

# NEW JERSEY SUPREME COURT.

June Term, 1855.

HENRY G. ELY, DEWITT CLINTON  
CLAPP and EDWARD E. BOWEN  
*vs.*  
BENJAMIN PARKHURST.

Upon a fi. fa. issued  
and delivered to the  
Sheriff of Essex County  
upon judgment obtain-  
ed November 2, 1853.

WELLINGTON CLAPP, WILLIAM  
KENT and SAMUEL M. BECKLEY  
*vs.*  
BENJAMIN PARKHURST.

Upon a fi. fa. issued  
and delivered to the  
Sheriff of Essex County 10  
upon judgment obtain-  
ed November 15, 1853.

GEORGE P. LORD and  
SAMUEL NEWELL BROWN  
*vs.*  
BENJAMIN PARKHURST.

Upon a fi. fa. issued  
and delivered to the  
Sheriff of Essex County  
upon judgment obtain-  
ed November 17, 1853.

## ESSEX CIRCUIT COURT.

OLIVER E. HOSMER  
*vs.*  
BENJAMIN PARKHURST.

On judgment and fi. fa. issued  
November 18, 1853. 20

NORMAN CUTTER  
*vs.*  
BENJAMIN PARKHURST.

On judgment and fi. fa. issued  
November 18, 1853.

Whereas a rule was granted in this cause, in the Term of June, in the year one thousand eight hundred and fifty-four, on the application of Wellington Clapp, William Kent and Samuel M. Beckley, George P. Lord and Samuel N.

Brown, Oliver E. Hosmer and Norman Cutter, for the plaintiffs to show cause why the judgment in this action should not be set aside, and the money paid into Court, or retained in the hands of John Kennedy, Sheriff of Essex, being the proceeds of the sale of the goods of the defendant, levied upon by him, by the writs of fieri facias, issued upon the judgments of the plaintiffs in this action, and of the said Clapp, Kent and Beckley, and the other said applicants respectively, appropriated to the payment and discharge of the  
 10 moneys due upon said judgments of said applicants respectively, and not of the money alleged to be due upon the judgment in this action above stated; and that both parties have leave to take affidavits to be used upon the hearing of said rule to show cause. And whereas the said parties took affidavits and proofs accordingly, and the matter was heard and debated before the Court at the last February Term of this Court, and the Court having held the matter for advisement until this present Term,

It is thereupon now ordered by the Court, that the said  
 20 rule to show cause be discharged, and the application of the said Wellington Clapp and others be altogether denied, with costs. And it appearing to the Court that the money raised under the executions aforesaid by the sale of the goods of said Parkhurst, before mentioned, is not sufficient to pay and satisfy to the said plaintiffs the amount due to them on their said judgment; It is further ordered, that the Sheriff do forthwith pay to the said plaintiffs in this action, or to their Attorney, the said moneys so raised as aforesaid, under the said executions, by the said sale.

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On motion of

THEODORE RUNYON,

*Plaintiffs' Att'y.*


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An order having been heretofore made, at the present Term, for the discharge of the rule to show cause, granted in this case, and that the Sheriff pay the moneys received by him on sale of defendant's property, under the executions of the plaintiff above named, and the executions of Wellington Clapp, William Kent, and Samuel M. Beckley against

Benjamin Parkhurst, George P. Lord and Samuel N. Brown v. said Parkhurst, Oliver E. Hosmer v. said Parkhurst, and Norman Cutter v. said Parkhurst, unto the said Henry G. Ely, Dewitt C. Clapp and Edward E. Bowen, towards satisfaction of their execution aforesaid, and a Writ of Error having been since presented and allowed, removing the said order and proceedings to the Court of Errors and Appeals in the last resort in all causes;

It is now ordered that the said John Kennedy, Sheriff of Essex County, do not pay the said moneys in his hands 10 to the said plaintiffs aforesaid, or their Attorney, as heretofore ordered, but that he pay the same into this Court, to the Clerk thereof, and that the said Clerk invest the same pending the said Writ of Error, for the benefit of such party as shall be adjudged entitled thereto.

On motion, for said subsequent creditors, Plaintiffs in Error, of

CORTLANDT PARKER, *Att'y.*

I, William M. Force, Clerk of the Supreme Court of New Jersey, do hereby certify that the foregoing is a true tran- 20 script of the record and proceedings in the above stated cause.

[L. s.] IN WITNESS WHEREOF, I have hereunto set my hand and the seal of said Court, at Trenton, this fourth day of July, A. D. eighteen hundred and fifty-five.

WM. M. FORCE, *Cl'k.*

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STATE OF NEW JERSEY.

*To the Justices of our Supreme Court of Judicature*

[L. s.]

GREETING: 30

Because in the record and proceedings, and also in the giving of judgment in a certain suit and proceeding, which was in our Court aforesaid, between Wellington Clapp, William Kent, Samuel M. Beckley, George P. Lord, Samuel N.

Brown, Oliver E. Hosmer, Norman Cutter, Plaintiffs in certain writs of *feri facias de bonis et terris* against the goods and chattels, lands and tenements of Benjamin Parkhurst, and Henry G. Ely, Dewitt C. Clapp, and Edward E. Bowen, plaintiffs in a certain other writ of *feri facias de bonis et terris*, issued against the goods and chattels, lands and tenements of said Benjamin Parkhurst, and also in the ordering and directing certain moneys brought into our said Court, by its order, raised by the sale of certain goods and chattels of the  
 10 said Benjamin Parkhurst, under and by virtue of said writs of execution, or some of them, to be paid to the said Henry G. Ely, Dewitt C. Clapp, and Henry E. Bowen, in part satisfaction of their said writ of execution, as it is said manifest error hath intervened to the great damage of the said Wellington Clapp, William Kent, Samuel M. Beckley, George P. Lord, Samuel N. Brown, Oliver E. Hosmer, Norman Cutter, as by their complaint we are informed, we being willing that the error, if any there be, should in due manner be corrected, and full and speedy justice done to the  
 20 parties in this behalf, do command you, that if judgment be thereupon given therein, without delay, you distinctly and openly send, under your seal, the record and proceedings aforesaid, with all things touching the same, to our Court of Errors and Appeals in the last resort in all cases, on the third Tuesday in June next, together with this writ, that the record and proceedings aforesaid being inspected, we may further cause to be done what of right and according to law ought to be done.

Witness His Honor, Benjamin Williamson, our Chancellor in our Court of Chancery, at Trenton, the third Tuesday  
 30 of May, in the year one thousand eight hundred and fifty-five.

D. B. BODINE, *Clerk.*

CORTLANDT PARKER,  
*Attorney.*

Presented in open Court and allowed, and return ordered  
 June 8, 1855.

DAN'L HAINES.

The Answer of the Justices of the Supreme Court of New Jersey within named, the record and proceedings whereof

mention is within made, with all things touching and concerning the same, we do certify to the Court of Errors and Appeals, in a certain schedule to this writ annexed as within commanded.

STACY G. POTTS. [L. s.]

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## AFFIDAVIT

ATTACHED TO JUDGMENT OF ELY, CLAPP & BOWEN.

NEW JERSEY, }  
 ESSEX COUNTY, } ss.

Dewitt Clinton Clapp, of the City of New York, in 10 the County of New York, and State of New York, of full age, being duly sworn according to law, on his oath saith, that he is a member of the commercial firm of Ely, Clapp & Bowen, of said City of New York, which firm is composed of Henry G. Ely, this deponent, and Edward E. Bowen; that a judgment is about to be confessed in the Supreme Court of the State of New Jersey in favor of this deponent and his said copartners, and against *his said*, Benjamin Parkhurst, of the City of Newark, in said County of Essex, upon a certain promissory note, made and delivered by said 20 Benjamin Parkhurst to said firm of Ely, Clapp & Bowen, and bearing date the second day of November, in the year of our Lord eighteen hundred and fifty-three, and payable on demand to said firm or order, for the sum of ten thousand dollars, for value received, without defalcation or discount. And this deponent further saith, that the true consideration of said promissory note, on or for which said judgment is about to be confessed, as aforesaid, is goods, wares, and merchandise, by said firm sold and delivered to said Benjamin Parkhurst, at his request, and money lent 30 and advanced by said firm to said Benjamin Parkhurst, at said Parkhurst's request. And this deponent further saith, that the debt for which said judgment is confessed is justly

and honestly due and owing to this deponent and his said copartners, as such firm as aforesaid, from said Benjamin Parkhurst, and that said judgment is not confessed to answer any fraudulent intent or purpose, or to protect the property of the said Benjamin Parkhurst from his other creditors.

D. W. C. CLAPP.

Sworn and subscribed before me, at Newark, }  
this 2d day of November, A. D. 1853. }

10 The words "*his said*" erased in the ninth  
line from top.

JAMES V. HAMLIN,  
*Justice of the Peace.*

## NEW JERSEY SUPREME COURT.

WELLINGTON CLAPP, WILLIAM KENT  
and SAMUEL M. BECKLEY,  
*vs.*  
BENJAMIN PARKHURST.

In Case.

SIR—Take notice, that I shall move the Supreme Court of  
20 New Jersey, at Trenton, on the first Tuesday in June next,  
at ten o'clock, A. M., or as soon thereafter as the said Court  
can attend to the same, for a rule that the money paid into  
Court, or retained in the hands of John Kennedy, Sheriff of  
the County of Essex, being the proceeds of the sale of the  
goods of the above named defendant, levied on by virtue  
of certain writs of *feri facias*, one issued upon the judgment  
in this cause, and one upon the judgment of Henry G. Ely,  
Dewitt C. Clapp, and Edward E. Bowen, shall be appro-  
30 priated to the payment and discharge of the moneys due  
upon the judgment in this cause, and not of the money alleg-  
ed to be due upon said judgment of Ely, Clapp & Bowen,  
although the same may be first in date of levy; and to set  
aside the said judgment of said Henry G. Ely, Dewitt C.  
Clapp, and Edward E. Bowen, and declare the same to be

fraudulent, null and void, for and by reason that the amount of the said last mentioned judgment, being a judgment by confession, was not at the time of entering the same justly or honestly due or owing to the plaintiffs therein, from the said Benjamin Parkhurst; and for that no affidavit of the true consideration of the instrument of writing or demand for which said judgment was confessed, was made by the plaintiffs, their attorney or agent, or produced at the time of entering said judgment to the Commissioner or Judge before whom the same was confessed; and for that the affidavit actually made by one of the plaintiffs, and produced before the Judge or Commissioner at the time of entering said judgment, did not express the true consideration of the instrument of writing, or demand for which said judgment was confessed, but on the contrary thereof, expressed and set forth a different consideration from what was actually and in truth the consideration of such instrument of writing, and therein was false and untrue; and for that the said judgment was fraudulent, and confessed to answer a fraudulent intent and purpose, and to protect the property of the said Parkhurst, the defendant therein, from his other creditors. 10

Yours respectfully,

A. C. M. PENNINGTON,  
*Attorney of* CLAPP, KENT & BECKLEY.

To THEO. RUNYON, Esq.,  
*Attorney of* ELY, CLAPP & BOWEN.  
*Newark, May 25, 1854.*

GEORGE P. LORD and SAMUEL M. BROWN <i>vs.</i> BENJAMIN PARKHURST.	}	In Case.
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(Same notice.)

From C. PARKER.  
*Att'y of* LORD & BROWN.

To THEO. RUNYON, Esq.,  
*Att'y of* ELY, CLAPP & BOWEN.  
*Newark, May 25, 1854.*

OLIVER E. HOSMER vs. BENJAMIN PARKHURST.	}	In Case.
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(Same notice.)

From C. PARKER,  
*Attorney of Plaintiff.*

To THEO. RUNYON, Esq.,  
*Att'y of ELY, CLAPP & BOWEN.*  
Newark, May 25, 1854.

10 NORMAN CUTTER vs. BENJAMIN PARKHURST.	}	In Case.
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(Same notice.)

From F. T. FRELINGHUYSON,  
*Attorney of Plaintiff.*

To THEO. RUNYON, Esq.,  
*Att'y of ELY, CLAPP & BOWEN.*  
Newark, May 25, 1854.

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## NEW JERSEY SUPREME COURT.

20 HENRY G. ELY, DEWITT C. CLAPP and EDWARD E. BOWEN vs. BENJAMIN PARKHURST.	}	In Case. Judgment confessed Nov. 2, 1853. Damages, \$10,000 00. Costs,           24 40.
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Entered Nov. 4, 1854.

Execution levied on stock of goods in Parkhurst's store,  
as per the same.

WELLINGTON CLAPP,  
WILLIAM KENT and  
SAMUEL M. BECKLEY  
*vs.*  
BENJAMIN PARKHURST.

In Case.  
Judgment confessed Nov. 14, 1853.  
Damages, \$3,122 00.  
Costs, 27 06.

Execution levied on same property.

GEORGE P. LORD and  
SAMUEL N. BROWN  
*vs.*  
BENJAMIN PARKHURST.

In Case.  
Judgment confessed Nov. 16, 1853.  
Damages, \$2,215 15.  
Costs, 27 41. 10

Execution levied November 17, 1853, on same property.

## ESSEX COUNTY CIRCUIT COURT.

OLIVER E. HOSMER  
*vs.*  
BENJAMIN PARKHURST.

In Case.  
Judgment confessed Nov. 1853.  
Damages, \$2,769 95.  
Costs, 19 34.

Execution levied November 17, 1853, on same property.

NORMAN CUTTER  
*vs.*  
BENJAMIN PARKHURST.

In Case.  
Judgment confessed Nov. 1853.  
Damages, \$ 20  
Costs,

Execution levied November 19, 1853, on same property.

## NEW JERSEY SUPREME COURT.

In the matter of  
HENRY G. ELY, DEWITT C. CLAPP  
and EDWARD E. BOWEN  
*vs.*  
BENJAMIN PARKHURST.

On rule to show  
cause why this judg-  
ment should not be  
postponed, &c., to sub-  
sequent judgments, as  
within.

It is agreed between the parties, Cortlandt Parker acting 30  
as attorney for the applicants for this rule, and Theodore

Runyon as attorney for the respondents, the prior judgment creditors, that the within statement of the judgments obtained against said Benjamin Parkhurst, their amount and time of levy, is true, and shall be read as part of the evidence on the argument of the said rule to shew cause; and it is also admitted that the goods of said Benjamin Parkhurst were levied upon in the within stated order under all said executions and judgments; that they were afterwards duly sold by the Sheriff of Essex County, and that there is in the  
 10 hands of said Sheriff, or paid into this Court, raised by such sale, the sum of seven thousand nine hundred and fifty-one dollars ten cents; and said money is regarded, for the purpose of this hearing and argument upon said rule, as paid into Court.

CORTLANDT PARKER,  
*Attorney for Applicants.*

THEODORE RUNYON,  
*Atty. for Respondents,*  
 ELY, CLAPP & BOWEN.

20 Feb. 21, 1855.

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## NEW JERSEY SUPREME COURT.

Examination of witnesses taken before Anthony Q. Keasbey, one of the Commissioners for taking Bail and Affidavits in the Supreme Court of New Jersey, at his office in the City of Newark, on the seventh day of November, eighteen hundred and fifty-four, in pursuance of a rule to show cause why the judgments of Henry G. Ely and others, against Benjamin Parkhurst, should not be set aside, or postponed, &c.; granted on the application of Wellington  
 30 Clapp, William Kent, Samuel M. Beckley, and others, judgment creditors of said Benjamin Parkhurst, in the presence of Cortlandt Parker, Counsel for the Applicants for said rule, and Joseph P. Bradley, for Ely, Clapp & Bowen.

William T. Cutter, a witness produced on the part of the applicants for said rule, being duly sworn, deposes and saith, as follows, being asked,

1. Where do you reside? In Brooklyn, Long Island.

2. Do you know Dewitt C. Clapp, of the firm of Ely, Clapp & Bowen, of New York? I do.
3. Have you had any conversation with Dewitt C. Clapp, in relation to the judgment obtained by Dewitt C. Clapp, Edward E. Bowen, and Henry George Ely, against Benjamin Parkhurst, and if yea, state when, where, and what it was?

I have had such conversation, soon after the judgment was confessed by Parkhurst to them, at first in the store of Ely, Clapp & Bowen, and then in the cars coming to 10 Newark, and in Newark, and on our return together to New York, and on several subsequent occasions; the first interview was at the store of Ely, Clapp & Bowen; I told Mr. Clapp that I had been informed that a judgment existed against Benjamin Parkhurst for a large amount, and had been over to see Mr. Parkhurst in relation to it, and that Mr. Parkhurst informed me that he had confessed a judgment to their firm for ten thousand dollars; and that Mr. Parkhurst further informed me that he had been induced to do it, from 20 promises of assistance which their firm had made him; that they had promised to loan him money from time to time upon this judgment; that there was but a small part of this judgment due from Mr. Parkhurst to them at the time this judgment was given, and that Mr. Parkhurst stated that they had promised to assist him to a credit at auction, and generally to assist him in the prosecution of his business; and I asked Mr. Clapp if these things were true. His reply was, "How did you know of this judgment being confessed? How did you find it 30 out?" I gave him to understand that I derived the information through one of these mercantile agencies. He admitted the statement as made by Parkhurst to be true, and stated that the consideration of this judgment was, something like nineteen hundred dollars of it I think, for goods that they had sold Parkhurst since his previous failure, and about one thousand of it was for a debt owing before his failure, which was over and above the sum which they had signed to take in their previous compromise with him; and that whatever else 40 was owing to them, on that judgment, was for advances

that they had made to him since the judgment was given; and that the whole together that they claimed under it was between eight and nine thousand dollars, I think not far from eighty-eight hundred; and that if we would give our note at four months for the whole sum that was due to them, they would transfer the judgment to us, and we could do what we pleased with it; (by "*we*," I mean Norman Cutter, for whom I was acting, and to whom Mr. Parkhurst was indebted for about one thousand dollars.)

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I told Mr. Clapp that it was unnecessary for us to buy this judgment if he was going to carry out this agreement with Mr. Parkhurst, and asked him if he should do so; and asked him further, if they were under any obligations to Mr. Parkhurst not to use this judgment, or to enforce it in the selling of his goods; he said they were not under any obligations of that kind; and the information of this judgment becoming public, Mr. Parkhurst could not keep up his credit and stock of goods, and remarked, "you would not trust him now, and if you are not willing to buy this judgment I shall offer it to my brother's firm (Clapp, Kent & Beckley,) and I don't know but I ought to offer it to them first;" and desired from me a prompt answer.

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I told him, if we could save our debt by it we would buy it, on the terms proposed. I left him to take counsel of an attorney in New York, and then returned to the store of Ely, Clapp & Bowen, and we came together to Newark to see Mr. Parkhurst; and confer together further on this subject. He told me Parkhurst was a very clever fellow, and I could get him to do most anything I wanted; and stated furthermore, that if I would buy this claim, he would not give ten cents on the dollar for the outsiders. We had an interview together with Mr. Parkhurst. Mr. Parkhurst asked him if he was going to enforce the payment of that judgment; that if he should attempt it, he would have an injunction put upon it at once, and then repeated the objects for which the judgment was confessed, as before stated, viz: that the judgment was given for the purpose of securing them for the debt that he owed them, and that a

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thousand dollars of that was in the original demand that they had once signed a release from, including the goods which he had bought from them since his previous failure, and for moneys which were to be subsequently advanced; and said Mr. Parkhurst, "it was unnecessary for you to have paid money to Carter, Quinan & Co., for they had consented to take your notes for it on three or four months' credit," and that he, Mr. Parkhurst, objected to their forcing him to payment of this amount. Mr. Clapp did not object to the 10 correctness of this statement of Mr. Parkhurst, but stated that the knowledge of this would prevent his getting on, and desired that a meeting of his creditors might be called, and see what they were willing to do; that they might pay off this judgment for their own protection. On our return to New York, Mr. Clapp told me Mr. Parkhurst might as well be closed up now as at any time, that he never was a good merchant, and that he could not succeed in business, and he wanted an answer from me whether we would buy the 20 judgment; I told him I did not see any way by which I could secure our debt in the transaction; I did not think we would be entitled to use the margin between the debt which he claimed and the amount of the judgment, that is in case we should buy it, but that I would inquire further into the matter and see him again; Mr. Clapp called upon me several times after this interview, to see what our determination was in relation to it, and to see whether we would call a meeting of the creditors of Parkhurst, and observed that if we did not call 30 it, he would. A meeting of the creditors subsequent to this took place at 44 Cedar Street, in the store of Norman Cutter. I think Mr. Clapp sent part of the notices of that meeting; Mr. Clapp was present at that meeting; Mr. Parkhurst was there, and a large number of the creditors. It was stated that the objects of the meeting were to make them acquainted with the situation that Mr. Parkhurst was then in, and see if they would do anything towards settling with Ely, Clapp & Bowen, for this judgment; the objects for 40 which this judgment was given were fully explained at

that meeting, which were to help Mr. Parkhurst on in his business, and to improve his credit and help him to means. The creditors wished to know of Mr. Clapp if they were willing to abate or discount anything from their demand, and complained considerably of this thousand dollars that had been revived from this old demand that they once compromised, but Mr. Clapp refused to make any abatement, and made no contradiction as to the nature of the judgment, or the object for which it was given; and his only excuse for enforcing the judgment was, that it had become public and would affect his credit, and that he could not go on.

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The creditors promised to take the matter in consideration as to what should be done, and adjourned that meeting.

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Mr. Clapp called on me several times after that, to see whether they were going to pay off their debt, and that if they did not do it, they should take the matter into their own hands and proceed to collect it themselves; that they should not let the matter rest in its present shape. I called upon Mr. Clapp a short time after this, and told him that Mr. Parkhurst had executed a judgment to some of the other creditors; and that he was enjoined, or their firm was, from going on to sell the goods until the matter could be investigated. He told me that he was very sorry that they had delayed—that if they had known what was being done they would have fixed the matter up for themselves; and that was pretty much the whole of the conversation at that interview; but afterwards I called to see whether they would abate or discount anything from their debt, particularly if they would not throw off something from that thousand dollars that was revived. They declined to do it, unless it was to throw off something in the shape of interest money; and from this stage of it, Mr. Ely, of that firm, took the matter up.

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4. Was anything stated by Mr. Clapp, as to whether he, or some other member of his firm, had carried on the negotiation with Parkhurst which resulted in the confession of the judgment? He said it was done by him.
5. In the conversation with Parkhurst and Clapp at Newark,

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was there or not, any statement made by Parkhurst, as to what expectations he had been led by Clapp to entertain, in regard to the sustaining of his credit, as an inducement to the confession of judgment? If so, what did Parkhurst say, and what did Clapp reply?

(This question objected to as leading.)

There was such conversation; Mr. Parkhurst said to Mr. Clapp, "you know you promised to help me and sustain my credit, and to enable me to buy goods at auction, and when I needed money to meet my payments, that 10 you would help me to it; and I protest against your going forward to collect your judgment," said he; "you *can't* do it, I won't permit you to do it; I'll get an injunction from the Court to have your judgment set aside if you undertake it." Clapp's reply was, that the thing having become known, he could not get goods upon a credit to keep up his stock.

6. Did you, at any interview with Mr. Clapp, recount to him any particulars respecting the thousand dollars of old debt revived, of which you have spoken? if so, state 20 such particulars as stated to him, and what his reply was.

I did; I informed him at the first interview I had with him after I knew of the judgment, that Mr. Parkhurst had informed me that he had revived a thousand dollars, or thereabouts, of that old debt, and asked him if he claimed that as a part that was due to them under this judgment, and he said he did; and I was unable to get him at any time to agree to abate it.

7. Was there anything said between you and Clapp as to 30 whether this thousand dollars was revived at, before, or after the occasion of his signing the release you spoke of?

I told Mr. Clapp that Mr. Parkhurst claimed that the revival of that was simultaneous with his agreement to take fifty cents on the dollar—that it was all one transaction, that he should revive it afterwards; and I complained to Clapp that we should have been selling him goods under this state of things, and urged him to take something off from that part of their 40 debt; he did not deny Mr. Parkhurst's statement, but declined to take anything off.

8. Was anything said between you as to the mode in which this thousand dollars was revived at the time of the release, as you have said, and if so, what did he say?

I don't know that anything was named by Mr. Clapp as to the mode of that, unless it was the giving of a considerable time to pay it in.

9. Do you know whether Clapp, Kent & Beckley, Norman Cutter, Oliver E. Hosmer, or Lord & Brown, were creditors of Benjamin Parkhurst prior to the release you have spoken of—prior to the compromise?

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Clapp, Kent & Beckley were. I am unable to say with regard to the others, except that Norman Cutter was not.

And being cross-examined by Mr. Bradley, the witness says, being asked,

1. Are you any relation of Norman Cutter, and if so, what?

I am his second cousin.

2. Have you any interest with Norman Cutter in his business, or the business of the firm of Norman Cutter?

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None whatever.

3. How long have you acted as his agent? My agency commenced in September, 1853, and terminated in the following March or February; except as to special claims, my general agency terminated then. He sold out his establishment of dry goods at that time.

4. Were you not active in the institution of the proceedings for obtaining an injunction against Ely, Clapp & Bowen in this case?

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I was not consulted upon the subject until after the judgment was given to Clapp, Kent & Buckley, and the steps taken for the procuring of an injunction, and had no knowledge that any such steps were being taken.

5. Were you not active therein before the injunction was obtained?

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When I came to know that a judgment had been given to Clapp, Kent & Beckley, and to Lord & Brown, and that the papers were being prepared by attorneys for those firms to procure an injunction, I then became active to secure a judgment for Norman Cutter, and do what I could for the recovery of his debt, or any part of it.

6. Did you not take part in concerting the removal of the goods of Parkhurst from Newark to New York, when they were under the execution of Ely, Clapp & Bowen?

I came to Newark in company with Wellington Clapp to procure ample security in the form of bail to the Sheriff, for the purpose of taking the goods and preventing their being sacrificed at a Sheriff's sale. We procured such bail, and there ended my agency in the matter.

7. Did you not assist in concerting means for the actual removal of the goods? 10

I did not, any further than as I have stated, and as I advised the removal of the goods if it could be done legally.

8. Who was to superintend their removal?

(Question objected to.)

I don't know of any one but Mr. Parkhurst.

9. At what time were they to be removed?

Not until after the twenty-four hours, I think—the time given to Ely, Clapp & Bowen to file counter security to keep them. 20

10. At what time of day were they to be removed? I had nothing to do with that—was not expected to have; I suppose at any time after they were entitled to them by law.

11. Was it not concerted that they should be removed in the night?

It was concerted that they should be removed as soon as they could conveniently after the said time had expired.

12. The question is repeated, was it not concerted as above? 30

There was no expectation to get them away in the night—of being able to accomplish it before the following day.

13. In making the statement you say you did to Mr. Clapp at your first interview with him, as mentioned in your answer to the third direct interrogatory, did you make that statement consecutively, or did you make the different parts of it from time to time during the conversation? 40

I stated part of it, and then he made some reply, and so it was drawn forth all during that interview.

14. In any of those interviews you have mentioned, did Mr. Clapp admit that the thousand dollars you have referred to was ever actually paid?

He did not. He said it had not been; he said it was included in this account they had made up against him.

15. Did that meeting of creditors, to which you have referred, take place before or after Parkhurst had confessed judgment to Clapp, Kent & Beckley, Norman Cutter, Lord & Brown, and Oliver E. Hosmer?

It took place subsequent to part of them, if not the whole of them; my impression is the whole of them. Clapp, Kent & Beckley came right out and got theirs immediately after I went out, I think it was the next day, and before I knew of their designs.

16. How many creditors attended at that meeting?

I should think some half a dozen firms were represented there, perhaps more.

17. What was the amount of Parkhurst's indebtedness in New York City, so far as came to your knowledge?

I think it was something over twenty thousand dollars; if you mean to include Ely, Clapp & Bowen's judgment, I should think not far from twenty-two thousand.

18. Who explained to the meeting the object of Ely, Clapp & Bowen's judgment?

It was done partly by myself and partly by Samuel E. Frink; one of the firm of Clapp, Kent & Beckley also I think.

19. Was De Witt C. Clapp present at the time such explanations were made? He was.

20. Did he ever admit to you or in your presence that he was under any obligation to lend Parkhurst any money or credit beyond an amount sufficient to make up the full amount of their judgment, \$10,000?

He did admit that he was under an obligation to loan Parkhurst money, and to assist him with a credit in the prosecution of his business, for which Parkhurst gave him this judgment; but I am not sure that he stated that he was under obligation to go beyond the amount of this

judgment without further security; yet he might have done so, I am not positive.

21. Did not Mr. Clapp in those interviews you have mentioned, or some of them, say that he was deceived as to the amount that Parkhurst owed?

I have not the slightest recollection of anything of that kind.

22. How do you know that Parkhurst owed Clapp, Kent & Beckley when he failed previously?

I know it from the statement of Parkhurst, and from 10 the statement of Clapp, Kent & Beckley, and I think from De Witt C. Clapp.

23. Can you say with any certainty that you ever learned that fact from De Witt C. Clapp, and if so, when and where?

In my conversations with Dewitt C. Clapp I had spoken of those he owed before his failure. I had spoken of Carter, Quinan & Co. being one, and I think that others were spoken of in that conversation that he owed previous to his failure. He did speak particularly of 20 Parkhurst having bought goods of his brother's firm, and owing them.

24. The last question repeated.

I can say with certainty that he spoke of Parkhurst being a customer of theirs and owing them, and I think some mention was made of his owing them before, and having dealt with them a long while.

Being re-examined by Mr. Parker, and asked:

1. Do you know what was the value of the stock in trade and property of Mr. Parkhurst, at fair market prices, 30 at the time or about the time of the confession of judgment to Ely, Clapp & Bowen?

I would have been willing to have given twelve thousand five hundred dollars for his stock of goods and debts on his books due to him at the time he was shut up. I have no knowledge except from going into the store and looking around, and hearing others talk of it. That is a cash price; but for the sale to be sold at that store in continuation of the business, I should suppose

it to be worth sixteen to eighteen thousand dollars at the time the original judgment was confessed.

WM. T. CUTTER.

Sworn and subscribed this 7th day of }  
November, A.D. 1854, before me, }

A. Q. KEASBEY,  
*Com'r of Bail and Affts.*  
*in Supreme Court.*

### SUPREME COURT, N. J.

10 In the matter of rule taken by Wellington Clapp, William Kent, and others, to show cause why the judgments of Henry G. Ely and others, against Benjamin Parkhurst, should not be set aside or postponed.

Examinations in the above stated matter, taken before me, at my office, in the City of Trenton, this ninth day of November, A. D. 1854, in the presence of Cortlandt Parker, Esq., on behalf of the parties obtaining said rule to show cause, and Joseph P. Bradley, Esq., on behalf of Henry G. Ely, Dewitt C. Clapp and Edward E. Bowen, judgment creditors of Benjamin Parkhurst, and others.

J. WILSON,  
*Comm'r to take Bail, &c.*

Benjamin Parkhurst, a witness called on the part of the parties represented by the said Cortlandt Parker, being duly sworn according to law, on his oath saith: (Before this witness was sworn, it being admitted by Mr. Parker that he is the defendant in said judgment, Mr. Bradley objected to him as an interested witness.)

30 The witness on his oath saith:

1. Question. Where do you reside?  
Answer. In the City of New-York.
2. Question. Did you formerly do business in the City of Newark, New Jersey?  
Answer. I did.

3. Question. Are you the defendant in execution at the suit of Henry G. Ely, Dewitt C. Clapp, and Edward E. Bowen, in the Supreme Court, in the suit by Wellington Clapp, William Kent and Samuel M. Beckley, in the suit by George P. Lord and Samuel M. Brown, in the same Court, and in the suits by Oliver E. Hosmer against Benjamin Parkhurst, in the Essex Circuit Court, and in the suit by Norman Cutter, in said Circuit Court?

Answer. I am.

4. Question. Do you know whether execution has issued on these judgments, and levied upon your stock in trade in Newark, and whether that stock in trade was sold to satisfy them?

Answer. There were executions issued and a levy made, I believe, and my stock in trade was sold under them.

5. Question. Were these judgments by confession or otherwise?

Answer. By confession.

6. Question. What was the consideration for the judgments entered against you, and above referred to, by all the judgment creditors, except Ely, Clapp & Bowen?

Answer. For money loaned and advanced, and for merchandise.

7. Question. Was or was not the amount of each of those judgments, excepting that of Ely, Clapp & Bowen, actually due and owing by you at the time of the entry of the judgments respectively?

Answer. They were all due at the time of the entry of the judgments.

30

8. Question. Was there any agreement between you and those creditors, excepting Ely, Clapp & Bowen, by which the avails realized by said judgments were to be held for the use of other creditors, and what was that agreement?

Answer. There was an agreement that the avails should be divided *pro rata* among all the creditors thereafter appointed by myself.

9. Question. Did you make any agreement more specific in regard to any portion of the Clapp, Kent & Beckley judgment, and if yea, what agreement?

Answer. Yes. There was an agreement with Clapp, Kent & Beckley that about nineteen hundred dollars of their claim should be considered confidential, as it was borrowed money, some time previous.

10. Question. Was or was not that amount to be paid out of the avails of those judgments before the pro rata distribution spoken of?

Answer. That was so understood by all the creditors except Ely, Clapp & Bowen.

- 10 11. Question. Did you make any appointment as to this pro rata distribution, and if so, what?

Answer. I did make an appointment in writing of all the creditors, except Ely, Clapp & Bowen.

(Mr. Bradley here objects to the answer, and objects to all oral evidence of the contents of that paper.)

A paper is here produced, and is shown to the witness, and he is asked to look at it.

12. Question. Is that the appointment?

Answer. Yes, that is the appointment.

- 20 (The paper is here by me marked Exhibit No. 1, ex parte applicants for rule to show cause.)

13. Question. Was this paper executed on the day of its date?

Answer. It was, I believe.

14. Question. Were or were not the judgments confessed to the judgment creditors subsequent to Ely, Clapp & Bowen, for moneys, the time of payment of which had arrived previous to the entry of such judgments?

- 30 Answer. They were all due at the time that judgments were confessed, but there was one or two that was made due by taking off the interest and giving up the notes.

15. Question. On the day of the entry of the confession of the judgment of Ely, Clapp & Bowen against you, what sum of money was due from you to them, and of what claims did that sum consist—state the particulars?

- 40 Answer. Well, I considered that there was nothing due at that time, except one note of ten hundred and seven dollars and seventy-one cents, which they had given me their check to take up, as I was unable to

meet it at the time, with the understanding that it was to be extended ahead. They also held a note against me of four hundred and twenty-five dollars and fifty-four cents, which would fall due in January next succeeding that time. Another note of four hundred and nineteen dollars and sixty-nine cents, due in the latter part of the same month, January. Also, two hundred dollars of borrowed money, for which I gave them my check dated two or three days ahead, and was paid on presentment at the Bank. Also, a promissory note of 10 one thousand dollars, due in the following March, which was obtained under threat that if I would not give them the said note, that they would not sign a release on a previous compromise of fifty cents on the dollar, which they had agreed to do, and had been very active with the other creditors in bringing about that arrangement. This conversation took place aside from the other creditors. Mr. Clapp called me away from the other creditors, and he further said if I did not give him the said note of one thousand dollars, that he would not sign 20 the release, and the whole thing should fall to the ground—that was the expression that he made use of. I gave him the said note on twelve months, with the understanding that if I was not able to pay it at maturity it should be renewed twelve months more without interest. [Mr. Bradley objects to all that part of the answer which relates to this understanding.] Making in all three thousand and fifty-two dollars and ninety-four cents—two hundred dollars of which was paid two or three days after by the check I have before mentioned. 30

16 Question. Was there any other amount claimed against you by Ely, Clapp & Bowen, at the time of the confession of the judgment to them?

Answer. None whatever.

17. Question. What was the amount of the judgment confessed by you to them?

Answer. Ten thousand dollars.

18. Question. How was that ten thousand dollars made up, and what occurred between you and any one of those plaintiffs in relation to the making up of that amount? 40

Answer. It was made up by Mr. Clapp, of the firm

Ely, Clapp & Bowen, by giving me a promissory note on demand for six thousand nine hundred and forty-seven dollars and six cents. This said note was given by Mr. Clapp with the understanding that it should be given up immediately after the judgment was confessed, and was to be considered void and without vitality. It was to be used merely as a matter of form to answer the law, so that he could make affidavit to the amount of the indebtedness.

10 19. Question. Whose name was subscribed to this note, and what became of it?

Answer. I could not tell whose name was signed to it; I did not take notice; I considered at the time that it was a matter of no consequence whose name was signed to it. (The last sentence objected to by Mr. Bradley.) The note was delivered to me, and I kept it in my pocket about a half an hour and returned it, and never heard of it since.

20. Question. Returned it to whom?

20 Answer. To Mr. Runyon.

21. Question. What Mr. Runyon?

Answer. Theodore Runyon I think his name was.

22. Question. What connection had Mr. Runyon with this transaction?

Answer. We went to him to get him to make out the papers.

23. Question. Was he attorney for the plaintiffs in that judgment?

Answer. I suppose he was considered so.

30 24. Question. When was it first proposed to you to confess this judgment to Ely, Clapp & Bowen? by whom, where, and upon what representations?

(Question objected to as leading, and withdrawn.)

25. Question. How came you to confess the judgment to Ely, Clapp & Bowen? State the negotiations, if any, under which said judgment was confessed.

40 Answer. By solicitation on the part of Mr. Clapp, of the firm of Ely, Clapp & Bowen. On making a partial statement to Mr. Clapp, about the middle of October, eighteen hundred and fifty-three, of having considerable money coming due in the course of the next

two or three months, I was going to be short of money to meet my payments, and should have to get some notes discounted, in order to meet my paper as fast as it come due.

[By consent of parties, the examination is here suspended, and is to be hereafter resumed, at such time as the parties may hereafter agree upon, either before the same, or another Commissioner.]

The above examination was resumed by consent, and in the presence of the above named counsel, before me, Anthony 10  
Q. Keasbey, at my office, in Newark, on the tenth day of November, A. D., 1854, when the witness continued his answer to the last question, as follows:

Mr. Clapp immediately replied, that he would loan me all the money that I wanted, that I must not get frightened; and further said, that he did not wish me to be running to Tom, Dick and Harry to get money, as it would injure my credit. Soon afterwards, I called on Mr. Clapp, of the firm of Ely, Clapp & Bowen, to borrow five hundred dollars. Mr. Clapp refused to loan 20  
me any money permanently, before some arrangement was made, but would exchange checks for a day or so, and I related to Mr. Clapp the conversation which took place as regards loaning money, &c.; and Mr. Clapp said, that before loaning money, he had a proposition to make to me for my advantage. On asking for the proposition, Mr. Clapp stated, that he wished me to give him a lien on my stock of goods, or a confessed judgment, as collateral security for the loan of money and credit, so as to have something to show. as 30  
a foundation to work upon. I immediately said to Mr. Clapp, that by confessing a judgment to him, it would injure my credit with other creditors, and I objected to doing so; but Mr. Clapp immediately replied, that he would make my credit good under all circumstances, and loan me all the money I wanted, if no one else would sell me a dollar. I asked Mr. Clapp what was his object for doing so, if it was not to secure his own claim which he held against me. Mr. Clapp said it was not, as I owed them but little, but said it was solely 40  
for my benefit to help me along, so that I could conduct

my business to advantage and profit. I further said to Mr. Clapp, that I could not see his object in taking so much interest in my affairs, as I could not pay him any money for the next three or four months, and on the contrary, would increase my indebtedness to them to a very large amount; and Mr. Clapp replied, that he understood the whole matter, and that he should eventually make money out of it, as I should purchase a large amount of goods of or through them. Under those circumstances, I agreed to confess the said judgment to Ely, Clapp & Bowen, Mr. Clapp proposing the amount to be fifteen or twenty or thirty thousand dollars, or any amount I should name; the amount agreed upon at that time, between Mr. Clapp and myself, was twenty thousand dollars, with the understanding, that he was to loan me all the money and credit that I needed, over and above that sum, if necessary.

10 26. Question. How came the judgment to be confessed in the sum of ten thousand dollars only?

20 Answer. After arriving at Mr. Runyon's office, Mr. Clapp objected to taking a confessed judgment for over ten thousand dollars, but again said, that he would loan me all the money and credit that I wanted over and above that judgment, and said that he would take an additional judgment if I desired it, for ten thousand dollars more, at his own expense.

The judgment was given for ten thousand dollars.

27. Question. Was the negotiation you have detailed all at one interview, or at different interviews? if the latter, state how many, and within what period.

30 Answer. It was at different interviews, at five or six, from October fifteenth to November second.

28. Question. Did you, after the confession of this judgment, apply to Ely, Clapp & Bowen to purchase goods or borrow money, or obtain credit? if so where, and state what occurred?

40 Answer. On the next day after confessing the judgment, I borrowed seven hundred dollars of Ely, Clapp & Bowen; on the second day after I purchased a small bill of goods of them to the amount of about one hundred dollars. I intended to have purchased

more goods at that time, but did not on account of the extravagant prices asked for goods, and the coolness exhibited towards me as a purchaser. On the following day, to satisfy myself that Mr. Clapp intended to carry out the agreement on which he had obtained the judgment, I did not purchase but a small bill for the same reasons as before stated; and Mr. Clapp said to me on that day that I must not lean on them, but obtain credit in other houses, and suggested several other firms that I had better apply to for credit, but said I must 10 not refer any one to them, for reference.

29. Question. You state that you borrowed money of Ely, Clapp & Bowen after the judgment—did you give any negotiable paper to them for such money, and if yea, what?

Answer. I borrowed seven hundred dollars of them for which I did not give any paper, as it was understood it was to come under the judgment. Two or three days afterwards I borrowed five hundred dollars of them, for which I gave them a check for three hundred dollars, dated two or three days ahead, another check for two hundred dollars, dated five or six days ahead—Mr. Clapp, of the firm of Ely, Clapp & Bowen, refusing to loan any more money on the judgment. 20

30. Question. Was or was not this five hundred dollars lent by them to you upon the judgment?

Answer. It was not.

31. Question. What became of the checks you gave for it?

Answer. The checks on presentation to the Bank were protested, and returned to Ely, Clapp & Bowen. 30

32. Question. You have mentioned a check of two hundred dollars as constituting a part of the judgment, and which was repaid to Ely, Clapp & Bowen; when was that paid to them and how—by presentation at the Bank or otherwise?

Answer. It was paid at maturity on presentation at the Bank, after the payment was confessed.

33. What became of the other claims mentioned by you as constituting part of the judgment, or the vouchers for such claims? 40

Answer. They remained as they were before, in the

hands of Ely, Clapp & Bowen, with the exception of one note for ten hundred seven dollars seventy-one cents, for which they gave me their check to take up, with the understanding that it was to be extended; that note I have in my possession.

34. Were they, or not, afterwards protested for non-payment?  
I do not recollect.
35. In calculating the amount of those notes at the time  
10 of entering the judgment, was any rebate made of interest?  
There was none.
36. You have mentioned a note for one thousand dollars incorporated in the judgment, and which you said was given at the time of a former failure on your part and compromise with your creditors; have you the instrument with you then signed by your creditors, and if yea, produce it?  
I have that instrument.
- 20 [Paper produced by witness, and marked Exhibit No. 2.]
37. Was this paper signed about the day of its date?  
It was.
38. In your presence? Yes.
39. Are these names the signatures of Ely, Clapp & Bowen, and of the other firms here mentioned?  
They are.
40. Did you or not, give these creditors notes as herein expressed, for fifty per cent. of their claims?  
I did.
- 30 41. When was the conversation between yourself and Mr. Clapp, which resulted in the giving of the thousand dollar note, with relation to the execution of this paper? at, before, or afterwards?  
Answer. At the execution of that release.
42. When was the note given, and when does it bear date—the \$1000 note?  
[Question objected to.]  
It was given on that day or very soon after, and  
40 dated about 30 days ahead. I mean afterwards.
43. Why was it so dated?

So as to make it appear as a transaction which took place after the compromise, or after the release by the creditors.

44. Who suggested that reason and course of conduct?  
I do not recollect, I think Mr. Clapp suggested it.  
I could not state positively.
45. Was this transaction divulged to the other creditors?  
It was not.
46. What was the value of your stock in trade and property, levied upon under Ely, Clapp & Bowen's judgment, at the time of confessing that judgment, according to fair retail market prices—so far as you know and can judge?  
Twenty thousand dollars—about twenty thousand dollars.  
(The witness asks for a repetition of the question, and says:)  
About twenty thousand five hundred dollars; I did not understand the question.
47. Do you know what the cost value of that property was?  
I supposed you meant the cost value at a fair valuation. It was twenty thousand five hundred dollars.
48. Can you tell the amount of your indebtedness at that time?  
I can, nearly the amount—about twenty thousand dollars.
49. Did you see the note for six thousand nine hundred and forty-seven dollars and six cents, of which you have spoken, made?  
I did. 30
50. Who drew it? Mr. Runyon drew the note and read it over to me.
51. Was it signed after being read?  
I believe it was signed after being read.
52. By whom? I believe it was signed by Mr. Clapp.  
(Cross-examination by Mr. Bradley.)
1. Question. You stated that about nineteen hundred dollars of Clapp, Kent & Beckley's claim was for money borrowed sometime previous to the confession of judgment to them. How long previous thereto?

It was borrowed about two months previous, the most of it; I don't recollect all the particulars about the time. I borrowed one thousand dollars at one time, and nine hundred and seventy-five at another.

2. What was it borrowed for?

One thousand dollars of it was borrowed to meet other payments that I had coming due at the time—the other nine hundred and seventy-five was borrowed to take up a note I had given Clapp, Kent & Beckley on four months that was due at that time, and that had been extended—been given in renewal of a previous note held by them at two or three months, I think—I don't recollect the time exactly.

10

3. Was the original indebtedness, for which Clapp, Kent & Beckley held the two last mentioned notes, subsisting at the time of the compromise with your creditors, referred to on your direct examination?

I really cannot tell; I was borrowing money backwards and forwards.

20 4.

4. What was the date of the first of those two notes? I have not got those notes entered in my bill-book, (to which witness refers,) not for those amounts. The previous notes were of different amounts; we had had a settlement and notes given, and I do not recollect the particulars about them.

5. What amount did you owe Clapp, Kent & Beckley at the time of that compromise?

Thirty-eight hundred and seven dollars and thirty-three cents.

30 6.

6. Did you give them your notes at four, six, and eight months for one half of that sum, at the time of making the compromise?

I did at or about that time.

7. Did you ever give them any note or other voucher after said compromise, for any of the remainder of their claim?

I did not.

8. Was any of the said remainder ever included by them in any account against you after the compromise?

40

None whatever; there never was a word mentioned about it afterwards by them to me.

9. Was no part of the claim they had against you at the time of the compromise included in the judgment which you confessed to them?

I think there was a portion of that claim included in the judgment.

10. What portion?

I could not say what portion of that claim, because I was in the habit of borrowing money of them from time to time, and then on settlement giving new notes.

11. If any portion of said claim was so included, was it any part of said claim except the fifty cents on the dollar, which they agreed to take by way of compromise?

It was not.

12. What property had you when you confessed judgment in November last, other than your stock of goods?

The furniture and fixtures of the store, and book accounts and notes.

13. Did your stock of goods and furniture and fixtures of store constitute all your visible property?

It did.

20

14. Was all that property levied on under all the judgments, so far as you know?

It was, so far as I know.

15. Was it so intended to be between you and your judgment creditors?

There was nothing said about it between the creditors and myself.

16. Did they understand that that was all your visible property?

I should think they did.

30

17. By furniture, what furniture do you mean?

I mean the furniture in the store.

18. Did you keep house? I did.

19. Where? In New York.

20. Did you not own household furniture there?

I did not.

21. At what time was your store closed by the Sheriff?

As nearly as I can remember, it was about the twentieth of November.

22. What was the value, at cost, of your stock of goods at that time?

40

About eighteen thousand six hundred dollars, according to the inventory.

23. What inventory, and by whom taken?  
It was taken by myself and young men in my employ at that time.
24. How long had your stock been accumulating?  
The majority of my stock had been purchased within four months previous, as we had just got in our fall stock of goods; I'll say a part, I won't say a majority. A portion of it had been accumulating two years.
- 10 25. Was the one thousand dollar note given by you to Ely, Clapp & Bowen, as mentioned in your direct examination, given before or after the compromise paper, Exhibit No. 2, was signed?  
It was given immediately after it was signed.
26. Where? At Ely, Clapp & Bowen's store, in New York.
27. Was it given the same day the compromise was signed, or on a subsequent day?  
20 I believe it was the same day, and I am not sure but that it was given a few moments before signing the release; I can't say with certainty; it was either given a few moments before or after.
28. Did the creditors signing that release all sign at one time?  
They all signed at that time except the last named in the release, and they signed the same afternoon.
29. At what place were they met when they signed the paper?  
30 At Ely, Clapp & Bowen's store, in New York.
30. Were they assembled when Mr. Clapp took you aside as you before stated?  
They had come together, but a portion of them had stepped out on business to return soon, and the others were there in the store.
31. To what place did Mr. Clapp take you aside?  
He took me in the back part of the store, behind a pile of goods.
32. Did you return from that place with Mr. Clapp  
40 directly to the place where the creditors were?  
I don't think we did immediately, but we assembled together soon afterwards.

33. Where else did you and Mr. Clapp go?  
I think I stepped out of the store a few moments.
34. Then how can you say that the one thousand dollar note was made before the release was signed?  
I came back in a few moments, and the note was made at the desk in the interior of the store. I don't say positively that it was made before the release was signed.
35. What amount of goods did you buy of Ely, Clapp & Bowen after confessing judgment to them? 10  
Two hundred and thirteen dollars and some cents, I can't state the exact amount.
36. When was the last bill bought?  
I think the second day after the confession of judgment to them.
37. At what time did you borrow the last five hundred dollars which you mentioned in your direct examination, of Ely, Clapp & Bowen?  
I can't recollect exactly the day, but it was about a week or ten days after confessing judgment to them. 20
38. Was it before or after you confessed judgment to Clapp, Kent & Beckley?  
I think it was before.
39. Was it before or after Ely, Clapp & Bowen gave you the money to pay Carter, Quinan & Deforest?  
[Question objected to.]  
I could not say, I don't recollect the time when that transaction was made; this five hundred dollars was borrowed at different times—three hundred dollars on one day and two hundred the next; I am not positive 30 which amount was borrowed first.
40. Did not Ely, Clapp & Bowen, within a few days after you confessed judgment to them, advance to you five thousand dollars or nearly that sum, to enable you to pay Carter, Quinan & Deforest a judgment which they held against you?  
They gave me a check, I believe the amount was four thousand nine hundred and sixty-five dollars and seventy-three cents, to take up certain promissory notes held by Carter, Quinan & Deforest against me, endorsed by 40 my wife, and book account for which they, Carter,

Quinan & Deforest, held a confessed judgment against me, as collateral security for the payment of said notes at maturity.

41. In what Court was said judgment entered?  
I believe it was in the Supreme Court of New Jersey.
42. Had execution been issued on said judgment?  
I believe it had; I am not positive, as I never saw it.
43. How long was it after you confessed judgment to Ely, Clapp & Bowen, that they gave you that check of  
10 four thousand nine hundred and sixty-five 73-100 dollars?  
I should think that it was in the course of a week or ten days, as near as I can recollect. It was soon afterwards.
44. On what Bank was that check?  
I could not say on what Bank.
45. What did you do with said check?  
I immediately gave it to Carter, Quinan & Deforest.
46. What did they give you in return?  
20 They gave me a receipt in full for said judgment, and gave up the notes that they held against me endorsed by my wife.
47. What was the amount of your indebtedness in New York when your store was closed by the Sheriff, independent of what you owed Ely, Clapp & Bowen?  
About twelve thousand dollars, besides what Ely, Clapp & Bowen claimed against me.
48. Did you owe any in Newark at that time, and if so, how much?  
30 I did owe a little, but not to exceed two hundred dollars.
49. Who else, beside yourself and Mr. Clapp, was present when he told you that you must not lean on them, but obtain credit in other houses?  
No one.
50. When Ely, Clapp & Bowen gave you the check to pay Carter, Quinan & Deforest before mentioned, what did you give them in exchange therefor?  
40 I did not give them anything, but there was an agreement or understanding between us, (Mr. Bradley objects to the witness stating any agreement or understanding,) that I was to have a long time to pay it in.

51. Was not the amount of that check to go on the judgment which you had confessed to them?

It was understood between us that that was to come under the head of the judgment, the judgment being collateral security for the payment of it, and they were to give me three and four months to pay the whole amount of the check.

52. At the time of confessing judgment to Ely, Clapp & Bowen, did not you execute to them a note for the amount of the judgment? 10

There was such a note talked of at the time, but there was some change made with regard to those two notes, and whether it is executed or not, I can't positively say; if it was given, it was considered to be not valid, but as a mere matter of form.

53. In what business are you now engaged?

I am acting as agent in Real Estate business, collecting rents, &c.

[Re-examination in chief by Mr. Parker.]

1. Do you know in whose hand-writing the body of the 20 paper marked Exhibit No. 2, is?

The largest portion was written by Mr. Quinan, of the firm of Carter, Quinan & Deforest, and the latter clause by Henry Robinson.

2. You state that that thousand dollar note was made at the desk in the interior of Ely, Clapp & Bowen's store. Do you recollect whether or not the creditors were in any part of the store at that time?

I think they were not any of them in the store at that time. 30

3. You have spoken of having possessed notes and book accounts against other persons. What was the amount of debts deemed solvent due you at the date of Ely, Clapp & Bowen's judgment?

About fifteen hundred dollars were considered good at that time.

4. You stated that you got of Ely, Clapp & Bowen a check for \$4,965.73, to take up certain notes held by Carter, Quinan & Deforest against you; state how that check came to be given you. 40

Carter, Quinan & Deforest held certain notes and

accounts against me as before stated, to the amount of nearly five thousand dollars, that were not due, and some of them had a long time to run; and they proposed to me to take Clapp, Kent & Beckley's notes, or Ely, Clapp & Bowen's on still longer time, and give up the said notes which were endorsed by my wife, and also give up the judgment which they held as collateral security for the payment of the same; and I immediately spoke to Mr. Dewitt Clapp, of the firm of Ely, Clapp & Bowen, concerning the matter, and he said that he would see Messrs. Carter, Quinan & Deforest that day, and make arrangements with them to take up the notes, by giving their notes or my notes with their endorsement, and obtain the longest time he could on them. And on the same day Mr. Clapp came to my store at Newark, and wished me to go over to New York and make arrangements with regard to the Carter, Quinan & Deforest claim against me, and on arriving at the store of Ely, Clapp & Bowen, Mr. Clapp suggested that we had better take up those notes and that judgment by paying the money for the amount of Carter, Quinan & Deforest's claim, but I objected to paying the money on the ground that they (Carter, Quinan & Deforest) had proposed to take notes on long time, and that I feared I would not be able to pay them (Ely, Clapp & Bowen) the money as soon as they might want it, and he (Mr. Clapp) had agreed to make that arrangement. And Mr. Clapp immediately said, that he would give me as long time as Carter, Quinan & Deforest would. And I also said to Mr. Clapp, that I could not pay him over one thousand dollars in money altogether for the next forty days. And it was agreed by Mr. Clapp and myself to take up the notes and judgment of Carter, Quinan & Deforest, under those circumstances.

5. You speak of Carter, Quinan & Deforest holding a judgment against you as collateral security; what do you mean by that?

After I had given them the endorsed notes spoken of, they became dissatisfied with the security, and wished me to give them additional security, and suggested taking a confessed judgment for five thousand dollars

on my stock of goods as collateral security for the payment of those notes, and for a loan of money or credit that might be obtained afterwards to the amount of five thousand dollars, and I so gave them the judgment for that amount.

6. At the time of confessing that judgment, what did you owe them, and how much of it was payable?

[Question objected to.]

I think I owed them at the time between three and four thousand dollars, notes and book account, but 10 there was not a dollar of it due at that time.

7. Did you, before the giving of the check by Ely, Clapp & Bowen, pay Carter, Quinan & Deforest any of the money which was owing to them at the time of the entry of that judgment, and if so, how much?

[Question objected to.]

I did pay them one note of one thousand dollars; I think that is all, as near as I can remember. [The witness uses a memorandum in his own hand-writing, handed him by Mr. Parker; the use of such memoran- 20 dum objected to.]

I had also paid them two notes besides the one thousand; one of five hundred and ninety-one dollars eighty-five cents; one of five hundred and sixty-five dollars and ninety-seven cents; also, one note of six hundred and fifty-two dollars fourteen cents; that is all.

8. Do you know whether Mr. Clapp knew of the character of this Carter, Quinan & Deforest judgment, before giving you the check of which you have spoken?

He did know the character of it, as I had told him all 30 about it.

(And being again cross-examined.)

1. When did you confess the said judgment to Carter, Quinan & Deforest?

On or about August 15th, 1853?

2. Did Mr. Clapp know of this judgment when you confessed judgment to his firm of Ely, Clapp & Bowen?

He did know all about it.

3. Who had informed him?

I had, and also Carter, Quinan & Deforest; he told 40 me they had.

4. When did you inform him of it?  
At the time he so earnestly solicited me to give him a judgment.
5. How long was that after the judgment of Carter, Quinan & Deforest had been confessed?  
About two months.
6. Give the dates and times of maturity of the notes which you say you had paid Carter, Quinan & Deforest before receiving the check from Ely, Clapp & Bowen.
- 10 The note for \$652,14 was dated March 20, 1853, and due September 23, 1853.  
The note for \$591,85 was dated Feb. 21, 1853, and due October 24, 1853.  
The note for \$565,97 was dated June 12, 1853, and due October 15, 1853.  
The note for \$1000 was dated August 4, 1853, and due November 7, 1853.
7. Were these notes endorsed by your wife?  
The \$1000 note was so endorsed.
- 20 8. What amount of notes endorsed by your wife was held by Carter, Quinan & Deforest, when you paid them with the said check?  
Two notes of \$1000 each.
9. Were these two notes held by them when you confessed judgment to them?  
They were.
10. Did they hold any other notes of yours when you paid them said check, which were held by them when said judgment was confessed?
- 30 They did not.
11. Of what did the balance of the \$4,965,73 consist?  
It consisted of borrowed money and book account.
12. How much of each, and when did it accrue?  
I could not state how much of each, or when it accrued, but it was some time after the judgment was confessed.
13. Was that judgment intended as a security for such advances as Carter, Quinan & Deforest might, after its confession, make to you?
- 40 It was intended as security for the payment of those notes at maturity; and for the payment of money and

merchandise that might be advanced afterwards to make up the amount of \$5,000.

14. Did you obtain from Carter, Quinan & Deforest any of the money with which you took up the notes above mentioned?

That I could not state positively, as I had other notes coming due at the same time; I might have exchanged checks with them for a few days for 200 to \$500. I am under the impression that I did.

15. Was not the borrowed money which you owed them 10 when you paid them Ely, Clapp & Bowen's check, money which you had borrowed of Carter, Quinan & Deforest to take up those notes or some of them?

I think not; however I am not positive, as I stated before; a small part of it may have been, but the majority was not.

16. For what purposes had such majority been borrowed? To take up other creditors' notes that were due about that time.

B. PARKHURST. 20

Sworn and subscribed before me, this }  
tenth day of November, A. D. 1854. }

A. Q. KEASBEY,  
*Com'r of Bail, &c.,*  
*in Supreme Court of N. J.*

## SUPREME COURT OF NEW JERSEY.

In the matter of rule taken by Wellington Clapp, William Kent and others, to shew cause why the judgments of Henry G. Ely and others against Benjamin Park- 30  
hurst should not be set aside or postponed.

Examinations in the above stated matter taken before me at the State House, in Trenton, this twenty-eighth day of February, A.D. 1855, in the presence of Cortlandt Parker, Esq., and Frederick T. Frelinghuysen, Esq., on behalf of the parties obtaining said rule, and Joseph P. Bradley,

on behalf of Henry G. Ely, Dewitt C. Clapp, and Edward E. Bowen, judgment creditors of Benjamin Parkhurst and others.

10 Theodore Runyon, Esq., a witness produced on the part of said Henry G. Ely, Dewitt C. Clapp, and Edward E. Bowen, being duly sworn, on his oath deposed and saith: I am an attorney at law, and reside in the City of Newark. I prepared the papers for the confession of the judgment of Ely, Clapp & Bowen against Benjamin Parkhurst, which is brought in question in this case; the warrant of attorney was prepared on the evening of the second day of November, eighteen hundred and fifty-three; the other papers were not, I think, prepared till the next day. In the evening of the first mentioned day Mr. Parkhurst and Dewitt C. Clapp came to my office; Mr. Parkhurst opened the business to me, and said that they wanted a confession of judgment; I inquired of them as to the amount, and then began a conversation between the two with regard to the amount for which the judgment should be confessed.

20 Mr. Parkhurst proposed twenty thousand dollars, Mr. Clapp peremptorily declined to take the judgment for that amount, and I think Mr. Parkhurst said the judgment, if taken for that amount, would be safe, as his stock was worth it. Mr. Clapp still declined; Mr. Parkhurst then proposed that the judgment should be fifteen thousand dollars; to this Mr. Clapp refused to accede peremptorily, and said that he would not make the judgment more than ten thousand dollars, and that from Mr.

30 Parkhurst's own statement to him as to his affairs, he would not need more advance to him than the difference between the amount that he (Parkhurst) then owed them, and ten thousand dollars to answer his exigency, or words to that effect. Mr. Clapp's statement was in nearly these words: "Why, Parkhurst, from your own showing, you don't want more than six or seven thousand dollars, and I won't consent to take a judgment for more than ten." Parkhurst still insisted on making the judgment fifteen thousand dollars, as the security, he said, would be ample for that amount if he should want it; and he added that he did not know that he

40

should want more than half the amount that had been mentioned, six or seven thousand dollars. Mr. Clapp then said that there was no further use in talking, as he would not take the judgment for more than ten thousand dollars. Parkhurst again said that he thought the judgment ought to be fifteen thousand dollars. Mr. Clapp said that he would not make the judgment for more than ten thousand dollars, and that he might as well be going home, or to New York—he lived at New York. He thereupon rose from his chair, buttoned up 10 his coat, and started out from the back office where this conversation was held. He had hardly got into the front office before Mr. Parkhurst followed him, and there a very short conversation took place between them, and they returned to the back office, and Parkhurst said that he had agreed to make the judgment ten thousand dollars. I told them that if they had agreed I would prepare the papers. Then a conversation took place between those two as to the amount which was then due from Parkhurst to Ely, Clapp & Bowen. It was 20 agreed between them that it was three thousand and fifty-two dollars (or sixty-two dollars, I do not remember which) and some cents. Then the question was asked by me “how about the balance, the difference?” Mr. Clapp then said, “why, you see that the advance is to be made up to ten thousand dollars.” He spoke then of the impracticability of paying that balance if it was to be paid that night. He spoke of his Bank account being kept in New York, and also of its being past banking hours. Mr. Parkhurst suggested to him 30 that that made no manner of difference; that he, Mr. Clapp, could give the note of the firm for the difference between the amount of the then present indebtedness and the amount for which the judgment was to be confessed. He said that he had had judgments confessed before in that way, and he knew it was all right. Mr. Clapp then turned to me and asked me if that would be all right. I told him it would be if it was bona fide, and thereupon that course was agreed upon. I drew the warrant of attorney, and the note which was to be given 40 to Parkhurst, which was for the amount of six thousand

nine hundred and forty-seven dollars and six cents; I also at the same time drew the note for ten thousand dollars, to be signed by Parkhurst, upon which the judgment was confessed. Mr. Clapp signed with the name of Ely, Clapp & Bowen the first named note. Mr. Parkhurst signed the warrant of attorney and the other note. The first named note was handed to Mr. Parkhurst, who put it in his pocket-book and put it in his pocket; I then told them that that was all that would be required that night; that I would attend to drawing up the papers and entering up the judgment. They then left the office, I don't know whether together or singly. Clapp came back shortly afterwards, and inquired about the time when the judgment would have validity. I told him that it would have validity as soon as signed, and that it would have a binding effect on Parkhurst's stock when the execution was levied, and not till then. He asked when that would be; I told him I would have the judgment signed the next day, and issue execution, and have it levied at once thereafter. He then said, according to that Parkhurst before the judgment is entered can use that note of ours that I have given him; I told him yes, but that I would see that it was all right so far as that was concerned, and I thought there would be no difficulty about it. I believe that the papers were all drawn that night—that is my impression; and judgment was signed actually that night. The next day I sent to Trenton the judgment roll, with the execution, to have the judgment entered and the costs taxed and the writ sent back to me after being sealed. That day I saw Mr. Parkhurst at my office I think, and suggested to him that it would be as well, perhaps, that he should leave with me the note which Mr. Clapp had given him, until the judgment was perfected and the lien under it. I stated the fact that he held the note of Ely, Clapp & Bowen, while they had nothing but the warrant of attorney, as it were—no lien as yet upon the stock. He said that he was willing to do it, and delivered the note to me.

They were in the front office I think about a minute together, after Clapp first went out, a very short time.

Question. Were you alone in your office that evening?

I think not; my clerk, Mr. Davis, was in there and assisted me in preparing the papers; he drew the affidavit of Clapp.

Question. Which office was he in?

Answer. The front office.

Question. What did the indebtedness then existing between them consist of, as understood by you from their conversation? I mean the sum of three thousand 10 and fifty-two or sixty-two dollars before mentioned?

In part of goods, wares and merchandise, and the rest of cash lent.

Question. Did that conversation take place in your presence and hearing?

Yes.

Question. Was there any difference or difficulty between them as to the amount aforesaid?

Not the slightest.

Question. Was a note to be given by Clapp to make 20 up the \$10,000 spoken of at all until after they had agreed on the amount of the judgment, and had given directions to draw it up for that amount?

No.

Question. Did Parkhurst return the note to you in pursuance of any previous arrangement whatever?

No. I believe the transaction to have been precisely as I have stated.

Question. Could he have had the note of you at any time after the entry of the judgment? 30

He most certainly could. When the matter was suggested to me by Mr. Clapp as to the possibility of Mr. Parkhurst using the note before we could get a lien upon the property, I felt that it was an oversight on my part to have suffered Parkhurst to take the note away before we had the judgment, and of myself undertook to get it of my own accord, to see that it would be all right as far as that was concerned.

Question. Did Parkhurst call for the note afterwards? 40

No. But he gave an order for it.

Question. When? The order was dated, I think, on the tenth day of November, was presented to me on the eleventh, by Mr. Bowen, of the firm of Ely, Clapp & Bowen, to whom I delivered it accordingly.

Question. What was the order, the amount of it?

I can say the substance of it. It was addressed to me, and requested me to give up the note to Ely, Clapp & Bowen, as he, Parkhurst, had value received for the same. It was signed by him, the whole of it was written by him I think.

Question. Can you on reflection state whether Parkhurst and Clapp did or did not leave your office together on the evening the judgment was confessed?

I believe that Mr. Parkhurst, after the notes and the warrant of attorney were signed, left the office by himself, while Mr. Davis, my clerk, was writing the affidavit, which was signed that night before a Justice of the Peace.

Question. Was the note for six thousand nine hundred and forty-seven dollars and six cents given by Clapp to Parkhurst, given with the understanding that it should be returned after the judgment was confessed, or that it was to be considered void, and without vitality or anything to that purpose or effect.

No. The note was given as I have stated before, and with no other agreement or understanding; and but for the circumstance I have stated of the note having been taken off by Parkhurst with my and Mr. Clapp's consent before the judgment was entered up, he would have retained it, and might have done what he please with it.

Question. Was that note made or looked upon as a mere matter of form?

[This question was objected to by Mr. Parker.]

Answer. I consider that the note when it was given to Mr. Parkhurst was his property, and that he might do with it as he pleased; and I knew of no agreement whatever, and heard of none to the contrary, from either party, or I should not have taken the trouble to have asked Parkhurst for the note.

Question. What was the time of payment of that note?

On demand, payable to Parkhurst or order.

Question. Was there or not, any understanding between Parkhurst and Clapp, had at the time the note was given, that Parkhurst was to have the money for it whenever he wanted it?

[This question objected to by Mr. Parker.]

Yes, I understood it so, certainly, that he could get it as and when he wanted it.

Question. Was anything said by Parkhurst and Clapp, or either of them, on the evening aforesaid, about 10 any portion of the sum of three thousand and fifty-two dollars being made up of a note for a thousand dollars given on an old claim of Ely, Clapp & Bowen against Parkhurst?

No.

Question. Are you acquainted with Parkhurst's hand-writing?

I consider myself so. I have seen him write, and received letters from him.

Witness being shown eight checks on American Ex-20 change Bank and three checks on the Metropolitan Bank, with the name of B. Parkhurst endorsed thereon, is asked,

In whose hand-writing are the said endorsements? and answers,

I believe them to be all in Benjamin Parkhurst's.

Question. Whose checks are they?

They are Ely, Clapp & Bowen's. I think the signatures to all are in Clapp's writing except one, which is in Ely's hand-writing, I think.

30

Question. What was the object of this transaction, the confession of judgment as stated by the parties in your presence?

It was to secure to Ely, Clapp & Bowen the payment of the debt of three thousand and odd dollars, and a further sum of money up to ten thousand dollars, or of money and goods together to that sum, to which Parkhurst desired, and they agreed, in consideration of the confession of the judgment, should be advanced by them to him for the purpose, as he said, of meeting an emergency in his business which would or might shortly

thereafter arise. He said he had some notes to take up, and should or might want the means to take them up with. He said distinctly he should want some means, but did not know how much.

And being cross-examined, the witness says, being asked by Mr. Parker,

10 Question. It was, then, the object of the parties to the judgment, as declared by them, that it was to be entered up and remain, so far as regards all but the three thousand and fifty-two dollars, as security for future advances to be made by the plaintiffs to Parkhurst in money and goods, when and how he might acquire them?

Yes.

20 Question. When Parkhurst proposed twenty thousand dollars, what reason did he give for such proposition? None. That was the first of the expressions that were used in the office. When they first came in they stated the business they had with me, and I asked the amount for which judgment should be confessed, and Parkhurst said twenty thousand dollars, to which Mr. Clapp objected immediately, as I have stated.

And being re-examined by Mr. Bradley, the witness says, in answer to the

30 Question. Was or was not the judgment, as to the amount thereof over and above the three thousand and fifty-two dollars, given as security to Ely, Clapp & Bowen for the obligation which they had assumed by the note of \$6,947.06?

Yes, to be sure.

THEODORE RUNYON.

Sworn and subscribed this 28th day of }  
February, A.D., 1855, before me, }

A. Q. KEASBEY,

*Com'r of Bail and Affts.*

*in Supreme Court of N. J.*

## EXHIBIT No. 1.

I hereby designate and appoint the following Creditors of mine as parties entitled to the benefit of the stipulations held by me, executed by George P. Lord and Samuel N. Brown, Norman Cutter, Oliver E. Hosmer, and also to the benefit of the trust declared by Wellington Clapp, William Kent, Samuel M. Beckley, in conjunction with Lord and Brown, in a bill in Chancery, filed this day in New Jersey Chancery, to wit: Clapp, Kent & Beckley, as to part of their indebtedness, amounting to about \$1,100, they being preferred, as to the rest of their judgment, as a confidential 10 debt, viz: \$1,925.

Lord & Brown, to amount of . . . . .	\$2,215 15
Norman Cutter, to amount of . . . . .	1,024 91
Oliver E. Hosmer, to amount of . . . . .	2,769 95
Peck & Todd, about . . . . .	150 00
Rufus Langer, about . . . . .	130 00
E. S. Mills, about . . . . .	400 00
James Copeland Brothers, about . . . . .	550 00
Henry Robinson, about . . . . .	300 00
Winston & Seaman, about . . . . .	900 00 20
A. E. Frink & Co., about . . . . .	900 00

B. PARKHURST.

*Newark, Nov. 17, 1853.*

Also, Carter, Quinan & Deforest, . . . . .	\$195 00
B. Spilman & Son, . . . . .	36 00
Wm. Whitenwright, . . . . .	45 00
J. Martine, . . . . .	52 00

B. PARKHURST.

*Nov. 17th, 1853.*

## EXHIBIT No. 2.

*New York, Feb. 21, 1853.*

Whereas B. Parkhurst & Co. and B. Parkhurst of Newark, New Jersey, are unable to pay their indebtedness in full, we, the undersigned creditors of said Parkhurst & Co. and B. Parkhurst, hereby agree to receive from Parkhurst & Co. and B. Parkhurst their notes at 4, 6, and 8 months from the date hereof, without interest, for fifty per cent. (50 per cent.) on the amount of our respective claims, set opposite to our  
 10 respective names, in full consideration of said claims; and we hereby bind ourselves to each other to receive said 50 per cent. in full for our claims:

Ely, Clapp & Bowen, . . . . .	\$4,029 46
Clapp, Kent & Beckley, . . . . .	3,807 33
Carter, Quinan & Deforest . . . . .	2,367 41
John T. Martin, . . . . .	1,838 80
James Copeland & Brothers, . . . . .	668 40
H. Robinson & Co. . . . .	1,394 58
Peck & Todd, . . . . .	290 78
20 Edmund S. Mills, . . . . .	294 78
Backus & Osborne, . . . . .	509 94

## EXHIBIT FOR DEFENDANTS.

List of checks in Evidence—drawn by Ely, Clapp & Bowen, and payable to, and endorsed by, *Benjamin Parkhurst*, and cancelled with the Bank mark and endorsements.

<i>Date.</i>		
	Oct. 20th, 1853, . . . . .	\$600 00
	Oct. 24th, 1853, . . . . .	600 00
30	Oct. 24th, 1853, . . . . .	1,959 56
	Oct. 28th, 1853, . . . . .	350 00
	Oct. 29th, 1853, . . . . .	300 00
	Nov. 2d, 1853, . . . . .	200 00

## AFTER THE JUDGMENT.

	Nov. 3d, 1853, . . . . .	200 00
	Nov. 8th, 1853, . . . . .	700 00
	Nov. 10th, " . . . . .	4,965 72
	Nov. 11th, " . . . . .	200 00
	Nov. 14th, " . . . . .	800 00

The defendants offered and read in evidence, subject to objection, a Bill and Answer in Chancery of New Jersey, in a cause between Clapp, Kent & Beckley and Lord & Brown, complainants, suing in behalf of themselves and the other creditors named in the writing of appointment before mentioned, against said defendants.

It was admitted that a Decree for Dismissal had been entered in said cause, at the instance of the plaintiffs, before the granting of the rule to show cause in this case, in the Supreme Court, in conformity with the direction of the Supreme Court, the plaintiffs electing their remedy in the Supreme Court.

An abstract of said Bill and Answer, with extracts, follow—the parties being at liberty, with the permission of the Court, to refer to such other parts thereof as they shall choose.

Bill filed November 18, 1853.

Answer filed December 15, 1853.

The Bill states—The recovery of said judgments by Clapp, Kent & Beckley and Lord & Brown, the issue of executions thereon and the levies thereby, and that the amounts thereof were justly due and owing at the time of entering such judgments; the existence of said previous judgment, execution and levy on the same goods, by Ely, Clapp & Bowen, and that they claimed to be first satisfied; that at the time of entering their judgment Parkhurst owed them no more than \$1,900, and that the same was confessed to answer a fraudulent intent and purpose, and to defeat and get an undue advantage of the other creditors; that Ely, Clapp & Bowen alleged that, at the time of confessing said judgment, they gave Parkhurst a note for \$8,000, or some such sum to make up the residue of the \$10,000, but that said note, complainants alleged, was a mere sham, a sheer matter of form without substance, and a fraudulent device for having a colorable demand for money, but upon which the affidavit required by law could be made as to the true consideration of the note on which the confes-

sion was founded; that it was to have no validity or vitality, as a claim against them; should not go, in fact, into Parkhurst's hands at all, but be left in the hands of the attorney, to be given up after the confession, on his order, and that the same was, soon after the judgment was entered, so in fact given up.

The Bill then proceeds as follows:

And your orators further show unto your Honor, that the said Henry G. Ely, Dewitt C. Clapp and Edward E. Bowen,  
 10 giving out and alleging that they had so made and delivered their said promissory note to the said Benjamin Parkhurst as aforesaid, further give out and allege that though the same was made and delivered as a mere matter of form, for the purpose of enabling them or one of them to make such affidavit as aforesaid, and it was understood and agreed that forthwith after the confession of the said judgment to them as aforesaid, it was to be given up to them as aforesaid; and though the same was so given up to them as aforesaid, the said judgment was so confessed to them as aforesaid, and  
 20 tended, as to so much of the amount thereof as is embraced therein over and above any actual debt or demand then justly and honestly due, and owing to them from the said Benjamin Parkhurst, as a security to them for money which they, in consideration of the confession of the said judgment for any part of the amount of the same, agreed to and with the said Benjamin Parkhurst to pay and advance to the said Benjamin Parkhurst, to the extent of such excess, to aid and assist him in meeting his payments and liabilities as they should fall due, and thus enable him by promptly paying his  
 30 business paper to keep on with his said business, and pay all his other creditors, or to the like or similar effect, he being at the time of the confession of the said judgment, though then in need of advances to pay his business paper promptly, abundantly able to pay all his debts, if he could keep on with his said business, and be enabled to apply the proceeds of the said stock of goods and effects, without any sacrifice of the same and the profits of his business, to the payment of his debts. And your orators insist, that if the said judgment was so confessed to the said Henry G. Ely, Dewitt C. Clapp

and Edward E. Bowen as aforesaid, with and upon such intention, consideration, and agreement as aforesaid, or other like or similar consideration and agreement, such consideration has failed, and such agreement has been fraudulently violated on the part of Henry G. Ely, Dewitt C. Clapp and Edward E. Bowen; and the purpose of the said Benjamin Parkhurst in confessing the said judgment has, by the fraud of the said Henry G. Ely, Dewitt C. Clapp and Edward E. Bowen, been wholly frustrated and defeated, they refusing to fulfil the said agreement and render such consideration as 10 aforesaid, and having expressly refused to pay or advance to the said Benjamin Parkhurst money to aid and assist him as hereinbefore mentioned in meeting his payments and liabilities as they should fall due, and thus enable him by promptly paying his business paper to keep on with his said business, and to pay all his other creditors, by applying the proceeds of his said stock and effects without any sacrifice of the same, and the profits of his said business to the payment of his debts. And your orators further charge, that if the said judgment was so confessed to the said Henry G. Ely, Dewitt 20 C. Clapp and Edward E. Bowen, with and upon such intention, consideration, and agreement as aforesaid, in any other like or similar consideration or agreement, such consideration and agreement were the only moving causes of and inducements to the consent of the said Benjamin Parkhurst to confess the said judgment, without which he would not have confessed the same, as they could not but have known, and were held out by them to him as such moving causes and inducements to such confession as aforesaid.

And your orators further show unto your Honor, that not- 30 withstanding the confession of the said judgment to the said Henry G. Ely, Dewitt C. Clapp and Edward E. Bowen, the said Benjamin Parkhurst has been since and is now unable to pay promptly his said business paper, and in particular his indebtedness to your orators, recovered by their said judgment; and that the payment or advancement of money to the said Benjamin Parkhurst by said Henry G. Ely, Dewitt C. Clapp and Edward E. Bowen, to the extent of such excess as aforesaid, to aid and assist him in meeting his payments and liabilities as they should fall due, would have enabled him 40

promptly to pay his business paper, to keep on with his said business, and to pay all his other creditors.

And your orators further show unto your Honor, that the said Henry G. Ely, Dewitt C. Clapp and Edward E. Bowen now threaten and intend forthwith to enforce the said judgment, and to proceed to sell the goods, wares, and merchandise so levied on and taken under the said execution respectively, as aforesaid, and thus fraudulently to make what, according to their own allegations, was designed by them  
 10 and the said Benjamin Parkhurst as an instrument of relief, assistance, and advantage, not only to the said Benjamin Parkhurst, but to his other creditors, and intended as a security to the said Henry G. Ely, Dewitt C. Clapp and Edward E. Bowen, merely to be enforced only in case of default by the said Benjamin Parkhurst in the payment, upon reasonable notice and within a reasonable time, of the money intended to be secured thereby, into an instrument not only of ruin to the said Benjamin Parkhurst, but of irreparable loss to his other creditors.

20 And your orators further show unto your Honor, that the said Henry G. Ely, Dewitt C. Clapp and Edward E. Bowen further give out and allege that, under such agreement as, according to their allegation, was made on the confession of the said judgment to them, they have advanced divers moneys to divers creditors of the said Benjamin Parkhurst—among them a large sum of money to Cyrus L. Carter, Henry E. Quinan and Richard A. Deforest; and your orators charge, that if any such advance has been made, the same was made long before the indebtedness or any part of  
 30 the same had accrued due and payable, and when the whole of the same, in different sums, had long periods of time to run to maturity, on or before the said Benjamin Parkhurst could lawfully be called to pay the same; which advance they now claim and insist ought to be paid immediately, by a sale of the goods, wares, and merchandise so levied on as aforesaid, for their reimbursement, thus insisting on making and seeking to make the said judgment, so confessed to them as aforesaid, an instrument of compelling an earlier payment by the said Benjamin Parkhurst of his indebtedness to

the said Cyrus L. Carter, Henry E. Quinan and Richard A. Deforest, than could otherwise be enforced against the said Benjamin Parkhurst, contrary to the intention, consideration and agreement with and upon which, according to their allegation, the said judgment was so confessed to them as aforesaid.

And your orators insist that if the said judgment so confessed to the said Henry G. Ely, Dewitt C. Clapp, and Edward E. Bowen as aforesaid, shall be held to be valid for any part of the same, or for any advance or advances made 10 by them under any agreement between them and the said Benjamin Parkhurst, when the said judgment was so confessed to them as aforesaid, they are not entitled to have their said advances refunded, nor their said judgment enforced forthwith, nor until after the indebtedness for which any such advances have been made, if any would have matured according to the terms of the contract, creating or evidencing the same, and a reasonable time after the same would have so matured, in the discretion of this Honorable Court. 20

And your orators further charge, that if the said judgment so confessed to the said Henry G. Ely, Dewitt C. Clapp and Edward E. Bowen as aforesaid, was confessed upon any such, or like or similar agreement and consideration as is hereinbefore set forth, or other agreement or consideration, having reference at the time of such confession to advances then in *future*, they fraudulently held out their willingness to make such advances, and stipulated and agreed therefor, as a notice or inducement and consideration for such confession in fraud of the said Benjamin Parkhurst, 30 and of his other creditors, to get from him such confession, and to secure to themselves an undue and unjust advantage of the said Benjamin Parkhurst, and of his other creditors, in regard to their demands against him, which they otherwise could not have secured from him without any "bona fide" intention of fulfilling such agreement, and rendering such consideration, but with the intention of pressing their judgment and execution immediately to a sale of the goods, wares, and merchandise so levied on and taken in execution

as aforesaid, in violation of such agreement, contrary to law and to the reasonable expectations of the said Benjamin Parkhurst, and to the manifest justice of the case.

And your orators further show unto your Honor, that in taking their said judgments respectively against the said Benjamin Parkhurst, they have stipulated and agreed respectively with him, that they will hold the net avails of the same for the benefit of themselves AND OF OTHER creditors of the said Benjamin Parkhurst, *pro rata* according to the  
 10 amounts of their respective claims, except the sum of one thousand nine hundred and seventy-five dollars, embraced in the judgment so recovered as aforesaid, by your orators, Wellington Clapp, William Kent and Samuel M. Beckley, which is confidential and therefore preferred by arrangement between them and the said Benjamin Parkhurst; and your orators hereby declare themselves, by virtue of the said stipulation and agreement, trustees of the said net avails for the purposes contemplated thereby.

The Bill then prays that Ely, Clapp & Bowen's judgment  
 20 may, wholly or in part, be set aside or postponed, and an injunction against proceedings thereon. It had the common affidavit annexed.

The Answer, after a reference to the judgment of complainants, leaving them to make proof, &c., proceeds thus:

## IN CHANCERY OF NEW JERSEY.

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The joint and several answer of Henry G. Ely, Dewitt C. Clapp, and Edward E. Bowen, to the Bill of Complaint of Wellington Clapp, William Kent, Samuel M. Beckley, George P. Lord, and Samuel N. Brown, Complainants.

These defendants, now and at all times hereafter saving and reserving to themselves all, and all manner of benefit and advantage of exception to the manifold errors, uncertainties and insufficiencies in the complainant's said bill of complaint contained, for answer thereunto, or unto so much and such part thereof as these defendants are advised it is material or necessary for them to make answer unto, they answer and say:

That they have no knowledge, save from said bill of complaint and from hearsay, as to whether the complainants Wellington Clapp, William Kent, and Samuel M. Beckley did or did not at or about the time in said bill, in that behalf alleged, recover against Benjamin Parkhurst the judgment in said bill alleged to have been recovered by them against him, but these defendants have been informed and therefore admit, that such judgment was so recovered as in said bill is alleged, but they cannot answer more particularly with regard to the same, and they therefore leave the said complainants to make such proof thereof as they may be able, or may be advised is necessary. And these defendants further answering say, that they have no knowledge, save from said bill and from hearsay, as to whether the complainants George P. Lord and Samuel N. Brown did or did not at or about the

time in said bill in that behalf alleged, recover against said Benjamin Parkhurst the judgment in said bill alleged to have been recovered by them against him, nor as to whether writs of fieri facias were issued on said judgments, and the stock in trade of the said Benjamin Parkhurst levied upon, and taken by the Sheriff of the county of Essex, under or by virtue of said writs, nor as to whether or not said Sheriff now holds said stock in trade by virtue or under said levies, if the same were ever made; but these defendants have been informed, and therefore admit, that said last named judgment was recovered as in said bill alleged, and that said writs were issued on said judgments and levy made thereunder by said Sheriff, on said stock in trade as in said bill alleged, but they cannot answer more particularly in regard thereto; and as to said several matters they therefore leave the complainants to make such proof thereof as they may be able, or may be advised is necessary.

And these defendants further answering say, that they have no knowledge, save from said bill and from hearsay, as to whether said Benjamin Parkhurst was or was not at the alleged time of the alleged rendition of said alleged two judgments indebted to the complainants Wellington Clapp, William Kent, and Samuel M. Beckley, and to the complainants George P. Lord and Samuel N. Brown, or either, or any of them, in the sums alleged in and by said bill to have been then due to them from said Benjamin Parkhurst, on the amount or accounts in and by said bill in that respect alleged, or in any sum or sums on any account or accounts. These defendants therefore cannot answer as to the same, but leave the complainants to make such proof thereof as they may be able, or may be advised is necessary.

And these defendants further answering say, that it is true and they therefore admit that at or about the time in said bill in that behalf alleged, the said Benjamin Parkhurst did confess to these defendants a judgment for the sum of ten thousand dollars of damages, besides costs of suit; and they further say, that that judgment was duly entered in the Supreme Court, of the State of New Jersey, and a writ of

execution thereupon duly issued, commonly called a fieri facias de bonis and catellis, that the same was directed to said Sheriff, and was delivered to him on the fifth day of November, A. D. 1853. And said Sheriff on the fifth day of November aforesaid, under and by virtue thereof, levied upon and took the stock in trade of said Benjamin Parkhurst in the city of Newark, in the county of Essex, and State of New Jersey, and the fixtures of the said Parkhurst's store in said city of Newark, and that said Sheriff now holds and has the said stock in trade and fixtures, under the said levy, by virtue of and under said execution in favor of these defendants issued on said last mentioned judgment. 10

And these defendants further answering say, that it is true that by virtue of their said judgment and the said execution and levy thereunder, they do claim to have a lien upon the goods, wares, and merchandise (being said stock in trade so levied on, under and by virtue of their execution as aforesaid, and a right to the payment out of said goods, wares, and merchandise, prior and in preference to any claim or claims of said complainants, or any or either of them, (if any such exists or exist) under and by virtue of their alleged judgments, executions thereon, and levies thereunder, or any or either of them, of the amount due and owing to these defendants on their said judgment. 20

And these defendants further answering say, that it is not true, and they therefore explicitly deny, that there was at the time of the confession of their said judgment due and owing from said Benjamin Parkhurst to them not more than the sum of nineteen hundred dollars, or that said judgment was confessed in their favor to answer any fraudulent intent or purpose whatever, to obtain an undue advantage of the other creditors of said Benjamin Parkhurst, in any way or manner whatever; but these defendants say that the said judgment so as aforesaid confessed in their favor, was justly and honestly confessed, without fraud, or the intention thereof in any way or manner, and that the history thereof is as follows: The said Benjamin Parkhurst was at the time of the confession of that judgment justly, truly, fairly, and honestly indebted, 30

unto these defendants in the sum of one thousand eight hundred and fifty-five dollars and twenty-three cents, for goods, wares, and merchandise by these defendants to said Benjamin Parkhurst sold and at his request, before the confession of said judgment, or the proposition therefor, and twelve hundred and seven dollars and seventy-two cents, for money lent and advanced by these defendants to said Benjamin Parkhurst at his request, before the proposition for the confession of said judgment was made, and being so indebted

10 the said Benjamin Parkhurst, some few days before the confession of said judgment, mentioned of his own accord to one of these defendants, (Dewitt C. Clapp) the said indebtedness from him the said Benjamin Parkhurst to these defendants, and added that although he was perfectly solvent, yet he would be glad to make an arrangement with these defendants whereby he might obtain further credit for goods, and further advances of money from them, which advances of money he wanted, he said, to meet some notes of his which shortly thereafter would come to maturity as he alleged.

20 And he thereupon proposed to said Dewitt C. Clapp, that if these defendants would agree to make such further advances of money and give to him such further credit for goods as might be mutually agreed upon between them, he would, in order to render these defendants perfectly secure in so doing, and safe against loss in any contingency, confess to these defendants a judgment for the amount of his then indebtedness to them, and such further amount as might be mutually agreed upon as the limit or extent of such advances and credit, and that execution should thereupon forthwith

30 be issued on said judgment, and levied on said Benjamin Parkhurst's stock in trade, in the City of Newark, in New Jersey. And the said Benjamin Parkhurst being apparently in good faith in his said application and proposition, the said Dewitt C. Clapp, in behalf of these defendants, went to said City of Newark very shortly thereafter, and on the second day of November, eighteen hundred and fifty three, for the purpose of conferring with said Benjamin Parkhurst on the subject, as the said Parkhurst requested; and while at said City of Newark, and in said conference,

40 the said Benjamin Parkhurst proposed to said Dewitt C.

Clapp that the proposed judgment should be entered for the sum of twenty thousand dollars, including therein the amount of his then indebtedness to these defendants, the said Parkhurst assuring said Dewitt C. Clapp, as an inducement to him to make such arrangement, and take said judgment for twenty thousand dollars, that the said arrangement could be made, and said judgment entered lawfully, and with perfect security to these defendants, seeing that the goods in said Parkhurst's store, in said Newark, were worth more than twenty thousand dollars, and the proposed levy 10 on them would be full security for that amount; and the said Benjamin Parkhurst further added that he did not expect that, if the judgment were entered for twenty thousand dollars, he should ever call for or need advances and credit to half that amount. But, notwithstanding the said Parkhurst's solicitations and averments, the said Dewitt C. Clapp refused to take said judgment for the sum of twenty thousand dollars, and the said Parkhurst thereupon proposed that it should be for fifteen thousand dollars, but the said Dewitt C. Clapp peremptorily refused to have anything to 20 do with the matter if the said Parkhurst should insist on making the judgment over ten thousand dollars, and stated to said Parkhurst that he saw no propriety in these defendants binding themselves to advance him money and give him credit to an amount which would exceed, in connection with the amount of his then indebtedness to these defendants, the sum of ten thousand dollars; seeing that, from said Parkhurst's own statement to said Dewitt C. Clapp, he would not need a sum of money advanced to him, to answer his exigency, to exceed six or seven thousand dollars, which 30 amount these defendants were willing to advance to him, provided they could be made secure in so doing. And it was thereupon accordingly agreed by and between said Dewitt C. Clapp, in behalf of these defendants, and the said Benjamin Parkhurst, that these defendants should and would advance to him money and goods, from time to time, as he should desire the same, to the amount of the difference between ten thousand dollars and the then indebtedness of said Parkhurst to these defendants, which indebtedness then amounted to the sum of three thousand and sixty-two 40

dollars and ninety-five cents; and that in consideration thereof said Parkhurst should and would confess to these defendants, as for said advances, a judgment for said sum of ten thousand dollars, and that execution should be forthwith issued on said judgment, and levied on the stock in trade of said Parkhurst, which method of advance was the same which was originally proposed by said Parkhurst to these defendants, at the time when he first proposed, as aforesaid, to confess said judgment to these defendants.

10 And in order to carry out said designs, the said Dewitt C. Clapp proposed to give to said Parkhurst the check of these defendants, for said residue; but in consideration that the money for said check could not be drawn that day, it being then after banking hours, and the said check being proposed to be given on the bank in the city of New York in which these defendants kept their bank account, and said conference taking place at the city of Newark aforesaid, so that it was impracticable then to pay said residue in cash, if it had been desired; and the said Parkhurst having origi-

20 nally proposed to said Dewitt C. Clapp that, seeing that he, the said Parkhurst, would only want said residue in such sums of money, or amount of goods, as from time to time he should need in his business, the said Dewitt C. Clapp should give to him the note of these defendants, payable on demand, for the sum so agreed to be advanced; the said Dewitt C. Clapp then acceded to said proposition, and accordingly gave to said Parkhurst said note for the amount of said residue, six thousand nine hundred and forty-seven dollars and six cents, and the said judgment was accordingly

30 entered up for said sum of ten thousand dollars.

And these defendants further answering say, that it is not true, and they therefore explicitly deny, that said note was made and delivered as a mere sham or matter of form, or as a fraudulent device in any respect; but on the contrary thereof, these defendants say, that said note was given said Parkhurst as a security to him for the making of said advances, and the giving of said credit for goods, as aforesaid, and was so understood between said Dewitt C. Clapp and said Benjamin Parkhurst; and it was at the giving of said

note expressly agreed between said Clapp and said Parkhurst that the advances which should be made, and the credit for goods which should be given, should, as the same were made and given respectively, be endorsed on said note as credit thereon.

And these defendants further answering say, that it is untrue that there was any agreement or understanding whatever between these defendants, or either of them, and said Benjamin Parkhurst, that said note was made, or to be deemed or regarded as a mere matter of form to enable 10 these defendants, or one of them, to make the affidavit required by law on confession of judgment, or that it was to have no validity or vitality as a claim against these defendants, or that the same should not go into the hands of said Parkhurst at all, or be left in the hands of the attorney employed to confess that judgment, or that the same was forthwith to be given up to these defendants, upon the order of said Parkhurst, or that the same was forthwith, or soon after the confession of said judgment, given up to these defendants, pursuant to any such understanding or agreement, 20 nor have these defendants ever so given out or alleged in any way, but on the contrary thereof these defendants say, that said note was given to said Parkhurst by said Dewitt C. Clapp, in behalf of these defendants, as and for a valid security, as aforesaid, and was so understood by and between Clapp and said Parkhurst, that the same was indeed made for the purpose of enabling said Parkhurst to confess said judgment, as security in part for said advances and credits, agreed to be given by these defendants to him, as aforesaid, as said Parkhurst was anxious to do, but it was 30 understood and agreed that the same should be and stand as security, as aforesaid, for said advances and credits to the amount thereof.

And these defendants further answering say, that the said note did in fact accordingly, absolutely, and by a full and unconditional delivery at the time of executing the warrant of attorney and papers upon and by virtue of which the said judgment was confessed, go into the hands of said Parkhurst, and was retained by him until the next day after the

same was given, when it was suggested to him by the attorney employed in the confession of the judgment that, for the security of all parties, it would be as well to leave the same in the hands of him, the said attorney, until the said judgment should have been entered, if said Parkhurst had no objection to so doing, and that immediately on the entering of said judgment said Parkhurst could get said note from said attorney; to which suggestion said Parkhurst assented at once, and left the said note in the hands of said attorney  
10 accordingly, but without any agreement for that purpose having been previously made.

And said Parkhurst was at liberty, if he had seen fit so to do, to have retained in his own possession, or to have disposed of said note, or to deliver the same to said attorney on said suggestion as he did, and to have obtained said note from said attorney at any time after said judgment was actually entered; but said Parkhurst never called for the same, and the same remained in the hands of said attorney for him until the *tenth day* of November, eighteen hundred  
20 and fifty-three, when the said Dewitt C. Clapp stated to said Parkhurst that the amount of money which had been advanced and the bills of goods which had been sold, and delivered to said Parkhurst by the defendants on account of said note and judgment, should be endorsed on said note, or said note delivered up to these defendants, and one given by them to said Parkhurst instead thereof, for exactly the amount then remaining due and unpaid thereon; the said Parkhurst then said that that note was so nearly paid off that he had no objection to its being given up to these defendants entire-  
30 ly, and he would draw said balance thereof as he might need the same; and said Parkhurst then accordingly gave to these defendants an order on said attorney for said note, and the same was delivered by said attorney to this defendant Edward E. Bowen, pursuant to said order, on the next day thereafter.

And these defendants further say, that at the time of the giving up of said note by said attorney, these defendants had advanced to said Parkhurst in cash thereon the sum of five thousand eight hundred and sixty-five dollars and seventy-

two cents, (of which two hundred dollars had been repaid to to them by said Parkhurst,) since the making thereof, and had sold and delivered to him goods, wares and merchandise thereon to the amount of two hundred and thirteen dollars and seventy-five cents, since the making of said note, which moneys were advanced, and said goods, wares and merchandise sold and delivered solely on the strength of said judgment, and in the confidence that the same was a valid security therefor; and afterwards, and on the fourteenth day of said month of November, A. D. eighteen hundred and fifty-three, 10 these defendants advanced to the said Parkhurst at his request on said judgment the further sum of three hundred dollars in cash.

And these defendants further answering say, that the amount of money due to them at this time, on their said judgment for the indebtedness of said Parkhurst to them, at the time of confessing said judgment, and advances of money made by them to him since the confession of said judgment, and goods, wares and merchandise sold and delivered by them to him since the confession of said judgment, and on the strength 20 thereof, and before the fifteenth day of November, A. D. eighteen hundred and fifty-three, is nine thousand two hundred and forty-two dollars and forty-two cents.

And these defendants further say, that they have at all times since the confession of said judgment been ready and willing to advance to said Parkhurst money, or to sell him goods, or both, up to the full amount of said residue for which said note was given; and they have since then always made to said Parkhurst such advances of money, and such sales and delivery of goods, on account of said judgment as 30 he has asked from them.

And these defendants further answering say, that they have never, and each answering for himself says, he has never given out or alleged that their said promissory note given as aforesaid to said Benjamin Parkhurst was made and delivered as a mere matter of form, for the purpose of enabling them, or one of them, to make affidavits requisite to be made in confessing said judgment, or that it was understood or

agreed that, forthwith after the confession of said judgment to them, the said note was to be given up to them; or that said judgment, as to so much of the amount thereof as exceeded the sum of money which at the time of the confession was actually due and owing to them from said Benjamin Parkhurst, was intended as a security to them for money which they, in consideration of the confession of said judgment, or any part of the amount of the same, agreed to and with said Benjamin Parkhurst to pay and advance to him, to  
10 the extent of such excess, to and assist him in meeting his payments and liabilities as they should fall due, and thus enable him, by promptly paying his business paper, to keep on with said business, and pay all his other creditors, or to the like or similar effect.

And these defendants further answering say, that there was no agreement or understanding had or made with said Benjamin Parkhurst by them, or either of them, or any person in their behalf, on or before the confession of that judgment, that these defendants were to make the advances of  
20 goods and money by them agreed to be made to him, as aforesaid, for the purpose of enabling said Parkhurst to keep on with his business, and pay all his other creditors, and that said judgment was confessed on no such consideration whatever; but the said advances were agreed to be made by these defendants, in consideration of the confessing said judgment to these defendants as security therefor, as these defendants confidently believed it would be, and in consideration of the securing by that judgment the said claim, which these defendants then had against said Park-  
30 hurst, as aforesaid, and then due and owing from him to them. And although said Benjamin Parkhurst stated to this defendant, Dewitt C. Clapp, that he wished to use said advances, when made, in his business, and that he was abundantly solvent, yet said judgment was not confessed to, or taken by these defendants with, or on any agreement or understanding whatever with any person, that these defendants were by said advances, or otherwise, to enable said Parkhurst to meet his payments and liabilities, as they should fall due, and thus enable him, by promptly paying

his business paper, to keep on with his business and pay all his other creditors, or any similar or like understanding; or that by means of this judgment, and by the advances to be made to said Parkhurst by these defendants, said Parkhurst was to be enabled to meet his payments and liabilities, as the same became due, and promptly pay his business paper, and so keep on with his business and pay his other creditors, otherwise than as said Parkhurst stated, as aforesaid, to said Dewitt C. Clapp, on the confession of said judgment; and when the matter was first mentioned to him by said 10 Parkhurst, that he wanted to use said advances in his business, and to take up some of his paper, which was soon to fall due, said Parkhurst at the same time stating that he did not know that he should want half of the amount of said excess of the amount of said judgment over the amount then due to these defendants from him, advanced to him, but still he might want it all, and wanted to be enabled to get it if he should desire it.

And these defendants further answering say, that they never agreed, and said Dewitt C. Clapp says he never 20 agreed with said Benjamin Parkhurst, to render said Parkhurst any assistance in his business over and above the advances of said excess, nor did any such understanding exist, nor was it agreed or understood that these defendants were in any way, except as said advance of said excess might enable him to do so, if he should apply the same thereto, to assist him in paying off his creditors, or that these defendants were not to be at liberty, whenever they should see fit so to do, to enforce the payment of said judgment.

And these defendants further answering say, that said 30 judgment was confessed on the sole and simple understanding and agreement, that these defendants should advance said excess in goods and money as said Parkhurst should call for the same, and that these defendants should have said judgment and the levy or levies to be made thereunder, for security for the repayment of the same, and the payment of the money which at the time of confessing said judgment was due to them from him, as aforesaid.

And these defendants further answering say, that it may be true that, at the time of the confessing of their said judgment, said Benjamin Parkhurst was abundantly able to pay all his debts, if he could keep on with his business and apply the proceeds of said stock of goods and effects, without sacrifice of the same, and the profits of his business, to the payment of his debts, as in said bill is alleged; these defendants having no knowledge thereof, cannot say how the fact may have been; but they do say, that they do not believe  
 10 that that was the case, inasmuch as the said Parkhurst, after he had received from these defendants advances under and on account of their said judgment, to about six thousand dollars over and above the amount of the indebtedness due from him to them at the time of the confessing said judgment as aforesaid, and no effort had been made on the part of, or by these defendants, to compel immediate or speedy, or any payment of the money due them on their judgment, nor any intimation made by these defendants, or any of them, of any such intention, confessed, as is alleged,  
 20 in said bill, and as these defendants have heard, judgment to said Wellington Clapp, William Kent and Samuel M. Beckley, as in said bill stated, and judgment as in said bill alleged, to said George P. Lord and Samuel N. Brown, and soon afterwards to others of his creditors for considerable amounts of money; and the said Parkhurst stated to this defendant, Dewitt C. Clapp, on the fifth day of December, eighteen hundred and fifty-three, that his liabilities amounted to about twenty thousand dollars, and that he should have been compelled to have stopped business and gone before his credit-  
 30 ors, as he termed it, under any circumstances, as an examination of his affairs shows.

And these defendants further answering, say, that it is utterly untrue that they have violated, or refused, or neglected to fulfill any agreement by them, or either, or any of them, or by any person or persons in their behalf, made with said Parkhurst, on or before the confession of said judgment; but on the contrary thereof, these defendants have, ever since the confession of said judgment, been ready to carry out the only agreement made between them and

said Parkhurst, on or in regard to the confession of said judgment, viz: the advancing of said excess, which they have advanced as far as and as promptly as the same has been called for by said Parkhurst; and they further say that they did not, nor did any of them hold out to said Parkhurst any moving cause or inducement to confess said judgment to them, but the proposition to confess the same first came from said Parkhurst, as and in the manner herein before mentioned.

And these defendants further answering, say, that judging from the amount of the judgments which said Parkhurst is said to have confessed to said complainants and others, and his other liabilities, of which they have heard as well from him as otherwise, they cannot believe it to be true that the advancing by them of so much of said excess as still remains unadvanced, being less than eight hundred dollars, would have materially enabled said Parkhurst in meeting his payments and liabilities as they became due, or would have enabled him promptly to pay his business paper, to keep on with his business, and to pay all his other creditors; but whether it would have done so or not, these defendants have always, since the confession of said judgment, been ready to advance the full amount of said excess, and have promptly advanced the same as the said Parkhurst has called therefor. 10 20

And these defendants further answering, say, that they cannot say whether said Benjamin Parkhurst is or is not unable to pay promptly his business paper, and in particular his indebtedness, if any exist, to said complainants, notwithstanding the confession of said judgment to these defendants; these defendants having no such knowledge of said Parkhurst's affairs as to enable or warrant them in speaking as to his ability promptly to pay his paper as it matures, or his indebtedness, if any exist, to said complainants. But these defendants further say, that they have paid to him since the confession of said judgment to them, and on account of said note and said judgment, six thousand one hundred and seventy-nine dollars and forty-seven cents, 30

in goods and cash, which, to say the least, cannot have lessened his ability to pay his debts promptly as they matured.

And these defendants further answering, say, that they have never threatened, or intended forthwith to enforce their said judgment, and to sell his goods and chattels levied on under and by virtue thereof. These defendants having never made any threats in the premises, and having never had any fixed intention as to proceeding upon their said judgment, except to proceed thereon whenever it should  
10 appear requisite to their interest so to do.

And these defendants further answering, say, it is untrue that their said judgment was intended or understood to be intended merely to be confessed, in case of default by said Benjamin Parkhurst in the payment, upon reasonable notice and within a reasonable time, of the money intended to be secured thereby; there having been no agreement or understanding whatever, by or in behalf of these defendants, or any of them, and said Benjamin Parkhurst, in regard to the manner or time of enforcing said judgment.

20 And these defendants further answering, say, that it is true that they have advanced a large sum of money, in pursuance of their said agreement, as to advances made at the time of confessing said judgment, and they have so given out and alleged, and now do aver that among said moneys is the sum of four thousand nine hundred and sixty-five dollars and seventy-two cents, which was on the tenth day of November, in the year of our Lord one thousand eight hundred and fifty-three, advanced by these defendants to said Benjamin Parkhurst, at his request, in cash, to enable him,  
30 by paying the same to Cyrus L. Carter, Henry E. Quinan, and Richard A. Deforest, in said bill mentioned, to prevent said Carter, Quinan & Deforest from selling out his stock of goods to pay the same, the said amount being the amount then due and owing to said Carter, Quinan & Deforest, from said Benjamin Parkhurst, on a judgment entered against him, in their favor, in the Supreme Court of New Jersey, on or about the fifteenth day of August, in the year

of our Lord one thousand eight hundred and fifty-three, for ten thousand dollars or thereabout, of debt, and four dollars or thereabout, of costs of suit; on which judgment a writ or writs of execution for the real debt, five thousand dollars due on said judgment, besides costs, has been issued therefor, and on or about the sixteenth day of August, A. D. eighteen hundred and fifty-three, and delivered to said Sheriff, and a levy or levies by virtue thereof made on said Benjamin Parkhurst's said stock of goods and fixtures, on the said sixteenth day of August, under and by virtue of which 10 levy said Sheriff still holds said stock and fixtures, which judgment the said Carter, Quinan & Deforest insisted, as said Parkhurst stated to this defendant, Dewitt C. Clapp, on or about the eighth or ninth day of November, eighteen hundred and fifty-three, on having immediately arranged, either by the giving by him to them of satisfactory security for the payment of the amount due thereon, at sixty days or thereabouts, or by the payment of the cash therefor; and the said Parkhurst thereupon requested the said Dewitt C. Clapp, to enable him to arrange said judgment with said 20 Carter, Quinan & Deforest, by giving him the endorsement of these defendants on his paper at sixty days, or thereabouts, for the amount of that judgment, or by the advancing by these defendants of the cash for the amount due on that judgment, whichever these defendants should prefer to do; and he, said Parkhurst, stating to said Dewitt C. Clapp, in making said request, that these defendants would be secured by their said judgment against loss in so doing; and these defendants accordingly delivered to said Parkhurst, on the tenth day of November, eighteen hundred and fifty- 30 three, their check for four thousand nine hundred and sixty-five dollars and seventy-two cents, the amount then due on said judgment of Carter, Quinan & Deforest, and the same was by him delivered to said Carter, Quinan & Deforest, who received the money therefor.

And these defendants are advised by their counsel, and respectfully submit and insist, that if this honorable court should be of the opinion that these defendants are not entitled to recover under their said judgment the amount of

said money so paid by them to said Parkhurst, for said Carter, Quinan & Deforest, as aforesaid, because the same was an advance, made after the entry of the said judgment in favor of these defendants, then these defendants are in equity, under the circumstances of the case, entitled to be subrogated to the rights which said Carter, Quinan & Deforest had under said judgment in their favor, at the time of said advance by these defendants of the amount due thereon, and are entitled to have the amount of the said advance reimbursed to  
 10 them by the sale of the said stock of goods, under said levy or levies under said judgment of said Carter, Quinan & Deforest.

And these defendants further answering say, that they do not believe it to be true, and therefore deny that the said indebtedness of said Parkhurst to said Carter, Quinan & Deforest, or any part thereof, had long periods of time to run to maturity, or before said Parkhurst could have been lawfully called on to pay the same, or that the same was paid as aforesaid by these defendants before the same, or any part  
 20 thereof, had become due and payable, but on the contrary thereof these defendants had no knowledge or information but that the same was due and owing at the time of said advancement by them, to said Parkhurst, of said money due thereon, as aforesaid, but they fully supposed that the same was then so due and payable, the said claim being in the form of a judgment; but whether the same was so due or not, in fact these defendants cannot say further than they have done; and they further say, that they made no inquiry in regard thereto at the time of the advancing of said money to said Parkhurst for  
 30 that judgment not adverting thereto, nor conceiving themselves called on to make inquiry in regard thereto, they being willing to advance to said Parkhurst the money for said judgment of said Carter, Quinan & Deforest, as aforesaid, on the strength of their own judgment aforesaid, and the same was advanced accordingly as aforesaid.

And these defendants are advised by their counsel, and respectfully submit and insist, that they are entitled to be repaid the said last named advance, and to have their said judgment enforced forthwith for the whole amount of nine  
 40 thousand two hundred and forty-two dollars and forty-two

cents—the amount justly, truly, and honestly due on the same to these defendants for their said original debt, and for said advances, made as aforesaid since the confession of said judgment to them, which is all (with interest and costs,) which these defendants claim under their said judgment.

And these defendants further answering say, that they deny that they ever held out to said Parkhurst their willingness to make advances, or stipulated or agreed therefor, as an inducement, or motive, or consideration for the confession of their said judgment in any way except in the manner above stated. And these defendants further answering say, that their said judgment was confessed on a note for ten thousand dollars, given by said Parkhurst to them at the time of confessing said judgment to them. 10

And these defendants further answering say, that they have no knowledge, save from said bill, as to the stipulations therein mentioned, and alleged to have been made with said Parkhurst by said complainants, on taking their alleged judgments against him, nor as to the debts, if any exist, of said complainants, or any of them, due from said Parkhurst, or as to the nature or character thereof. But these defendants insist, that if said allegations of said complainants in said bill contained, in reference thereto, be true, then that said judgments of said complainants are contrary to, and in violation of the Act of the Legislature of the State of New Jersey, entitled, “An act to secure to Creditors an equal and just division of the estates of Debtors, who convey to assignees for the benefit of Creditors,” and are fraudulent and void. 20

And these defendants pray that they may have the same advantage of this objection as if they had demurred to said bill on account thereof. 30

And these defendants deny all, and all manner of fraud, combination, confederacy, and conspiracy in said bill charged; without that, that any other matter or thing in said bill contained, and material for these defendants to make answer

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

THEODORE RUNYON,

*Solr. for and of Counsel with the Defendants.*

10 NEW JERSEY, }  
Hudson County, } ss.

Henry G. Ely, Dewitt C. Clapp, and Edward E. Bowen, the defendants in the foregoing answer named, being severally duly sworn according to law, on their respective oaths do respectively say, that the facts, matters, and things in said answer mentioned and set forth, so far as the same relate to the acts and deeds of these deponents, are true; and that so far as the same relate to the acts and deeds of any other person or persons, they verily believe the same  
20 to be true.

Sworn and subscribed before me, }  
at Jersey City, Dec. 15th, 1853. }  
J. D. MILLER, *Mast. in Chan.* }

HENRY G. ELY,  
D. W. C. CLAPP,  
E. E. BOWEN.

## SUPREME COURT.

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Ely, Clapp & Bowen,  
vs.  
Benjamin Parkhurst.

Argued before Justices ELMER and HAINES. *Parker and Frelinghuysen* for the junior creditors. *Runyon and Bradley* for the plaintiffs.

ELMER, J.—A judgment having been entered up in this Court in the above case, on the fourth day of November, 1853, for the sum of ten thousand dollars, by virtue of a 10 warrant of attorney, an execution was issued and put into the hands of the Sheriff of Essex. Other creditors shortly afterwards entered judgments and issued executions against the defendant, which were levied by the Sheriff on the same goods. The goods having been sold, produced the sum of \$7,951.10; and a rule was obtained on behalf of the junior creditors, that the plaintiffs show cause why the money thus raised, and paid into court, should not be appropriated to their executions, and the judgment and execution of plaintiffs declared to be null and void. Affidavits having been 20 taken, it is now moved to make the rule absolute. The reasons assigned are, that said judgment was not justly or honestly due or owing to the plaintiffs; that no affidavit of the true consideration of the note for which the judgment was conferred was made, and that the affidavit actually made by one of the plaintiffs did not express the true consideration of the note, but, on the contrary, expressed a different consideration from which was actually and in truth the consideration thereof.

The affidavit made at the time the judgment was signed is correct in form, and sets forth that the true consideration of the note was goods sold and delivered, and money lent. It appears by the testimony taken and now produced, that the defendant, being indebted to the plaintiffs in the sum of \$3,052,94, partly for goods sold and partly for money lent, agreed to give them his note for ten thousand dollars and a warrant of attorney to confess judgment for that sum, and that plaintiffs' note was given for the sum of \$6,947,06, with  
 10 the understanding that they should subsequently advance to him goods and cash to that amount, as he should require; after the entering of the judgment, and before the other creditors obtained their judgments, the plaintiffs did advance and pay to the defendant, or to his use, in cash and goods, a sum which, added to the original indebtedness, made the sum due to them amount to \$9,242,42, and their note having been surrendered to them, they only claim to collect this sum on their execution. It further appears that the original indebtedness was in part for a note of one thousand dollars, given  
 20 by defendant to the plaintiffs, when, at a prior time, they, with other creditors, compounded with him, and agreed to take fifty per cent. of their respective claims, it being alleged that plaintiffs exacted this note of him, in addition to receiving their fifty per cent., without which they would not enter into the arrangement. This note it was insisted was given in fraud of the other creditors, and did not form a bona fide debt which could be legally included in the judgment.

Much testimony is contained in the affidavits produced, in regard to the circumstances attending the giving of the notes  
 30 and the warrant of attorney. The facts as above stated, however, clearly appear, and do not seem to be controverted; as between the parties before the court, it is altogether unimportant what were the inducements for the arrangements actually made between the plaintiffs and the defendant, or whether the one party or the other was in the wrong, unless there was actual or legal fraud by which other creditors were injured.

There can be no doubt that the affidavit made by one of the plaintiffs fails to set forth the true consideration of the

note for which the judgment was confessed. A large part of that consideration was neither goods sold and delivered nor money lent, but the plaintiffs' note to defendant, agreed to be paid by a subsequent advance of cash or goods. It is now insisted that, according to the true construction of the statute requiring an affidavit in all cases of confessed judgment, (R. S. 946, sec. 5,) no judgment can be confessed for a debt which was not actually due, or, as counsel expressed it, for which there was not a cause of action, when the instrument for which the judgment is confessed was executed. 10 This assumes that the object of the statute was to alter the common law in regard to the nature and validity of judgments, which I see no reason to believe. The object intended, as remarked by Chief Justice Ewing in *Scudder vs. Scudder*, 5 Hal. 346, and repeated by Chief Justice Hornblower in *Hoyt vs. Hoyt*, 1 Har. 138, was to secure fairness, honesty, and good faith in the transaction, and not to prevent entering judgments by confession for a liability, or by way of security or for any other fair and honest object. The validity and effect of the judgment is left to stand precisely as it 20 did without an affidavit. By the common law a judgment may be confessed as a voluntary gift, which is good as against the party, although it may be constructively fraudulent as against creditors. A mortgage is good to secure future advances, 7 *Cranch*, 34; and so is a judgment, *Brinckerhoof vs. Martin*, 5 John C. R. 326; the limitation being, as Chancellor Kent remarks, that when a subsequent judgment or mortgage intervenes, further advances after that could not be covered, *Morrell vs. Smith*, 5 Cow. 441; *Averill vs. Louck*, 6 Barl. S. C. R. 21; *Truscott vs. Ring*, I. O. 346; *Terhoren* 30 *vs. Kerry*, 2 Barr, 96; *Davis vs. Charles*, 8 Barr, 82.

It was earnestly insisted on the argument, that the plaintiff cannot swear "that the debt or demand for which the judgment is confessed is justly and honestly due and owing to him," unless he had at the time the note, bond or other instrument for which the judgment is confessed, was made to him an existing debt, if not due at least absolutely to become due. But why not? If the maker of the instrument chooses thereby to contract for the first time such a debt to him, can he not swear that the amount therein agreed to be

paid is justly and honestly due, provided the intention was to contract a real debt for a just and honest purpose? Such a debt is as truly, justly, and honestly due as any other. So if the instrument is given in consideration of a liability to which the payee is exposed, or of an agreement on his part to make future advances, if the sum contained in the instrument is agreed to be paid; at all events, there is a debt thus incurred which is justly and honestly due. If it turns out that the plaintiff in such a judgment does not meet the liability, or make the advance, the transaction is not necessarily fraudulent, although the defendant or his other creditors may be entitled to equitable relief.

The creditor is not required to swear that, at the time of making the instrument, he had a just demand against the maker to the amount therein inserted, nor anything to that effect, but that the debt thus contracted, and for which the judgment is conferred, is justly and honestly due and owing. The previous part of the oath requires him to set forth the true consideration of the instrument. There is a material difference between these two things, which shows that by the debt itself something different is meant from the consideration of the instrument, by means of which the debt was contracted. The first Act requiring an affidavit, passed in 1817, (*Pam.* 16) required "the true cause of action" to be stated. In the case of *Borroughs v. Condit*, 1 *Hal.* 300, it was held that an affidavit, stating that the true cause of action was the bond for which the judgment was conferred, was a sufficient compliance with that Act. The consideration of a note, bond, or other instrument, as said by Chief Justice Ewing, in the case of *Latham v. Lawrence*, 6 *Hal.* 325, is the price or motive of the contract. Whatever that price or motive for giving the instrument must be stated on oath, and of course if it be wilfully stated falsely, the party making the oath is guilty of perjury. The object of the oath obviously is, as held by Chief Justice Hornblower, in *Evans v. Adams*, 3 *Green*, 375, to prevent the signing of fraudulent judgments, by an appeal to the conscience of the plaintiff as to the fairness of the transaction. Being required to set forth the consideration for making the instrument, he thus

furnishes the means for detecting a fraud, if there is one. If there was no pre-existing debt, and the obligation is purely voluntary, other creditors will have their remedy. If the liability of the plaintiff is not such, or the advances agreed upon are not made, those creditors are furnished with the means of protecting their interests, as the case may require. If no other creditors are injuriously affected, no one has a right to complain. I am entirely satisfied that there is nothing required in the affidavit, which prevents a judgment from being entered by confession, to secure a liability or future advances. A different construction of the statute is not warranted by its terms, and in my opinion would tend rather to impair than to secure the rights of creditors. If the money is actually lent and advanced at the time, it is clear that the judgment may be confessed; but how will requiring this help other creditors? Such money may be put into the debtor's pocket, and is much more likely to be misapplied than advances made as his business requires. It is for the benefit of all parties that the right of making contracts and of securing their fulfillment, should remain without other restriction than that they be made fairly and for a just and honest purpose. 10 20

Since the cases of *Hoyt v. Hoyt*, and of *Evans v. Adams*, it must be considered as settled, that a judgment signed by virtue of a warrant of attorney will not be set aside upon the application of a subsequent judgment creditor, for a defect in the affidavit. These decisions were deliberately made, and have been long acted upon, and even if I thought them originally questionable, I should not feel at liberty to disturb them. Although, in common with other members of the bar, I had somewhat doubted their correctness, a more careful examination has satisfied me that they are founded on correct principles. The Court will undoubtedly exercise an equitable power over such judgment, to prevent fraud. This will be best accomplished by allowing subsequent creditors, who have levied executions upon the same property, to invoke the aid of the Court, as has been done in this case, to ascertain whether there is fraud in fact, and if there is, to give their debts the preference. 30

But it is urged for the junior creditors, now before the Court, that inasmuch as the plaintiffs' affidavit is shown to be false, that of itself affords a sufficient reason for postponing the first judgment and execution, and giving the preference to those that are younger, which are unimpeached. If there was reason to believe that the incorrectness of the affidavit was wilful, I should be strongly disposed to regard that fact as conclusive evidence of fraud. But it satisfactorily appears that the affidavit was drawn as it stands, by  
 10 the advice of the attorney, who appears to have misapprehended the opinion of Justice Ryerson, in the case of *Hoyt v. Hoyt*; admitting what he says to be correct, this case differs from that. Even in that case, however, I think the affidavit, instead of setting forth that the true consideration of the note was money lent, should have stated, as the fact was, that the true consideration was plaintiffs' note to the defendant, advanced and used for the purpose of paying for property purchased by the latter. The other Judges did not put their opinions upon the ground that the affidavit was  
 20 strictly correct, but upon the ground that its incorrectness did not authorize the Court of Common Pleas to set aside the judgment.

There seems in this case no reason to doubt that the plaintiffs did advance what they claim, before the other judgments were signed. The claim of the plaintiffs is thus shown to be perfectly just and honest, so that the presumption of fraud, which would arise from the fact that the true consideration of the note is not set forth in the affidavit, is entirely removed. Such a presumption necessarily arises in  
 30 every case where there is an attempt to conceal a full disclosure of the true consideration, and perhaps, also, when there is a substantial defect in the affidavit, and I think the Court is bound to discountenance everything like evasion or unfairness.

What will be the consequence if there is no affidavit, this case does not call upon us to decide. The Court of Errors recently held in the case of *Derr v. Gaston & Mason*, (June T., 1854,) that a judgment by confession without an affida-

vit is not absolutely void, so that it cannot be given in evidence to support a Sheriff's sale under it. Chief Justice Kirkpatrick held in the case of *Oliver v. Applegate*, 2 South. 481, and I incline to think correctly, that such a judgment, although not absolutely avoid, is fraudulent and void against creditors. Chancellor Williamson, before whom it appears that this case had been by \_\_\_\_\_ of a Bill filed by the junior creditors, whose opinion has been furnished to me, and is certainly entitled to great respect, seems to have held that the absence of an affidavit would not of itself have ren- 10  
dered the judgment fraudulent, at any rate, so as to authorized him to declare it void on that ground, that being a question more proper for the Court in which the judgment was entered.

As to the objection that a note of one thousand dollars was included in plaintiffs' judgment, which was given at the time in fraud of other creditors, two sufficient answers have been made to it. First, the sum actually collected upon the execution is not large enough to cover the amount due, after excluding that note. Secondly, admitting that the plain- 20  
tiffs could not have recovered that note of the defendant, it does not follow that he might not pay it, or secure its payment, if he thought proper. The creditors now before the Court have no right to object; a usurious note could not have been collected at law, but it has never been held a fraud upon creditors to pay or secure such a note. The rule to show cause must be discharged, with costs.

HAINES, J., concurred.

