adjudged and decreed, that the complainant's said bill be and the same is hereby dismissed, with costs.

THEO. L. RUNYON, C.

APPEAL.

[Filed November 4th, 1874.]

The complainant hereby appeals from the final decree made in this court in the above stated cause, dismissing the bill of complaint with costs, to the Court of Appeals, in the last resort in all causes of law.

S. M. SCHANCK,  
*Solicitor and of Counsel of Complainant.*  
Dated November 4th, 1874.

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

S. M. SCHANCK,  
*Cf Counsel with Complainant.*

PETITION OF APPEAL.

[Filed November 17, 1872.]

Between

William Warwick, Appellant,

and

Benjamin Marlatt, and Emeline his

20 wife, and John Dawes, Appellees.

} On bill, &c.

To the Honorable the Court of Errors and Appeals, in the last resort in all causes: The humble petition of William Warwick, the appellant in the above stated cause, respectfully shows, that your petitioner finds himself aggrieved by a final decree made in the Court of Chancery by his Honor Theodore Runyon, Chancellor of New Jersey, bear-

ing date the twenty-seventh day of October, A. D. eighteen hundred and seventy-four, wherein the said William Warwick was complainant, and the said Benjamin Marlatt and Emeline his wife, and John Dawes, were defendants, in this respect, to wit, that the said decree orders, adjudges and decrees, that the said complainant's said bill of complaint be and is thereby dismissed with costs.

And your petitioner humbly appeals from the said decree of the Chancellor, upon the ground that the same is erroneous, for that the said bill of complaint of said complain- 10  
ant ought not to be dismissed.

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

S. M. SCHANCK,

*Solicitor and of Counsel with Appellant.*

Dated November 14, 1874.

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ANSWER.

[Filed December 19th, 1874.]

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The answer of John Dawes and others, respondents, to the petition of appeal of William Warwick, appellant.

The respondents, not confessing or admitting all or any of the matters or things to be true, as in and by the said petition of appeal are mentioned and set forth, for answer thereunto say—that they believe it to be true that such a decree was made by the Court of Chancery, as in the said petition of appeal is mentioned and set forth, but as to the date, substance and contents thereof, these respondents 30  
crave leave to refer thereto when the same shall be produced, and these respondents are advised and believe that the said decree is agreeable to equity and justice, and is sustained by the law and the facts of the case, and they there-

fore humbly pray that the same may be affirmed, and that the said petition of appeal may be dismissed, with costs, to be adjudged to these respondents.

Dated December 19th, 1874.

F. KINGMAN,

*Solicitor for and of Counsel with Respondents.*

ANSWER

[That December 19th, 1874.]

The answer of John Dawes and others, respondents, to the petition of appeal of William Warwick, appellant, the respondents, not contesting or admitting all or any of the matters or things to be tried, as in and by the said petition of appeal are mentioned and set forth, for answer thereto say that they believe to be true that each of the matters mentioned in the said petition of appeal is mentioned and set forth, but as to the facts and contents thereof, these respondents have to refer thereto when the same shall be produced, and these respondents are advised and believe that the facts are agreeable to equity and justice, and in accordance with the law and the facts of the case, and they there-

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