INDEX

NOTICE OF APPEAL.

Filed: January 2, 1930.

In Chancery of New Jersey

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Between JOHN A. VAN GENDEREN, *Complainant,* *and* ARROW BUS LINES, INC., otherwise known as Arrow Bus Lines of Passaic County, and PUBLIC SERVICE COORDINATED TRANSPORT, a body corporate, and PUBLIC SERVICE INTERSTATE TRANSPORTATION COMPANY, a body corporate, *Defendants.*	*On Bill, etc.* *Notice of Appeal.*

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The defendants, Public Service Coordinated Transport and Public Service Interstate Transportation Company, appeal from the order and decree denying the motion of said defendants to strike out the bill of complaint in the above-entitled cause made by the Chancellor on the advice of Vice-Chancellor Church on the 20th day of December, 1929, as of the 10th day of December, 1929, and from the whole and every part thereof, to the Court of Errors and Appeals in the last resort in all causes.

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Dated December 27, 1929.

FRANK BERGEN,
Solicitor for Defendants.

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Notice of Appeal.

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

WILLIAM H. SPEER,
Of Counsel with Defendants.

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PETITION OF APPEAL.

Filed: January 7, 1930.

New Jersey Court of Errors and Appeals

JOHN A. VAN GENDEREN, *Respondent,* *vs.* ARROW BUS LINES, INC., otherwise known as Arrow Bus Lines of Passaic County, and PUBLIC SERVICE COORDINATED TRANSPORT, a body corporate, and PUBLIC SERVICE INTERSTATE TRANSPORTATION COMPANY, a body corporate, *Appellants,*	*On Appeal from Chancery.* *Petition of Appeal.*

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To the Honorable, the Court of Errors and Appeals in the last resort in all causes:

The petition of Public Service Coordinated Transport and Public Service Interstate Transportation Company, appellants in the above-stated cause, respectfully shows that:

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Your petitioners, and each of them, find themselves aggrieved by an order and decree made in the Court of Chancery by his Honor, Edwin Robert Walker, Chancellor of the State of New Jersey, bearing date the 20th day of December, 1929, as of the 10th day of December, 1929, wherein John A. Van Genderen is complainant and Arrow Bus Lines, Inc., otherwise known as Arrow Bus Lines of Passaic County, and Public Service Coordinated Transport, a body corpo-

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rate, and Public Service Interstate Transportation Company, a body corporate, are defendants, in this respect, to wit:

That the said order and decree denies the motion of said defendants, Public Service Coordinated Transport and Public Service Interstate Transportation Company, to strike out the bill of complaint filed by the respondent in the Court of Chancery, and in that it orders these defendants to pay to the said respondent the costs of the motion to be taxed.

Your petitioners humbly appeal from the whole of said order and decree and the several parts thereof on the ground that the same is erroneous, illegal and contrary to equity, for the following reasons:

1. Because it discloses no cause of action, in that

(a) No ground for equitable relief was shown.

(b) The respondent has adequate remedy at law.

(c) Respondent did not allege that he had obtained a judgment at law, and did not show that he possessed any lien or legal claim against any goods or chattels which may have been sold to these defendants.

(d) Respondent did not establish his status as a creditor.

(e) No facts are alleged by respondent showing a violation of Chapter 208 of the Laws of 1915, known as the "Bulk Sales Act."

(f) Said Chapter 208 of the Laws of 1915 does not apply to property alleged to have

been sold by the Arrow Bus Lines, Inc., to these defendants.

(g) Said "Bulk Sales Act" is inapplicable to the alleged sale set forth in the bill of complaint.

(h) Said bill of complaint does not allege that these defendants were sold the whole or a large part of the goods and chattels of the defendant Arrow Bus Lines, Inc. 10

(i) No facts are alleged in the bill of complaint to justify a charge of fraud as against these defendants.

2. Said bill of complaint is multifarious in that respondent in the said bill has joined an action to set aside a sale with an action for a decree to have a judgment paid. 20

3. The Court of Chancery is without jurisdiction to hear this matter in that if the facts as alleged were true, and if the said "Bulk Sales Act" were applicable, said sale would be void and there would be no necessity for applying to the Court of Chancery to set the same aside.

Your petitioners therefore pray that the order and decree of the Court of Chancery may be reversed, set aside and for nothing holden. 30

And that your petitioners may have such other relief in the premises as to this Honorable Court shall seem meet.

FRANK BERGEN,
Solicitor for Petitioners and Appellants.

WILLIAM H. SPEER,
Of Counsel with Petitioners and Appellants.

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Service of a copy of the within petition of appeal is hereby acknowledged this 4th day of January, 1930.

ALEX. MOSKOWITZ,
Solicitor of Respondent.

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ANSWER TO PETITION OF APPEAL.

Filed January 17, 1930.

NEW JERSEY COURT OF ERRORS AND APPEALS.

JOHN A. VAN GENDEREN, *Respondent,* *vs.* ARROW BUS LINES, INC., otherwise known as Arrow Bus Lines of Passaic County, and PUBLIC SERVICE COORDINATED TRANSPORT, a body corporate, and PUBLIC SERVICE INTERSTATE TRANSPORTATION COMPANY, a body corporate, *Appellants.*	*On Appeal from Court of Chancery.* *Answer to Petition of Appeal.*

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The answer of John A. Van Genderen, abovenamed appellee, to the petition of appeal of the Public Service Coordinated Transport, a body corporate, and Public Service Interstate Transportation Company, a body corporate, the abovenamed appellants.

This appellee not admitting the truth of all or any of the matters of the said petition of appeal

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contained, for answer thereto, nevertheless admits that an order, was on December 20, 1929, made and entered in the Court of Chancery in New Jersey, in the above-entitled cause, for the purposes in said petition mentioned and as therein set forth; but as to the substance and form of said order, this appellee begs leave to refer thereto when the same shall be produced. 10

This appellee is advised and believes that the said order is agreeable to equity; and he prays that the same may be affirmed with costs to be taxed in favor of the appellee.

ALEX. MOSKOWITZ,
Solicitor for and of Counsel with Appellee.

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NOTICE OF ARGUMENT.

Filed April 1, 1930.

NEW JERSEY COURT OF ERRORS AND APPEALS.

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JOHN A. VAN GENDEREN, *Respondent,* *vs.* ARROW BUS LINES, INC., otherwise known as Arrow Bus Lines of Passaic County, and PUBLIC SERVICE COORDINATED TRANSPORT, a body corporate, and PUBLIC SERVICE INTERSTATE TRANSPORTATION COMPANY, a body corporate, *Appellants.*	*On Appeal from Chancery.* *Notice of Argument.* Sat below: ALONZO CHURCH, *Vice-Chancellor.*

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To Alex. Moskowitz, Esq., solicitor for John A. Van Genderen:

SIR:

PLEASE TAKE NOTICE, that the argument of the above-entitled appeal will be brought on at the next term of the New Jersey Court of Errors and Appeals, to be held on the third Tuesday of May, 1930, at 11 o'clock in the forenoon or as soon thereafter as counsel may be heard, at the State House, Trenton, N. J.

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Respectfully,

FRANK BERGEN,
Solicitor for Public Service Coordinated Transport and Public Service Interstate Transportation Company.

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Notice of Argument.

Service of a copy of the within notice of argument is hereby acknowledged this 28th day of March, 1930.

ALEX. MOSKOWITZ,
Solicitor of Respondent.

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BILL OF COMPLAINT.

Filed September 14, 1929.

IN CHANCERY OF NEW JERSEY.

To his Honor Edwin Robert Walker, Chancellor of the State of New Jersey:

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The complainant, John A. Van Genderen, residing in the City of Paterson, County of Passaic and State of New Jersey, respectfully shows:

1. On the 25th day of June, 1929, defendant Arrow Bus Lines, Inc., otherwise known as Arrow Bus Lines of Passaic County, was indebted to the complainant in the sum of $1,495.32 on a certain book-account which was then and there running in the name of Arrow Bus Lines, Inc.

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2. On or about the aforesaid date, the Public Service Coordinated Transport, a body corporate and Public Service Interstate Transportation Co. purchased and acquired numerous buses belonging to the Arrow Bus Lines, Inc., in violation of the provisions of the "Bulk Sales Act", Chapter 208 of Laws 1915.

3. The defendants or any one of them failed to give any notice whatsoever of the proposed sale to your complainant who at the time of the sale was a creditor, in violation of the aforesaid statute.

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4. Said conveyance was voluntary and without the sanction of the statutes in such case made and provided, and was fraudulent against the complainant as a creditor of the said Arrow Bus Lines, Inc.

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Complainant is without adequate remedy in the courts of law and therefore prays:

1. That Arrow Bus Lines, Inc., Public Service Coordinated Transport, a body corporate, and Public Service Interstate Transportation Co., a body corporate, who are the defendants to this suit, may answer this bill of complaint without oath and each statement herein made.

2. That the said defendants may make discovery of who is possessed of the numerous buses purchased by the Arrow Bus Lines, Inc.

3. That the said defendants, Public Service Coordinated Transport, a body corporate, and Public Service Interstate Transportation Co., a body corporate, may be decreed to pay to the complainant the full amount due and owing to him on any judgment recovered against the Arrow Bus Lines, Inc., or Public Service Coordinated Transport, a body corporate, and Public Service Interstate Transportation Co., a body corporate, together with interest and costs.

4. That the said fraudulent conveyance by the said defendant Arrow Bus Lines, Inc., to said Public Service Coordinated Transport, a body corporate, and Public Service Interstate Transportation Co., a body corporate, may be set aside and held to be fraudulent to and of no effect as against complainant's claims.

5. That a writ of subpoena may be issued commanding said defendants to answer this bill of complaint and to abide by such decree as this court may make in the premises.

ALEX. MOSKOWITZ,
Solicitor for and of Counsel with Complainant.

NOTICE OF MOTION TO STRIKE OUT BILL OF COMPLAINT.

Filed October 16, 1929.

IN CHANCERY OF NEW JERSEY.

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Between JOHN A. VAN GENDEREN, *Complainant,* *and* ARROW BUS LINES, INC., otherwise known as Arrow Bus Lines of Passaic County, and PUBLIC SERVICE COORDINATED TRANSPORT, a body corporate, and PUBLIC SERVICE INTERSTATE TRANSPORTATION COMPANY, a body corporate, *Defendants.*	*On Bill, etc.* *Notice of Motion to Strike Out Bill of Complaint.*

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To the complainant, John A. Van Genderen, or his solicitor:

TAKE NOTICE that on Tuesday, the 22nd day of October, A. D. 1929, at the hour of ten o'clock in the forenoon, or as soon thereafter as counsel can be heard, at the Chancery Chambers, #1060 Broad street in the City of Newark, New Jersey, I shall apply to the Chancellor for an order striking out the bill of complaint filed by you in the above-entitled cause, for the following reasons:

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Notice of Motion to Strike Out Bill of Complaint.

1. The said bill of complaint discloses no cause of action in that:

a. No ground for equitable relief is shown.

b. Complainant has an adequate remedy at law.

c. Complainant does not allege that he has obtained a judgment at law and does not show that he possesses any lien or legal claim against any goods and chattels which may have been sold to these defendants.

d. Complainant has not established his status as a creditor.

e. No facts are alleged by complainant showing a violation of Chapter 208 of the Laws of 1915, known as the "Bulk Sales Act."

f. Said Chapter 208 of the Laws of 1915 does not apply to property alleged to have been sold by the Arrow Bus Lines, Inc., to these defendants.

g. Said "Bulk Sales Act" is inapplicable to the alleged sale set forth in the bill of complaint.

h. Said bill of complaint does not allege that these defendants were sold the whole or a large part of the goods and chattels of the defendant Arrow Bus Lines, Inc.

i. No facts are alleged in the bill of complaint to justify a charge of fraud as against the defendants.

2. Said bill of complaint is multifarious in that complainant in the said bill has joined an action to set aside a sale with an action for a decree to have a judgment paid.

3. This Court is without jurisdiction to hear this matter in that if the facts as alleged were true, and if the said "Bulk Sales Act" were applicable, said sale would be void and there would be no necessity for applying to the Court of Chancery to set the same aside.

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Yours, etc.,

FRANK BERGEN,
Solicitor for Public Service Coordinated Transport and Public Service Interstate Transportation Company.

Service of a copy of the within notice is hereby acknowledged this 11th day of October, A. D. 1929.

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ALEX. MOSKOWITZ,
Solicitor of Complainant.

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ORDER DENYING MOTION TO STRIKE OUT.

Filed December 20, 1929
as of
December 10, 1929.

IN CHANCERY OF NEW JERSEY.

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Between JOHN A. VAN GENDEREN, *Complainant,* *and* ARROW BUS LINES, INC., otherwise known as Arrow Bus Lines of Passaic County, and PUBLIC SERVICE COORDINATED TRANSPORT, a body corporate, and PUBLIC SERVICE INTERSTATE TRANSPORTATION COMPANY, a body corporate, *Defendants.*	*On Bill, etc.* *Order Denying Motion to Strike Out.*

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A motion having been made by Frank Bergen, solicitor for Public Service Coordinated Transport and Public Service Interstate Transportation Company, to strike out the bill of complaint filed herein, on the ground that it discloses no cause of action, in that

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1. (a) No ground for equitable relief is shown.

(b) Complainant has an adequate remedy at law.

(c) Complainant does not allege that he has obtained a judgment at law and does

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not show that he possesses any lien or legal claim against any goods and chattels which may have been sold to these defendants.

(d) Complainant has not established his status as a creditor.

(e) No facts are alleged by complainant showing a violation of Chapter 208 of the Laws of 1915, known as the "Bulk Sales Act."

(f) Said Chapter 208 of the Laws of 1915 does not apply to property alleged to have been sold by the Arrow Bus Lines, Inc., to these defendants.

(g) Said "Bulk Sales Act" is inapplicable to the alleged sale set forth in the bill of complaint.

(h) Said bill of complaint does not allege that these defendants were sold the whole or a large part of the goods and chattels of the defendant Arrow Bus Lines, Inc.

(i) No facts are alleged in the bill of complaint to justify a charge of fraud as against the defendants.

2. Said bill of complaint is multifarious in that complainant in the said bill has joined an action to set aside a sale with an action for a decree to have a judgment paid.

3. The Court of Chancery is without jurisdiction to hear this matter in that if the facts as alleged were true, and if the said "Bulk Sales Act" were applicable, said sale would be void and there would be no necessity for applying to the Court of Chancery to set the same aside, and it appearing that due notice of such motion

has been given to the complainant, John A. Van Genderen, and the Court having heard the arguments of Frank Bergen, solicitor for said defendants, Public Service Coordinated Transport and Public Service Interstate Transportation Company, and of Alex. Moskowitz, solicitor for said defendant, John A. Van Genderen, and being of the opinion that the objections taken by the defendants are not well founded,

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It Is, on this 20th day of December, 1929, as of the tenth day of December, 1929, Ordered and Decreed that the aforesaid motion be and the same is hereby denied; and It Is Further Ordered that the said defendants pay to the complainant the costs of this motion to be taxed.

EDWIN R. WALKER,

C.

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Respectfully advised,

Alonzo Church,

V.-C.

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MEMORANDUM OF VICE-CHANCELLOR.

Filed April 2, 1930.

IN CHANCERY OF NEW JERSEY.

10 *Between*

JOHN A. VAN GENDEREN,
Complainant,

and

ARROW BUS LINES, INC., otherwise known as Arrow Bus Lines of Passaic County, and PUBLIC SERVICE COORDINATED TRANSPORT, a body
20 corporate, and PUBLIC SERVICE INTERSTATE TRANSPORTATION COMPANY, a body corporate,
Defendants.

Memorandum

(Not for Print.)

This memorandum is not to be published in the official or unofficial reports.

Mr. Alex. Moskowitz for complainant.
30 Mr. Frank Bergen for defendants.
Mr. William H. Speer for defendants.

CHURCH, *V.-C.*

This is an action instituted by complainant against Arrow Bus Lines, Inc., otherwise known as Arrow Bus Lines of Passaic County, and Public Service Coordinated Transport, a body corporate, and Public Service Interstate Transportation Company, a body corporate, to set
40 aside a sale made by the defendant Arrow Bus

Lines, Inc., to the defendant Public Service Coordinated Transport, in violation of the provisions of the "Bulk Sales Act," Chapter 208 of the Laws of 1915.

The complainant sets forth in his complaint that on or about June 25, 1929, the Arrow Bus Lines, Inc., otherwise known as Arrow Bus Lines of Passaic County, was indebted to the complainant in the sum of $1,495.42 on a certain book-account which was then and there running in the name of Arrow Bus Lines, Inc. The complainant also alleges that on or about June 25, 1929, Public Service Coordinated Transport and Public Service Interstate Transportation Company, purchased a line of buses running and belonging to the Arrow Bus Lines, Inc., without any notice whatsoever to the complainant, who was a creditor at the time of the said sale. The complainant further alleges that the said sale and conveyance of the vehicles in question were fraudulent as against the complainant.

An action was commenced in the Supreme Court of New Jersey within the ninety days provided under the "Bulk Sales Act" after the date of sale of the buses herein mentioned, and judgment was recovered against the Arrow Bus Lines, Inc., otherwise known as Arrow Bus Lines of Passaic County, in the sum of $1,527.45, together with costs amounting to the total sum of $1,586.07, upon which judgment execution was issued and returned unsatisfied on November 17, 1929, by the Sheriff of Passaic County.

The complainant in his bill prays that the Arrow Bus Lines, Inc., otherwise known as the Arrow Bus Lines of Passaic County, the Public Service Coordinated Transport, a body corporate, and Public Service Interstate Transporta-

tion Company, a body corporate, who are the defendants to the suit instituted in this court, may answer the bill filed therein, without oath and each statement therein contained; further that the said defendants may make discovery of who is possessed of numerous buses purchased from Arrow Bus Lines, Inc.; further that the defendants, Public Service Coordinated Transport, a body corporate, and Public Service Interstate Transportation Company, a body corporate, be decreed to pay to the complainant the full amount due and owing to the complainant, or that the said sale be set aside and declared null and void in this court and of no effect as against the complainant's claims.

The defendant, Arrow Bus Lines, Inc., has filed no answer to the bill of complaint. The defendants, Public Service Coordinated Transport and Public Service Interstate Transportation Company, have moved to strike out the bill of complaint on the ground that same does not allege a cause of action, that the "Bulk Sales Act" is inapplicable to the alleged sale set forth in the bill of complaint; together with various other objections to the bill of complaint as filed.

I am of the opinion that the violation of the "Bulk Sales Act," Chapter 208 of the Laws of 1915, is applicable to the facts set forth in the bill of complaint filed herein, in that all or a large part of the buses belonging to the Arrow Bus Lines, Inc., were sold outright, together with the franchises to the Public Service Coordinated Transport, without any notice whatsoever to the creditor. The "Bulk Sales Act" specifically provides that where a sale out of the ordinary course of business of all or a large part of the

seller's goods or chattels is made, notice must be given to the creditors. It is very obvious that a sale not in the ordinary business conducted by Arrow Bus Lines, Inc., namely transportation of passengers for hire, was made in this case and therefore in violation of the "Bulk Sales Act." I have advised a decree to this effect. 10

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Amended Bill of Complaint.

Filed Dec. 18, 1929.

In Chancery of New Jersey.

To his Honor EDWIN ROBERT WALKER,
Chancellor of the State of New Jersey:

The complainant, John A. Van Genderen, residing in the City of Paterson, County of Passaic and State of New Jersey, respectfully shows: 10

1. On the 25th day of June 1929, defendant Arrow Bus Lines, Inc. otherwise known as Arrow Bus Lines of Passaic County was indebted to the complainant in the sum of $1495.32 on a certain book-account which was then and there running in the name of Arrow Bus Lines, Inc.

2. On or about the aforesaid date, the Public Service Corordinated Transport, a body corporate and Public Service Interstate Transportation Co. purchased and acquired numerous buses belonging to the Arrow Bus Lines, Inc. in violation of the provisions of the "Bulk Sales Act" Chapter 208 of Laws 1915. 20

3. The defendants or any one of them failed to give any notice whatsoever of the proposed sale to your complainant who at the time of the sale was a creditor, in violation of the aforesaid statute. 30

4. Said conveyance was voluntary and without the sanction of the statutes in such case made and provided, and was fraudulent against the complainant as a creditor of the said Arrow Bus Lines, Inc.

5. On November 19, 1929, the complainant John A. Van Genderen recovered judgment against Arrow Bus Lines, Inc. otherwise known as Arrow 40

Bus Lines of Passaic County, in the sum of $1527.-45 together with costs amounting to the total sum of $1586.07 upon which judgment execution was issued and returned unsatisfied on November 27, 1929 by the Sheriff of Passaic County.

Complainant is without adequate remedy in the courts of law and therefor prays:

1. That Arrow Bus Lines, Inc. otherwise known as Arrow Bus Lines of Passaic County, Public Service Coordinated Transport, a body corporate, and Public Service Interstate Transportation Co. a body corporate, who are the defendants to this suit may answer this bill of complaint without oath and each statement herein made.

2. That the said defendants may make discovery of who is possessed of the numerous buses purchased by the Arrow Bus Lines, Inc. otherwise known as Arrow Bus Lines of Passaic County.

3. That the said defendants Public Service Coordinated Transport, a body corporate, and Public Service Interstate Transportation Co. a body corporate may be decreed to pay to the complainant the full amount due and owing to him on the judgment recovered against the Arrow Bus Lines, Inc. otherwise known as Arrow Bus Lines of Passaic County or Public Service Coordinated Transport, a body corporate and Public Service Interstate Transportation Co. a body corporate together with interest and costs.

4. That the said fraudulent conveyance by the said defendant Arrow Bus Lines, Inc. otherwise known as Arrow Bus Lines of Passaic County to said Public Service Coordinated Transport, a body corporate and Public Service Interstate Transportation Co. a body corporate may be set aside and

held to be fraudulent to and of no effect as against complainant's claims.

5. That a writ of subpoena may be issued commanding said defendants to answer this bill of complaint and to abide by such decree as this Court may make in the premises.

ALEX MOSKOWITZ, 10
Solicitor for and of
Counsel with Complainant.

Order for Amendment.

Filed Dec. 13, 1929.

IN CHANCERY OF NEW JERSEY.

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Between JOHN A. VAN GENDEREN, Complainant, and ARROW BUS LINES, INC., otherwise known as Arrow Bus Lines of Passaic County, and PUBLIC SERVICE COORDINATED TRANSPORT, a body corporate, and PUBLIC SERVICE INTERSTATE TRANSPORTATION COMPANY, a body corporate, Defendants.	On Bill, &c. Order for Amendment.

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This matter being opened to the Court by Alex Moskowitz, solicitor for complainant, and in the presence of William H. Speer, solicitor for defendant Public Service Coordinated Transport, a

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body corporate and Public Service Interstate Transportation Co. a body corporate, and it appearing after due argument by counsel for the respective parties, that leave should be granted to amend the bill of complaint as filed heretofore;

It is on this 13th day of December 1929, ORDERED that the complainant have leave to amend his bill of complaint by adding thereto and inserting therein the following paragraph, viz; 5. On November 19, 1929, the complainant John A. Van Genderen recovered judgment against Arrow Bus Lines, Inc., otherwise known as Arrow Bus Lines of Passaic County in the sum of $1527.45 together with costs amounting to the total sum of $1,586.07 upon which judgment execution was issued and returned unsatisfied on November 27, 1929 by the Sheriff of Passaic County.

E. R. WALKER,
C.

Respectfully Advised,
ALONZO CHURCH,
V. C.

Order for Amendment.

Filed Dec. 20, 1929.

IN CHANCERY OF NEW JERSEY.

Between JOHN A. VAN GENDEREN, Complainant, and ARROW BUS LINES, INC., otherwise known as Arrow Bus Lines of Passaic County, and PUBLIC SERVICE COORDINATED TRANSPORT, a body corporate, and PUBLIC SERVICE INTERSTATE TRANSPORTATION COMPANY, a body corporate, Defendants.	On Bill, &c. Order for Amendment.

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This matter being opened to the Court by Alex Moskowitz, solicitor for complainant, and it appearing to the Court that a motion to strike out the bill of complaint in this cause had heretofore been made herein, which motion was overruled and denied by this Court, and solicitor for complainant, no answer having been yet filed in the cause, having asked leave to amend his bill of complaint of course, and without costs, and it further appearing that on the thirteenth day of December, 1929, an order permitting said amendment, which contained an inadvertent misrecital, was made and entered in the above-entitled cause, and it appearing to the Court that said order of December 13, 1929, should be amended by this order:

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IT IS, on this 20th day of December 1929, ORDERED that the order entered on the 13th day of December, 1929, be and the same hereby is quashed,

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set aside, and for nothing holden; and it is further ORDERED that the complainant have leave to amend his bill of complaint by adding thereto and inserting therein the following paragraph; viz., 5. On November 19, 1929, the complainant John A. Van Genderen recovered judgment against Arrow Bus Line, Inc., otherwise known as Arrow Bus Lines of Passaic County in the sum of $1527.45, together with costs, amounting to the total sum of $1586.07, upon which judgment execution was issued and returned unsatisfied on November 27, 1929, by the Sheriff of Passaic County.

E. R. WALKER,
C.

Respectfully advised,
ALONZO CHURCH,
V. C.

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Arthur W. Cross, Law Printer, 55-57 Lafayette Street, Newark, N. J.

New Jersey Court of Errors and Appeals

JOHN A. VAN GENDEREN, *Respondent,* *vs.* ARROW BUS LINES, INC., otherwise known as ARROW BUS LINES OF PASSAIC COUNTY, and PUBLIC SERVICE COORDINATED TRANSPORT, *et al.,* *Appellants.*	*On Bill, etc.* *On Appeal from Chancery.*

MEMORANDUM OF APPELLANTS' POINTS.

On September 14, 1929, complainant filed its bill of complaint in the Court of Chancery. In this bill complainant made no averment that a judgment had been obtained at law against the vendor by the creditor, nor that any effort had been made to execute the same by a levy and sale of the vendor's goods, nor that, being unable to execute the judgment by a levy and sale of the goods, complainant had caused the writ to be returned *nulla bona.* Indeed, the bill is utterly devoid of any averment to the effect that an action at law had ever been instituted.

The learned Vice-Chancellor, apparently misled by complainant's memorandum furnished at the Vice-Chancellor's request, says (State of Case, p. 19, ll. 25-35): "An action was commenced in the Supreme Court of New Jersey within the ninety days provided under the 'Bulk Sales Act' after the date of sale of the buses herein mentioned, and judgment was recovered against the Arrow Bus Lines of Passaic County, in the sum of $1,527.45, together with costs

amounting to the total sum of $1,586.07, upon which judgment execution was issued and returned unsatisfied on November 17, 1929, by the Sheriff of Passaic County."

There is not a single averment in the bill of complaint of any of the alleged facts contained in this excerpt from the conclusions of the Vice-Chancellor. Indeed, such averments would have been factually impossible, since the bill of complaint was filed on September 14, 1929, and the Vice-Chancellor says the execution was not returned unsatisfied until November 17, 1929, over two months after the bill had been filed. The Vice-Chancellor seems to have been writing his conclusions about a state of facts that are not even hinted at, much less averred, in the bill of complaint. That a bill devoid of such averments is fatally defective and must be struck out on motion is definitely settled in our own Court of Chancery by the decision of Vice-Chancellor Stevens in *Muller* v. *Hubschman,* 84 N. J. Eq. 30. The principle there declared was, "Before a creditor can in this court avail himself of the provisions of the Bulk Sales Act (P. L. 1914, p. 59), which annuls a certain class of sales as against the vendor's creditors, unless certain prescribed steps are taken, the creditor must show that he has acquired by judgment and execution, or otherwise, a lien upon the vendor's goods." The same doctrine is stated by Vice-Chancellor Backes in *J. C. Smith & Wallace Co.* v. *Goldner,* 92 N. J. Eq. 504, and is indeed nothing but the application of perfectly-settled principles of equity jurisprudence. *Prentiss* v. *Bowden,* 145 N. Y. 345; *Haston* v. *Castner,* 31 N. J. Eq. 697; *Wimpfheimer* v. *Perrine,* 61 N. J. Eq. 126, aff'd in 67 *id.* 597; see also especially *Klein* v. *Maravelas,* 152 N. Y. Supp. 584.

Inasmuch as these essential allegations are entirely absent from the bill of complaint, the motion to strike it out should have been granted.

The learned Vice-Chancellor next says, in his memorandum (State of Case, p. 19, ll. 14-18): "The complainant also alleges that on or about June 25, 1929, Public Service Coordinated Transport and Public Service Interstate Transportation Company, *purchased a line of buses* running and belonging to the Arrow Bus Lines, Inc." etc. Where the Vice-Chancellor got this alleged allegation of the bill is not apparent. The allegation of the bill (State of Case, p. 10, ll. 20-28) is, "On or about the aforesaid date, the Public Service Coordinated Transport, a body corporate and Public Service Interstate Transportation Co. purchased and acquired numerous buses belonging to the Arrow Bus Lines, Inc., in violation of the provisions of the 'Bulk Sales Act,' Chapter 208 of Laws, 1915."

Now the language of the Bulk Sales Act in this particular is, "The sale in bulk of the whole or a large part of the stock or merchandise and fixtures, or merchandise or fixtures, or goods and chattels, otherwise than in the ordinary course of trade, and in the regular and usual prosecution of the seller's business, or occupation, shall be void as against the creditors of the seller, unless" etc. There is not, however, a single averment in the bill sought to be stricken out that speaks of "a line of buses running and belonging to the Arrow Bus Lines, Inc." There is not a word in the bill, nor is there any averment that the buses sold and purchased were sold in bulk, or that they constituted "the whole or a large part of the stock," etc. The single and simple averment is, "numerous buses" were purchased and acquired, but whether the number

was enough to constitute "the whole or a large part" of the stock, etc., is not averred or referred to.

The Vice-Chancellor must have sensed the insufficiency of the averment, for he says that what was sold was "a *line* of buses," but even this would have been insufficient, since the line might well have consisted of three or four buses, and have been an insignificant part of the whole number of buses owned by Arrow Bus Lines, Inc. Neither is there the slightest intimation by averment in the bill what the business of Arrow Bus Lines, Inc. was, or that the sale of the buses was not in the ordinary course of trade, and in the regular and usual prosecution of the seller's business or occupation. *Non constat* but that the business of Arrow Bus Lines, Inc. was the purchase and sale of buses and lines of buses, and that this sale was one of it usual and normal business activities.

When one talks of "sale in bulk" one means, as the dictionaries are unanimously agreed, the sale of the greater or principal part; main body, majority, but there is no averment here that the transaction in question was of that magnitude. Nor will the averment of the conclusion of law that the sale was "in violation of the provisions of the 'Bulk Sales Act,' Chapter 208 of Laws, 1915" eke out the factual insufficiencies of the bill of complaint.

How did it violate that act, and what portion of the Act did it violate? As was said in *Breese* v. *Trenton Horse R. R. Co.*, 23 Vroom 252: "If the particular facts set forth raise the duty, the allegation is unnecessary, and if they do not, it will be unavailing." Furthermore, it has been quite uniformly held that the Bulk Sales Law is penal in its nature, in derogation of the common

law and of a person's right to alienate his property without restriction, and must, therefore, be strictly construed. *Balter* v. *Crum,* 203 S. W. 506; *Schwartz* v. *King Realty Co.,* 93 N. J. L. 115. Kalisch, *J.,* says, "Because the act is drastic in its provisions, and restrictive of the free alienation of property, it should be strictly construed and not be extended to a transaction which does not clearly come within its terms."

It is apparent, therefore, that the bill of complaint is radically defective in the particulars hereinbefore set forth, and should have been struck out therefor.

Again, the bill prays for no relief that the Court of Chancery is capacitated by the statute to afford. Outside of the ordinary prayers for answer, discovery, the setting aside of the conveyance as fraudulent, concerning which I shall set down a few words hereinafter, the prayer is "that the defendants * * * may be decreed to pay to the complainant the full amount due and owing him on any judgment recovered against the Arrow Bus Lines, Inc., or Public Service Coordinated Transport," etc., and that "the * * * conveyance * * * may be set aside and held to be fraudulent to and of no effect as against complainant's claims." Such relief, of course, cannot be granted. All that, by the widest construction of the statute, complainant could be entitled to would be a decree to the extent of the value of the goods; respondent could not, as it prays, have a decree for the full amount due and owing to him on any judgment recovered, etc. The fallacy of this is fully exposed in *Muller* v. *Hubschman,* 84 N. J. Eq. 32, and *Smith and Wallace Co.* v. *Goldner, supra.*

Now a word as to the prayer to set aside the conveyance as fraudulent! This rests upon the

allegations in paragraph 4 of the bill of complaint, as follows: "4. Said conveyance was voluntary and without the sanction of the statutes in such case made and provided, and was fraudulent against the complainant as a creditor of the said Arrow Bus Lines, Inc." If these allegations were intended to set forth a separate cause of action to set aside the conveyance as in fraud of creditors, aside from the cause of action intended to be set forth under the Bulk Sales Act, it is evident that they are conspicuously insufficient to accomplish that purpose. Such a bill must set forth clearly all the facts necessary to give the Court jurisdiction. It must clearly show the matters essential to such relief, and not leave any of them dependent upon inferences. The law is entirely settled that in all cases where the acquisition of a specific lien on the property sought to be charged is a condition precedent to the right to set aside a fraudulent conveyance, it is necessary to show that complainant has acquired such a lien; such for instance as a lien acquired by judgment, by an execution returned unsatisfied or a lien acquired by attachment proceedings. A complaint which is defective in this respect fails to state a cause of action, and is demurrable. 27 C. J., sections 656, 657, pp. 675, 676.

In the State of New Jersey the law is completely settled that the bill must show that plaintiff is without an adequate remedy at law, and it is essential that the complaint or bill should show that the complainant has exhausted his remedies at law before coming into equity for relief. *Stockton* v. *Lippincott,* 37 N. J. Eq. 443; *Robert* v. *Hodges,* 1 C. E. Gr. 303.

The statement that "said conveyance was voluntary and without the sanction of the statutes

in such case made and provided," if intended to refer to other statutes than the Bulk Sales Act must have reference to the 11th and 12th sections of the statute of frauds, in the construction of which it has been uniformly held that before the creditor can avail himself of the provisions of that act, "he must have his debt fastened on his debtor's property by law, judicial process or in some other way," etc. *Graham Button Co.* v. *Spielmann,* 50 N. J. Eq. 123; and the contrary view was repudiated in *Haston* v. *Castner,* 31 N. J. Eq. 697, by the Court of Errors and Appeals, and in the case hereinbefore cited of *Wimpfheimer* v. *Perrine,* 61 N. J. Eq. 132, affirmed 67 N. J. Eq. 598, where it was said that it is "entirely settled that the recovery of such judgment and the issuing of execution entitling the judgment creditor to a lien upon personal property of the debtor is necessary in order to put a creditor in a position to attack the validity of an unrecorded mortgage."

Inasmuch as there is no allegation whatever in the said bill of complaint to the effect that any judgment ever had been recovered on said claim or any execution drawn, issued and returned unsatisfied, or any allegation remotely approaching such averments, it is perfectly clear that the bill cannot be sustained as one for relief against fraudulent conveyances under the statute of frauds and the equity jurisdiction of our Court of Chancery.

I therefore reiterate that the bill does not pray for any relief which under either the Bulk Sales Act or the Statute of Frauds of our State, our Court of Chancery could afford.

It perhaps is not necessary, but it is certainly not inappropriate to point out that where fraud is an essential ingredient of a cause of action or

defense, it must be pleaded, and that in the absence of some special statutory provision the rule is that the facts upon which fraud is predicated must be specifically pleaded. *Smith* v. *Wood,* 42 N. J. Eq. 563.

A mere general averment of fraud is nothing but the averment of a conclusion, and will not suffice; it presents no issue for trial, and is bad on demurrer.

I also point out as apt, but as unnecessary to be elaborated upon, that one seeking relief against an alleged fraudulent conveyance or transfer is obliged to allege that it was made with intent to hinder, delay, or defraud creditors. It will be observed that nowhere in the bill of complaint is there any allegation made of the facts upon which fraud is predicated, or of the fraudulent intent of the parties, and especially of the appellants.

While the above considerations are fatal to the validity of the bill, and should have resulted in the striking out of the same, pursuant to the motion made by appellants; and while the order of the Court of Chancery, denying the motion to strike out said bill on the ground that it disclosed no cause of action, for the reasons stated in the Notice of Motion, and ordering that the defendants pay to the complainant the costs of the motion to be taxed (as will be seen on page 17 of the State of the Case), should be reversed, for the reasons hereinbefore set forth; there is a much deeper point involved, and one which goes to the entire merits of the controversy, which should have resulted in the Vice-Chancellor's advising the striking out of the bill. That point is that Chapter 208 of the Laws of 1915 does not apply to such a sale—even if it had been

properly alleged in the bill of complaint—as is attempted to be brought within its operation.

It seems to be the consensus in most of the well-considered cases that goods and chattels which are kept for use, but not for sale, or which are mere facilities for the operation of a business, or which are the manufacturer's stock of raw material, not kept for sale, or are utensils used in conducting a business, do not come within the purview of these statutes.

In 27 C. J., p. 878, under the title "Persons within Statute," it is stated that only the persons contemplated and designated by the statute are subject to its restrictions, or entitled to its benefits. With respect to sellers it has been held that particular statutes do not apply to wholesalers, retailers not selling goods bought for resale but only goods produced or manufactured by themselves. Conspicuous among the cases cited in support of this view are *Conn. Steam Brown Stone Co.* v. *Lewis,* 45 L. R. A. N. S. 495, manufacturers; *Cooney* v. *Sweat,* 25 L. R. A. N. S. 758; *Spurr* v. *Travis,* 108 N. W. 1090, farmers; *Krower* v. *Martin,* 184 S. W. 511; hotel keepers, *Stewart* v. *Sulzer,* 161 N. Y. S. 489; livery stable keepers, *Johnson Co.* v. *Bellosky,* 105 N. E. 287; *Pogue* v. *Rowe,* 86 N. E. 207; *Off* v. *Morehead,* 85 N. E. 264; *Richardson Coal Co.* v. *Cermak,* 190 Ill. A. 106; *Balter* v. *Crum,* 203 S. W. 506; *Swift* v. *Templelos,* 101 S. E. 8; *Johnson* v. *Kelly,* 155 N. W. 683; *Northrop* v. *Finn Co.,* 103 Atl. 544; and see especially *Everett Produce Co.* v. *Smith Bros.,* 2 L. R. A. N. S. 331; *Nolte* v. *Winstanely,* 145 Pac. 246; *Ettelson* v. *Sonkopp,* 210 Ill. 348; *Bowen* v. *Quigley,* 34 L. R. A. N. S. 218; *Ferrat* v. *Adamson,* 163 Pac. 112; *Lee* v. *Gillen,* 134 N. W. 278; *Gallus* v. *Elmer,* 78 N. E. 772.

Section 889 in 27 C. J., in describing "Property within Statute," page 880, says: "A sale or transfer of property in bulk is not within the condemnation of the statute unless the property falls within the statutory description at the time of the sale." It has also been held, "Where a bulk sale embraces both property subject to the statute and property not so subject, the statute operates upon that part of the property within the statutory description, but does not affect the valadity of the transfer as to the other classes of property. Substantially all of the statutes use the term 'stock of merchandise,' or the equivalent 'goods, wares and merchandise,' under which term or terms is included all classes of commodities kept for sale in the usual course of trade, but not '*fixtures*' or other property not kept for sale, although used in connection with the business. * * * Some statutes specify, in addition to the merchandise, fixtures pertaining to the conducting of the business of the seller, or other goods and chattels of the vendor's business. Such terms are usually restricted to the inclusion of goods and chattels used in connection with the business of selling merchandise, but include all goods and chattels so used, although not '*merchandise.*' "

It would seem entirely clear, therefore, that when the term "goods and chattels" was used in the act of 1915, under well-settled rules of construction, the intention of the legislature must be taken to have been to include all merchandise, that is to say, all classes of commodities kept for sale and all goods and chattels used in connection with the business of selling such merchandise, but must be held not to include goods and chattels dissociated from the business of merchandising.

Without extending this brief to too great a length, it might be pointed out that the word *stock,* which introduces the specification of the kinds of property specified in the act, is to be applied to and governs the several specifications. This would be clear from the context, where it says, "the sale in bulk of the whole or a large part," which must be held to mean the whole or a large part of the stock of merchandise and fixtures, or merchandise or fixtures, or goods and chattels, especially when followed by the language "otherwise than in the ordinary course of trade, and in the usual prosecution of the *seller's* business or occupation." This would seem to indicate that the statute was meant to apply to some unit, and not to a mere dispersion of goods and chattels which an individual might own, whether they were all in one place or subject to one character of business, or scattered in many places and engaged in many different processes, since it could hardly be said that the language of the section above quoted would be intelligible unless it were made applicable to a sale of stock of the various kinds of personal property mentioned in the descriptive part of the enactment.

It must also be borne in mind that inasmuch as the provisions of these acts are very drastic, are in derogation of the common law, and are in restraint of the free alienation of property, that they must receive a strict construction, and not be extended to a transaction which does not clearly come within their terms. *Schwartz* v. *King Realty Co.,* 93 N. J. L. 115.

The mischief which was intended to be remedied by the enactment of Bulk Sales laws has

been stated in *Balter* v. *Crum,* 203 S. W. 506, as follows:

> "We are of the opinion that our Bulk Sales Law was enacted for the protection of persons who extend credit to merchants relying upon their right to credit as ascertained from a financial report of such merchant's assets and liabilities and his past record with reference to prompt payment or settlement for goods purchased, together with a reliance upon the fact that such merchant is a vendor of merchandise, which of necessity presumes that such merchant keeps on hand a stock of merchandise for sale, and which stock is not sold in bulk but to be kept up and replenished from time to time as the sales made therefrom may require. Credit extended in this manner presupposes a continuance in the business of merchandising on the part of him to whom the credit is extended; but if often happened that merchants who had become involved financially would dispose of their entire stock of goods to one or more persons without notice of any kind to their creditors and perpetrate a fraud upon them, and our legislature undoubtedly enacted the statute under discussion to prescribe a practical method for sales in bulk which would give due notice and protection to all parties interested, and at the same time provide a remedy to defrauded creditors in cases where sales in bulk were made without complying with the requirements of such statutes."

The definition of Bulk Sales Acts given in 27 C. J., section 881, pp. 873, 874, is "*Bulk Sales Acts* is a generic term descriptive of a class of statutes designed to prevent the defrauding of creditors by the secret sale in bulk of substantially all of a merchant's stock of goods."

Williston in the 2d volume of his book on *Sales,* second edition, section 643, p. 1616, states

that "The statutes are applicable to retail dealers but generally not to wholesale dealers or to manufacturers or persons not ordinarily engaged in trade."

The language of the act itself would seem to indicate unmistakably that the vendor was one who had a *stock* of merchandise and fixtures, or fixtures or merchandise, or goods and chattels, and that it was his business or occupation to *sell,* in the ordinary course of trade, articles from the various stocks mentioned; and that the person disposing by sale of said stocks was what might be called one engaged in the business of a seller of such articles—in other words, that he was a dealer whose business was the selling at retail of merchandise, goods, etc. from his stock therefor kept by him and for sale as his ordinary trade and business.

Either a construction limiting the act to the transactions of a retail dealer must be accepted, or else a broad construction, which would make a sale by any one, whether a transmission or not of goods and chattels, subject to its provisions. Having in mind, therefore, the strict construction that must necessarily be attached to such a statute as hereinbefore set forth, it will be found that the statement made by Williston, "The statutes are applicable to retail dealers but generally not to wholesale dealers or to manufacturers or persons not ordinarily engaged in trade," is one that has at once the sanction of reason and authority on its side.

One other consideration I would mention before closing this brief, and that is that by application of the rule of construction commonly called the rule of *ejusdem generis,* the words *goods and chattels* must be held to be limited to goods and chattels of the species thereinbefore

mentioned, to wit, stock of merchandise and fixtures, or merchandise or fixtures. The rule is based upon the obvious reason that if the legislature had intended the general words to be used in their unrestricted sense, they would have made no mention of the particular classes.

In *Livermore* v. *Freeholders of Camden,* 29 N. J. L. 248, the Chief Justice said, "Where an act specifies a number of things all of a particular character, and then closes with the general expression, other property, it means other property *ejusdem generis.*"

For the reasons hereinbefore set forth, it is respectfully submitted that the decree and order of the Court of Chancery denying the motion to strike out the bill of complaint for the reasons stated in the moving papers, and assessing costs against appellants, should be reversed.

Respectfully submitted,

WILLIAM H. SPEER,
Solicitor for and of Counsel with Appellants.

New Jersey Court of Errors and Appeals

Between JOHN A. VAN GENDEREN, Respondent, and ARROW BUS LINES, INC., otherwise known as Arrow Bus Lines of Passaic County, and PUBLIC SERVICE COORDINATED TRANSPORT, a body corporate, and PUBLIC SERVICE INTERSTATE TRANSPORTATION COMPANY, a body corporate, Appellants.	On Bill, &c. On Appeal from Chancery.

SUPPLEMENTAL MEMORANDUM OF RESPONDENT'S POINTS.

Facts.

On the oral argument of this case, leave was granted to the respondent to file a supplemental state of the case including the amended bill of complaint and the orders granting leave to file the amended bill of complaint. The amended bill of complaint and the orders upon which it was based were omitted from the state of the case prepared by the appellant. Leave was also granted to file a supplemental memorandum in answer to the reply brief of the appellants which the appellants failed to serve upon the respondent prior to the oral argument.

The facts briefly stated chronologically are as follows:

June 25, 1929—Public Service purchased from Arrow Bus Lines a fleet of busses operating between Paterson, Montclair and Newark.

June 25, 1929—Arrow Bus Lines, Inc. was at this time indebted to complainant, John A. Van Genderen for automobile accessories in the approximate sum of $1500.00.

September 12, 1929—Suit was instituted in the Supreme Court on this book account.

September 14, 1929—Bill filed in Chancery to set aside transfer of bus line by Arrow Bus Lines to Public Service.

November 19, 1929—Judgment obtained in Supreme Court against Arrow Bus Lines, Inc. on book account.

November 27, 1929—Execution returned unsatisfied on this judgment.

December 10, 1929—Motion made by Public Service to strike out the bill of complaint on the ground that the bill of complaint was defective and that the Bulk Sales Act was inapplicable to the situation.

December 13, 1929—An order was granted giving leave to complainant to file amended bill of complaint setting up judgment obtained after the filing of the original bill of complaint.

December 18, 1929—New order signed by the Vice Chancellor, at the request of appellant, vacating the order of December 13, 1929 but giving leave to file amended bill of complaint as filed on December 18, 1929, the December 20th order to take effect as of December 13th, 1929.

At the oral argument, counsel for the appellant stated that the Vice Chancellor did not give him an opportunity to present his argument. This is

not correct. The Vice Chancellor heard all the arguments presented by the defendant prior to the making of his decision.

Argument.

The grounds urged by the appellant for reversing the order of the Vice Chancellor refusing to strike out the bill of complaint are, briefly, two: the first on matter of form, that the bill of complaint is technically defective; and the second on matter of substance, that on the merits of the case, a judgment is required before the bill of complaint can be filed and that the Bulk Sales Act has no application to the sale of a fleet of busses by a company in the business of transporting passengers.

The appellant attacks the bill of complaint for matter of form on the ground that the bill of complaint does not use the exact words of the statute to the effect that all or a large part of the busses of the Arrow Bus Line was sold. The words of the bill of complaint are "that numerous busses belonging to the Arrow Bus Lines were sold to the Public Service contrary to Chapter 208 of the Laws of 1915."

It is submitted that the object of the bill of complaint is to apprise the defendant of the complainant's cause of action so as to give the defendant an opportunity to prepare his defense. It is submitted that the words of the bill of complaint are amply sufficient to apprise the defendant of the alleged violation of the Bulk Sales Act. It is true that the paragraph in the bill of complaint referred to could have been more artistically drawn, but the addition of the words "in violation of Chapter 208 of the Laws of 1915" certainly places the defendant on notice of the alleged vio-

lation complained of. It is true that pleadings should state facts and not conclusions of law but it is also true that a bill of complaint should be read as a whole and that if, read as a whole, it states facts sufficient to apprise the defendant of the complainant's alleged cause of action the court should allow it to stand.

Another argument addressed by the appellant to the form of the bill of complaint is that it does not appear that the Arrow Bus Line was in the business of transporting passengers and not in the business of selling busses. It is highly significant both on this point and on the point that the Arrow Bus Line sold their entire line of busses that nowhere either in the two written briefs of the appellant nor in the oral argument is there a single denial of the fact that the Public Service purchased the entire fleet of busses operated by the Arrow Bus Line between Paterson, Montclair and Newark. Nor is there a single denial of the well known fact that the Arrow Bus Line was in the business of transporting passengers between those points. Pleadings have ceased to be a game of chess, wherein a single false move spelled failure. New Jersey, by its Practice Act and Chancery Act, has been among the foremost jurisdictions to recognize that the object of pleadings is to determine the substantive rights of the parties.

That the right to amend pleadings, like the bill of complaint in the case at bar, is freely given, is shown by the pronouncement of the Court of Errors and Appeals in *Swank* v. *Pennsylvania R. R.*, 94 L. 546. The court here went so far as to allow the joining as a party plaintiff in a death action of a child *en ventre sa mere* at the time of filing the original complaint, even though the two year period for bringing this action for personal injuries had expired in the meantime.

This policy is in line with Rule 79 of the Court of Chancery which applies to the case at bar and provides that the bill of complaint may be amended as of course after a motion to strike out and before answer filed.

On the merits of the case, the appellant urges that a judgment at law is necessary as a condition precedent to the right to file the bill of complaint to set aside the transfer under the Bulk Sales Act. If this requirement were made it would result in nullifying the Bulk Sales Act. The reason is that the Bulk Sales Act requires that a bill of complaint be filed within ninety days after the alleged sale in bulk. In the ordinary county if the defendant interposes an answer it is impossible to obtain a judgment within less than six months after the filing of the original complaint. The result would be that the court, by construing the act in such a way as to require a judgment prior to the filing of the bill of complaint, would in effect, repeal the Bulk Sales Act.

In this connection it may be pointed out that there is a considerable difference between a bill to set aside a fraudulent conveyance and a bill to set aside a transfer in violation of the Bulk Sales Act. This court has decided in *Gross* v. *Pennsylvania Mortgage and Loan Company,* 7 A. R. 710, that a judgment is necessary prior to the filing of the bill of complaint to set aside a fraudulent conveyance. In such a case there is no time limit within which the complainant may file his bill, and therefore it is no hardship to him for the court to require him to obtain a judgment prior to the filing of the bill of complaint. On the other hand there is a definite time limit within which the complainant must file his bill of complaint to set aside a transfer in violation of the Bulk Sales Act. For this reason it is submitted that the appel-

lant's contention that a judgment must be obtained prior to the filing of the bill of complaint is not sound.

It is submitted that the case of *Jaburg* v. *Kirschenbaum,* 90 Eq. 510, is on all fours with the case at bar. In that case a creditor of the vendor filed a bill of complaint to set aside a transfer by the vendor to the vendee. The vendor died prior to the filing of the bill of complaint. A claim was duly presented to the administratrix of the vendor. The bill of complaint was then filed. Vice Chancellor Lane in refusing to require a judgment at law as a condition precedent to the filing of the bill of complaint summarized the authorities as follows: (p 502)

> "Without considering the question as to whether the objection secondly indicated—i. e., that complainants do not show that they have a lien upon the goods now in possession of Benjamin Newman, can be raised by the administratrix of the deceased debtor, I will pass upon its merits. The present case, I think, is distinguishable from *Muller* v. *Hubschman, supra.* In that case Vice-Chancellor Stevens held that before a creditor can attack a sale made in violation of the Bulk Sales Act, Chapter 208 of the Laws of 1915, he must have his debt fastened on the property, and that a general creditor prior to obtaining by judgment, execution or otherwise, a lien upon the property, cannot proceed by bill in this court. In that case the original debtor was living and there was nothing in the way of a proceeding at law against him, the obtaining of a judgment and execution thereon. He held that the mere fact that the right of attack under the Bulk Sales Act was limited to ninety days was not, of itself, a ground for a different rule. The contention is made by counsel that Vice-Chancellor Stevens indicated that it was a prerequisite that the creditor should have a judgment and based

that contention upon the language of the vice-chancellor (at p. 32 of 84 N. J. Eq.). The vice-chancellor did not so hold. At p. 31 he quoted the language of the court in *Graham Button Co.* v. *Spielmann,* 50 N. J. Eq. 123, which is to the effect that a creditor must have his debt fastened on the debtor's property by law, judicial process, or some other way—quite a different proposition. I am forced to concede that this is the rule. (*Haston* v. *Castner,* 31 N. J. Eq. 697), but the tendency of the courts is to limit the application of the rule where the interests of justice require, and this tendency is evidenced by adjudications that certain conditions may fasten the debt on the debtor's property other than judicial process. The injustice occasioned by a strict adherence to the rule is one not easily remedied by legislation, so the courts are left to work out a solution by themselves. In *Currie* v. *Knight,* 34 N. J. Eq. 485, Vice-Chancellor Van Fleet held that the direction of the statute that the assets of an insolvent estate should be distributed among creditors of the decedent gives them a lien on such assets and entitles them to a standing to contest the validity of a chattel mortgage not filed according to the statute. And he based his conclusion upon *Haston* v. *Castner.* He reiterated what he said in *Currie* v. *Knight,* in *Graham Button Co.* v. *Spielmann,* 50 N. J. Eq. 120; affirmed, 50 N. J. Eq. 796; in *Brockhurst* v. *Cox,* 71 N. J. Eq. 703; affirmed 72 N. J. Eq. 950. Vice-Chancellor Garrison held that a receiver of a partnership might, in the right of general creditors, attack a chattel mortgage. He based his conclusion upon the fact that, creditors being prevented from proceeding to judgment and execution, the receiver appointed by the court must, of necessity, represent them and their debts must, of necessity, be considered as a charge upon the assets so as to give the receiver in their right a standing. The

> Orphans Court Act (3 Comp. Stat. p. 3832 Sec. 65 *et seq.*) contains a comprehensive scheme for the payment of debts of decedent. Suits are forbidden against the representative without leave of court for a period of six months. If leave of court be given for the institution of a suit execution cannot issue upon the judgment within the six months, so that, by operation of statute, the creditor is prevented from acquiring any lien upon the goods of decedent for a period of six months. The statute provides for the barring of creditors, presentation of their claims, passage upon the claims by the representatives and the payment of debts. It seems to me to be clear that by force of this statute the debts of the decedent are so fastened upon the assets of the estate, even if the estate be not insolvent, as that the creditors have a standing to contest a sale in fraud of creditors under the provisions of the Bulk Sales Act. Any other holding would result in denying relief in any case under the act to a creditor of a decedent. The goods, &c. alleged to have been sold in violation of the Bulk Sales Act are considered, for the purpose of the suit, still a part of decedent's estate.

The appellant urges that the *Jaburg* case is no authority in the present case for the reason that in the *Jaburg* case, the filing of a claim with the administratrix was equivalent to the obtaining of a lien not by judicial process but "otherwise." The reason why Vice Chancellor Lane held that the filing of a claim with the administratrix is a sufficient obtaining of a lien otherwise than by judicial process is that the Orphans' Court Act provides a definite method of filing a claim with the administrator and for the determination of the claim. It is submitted that the procedure laid down by the Practice Act for commencing a suit and reducing

the claim to judgment is fully as definite a method of determining the validity and amount of the complainant's claim as is the method provided by the Orphans' Court Act for the determination of a creditor's claim against a decedent's estate. Consequently if the mere filing of the claim with the administrator is regarded as a sufficient obtaining of a lien otherwise than by judicial process, then the filing of the complaint and the actual rendition of judgment in the case at bar is equivalent to fastening the debt on the debtor's property, if not by judicial process, then otherwise.

In the *Jaburg* case an argument advanced by losing counsel for striking out the bill of complaint was that the Court of Chancery would be required to pass on the validity and amount of the complainant's claim, thereby depriving the law court of its common law jurisdiction. Vice Chancellor Lane summarizes the argument of the Court of Errors and Appeals in the case of *Haston* v. *Castner,* 31 N. J. Eq. 697 at p. 701, giving the following conclusive answer: (p. 5 of Jaburg case)

> "The argument that this court would be obliged to determine the amount of the debt due from the estate, properly determinable in a court of law, is not persuasive. That argument was answered by the Court of Errors and Appeals in *Haston* v. *Castner,* 31 N. J. Eq. (at page 701). The fact that neither the existence nor the amount of a debt has been conclusively established at law does not prevent this court acting in aid of attachment. I assume from the charges in the bill that the claim of the creditor has been properly presented to the administratrix. No point is made that it does not so appear. It is charged in the bill that the administratrix has admitted the correctness of the bill. If necessary there is no reason whatever why the cause in this court should not be held pending an adjudication as to the

> amount of the claim by the probate or law courts."

Counsel for appellant cite the case of *J. C. Smith & Wallace Co.* v. *Goldner,* 92 E. 504, as authority for the proposition that a judgment must be obtained in advance of the filing of the bill of complaint. An examination of that decision shows that the case does not decide that point but merely denies to a creditor of the vendor the right to enjoin the payment by the purchaser to the vendor of any part of the purchase price. An excerpt from the opinion of Vice Chancellor Backes reads as follows: (p. 505)

> "A sale in bulk is void as to creditors unless the provisions of the act are complied with, but this does not give creditors a claim upon the purchase price. The act implies that, the sale being void, creditors have a remedy at law and in equity—that is, as I take it, creditors may execute their judgment at law by a levy and sale of the goods, or, if unable to execute the judgment by a levy and sale, they may cause the writ to be returned *nulla bona* and proceed in equity against the purchaser for the value of the goods, exactly as if the goods had been transferred without consideration, with intent to cheat and defraud creditors."

As a judgment had actually been obtained in this case, the Vice Chancellor did not pass on whether it was necessary.

The second point urged by the appellant on the merits of the case is that the Bulk Sales Act does not apply to the sale of a fleet of busses by a bus company in the business of transporting passengers. The argument is that the Bulk Sales Act applies only to merchandising retailers. Professor Williston is quoted to the effect that the Bulk

Sales Act in most states covers only merchandising retailers. It is significant that the appellant has not attempted to show that the statutes relied upon by Professor Williston bear any similarity to the New Jersey Bulk Sales Act. The Bulk Sales Act is not a uniform act like the Uniform Conditional Sales Act or the Uniform Warehouse Receipt Act. On the contrary, it is a distinct act of the New Jersey legislature.

The words of the act are all-inclusive. They cover the sale of all or a large part of the stock and fixtures or stock or fixtures or goods and chattels. It is submitted that the words of the act are equally inclusive of vendors of services as of vendors of commodities. The reason underlying the Bulk Sales Act, as pointed out in the Western case cited in the appellant's brief, is that creditors are entitled to rely upon the fact that the stock and fixtures or equipment of debtors will continue as a fund from which to collect the claim and that if a sudden change is made in the stock, fixtures or equipment the creditors should be protected in the absence of notice to them. The fact that notice was not given in the case at bar is not denied.

It is submitted that the reason underlying the act applies as strongly to protect creditors who sell supplies or equipment to hotels, railroads, telegraph companies, newspapers, amusement parks, employment agencies, advertising agencies, steamship companies, bus companies, and other vendors of service as it applies to protect wholesale grocers, druggists and other vendors of commodities. In either case the object of the act is protection of the creditor who relies upon his debtor continuously keeping up a stock in trade or fixtures or equipment or both, as a basis of extending credit: in other words, the creditor of a firm deal-

ing in either commodities or services should be protected in relying upon the representation that a stock in trade or equipment depleted by sales will be renewed by purchases.

The appellant clearly does not fall within the excluding provisions of the Bulk Sales Act, including administrators, persons selling under order of the court and assignees for the benefit of creditors. The Bulk Sales Act includes corporations, partnerships and individuals. The fact that the legislature intended the act to be all-inclusive is shown by the fact that as recently as 1928 the status of assignees for the benefit of creditors was changed from the excluded to the included class, (L. 1928, c. 235.) so that assignees for the benefit of creditors must now also give ten days notice to creditors of the vendor.

The Public Service is clearly a corporation within the meaning of the Bulk Sales Act, and as such it falls strictly within the purview of the act.

The citation by the appellant of the case of *Schwartz* v. *King Realty Co.,* 93 L. 111, to the effect that the act must be strictly construed is not an argument against the inclusion of bus companies within the meaning of the act, because the *Schwartz* case merely holds that a sale at auction does not fall within the provisions of the act. On page 115, Mr. Justice Kalisch, speaking for the Supreme Court, said:

> "Because the act is drastic in its provisions, and restrictive of the free alienation of property, it should be strictly construed and not be extended to a transaction which does not come clearly within its terms. Guided by this universal canon of statutory construction, we are unable to perceive the applicability of the statute to the facts of the present case. The goods of the Schultz company were sold at a public and not a

private sale. The statute is plainly aimed at private sale of property, and not at public sales. Unless we adopt this view the sale of one's goods and chattels at public auction conveys no title to the purchaser, though the sale and purchase are made in good faith. And in this connection it is difficult to comprehend how a purchaser at such sale can comply with the terms of the statute which require that a buyer shall make inquiry of the vendor and demand an inventory from him of his creditors and to send to each a ten days' notice of the buyer's intended purchase and the amount of consideration to be paid and the place where it is to be paid. It needs no further discussion to demonstrate how absurd it would be to attempt to fit these requirements of the statute to a purchase made at a public auction."

As far as counsel for respondent have been able to discover, this vital question of whether a judgment is necessary as a prerequisite to filing a bill to set aside a transfer alleged to be void under the Bulk Sales Act has never yet been decided by the Court of Errors and Appeals. Nor has the question been determined as to whether bus companies in the business of transporting passengers are within the purview of the act.

It is earnestly urged that this Court, brushing aside minor questions of form, which, on the undenied facts, can hardly be asserted as in any way prejudicial to the appellant, should once and for all decide these questions on the merits and affirm the decision of the Court of Chancery.

Respectfully submitted,

ALEX MOSKOWITZ,
Solicitor for Respondent.

HARRY NADELL,
Of Counsel.

Arthur W. Cross, Law Printer, 55-57 Lafayette Street, Newark, N. J.

New Jersey Court of Errors and Appeals

JOHN A. VAN GENDEREN, *Respondent,* *vs.* ARROW BUS LINES, INC., otherwise known as Arrow Bus Lines of Passaic County, and PUBLIC SERVICE COORDINATED TRANSPORT, *et al.,* *Appellants.*	*On Bill, etc.* *On Appeal from Chancery.*

APPELLANTS' REPLY BRIEF.

Respondent's memorandum of points is a complete admission of appellants' contentions.

Appellant, Public Service Coordinated Transport and Public Service Interstate Transportation Company, in its memorandum of points, stated as its first point that "On September 14, 1929, complainant (respondent) filed its bill of complaint in the Court of Chancery. In *this* bill complainant made *no* averment that a judgment had been obtained at law against the vendor by the creditor, nor that any effort had been made to execute the same by a levy and sale of the vendor's goods, nor that, being unable to execute the judgment by a levy and sale of the goods, complainant had caused the writ to be returned *nulla bona.* Indeed, the bill is utterly devoid of any averment to the effect that an action at law had ever been instituted."

It was then pointed out that the Vice-Chancellor, in his conclusions denying appellants' motion to strike, apparently misled by complainant's memorandum, had stated that an action

had been commenced within the ninety days after the date of sale and a judgment recovered thereon, upon which judgment execution was issued and returned unsatisfied, on November 17, 1929. It was further pointed out that there was not a single averment in the challenged bill of complaint, nor could there have been, to support or serve as a basis for these conclusions. It was further pointed out that these allegations of judgment, execution and return are absolutely essential to the validity of the bill of complaint, as had been adjudicated in *Muller* v. *Hubschman,* 84 N. J. Eq. 30, and *J. C. Smith & Wallace Co.* v. *Goldner,* 92 N. J. Eq. 504.

How does respondent attempt to answer this point? By confessing its truth. He says (Brief, pp. 1 and 2), "On September 14, 1929, a bill was filed in Chancery against all of the parties mentioned, alleging violation of the provisions of the 'Bulk Sales Act.' At the time of filing of the Bill in Chancery, the complainant had not recovered judgment in the Supreme Court on the book account. If the complainant postponed the filing of the bill until a judgment was recovered in the Supreme Court, no bill could be filed in Chancery, inasmuch as the very first section of the 'Bulk Sales Act' provides that 'No proceedings at law or equity shall be brought against the purchaser to invalidate any such voidable sale after the expiration of ninety days from the consummation thereof.' The sale of all the buses of the Arrow Bus Lines was consumated on June 25, 1929. A judgment was entered in the Supreme Court on November 19, 1929. It must, therefore, seem very apparent that in justice to the complainant's rights the Court of Chancery rightfully permitted the bill to be amended so as to set forth that subse-

quently on November 19, 1929, judgment was entered in the Supreme Court, on which the writ of execution was returned *nulla bona* as against the Arrow Bus Lines, Inc."

This is certainly a most extraordinary attempt to answer appellants' argument. The bill of complaint which appellants moved to strike out appears on pages 10 and 11 of the State of Case. Notwithstanding what he said in his conclusions, that is the *only* bill of complaint which was before the Vice-Chancellor when the motion to strike it out was argued. That was the bill of complaint which the Vice-Chancellor then refused to strike out. He neither did, nor could, on that motion, import and insert in it any averments which were not there, nor could he, after refusing to strike it out as it then stood, justify such refusal by relying upon alleged facts dehors the bill. If an amendment of the bill has been attempted, the amended bill must be dealt with when it is brought in question by some appropriate legal proceeding—a substituted bill cannot be avouched as support for a bill fatally defective which it is moved to strike out.

The Vice-Chancellor had before him a motion to strike out a bill of complaint which is found on pages 10 and 11 of the State of Case. This State of Case was not objected to or challenged in any way in the manner pointed out by the rules and practice of this Court. The argument of the motion to strike out came on to be heard and was heard by the Vice-Chancellor, who refused to strike out the bill of complaint there set forth, and assessed the costs of the order denying the motion to strike out against the appellants, notwithstanding the fact that said bill of

complaint was patently and incurably insufficient and unsustainable as against said motion.

The motion to strike out was made on the tenth day of December, 1929. An appeal was taken therefrom on the 27th day of December, 1929. The Vice-Chancellor did not file his memorandum of conclusions until April 2, 1930. This memorandum does not even pretend to consider the validity of the bill of complaint against which the motion to strike out of appellant was directed, but on the contrary, as hereinbefore set forth, deals with a set of alleged facts which are not to be found in the challenged bill of complaint.

Respondent says on page 2 of his brief: "Judgment was entered in the Supreme Court on November 19, 1929," and that it seems apparent that in justice to complainant's rights the Court of Chancery rightfully permitted the bill to be amended so as to set forth that alleged judgment and the execution thereon and the return thereto.

Of course, there is nothing in the State of Case anywhere to show that any amendment to said bill of complaint was made. If any were attempted, very serious questions would arise as to the propriety of such an amendment, since the original bill of complaint did not set forth any ground for equitable relief, and the first section of the Bulk Sales Act provides that "No proceedings at law or equity shall be brought against the purchaser to invalidate any such voidable sale after the expiration of ninety days from the consummation thereof."

Inasmuch as the judgment alleged to have been entered in the Supreme Court was not entered until November 19, 1929, and inasmuch as

the cases hereinbefore cited of *Muller* v. *Hubschman,* 84 N. J. Eq. 30, and *Smith & Wallace Co.* v. *Goldner,* 92 N. J. Eq. 504, are clear authority for the proposition that before such a suit could be maintained, the complainant must have his debt fastened on his debtor's property by law, judicial process, or in some other way—or as said by Vice-Chancellor Stevens in *Muller* v. *Hubschman, supra,* "Before a creditor can avail himself of the provisions of the Bulk Sales Act, which annuls a certain class of sales as against the vendor's creditors, unless certain prescribed steps are taken, the creditor must show that he has acquired by judgment and execution, or otherwise, a lien upon the vendor's goods." And in the absence of such an allegation it is perfectly clear that the bill of complaint challenged in this case did not state any ground for equitable relief, and that the respondent at the time of bringing the bill did not have any status as a judgment creditor which would entitle him to maintain the same. Under such circumstances, after the three-months period hereinbefore mentioned had passed, it is, to say the very least of it, very unlikely that an amendment could be permitted which would permit a cause of action already barred by the statute to be introduced into the case.

Furthermore, even admitting, merely for the sake of the argument, that the bill had been amended so as to set forth that "subsequently on November 19, 1929, judgment was entered in the Supreme Court, on which the writ of execution was returned *nulla bona* as against the Arrow Bus Lines, Inc.," as solicitor for respondent states on page 2 of his brief, still the amended bill would be utterly insufficient to prove the case under the Bulk Sales Act, or to

entitle respondent to equitable relief, since paragraph 2 of the bill of complaint merely states that Public Service Coordinated Transport purchased and acquired numerous buses belonging to the Arrow Bus Lines, Inc., in violation of the provisions of the Bulk Sales Act, Chapter 208 of the Laws of 1915. It does not state that the said numerous buses constituted either the whole or a large part of the stock or merchandise and fixtures, or merchandise or fixtures, or goods and chattels of Arrow Bus Lines, Inc.; neither does it set forth that the sale thereof was otherwise than in the ordinary course of trade and in the regular and usual prosecution of the seller's business or occupation, as required by the Bulk Sales Act; nor does it set forth in any way what the ordinary course of trade or the regular and usual prosecution of the seller's business or occupation was. It is not alleged what business Arrow Bus Lines was in—whether in that of buying and selling buses, or of running the same in carrying passengers for hire.

It does not state that the regular and usual prosecution of the seller's business or occupation was either the carrying of passengers or the sale of buses. It does not anywhere state what number of buses Arrow Bus Lines, Inc., owned, and whether the number alleged to have been sold constituted a large or a small part of the stock of said company.

When it is borne in mind that the provisions of the Bulk Sales Act are very drastic, are in derogation of the common law, and are in restraint of the free alienation of property, and that they must therefore receive a strict construction, and must not be held to be extended to a transaction which does not clearly come within their terms, as held in *Schwartz* v. *King*

Realty Co., 93 N. J. L. 115, and when it is borne in mind that the general rule of pleading is that the allegations are to be taken most strongly against the pleader, it is clear that a bill as loosely and insufficiently framed as is this one cannot stand against a motion to strike the same out.

Respondent discloses and confesses the whole basis upon which the mistake of the Vice-Chancellor arose on page 3 of his brief, where he says: "Assuming that the original bill as filed did not contain the averment that a judgment had been obtained previous to the filing of the bill, still the Vice-Chancellor in the Kirschenberg case at p. 514 said, 'The fact that neither the existence nor the amount of a debt has been conclusively established at law does not prevent this Court acting in aid of attachment.' The appellants evidently are in error by saying that the learned Vice-Chancellor has been misled by the complainant's memorandum. The memorandum of the complainant to the Vice-Chancellor sets forth the facts as existing under the amended bill which was permitted to be filed by the Vice- Chancellor and which contains the additional allegation that a judgment was recovered against the Arrow Bus Lines and execution returned unsatisfied."

Here it is shown clearly where the Vice-Chancellor obtained the facts which he imported into his statement of conclusions, and a disclosure of the fact that the original bill did not contain the same, but that the Vice-Chancellor extracted them from the memorandum of the complainant, in which he sought to impress upon the mind of the Vice-Chancellor that the facts alleged in the bill were as stated in an alleged amended bill, whereas the facts upon which the Vice-Chancellor had actually adjudicated were those con-

tained in the original bill, upon which the Vice-Chancellor had made the decision.

Counsel next declares that in the case of *Jaburg* v. *Kirschenbaum,* 90 N. J. Eq. at p. 512, the Court permitting the filing of a bill alleging violation of the Bulk Sales Act although no judgment had been obtained at law. He further states in his brief that in that case complainant would also have been outside the time limit if compelled to first obtain judgment before filing of the bill in Chancery, and that the Court learnedly said, "In view of the fact that complainants will be deprived of taking advantage of the provisions of section 208 of the laws of 1915 (P. L. 1915, p. 377), unless a suit of this nature can be brought, I think that leave should be granted," and that the Vice-Chancellor then disputed the pre-requisite of a judgment at law, by quoting from the opinion of Vice-Chancellor Stevens in the case of *Muller* v. *Hubschman, supra,* at p. 32, to the effect that "a creditor must have his debt fastened on the debtor's property by law, judicial process, or some other way,' and that the Vice-Chancellor then continued to say, "I am forced to concede that this is the rule, but the tendency of the courts is to limit the application of the rule where the interests of justice require, and this tendency is evidenced by adjudications that certain conditions fasten the debt on the debtor's property other than judicial process. The injustice occasioned by a strict adherence to the rule is one not easily remedied by legislation, so the courts are left to work out a solution by themselves."

The case of *Jaburg* v. *Kirschenbaum, supra,* is a direct authority against the contention of the respondent and in favor of the appellants herein. In that case Joseph Kirschenbaum was

the debtor and vendor of a stock of merchandise and fixtures which he sold in bulk to Benjamin Newman. Newman entered into possession of the property and was still in possession at the time the motion to strike was made. Thereafter and before the bill was filed, Fannie Kirschenbaum applied for and was duly granted letters of administration upon the estate of Kirschenbaum. Complainants presented their bill to both Newman, the purchaser, and Fannie Kirschenbaum, as the administratrix. The motion to strike out the bill in that case was not made by the purchaser, but was made by Fannie Kirschenbaum, the administratrix, who rested her argument upon two grounds: first, that the statute precludes an action at law or in equity against the administratrix within six months after the death of her intestate where the object of the action is to obtain a money judgment against the estate, and second, that neither the Bulk Sales Act nor the statute of frauds can be available to complainants until they have their debt fastened on their debtor's property by law or by judicial process.

The decision of the Court was that the case was distinguishable from the case of *Muller* v. *Hubschman, supra.* In that case Vice-Chancellor Stevens had held that before a creditor can attack a sale made in violation of the Bulk Sales Act, he must have his debt fastened on the property, and that a general creditor prior to obtaining by judgment, execution or otherwise, a lien upon the property, cannot proceed by bill "in this court." In that case (*Muller* v. *Hubschman*) the original debtor was living and there was nothing in the way of a proceeding at law against him, the obtaining of a judgment and execution thereon. This, it will be noticed, is

precisely the situation that exists in the case now *sub judice.* The original debtor is living, and there was nothing in the way of a proceeding at law against him, and the obtaining of a judgment and execution thereon.

Indeed, respondent by his brief expressly admits that on November 19, 1929, a judgment was entered in the Supreme Court against Arrow Bus Lines, Inc., and a writ of execution was issued thereon and returned *nulla bona* as against the company.

It will thus appear that *Muller* v. *Hubschman,* which Vice-Chancellor Lane thought it necessary to distinguish from *Jaburg* v. *Kirschenbaum* is a direct authority in favor of the appellants' position in this case and on all fours therewith.

Furthermore, in *Jaburg* v. *Kirschenbaum* the motion to strike out having been made by the administratrix of the vendor (while in the case *sub judice* it is made by the purchaser), the Court determined that a creditor of a decedent's estate who has presented his claim to the administrator *has his debt fastened on his debtor's property* so that he may maintain a bill against the buyer and the estate of the vendor (the decedent) to set aside a sale alleged to have been made in violation of the Bulk Sales Act, and that, it appearing that, unless such a suit is maintainable, the creditor of a decedent will be deprived of all remedy under the Bulk Sales Act, leave was granted under the provisions of Section 65 of the Orphans' Court Act to maintain such a suit against the administrator prior to the expiration of the six months' immunity from suit granted to the administrator under such section.

That the debt must be fastened on the property was expressly admitted by Vice-Chancellor Lane

in *Jaburg* v. *Kirschenbaum.* His language is, "The contention is made by counsel that Vice-Chancellor Stevens indicated that it was a prerequisite that the creditor should have a judgment and based that contention upon the language of the Vice-Chancellor (at p. 32 of 84 N. J. Eq.). The Vice-Chancellor did not so hold. At p. 31 he quoted the language of the Court in *Graham Button Co.* v. *Spielmann,* 50 N. J. Eq. 123, which is to the effect that a creditor must have his debt fastened on the debtor's property by law, judicial process, or some other way—quite a different proposition. I am forced to concede that this is the rule (*Haston* v. *Castner,* 31 N. J. Eq. 697), but the tendency of the Courts is to limit the application of the rule where the interests of justice require, and this tendency is evidenced by adjudications that certain conditions may fasten the debt on the debtor's property other than judicial process. The injustice occasioned by a strict adherence to the rule is one not easily remedied by legislation, so the Courts are left to work out a solution by themselves."

The Vice-Chancellor then goes on, after having discussed the Orphans' Court Act (3 Comp. Stat., p. 3822, paragraph 65 *et seq.*), which contains a comprehensive scheme for the payment of debts of a decedent, "The statute provides for the barring of creditors, presentation of their claims, passage upon the claims by the representative and the payment of debts. It seems to me to be clear that by force of this statute the debts of the decedent are so fastened upon the assets of the estate, even if the estate be not insolvent, as that the creditors have a standing to contest a sale in fraud of creditors under the provisions of the Bulk Sales Act."

It will thus be apparent that Vice-Chancellor Lane in the *Jaburg* v. *Kirschenbaum* case reached the conclusion that under the circumstances of that case the creditor did have his debt fastened on the debtor's property by law. In the case now *sub judice,* all persons are alive, and there is no judicial process or other legal situation which fastens the debt of the complainant on the property of the vendor. The case is left to be governed entirely by *Muller* v. *Hubschman, supra,* and in that case the Court distinctly said that "before a creditor can in this Court avail himself of the provisions of the Bulk Sales Act, which annuls a certain class of sales as against the vendor's creditors, unless certain prescribed steps are taken, the creditor must show that he has acquired by judgment and execution, or otherwise, a lien upon the vendor's goods." This direct authority, which has been relied upon consistently in our Courts, is fatal to respondent's case.

Respondent complains in his brief that "If the complainant postponed the filing of the Bill until a judgment was recovered in the Supreme Court, no bill could be filed in Chancery, inasmuch as the very first section of the Bulk Sales Act provides that 'No proceedings at law or equity shall be brought against the purchaser to invalidate any such voidable sale after the expiration of ninety days from the consummation thereof'."

The most obvious reflection which will arise upon a consideration of this claim is that there is no evidence in the case, nor are there any allegations in the papers, to the effect that if respondent had promptly sought his remedy in a suit at law he would not have been able within the time limited by the statute to have

his judgment, issued his execution, and had it returned unsatisfied.

The same consideration was urged upon the attention of Vice-Chancellor Stevens in the case of *Muller* v. *Hubschman, supra,* who answered it by saying, "It is said that the time limit would some time prevent relief from being had in this court, but I cannot understand why, because the right of attack is limited to ninety days, this should, of itself, be a ground for a different rule. It seems to me rather that when the legislature saw fit to give this new and drastic remedy—a remedy which confounds the innocent and the guilty because of the difficulty of discriminating between them—it did not think it wise to allow it to be applied, except for that limited period."

The only other point mentioned in respondent's brief, in his attempt to answer that portion of my original brief in which I claim, "It seems to be the consensus in most of the well-considered cases that goods and chattels which are kept for use but not for sale, or which are mere facilities for the operation of a business, or which are the manufacturer's stock of raw material, not kept for sale, or are utensils used in conducting a business, do not come within the purview of these statutes," is that he says, on page 3 of his brief, "The provisions of the Bulk Sales Act apply to any business, and necessarily so; nowhere in the act is a differentiation made between chattels of wholesalers, or retailers, or bus lines belonging to corporations. The act plainly includes any sale 'otherwise than in the ordinary course of trade, and in the regular and usual prosecution of the seller's business or occupation.' "

The first conclusive answer to his argument on this phase of the case is that there is no allegation in his bill of complaint that this sale took place otherwise than in the ordinary course of trade, and in the regular and usual prosecution of the seller's business or occupation. What the seller's business is or was is nowhere mentioned in said bill, nor is there even a hint that the sale of numerous buses is not the ordinary course of trade and the regular and usual prosecution of its business.

The other answer, which goes to the entire merits of the case, will be found fully and adequately presented in my original brief, and inasmuch as I have already drawn this reply brief out longer than I had intended, I shall content myself with a reference thereto.

For the reasons in that brief and in this one set forth, it is respectfully submitted that the decree and order of the Court of Chancery, denying the motion to strike out the bill of complaint for the reasons stated in the moving papers, and assessing costs against appellants, should be reversed.

Respectfully submitted,

WILLIAM H. SPEER,
Solicitor for and of Counsel
with Appellants.

New Jersey Court of Errors and Appeals

JOHN A. VAN GENDEREN, Respondent, vs. ARROW BUS LINES, INC., otherwise known as ARROW BUS LINES OF PASSAIC COUNTY, and PUBLIC SERVICE COORDINATED TRANSPORT, *et al.*, Appellants.	On Bill, etc. On Appeal from Chancery.

MEMORANDUM OF RESPONDENT'S POINTS.

The complainant filed a suit on a book account in the Supreme Court on September 12, 1929, against the Arrow Bus Lines, Inc., Public Service Co-Ordinated Transport, a body corporate, and Public Service Interstate Transportation Co. The Public Service corporations were made parties originally in the Supreme Court to protect the rights of the complainant under the "Bulk Sales Act", inasmuch as the ninety day period had about elapsed since the sale of the Arrow Bus Lines, Inc. to the Public Service Co-Ordinated Transport,

On September 14, 1929, a bill was filed in Chancery against all of the parties mentioned alleging violation of the provisions of the "Bulk Sales Act". At the time of filing of the Bill in Chancery, the

complainant had not recovered judgment in the Supreme Court on the book account. If the complainant postponed the filing of the Bill until a judgment was recovered in the Supreme Court, no bill could be filed in Chancery, inasmuch as the very first section of the "Bulk Sales Act" provides that "No proceedings at law or equity shall be brought against the purchaser to invalidate any such voidable sale after the expiration of ninety days from the consummation thereof." The sale of all the buses of the Arrow Bus Lines was consummated on June 25, 1929. A judgment was entered in the Supreme Court on November 19, 1929. It must, therefore, seem very apparent that in justice to the complainant's rights the Court of Chancery rightfully permitted the Bill to be amended so as to set forth that subsequently on November 19, 1929, judgment was entered in the Supreme Court, on which the writ of execution was returned *nulla bona* as against the Arrow Bus Lines, Inc.

In the case of Jaburg v. Kirschenbaum, 90 N. J. E. at P. 512 the court permitted the filing of a bill alleging violation of the "Bulk Sales Act" althought no judgment had been obtained at law. In that case the complainant would also have been outside the time limit if compelled to first obtain judgment before filing of the bill in Chancery. The court learnedly said "In view of the fact that complainants will be deprived of taking advantage of the provisions of section 208 of the laws of 1915 (P. L. 1915 page 377), unless a suit of this nature can be brought, I think that leave should be granted." The Vice-Chancellor then disputed the prerequisite of a judgment at law, by quoting from the opinion of Vice-Chancellor Stevens in the Muller v. Hubschman case (at P. 32 of 84 N. J. E.) "which is to the effect that a creditor must

have his debt fastened on the debtor's property by law, judicial process, or some other way." The Vice Chancellor then continued to say "I am forced to concede that this is the rule but the tendency of the courts is to limit the application of the rule where the interests of justice require, and this tendency is evidenced by adjudications that certain conditions fasten the debt on the debtor's property other than judicial process. The injustice occasioned by a strict adherence to the rule is one not easily remedied by legislation, so the courts are left to work out a solution by themselves."

I am of the opinion that the creditor's claim fastens itself on the property of a debtor, especially where the property is sold in violation of the "Bulk Sales Act."

Assuming that the original bill as filed did not contain the averment that a judgment had been obtained previous to the filing of the bill, still the Vice-Chancellor in the Kirschenberg case at P. 514 said "The fact that neither the existence nor the amount of a debt has been conclusively established at law does not prevent this court acting in aid of attachment."

The appellants evidently are in error by saying that the learned Vice-Chancellor has been misled by the complainants memorandum. The memorandum of the complainant to the Vice-Chancellor sets forth the facts as existing under the amended bill which was permitted to be filed by the Vice-Chancellor and which contains the additional allegation that a judgment was recovered against the Arrow Bus Lines and execution returned unsatisfied.

The provisions of the "Bulk Sales Act" apply to any business, and necessarily so; nowhere in the act is a differentiation made between chattels of

wholesalers, or retailers, or bus lines belonging to corporations. The act plainly includes any sale "otherwise than in the ordinary course of trade, and in the regular and *usual prosecution* of the seller's business or occupation". The exceptions are also plainly set forth in the third section of the act. Does the third section exempt corporations operating bus lines for the transportation of passengers? No. The regular and usual business of the seller was to carry passengers for hire, not to sell franchises and fleets of auto buses, and the creditor has a right to rely on the soundness and security of his debtor's franchise and properties. I contend that a gross violation of the "Bulk Sales Act" has been perpetrated, and that, the buyer having aided in such violation should not be permitted to rely on mere phraseology to escape the legal and equitable burden placed upon it by the act of 1915, chapter 208.

For the reasons herein set forth, it is respectfully submitted that the decree and order of the Court of Chancery should be affirmed.

Respectfully submitted,

ALEX MOSKOWITZ,
Solicitor for and of Counsel
with Respondent.