NEW JERSEY

Court of Errors and Appeals

Between HARRY B. BROCKHURST, Complainant, and JOHN H. COX, Defendant.	On Bill for Dissolution of Partnership.
In re Claim of ELIZABETH A. BROCKHURST, Claimant-Appellant, vs. J. MERRITT LANE, Receiver-Respondent.	On Appeal from Chancery.

POINTS FOR APPELLANT.

This appeal presents to this Court for review a decree of the Court of Chancery denying a preference to the claim of the appellant upon the funds in the hands of the Receiver of the partnership composed of the complainant and the defendant in the original suit.

The appellant seeks a reversal of the decree of the Chancellor for the following reasons:

I. FACTS FOUND BY VICE-CHANCELLOR ARE NOT SUSTAINED BY THE EVIDENCE.

On May 5th a temporary Receiver was appointed. (Case, page 2, lines 20-26.)

Which appointment was afterwards confirmed by the Court.

(Case, page 2, lines 38 to page 3, lines 1-11.)

On June 28th, 1905, the temporary Receiver was ordered to notify creditors by publication to present their claims within thirty days, within which time this appellant presented her claim to the Receiver, who objected to the same.

(Case, page 3, lines 18-26.)

J. Merritt Lane, as Receiver and Master, took testimony on this claim, beginning October 5th and ending October 17th, 1905.

(Case, page 5, line 16.)
(Case, page 31, line 4.)

The decree dissolving the partnership and appointing the permanent Receiver; also ordering Receiver, as a Master, to ascertain the firm creditors and the amounts due to each, was filed December 8th, 1905,

(Case, page 58, lines 18-40);

and was made after the testimony had been taken and completed by the temporary Receiver; whereas from the facts as stated by the Vice-Chancellor it would seem that the appellant presented her claim to the *permanent* Receiver after the decree of dissolution and the appointment of the permanent Receiver, and after the order to ascertain creditors had been made.

(Case, page 89, lines 21-39.)

The Vice-Chancellor finds that:

"The funds in the hands of the Receiver are slightly in excess of the amount of this mortgage and interest thereon."

(Case, page 89, line 40.)
(Case, page 90, lines 1-2.)

ALSO—"The assets are insufficient to pay the debts."

(Case, page 90, lines 4-5.)

There is nothing in the case to justify such finding.

ALSO—In his conclusions he states:

> "And her sons were each in business in and about Jersey City and were in constant communication with her."

(Case, page 91, lines 38-39, to page 92, line 1.)

This is not the true fact, and is not sustained by the evidence in this case.

ALSO—The Vice-Chancellor finds:

> "No attempt at any explanation or reason for this delay is made,"

(Case, page 92, lines 6-7),

whereas the evidence shows that appellant received this mortgage and swore to the affidavit annexed thereto on May 3rd,

(Case, page 9, lines 3-13),

and sent it to her Attorney in Jersey City, who immediately placed it in the hands of a Constable to foreclose and to take possession under it,

(Case, page 37, lines 23-37),

that this Attorney received the mortgage one or two days before the bill in Chancery was filed,

(Case, page 38, lines 3-6);

that the Receiver took possession of the partnership assets on May 5th and continued in possession until he sold them on May 19th.

(Case, page 3, lines 14-15.)

This shows immediate action on the part of the mortgagee, and explains the lapse of time between the giving of the mortgage and the taking of possession by the Receiver. It shows that it was the intention of the mortgagee to take "immediate possession" of the goods, but her intention was frustrated by the Receiver first securing possession. It shows appellant used reasonable diligence and dispatch in endeavoring to comply with the statute.

II. MORTGAGE IS NOT INVALID AS AGAINST CREDITORS.

Chattel mortgage is void as against creditors of the mortgagor only when not accompanied by possession or when mortgage is not recorded.

Pam. Laws 1902, page 487, Sec. 4.

"Immediate possession" means "as soon as may be by reasonable diligence and dispatch under the circumstances of the case";

Roe vs. Meding, 8 Dick., 350, at 368.

The evidence in this case shows that the mortgagee used due diligence and dispatch in attempting to take possession of the mortgaged goods, but that she was prevented from doing so by the Officer of the Court of Chancery.

ON MAY 3RD MORTGAGEE RECEIVED MORTGAGE AT RED BANK, N. J.

ON MAY 4TH SENT MORTGAGE TO JERSEY CITY.

ON MAY 4TH PLACED MORTGAGE IN THE CONSTABLE'S HANDS.

ON MAY 5TH COURT, BY RECEIVER, TAKES POSSESSION OF THE GOODS.

(Case, page 9, lines 3-13.)
(Case, page 37, lines 23-37.)
(Case, page 38, lines 3- 6.)
(Case, page 3, lines 14-15.)

"After the assets were in Court they could not be reached or touched except by permission of the Chancellor."

Buckingham vs. Ludlum,
10 Stew., 137, at 146.

> "The legal remedy of the parties was then changed to an equitable remedy. It may be said, then, that after the partnership assets were in Court the remedy of the creditors of the firm against them (the assets) was exclusively equitable."
>
> Buckingham vs. Ludlum, supra, page 146.

The principles of equity must then be called upon to settle all questions involved affecting this mortgage, and it then became impossible to take possession under it, and unnecessary to record the mortgage.

By the action of the Receiver in taking possession, the mortgagee was deprived of one of her legal rights (that of taking possession under the chattel mortgage act).

Can it be successfully contended that a Court of Equity will sequester mortgaged property and prevent the mortgagee by such sequestration from taking possession of the mortgaged property, and then allow anyone, *much less the officer,* to assert such lack of possession in order to make void that mortgage. Certainly such contention would be inequitable. Such sequestration makes the statute inapplicable.

The Court must hold that the Receiver and everyone else are estopped to now insist that this mortgage is void because the statute was not complied with, because the Court itself made compliance with the Chattel Mortgage Act impossible in this respect.

Appellant had title to the property, and all that was necessary to perfect her rights in the property was the possession. This Court deprived her of and the Court's possession must be construed to be her possession.

The Receiver cannot now urge non-compliance

with this statute under the circumstances and seek to avoid the mortgage on those grounds when he by his actions prevented compliance with the statute.

III. ONLY CREDITORS WITH LIENS CAN QUESTION MORTGAGES.

The proofs show that only two creditors obtained judgments, and that these had not been obtained at the time of beginning the attack on this mortgage. The judgments were recovered February 21 and February 23, 1906, respectively.

(Case, Exhibits B and C, pages 104-105.)

Taking of testimony commenced on October 5th, 1905.

(Case, page 5, line 25.)

Creditors must have lien on property.

Hall vs. Nash, 13 Dick, 554 (Er. and Ap.)
Glorieux vs. Schwartz,
8 Dick., 231 (Er. and Ap.)
Thompson vs. Van Vechten, 27 N. Y., 568-582
Knowles Loam Works vs. Vacher, 28 Vr., 490.
Ex parte Ruffin, 6 Ves., 119.
Jones on Liens, 2d Ed., Vol. 1, 517, Sec. 788.

Neither of these judgments created liens against the partnership assets.

"A judgment against a partnership without the Receiver being a party thereto is a nullity."
Kirkpatrick vs. McElroy (Er. and Ap.),
14 Stew., 539, at 554.
Lawson v Dunn, 49 Atl. Rep. 1087 (N.J.)

The proceeding does not become an involuntary proceeding so as to create liens against the assets any more than an assignment for benefit of creditor does.

Scull, et als., vs. Reeves, 2 Gr. Ch., 131.
Wimpfheimer vs. Perrine, 1 Rob., 597.
Ross vs Isaworth, 10 Stew. 333

Receiver is merely the assignee of the party whose property is placed in his care.

Kings vs. Cutts, 24 Wisc., 627.

"Receiver would not have been permitted to exercise any rights in the property against their (the partners') wishes."

(Kirkpatrick vs. Corning, (ER. & AP.) 11 Stew 234 ~~and~~ or 238.

The Receiver's appointment has no effect on the title to the property, either to change or create a lien upon it.

Beach on Receivers, Section 1, page 2.
Higgins vs. Gillesheiner, supra.

IV. "CREDITORS" IN STATUTE MEANS THOSE WHO DEAL WITH A MORTGAGOR ON THE FAITH THAT HIS PROPERTY WAS NOT ENCUMBERED.

The decisions in New Jersey are not directly in point. None of the adjudicated cases have been called upon to decide directly that a mortgage is void as to a creditor, who became such before the making of the mortgage and has been in no way damaged by non-compliance with the statute; but from the dicta used in Roe vs. Meding, this would seem to be the law in this state. Vice-Chancellor Pitney in this case says: "The apparent and real object of the statute is, to prevent the setting up of secret mortgages *against persons who might deal with the mortgagor on the faith that his property was not thus encumbered.*

Roe vs. Meding, 8 Dick, at pp. 362-363.

In re Hopper vs. Lovejoy, 2 Dick., at page 576, the present Vice-Chancellor Stevens, as Master,

approves Thompson vs. Van Vechten, 27 N. Y. 532, saying:

> "The rule on this subject is, as it seems to me, correctly stated in Thompson vs. Van Vechten";

where it was said that creditors with process can go back to the origin of their debt and show that when it was contracted the encumbrance with which they are now confronted existed and was kept secret by being withheld from the proper office. Which expression of opinion was in no way criticised by the Court of Errors and Appeals on appeal.

> Our Chattel Mortgage Act is almost identical with the New York Chattel Mortgage Act of 1883, Chapter 279, after which it was copied.

Knowles Loam Works vs. Vacher, 28 Vr., at p. 494.
Roe vs. Meding, 8 Dick., 350, at p. 360 and 363.
Milton vs. Boyd, 4 Dick., 142, 147, 148.

The New York statute has been construed to mean creditors who have become such between the giving and recording of the mortgage.

Thompson vs. Van Vechten, 27 N. Y., 568, approved in
Roe vs. Meding, supra; also approved in
Hopper vs. Lovejoy, supra;
Parshall vs. Eggert, 54 N. Y., at 22.

Delay in recording a chattel mortgage affects it only as against intervening judgment creditors.

11 N. Y., Super. Ct., 107.

Only void as to those creditors whose claims accrue while default in filing continues.

Smith vs. Clarendon, 53 Hun., 636.

The Michigan statute, Laws of Michigan, page 2912, Sec. 10, is identical with the New York and New Jersey statutes. The Courts of that state fol-

lowed the construction of the New York Courts and that as above indicated by V. C. Pitney in Roe vs. Meding.

A creditor cannot complain of failure to file a chattel mortgage for any length of time unless after its execution and before its filing he dealt with the mortgagor as he would not have dealt had the mortgage been recorded.

Waite vs. Mathews, 50 Mich., 392.
John vs. Stellwagon, 67 Mich., 10.

See also

Barton vs. Sitlington, 128 Mo., page 164.
Argall vs. Seymour, 43 Fed. Rep., 548.
Simon vs. Openheimer, 20 Fed. Rep., 553.

V. RECEIVER OF PARTNERSHIP DOES NOT REPRESENT CREDITORS.

He is a mere impartial, ministerial officer.

Beach on Receivers, pp. 1 and 5, Sec. 4.
Wyatt's Prac. Reg., 335.
Edwards on Receivers, p. 2.
Anderson on Receivers, p. 4, Sec. 3.

Receiver has such powers as the order appointing him confers upon him and no more.

Anderson on Receivers, p. 4, Sec. 3.

The orders appointing him provide:

(1) "And it is further ordered, that J. Merritt Lane, of Jersey City, New Jersey, be and he is hereby appointed Receiver of all the partnership property and effects of the firm of Brockhurst and Cox, and that he take possession of the same and continue the business in the usual course until the further order of this Court."

(Case, page 2, lines 20-26.)

(2) "And it is further ordered that J. Merritt Lane, of Jersey City, and State of New Jersey, be and he is hereby appointed Receiver of all the partnership effects of the firm of Brockhurst and Cox, to take possession of the same, and to sell, convey or assign all the property and effects of the said partnership firm, and to pay into the Court of Chancery all the moneys and securities for money arising from said sales or which he shall collect or receive by virtue of his said office, and to do and perform all the duties imposed upon him and required by law, and in the meantime to continue the business in the usual course until the further order of this Court."

(Case, page 2, lines 38-39,
to page 3, lines 1-11.)

(3) "And that said J. Merritt Lane, Esquire, a Master of this Court, who has been previously appointed Receiver pending this suit, be made permanent Receiver of the effects of the said partnership and that said Master shall ascertain the creditors of the said partnership and the amounts due to each, and report thereon to this Court";

(Case, page 58, lines 24-29.)

Equitable Receivers have no statutory powers.
Anderson on Receivers, page 4, Sec. 3.

"Their functions are to be ascertained by reference to ancient practice and usage.
Miller vs. Mackenzie (Er. and Ap.)
2 Stew., 291, at 293.

"In the absence of statutory provision a Receiver is a mere instrument or arm of the Court by which he holds the property in dispute for

safe keeping and preservation. He is not invested with the legal title. He acts or refrains as the Court directs. He is so purely the creature of the Court that the property he holds is esteemed to be in custodia legis. * * * It is clear, therefore, that unless the statute authorizing the complainant's appointment as Receiver confers upon him the right to maintain this action he cannot maintain it. His right to appear here as a suitor to impeach these conveyances must appear in the law authorizing his appointment, or he has no such right. So far as he is the representative of a judgment debtor or claims under him, it is certain he is without standing or right in this Court, for no principle of law is more firmly established, or more uniformly upheld by the Court, than that neither a fraudulent grantor, nor those who represent or claim under him will be allowed to impeach his grant.

Higgins vs. Gillesheimer,
11 C. E. Gr., 308, at 309.

Although this case was reversed by this Court in Miller vs. Mackenzie, supra, the opinion expressed above was not weakened, as the case was reversed on another ground.

Kirkpatrick vs. Corning, (ER. & AP.)
11 Stew 234 ~~and~~ at 238, supra, p 7, brief

Receiver represents the partners for the followings reasons:

(a) He was appointed on their application, with their consent and to settle their disputes.

(b) The creditors took no part in any proceeding in this cause, except to present their claims.

(c) The partnership has not been decreed to be insolvent and the Receiver was not appointed because of the insolvency of the partnership.

(d) The creditors had no voice in the appointment of the Receiver; they had no opportunity to be heard regarding his appointment and consequently they are in no way bound by any of his acts which might determine their rights.

(e) The creditors have never consented to any action on the part of the Receiver, or have they become a party to such action.

(f) The Receiver was not created for the protection of the rights of the creditors.

A Receiver of a corporation is held to represent its creditors in Graham Button Co. vs. Spielmann, 50 N. J. Eq. 120, but this is upon the ground that the corporation was insolvent and that the *statute* thereby fastens the debts of the creditors upon the assets of the corporation, upon the appointment of a Receiver. The appointment of a Receiver of a partnership does not so fasten the debt of the partnership upon its assets. The Receiver takes no title by his appointment, he merely takes possession.

In this case the partnership has never been declared insolvent and unquestionably by the appointment of this Receiver, the debts of the partnership never became any lien upon its assets because the partners at any time could have discontinued their proceeding and taken possession of the assets back into the partnership and unaffected by any lien of the creditors. There is no authority whatsoever in this state for the practice adopted in this case of advertising for creditors and compelling creditors within a specified time to present and prove their claims before a Receiver, who after allowing the claims, then attempts to attack their validity.

Receiver is not invested with title.

Higgins vs. Gillesheiner, Supra, at 309.

The appointment of a Receiver will not oust any party of his rights.

Beach on Receivers, Section 222, p. 173.
Ellicot vs. Warford, 4 Md., 80.

The Berlin Machine Company against Security Trust Company case, seems to be in all points similar to this case. In that case the Court said:

"This instrument, a chattel mortgage on a machine was never filed of record. It is claimed by the Receiver that he represents creditors of the Furniture Company and as to such creditors the instrument is void, because not so filed. We are of the opinion, that the Receiver does not represent creditors, so as to enable him to avoid this instrument, because not so filed. He represents merely the partners, or the partnership for which he was appointed Receiver."

Berlin Machine Co. vs. Security Trust Co.,
61 N. W. Rep., 1131.

"Receiver of partnerships cannot question conveyances as preferential."

Mastermann vs. National Bank,
61 Minn., 299.

"A Receiver appointed on the application of a partner in a proceeding for an accounting and settlement of the firm's affairs, has only those rights against the creditors of the firm which the firm had."

Security Trust Co. vs. Schlender,
60 N. E. Rep., 854.

Van Heusen v Radcliff
17 N. Y. 580

The Receiver's appointment has no effect on the title to the property, either to change or create a lien upon it.

Beach on Receivers, Section 1, page 2.
Higgins vs. Gillesheiner, supra.

Receiver represents partners.

"Receiver would not have been permitted to exercise any rights in the property against their (the partners') wishes."

Kirkpatrick vs. Corning, (ER. & AP.)
11 Stew 234 and 238.

It is now well settled by this Court in this State that an assignee appointed for the benefit of creditors cannot impeach a prior chattel mortgage for not complying with the chattel mortgage act. He does not represent creditors.

Wimpfheimer vs. Perrine, 1 Rob., 597.
Shaw vs. Glenn, 10 Stew., 30.
Millsbury vs. Kingdon, 33 N. J. Eq., 287.
Knowles vs. Vacher, 28 Vr., 490-494.

Watson vs Rowley
18 Dick. 195 at 203

An assignee does not represent creditors. He stands in the same position as the assignor. He takes the property subject to all the rights and equity which the mortgagees could have asserted against the assignor.

Simon vs. Openheimer, 20 Fed., 553.

Receiver is merely the assignee of the party whose property is placed in his care.

Kings vs. Cutts, 24 Wisc., 627.

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"The judicial action taken in this case affected substantially the same result that a debtor who makes an assignment for the benefit of his creditors, accomplishes by his own voluntary act."

Buckingham vs. Ludlum, supra, at 146.

This Receiver is in every respect an assignee. He was appointed by the *voluntary* act of the partners. He has no statutory powers. He has only the powers given him by the Court, e. g., to take possession of the goods and hold the same for distribution.

Receivers ought not to interfere in litigation.
Comyn vs. Smith, 1 Hogan, 81.

Receivers take property subject to such equity as existed against it in the hands of the partnership.

Beach on Receivers, 166, Section 102.
Dann Manf'g Co. vs. Parkhurst,
125 Ind., 317.
See also 40 Neb., 216.
Anderson on Receivers, 652, Section 463.

"The appointment of a Receiver terminates no right between the parties nor does it affect the title to the property in any way. The Receiver is appointed merely for the preservation of the property or funds during litigation, and in the meantime the Court proceeds to determine the rights of the parties upon the same principles it would had no change of possession taken place.

Davis vs. Bonny, 17 S. E. Rep., 229.

VI. THE COURT NEVER ACQUIRED JURISDICTION TO DECIDE THIS CASE.

This matter was referred to the Receiver to take proofs and to report whether the claims should be paid or not. He filed his report to which certain of the creditors filed exceptions.

(Case, page 59, line 8, etc.)
(Case, page 60, line 20.)

This case should have come up for confirmation or disallowance of the report, and have been argued on these exceptions filed. There were no pleadings or other papers filed showing who were attacking this mortgage or showing their grounds of attack and therefore appellant was compelled affirmatively to prove that there was no fraud or other misdealings in the consideration or the giving of this mortgage and to prove affirmatively every matter pertaining to its validity before any attack was made thereon.

Jurisdiction cannot be waived or granted by consent.

Coffin vs. Tracy, Col. & Cai, 470; S. C. 3 Cai, 129.
Dudley vs. Mayhew, 4 N. Y., 9-12.
Daykin vs. Denning, 6 Paige, 95.

Want of jurisdiction is not waived by appearance and contest.

Grovers Bank vs. Clarke, 31 Hun., 115.

It is well settled that a defect of jurisdiction in the Court below may be set up for the first time on appeal.

Ex parte Livingston, 34 N. Y., 555.
See also 50 Barb., 191.
43 N. Y., 554.
9 Cow., 227.

"Relief of this nature can only be asked for and received in a suit regularly brought to which all persons in interest are made parties and afforded an opportunity to make defense."

Buckingham vs. Ludlum, supra, at 142.

I most respectfully submit that this chattel mortgage is not void against the creditors of the partner-

ship. That the mortgagee would have taken possession of the mortgaged property with reasonable diligence and dispatch, had not such possession been obstructed and interfered with by the Receiver of the Court of Chancery. That it then became wholly unnecessary to record the chattel mortgage because the mortgagors were no longer in possession, and no fraud could be perpetrated on the public by future dealings by the mortgagors upon the representation that they still owned the property free and clear of encumbrances. The evidence shows that under the circumstances the mortgagee did not have time between the receiving of the mortgage and the taking of possession by the Receiver to go into possession of the mortgaged goods, but that it was her intention and she took steps to do so.

But if the mortgage is void as against creditors, I submit that the Receiver does not and did not at any time, represent creditors for the purpose of contesting this mortgage. As shown above, he is a ministerial officer, appointed to hold the assets of the partnership during litigation and is appointed on the motion and with the consent of the partners. The creditors had no voice in his appointment, retention or dismissal. He is created by the voluntary act of the partners, for their dispute and for their benefit. He is in all respects the assignee of this property during their litigation. The Vice Chancellor in his conclusion says that upon decree of dissolution the Court determines that the partnership property must first go to pay the creditors of the partnership, and that the creditors will be ascertained and their debts paid and that by virtue of such decree of dissolution the said creditors' debts against the partnership become fastened upon its assets, and that thereupon the Receiver became the representative of the creditors, and that the dis-

tribution of the property of the partnership among the creditors is an involuntary proceeding.

But the Vice Chancellor has overlooked the fact, that the proceeding throughout was entirely under the control of the partners and that even the final decree of dissolution was obtained by them solely, and that this Receiver was their Receiver, appointed at their solicitation and without any right in any creditor to object to his appointment. The Vice Chancellor also overlooked the fact, that it was wholly voluntary whether the partners did or did not apply for a decree of dissolution. The filing of this decree did not make the distribution of the property of the partnership an involuntary proceeding and appropriate the assets irrevocably to the payment of the creditors' claims so as to create a lien upon those assets in favor of the creditors, any more than the giving of an assignment under the Assignment Act (Gen. Stat., Vol. 1, p. 77) rendered that proceeding an involuntary proceeding and appropriated the assignor's assets irrevocably to the payment of his creditors' claims so as to create a lien upon them.

In Scull et al. vs. Reeves, 2 Gr. Ch. 131, it was held, that an assignment once given was irrevocable by the assignor and that it was then in the hands of the Court and would be executed under its direction, according to law. In that case after the giving of the assignment the assignor no longer had control over his property and this property was then used by the assignee solely for the purpose of paying the creditors' claims, and if any surplus remained, of paying back this surplus to his assignor.

But in the case of Wimpfheimer vs. Perrine, 1 Rob., 597, this Court after reviewing all the decisions, some of which seemed to be in conflict laid down the law of this State to be, that such an as-

signee could not impeach an encumbrance of his assignor as the representative of creditors, unless such encumbrance was tainted by fraud.

I contend that the Receiver of a partnership is in all respects, only an assignee of the partnership property. There is no reason for him to represent creditors. By his doing so, the creditors are not benefited, but are prejudiced and delayed in the collection of their claims. If he represents creditors, they must wait until litigation instituted by him is finished, while if he does not represent them, they may institute proceedings in equity to set aside encumbrances, or they may proceed at law against the individual partners for the collection of their claims.

I further submit that the proceeding now under review has been irregular and without any warrant of authority from the commencement of the attack on this claim. The appellant has never been advised of what fault existed against the validity of this mortgage. She has been compelled to put in an abundance of evidence, not knowing from which standpoint the mortgage would be attacked.

I most respectfully submit that the decree of the Chancellor should in all respects be reversed and that this chattel mortgage be declared a valid and subsisting lien against the assets in the hands of the Receiver, and entitled appellant to a preference upon the assets of the firm in the hands of the Receiver, and that the said Receiver does not represent creditor to impeach encumbrances created by the partners.

Respectfully submitted,
ADOLF L. ENGELKE,
Sol'r for and of Counsel
with Appellant

Supplemental brief
New Jersey

Supplemental Brief.

An assignment "by operation of law" is a voluntary assignment and passes the property in the same plight as held by the original owner.

Milford v Milford
9 Vesey 100

Vandorren vs Todd et al
2 Gr. Ch. 397, at 414

Receivers etc v Paterson Gas Co.
3 Gals. at p. 291

The final decree dissolving the partnership amounts to an assignment of the property for the benefit of creditors "by operation of law". An assignment may be created although not in regular form.

See Burrill on Assignments § 2
Fairchilds vs Hunt, 1 McCart 367
Stites v Champion, 4 Dick. 446

NEW JERSEY COURT OF ERRORS AND APPEALS.

Between HARRY B. BROCKHURST, Complainant, and JOHN H. COX, Defendant.	On Bill for Dissolution of Partnership.
In re-claim of ELIZABETH A. BROCKHURST, Claimant-Appellant, and MERRITT LANE, Receiver-Respondent.	On Appeal from Chancery.

BRIEF FOR RECEIVER-RESPONDENT.

Harry Brockhurst, who with John H. Cox, constituted the firm of Brockhurst & Cox, filed on May 5th, 1905, a bill for a dissolution of the partnership and an accounting. The bill did not mention the debt or chattel mortgage of the appellant, Elizabeth Brockhurst. On May 5th, 1905, an order to show cause was granted and Merritt Lane was appointed Receiver (p. 1-2). On the return of the order, it was made absolute and Merritt Lane appointed Receiver (p. 3). Under the order

of the Court, the Receiver sold the assets of the firm for $850.00. Under like order he gave notice to creditors to come in and prove claims, and among others presented was that of appellant (p. 102) $832.00 upon a chattel mortgage dated May 2nd, 1905, recorded May 18th, signed for the firm by Harry B. Brockhurst, the son of appellant, and the partner, who, on May 5th, 1905, three days after the date of the mortgage, filed the bill for a Receiver (p. 100). The Receiver objected to this claim, and gave notice of an application to the Court for permission to distribute the assets without paying it (p. 3). Elizabeth Brockhurst appeared, presented a petition praying that the money be paid to her. Her petition was considered on proceedings on Receiver's petition for order of distribution and upon her consent an order was made referring the matter to the Receiver to take testimony and report whether the claim should be paid (p. 4). The Receiver took testimony and reported on December 23rd, 1905, that the claim was valid (p. 59). On December 8th, 1905, a decree for dissolution was made and Merritt Lane was appointed permanent Receiver and "**shall ascertain the creditors of said partnership and the amounts due to each.**" (p. 58). Exceptions were filed to the Receiver's report of December 23rd, 1906, (p. 60), and upon the matter being brought on before Vice-Chancellor, he directed on consent of all parties (p. 62) further testimony to be taken and directed the Receiver to intervene. Further testimony was taken, and on July 17th, 1906, a decree was made denying the claim of the appellant to a preference under the chattel mortgage (p. 97). From that decree this appeal is taken. The conclusions of the Vice-Chancellor appear on page 89 of the printed case. Two judgment creditors of the partnership were and are parties to the proceedings. The partnership is insolvent, assets, $850.00 (p. 3), liabilities $1,854.70 (p. 103).

The claim of the appellant is based upon a chattel mortgage purporting to be made by her son, Harry, for the partnership, dated May 2nd, 1905, recorded May 18th, 1905, to secure an alleged advance of money by her to her son, for the partnership in December, 1904. Three days after the date of the mortgage, the son Harry filed the bill for a dissolution and did not mention the mortgage.

The Receiver insisted below:

First: **That the appellant never advanced the eight hundred dollars to the firm of Brockhurst & Cox, or if she did it was repaid.**

Second: **That the chattel mortgage is fraudulent in fact.**

Third: **That the chattel mortgage, because of defective recording, is invalid as against the Receiver representing creditors, or as against the creditors who are parties to this proceeding.**

FIRST: APPELLANT NEVER ADVANCED EIGHT HUNDRED DOLLARS TO THE FIRM OF BROCKHURST & COX, OR IF SHE DID, IT WAS REPAID.

In support of the claim, the only witnesses produced were **appellant and her son, Harry, to whom she had advanced the money,** for, as she alleges, the firm.

Harry Brockhurst, son of the appellant, was in the butter and egg business prior to the formation of the partnership of Brockhurst & Cox, on or about the fifth day of December, 1904. Harry had been dealing with one Lucus, buying butter and eggs from him. Appellant, on page 7, lines 20 to 30, says that Harry told her one evening when he came home "that he was a little short, and he says

'Will you loan the firm of Brockhurst & Cox a little money to help us out?' I said 'certainly, to help you out.' And it is the truth I loaned eight hundred dollars for the firm of Brockhurst & Cox for the purpose of using it in their business for purchasing butter.'' Harry says that on or about the 6th or 7th of December, 1904, he purchased from Lucus a certain amount of butter and to pay for it borrowed eight hundred dollars from his mother (p. 16, l. 20).

Appellant first insisted (p. 12, l. 30), that she did not have any financial dealings with her son after the time she loaned him the eight hundred dollars and May, when the mortgage was made. On page 13, line 10, she says she does not remember whether she had any dealings or not, but would be likely to remember if she had. Harry admits, on page 23, l. 10, that he paid his mother (appellant) about March 14th, 1905, something between nine hundred and fifty dollars and twelve hundred dollars, moneys which he had received from Lucus for butter, which he had resold to Lucus, he having (as he says) purchased it from Lucus in January, 1905, immediately after the purchase that was made December 8th, 1904, for the partnership, and for which he paid the eight hundred dollars borrowed from his mother.

The check from Harry to his mother is in evidence and appears to have been dated on March 15th, 1905. Page 84 and 85.

Harry insists that on December 6th, 1904, he purchased from Lucus a large amount of butter, some 115 tubs, and that this purchase was for and on account of the partnership. Page 26, l. 20. That the purchase of January 9th, 1905, of the 92 tubs of butter was not on account of the partnership, but was a separate transaction **for his own**

personal benefit. .Page 23, l. 10-30; p. 27, l. 10. He refuses to explain the circumstances in reference to it. On March 15th, 1905, he resold to Lucus the goods which he had bought from him on January 9th, 1905, for his own personal use at a profit, **and out of that money he had paid to his mother.** (p. 23, l. 13). A. **What was due her at the time, I do not recollect, something between nine hundred and fifty dollars and twelve hundred dollars.**

Up to this point there had been no evidence that his mother had ever advanced him any more than the eight hundred dollars, which it is alleged she advanced for the partnership, and there is no proof that his mother ever advanced more than this one eight hundred dollars. He does not swear that his mother advanced him any other amount in positive terms.

After the testimony was produced showing that Harry had paid his mother in March something between nine hundred and twelve hundred dollars and after appellant had testified that she had no financial dealings with her son subsequent to the advance of eight hundred dollars to him, she was recalled, on page 28, and then says that if he paid her between nine hundred and twelve hundred dollars in March, 1905, it was a separate loan, and then the following appears, page 29. Q. **Did your son owe you any such amount of money as from nine hundred to twelve hundred dollars in addition to the eight hundred dollars loan to the firm of Brockhurst & Cox?** A. **He has accommodated me at different times.** Q. **You don't understand, Mrs. Brockhurst, what I want to know is, did Harry owe you in addition to the eight hundred dollars which the firm borrowed, did he owe you nine hundred dollars or twelve hundred dollars outside of that?** A. **No, not that I know of.**

Q. Are you positive of the fact? A. I am not certain about it, but I am positive about the eight hundred dollar loan. Q. You don't remember Harry ever owing you nine hundred dollars or one thousand dollars in addition to the eight hundred. There were no separate transactions where you gave Harry nine hundred dollars or one thousand dollars in addition to the eight hundred dollars? A. Yes there were. Q. Between what times. A. I do not remember.

On page 30, she says she remembers that there were two loans. A. I remember there were two loans I gave you **because there was not enough to cover the whole amount of the butter.** I am positive of a second loan. She says the first loan was the eight hundred dollars. (p. 30, l. 12). That it was to cover the **92** tubs of butter which were purchased from Mr. Lucus by the firm, **and they didn't have enough to meet it.**

Harry says that the purchase of 92 tubs of butter was for his own individual use. P. 27, l. 10.

James Brockhurst (a brother) says (p. 51, l. 20) that the butter for which the eight hundred dollars was advanced was the **92** tubs.

Lucus, from whom all this butter was bought, testified on page 31, that he only knew Mr. Harry B. Brockhurst. That he did not know Mr. Cox; that the account had always been kept in the name of Harry B. Brockhurst & Company. That all the purchases made by Harry Brockhurst were billed in the same way. **That he remembers the two purchases of 92 tubs and 115 tubs, and they were both made in exactly the same way.** That he remembers that he bought back an amount of butter from Harry Brockhurst in March and says that Harry Brockhurst came to him and **requested a check for the butter and he said he wanted to**

pay it to his mother and that he understood the amount due his mother was $800. (p. 32 ,l. 2; p. 35, l. 2), and says that Harry Brockhurst told him that the amount was $800. .This indicates that the checks Harry gave his mother in March, of moneys which he received from Lucus, were to pay off this identical $800 loan now claimed to be unpaid.

Harry says that he entered the eight hundred dollars in the partnership book (p. 22, l. 20), in the book produced as Receiver's Exhibit R. 1., (p. 99, l. 20). This book contains on its first, second, third and fourth pages, items of money received by Harry B. Brockhurst in the store for the months of February, March and April, nineteen hundred and five, and at the bottom of the first page appears seven memorandums, four of them being loans to Cordyon, one a loan to Bradley, two, one following the other, loan $800, loan $1200.

The $800 loan and the $1200 loan therefore appear to have been entered among personal memorandum of Harry B. Brockhurst. Why if one was a personal loan and the other was a loan to the partnership, they should be entered together among Harry's personal memorandum is not explained. If the $800 loan was a loan to the partnership, it should have been entered in this book before the month of January. It is apparent that both loans, if made, were loans to Brockhurst personally. Harry testifies that the butter which was bought with the $800 loan from his mother was put in the Merchant's Refrigerator Company and was drawn out on Cox's order. The orders are not produced nor is any explanation made for their non-production and Cox denies that he ever used the butter. Cox denies that Harry ever spoke to him about any loan of eight hundred dollars from his mother; he denies that he authorized

Harry to buy any butter in December, 1904. Page 43, he says that no such amount of butter was used by the firm. He says that Harry Brockhurst used to buy all the butter and eggs; that the butter which was being used was that which was in storage and that Cox understood that Harry had a large amount on storage when he went into the partnership. Page 45, l. 20.

Harry took all the money belonging to the firm and put it through his own bank account. There never was any firm bank account. Page 82, l. 20. Both of these loans went through the same bank account. Checks were drawn upon the same account to Lucus for payment. **Both loans and the money which Harry received from Lucus in payment of the re-sale to Lucus went through this bank account and the money which was paid to appellant was taken out of this bank account.** Yet it is insisted by the appellant that the loan of eight hundred dollars was a loan to the partnership and the loan of one thousand dollars was a loan to Harry personally; that the one thousand dollars received from Lucus was Harry's personally and that when Harry paid it out of this same bank account to his mother, he paid his personal debt, and not the debt of the partnership.

There is no way of ascertaining what was intended at the time of the different transactions because of the manner and method in which Harry mixed the funds of the partnership and his own, and any question should be resolved against Harry and in favor of the partnership.

The testimony of appellant on direct examination was in response to leading questions, in most instances the words being put into her mouth. On page 30 it was necessary after she had already been examined by her counsel for

her son Harry to examine her. She does not remember any of the details in reference to the making of the loans except the bare fact that the loan was made. She says that the money was paid by check, **sent by her in blank to her son with the amount not filled out.** (p. 13, l. 20 to 30). Although notified to produce the check and books, neither she nor her son, Harry, does so. Page 88. No bank account from which the amount could have been drawn is produced. **She was not in the habit of giving blank checks to her son Harry.** (p. 15, l. 21). She knew nothing about her bank account and although she says she knew she had eight hundred dollars in the bank, yet from the testimony on pages 15 and 16 it is apparent that there was no basis for her knowledge. On page 12 she says she had no financial dealings with her son after the loan of eight hundred dollars and on page 13, she does not remember. On page 28, on being recalled, she says her son paid her in nineteen hundred and five something between nine hundred and twelve hundred dollars. That this was a separate matter. On page 29 that her son did not, to her knowledge, owe her nine hundred or twelve hundred dollars in addition to the eight hundred dollars at the time this twelve hundred dollars was paid to her.

After the check was produced, an opportunity was given to her to resume the stand before the Vice-Chancellor and to clear up some of the apparent inconsistencies in her testimony and that of her son, but she did not take advantage of the opportunity.

The testimony of Harry is almost as confusing and inconsistent. He does not remember anything about the check, how it was paid or on what funds it was drawn. He refuses to tell anything about the second purchase from Lucus or the re-sale on

the ground that it was a personal transaction. (p. 23, l. 30; p. 25, l. 20). He says that they were two entirely different transactions and two entirely different loans from his mother, although he entered them in R. 1., the only memorandum that he had, together and among his personal memorandums. His mother says that both loans were made for the same purpose. He mixed the funds of the partnership and his own. He says on page 27 (l. 30 to 40) that besides paying his mother the twelve hundred dollars he also advanced her sums from time to time when she would be short, and his mother says, on page 29, l. 9, that he had accommodated her at different times. There is no evidence as to the amount of these advances as to whether they were Harry's personal moneys or as to whether they were partnership funds. They were taken out of the same bank account into which the partnership moneys went.

Lucus says that he paid Harry money which Harry said was expressly for the purpose of repaying his mother this eight hundred dollar loan and that Harry told him so.

Cox denies that he ever authorized Harry to borrow any money from his mother or to buy any butter for the firm and denies that the butter was used.

Appellant says that she advanced the money to Harry for the firm for their business of purchasing butter. This was not the business of Brockhurst & Cox, but was the private individual business of her son.

If the appellant's history of the transactions is true, it appears that Harry purchased a large amount of butter from Lucus in December, 1904, for the firm, and to pay for it he borrowed eight

hundred dollars from his mother and that in January he purchased another large amount of butter from Lucus personally, and to pay for it he borowed some twelve hundred dollars from his mother. That in March he sold the last butter to Lucus at a profit, which he refused to disclose, and with the moneys which he derived from this sale he paid off the last loan from his mother.

The testimony produced by the appellants does not support this proposition. It is apparent that Harry B. Brockhurst was running an independent butter business separate and distinct from the partnership of Brockhurst & Cox; **that whatever money was advanced by appellant was advanced to her son Harry for his own independent business**; some of the butter which he bought he unquestionably sold to the partnership. The butter business was his own personal business in which Cox had no interest and he (Brockhurst) was making a profit independent of the partnership. **His mother knew this and gave him an opportunity to use the money as he chose, by giving him blank checks, and the circumstances surrounding this alleged loan indicates that the transaction between appellant and her son Harry was personal to them and that the idea of fastening the debt upon the partnership only arose in May, 1905, when it could be used to seize upon all the assets of the partnership by means of this alleged chattel mortgage.** Three days after the chattel mortgage was made (the first evidence of the indebtedness from the partnership to Harry's mother), Harry, as a partner, files a bill for dissolution of the partnership and a receiver. The mortgage is made and signed only by Harry. If appellant was not a party to this proceeding she should have explained her position, as she was given an opportunity to do. A careful examination of the testimony will lead to the conclusion that appellant's

testimony is practically worthless, the words being placed in her mouth for the purpose of supporting the mortgage.

Appellant did not establish that she advanced to the partnership of Brockhurst & Cox eight hundred dollars or any other sum. If any sum was advanced it was repaid by the check of twelve hundred dollars or by the other amounts which Harry admits he paid her but which there is no account of, out of the bank account into which all the partnership funds went.

Second: THE CHATTEL MORTGAGE IS FRAUDULENT IN FACT.

Harry Brockhurst testifies on page 18 that his authority to make and execute the chattel mortgage was based upon a conversation which he had with Mr. Cox in which Mr. Cox said as follows: Page 18, l. 10. A. Mr. Cox was always willing to secure claims and the Tuesday preceding the day the Receiver went into possession, I went to the store and had a conversation with him and in that conversation I asked him if he was willing to secure all creditors, and he said he was; and in compliance with this conversation I drew this mortgage and another mortgage to another creditor (not produced) **and would have drawn other mortgages only I was interrupted.**

Interrupted by what? **By his own act in filing the Bill of Complaint in this cause by applying for a dissolution of the partnership and the appointment of a receiver.**

The debt is alleged to have been contracted in December, 1904. He waits until May, three days before the appointment of the Receiver, and then gives the chattel mortgage to his mother, the only

authority, for which as he says was the agreement on the part of Cox that all creditors should have chattel mortgages and then before giving any other chattel mortgages, he files the bill of complaint and his excuse for not executing other chattel mortgages is that he was interrupted. He had three days between the making of the mortgage to his mother and the filing of the bill in which to make other chattel mortgages and the filing of the bill of complaint was itself a voluntary act on his part.

There is no indication in the statement on page 18 that his mother was to secure any benefit that other creditors did not secure. All creditors were to be equally protected. Why it was necessary to give chattel mortgages to do this is not apparent. He violates the agreement by giving a chattel mortgage to his mother and not giving any others.

The transaction is so tainted with fraud that the Court will look upon it with the closest scrutiny and will intend nothing in its favor.

The testimony must all be taken together and when we consider the testimony of appellant and Harry Brockhurst and all the facts in the case, the conclusion is irresistable that the chattel mortgage is a scheme to get control of the assets of the partnership.

In the case of Wallace vs. Yeager, 4 Phil., Pa., 251, it appeared that the son, a member of a partnership, had sold his father, at reduced price, all the assets of the partnership.

It was held that the partner had control over all the assets but "a forced sale by one partner not in the course of the business of the partnership but outside of it and of a nature to break it up is

however a different matter, and should, as it would seem, confer no title on a purchaser who buys with notice." And further "Although the mere circumstance that the defendant bought goods in a lump and for less than one-half price would not suffice to show that he bought mala fide if it stood alone **it bears a different aspect when viewed in connection with the fact that the purchase was made from his son and the whole of the proceeds were appropriated by the latter to his own purposes** in fraud of his co-partners and the partnership creditors. When evidence is adduced that one of the parties to a transaction has acted fraudulently and the question is as to the complicity of the other, **their near relationship must always be a material element** and may in connection with other circumstances serve as proof. **The father who buys from a son may reasonably be presumed to know and approve the object for which the sale is made,** especially where, as in the present instance, they were sold in such a manner as to excite suspicion.

The facts in that case seem to be parallel with the facts in the case at bar. There it was a case of sale from son to father and here is a case of chattel mortgage of all the firm's assets from son to mother. There there was no question but that the purchase price was actually paid by the father. Here there is a grave question whether the mother ever advanced the eight hundred dollars or whether she has not been repaid, if advanced.

It seems to me that the same rule applied in the case of Wallace vs. Yeager may be applied here. We have the near relationship of all the parties and the suspicious acts of them both and there is enough to warrant the Court in finding that the mortgage was fraudulent in fact.

In Wallace vs. Yeager, the defendant contended that the receiver could not set aside the sale as he stands in no better position than the partnership, but the Court said: "The receiver succeeds not only to the legal title of the partnership as joint tenants but also to the equitable rights and remedies of the firm. **His authority is conferred by law and not like that of a voluntary assignee derived from the appointment of the parties.**"

In the case of Wimpfheimer vs. Perrine, 59 Atl., 357, 1 Rob., 597, it is held that even a voluntary assignee can void a mortgage for fraud.

It is submitted that the chattel mortgage is fraudulent in fact and if fraudulent in fact is invalid as against the receiver.

THIRD.

THE CHATTEL MORTGAGE, BECAUSE OF DEFECTIVE RECORDING, IS INVALID AS AGAINST THE RECEIVER, REPRESENTING CREDITORS, OR AS AGAINST THE CREDITORS, WHO ARE PARTIES TO THESE PROCEEDINGS.

The mortgage was not recorded in accordance with the statute and is void as against creditors.

Chapter 153 of the Laws of 1902, page 487, section 4, which refers to the record of chattel mortgages, has been construed and the law is settled, that a chattel mortgage, withheld from record an unreasonable length of time, is void as against creditors, who became such before or after the giving of the chattel mortgage, and that, if a creditor obtains a standing in Court after the recording of the chattel mortgage, his standing relates back to the inception of the debt, and the

chattel mortgage is void as against such a creditor if his standing is based upon a debt arising before the recording of the mortgage.

What is a reasonable time depends upon the circumstances of each case. It must be immediate recording. Five days has been held too long to withhold from record.

Roe v. Meding, 8 Dick., 362, 368.
Bleakley v. Nolson, 11 Dick., 676.
Williamson v. N. J. Southern R. R. Co., 2 Stew., 336.
Dunham v. Crammer, 18 Dick., 151.
Thompson v. Van Vechten, 27 N. Y., 582.
General Electric Co. v. Transit Equipment Co., 12 Dick., 468.
Brown v. Harris, 38 Vr., 209.
Hardcastle v. Stiles, 40 Vr., 552 (5 days).
Murray v. Zeller, 59 Atl., 261.

Nothing can satisfy the statute except immediate delivery followed by an actual and continual change of possession or immediate recording.

The statute is one which must be liberally construed to protect a creditor.

Particularly:

National Bank v. Sprague, 5 C. E. Gr., 27.
Knickerbocker v. Penn. Cordage Co., 20 Dick., 181 (1903), (particularly at page 187).
Roe v. Meding (Ct. of Errors, Van Syckel), 8 Dick., at page 369.

in which last case the Court said the statute must be construed if possible so as to protect general creditors.

Tested by these rules, it is apparent that the chattel mortgage to Mrs. Brockhurst is **absolutely void as against creditors.**

It was dated May 2, 1905, sworn to May 3, 1905, the appellant then kept it some time (p. 9), then thinks she sent it to her son—was not recorded until May 18—16 days after execution. Appellant was within easy reach of Court House and no reason is given why mortgage was not sooner recorded. The Vice-Chancellor's conclusions (on page 91 and 92) correctly express the situation.

The inquiry is as to whether or not the enforcement of the alleged lien of the mortgage can be resisted in this proceeding by either, first the Receiver and second the creditors.

FIRST: The Receiver may resist enforcement of the chattel mortgage.

The Receiver was appointed by a final decree of dissolution. The partnership is insolvent. The assets in the Receiver's hands are the proceeds of the sale of the goods and chattels alleged to be mortgaged to appellant. The order for such sale did not reserve any right to Mrs. Brockhurst. After the sale of the assets, she presented a petition to the Court of Chancery, in which she set up her chattel mortgage, and asked that the assets in the Receiver's hands be paid to her. The Receiver then presented a report and asked for a decree of distribution, setting up the fact of the presentation of the petition of Mrs. Brockhurst. Upon notice to all parties, including all creditors of the partnership, the hearing was brought on, upon the application of the Receiver for a decree of distribution and upon the petition of Mrs. Brockhurst for the payment of the moneys to her.

The order directing sale of these assets did not reserve any right to Mrs. Brockhurst; that she did not appear and assert her lien until after the assets of the concern had been changed into cash.

The creditors had all been brought in, the fund was in the Court of Chancery and the mortgagee had submitted to the jurisdiction of the Court.

There might have been a different question presented if the mortgagee were in possssion of the mortgaged chattels and the Receiver was attempting to reach them.

The chattel mortgage is void as against creditors and if void as against creditors, it is void as against those who represent creditors.

Pillsbury v. Kingon, 6 Stew., 287, at page 297.

Graham Button Co. v. Spielmann, 5 Dick., 120-128.

Hopper v. Lovejoy, 2 Dick, 573.

Lembeck & Betz Eagle Brewing Co. v. Kelly, 18 Dick., 405 (1902—Pitney).

Smith's Executors v. Woods (1887—Van Fleet) 15 Stew., 563.

Taylor v. Taylor (1899—Reed), 14 Dick., 88

Smith v. Crater, Ct. of Errors, 16 Stew., 636.

Currie v. Knight, (1881—Van Fleet), 7 Stew., 485.

Kalmus v. Ballin, (Ct. of Errors—Magie) 7 Dick., 290, 1894.

THE RECEIVER REPRESENTING CREDITORS MAY AVOID MORTGAGE.

The position of a Receiver of a partnership after dissolution is radically different from that of a

general assignee. There has been considerable divergence of judicial opinion as to what are the rights of a general assignee.

The last case except that of Lembeck & Betz vs. Kelly, 18 Dick., 405, upon the subject (although the settlement of the question was not necessary to the decision) was that of Wimpfaeimer v. Perrine (Ct. of Errors—Van Syckel—November, 1901) 50 Atl., 356, also cited in 1 Robbins, 597.

The Court said that, while a general assignee has a right to set aside **a fraudulent conveyance,** he has no right to set aside a conveyance which is not operative as against creditors because not properly recorded. The Court held that where the conveyance is fraudulent, title never passes from the fraud doer, but, because of his fraud, he is estopped from setting up the fraud, and therefore is estopped from questioning the conveyance; but that, where the deed is merely void as against creditors, where there is no fraud in fact, title passes and the defect can only be taken advantage of by creditors; that in the first place the estopped does not descend as against the assignee, while in the second, there is no estoppel but a positive right which the general assignee cannot take advantage of.

If this view be correct, then, if a fraudulent conveyance were set aside by a creditor, it would be set aside for all purposes, title having in fact never passed, and the excess of proceeds over the amount necessary to pay creditors, would go to the grantor and not to the grantee; this is not the law, the premise must be incorrect, and the distinction upon which the case of Wimpfheimer v. Perrine seems to hinge, fails.

Whether title passes or not is a matter of intention between the parties. It cannot be said that the parties in the case of a fraudulent conveyance intended that title should not pass. They intended to pass title just as much as in the case of a conveyance not properly recorded. The law in each case provides that intention shall have no effect as against creditors.

The result of setting aside a fraudulent chattel mortgage and one invalid for lack of registry, is exactly the same; the statute is the same in each case, and the remark of Vice-Chancellor Van Fleet, in Graham Button Co. v. Spielmann, 5 Dick., 128, cannot be gainsaid.

Also see opinion of Vice-Chancellor Pitney, in Roe v. Meding, 8 Dick., at page 360 (1895), approving the language of Vice-Chancellor Van Fleet, and Knickerbocker Trust Co. v. Penn. Cordage Co., 20 Dick., 181 (1903—at page 188—Grey), see same case, 21 Dick., 311, where his remarks are approved on this point.

Lembeck & Betz v. Kelly, 18 Dick., 405 (Pitney.—1902).

Justice Van Syckel does not seem to have considered:

FIRST: That title never passes by a chattel mortgage and that the mortgage has nothing but a lien; and

SECOND: That the **real question** is whether the assignee **represents** creditors, for if he represents creditors, then the chattel mortgage is void as against him.

The line of cases, including

Pillsbury v. Kingon, 6 Stew., 287 (Ct. of Errors—Depue, 1880);
Kalmus v. Ballin, 7 Dick., 290 (Ct. of Errors—Magie, 1894)

and all those already cited which hold that an assignee has the right to set aside a fraudulent conveyance, proceed upon the theory that the **assignee represents creditors.**

See pages 297, 298, 299, Pillsbury v. Kindon, 6 Stew.

The material question is whether those who hold a title derived from the grantor, but who by virtue of that title become the **representative of creditors,** as for instance, executors or administrators of insolvent estates, or as **assignee for benefit of grantor's creditors**—page 291, may act.

Holland v. Crift, 20 Pick., 321-323, cited on page 295.

In that case, right of administrator of insolvent estate to set aside fraudulent conveyances was deduced from the fact that in such a condition of the estate, the administrator is the trustee and representative of creditors, and as such **may stand upon their rights.**

Page 297 of the Pillsbury case—remarks of Baron Parke and Baron Alderson, cited with approval, to wit:

"A deed which is void as against creditors is void as against those who represent creditors."

Moore v. Bonnell, 2 Vr., 90-95—cited in which case the Chief Justice said, that it was **difficult**

to perceive the distinction between a voluntary assignment and one made under compulsion of insolvency law.

By virtue of the trust, the assignee becomes the representative of the creditors for the creditors.

Following this case, Currie v. Knight (1881), 7 Stew., 485—Van Fleet, held that the direction of a statute that the assets of an insolvent estate should be distributed ratably among creditors, gives creditors a lien, and gives them a standing to contest the validity of a chattel mortgage because of its not being filed.

And in that case on Page 488, the application for a Receiver is denied upon the ground "that the executors will now understand that creditors occupy the position of superior right and will. I have no doubt, take such steps as will be necessary to give them the full benefit of their rights. This seems to imply that the executor represents creditors.

The case of Shaw v. Glen, 10 Stew., 32—Runyon—1863, held, without any consideration or discussion, that an assignee could not take advantage of a defect in registry of a chattel mortgage.

It did not go to the Court of Errors and Appeals.

In Moore v. Williamson, N. J. Prerogative, 17 Stew., 496, McGill as Ordinray, 1 L. R. A., 336 (1888), in a case where an assignee questioned a mortgage tainted with fraud, said: "The assignee is regarded as the representative of creditors, and as such, may, for the benefit of creditors, set aside conveyances in fraud of them."

In Smith's Executors vs. Wood, 15 Stew., 565—Chy—1887—Van Fleet said—"As to such debts, the principle is established that the assignee stands in the place of creditors **with all their rights and equities.**"

Then followed Hopper v. Lovejoy, 2 Dick., 573, 1890—Stevens, which held that a Receiver of an insolvent corporation might take advantage of defect in registry, and the decision was based upon Pillsbury v. Kingon, 6 Stew., 287, **and not upon any express words of the statute**—Page 577. The Court quotes with approval words of Baron Parke: "**A deed void as against creditors is void as against those who represent creditors.**" * * But if the assignee **may avoid the deed because he represents creditors, the receiver may, for the same reason.**

Vice-Chancellor Van Fleet—1892, in the case of Graham Button Co. v. Spielmann, 5 Dick., 120, **expressly overrules Shaw v. Glenn,** and citing Pillsbury v. Kingon and Hopper v. Lovejoy, says, that the law is settled that a general assignee may take advantage of a fraudulent deed, **and is a representative of creditors,** and that the foundation of the decision in Pillsbury vs. Kingon, was the words of Baron Parke: "**A deed which is void as against creditors is void as against those who represent creditors.**" The Court says that there **is no distinction between a mortgage invalid for actual fraud, and one not properly recorded.**

The Court says: "A mortgage, in the faulty condition in which the defendant's mortgage was when it was recorded, is, according to the express words of the statute, absolutely void as against the creditors of the mortgagor, and as, by force of the principle just stated, such an instrument is equally invalid as against the representative of

creditors, it would seem to be undeniable that the same judgment precisely must be pronounced on such an instrument in a suit by a receiver that the Court would be bound to pronounce in a suit by creditors in their own names. The receiver in such a case stands in the rights of the creditors of the mortgagor, and he is, consequently, entitled as their representative, to the same relief that would be given to them in a suit instituted by themselves in their own names. The statute of frauds makes a deed EXECUTED IN FRAUD OF CREDITORS ABSOLUTELY VOID AS AGAINST THE CREDITORS OF THE GRANTORS and the statute under consideration makes a chattel mortgage, executed in disregard of its requirements, ABSOLUTELY VOID AS AGAINST THE CREDITORS OF THE MORTGAGOR. To invalidate the first fraud must be shown, and, to invalidate the second, it must appear that the satutory requirements have not been observed in its execution; but when the first has been shown to be fraudulent and when it appears that the second was not executed in compliance with the requirements of the statute, then both are placed, by positive law, in precisely the same category; both are then without the least legal force as against creditors, and must be so treated by the Courts. To invalidate a chattel mortgage, executed in disregard of the requirements of the statute, the person assailing its validity is not required to show, in addition to such fact, that it was executed to defraud creditors. The statute requires nothing of that kind, but, on the contrary, expressly declares, that if the statutory requirements have not been observed in its execution, it shall for that reason, and that reason alone, be treated as void against creditors. The fault which renders it void as against creditors is not fraud, but the failure of the mortgagee to perform a duty which the statute imposes upon him.

This view, it must be admitted, does not stand in strict accord with that expressed in Shaw v. Glen, 10 Stew., Eq. 32. It was there held that while an assignee under our statute might maintain an action to recover property which his assignor had conveyed away in fraud of creditors, yet he could not successfully defend a suit brought to enforce a chattel mortgage, which though untainted by fraud, was, nevertheless, by force of the statute, void as against the creditors of his assignor. **This decision was placed on this ground: That, in case unaffected by fraud, the assignee takes the estate subject to such equities as existed against it in the hands of his assignor.** In other words, that as to honest liens, although they may be void as against creditors, the assignee takes the estate assigned, in the same plight and condition in which his assignor held it. **But I am unable to reconcile the basis of decision, thus adopted,** with the leading principle established by the judgment of the Court of Errors and Appeals in Pillsbury v. Kingon, which is, that in virtue of the trust created by an assignment pursuant to the statute, **the assignee becomes the representative of the creditors of the assignor, and stands invested with their rights, and may, consequently avoid, by suit or defence, any instrument which** they themselves might avoid.''

Graham Button Company v. Spielmann was taken to the Court of Errors and Appeals and affirmed by that Court upon the opinion below.

The case did not rest upon any distinction between general assignees and receivers of insolvent corporations, but expressly holds, and the opinion is adopted as the opinion of the Court of Errors and Appeals that a general assignee may question the validity of a chattel mortgage void because not properly recorded.

Martin v. Bowen—1893—Pitney, V. C., 6 Dick., 454, followed, and in that case an equitable mortgage on real property was under discussion, and the Vice-Chancellor based his opinion upon the distinction between mortgages on real property void as against **judgment creditors,** and mortgages upon personal property **void as to creditors,** although in the course of his opinion, he throws out a suggestion that there may be a difference between assignees and receivers, but he does not decide anything in reference to this. He admits that Pillsbury v. Kingon decided that the assignee **represented creditors,** page 463, but denies that it raised him to the dignity of a judgment creditor, basing his opinion partly upon the language of the act and on page 465, he states that when there is proof that there are creditors, a **general assignee represents them** and cites again Pillsbury v. Kingon, page 465.

He mentions the Graham Button Co. v. Spielman, case, p. 460, as being under review in the Court of Errors. It was afterwards affirmed by such Court, and the question suggested by the Vice-Chancellor as to the difference between a general assignee and a receiver settled; and the decision of Vice Chancellor Van Fleet, that there is no difference in this particular, became the law.

Next followed Kalmus v. Ballin (1894—Court of Errors—Magie), 7 Dick., 290, holding that creditors who have presented claims to assignees where assignee has refused to proceed to set aside fraudulent conveyance, may themselves do so, and on page 296, that the sasignee was the **representative of creditors** so far as necessary to enable him to set aside fraudulent conveyances of property needed to satisfy creditors.

In Taylor v. Taylor, Ch. 14 Dick., 88—1899—Reed, says that assignees, executors and admin-

istrators of insolvent estates are **representatives of the general creditors** and have exclusive right to bring suit, citing Pillsbury v. Kingon and McCarter's Executors v. Perry, 12 Stew., 198.

Next is the case of Knowles Loom Works v. Vacher, N. J. Sup. 1895—28 Vr., 490, where the Court, speaking through Van Syckel, seems to cast doubt (without deciding anything) upon the right of a general assignee to avoid an instrument because not properly recorded.

This case is useless as a precdent. The remarks are not definite. They were not at all necessary to the decision, a mere suggestion is thrown out, p. 499; they were made without a careful review of the cases, and without considering the basic principle of Pillsbury v. Kingon and Graham Button Co. v. Spielmann; they were based upon a false assumption, to wit: that a **chattel mortgage is not void, if unrecorded, against general creditors.** The words of the statute are to the contrary, the remarks are based upon the quoted words: "The assignee takes the estate assigned in the same plight and condition in which the assignor held it."

The case really decides nothing on the question.

Then comes the case of Wimpfheimer v. Perrine, 50 Atl., 356 (Ct. of Errors, 1901), 1 Robbins, 597—Van Syckel, above referred to. In this case certain creditors filed a bill to set aside a conveyance, void because not recorded. There had been a general assignment and the defense was set up, that no one could bring the suit but the assignee. Justice Van Syckel in disposing of this proposition said, that the assignee could not have acted, therefore the creditors could, and he makes the distinction heretofore alluded to between mortgages void because of actual fraud and mort-

gages void because not recorded. The basic principle of Pillsbury v. Kingon, 6 Stew., 287, Currie v. Knight, 7 Stew., 485; Graham Button Co. v. Spielmann, 5 Dick., 120; Kalmus v. Ballin, 7 Dick., 290, and other cases cited, to wit: that the assignee **represents** creditors and a deed **void** as against creditors is **void** as against him who represents creditors, is ignored. He suggests a distinction between general assignees and receivers.

The first proposition is answered by Vice-Chancellor Van Fleet in the case of Graham Button Co. v. Spielmann, 5 Dick., 120-128-129, and the opinion of Vice-Chancellor Pitney in Roe v. Meding, 8 Dick., page 360, and in Knickerbocker Trust Co. v. Penn. Cordage Co., 20 Dick., 188; 21 Dick, 311, wherein it is said that both of these classes of mortgages are **void** and have the same effect, are in the same category; by the fact that if there was such a distinction the excess proceeds would go to the grantor in the case where title does not pass, as the deed once having been set aside would be set aside for all purposes, that is in case of a fraudulent conveyance, and to the grantee in the other case, whereas in fact they go to the grantee in both cases.

The second proposition is answered by the many cases wherein the law is settled that the assignee represents creditors, and as **their** representatives, not the representatives of the assignor, he proceeds to set aside a fraudulent conveyance, and any deed void as against creditors is void as against him; and the third proposition is answered by Graham Button Co. v. Spielmann, in which case it is expressly held that the receiver can avoid a chattel mortgage not properly filed, **because of the doctrine of Pillsbury v. Kingon and because a general assignee can.**

Further as in Knowles Loom Works v. Vacher, the Justice seems to base his opinion on the quoted words "such assignee takes the entire estate assigned in the same plight and condition in which his assignor held them."

It will be observed that it was not necessary for the Court to hold that the assignee could not avoid a chattel mortgage not properly filed. All that the case should have decided was that a judgment creditors notwithstanding an assignment might as in Hamlen's Administrator v. Bennett, 7 Dick., 77.

This decision has not shaken the principle enunciated in Pillsbury v. Kingon, and notwithstanding that decision, a general assignee under the old law, might have attached a chattel mortgage because not properly filed.

After the decision of Wimpfheimer v. Perrine, V. C. Pitney in Lembeck & Betz Brewing Co. v. Kelly, 18 Dick., 405, 1902, following Currie v. Knight, held that **executors of an estate** might take advantage of the non-recording of a chattel mortgage because they represented creditors.

And such seems to be the view in California:

In the case of Ruggles' Assignees v. Cannedy—Cal. 1898, 46 L. R. A., 371, the question was whether a mortgage not properly filed was invalid as against assignee in insolvency, and the Court on page 376, held, upon the authority of Pillsbury v. Kingon, and kindred cases, that the assignee might take advantage of the improper recording. The decision is not based upon any particular statute, and the Court, quoting Putnam v. Reynolds, 44 Mich., 114, 6 N. W., 199, says, that it may be well questioned, whether where the

mortgage is void as against creditors because of non-recording, a neglect of the mortgagee, it is necessary for creditors to obtain a lien to avoid such a mortgage as is necessary in case of a fraudulent mortgage, thus implying that the assignee has the better established right when the mortgage is void because not properly recorded.

A receiver of a partnership, however, stands in a better position than a general assignee, and the object in referring to the foregoing cases is merely to deduce the principles to be applied.

It has been held, and is now the settled law in this State, that the receiver of an **insolvent** corporation **represents the creditors,** and has a right to take advantage of defect in recording. This result does not arise because of any express words in the statute but **because** of the fact that the proceedings in insolvency **result in appropriating the assets of the corporation, irrevocably to the payment of its debts,** and that therefore the receiver in whom the title is vested for such purpose, has such of the attributes of the creditors as are necessary for him to perform his trust.

See Hopper v. Lovejoy, 2 Dick., 577.
National Trust Co. v. Miller, 6 Stew., 155.
Graham Button Co. v. Spielmann, 5 Dick., 126-128.
Wimpfheimer v. Perrine, 50 Atl., 357.

He has been held to be in the position of **judgment creditors.**

Bonnett v. Hope Mfg. Co., 6 Dick., 163-169.
Miller v. Savage, 17 Dick., 747—1900—Dixon—Ct. of Errors.

In speaking of a general assignment, Vice-Chan-

cellor Pitney, in Martin v. Bowen, 6 Dick., 454, says: "It, the assignment, still remains a voluntary trust. It has no effect on creditors," and also in Knowles v. Vacher, 28 Vr., 490, the same idea is expressed.

The position of a receiver of a partnership, as in the case at bar, after dissolution is not that of a voluntary trustee.

After dissolution, the funds of the partnership are **irrevocably devoted to the payment of firm creditors.** A decree of dissolution operates exactly the same as the decree for an injunction, and the appointment of a receiver in the case of an insolvent corporation.

In Van Alstyne v. Cook, 25 N. Y., 494, the Court said:

Courts of Equity have an established jurisdiction in cases of partnership to dissolve the co-partnership, to close its affairs and settle all matters involved in the liquidation of its affairs as among the partners themselves, and in respect to their creditors. As an incident to the exercise of its control over the partners in compelling them to account, and in the adjustment of all equities between them, **it appoints a receiver of their assets, when proper, and distributes the assets. If the partnership is insolvent, it makes such distribution upon its favorite rule that equality is equity** and it regards the property of the co-partnership as a trust fund for the payment of the partnership debts pro rata.

The commencement of such suit, as between the parties thereto, created a lis penden in respect to all the partnership property and necessarily **gave the Court exclusive control of such property for**

the liquidation of the partnership affairs. It was in effect a suit in behalf of the general creditors of the partnership. But as against third persons or any private creditor pursuing his legal remedies for the collection of his debt, it did not operate as a lien upon such property till the making of the order for the appointment of the receiver. When an order IS made for the appointment of a receiver of partnership property, it amounts to a sequestration by act and operation of law of such property, and when the receiver is subsequently appointed the title to such property vests by relation from the date of the order to the same effect as if such was named in, and appointed by, such order.

Butter v. Tallin, 5 Sandf., 610.
Porter v. Williams, 5 Seld., 152.
Fairchild v. Weston, 2 S. & S., 96.

In Wallace v. Yeager, 4 Phila. (Pa.), 251, the Court by Hare J. said: "The receiver succeeds, not only to the legal titles of the partners as joint tenants, but also to the equitable rights and remedies of the firms, his authority is conferred by law and not like that of a voluntary assignee derived from the appointment of the parties, citing

Higgins v. Bailey, 7 Robt., 613.
Brush v. Milligan, 110 Ind., 498.
Noonan v. McNab., 30 Wis., 277.
Miller v. Jones, 39 Ill., 54;
Jackson v. De Forest, 14 How Pr., 81;
Van Rensalaer v. Emery, 9 How Pr., 135;
Gregory v. Gregory, 1 Sweeney, 613.

In Rose v. Titsworth, 10 Stew., 337, the distinction between a suit to declare a corporation is insolvent and a suit to dissolve a partnership is pointed out, but the Court then proceeds and it

clearly holds that after **dissolution the result is practically the same** as in the case of a suit against an insolvent corporation, and the following language is used:

"Such a suit is unlike one brought under the statute in insolvency against a corporation. Under that statute the Court proceeds against the corporation to wind up its affairs and distribute its assets. If the Court is satisfied that the Company is within the provision of the statute as to insolvency, &c., it will enjoin it from exercising its privileges or franchises, and from collecting or receiving its debts and from disposing of its property. **Until there is a decree of dissolution,** providing for calling in the creditors and ascertaining their demands, and some creditor has come in, the proceedings are within the control of the parties, **and until then the creditors of the firm may proceed at law to acquire liens upon the property for their debts. After the decree of dissolution they may be enjoined, because then the Court has provided a mode of collecting their claims.**"

This view of the subject was taken in Waring v. Robinson, Hoffn. Ch., 524, a well-considerd case. In Adams v. Hackett, 7 Cal., 187. See also Adams v. Woods, 8 Cal., 152; Adams v. Woods, 9 Cal., 24, and Ellicott v. U. S. Ins. Co., 7 Gill, 358.

The distinction often suggested, is not really between a general assignee and a receiver of an insolvent corporation, **but between a general assignee and any receiver appointed by law,** and this distinction, as recognized by all cases, is a distinction between a case where the assets are devoted irrevocably to the payment of debts and cases in which they are not.

Knowles Loom Works v. Vacher, 1895, 28 Vr., 499.

In that case the following language is used:

"The effect to proceed in involuntary assignments under the insolvent laws, **is to appropriate the property of the debtor exclusively and irrevocably to the payment of debts,** which is held to establish a lien, while in involuntary assignments **no appropriation of property is made unless the creditors elect to come in.**

Martin v. Bowen, 6 Dick., 452, in which case the Court says that in general assignments the creditors are not affected.

In Wimpfheimer v. Perrine, 50 Atl., 357, the Court said:

"In an involuntary proceeding, as in case of a receivership **or assignee appointed by the Court, the proceeding is adverse to the debtor. The law takes the property in the position in which it is with reference to the rights of creditors, and appropriates it exclusively and irrevocably to the payment of debts. Any one claiming a superior right must show his title stricti juris. The receiver is the embodiment of creditors. He stands as and for them.** When he challenges the validity of the mortgage he does so in the character of creditors, **having in virtue of his receivership debts fastened upon the mortgagor's property.**

The language used in this case indicates that it does not refer solely to a receiver of an insolvent corporation, but to any receiver or **assignee appointed by the Court,** in other words, to any case where the property **is devoted exclusively**

and irrevocably to the payment of debts. That is the test. If the property is so devoted, then, in order to carry out the purpose of his existence, the receiver or assignee must represent creditors.

After dissolution the proceeding in a receivership of a partnership in adverse to the debtor. The receiver then stands for and represents the creditors.

The effect of dissolution and of the appointment of a receiver is the same as the appointment of a receiver for an insolvent corporation.

EFFECT OF APPOINTMENT OF RECEIVER.

A. Creditors can no longer obtain liens and will be restrained from proceeding at law upon their claims.

Ross v. Titsworth, 10 Stew., 333.

B. The receiver is a necessary party to all proceedings affecting the assets of a partnership and the Statute of Limitations is stayed.

Kirkpatrick v. McElroy, 14 Stew., 539.

And the Court, on page 555, uses this language:

"As a general rule, the mere appointment of a receiver to take charge of property in dispute will not suspend the operation of the Statute of Limitations (Anon, 2, Atk., 15) nor will it interrupt the possession of a stranger, so as to prevent the statute conferring title on him; or suspend the running of the statute against a stranger. Harrison v. Duigman, 2 Dru. & War., 295, Kerr on Receivers, 172. But where the receiver is appointed to take charge of an estate for the purpose of ad-

ministering it, as for instance, the settlement of the affairs of a partnership and the payment of firm debts, the suit being substantially for the benefit of all the creditors, in analogy with an ordinary creditor's bill, the appointment of a receiver with such powers will suspend the running of the statute. (Sterndale v. Hankinson, 1 Sim., 393, 398; Wrixon v. Vine, 3 Dru. & War., 104)."

The proceeding is an analogy to a creditor's bill. It is so declared by the Court in

Kirkpatrick v. McElroy, 14 Stew., 539, at p. 555.

Van Alstyne v. Cook, 25 N. Y., 495, at p. 496.

Ross v. Titsworth, 10 Stew., 337, at p. 337.

Smith v. Crater, 16 Stew., at p. 641 (Ct. of Errors.)

Unless a receiver is held to represent creditors we have a very curious anomaly of a right without a remedy.

The creditors are debarred from proceeding to enforce their own liens.

Ross v. Titsworth, 10 Stew., 337;

and yet the receiver cannot represent them. Although the chattel mortgage is clearly void, no one can take advantage of such fact, and the creditors are therefore deprived of their remedy. Such a proceeding would be contrary to constitutional rights. It is only because the receiver of an insolvent corporation represents creditors, and therefore can, for the creditors, pursue the same remedies that they have, that it is constitutional to give the effect of an appointment of a receiver

of an insolvent corporation, of staying creditors from proceeding with their suits at law. Just as another remedy is given in the case of an insolvent corporation, so another is given in the case of a partnership dissolved.

Kirkpatrick v. McElroy, 14 Stew., 555.
Van Alstyne v. Cook, 25 N. Y., 495.
Ross v. Titsworth, 10 Stew., 337.

The Court in the case of Ross v. Titsworth, says that creditors may be enjoined **because the law has provided another method for the collection of their debts.**

The late case of Lawson v. Dunn, 21 Dick., 91, seems to hold that the **receiver represents creditors** so far as it may be necessary to **resist the payment of a claim invalid as to them.** On page 91, Vice -Chancellor (Reed) speaks of the receiver **as representing creditors.**

This case appears to be a direct authority for the position here taken by the receiver.

TO SUMMARIZE: The receiver represents creditors, so far as necessary to resist this chattel mortgage; whatever the law may be as to whether or not a general assignee can take advantage of improper filing of a mortgage, the rule does not extend to bar a receiver from so doing. Whether or not there is a distinction between a fraudulent chattel mortgage and one void because not properly recorded (which distinction it is urged has no existence in fact) does not affect the situation in the least. The effect of the receiver's appointment and the decree of dissolution is to fasten the debts of the partnership upon the assets, is to create a trust fund, devoted irrevocably to the payment

of firm debts, a trust not voluntary but involuntary, is to create in him an officer of the Court, charged with the duty of administering the assets of the partnership, and dividing them among the creditors. In these three last particulars, the situation is materially different from that of a general assignee and is exactly the same as that of a receiver of a corporation. The reason why a receiver of a corporation can avoid a mortgage not properly filed, is because of the effect of his appointment. The effect of the decree of dissolution and appointment of a receiver in this case is the same as in the case of an insolvent corporation; the result must be the same. It is necessary for him to have the attributes of creditors in order to properly perform his duties. The creditors have a right to avoid this chattel mortgage. The effect of the decree of dissolution and his appointment is to prevent them from doing it themselves, and therefore it is necessary that the law should give them a substitute, otherwise such effect would be contrary to constitutional rights. The proceeding after dissolution is more in the nature of a creditor's bill, and in the nature of a proceeding against an insolvent corporation than it is in the nature of proceedings under voluntary assignments. It has been called the same as a creditor's bill in several cases.

Kirkpatrick v. McElroy, 14 Stew., 559, at page 555.

Van Alstyne v. Cook, 25 N. Y., 495, at page 496.

Ross v. Titsworth, 10 Stew., 337.

Smith v. Crater, 16 Stew., at page 641 (Ct. of Errors).

SECOND: THE CREDITORS NOW IN THE SUIT MAY AVOID THE CHATTEL MORTGAGE.

Creditors have the right to have this chattel mortgage set aside without proceeding to judgment. Their claims by the decree of dissolution become fixed upon the assets of the partnership. Such is the effect of a general assignment, of proceedings against insolvent estates, and of proceedings against insolvent corporations.

Smith v. Crater, 16 Stew., 637.
Haston v. Castner, 4 Stew., 698.
Kalmus v. Ballin, 7 Dick., 294.
Pillsbury v. Kingon, 6 Stew., 287.
Lee v. Cole, 17 Stew., 319 (1888—McGill) (reversed a question of fact, 18 Stew., 780).
Terhune v. Siball, 10 Dick., 236 (1897—Pitney).
Laucheim v. Casperon, 16 Dick., at p. 535 (1901—Grey), and cases above cited.

It would seem, therefore, that even if the receiver does not represent creditors, the creditors themselves, being parties to the proceeding, the Court will, in proceedings to distribute the estate, look into the equities of the parties.

Kirkpatrick v. McElroy, 14 Stew., 554
Van Alstyne v. Cook, 25 N. Y., 494.
Lawson v. Dunn, 21 Dick, 91.
Hamlen's Adm. v. Bennett, 7 Dick., 77.

The fund to be disposed of was within the control of a jurisdiction competent to administer it and adjudicate the rights of all creditors who might set up a claim of any part of it.

See Smith v. Crater, 16 Stew., at page 641, citing

It is not as if the mortgagee were in possession of the chattels and the receiver were endeavoring to reach them. The chattels are not in existence, they have been sold by the receiver and the proceeds are now in Court and are being distributed by the Court, all possible parties interested are now before the Court, and remarks of Justice Van Syckel in the case of Smith v. Crater, 16 Stew., 641, are particularly in point.

The creditors having their claim fixed upon the assets by the decree of dissolution, and the mortgagee being in Court, it would answer no purpose to compel the creditors to file a bill to reach the fund in Court, the whole issue already having been fought out in this proceeding.

These questions are being settled in case of insolvent corporations and there is no reason why they should not be settled in this proceeding.

It is submitted that the appeal should be dismissed and the decree of the Court of Chancery affirmed.

May Term, 1907.

Respectfully submitted,

MERRITT LANE,
Of Counsel pro se.

The questions presented upon this appeal having been all considered in the foregoing brief we unite therein.

F. W. HASTINGS,
Of Counsel with Edw. D. Depew & Co..

JAS. E. PYLE,
Of Counsel with Evening Journal Association.

INSTITUTE PRESS, JERSEY CITY, N. J.

NEW JERSEY

Court of Errors and Appeals

BETWEEN
HARRY B. BROCKHURST,
Complainant,
and
JOHN H. COX,
Defendant.

On Bill for Dissolution of Partnership.

In Re Claim of
ELIZABETH A. BROCKHURST,
Claimant-Appellant,
and
J. MERRITT LANE,
Receiver-Respondent

On Appeal from Chancery

BILL OF COMPLAINT

(*filed May 5th, 1905.*)

The Bill of Complaint in this cause was filed on the 5th day of May, A.D. 1905, by Harry Brockhurst, and is the ordinary bill for the dissolution of a partnership setting out irreconcilable differences existing between said partners and asking for a dissolution of the partnership and accounting, together with a prayer for a Receiver and a restraining order. The bill did not mention the debt or chattel mortgage of Mrs. Elizabeth A. Brockhurst.

On filing the bill on May fifth, nineteen hundred and five, an order to show cause was granted, which provided, among other things, as follows:—

ORDER

It is further ORDERED, upon condition that said restraint applies equally to the complainant, that until this order shall be made absolute or be discharged, the said defendant, John H. Cox, shall absolutely desist and refrain from conveying and encumbering or otherwise disposing of the goods and chattels in said store at No. 245 Newark avenue, in Jersey City, or of any of the partnership property and effects of the firm of Brockhurst & Cox, and shall desist and refrain from interfering with the conduct and operation of the said business; unless he be employed by and acts under the instruction and direction of the Receiver hereinafter appointed.

And it is further ORDERED, that J. Merritt Lane, of Jersey City, N. J., be and he is hereby appointed Receiver of all the partnership property and effects of the firm of Brockhurst & Cox, and that he take possession of the same and continue the business in the usual course until the further order of this Court.

Upon the return of the above order to show cause, after hearing Adolph Engelke, of counsel with the complainant, and Frank W. Hastings, of counsel with the defendant, an order was made making absolute the order to show cause, as follows:—

ORDER

And it is further ORDERED that J. Merritt Lane, of Jersey City and State of New Jersey, be

and he is hereby appointed Receiver of all the partnership effects of the firm of Brockhurst & Cox, to take possession of the same, and to sell, convey or assign all the property and effects of the said partnership firm, and to pay into the Court of Chancery all the moneys and securities for money arising from said sales or which he shall collect or receive, by virtue of his said office, and to do and perform all the duties imposed upon him and required by law, and in the meantime to continue the business in the usual course until the further order of this Court.

Said Receiver took possession of the store and other property of the partnership on the fifth day of May, 1905 and under order of the court sold the assets of the firm for $850.00 on May 19th, 1905.

On the twenty-eighth day of June, 1905, the Receiver was ordered to give notice to the creditors of said partnership by publication, notifying the said creditors to come in and prove their several claims and demands against the partnership within thirty days of the date of said order. Several claims were presented, five of which, including the claim of Elizabeth A. Brockhurst, marked exhibit B4, were objected to by the Receiver.

The said Receiver presented to the Court a petition and report wherein he set forth that notices had been given to five creditors of the partnership of Brockhurst & Cox, including the claimant, Mrs. Elizabeth Brockhurst, and that five claims had been objected to, and that application would be made to the Court for an order allowing the Receiver to distribute the moneys in his hands, but without payment of the said five claims, including that of Mrs. Brockhurst; an order was thereupon made as follows:

ORDER

And the said creditors consenting to so much of this order as bears upon the taking of testimony upon, and the hearing and determination of said claims.

It is on this eighteenth day of September, nineteen hundred and five, on motion of J. Merritt Lane, of counsel *pro se,* ORDERED, that the report and petition of the said Receiver be filed with the Sergeant-at-Arms, at Jersey City, until the return of this order.

And it is further ordered, that the matter of the allowance or disallowance of the said five (5) claims of creditors objected to, be referred to J. Merritt Lane, Receiver of the partnership of Brockhurst & Cox, and a master of this Court, to take testimony thereon, and to report to this Court, whether said claims should be allowed or disallowed. That said testimony shall be taken upon the motion of any person interested, including the Receiver, upon five days' notice to the claimants whose claims have been objected to, and to the complainant and defendant, and such creditors as have filed written objections with the Receiver, which said notice may be mailed to the said parties at their last known place of address.

And it is further ORDERED, that the said Receiver do present his report, upon the allowance or disallowance of said claims, together with the testimony taken before him, upon the ninth day of October, nineteen hundred and five, and that the creditors of said partnership, and said complainant and defendant, show cause before this Court, upon such day, at ten o'clock in the forenoon, or as soon thereafter as counsel can be heard, why said report should not be confirmed, and why the report and accounts of the said Receiver, now filed, should not be approved and confirmed, and an order of distribution made, after the payment to the said Receiver

of a reasonable compensation and counsel fee, to such persons as the Court shall at such time direct.

The above order consented to.

ADOLF L. ENGELKE,
Solr. Complt ; Mrs. Elizabeth Brockhurst,
James B. Brockhurst.

F. W. HASTINGS,
Solr. Deft.

JAS. E. PYLE,
Solr. Evening Journal.

CHAS. K. ZINN,

JOHN W. TICKERSTY.

The Receiver then gave notice appointing the fifth day of October, nineteen hundred and five, as the time when he would proceed to take testimony and at such time the following testimony was taken:

TESTIMONY.

Testimony taken before me, Receiver of the partnership of Brockhurst & Cox, and Master in Chancery of New Jersey, at my office, No. 259 Washington street, Jersey City, on Thursday, the fifth day of October, A. D. nineteen hundred and five, at ten o'clock in the forenoon, in pursuance to a written notice served and service acknowledged for all the parties whose claims have been objected to and by all the objecting parties, which notice is marked in evidence Exhibit I.

Adolf L. Engelke appears for Elizabeth A. Brockhurst, James B. Brockhurst, Harry B. Brockhurst, and for the purpose of this examination for Charles H. Zinn.

Frank W. Hastings appears for John H. Cox, and Edward D. Depew & Company, a creditor.

Claim sworn to by Mrs. Elizabeth A. Brockhurst. Exhibit E. B. 4.

STEPHEN R. SMITH, duly sworn, testifies as follows:
Examination by MR. ENGELKE.

Q. Mr. Smith, what is your business?

A. I am a bookkeeper in the Third National Bank.

Q. Were you bookkeeper in this bank during the month of December.

A. I was.

Q. Did you make the entries in the books of that bank of depositors?

A. I did.

Q. Do you recall an account of Harry B. Brockhurst?

A. I do.

Q. Do you recall an entry on December 8th, 1904, of $825.

A. Yes, sir.

Q. Have you a transcript of that entry?

A. I have.

Q. Did you make the original entry?

A. I did.

Q. Did you make a transcript of that entry. Have you it here? Will you produce?

A. Yes, sir.

Examination by RECEIVER.

Q. Explain why the books are not here.

A. We never allow the books to go out of the bank, because it delays the business of the bank for several hours, so it is never allowed to take the original ledger out of the bank.

I admit this transcript subject to further ruling, it being in some way connected with Brockhurst & Cox. There is no connection on the record at the present time.

Examination by MR. ENGELKE.

Q. Will you testify what the balance on the account of Mr. Harry B. Brockhurst was on December 5th, 1904?

A. $207.24 on December 5th, 1904; same balance

on the 7th.

Q. Doesn't your transcript show a deposit on the 8th?

A. Yes, sir.

Q. Was there a draft made on the 8th or 9th on that account.

OBJECTION BY MR. HASTINGSS The transcript speaks for itself.

The transcript is offered in evidence and is admitted, subject to the above objection, and subject to further ruling, marked "B. I."

ELIZABETH A. BROCKHURST, sworn, testifies as follows:

Q. Mrs. Brockhurst, is Harry Brockhurst your son?

A. Yes.

Q. Was a request for a loan ever made of you?

A. It was.

Q. By who?

A. By my son Harry.

Q. For who?

A. For the firm of Brockhurst & Cox.

Q. Will you state how the request was made?

A. Harry told me one evening, when he came home, that he was a little short, and he says, will you loan the firm of Brockhurst & Cox a little money to help us out? I said, certainly, to help you out. And it is the truth, I loaned $800 for the firm of Brockhurst & Cox for the purpose of using it in their business for purchasing butter.

Q. When was this?

A. It was some time in December. I think between the 6th and 8th.

Q. Have you ever requested its return?

A. Yes, a number of times.

Q. Has any return ever been made to you?

A. No.

Q. Was anything given you in return for it?

A. Well, I asked for something that would show; a mortgage.

Q. Did you receive it?

A. Yes, I did.

Q. I show you a mortgage dated the 2d day of May of this year, and ask you if this is the mortgage you received?

A. Yes, that is the mortgage I received.

Q. Is that your signature?

A. Yes, that is.

Q. Who did you receive it from?

A. I received it from the firm.

Q. Has nothing been paid on that mortgage?

A. I did not receive anything.

Q. No interest?

A. No, sir.

Q. How much is due you from the firm?

A. $800 is due me, with interest.

Cross Examination by MR. HASTINGS:

Q. You count interest from the date of the mortgage?

A. The understanding the evening I consented to the drawing of the $800 from the bank was, you will receive interest.

Q. What rate?

A. More than I would receive in the bank; 6 per cent.

Q. This is your son Harry?

A. Yes, sir.

Q. Did you know Mr. Cox at that time?

A. No, sir.

Q. Were you acquainted with him?

A. No.

Q. Ever have any talk with him at the time you loaned this money?

A. No, sir.

Q. Did you know there was a partnership, except what your son told you?

A. Yes, I believe what he tells me.

Q. When was this mortgage given you?

A. Before the receivership.

Q. How soon before the receivership?

A. I cannot tell you that. I felt as though I was protected. I did not look after anything further.

Q. Was this mortgage delivered to you on the day it is dated, May 2d, 1905?

A. I signed it in Red Bank and sent it here; I will not say when it was dated.

Q. Is the 3d of May the day the mortgage was given to you?

A. It was given to me the day I signed it.

Q. You swore to it on the 3d of May; was the mortgage given to you on that day?

A. Yes, the mortgage was given to me on the day I signed it.

Q. Then after you signed it what did you do with it?

A. I kept it until my son told me what to do with it.

Q. What did your son tell you to do with it?

Objection by MR. ENGELKE.

Objection overruled.

A. He told me it would protect me and to take care of it.

Q. Did you keep the mortgage in your possession?

Objection by MR. ENGELKE.

Objection overruled.

A. I certainly took care of it. I kept it in my house at Red Bank.

Q. How long did you keep it?

A. I don't remember; it was some days.

Q. When did it leave your possession?

Objection by MR. ENGELKE.

Objection overruled.

A. I do not know.

Q. How did it leave your possession?

A. I presume I mailed it to my son.

Q. At the suggestion of anybody?

A. No, sir.

Q. Why did you send it to your son?

A. Because he was interested in me, and he knew that I stood in the transactions of the firm of Brock-

hurst & Cox. I knew that he was the best one to look after my interest.

Q. What directions, if any, did you give to your son when you mailed this mortgage?

A. To see that I got my money that was loaned to them.

Q. Did you direct him to do anything with the paper?

A. To use his own judgment.

Q. You stated, I believe, that the money was actually loaned in December, 1904.

A. Yes, sir.

Q. When was the first talk between you and your son with regard to any evidence of the indebtedness or any security of the indebtedness you ever have?

A. I suggested to Harry a number of times to look after me, and see that I got my money. I thought about buying real estate and wanted the money.

Q. When did you first talk about making a paper or writing?

A. Just before I made the mortgage.

Q. Just before you made this mortgage; was that the first talk?

A. Yes.

Q. These frequent requests for repayment of the money, to whom did you make them?

A. I wanted my money from the firm, not my son personally.

Q. But who did you ask for repayment?

A. I asked my son.

Q. Did you ever ask Mr. Cox?

A. No.

Q. Did you ever tell Mr. Cox anything about the fact that you had loaned money to the partnership?

A. I wrote to him at 245 Newark avenue.

Q. When did you do this?

A. Before the receivership.

Q. Did you have any communication with Mr. Cox at the time you loaned the money or from that

time until you wrote this letter you spoke of to 245 Newark avenue?

A. I wrote the letter.

Q. Before you wrote this letter you speak of?

A. No.

Q. Did you ever inform him that you had loaned the firm $800 until you wrote this letter to Brockhurst & Cox at 245 Newark avenue? Did you have any communication with him until you wrote this letter?

A. No.

Q. Can you recall about the date when you wrote this letter?

A. No, not exactly.

Q. Is this your signature?

A. That is.

Q. Is that the letter you refer to?

A. It is.

Q. And that is the first you informed Mr. Cox about this loan?

Objection by MR. ENGELKE.

Objection overruled.

A. That is the first.

Q. At whose suggestion did you write this letter?

Objection by MR. ENGELKE.

Objection overruled.

A. At no one's suggestion. I wanted my money.

Q. Why didn't you write before?

A. Because I found from what I understood that Mr. Cox was taking the moneys and withholding them, and things were going in a very bad shape, and a very poor outlook for anybody who they owed money to at the time I wrote this letter.

Q. You mentioned you heard this information just before you wrote this letter.

A. For some little time before.

Q. For how long a time before?

A. I understood that things were not going right in January, and the business was not carried on in

an honest manner, and I feared.

Q. What do you know about Mr. Cox as holding moneys out, personally?

A. Well, I know that he brought this business to where it is now.

Q. How do you know this? Do you know this of your own personal knowledge?

A. I know it because it has been told to me.

Q. You have no personal knowledge?

Q. You state that none of this money has been repaid to you?

A. No, sir.

Q. At the time you made this loan was there any time stated when you would receive it back?

A. In this way; you will get it back in a short time.

Q. I wish to call your attention, to fix your mind on a time about the middle of March, 1905, and ask you, with special reference to a date just after the middle of March. I want to ask you, calling your attention to that period, whether you didn't receive a payment of moneys from your son Harry?

A. I do not know.

Q. Payment on this mortgage, I mean?

A. Not one cent.

Q. Did you ever have any financial dealings with your son?

Objection by MR. ENGELKE.

Objection overruled.

Q. Did you ever have any financial dealings with your son between December, when you loaned the $800, and May, when you received the mortgage? Did you have other dealings with your son?

A. No, sir.

Q. Did you ever pay him money, or he pay you money?

Objection by MR. ENGELKE.

Objection overruled.

Q. Did you ever pay any moneys to your son between December and May last, or did he ever give

you any moneys.

A. I don't know. There may have been. I think it is likely I would remember.

Q. You are apt to remember money matters pretty well?

A. I remember just the matters I am interested in.

Q. The only financial dealings between you and your son Harry, between December and May, was just this one matter of $800, that was loaned the firm?

A. I don't remember.

Q. But you think it is likely you would remember if there was?

A. I think I would.

Examination by MR. ENGELKE.

Q. Was it just a few days before you received this mortgage that you requested a mortgage from the firm, or was it some time before?

A. Some time before.

Q. How many times have you asked for a payment of this loan from the firm?

A. I think only once.

Q. Of whom did you ask?

A. Of my son Harry for myself.

Cross Examination by MR. HASTINGS.

Q. How did you pay this $800.

A. In check.

Q. To whose order was the check drawn?

A. I don't remember. I sent it in blank.

Q. There was no name after the words pay to the order of?

A. No, sir.

Q. To whom did you deliver this check?

A. To my son.

Q. Was the amount, eight hundred dollars, filled out?

A. I left that for him to fill out; he told me he wanted $800.

Q. Have you got that check now?

A. I don't know.

Q. Do you go to the banks for your checks?

A. I haven't called at the bank for some time. If I called, I have it.

Q. Did you call at the bank between December of last year up to the present time for your checks?

A. No.

Q. Then this check is in the bank?

A. I suppose so.

Q. What bank is that?

A. Third National Bank.

Q. How long have you had an account in this bank?

A. For some years; between seven and ten.

Q. You have private means of your own?

Objection by MR. ENGELKE.

Question overruled.

Q. When you drew this check for $800, or this blank check, as you call it, did you have $800 in the bank?

A. Yes.

Q. Did you have $800 of your own money?

Objection by MR. ENGELKE.

Objection overruled.

A. Yes, sir.

Q. You have private means of your own?

Objection by MR. ENGELKE.

Objection overruled.

A. Yes.

Q. What is the source of your income?

Objection by MR. ENGELKE.

Objection overruled.

A. I have property bringing in rents.

Examination by RECEIVER.

Q. Mrs. Brockhurst, have you ever held any moneys of your son Harry?

Objection by MR. ENGELKE.

Objection overruled.

A. No.

Q. Has Harry ever given you any money to keep for him?

A. No.

Q. This bank account you have in the Third National, was that made up of moneys Harry gave you?

A. No. That money is my personal property; not a cent belongs to any of my children.

Q. Had your account in the Third National Bank for some time prior to December, 1904, and since that time, contained a sum of money exceeding $800, as a usual thing?

A. Yes, sir.

Cross Examination by MR. HASTINGS.

Q. Do you know where you got this money, I mean this particular $800 you turned over to your son?

A. Yes.

Q. Will you explain?

A. I got it out of my property located on Newark avenue, between Jersey and Coles street.

Q. Were you in the habit of giving blank checks to your son?

Objection by MR. ENGELKE.

Objection overruled.

A. No.

Q. Did you make any inquiries at the time of giving this check to your son Harry, whether you you had $800 in the bank.

Objection by MR. ENGELKE.

Objection overruled.

A. No.

Q. Did you know whether you had $800 in the bank or not?

Objection by MR. ENGELKE.

Objection overruled.

A. Yes, I knew.

Q. How long or short a time prior to December, 1904, had you had your book written out in the

bank?

Objection by MR. ENGELKE.

Objection overruled.

A. I don't know.

HARRY B. BROCKHURST, sworn, testifies as follows:

Examination by MR. ENGELKE.

Q. Do you know the firm of Brockhurst & Cox?

A. I was a member of it.

Q. When did it start?

A. It started on December 5th.

Q. What was the financial standing of the firm on December 5th?

A. They had no money in the bank, but had the stock.

Q. On December 6th what took place, with regard to the purchase of butter for the firm?

A. I do not recall whether it was the 6th or 7th, but either of the two, Mr. Lucas offered us some butter. We had no money in the bank to pay for it; I meant to say had not sufficient, had probably $50 at that time to pay for the butter, which bill amounted to $1,326, to the best of my recollection. Therefore on the 8th I borrowed $800 to pay for this butter, and I believe on the morning of the 9th I gave Mr. Lucas a check for $1,000 and the balance of $326 I gave him a check two or three days later.

Q. Did you have to borrow any money?

A. I had to borrow $800 for the firm of Brockhurst & Cox.

Q. From who?

A. Elizabeth A. Brockhurst.

Q. When?

A. On the 8th of December. On the 7th I asked for it.

Q. You paid Mr. Lucas a check for $1,000; of what was this money composed?

A. It was composed of the money which the firm of Brockhurst & Cox had taken in the store since the 5th, together with the $800 I borrowed from

Mrs. Brockhurst for the firm.

Q. What was the understanding between the partners regarding financial matters?

A. I was to take full charge.

Q. Was any request made for the repayment of this loan?

A. Several times.

Q. Did you repay any of it?

A. Never had the chance to repay one cent of it. Several times Mrs. Brockhurst asked for it, and when it got troublesome to me to hear her asking, I told her we would secure the payment by a chattel mortgage.

Q. Was the chattel mortgage executed by the firm?

A. By the firm's name.

Q. Was this mortgage executed and delivered by the firm?

Objection by MR. HASTINGS.

Objection overruled.

A. That is a mortgage that the firm executed on the 2d day of May last, and that is the mortgage I acknowledged for the firm as agent for the firm on the date the acknowledgement bears.

Objection by MR. HASTINGS.

This mortgage is not properly executed. It is a sealed instrument under seal, signed by one partner alone, and the mortgage on its face shows that it is not a lien or obligation under the laws of the State of New Jersey, because, although dated the 2d and 3d of May, it is not recorded until the 18th day of May, and it is an invalid chattel mortgage.

THE MASTER:

I will admit the paper writing subject to the above objections; that is, I will reserve the right to pass on these particular objections. (Marked Exhibit B2.)

Q. This is the mortgage delivered to Mrs. Brockhurst?

A. Yes.

Q. Was Mr. Cox willing to secure Mrs. Brockhurst for this loan?

Objection by MR. HASTINGS.

Q. Did you ever have any conversation with Mr. Cox regarding securing Mrs. Brockhurst for her loan?

A. I had a conversation with Mr. Cox about securing all claims.

Q. And what did he say?

A. Mr. Cox was always willing to secure claims, and the Tuesday preceding the day the Receiver went into possession I went to the store and had a conversation with him, and in that conversation I asked him if he was willing to secure all creditors, and he said he was; and in compliance with this conversation I drew this mortgage and another mortgage to another creditor and would have drawn other mortgages, only I was interrupted.

Q. Has anything been paid on this mortgage?

A. Not one cent.

Q. What amount is due?

A. $800, together with interest at 6 per cent. from December 8th, 1904.

Cross Examination by MR. HASTINGS.

Q. When you had this conversation with Mr. Cox about securing claims, did you mention to him the claim of your mother?

A. We talked of all the claims, and while talking of all the claims the claim of Elizabeth Brockhurst was mentioned.

Q. You did not mention the claim of Elizabeth Brockhurst specifically?

A. We mentioned the claim of Elizabeth Brockhurst during the conversation in regard to securing the payment of it under a chattel mortgage.

Q. Did you also mention the amount of it to Mr. Cox?

A. I do not recall; but Mr. Cox knew the amount, for I had mentioned it to him the day before in the office upstairs.

Q. Did you ever mention this claim of Elizabeth Brockhurst for $800 to Mr. Cox prior to that day before you referred to?

A. I did.

Q. When?

A. On either the 6th or 7th of December we spoke about borrowing this money, and at store several times afterwards we spoke about returning the money to her, and he insisted upon us paying the 6 per cent. interest on the money.

Q. This was all the conversation you had with Mr. Cox?

A. Yes, that I had personally with Mr. Cox at the store.

Q. And you say that you consulted him before you borrowed this money?

A. I consulted him at the store, he behind the counter and I outside.

Q. And he consented to the making of this loan?

A. He said, "do as you think best."

Q. Did you state the amount of your proposed loan?

A. I do not recall; I believe I said I would borrow the amount necessary.

Q. Did you tell him the person of whom you intended to borrow this money from?

A. Yes, I did.

Q. Did you frequently refer to it in Mr. Cox's presence from the time the loan was made?

A. I referred it to Mr. Cox himself.

Q. You say that not part of this sum was paid?

A. Not one cent.

Q. Did you inform Mr. Cox at the time you got the money you had made the loan of $800?

A. Right after I got the money.

Q. Where did you tell him?

A. I told him in the store.

Q. Did you show him the check?

A. I did not.

Q. Was the check filled out at that time?

A. I did not have the check.

Q. Where was it?

A. I do not know where it was.

Q. Had you received it from your mother?

A. I had the money.

Q. You received a check from your mother for the money?

A. There was a check that I received the money through.

Q. Did you receive a check on the 8th of December signed by your mother but not filled out as to the amount?

A. I do not remember.

Q. Did you receive a check from her on the 8th of December for $800?

Objection by MR. ENGELKE.

A. I do not recollect.

Q. You say that you had the money in your possession. How did you get it?

A. I got it out of the bank.

Q. By what means?

A. By going to the bank.

Q. How did you get it out of the bank?

A. The paying teller paid it to me, I suppose.

Q. I ask you by what means you got the money out of the bank?

A. Through a check.

Q. Whose check?

Objection by MR. ENGELKE.

Objection overruled.

A. A check drawn on the funds of Elizabeth A. Brockhurst.

Q. To whose order?

A. I do not recall. Undoubtedly it was drawn to my order, or the bank would not have paid the funds.

Q. It was to your individual order?

A. I do not recollect whose order it was drawn to.

Q. How could you get it?

A. It must have been drawn to my order.

Q. Did you indorse the paper.

A. I undoubtedly did, or the bank would not have paid it.

Q. What was the amount?

A. $800.

Q. What was the date?

A. Undoubtedly the 8th of December.

Q. Just a short time ago you stated that you did not remember whether you got the check from your mother on the 8th of December or not.

A. I did not know who sent it to me.

Q. Where did you get this check for $800?

A. Do not recollect where I got it. Whether it was sent to me or whether my brother James gave it to me or how I got it.

Q. It came from your mother, did it?

A. I have no personal knowledge of that.

Q. You heard your mother's testimony, did you?

A. I was out of the room part of the time.

Q. Did you hear her state she gave you a check?

A. I remember she said something about a check being in blank.

Q. Did you hear her state she gave the check to you?

A. I did not hear her say so.

Q. Was this check you presented at the bank, was it entirely filled out in your mother's handwriting?

A. I do not recall anything about the check. I suppose I must have filled out the amount, because at the time I did not know how much was necessary to borrow.

Q. Did your mother fill it out?

A. I have no knowledge of that.

Q. You are quite positive that you never paid back any of this money?

A. Positive that neither Mr. Cox or I paid any of it.

Q. Did you state to Mr. Lucas about March 14th, 1905, when asking him for a check that you wanted

it because you intended to pay your mother back out of it? Do you recall any such conversation?

A. I do not recall any such conversation, and if any such conversation was had it did not apply to this $800 transaction which I had with Lucas.

Q. Did you have any other matters with your mother at this time?

A. Yes. My mother was confused when she answered that question.

Q. Is your mother wrong when she states that she had no other transaction with you between December and May?

A. She is entirely wrong, because I had given her small sums of money.

Q. When you received this $800 in December for the benefit of the partnership, did you make an entry of that amount?

A. The bank made an entry in my pass book.

Q. Did you make an entry in any books kept by you concerning the partnership affairs about this $800 you received?

A. I kept track of all the partnership affairs.

Q. Did you make an entry of this $800 account?

A. I undoubtedly did.

Q. You kept books keeping track of the partnership affairs? Have you these books?

A. Yes.

Q. Can you produce them?

A. I can if I am given sufficient time.

Q. Are you willing?

A. I am.

Q. You received a check, did you, from Mr. Lucas about March 14th for $1,381, which was for payment of goods belonging to the partnership?

A. I did not.

Q. Did you receive such a check?

A. I did.

Q. You said that you did not say to him at that time that you wanted this check to pay your mother?

A. If I did it was referring to another matter Mr. Lucas sent me a check on.

Q. Did you state at that time that you wanted to repay back $800 that the firm had borrowed from your mother to buy butter?

A. I did not make such a statement; if I did have a conversation with him at that time. the conversation was to the effect that something over $1,000 was to be returned to my mother. It was a separate transaction.

Q. Did you pay any moneys out of that check over to your mother?

A. Well, I believe I must have.

Q. How much?

A. What was due her at the time; I do not recollect. Something between $950 and $1,200.

Q. Can't you come any nearer than that?

A. No, I do not know the weights of certain articles.

Q. Your firm bought considerable butter from Lucas, did you not? You resold this butter to him?

A. No; we never resold butter to Lucas.

Q. What was this check you received from him?

A. That was a private matter.

Q. Was that a separate account?

A. I do not know that it was an account. It was a cash transaction. It was for the sale of butter. I do not think that is relevant; it does not apply to this transaction or to anything relating to the partnership. This does not apply to the mortgage or anything relating to the partnership.

Objection by MR. ENGELKE.

Q. Was the check in payment of goods sold to Mr. Lucas?

Objection by MR. ENGELKE.

Examination by RECEIVER.

Q. When did this all take place?

A. In the month of March, 1905.

Question ruled out.

Cross Examination by MR. HASTINGS.

Q. This transaction between you and Mr. Lucas and your mother, did it or did it not relate to the firm's business?

A. It did not relate to the firm's business.

Q. Did you state to Mr. Lucas that this was a private matter of your own?

A. I do not recall what conversation I had with Lucas, but I did not state that it was a transaction of the firm.

Q. The firm had been dealing with Mr. Lucas some time through you?

A. I had dealt with Mr. Lucas personally, and so had the firm.

Q. At this present time did you have two different accounts with Lucas?

A. I do not know how he kept his books.

Q. You received bills from him?

A. I received certain bills for goods received in the store.

Q. Do you so state that you did not tell Mr. Lucas that this was a private matter of your own?

A. I did not say that I stated to Mr. Lucas that this was a partnership matter.

Q. Now I ask you again, was this check for $1,281, was that in payment for butter sold to Mr. Lucas?

A. I refuse to answer this question until made more specific.

Master rules out the question.

Q. Do you not give Lucas to understand that you were selling goods of the firm of Brockhurst & Cox?

A. I did not.

Q. Did you not tell him that they were not goods of Brockhurst & Cox?

A. When I sent the bill I sent the bill in my name for the payment of the goods.

Q. Did you at that time tell him that they were not goods of the firm?

A. I do not believe I did.

Q. Do you state now that the goods which you

sold to Mr. Lucas were not the goods of Brockhurst & Cox?

A. I said that they were not the goods of Brockhurst & Cox, and never belonged to them, and they never had any interest in them as a firm.

Q. Did not the firm buy these goods?

A. I think I have already answered that question, when I say they had no interest of any sort in them.

Q. Did they not about the 9th day of January, 1905, buy these goods which you sold afterward to Mr. Lucas, the ninety-two tubs of renovated butter?

A. They did not buy these goods from Charles H. Lucas Co.

Q. Did you not as a firm buy the ninety-two tubs of renovated butter about the 9th of January from Mr. Lucas?

A. Positively no.

Q. Did you not make an entry in books kept by you as to the financial dealings of the firm of Brockhurst & Cox on or about the 9th day of January, 1905, or as of that date of the purchase of this ninety-two tubs of renovated butter for the amount of $1,097.19?

Objection by MR. ENGELKE.

Examination by RECEIVER.

Q. It appears on your transcript of bank balance, that on December 10, $1,000 was drawn out of your bank account. As I understand, that $1,000 represents the $800 that was advanced to you by your mother for the firm of Brockhurst & Cox, and what was that $1,000 made to pay?

A. I said that check was given to Lucas on December 9th.

Q. What was it given for?

A. In payment on account of about 125 tubs renovated butter.

A. Amounting to how much?

A. I think $1,326.

Q. Was the balance of that ever paid?

A. It was paid about the 14th.

Q. How?

A. By check. Out of that account which was both my account and the firm's account; and I advanced money continually out of my account to pay their bills.

Q. In what form did it stand?

A. Harry B. Brockhurst.

Q. Mr. Lucas was paid the $1,000 and the remaining $300 in full for the butter, and that included the $800; now what was done with the butter?

A. That butter was bought in two lots. One 110 and one fifteen tubs. The fifteen tubs was delivered at the store, 245 Newark avenue, and I believe ten of the 110 lot were delivered at the store. The balance was put in the Merchants' Refrigerating Company, on or about 10th, 11th or 12th, and was drawn out on Mr. Cox's order and went to the store, where it was sold.

Q. I understand that no part of this 125 tubs of butter was sold back to Mr. Lucas for which you got this check?

A. This particular butter was bought from Mr. Lucas and for the firm, and that butter lasted up to the butter that was bought from Zinn, and there was no necessity for me to buy more butter for the firm for the month of March.

Examination by MR. HASTINGS.

Q. That payment between $000 and $1,200 which you made to your mother in March, you state that no part of that sum of money then paid was this $800 borrowed for the firm?

A. I did not state positively that I paid it at that time.

Q. If you did pay it to her, you are positive that it did not include this $800 which you borrowed in December?

A. I had nothing to do with the $800 whatsoever.

Examination by RECEIVER.

Q. Mr. Brockhurst, on December 9th, 1904, you bought goods from Mr. Lucas and paid the $1,000 on account of the firm?

A. I bought the goods on December 9th for the firm and paid the money to Mr. Lucas for the firm.

Q. On January 5th, when you bought goods from Mr. Lucas and paid for them on January 9th by check of $1,017.19, was that for the firm?

A. That was for the ninety-two tubs of butter; it was not for the firm; it had nothing to do with the firm.

Examination by MR. ENGELKE.

Q. Have you your bank book? Will you produce it? Will you turn to an entry made in that book on the 8th day of December? Did you make a deposit on that day?

A. Yes.

Q. Did you see the entry made in that book?

A. I stood at the window when the teller entered his initial, the date and the amount of the deposit.

Q. What was the amount of the deposit?

A. $825.

Entry in bank book is offered in evidence and marked B3.

Q. That deposit of $825 is composed of what?

A. $800 from Elizabeth A. Brockhurst and $25 which Mr. Cox handed me that morning, when I informed him that I borrowed the $800.

Q. What became of the $825?

A. It was drawn out by the check given to Mr. Lucas.

Q. You had other financial dealings besides this $800 loan with Mrs. Brockhurst?

A. Yes; sometimes when I would come home she would be short and I would advance her sums from time to time.

Q. Was anyone present during the conversation had between you and Cox regarding this loan?

A. Yes; at the time I spoke to him, around the 6th or 7th, my brother was with me.

Q. Did you tell him from who you had borrowed the money?

A. Yes; I told him who I was going to borrow it from, and who I had borrowed the money from, and that we were to return it shortly.

Q. Do you know whether or not Mr. Cox sold this butter?

A. I know he sold a good part of it; of course I do not know anything about it when I was not there, I know he gave receipts to the Merchants' Refrigerating Company for the delivery of the goods taken out of there.

Examination by MR. HASTINGS.

Q. You have a check book and check stubs for checks drawn on the account in the Third National Bank, covering a period from December, 1904, to May, 1905. Are you willing to produce these stubs just covering this period?

A. No, I am not. I will not volunteer anything.

Q. Do you state that you will not produce the cash book which you kept for the firm of Brockhurst & Cox?

A. I did not state that I kept such a book. I don't know that you call it a cash book.

Q. Whatever books or memorandums you have concerning the receipts or payments of moneys of the firm of Brockhurst & Cox.

A. If you wish the information you know what to do.

MRS. ELIZABETH A. BROCKHURST, recalled.

Examination by MR. HASTINGS.

Q. Your son paid you in March, 1905, something between $900 and $1,200. Do you remember him giving you any such sums?

A. I recall he gave me some, but the amount I cannot recall.

Q. If he gave you any such sums would it have been in payment of the $800 loan?

A. This was a separate loan.

Q. Did he owe you $900 or $1,200 besides the $800 loan?

Objection by MR. ENGELKE.

Q. Did your son owe you any such amount of money as from $900 to $1,200 in addition to the $800 loan to the firm of Brockhurst & Cox?

A. He has accommodated me at different times.

Q. You don't understand, Mrs. Brockhurst; what I want to know is, did Harry owe you in addition to the $800, which the firm borrowed, did he owe you $900 or $1,200 outside of that?

A. No, not that I know of.

Q. You are positive of the fact?

A. I am not certain about that; but I am positive of the $800 loan.

Q. You don't remember Harry ever owing you $900 or $1,000 in addition to the $800. There were no separate transactions, where you gave Harry $900 or $1,000 in addition to the $800?

A, Yes, there was.

Q. Between what times?

A. I do not remember.

Examination by MR. ENGELKE.

Q. Do you remember any talk referring to buying two lots of butter, one lot which you loaned the $800 and another lot that you loaned money for?

A. Yes, I do.

Q. Do you recall what you loaned on that second lot of butter?

A. I don't know.

Q. Have you attempted to refresh your memory in any matters outside of this $800 loan?

A. No.

Q. Are matters outside of the $800 vague to you?

A. Yes, they are; I can't recall.

Q. Will you state positively, if you can, whether you loaned a second sum of money to Harry Brockhurst, at any time between December, 1904, and May, 1905?

A. I remember your asking me, and that I loaned you between that time.

Q. Does that apply to the $800 or to a subsequent loan, the loan you gave me for butter?

A. I remember there was two loans I gave you, because there was not enough to cover the whole amount of the butter. I am positive of a second loan.

Examination by RECEIVER.

Q. When you referred to the first loan, what one do you mean?

A. I mean the $800 loan.

Q. What butter was that in particular?

A. Well, I remember it was something about ninety-two tubs. It was purchased from Mr. Lucas by the firm and they didn't have enough to meet it.

Q. Now, the second loan, Mrs. Brockhurst; do you remember what butter that was?

A. Well, I thought it was the same.

Q. And you thought the firm of Brockhurst & Cox was buying it?

A. So far as I knew.

Q. At the time you loaned the second loan, do you know what it was for?

A. I knew it was for the firm of Brockhurst & Cox.

Q. How do you know, Mrs. Brockhurst?

A. I understood it from James and Harry.

Questions by MR. BROCKHURST.

Q. You had this told to you by Mr. James Brockhurst?

A. Yes.

Q. This matter of the second loan, to whom was it made?

A. It was made to the firm.

Q. Now the loan of $800 was made to the business of Brockhurst & Cox, you say; now how do you know this?

A. Because you told me so.

Q. How could you know I was taking a partner in and was borrowing this money from you for the firm when the partner was already taken in?

This matter is continued over until October 17th at ten o'clock at this office.

CHARLES F. LUCAS, a witness produced on behalf of the objecting creditors, being duly sworn on his oath, says:

DIRECT EXAMINATION BY MR. HASTINGS:

Q. Do you recall an occasion in March, 1905, when Mr. Harry B. Brockhurst came to you, asking for a check in payment of goods sold to you, which he testified to the other day?

Objected to. Objection overruled.

A. Yes, sir.

Q. Did Mr. Brockhurst ask you for a check in payment of goods sold to you at that time?

Objected to.

A. Yes, sir.

Q. What was the amount of that check?

Objected to. Objection sustained.

Q. Do you know the firm of Brockhurst & Cox?

A. Yes, sir.

Q. Did you know either of the partners prior to the beginning of the partnership?

A. No, I knew neither of them.

Q. Prior to December, 1904?

A. I didn't know either of them prior to December, 1904. The first transaction I had was in December.

Q. Who did you deal with—which member of the firm?

A. Well, Mr. Harry Brockhurst was the only member of the firm I knew.

Q. You didn't know Mr. Cox at that time?

A. I didn't know Mr. Cox until a month or two afterwards.

Q. How did you keep the account in your books—in what name?

Objected to because the books are the proper evidence. Objection overruled.

A. Harry B. Brockhurst & Company.

Q. And such orders as you received from Harry B. Brockhurst were entered in that account?

A. Yes, sir.

BY RECEIVER:

Q. I understand Mr. Lucas that those books can be produced.

Witness: Yes, sir.

Q. Did you have any other account upon your books than that of Harry B. Brockhurst, John H. Cox and Brockhurst & Cox?

A. No, I only had one account.

Q. Do you recollect a sale of 92 tubs of butter by Harry Brockhurst, in the latter part of February, 1904?

A. Yes, sir.

Q. What was the amount of that purchase?

A. $1,281.21.

Q. Was anything said at the time of this sale to you by Harry B. Brockhurst, or any directions given to you to make this transaction a separate matter from the account you already had on your books?

A. No, sir.

Q. In March, about the middle of March, 1905, tell what happened at an interview between you and Harry B. Brockhurst, with reference to this sale.

Objected to as immaterial. Objection overruled.

A. Mr. Brockhurst came to me and requested a check for the butter that we had bought from him, and said he wanted it to pay his mother. I had understood previously that he had borrowed money to buy butter with, and he said he wanted this money to pay her back.

Q. Had he ever stated to you the amount that he

owed his mother?

A. I understood it was $800.

Q. Did he ever state the amount to you?

A. Well, he must have told it to me or I wouldn't have known it.

THE RECEIVER.—That answer may be stricken out.

Q. To the best of your recollection did he inform you as to the amount?

Objected to as immaterial.

A. To the best of my recollection Harry Brockhurst told me.

Q. And did you discuss the matter with anybody else?

A. No.

CROSS-EXAMINATION BY HARRY B. BROCKHURST:

Q. You remember who came to you and bought this butter, do you?

A. Yes, sir.

Q. Who bought this butter that was paid for on December 8th?

Objected to as not cross-examination. Question withdrawn.

Q. At the time this statement was made, how did I come to be in your place?

A. I presume you came to get a check.

Q. Are you positive I wanted to get a check? Was it Mr. Harry B. Brockhurst, or Mr. James B. Brockhurst?

A. I think you came after that yourself.

Q. Do you recollect?

A. That is the best of my recollection.

Q. Which one will you say it was?

A. Harry B. Brockhurst.

Q. What was the statement?

A. You wanted the money to repay your mother. That was the substance of it.

Q. At the time you sent out bills to this firm

that you had an account on your books for—that is, Brockhurst & Cox—how did you send out bills?

A. Brockhurst & Company; that is my recollection.

Q. How did you send out bills for these goods that were purchased—that is, 92 tubs—on December 9th?

A. I presume to Brockhurst & Company.

Q. You must have sent it out the same way?

A. Yes, sir.

Q. Is that a bill for that 92 tubs?

A. Yes, sir.

Q. In whose name is that sent?

A. Harry B. Brockhurst.

Q. You sent that to me?

A. Yes.

Offered in evidence and marked E. B. 8.

Q. Do you know, as a matter of fact, that it was Mr. James Brockhurst that asked you for that money, and that I wrote you a letter?

A. No, I don't think so.

Q. Which of the two Mr. Brockhursts was it that you had most dealings with?

A. James Brockhurst.

Q. Do you recall about how many times you saw me during our transactions?

A. Not very often. Occasionally.

Q. In your direct testimony you said that you understood that I borrowed money. When was it that I had borrowed money?

A. You bought in December and January two good-sized lots of butter, and it came to my knowledge that you got some money from your mother to pay for it.

Q. That was in reference to the first lot?

A. Well, I won't say whether it was the first or second lot.

Q. Well, when was this told to you?

A. I couldn't tell you the exact days on that.

Q. Are you positive that such a statement was

made to you?

A. Well, I know it as I know anything.

Q. You stated the amount was $800?

A. Yes, sir.

Q. And that was told to you before the appointment of the Receiver?

A. Yes.

Q. How long, about?

A. Why, I think I knew it when you bought the butter. You made the statement that you would have to get the money from your mother.

RE-DIRECT EXAMINATION BY MR. HASTINGS:

Q. Have you rendered any other bills for goods sold to the partnership of Brockhurst & Co., simply in the name of Harry B. Brockhurst?

A. I didn't know there was any partnership in the beginning, and I believed we started the account as Harry B. Brockhurst. And it was changed afterwards to Brockhurst & Company when we found out there was a company.

BY HARRY B. BROCKHURST:

Q. At whose suggestion was it made Brockhurst & Company?

A. No suggestion.

Q. Whose suggestion was it changed to Brockhurst & Company?

A. Our own, when we found there was a company.

Q. How did you find it out?

A. I think you told me yourself.

Q. When these 92 tubs of butter were bought, weren't they bought for Brockhurst & Company?

A. It was bought for your business over here.

Q. I mean the butter that was bought on December 8th—you knew that was bought for Brockhurst & Company.

A. We only knew one party in the business.

Q. Did you know that was bought for Brockhurst & Company?

A. No, because I didn't know there was any company.

Q. How did you enter that up in your books?

A. As we started the account, Harry B. Brockhurst.

Q. When did you change it to Brockhurst & Company?

A. Some time in March. I didn't know there was any company until some time after we had been dealing with you.

Q. It was some time in March you changed it?

A. Approximately.

Q. Was it before or after you bought this butter from us?

A. It was after we had made the transaction. I didn't know that until away in March—maybe later.

Q. When this second lot of butter was bought you had no knowledge of the partnership at all?

A. No.

Q. You didn't hear of Mr. Cox at all?

A. I didn't know of him at all.

Q. And there was no question as to whose account this should be entered up to.

A. No; we had dealings before and we charged it the same.

Q. Was it a cash transaction?

A. Not strictly.

Q. Just tell us how the transaction was.

A. I think you paid in four or five days after.

Q. Isn't it true that I paid a check for $1,000 that day?

A. Not on the 92 tubs. That was on the original purchase.

Q. Isn't that called practically a cash transaction?

A. No; that ain't cash.

Q. Let me ask you what is a cash transaction in

New York in dealing in butter?

A. A cash transaction is spot cash.

Q. Isn't it ten days?

A. Ten days is a net.

Q. That isn't cash?

A. A man that would pay his bills in ten days, that is net.

Q. Would you call it giving credit?

A. Yes.

Q. Do you give a discount on your credit accounts?

A. No.

Q. And how do you call this account a credit account?

All this testimony is objected to as irrelevant. Objection sustained.

DANIEL P. BYRNES, a witness on the part of the claimant, being duly sworn in the matter of the claim of Elizabeth A. Brockhurst, testifies as follows:

DIRECT EXAMINATION BY MR. ENGELKE:

Q. You are an Attorney at Law?

A. I am.

Q. Do you know Mrs. Elizabeth A. Brockhurst?

A. I do.

Q. Have you had any business dealings with her?

A. I have.

Q. I show you a chattel mortgage from Brockhurst & Cox to Mrs. Elizabeth Brockhurst and ask you if you ever received the same from her?

A. I did.

Q. What did you do with the same?

A. I authorized a constable to foreclose the mortgage. The Constable's name was Andrew Donnell. I authorized him in writing to foreclose that mortgage, to take possession under the mortgage.

MR. HASTINGS:

Q. I object to that testimony and ask that it be

stricken out.

BY THE RECEIVER:

Q. What day was it that you got this mortgage?

A. It was one or two days before the bill in chancery was filed.

Q. That was about May 5th?

A. I don't recall the date of the bill.

A. The bill in chancery was filed on May 5th. Where was Mrs. Brockhurst when she gave you this?

A. I don't just recall now.

Q. Was it at your office?

A. It might have been; I don't recollect now.

Q. Do you know where she got it from?

A. I believe she got it from her son Harry.

Q. I mean at that particular time—where did she produce it from?

A. It was in her possession.

Q. How in her possession?

A. It came from her possession.

Q. What do you mean by that?

A. I don't understand the question.

Q. I mean did she come in?

A. Do you mean to inquire as to whether she took it out of some receptacle of her own and handed it over?

Q. Yes.

A. I do not recollect it that way. I recollect it came from her to me direct.

Q. Was her son Harry there at the time?

A. No; her son Harry was not there.

Q. Is there anything that you remember on this particular occasion that you remember where it was?

A. No; I do not recall the incident connected with the possession of the mortgage except that it came to me from her.

Q. By mail?

A. I do not recollect that it did. My impression of the matter is that Mr. James Brockhurst brought it to me with instructions to take charge of it and

protect her rights.

Q. Then as a matter of fact it didn't come from her possession at all—it came from the possession of Mr. James Brockhurst?

A. It came from her through him.

Q. How do you know it came from her through him?

A. On a previous occasion we had a conversation with her personally.

Q. That is the only way you know it was in her possession by that conversation and the fact that James Brockhurst gave it to you?

A. I think at the time that the mortgage was given it was given to her personally.

Mr. Hastings: Objected to as hearsay.

CROSS-EXAMINATION BY MR. HASTINGS:

Q. Were those instructions in writing from Mrs. Brockhurst? When the mortgage was delivered to you, you say there were instructions from her. In what form were those instructions?

A. I am rather inclined to think that they were written instructions, although I am not positive.

Q. Have you got them?

A. No, I haven't got them now.

Q. Have you got them in your office in your possession?

A. I can't say that I have.

Q. Did you destroy them?

A. I can't say.

Q. Did you keep a copy of the instructions you gave the Constable?

A. No, I did not.

THE RECEIVER:

I will consider the claim of Elizabeth A. Brockhurst closed on the part of the claimant.

MR. HASTINGS:

Q. Mr. Brockhurst (referring to Harry B. Brockhurst) you were served with a subpoena *duces tecum* to produce the books of account, check books, checks, writings and memoranda regarding the cash transactions of the firm of Brockhurst & Cox, espe-

cially with regard to moneys received from or paid to Elizabeth A. Brockhurst and James B. Brockhurst. You were served with such subpoena?

Mr. Engelke: I object to the question. There is affirmative proof of that.

Mr. Hastings: It isn't to prove the fact. It is for another purpose. I simply want to identify the things he was asked for.

THE RECEIVER:

Do you want to swear Mr. Brockhurst?

Mr. Hastings: Not for a full examination.

HARRY B. BROCKHURST recalled.

BY THE RECEIVER:

Q. Will you kindly produce all books or memoranda of accounts kept by you concerning cash receipts and disbursements for the partnership of Brockhurst & Cox, or in your own name for the use of said partnership, and also all bank books, check books, stubs, return check, or other paper writings or memoranda in your custody or control kept for said partnership or in your individual name, showing the receipts and disbursements of moneys and especially of such as refer to the receipt of moneys from or payments of moneys to Elizabeth A. Brockhurst and James B. Brockhurst?

A. I have such papers and books.

JOHN H. COX, a witness on behalf of the contestants, being duly sworn, on his oath says:

DIRECT EXAMINATION BY MR. HASTINGS:

Q. Do you recall any conversation you had with Mr. Harry B. Brockhurst, just prior to the filing of this bill or at any other time, about securing the claims of the creditors of the company or any of the claims?

A. I never had such conversation with Mr. Brockhurst.

Q. Did you ever have a conversation with him with regard to securing the claim of Elizabeth A. Brockhurst?

A. Never. I never understood there was a claim

until two days before the matter came into Chancery.

Q. Did Mr. Harry Brockhurst ever speak to you in December, 1904, about borrowing $800 from his mother, either on the 6th or 7th of December?

A. No.

Q. Did he at that time inform you that it would be necessary to borrow any money whatever for the purpose of a partnership?

A. No. He did speak to me at one time about borrowing money.

Q. When was that?

A. That was two days before the matter came into Chancery—the first Monday in May.

Q. In what manner did you hear that there was such a claim?

A. On that particular day I was at dinner, and after returning from dinner to the store, both the Brockhursts were there—James and Harry, and there was another man in company with them, and Harry said that this gentleman wanted to speak to me, and I went up to the man, and he said: "What about this chattel mortgage that Elizabeth Brockhurst holds from Brockhurst & Cox?" I said: "I don't know the lady; I never had any idea there was such a thing in being." That is the only time and that is the only conversation.

Q. Mr. Brockhurst never informed you that he had executed a chattel mortgage to his mother?

A. Never.

Q. And he never informed you that he had borrowed the $800 until just prior to the receivership?

A. Even then he did not inform me. He said we would have to borrow money to pay some of these creditors, and I said I would not be a party to borrowing money for such a purpose.

Q. Did Harry Brockhurst frequently refer to borrowing this money?

A. No; except on one occasion. Mr. Brockhurst and Mr Lucas and I had some idea of putting this

business into a corporation, and they drew up papers for that purpose, so previous to these papers being drawn he wanted to get some money out of the business, about $600, but he never told me it was for his mother, or for what purpose.

Q. When was the date of this proposed corporation?

A. In April.

Q. Did you from time to time make requests upon Mr. Brockhurst to render an accounting to you?

Objected to.

Objection sustained.

Q. And the statements, if any—referring now back as early as you can to the partnership, have been made to you by Mr. Harry Brockhurst, concerning the financial condition of the business of Brockhurst & Cox?

Objected to because the question is not specific.

Objection overruled.

A. About the first week in March Harry Brockhurst told me that we had made quite a lot of money. He considered, on a rough calculation, about $1,200 or $1,400, and I think it was the first Sunday in March, for the purpose of finding our profits, we took stock at the store. Mr. Brockhurst and the clerk and myself. After we had taken stock, Mr. Brockhurst was supposed to figure it out, but he never did. I asked him about it several times, but he seemed to avoid giving me any decided answer.

Q. Were any statements made to you prior to March by Mr. Harry Brockhurst?

A. Well, yes. From the first month of our partnership he seemed quite elated about the successful turn of business affairs, as business had quadrupled in that time.

Q. During the month of January, did he assure you that there was a profit?

A. Yes; and even in December, that business was

increasing so rapidly that he was so elated over it and at all times referred as to how successful things were going on.

Q. Did he make such statement in February?

A. Yes, sir.

Q. Did you frequently make inquiries from him regarding the situation of affairs?

A. Not very often before March, because he seemed to express those things himself.

Q. You had practically the entire control of the sales, did you not?

A. Yes.

Q. Were you there every day in the store in attendance?

A. Every day.

Q. And you turned over the cash of every day's business to Mr. Brockhurst?

A. Yes. Except Saturday night. On Saturday he used to make up the cash and take it, but entries were made in the book.

Q. Can you tell from week to week or from month to month the business increased or not.

Objected to.

Objection sustained.

RECEIVER:

Q. Did you know anything about the purchase of these 110 or 115 tubs of butter from Lucas & Company in December, 1904?

A. No; nothing whatever.

Q. Did Harry Brockhurst say anything to you about it before he purchased it?

A. Yes; he told me he purchased the money, but the extent of the purchase or anything like that, I don't know. I didn't come to the store.

Q. Did you authorize him to purchase the butter for Brockhurst & Cox?

A. No.

Q. Was there any agreement between you and he who should purchase butter for Brockhurst & Cox?

A. It was understood that he should buy butter and eggs. The other goods requisite for the business I purchased.

Q. These 115 tubs of butter, were they used by your firm of Brockhurst & Cox?

A. I hardly think there was any such quantity used.

MR. ENGELKE:

Q. You refer to the first purchase?

RECEIVER:

The first purchase.

Q. How did you get this in the store?

A. There would be a notice sent down to the Merchant's Warehouse, and then we would receive four or five or six tubs together, and our order would be signed, sometimes by Harry Brockhurst and sometimes by James Brockhurst, and I think by myself one or two times. With regard to the amount of butter in the storage I have no knowledge. I have always been asking Mr. Brockhurst to have bills sent with the butter. I didn't know the price of any of the butter. I kept a record of the other stuff.

Q. Mr. Cox, did you ever receive any bills for this particular butter?

A. No, sir.

CROSS-EXAMINATION BY MR. HARRY B. BROCKHURST:

Q. You heard my testimony on my direct examination, that I went to the store on either December 6th or 7th and talked to you about buying some butter from Charles F. Lucas & Co., and in the presence of Mr. James Brockhurst, you told me to do as I thought best. Is that true, or is it false?

A. I don't remember having such a conversation with you.

Q. Will you make your answer more specific than that, by either affirming or denying it?

A. I deny it.

Q. Was Mr. James Brockhurst there on either December 6th or 7th, when we had conversations relating to the purchase of butter?

A. We never had any such conversation.

Q. Did you know that this butter was going to be purchased from Mr. Lucas?

A. No.

Q. Did you know afterwards that it had been purchased?

A. Never in such quantities.

Q. Where did you suppose the butter we had before placed in storage, came from? This butter that you spoke of as being drawn from the storage, where did you understand it came from?

A. You gave me to understand that you had a lot of butter in storage when I went into the partnership.

Q. Did you understand that this renovated butter came from what we had in storage?

A. Yes, sir.

Q. Do you recollect drawing any of this butter, that you say we had in storage, from the storage?

A. I never took any from storage.

Q. Do you remember that any of it came from storage, on any of those orders?

A. Yes, sir.

Q. Do you remember what mark or grade that was?

A. I do not remember. I don't know whether it was renovated or creamery.

Q. Do you know whether it was renovated or creamery or what?

A. Well, we drew both kinds from storage.

Q. When you drew both kinds, you thought that both kinds belonged to me, did you?

A. Undoubtedly.

Q. When did you come to find out that that did not belong to me; that it belonged to the firm?

A. The first time I knew you bought butter in

such quantities was one day down at the office, when you showed me some account or book, in which you kept account of your receipts and disbursements.

Q. When was that?

A. Probably in April.

Q. I show you a book, did you ever see this book before?

A. Yes.

Q. Did you keep that book?

A. Yes.

Q. Doesn't that show the receipts that were taken in in the store during the first week in December?

A. Yes.

Q. What are they? Call them out, day and date and amount.

THE RECEIVER:

Let the books speak for themselves.

Book offered in evidence.

Q. Those entries are in your own writing?

A. Yes.

Q. Those entries show the daily receipts?

A. Yes, sir.

Q. Can you, from those entries, state how much had been taken in in the store, up to and including December 8th, of that year?

Objected to. Objection sustained.

Q. These statements that you say that I made to you, when was the first statement, about the financial condition of the partnership? You say in December—about what time in December?

A. During about the second week in December.

Q. What was said?

A. You were elated at the amount of business we were doing. I can't remember the exact words.

Q. You don't recollect any such conversation then?

A. Oh! yes; I recollect such a conversation, but the exact words I hardly remember.

Q. As near as you can?

A. You seemed satisfied with the amount of business we were doing.

Q. Did I, at that time, tell you that some $1,400 had been made?

A. Not at that time.

Q. The statement in January, when was that made?

A. Well, generally on a Saturday night, you and I used to have a conversation, after business. We used to walk home together, and you always said things were progressing.

Q. Did I state to you how much had been made?

A. Not then.

Q. In February, during that conversation, did I state to you how much had been made?

A. You never stated any particular amount except in April.

Q. In April I did state how much?

A. You said $1,200 or $1,400.

Q. Did I ask you previously before making that statement, how much you considered the stock in the store was worth?

A. Yes.

Q. How much did you tell me.

A. It varied sometimes $1,200 or $1,400.

Q. Did you not tell me the stock was worth $3,000.

A. Never.

Q. I have reference to the time we had this conversation.

A. You deny that.

Q. Do I understand you to deny my statement to the effect in my direct examination that I told you on several occasions of this loan of $800 from my mother?

A. I do undoubtedly; I never heard of it.

Q. This person that you say came into the store. who first informed you of this chattel mortgage, who was he?

A. I don't know.

Q. Did he tell you who he was?

A. No; he simply said he had some papers in his hand and said: "How about this chattel mortgage?"

Q. Did he tell you he was a Constable?

A. No.

Q. Did he not show you his shield?

A. No.

Q. Did he not come over and tell you that he had foreclosed that mortgage and was going to take possession.

Objected to. Objection sustained.

Q. Have you not stated to several persons who came in the store then, that we had lots of money behind us now, and we were going to put Henry Cole in the shade?

Objected to as immaterial and not cross-examination.

Objection overruled.

A. I never made such a statement.

Q. Did you make any statement similar to that?

A. Never.

Q. Did you ever tell any person coming in the store that we had lots of money behind us?

A. Never.

RE-DIRECT EXAMINATION by Mr. Hastings:

Q. You have seen this book marked, "Receipts," as you have stated.

A. Yes, sir.

Q. In going over that, did you notice charges for payments against the firm of Brockhurst & Cox for charges of large amounts of $1,600 or $1,200?

A. Not in this book, but in a book which I saw in Mr. Brockhurst's office in which he kept account of those things.

Q. About when was this?

A. In April, I said.

Q. Do you remember as to what time these payments were entered?

A. Well, I don't exactly remember the days, but I have an exact copy of these books.

Q. In what month?

A. I think in December or January.

BY THE RECEIVER:

Q. Where is that copy?

A. I have it here—kept by our cashier.

Q. Is that book that you refer to one of the books that has been produced here to-day?

A. No, sir.

Q. It is a book kept by Mr. Brockhurst and seen by you in his office?

A. Yes, in the store. He sent it up to the store for me to O. K. it, and I got the cashier to copy it exactly.

Q. These large amounts referred to, did you ever receive into the store any such quantities of goods as is represented by these large payments of $1,000 and $1,200?

A. No, sir.

RE-CROSS EXAMINATION BY MR. BROCKHURST:

Q. Do you deny that the goods, the 100 and some odd tubs of renovated butter that we placed in the Merchants' Refrigerating Company were received into the store?

A. I do.

Q. Do you deny that those goods were sold over the counter under your supervision?

A. I have no means of knowing and never had any means of knowing what were the identical goods that you refer.

Q. Do you deny that those goods were sold over the counter under your supervision?

Objected to.

Objection sustained.

Q. If those goods had been received in the store and had been sold over the counter under your supervision, you would have known it?

A. I wouldn't know that they were any identical brand, because I never was furnished with bills.

Q. You would know the goods were renovated butter?

A. Yes.

Q. Would you not know if this renovated butter that was placed in the Merchants' Company, if it had been received in the store and sold under your supervision?

A. No. It might have been purchased from any other firm but Lucas.

Q. If it had been received from the Merchants' Company? You come here and deny that these items represented by these large amounts, you say they never were received? What do you base your opinion on?

A. On the amount of butter we sold.

Q. How much did we sell—did we sell 100 tubs?

A. Yes.

Q. Did we sell 200 tubs?

A. Probably.

Q. Do you think we sold 200 tubs?

A. I believe we did.

Q. And what is the other item that you deny that is a large amount?

A. There are several items. There is another item of the 13th of December, that isn't there.

Q. What item is that?

A. It says also 15 tubs.

Q. Is there any other item on that list that appertains to that particular matter—I have reference to butter from Mr. Lucas of December 7th or 8th?

Question repeated.

A. There is another item of the 13th, that mentions 15 tubs and 10 tubs, 17¾; and then there is another item of $221.38.

Q. Does that appertain to this butter?

A. I don't know.

Q. Do you know whether that was renovated butter or creamery butter?

A. I don't know.

JAMES B. BROCKHURST, a witness on behalf

of the claim of Elizabeth Brockhurst, being duly sworn, on his oath, says:

DIRECT EXAMINATION BY HARRY B. BROCKHURST:

Q. You remember calling at the store in company with me on either December 6th or 7th of last year, at which time I had a conversation with Cox?

A. Just previous to your going to New York to buy butter.

Q. How long previous to the time was it?

A. We left to go right over.

Q. Were you present at the time this conversation was had?

A. Yes.

Q. State what the conversation was?

A. I was behind the counter with Mr. Cox, and you were in front of the counter, and I had been sent by Mr. , of the Refrigerating Company, to Mr. Lucas, a friend of his, to see about renovated butter, and I located the goods, a good-sized lot of butter; I think it was 92 tubs, and the price seemed all right, and I came over and spoke to Harry about it, and Harry and I went up to the store, and we spoke to Mr. Cox about it.

Q. Who spoke?

A. You spoke to Mr. Cox about it—Mr. Harry Brockhurst spoke to Mr. Cox about it, and Mr. Cox took the position for us to do what we thought best.

Q. Do you know what he said?

A. You said that you would have to borrow the money to buy the butter—I don't recall that you stated the amount of money, but as much as was necessary—I don't really know the amount. We knew how much a pound, but we didn't know the weight, and the idea was to borrow whatever money was necessary to buy the goods.

Q. Did you hear what he said in reply to my talk, in reply to buying this butter?

A. Yes, he said to you, to use your own judgment about getting it.

Q. You say you also heard me state to him that I would have to borrow the money?

A. Yes.

Q. Did you hear me state from whom I was to borrow?

A. Yes; he understood always.

Q. From who?

A. My mother.

Q. You heard me state that to him?

A. Yes.

Q. Did you have any conversation subsequent to that time with Cox in regard to this loan or this purchase of butter?

A. Mr. Cox knew that I was staying in the store to look after the interest of my mother, who had invested the money.

Question stricken out.

Q. What was the substance of the conversation that you had with him about it?

A. Well, I am a little hazy on that.

Q. I will recall something to your recollection. Do you remember asking Cox to go to Red Bank at Christmas time, and his refusal to go on account of this money?

A. That is right.

Q. What was the conversation?

A. I asked him to come down and take dinner, and he didn't like to—because, well he felt that—

Q. What did he say?

A. He refused to go.

Q. For what reason?

A. He didn't like to meet my mother.

BY RECEIVER

Q. Did he say for that reason?

A. Yes, he did say at the time. I know he gave me the reason at the time.

BY MR. BROCKHURST:

Q. Did that reason relate to the firm owing Mrs. Brockhurst this money?

A. It did relate to the money.

Q. What was said then?

Objected to. Objection overruled.

A. I can't remember the exact words.

BY RECEIVER:

Q. Can you remember the substance?

A. He didn't like to meet her because of borrowing the money from her. That was the substance of it.

BY MR. HASTINGS:

Q. What dinner was this that you invited him down to?

A. It was Christmas dinner.

Q. You are quite positive that he refused to go because he was indebted to your mother?

A. Yes; he was backward about meeting her for that reason. I can't say what words he used, but that was about the general idea of what he said.

BY RECEIVER:

Q. Where was this conversation?

A. Right behind the counter in the store.

Q. When?

A. About a few days before Christmas.

Q. Do you remember what day of the week it was?

A. No. I should say about two days before Christmas.

Q. What did you say to him?

A. I asked him to come down and take dinner with us and meet my mother, and he didn't care to do it.

Q. Why did you want him to come down there?

A. His wife was in the country, and he was alone, and I thought it was a nice thing to do.

Q. Does the store keep open on Christmas morning?

A. I don't think so.

Q. Don't stands of that kind generally keep open until 12 o'clock on Christmas?

A. I am not positive, but I am pretty sure it was closed. I think Christmas came on Sunday. Un-

less it was closed, I wouldn't have invited him.

Q. He couldn't have got down if the store hadn't been closed?

A. We didn't always open. I don't recollect whether we were closed or not. If the New Jersey Beef and Provision Company opened their doors, we would have to stay there.

Q. Did the New Jersey Beef and Provision Company always open their store on holidays, unless it is a Sunday?

A. I don't know about that.

Q. What was Mr. Cox's exact language. Do you remember the exact words that he used?

A. I can't recollect.

Q. Do you remember any of them?

A. Well, he acted as though he was backward about meeting my mother on account of the money.

Q. Was the money mentioned at that time?

A. More as an indebtedness—as though, if you owed me money and I invited you down. It was more his actions than what he really said; he was backward and didn't care about going for that reason.

Q. In other words you knew that your mother had loaned him $800?

A. Had loaned the firm.

Q. And you asked him down to dinner, and he wouldn't come?

A. Yes.

Q. As a matter of fact, you supposed that he wouldn't come, because of the fact that he felt a little backward about it, because of the money that he owed your mother?

A. It was more than supposition.

Q. You supposed by the way he acted?

A. I was pretty sure that it was for that reason, but I can't recollect what he said. It is too far back.

Q. Was there any time other than this that the $800 was mentioned between you and Cox?

A. Cox and I had more conversations about the $800, than my brother and he.

Q. Did you and he have a talk about $800 at any particular time?

A. Not exactly the $800—more as an indebtedness to my mother—in that way.

Q. Was there any talk between you and he when Harry was present, or when Harry was not present, when you and he mentioned any particular amount of money due from Brockhurst & Cox to your mother?

A. I don't recollect anywhere the particular amount was mentioned.

Q. Do you recollect anywhere any amount was mentioned?

A. I know that the first conversation in buying the butter, that whatever amount was necessary was mentioned, I recollect that conversation well. I can place exactly where we stood.

Q. That was in December?

A. That was in December.

Q. And what were the words that he used then; do you recollect?

A. He told my brother to use his judgment about what he should do about the matter.

Q. Anything else?

A. No; we left him that way. We were to use our own judgment and do what we thought best.

Q. That was all that was said?

A. That was after we discussed buying it, and that was about the way it ended up, and we went directly over to Mr. Lucas and purchased the goods.

CROSS-EXAMINATION BY MR. HASTINGS:

Q. Did not Mr. Cox give you any excuse when you invited him to dinner for his refusal?

A. No other excuse that I can recollect.

Q. Didn't Mr. Cox state to you that he didn't feel that he had the proper clothing to accept an invitation of that kind?

HARRY B. BROCKHURST recalled.

DIRECT EXAMINATION BY MR. ENGELKE:

Q. You heard your brother James testify concerning the invitation extended to Mr. Cox to come to Red Bank?

A. I was there at the time. The three of us were behind the counter; Mr. Cox was between us; we were right near the rear of the tea canisters. My brother had previously told me that he was going to ask Cox to go down to dinner, and I didn't like the idea, but I didn't say anything. I was there at the time he asked him to come to dinner on Christmas, and Cox commenced to shrug his shoulders.

It is true that he said something about his clothing not being proper, but he couldn't go down because there was money owing to my mother, and he didn't like to meet her just at that time.

Q. You heard Mr. Cox testify to statements made by you from December to the middle of April, concerning the flourishing finances of the firm?

A. That was an absolute falsity, with the exception of the statement in April, and that was on the assumption, that what he told me, that the stock in the store was worth $3,000, and I said then, we must have made a profit of about $1,400, but previous to this I made no statement of any money we made. I had stated that the thing was going along apparently all right, but I made no statement. We took account of stock one day, and I was never able to finish that, and for that reason, I didn't know where we did stand, and I could not say that we had made $1,400, only for the statement that he made, that the stuff in the store was worth $3,000.

Q. Mr. Cox testifies that he was never told by you of the loan made to you by Elizabeth A. Brockhurst?

RECEIVER: This is not proper rebuttal.

Q. Can you state any instance when you did tell him?

RECEIVER: He has told all that.

Q. Who was present at the time you told him?

A. Mr. James Brockhurst, standing behind the counter.

BY MR. HASTINGS:

Q. It is true that Mr. Cox demurred to the invitation on account of his clothing?

A. He brought in the two matters. He shrugged his shoulders, and said something about his clothing, and also said something about the indebtedness.

Q. When was this?

A. That must have been about the 21st, 22d, or 23d of December—just previous to Christmas.

JOHN H. COX recalled, for objecting creditors.

DIRECT EXAMINATION BY MR. HASTINGS:

Q. Did you have any conversation in the presence of Mr. James B. Brockhurst, with Harry B. Brockhurst in December, 1904, with regard to purchasing those 92 tubs of butter?

A. Never.

Q. Did you ever have any conversation in the presence of James Brockhurst, with Harry Brockhurst, in regard to borrowing any money for the purpose of making a large purchase of butter?

A. No. No conversation whatever.

Q. Did you ever after that time have frequent references and talks with James Brockhurst about this butter and about the $800 which the firm owed to his mother?

A. I never discussed a syllable with him about any such subject.

BY RECEIVER:

Q. Do you remember the time when Mr. James Brockhurst asked you to go down and take dinner with him?

A. Yes.

Q. Did he ask you?

A. Yes; he asked me to go and take dinner; that his mother would be pleased to meet me, and I excused myself on account of my clothing.

Q. Did you at any time say that you would not go down, because you owed her money, or the partnership owed her any money?

A. No, sir.

I certify that the foregoing testimony was taken by a stenographer selected by me, who was first sworn to faithfully and truly to take stenographically and to reproduce in manuscript and typewriting the testimony given, and that such testimony was taken in my presence and hearing, and I believe that it accurately states the evidence.

Signature of witnesses waived.

J. MERRITT LANE,
Master.

DECREE.

(Filed December 8, 1905.)

It is, on this eighth day of December, 1905. * * * ordered, adjudged and decreed * * * that the partnership heretofore existing between Harry B. Brockhurst and John H. Cox is hereby dissolved; * * * and that the said J. Merritt Lane, Esq., a Master of this Court, who has been previously appointer Receiver pending this suit, be made permanent Receiver of the effects of the said partnership, and that said Master shall ascertain the creditors of the said partnership and the amounts due to each, and report thereon to this Court; and that any proceedings already taken by said J. Merritt Lane, Esq., as Receiver in the matter of advertising for creditors, of receiving proofs of their claims, and as Master and Receiver passing upon and reporting upon the said claims, shall be and are hereby ratified and confirmed in every particular. All further and other equities to await the coming in of the report of the Master and Receiver.

Respectfully advised,

LINDLEY M. GARRISON, V. C.

W. J. MAGIE, C.

The Receiver, after hearing the testimony offered, filed his report, which so far as affects the claim of Elizabeth A. Brockhurst, is as follows:

REPORT.

(Filed December 23, 1906.)

FOURTH—That as to the claim of Elizabeth Brockhurst upon her chattel mortgage, dated May 2, 1905, and recorded May 18, 1905, Liber 231, page 380, covering all stock and fixtures and lease belonging to the partnership, I find and report:

(A) That Elizabeth Brockhurst advanced the sum of Eight Hundred Dollars to the partnership on December 8, 1904, and that no part has been repaid, and there is due on this date Eight Hundred and Forty-five Dollars and Six Cents ($845.06).

(B) That the chattel mortgage was duly executed and delivered and is a valid instrument.

Gilson v. Warden, 14 Wall, 244.
20 L. C. P., 797.

(C) It is urged that the chattel mortgage was withheld from record an unreasonable length of time, and is therefore invalid as against all creditors, whether their debts accrued subsequent or prior to the making and recording of the mortgage under Act concerning chattel mortgages, Revision 1902, Section 4; Roe v. Meding, 8 Dick., 368; Dunham v. Cramer, 18 Dick., 151; Thompson v. Van Vechten, 27 N. Y., 568. But I make no finding upon this point, because of my conclusion that there are no creditors in a position to take advantage of such withholding from record, no creditors having a lien upon the property of the partnership. Receiver v. Spielman, 5 Dick., 120, and p. 123; Martens v. Bowen, 6 Dick., 458, although grave doubts may exist whether under Kirkpatrick v. McIlroy, 14 Stew., 554, and Lawson v. Dunn, 21 Dick., 90, the appointment of a Receiver of a partnership does not fix the debts of the partnership upon the partnership as-

sets as is necessary to void a chattel mortgage under the act, and whether this Court upon a motion for a distribution would not take into consideration the creditors in as advantageous a position as they could have placed themselves in by commencing suit. It follows that the sum of Eight Hundred and Forty-five Dollars and Six Cents ($845.06) should be paid to Elizabeth Brockhurst or such part thereof as there are funds in the hands of the Receiver sufficient to pay.

Dated November 17, 1905.

Respectfully submitted,

J. MERRITT LANE,
Master and Receiver.

To this report the following exceptions were filed:

EXCEPTIONS.

(Filed July 19, 1906.)

John H. Cox, the defendant, and E. D. Depew & Co. and Evening Journal Association, creditors who have proved their claim before the Receiver and the same allowed, except to the report of said Receiver and object to its confirmation, in so far as it allows the claim of Elizabeth A. Brockhurst as a preferred creditor under an alleged chattel mortgage for $800 and gives her priority in distribution of assets in hands of Receiver for the following reasons:

1. Because the Receiver finds that Elizabeth A. Brockhurst did, in fact, loan the sum of $800 or any other sum in December, 1904, or any other time to the firm of Brockhurst & Cox, and that the same has never been repaid, whereas such facts were not established before him by a preponderance of proof.

2. Because such Receiver has found said chattel mortgage to be a valid obligation of the partnership as against creditors, whereas the same is an instrument under seal executed by one of the partners alone, covering all the assets of said partnership.

3. Because said Receiver denies the right of creditors who have proved their claims before him to question the validity of said chattel mortgage claimed by Elizabeth Brockhurst because their claims were not fastened upon the property of the partnership, whereas such claims were, in fact, fastened upon the property of said partnership.

4. Because said alleged claim of Elizabeth A. Brockhurst is in divers other respects illegal and invalid and should not have been allowed by said Receiver.

F. W. HASTINGS, JR.,
Solicitor for Defendant and for E. D. Depew & Co.
JAS. E. PYLE,
Solicitor for Evening Journal Ass'n.

The exceptions came on for argument before Vice-Chancellor Garrison.

ORDER.

(Filed February 28, 1906.)

This matter being opened to the Court, in the presence of Adolf L. Engelke, counsel for the complainant, and Frank W. Hastings, counsel for defendant, and J. Merritt Lane, Receiver, *pro se,* and it appearing to the Court that the matter of the contest of the various claims of creditors of the partnership of Brockhurst & Cox, were referred by an order of this Court to the Receiver as Master to take testimony and report thereon to the Court whether the said claims should be allowed or not, and the said Master having taken the testimony, and having filed his report with this Court, by which it appears, * * * that the claim of Elizabeth A. Brockhurst should be allowed as a preferred claim against the partnership and due notice of application to confirm such report having been given to all

the parties hereto, and to all the creditors of said partnership, who could be ascertained; and the Court having heard the argument of Adolf L. Engelke, of Counsel for Harry Brockhurst, and Elizabeth Brockhurst and James Brockhurst, and Frank Hastings, of counsel for John H. Cox, and various creditors; and it appearing that as to the claim of Elizabeth A. Brockhurst there is not sufficient evidence before the Court upon which to pass upon such claim and upon the consent of all parties appearing, it is ORDERED on this twenty-seventh day of February, Nineteen hundred and six;

AND IT IS FURTHER ORDERED that the matter of the claim of Elizabeth Brockhurst be reopened and be further heard before the Court, and that the testimony heretofore taken before the Master be considered as having been taken before the Court, and be used upon further hearing, and that the Receiver may intervene and become a party to proceedings upon the claim of said Elizabeth A. Brockhurst, and that either party hereto or any creditor who has filed a claim may proceed to put in such further proof or evidence as they may be advised is proper before the Court, and that the matter may be moved for hearing by either party, or by any creditor who has filed a claim upon five days notice to the creditors of said partnership, who have filed claims; that said notice may be mailed to them at their post-office addresses.

AND IT IS FURTHER ORDERED that notice of this order be, within five days of the date hereof, mailed to each of the creditors of the said partnership who have filed claims.

Respectfully advised,

LINDLEY M. GARRISON, V. C.

W. J. MAGIE, C.

Above order consented to.

J. MERRITT LANE,

Receiver *pro se.*

ADOLF ENGELKE,
Sol'r for Complt.
F. W. HASTINGS, JR.,
Sol'r for Deft.

March 12, 1906, further testimony was taken before the Court in pursuance of the foregoing order:

TESTIMONY.

Testimony taken before Hon. LINDLEY M. GARRISON, Vice Chancellor.

APPEARANCES:

MR. ENGELKE, for Harry B. Brockhurst and Elizabeth A. Brockhurst.

MR. HASTINGS, for John H. Cox and Edward D. Depew & Co., a judgment creditor.

MR. PILE, for the Evening Journal Association, a judgment creditor.

MR. LANE, the Receiver, *pro se.*

JERSEY CITY, Monday, March 12, 1906.

Mr. Lane, the Receiver, acting as solicitor for himself, moves the above matter, under a notice given to all of the parties in interest, as appears by an affidavit to such fact filed as of the 12th of March. The hearing is brought on in accordance with the notice, in pursuance of the permission to bring the matter to a hearing contained in an order dated February 27th, 1906, and filed on the 28th day of February, 1906. The matter to be heard is the claim of Elizabeth Brockhurst upon a chattel mortgage for $800 mentioned in the report of the Receiver.

MR. LANE: I desire to offer the report of the Receiver, heretofore filed in the cause, showing the claims filed with the Receiver, under the order of this court, as against the partnership of Brockhurst

& Cox.

THE VICE-CHANCELLOR: Is there any objection to that?

MR. HASTINGS: Only with some amendment; two of those claims have since been reduced to judgment, which I suppose Mr. Lane will make supplementary report of.

THE VICE-CHANCELLOR: Is there any objection to that report coming into evidence in this case?

MR. ENGELKE: Is it to be used as evidence?

THE VICE-CHANCELLOR: That is the purpose of offering it. He says he offers it in evidence.

MR. LANE: For the purpose of showing those claims against the partnership.

THE VICE-CHANCELLOR: I will hear any counsel who desires to make any inquiry or objection.

MR. ENGELKE: Is this a report of all the claims?

MR. LANE: Yes, sir.

THE VICE-CHANCELLOR: As there is no objection, it may be admitted. (The report is marked Exhibit A of March 12, 1906.)

MR. LANE: I offer a transcript of judgment, in the case of Edward D. Depew & Co. vs. Harry B. Brockhurst and John H. Cox, partners trading as Brockhurst & Cox, obtained in the Second District Court of Jersey City on the 21st day of February, 1906, for $264.04, and costs.

THE VICE-CHANCELLOR: Has that been assigned to you?

MR. LANE: No, sir; there has been no assignment at all.

THE VICE-CHANCELLOR: How is it relevant?

MR. LANE: Because all the creditors are parties to these proceedings, under the consented-to order of the Court.

THE VICE-CHANCELLOR: What if they are?

MR. LANE: It shows that there are in existence judgment creditors. That is all I am trying to show now—that these claims which are set out in my report have been reduced to judgment.

THE VICE-CHANCELLOR: But in a contest between you, the holder of this partnership's property, and a claimant, how does it lie in your mouth to set up a right of Mr. Depew unless it has been assigned to you?

MR. HASTINGS: If your Honor please, I represent Depew & Co., and we filed a claim originally simply on a general book account, and there arose some doubt as to whether a general creditor could take advantage of the contest of Elizabeth A. Brockhurst under a chattel mortgage, under the decisions in this State. There are some authorities to the effect that it might be done by the appointment of a receiver, but that not being a statutory appointment, we were not positive of it, and for that reason we secured a judgment, so that, with the standing of a creditor having a judgment, we could raise the questions through the receiver, or before the receiver, or before the court.

THE VICE-CHANCELLOR: I agree with everything you say, excepting that I do not see how you have the matter before the Court.

MR. HASTINGS: We filed it as a supplemental proof of the claim of Edward D. Depew & Co. with the receiver, who seems to be the proper party. Now he is offering it to the Court as a record filed with him.

THE VICE-CHANCELLOR: Is there any objection?

MR. ENGELKE: Yes, sir. Depew & Co. have proven their claim before the Receiver, and now attempt to come in and prove a judgment different from their claim proven before the Receiver. They cannot come in at this time and claim a right under a judgment, when their proof was under a mere claim on a book account. They are precluded from putting that in at this time. They would, we con-

tend, be in an entirely different position if they had a judgment prior to the appointment of the Receiver in this cause. But here is a judgment obtained almost a year subsequent to the appointment of the Receiver. Therefore, they have no rights in this case. The action suggested by Mr. Hastings is plain, that they wish, because of being a judgment creditor, to attack this chattel mortgage; but it seems that the decisions are clear in this state that they are too late. The lien of the chattel mortgage must be prior to the lien of any judgment obtained much later.

THE VICE-CHANCELLOR: That is not the law, is it?

MR. ENGELKE: I believe it is.

THE VICE-CHANCELLOR: I think the law is that if the debt for which the judgment stands was contracted prior to the recording of the chattel mortgage, it is immaterial when the judgment was recovered, provided it was recovered before the chattel mortgage was completely executed and property obtained under it. That is my understanding of it.

MR. ENGELKE: Recorded?

THE VICE-CHANCELLOR: No, not recorded; I understand that if the debt was contracted before the chattel mortgage was recorded, judgment may be obtained upon that debt subsequent to the recording of the mortgage and the mortgage may then be subject to attack.

MR. ENGELKE: Well, it was on that ground that we object.

THE VICE-CHANCELLOR: I shall let it in, although I do not now see how it is relevant—not on the grounds counsel has suggested, but because this does not seem to me to be a contest between Depew & Co. and this chattel mortgagee, this seems to be a contest between the chattel mortgagee and the Receiver, representing the estate. If this had been assigned to the Receiver, then I can see how

the Receiver could assert rights under it; but I do not see how the Receiver can assert the rights of Depew under this judgment.

MR. LANE: If your Honor please, Depew & Co. and the Evening Journal Association—both of whom are in the same class—have been made parties to this proceeding under that order of the Court.

THE VICE-CHANCELLOR: I know, but is it your idea that I could hold that, as between the chattel mortgagee and you, as Receiver, the chattel mortgagee had no lien preference because she held her chattel mortgage off of record for fifteen days, and there were judgment creditors who had a right to assert themselves in this proceeding; and then subsequently order you to distribute *pro rata?*

MR. LANE: Yes, sir; because of the fact that all of the parties are here before the Court.

THE VICE-CHANCELLOR: Well, if I hold that, why must I not hold that the judgment creditor is entitled to preference?

MR. LANE: I have not considered that. I don't know whether he is, or whether he is not. I do not know whether a judgment obtained after a decree of dissolution will give the judgment creditor a prior lien upon the assets of the estate.

THE VICE-CHANCELLOR: Well, I will admit the exhibit now and rule on its relevancy afterwards—at least, I will now admit it.

MR. LANE: For the purpose of getting the record straight I also want it to appear that that offer comes from Mr. Hastings also, as representing Mr. Depew.

MR. HASTINGS: I do offer it, on the part of the creditor Edward D. Depew & Co., as testimony on this contest of Elizabeth Brockhurst.

(The offer on the part of Mr. Hastings is also objected to by Mr. Engelke for the same reasons as stated to the offer when made by Mr. Lane, and the offer is admitted for the reasons already given).

(Transcript of judgment is marked Exhibit B of March 12, 1906).

MR. LANE: I make the same offer as to a transcript of judgment of the Evening Journal Association, in the case of The Evening Journal Association vs. Harry B. Brockhurst and John H. Cox, partners trading as Brockhurst and Cox, obtained in the Second District Court of Jersey City on the 23d day of February, 1906, for $107.17.

(Offer objected to by Mr. Engelke on the grounds heretofore urged to the previous offer, and the offer is admitted for the reasons heretofore given).

MR. PYLE: I wish to offer that transcript of judgment on the part of The Evening Journal Association.

(The offer on the part of Mr. Pyle for The Evening Journal Association is objected to by Mr. Engelke for the reasons heretofore given, and the offer is admitted for the reasons heretofore given).

(The transcript of judgment is marked Exhibit C of March 12, 1906).

MR. LANE: I now offer in evidence a book heretofore marked "B, 1." Now, unless counsel will stipulate to consider the testimony taken before me as a Master hearing the account between the complainant and defendant in reference to this book, testimony which bore directly upon this book and upon the claim of Elizabeth A. Brockhurst, as before your Honor, it will necessitate the taking of further testimony in this case; I will have to have Mr. Brockhurst sworn.

MR. HASTINGS: I consent to it.

MR. ENGELKE: We have refused to make the stipulation.

THE VICE-CHANCELLOR: You will, therefore, Mr. Lane, have to offer any testimony you desire with respect to it.

At this point the further hearing of the matter was adjourned until Thursday, March 15th, at ten o'clock, A. M.

JERSEY CITY, N. J., March 15th, 1906.

Hearing of the cause resumed in the presence of the counsel of the respective parties.

THE VICE-CHANCELLOR: Mr. Lane, was the testimony that you spoke of concerning this book taken before you as a Master hearing the claim of Elizabeth Brockhurst?

MR. LANE: No, sir.

THE VICE-CHANCELLOR: It was in the main case, and not with respect to the claim?

MR. LANE: Yes, sir.

THE VICE-CHANCELLOR: The order of February 28th consents that the testimony taken before the Receiver, as a Master, with respect to the claim shall be before this court as if taken by this court upon this hearing; but since it is stated that the evidence with respect to this book was not given before the Receiver as Master hearing the claims, there is, of course, nothing before the Court concerning it. Mr. Lane, point out to these gentlemen what it is that you want to have admitted, and see if they will admit it, and, if so, let it go right in here as if sworn to before me on this hearing.

MR. LANE: All that I desire to have admitted on this record is about one page and a half of the testimony given by Mr. Brockhurst, in the hearing before me on the account between the defendant and complainant, beginning on page 28 with the question, "Mr. Brockhurst, I notice on the first page a debit against you marked loan $800. What does that refer to?" and ending on page 30, with the answer immediately preceding the question "I notice."

It is stipulated and agreed that the following testimony given by Harry B. Brockhurst before the Master who is taking the accounts of the parties in this suit is testimony and evidence in the matter now before the Court, and that the Exhibit B, 1, referred to in said testimony shall be an exhibit in this matter now before the Court:

BY MR. HASTINGS:

Q. Mr. Brockhurst, I notice on the first page a debit against you marked loan $800. What does that refer to?

NOTE: Book referred to is marked B1.

A. That refers to the $800 that my mother loaned to the firm in December. I put it down in the month of January because the December memorandum I kept I either filed away or lost it. I couldn't find it.

Q. Following that on January 9th, is a loan $1200. What does that refer to?

A. That is another loan made by my mother to me.

Q. Not to the partnership?

A. No.

Q. Why is it among the partnership accounts?

A. Because I didn't consider that a partnership book. That was my individual book that I kept for other loans that I made to different people. It was the only memorandum book I had in January.

Q. What memorandums are there in this book commencing on January 2d and ending on April 29th, that refer to anything except partnership matters?

A. Well, there is a loan made by me to a constable that I know of $25. Another loan of 80 cents and a loan made to me of $1200. Another one on January 7th or 9th of $2. Another loan to a fellow I know of 85 cents. Another loan to the same constable of an amount that I didn't put down.

Q. Those entries were made at the same time that these were?

A. The first one looks as if it might have been made at another time and the loan on January 9th looks different again; well, I won't say one way or the other.

Q. Of the items on the lower part of the page, the only one referring to the partnership is the $800?

A. That was a memorandum I kept, but I didn't enter it as a partnership matter in a partnership book. I made it in an individual book; it was my individual property. I kept it individually.

Q. You entered that memorandum of $800 there for some purpose?

A. To keep tract (sic) of it.

Q. To keep tract (sic) of it for what? What do you mean?

A. That money was to be paid back as soon as we could pay it, and my purpose for entering it there was to keep tract (sic) of it, so that the first time we could pay it back we would do so.

Q. How about that $1200? Does the same explanation apply?

A. No, that was for a different purpose. I was going to hold the money as long as it was necessary. All those entries were made for the purpose of keeping them before me.

Q. Why didn't you enter that $800 loan among the partnership accounts?

A. Well, I didn't keep any partnership accounts.

Q. Well, in the partnership account as carried by you?

A. I carried no partnership book. Only my individual book. My own memorandum. That was the only book I carried in December.

Q. Well, why did you not, Mr. Brockhurst, if the loan of $800 was a partnership matter and the loan of $1200 was your own personal matter, enter them in different places in this book?

A. Because the loan of $800 was received in December, and the loan of $1200 was received in January. I made that entry probably in December, at the time I lost the other book.

Q. Why are the items that do not effect (sic) the partnership entered in the part of the book which contains partnership matters?

A. Because that is the only cash account part in that book. I entered them in the cash account part. I didn't enter them in the middle because I didn't know how long the partnership was going to last. There were deceptions practiced upon me for the purpose of making me believe that things were going rightly.

It is stipulated between counsel that, beginning with the first page of this book on which there is pencil memoranda, all of the items therein excepting the seven items at the bottom of the first page indicate sums of money received by Harry B. Brockhurst from the business of Brockhurst & Cox. (Referring to the book Exhibit B, 1).

MR. LANE: There was put in evidence before me, sitting in the hearing of the claim of Elizabeth A. Brockhurst, by the other side, I believe, and which does not appear in the testimony as having been marked by me, the private bank book of Mr. Harry B. Brockhurst. I move now that that be marked as an exhibit in the cause.

THE VICE-CHANCELLOR: Is there any objection?

MR. BROCKHURST: Well, I think the page should be specified, because the book is pretty nearly filled up, and there are matters in there that I do not think the other side claims relate to the partnership in any way.

THE VICE-CHANCELLOR: I cannot do that without the book.

MR. BROCKHURST: Well, if we haven't the book it cannot be offered in evidence.

THE VICE-CHANCELLOR: They tell me that the book is in my custody.

MR. LANE: It is in evidence.

MR. BROCKHURST: Well, I can specify the date, if you want the date specified, of that item.

MR. LANE: The book was given to your Honor as part of the exhibits in this cause.

THE VICE-CHANCELLOR: Who gave it to me? Did you give it to me?

MR. LANE: I gave it to you. It was part of the entire testimony that went up to you on the original claim; but by inadvertence it was not marked in the testimony, although the book itself bears a mark, but it does not appear in the testimony as having been marked in evidence.

THE VICE-CHANCELLOR: Your motion now is that that book which was offered in evidence, or actually marked in evidence, shall be shown on the minutes as having been marked in evidence?

MR. LANE: Yes.

MR. BROCKHURST: I asked that that be changed to say that "the item purporting to have been entered on December 8th or 9th, 1904, be marked."

THE VICE-CHANCELLOR: Is this a book which it is shown the

MR. LANE: Yes, sir.

THE VICE-CHANCELLOR: How have you got a right, Mr. Brockhurst, to specify any particular date, then? If a trustee takes trust money and puts it in his own private account, why does it not subject the whole private account to inquiry?

MR. BROCKHURST: The question here is not on the account in any way; it is a question whether this loan of $800 was a *bona fide* loan, or not. They are questioning the *bona fides* of this mortgage, and there is no question at all in regard to the moneys I received for the firm, excepting this $800. That is

the only question involved in this matter before your Honor at this time, as I understand it.

THE COURT: Is there not some question of repayment to Elizabeth Brockhurst?

MR. BROCKHURST: No, the other side denies all knowledge of it. They do not claim that it has ever been repaid.

THE VICE-CHANCELLOR: Well, then, it is distinctly changed from what it was when it was before me before, because then they distinctly claimed it was repaid. I will rule against you, Mr. Brockhurst. I will consider that book in evidence for any purpose for which it is evidential.

MR. LANE: I want to call on Mr. Engelke, representing Mrs. Elizabeth A. Brockhurst, for the production of her bank book and her return checks and her check stubs, which show, or tend to show, the payment of this $800 to the partnership of Brockhurst & Cox, or to Harry Brockhurst individually; or any other papers which she may have in her possession which would show any such payment.

THE VICE-CHANCELLOR: Is this call under a notice?

MR. LANE: Yes, sir.

THE VICE-CHANCELLOR: Where is the notice?

(Mr. Lane produces and hands to the Court a paper).

THE VICE-CHANCELLOR: Was it served?

MR. LANE: Yes, sir.

THE VICE-CHANCELLOR: What is the response to the notice?

MR. ENGELKE: Your Honor, we say that that notice makes no such requirement. It is news to me. If your Honor will peruse the notice I think you will find it so.

THE VICE-CHANCELLOR. The notice referred to has been marked "Filed March 15, 1906," and will now be read by the Court: "You are required to produce upon the hearing of the claim of

Elizabeth A. Brockhurst the following books and papers, to wit: All books or memorandum of accounts, and all bank books, check books, stubs, return checks, or other paper writings or memorandum under your control or in your custody which show moneys paid by you to the partnership of Brockhurst & Cox, or to anyone for their use, or to Harry Brockhurst individually; and also which show any moneys paid by the partnership of Brockhurst & Cox to you or by anyone for their use, or by Harry B. Brockhurst individually.

Take further notice, That I require the presence of Mrs. Elizabeth Brockhurst in court for further cross-examination, and if not present, I shall move to strike out her testimony." Now, what is your response to the first part of the notice, considering what I read last as a sort of postscript to be read separately?

MR. ENGELKE: In the first place, it is not directed to me as her counsel or her solicitor; and, in the second place, it is indefinite in that it does not tell me whose books or memoranda and the rest of the items stated in that notice are required.

THE VICE-CHANCELLOR: I notice that it is not directed to anybody. How do you vindicate your right, Mr. Lane, to make this call, when you have not directed this notice to anybody?

MR. LANE: It is acknowledged by him as solicitor for Elizabeth A. Brockhurst.

THE VICE-CHANCELLOR: No, "Solicitor of Complainant" it is acknowledged.

MR. LANE: Then, your Honor, I am at the mercy of my antagonist to a certain extent. The understanding, when it was served, was that it was served upon him (Mr. Engelke) as solicitor for Elizabeth A. Brockhurst, and I never looked at the acknowledgment; and I presumed it was acknowledged by him as solicitor for Elizabeth A. Brockhurst. The complainant is not a party to this suit at all.

THE VICE-CHANCELLOR: The Court cannot

help that. The Court must take the paper as it appears before it. It does not appear that you have made any demand on the solicitor of Elizabeth A. Brockhurst to produce these various things.

MR. LANE: Well, I ask whether or not counsel have any of those books in court at the present time?

MR. ENGELKE: I will reply to the Court in that regard that the testimony of Mrs. Elizabeth A. Brockhurst clears that up, which testimony is before your Honor. I believe she stated, if I recall it correctly, that she had no papers of this sort, that they were mislaid or destroyed—checks and such memoranda.

THE VICE-CHANCELLOR: Then your answer is that you have none?

MR. ENGELKE: Well, practically that; but, as I say, I do not wish to speak to this notice.

MR. LANE: Well, I ask whether or not counsel have any of those books in Court at the present time?

MR. ENGELKE: We have not.

MR. LANE: I ask, for the purpose of the record, whether Mrs. Elizabeth A. Brockhurst, the claimant, is in Court and will submit to further cross-examination?

MR. ENGELKE: It is quite evident that she is not. That is my answer to it.

MR. LANE: Now, I have served a subpoena *duces tecum* on Mr. Harry Brockhurst, directing him to produce the same papers which, in that notice, I have directed her to produce.

THE VICE-CHANCELLOR: Have you that subpoena here?

MR. LANE: Yes, sir.

THE VICE-CHANCELLOR: What do you want to do—swear him and find out what he has produced?

MR. LANE: Yes, sir.

HARRY B. BROCKHURST, sworn.

BY MR. LANE:

Q. You were served with a copy of that subpœna, were you not, yesterday afternoon? (Showing the witness a paper which is marked G. W. B., 1 for identification.)

A. I was.

THE VICE-CHANCELLOR: Is this the original subpœna?

MR. LANE: This is the original.

THE VICE-CHANCELLOR: Well, that may be offered in evidence, and may now be marked with the proper exhibit number.

(The subpœna produced by examining counsel was thereupon offered in evidence and marked Exhibit R, 2.)

Q. I ask you, Mr. Brockhurst, whether or not you have produced all bank books, check books, stubs, return checks, or other paper writings or memorandum in your custody kept for the partnership of Brockhurst & Cox, or in your individual name, showing receipts and disbursements of money, and especially such as refer to receipt of moneys from, or payment of moneys to Elizabeth A. Brockhurst from or to the partnership, or you individually?

A. I have here with me and ready to produce all of the items mentioned in that subpœna that it was possible for me to find. I do not attempt to say that I have them all, but the subpœna was served upon me last night about five o'clock. I was at the office last evening until about half past ten, searching through all my papers, and I have a large number of checks and stubs, and so forth, and I believe I have them all; to the best of my knowledge and belief I have.

Q. Will you produce them?

(Witness produces a large package of papers.)

Q. Have you, among those papers that you have produced, any check from Elizabeth A. Brockhurst to you, or to the firm of Brockhurst & Cox?

A. I have not.

Q. Have you any checks from you to Mrs. Elizabeth A. Brockhurst———

A. I have.

Q. Wait until I make it more definite—between December, 1904, and May, 1905?

A. I have. If I haven't got the check I can show you the stub. I suppose you want them from the 1st of December, 1904?

Q. December 8th.

A. (Referring to check in check stub book now produced.) Here is one check, No. 726, dated March 11, 1905, to the order of Elizabeth A. Brockhurst, for $166. That check was given for rent, amounting to $125—the check doesn't show that; I will state just what it does show—it shows that the check was given for rent and for clothes. I will say the rent is for the premises, 209 Newark avenue, and amounts to $125, and the clothes is a clothes bill of mine. That is all that book shows. That book ends April 6, 1905. (Referring to another check stub book.) Here is a check, No. 771, dated April 12, 1905, drawn to the order of Elizabeth A. Brockhurst, for $75, and it is marked underneath "Balance due." That refers to the rent I collected in April, 1905, and which I received on April 5th from Mr. Hirschenstein, amounting to $125, for the same premises. For some reason or other I had a deduction of $50 to take out; I don't recall what that was for, but it was something that was paid by me, some bill of hers which was paid by me before I turned the rent check over to her. Now, that is all that this book shows. There are no more checks after that at all.

Q. Have you any other check book which shows any other payments made during that period?

A. Well, I cannot say. (After examining a num-

ber of other small check books now before the witness.) I might say there are no checks in any of these books here which show any payment of that $800, if you wish to take a statement like that from me.

Q. That is not what I am after, Mr. Brockhurst.

A. (Referring to another check book.) Here is a check, dated February 20, 1905, No. 593, "Pay to the order of E. A. Brockhurst, twenty-five dollars." Then underneath it shows that the check was given for part of rent of February. That is all in that book.

BY THE VICE-CHANCELLOR:

Q. Are those checks all on the same bank?

A. No, sir; there are two or three different check books here, but there is no account, in any other bank, of mine, at any time between December, 1904, and May, 1905.

BY MR. LANE:

Q. Did you not, Mr. Brockhurst, between December, 1904, and May, 1905, pay your mother some amount, approximately a thousand dollars?

A. In a personal transaction between herself and myself I did. It had no relation whatsoever to the partnership.

Q. By check?

A. By check.

Q. Where is the check?

A. No, I beg your pardon—I did not draw the check to her order; I drew the check to the bank's order, and placed it on deposit in the bank.

Q. Is that check here?

A. That check is here.

Q. Can you produce it?

A. I can. There is the check (producing check book and referring to a check attached to a stub therein): Check No. 734, drawn on the Third National Bank, signed Harry B. Brockhurst, dated March 15, to the order of the Commerical Trust Company, "Repayment of loan of money, $1210.83."

Q. How did that get into the account of Mrs. Elizabeth A. Brockhurst, Mr. Brockhurst?

A. By the endorsement on the back it appears it was deposited in the Commercial Trust Company, and by the Third National Bank paid to the Commercial Trust Company, and by them placed to her credit.

Q. Placed to her credit in the Third National Bank?

A. Let me see how it was, please (after examining the check and reading the endorsement thereon): "Pay to the order of the Third National Bank, Jersey City, March 15. Commercial Trust Company." Yes, evidently it was.

Q. It went to her account in the Third National Bank?

A. Evidently it did.

Q. Did she have a separate account in the Third National Bank?

A. I believe she did. She has sworn that she did.

THE VICE-CHANCELLOR: Is there anything on the back of the check that has not been read in evidence?

MR. LANE: No, sir.

THE VICE-CHANCELLOR: Everything that is on the back of that check has been read on this record?

MR. LANE: Yes, sir. I offer that check in evidence.

THE VICE-CHANCELLOR: Is there any objection?

MR. ENGELKE: No.

(The check is admitted in evidence and is marked Exhibit R, 3.)

MR. LANE: I offer the stub in evidence.

THE VICE-CHANCELLOR: Is there any objection?

MR. ENGELKE: None.

(The stub, to which the check is attached,

is admitted in evidence and is marked Exhibit R, 4.)

Q. As a matter of fact, did not this check go to the credit of your own account in the Third National Bank—that is, the account which you have designated as the account of H. B. Brockhurst?

A. By no means. It was drawn from that account, and I had believed it went to the account in the Commercial Trust Company, but the endorsement seems to indicate to me that it went to the account in the Third National Bank belonging to my mother. But that is not my recollection. It cannot be a mistake on the endorsement. I must be mistaken.

Q. Do you know of your own knowledge whether your mother has any account in the Third National Bank, separate and distinct from your own account?

A. She has—for the last ten years.

Q. Can you explain how this check got into the account of your mother without your mother's endorsement?

A. Why, yes; it was not drawn to my mother; it was not neecssary to be endorsed by her. It was drawn to the Commercial Trust Company.

Q. Did any other money reach your mother through you, between December, 1904, and May, 1905, except such as you have already testified to?

A. I will answer that, if I possibly can. I believe I have a recollection that at times when I was at home and she was short I would give her whatever moneys she needed, only small sums like a dollar, maybe five dollars, things like that; but there was no considerable amount paid that I know of.

Q. There was no amount paid by means of a check drawn to some bank, as in this last case you have testified about?

A. Not that I know of; not that I drew; not that I had any interest in in any way.

Q. Mr. Brockhurst, since May, 1905, have there been any payments made by you to your mother of any considerable amount?

A. Yes.

Q. Have you the checks here?

MR. ENGELKE: I object, on the ground that they are not material, in the first place; and, in the second place, they have not been asked to be produced.

THE VICE-CHANCELLOR: How is it relevant to inquire about payments by this gentleman to his mother after the date in May that you have been asking about, Mr. Lane?

MR. LANE: Because I think it is already in evidence that this account of Harry B. Brockhurst was kept by him both as an individual account and as a partnership account, and that account extends down to the present time and is still in existence, and he may have made payments since May. If he had paid his mother, since May, an amount in payment of this loan of $800, it would entirely defeat her claim, just as if he had made it before that time. So I think it is entirely proper.

THE VICE-CHANCELLOR: What have you to say to that, Mr. Engelke? Suppose it should appear that, as a matter of fact, Mr. Brockhurst, the next day after the date that Mr. Lane has heretofore been inquiring about, paid his mother $800 on this specific account of Elizabeth A. Brockhurst, would not that defeat this claim of Mrs. Brockhurst's?

MR. ENGELKE: I presume it would.

THE VICE-CHANCELLOR: Then I think the evidence may be relevant. I cannot say that it is not at this time. I will admit it.

A. I have no checks here, I believe, paid by me since the close of the partnership. I will say further that the only checks given by me to my mother during that time were checks in payment of the rent which was collected from Hirshenstein

every month. Each month I gave her a check for whatever balance was due.

MR. LANE: I move to strike out that answer as not responsive.

THE VICE-CHANCELLOR: "I have no checks here, I believe, paid by me since the close of the partnership," is the answer. Strike everything else out. The answer is that he has no checks here.

Q. Why not?

A. Because no checks were given to her by me except for the rent collected by me from Hirshenstein, and a check for that amount, or the balance that was due from that amount to her, was given each month.

Q. You were subpœnæd to produce those checks, were you not?

A. I did not understand it so. I understand that I was subpœnæd specially to produce checks relating to the partnership.

BY THE VICE-CHANCELLOR:

Q. Is that $10.83, that was added to the $1200 item, interest?

A. Yes, sir.

Q. At what rate?

A. At five per cent.

Q. And for what length of time?

A. For the time elapsing between the time the money was taken and the time that it was repaid.

Q. Between the 9th of January, and the 15th of March, 1905?

A. Probably those are the dates. I think those are the correct dates.

Q. And that money, you say, you borrowed from your mother?

A. I did.

Q. Now, when your mother loaned you that, did it come in the shape of a check from your mother?

A. That money came to me from the bank direct, in cash.

Q. What bank?

A. The Commercial Trust Company. That is not the loan referred to in this mortgage.

THE VICE-CHANCELLOR: Strike that last out.

Q. I did not ask you that, sir. That money, you say, came to you in cash from the Commercial Trust Company?

A. That is right.

Q. Did your mother have an account at the Commercial Trust Company?

A. Her money was in the Commercial Trust Company in this manner: She had sold property on the Hill on the 2d of May, and received the consideration for it, and it was placed in the Commercial Trust Company in my name as trustee for either her or for my aunt, I do not recollect which.

Q. Well, then, how did you get some of that money out—did you draw a check on it? It was in your name as trustee.

A. I got it out in this manner: My mother gave me the bank books, which were in her possession, and I went to the bank and asked them for a loan on the bank books, telling them I would return the money very shortly. I then signed, I believe, a note agreeing to pay them five per cent. interest, and, I believe, also a check drawing the money out, and depositing the bank books as security for the loan.

Q. The bank books of the Commercial Trust Company?

A. Of the Commercial Trust Company.

Q. Then that $1200 which you obtained in that way you took and put in your account in the Third National?

A. In the Third National.

Q. And on the 15th of March you drew a check on your account in the Third National to the credit of the Commercial Trust Company and took up whatever you had given them at the time you got the $1200 from them—is that correct?

A. I did. That is correct.

Q. Well, then, what evidence is there, so far as this check is concerned, that it ever went to Elizabeth Brockhurst's account anywhere?

A. Well, practically it didn't; it went to pay off the loan she secured by loaning me the books.

Q. Well, you say it appears on the back of this check to be endorsed by the Commercial Trust Company, to whom it was payable, to the Third National Bank, and there is nothing, so far as I can see, which shows what became of the money after it was collected by the Third National Bank from your account—is not that so?

A. Nothing on the check to show that. My recollection———

Q. I did not ask you for your recollection; I asked whether you could find anything anywhere about that check which conveys any information to anybody as to what became of the money after the Third National Bank collected it out of your account?

A. There is nothing about the endorsement on that check to explain where the money went, except probably it was paid by the Commercial Trust Company to the Third National Bank to offset some checks which the Third National Bank had drawn on the Commercial Trust Company. I do not understand the banking conditions, but that possibly might be the explanation.

Q. It would not show it by the check in the least. What I asked you was this: You had testified that that check went in a certain way, and I am asking you whether there is anything about that check which shows that that check went in the way you said it did—in other words, can you point out to this Court anything about that check which would convey information that it went to the account of any particular person after the Third National Bank had collected the money out of your account?

A. Nothing, excepting on the face of the check it says "Pay to the order of the Commercial Trust

Company," and that is the only thing that shows me who collected the money.

Q. They did not collect the money, the Third National Bank collected the money.

A. That is the only thing, then, that shows me who received the money after it was collected; because it was payable to their order.

Q. And they evidently did not collect it because they endorsed it to somebody else. If you collect a check you cannot endorse it after you collect it. So that shows that the Commercial Trust Company did not collect it—that shows that the Commercial Trust Company paid it over to somebody else to collect, namely, the Third National Bank, and they collected it out of your account; and there is nothing to show, so far as I see from inspection, what became of the money which the Third National Bank collected on that check out of your account.

A. There is nothing that I can explain. I do not understand the endorsement.

MR. LANE. I desire to place this notice that it is alleged is not directed to anybody and that was acknowledged by Mr. Engelke as solicitor for the complainant, upon the record, because my insistment is that, by the terms of that notice, it is clearly apparent to whom it is directed, and what it is that the Receiver desires; and its acknowledgment by the solicitor for Mrs. Brockhurst, even although he signed as solicitor for the complainant, constitutes an acknowledgment for her, when it appears that there was no matter before the Court at all in which the complainant was interested. I insist that the notice is effective.

THE VICE-CHANCELLOR: I shall rule against you on that. Whatever the Court may believe with respect to the intention of counsel for the Receiver and the knowledge and information of counsel for Mrs. Brockhurst, since it was not directed to Mrs. Brockhurst, and was not acknowledged by him as

solicitor for Mrs. Brockhurst, I do not see how I could base any effective action against her upon that notice. Whatever effect it may have upon my mind with respect to their tactics regarding it, I should feel disinclined to base any ruling against her on a notice containing the defects this notice contains. I will see that the Receiver does not lose anything by it, because if necessary, I will adjourn the hearing until a time when he can serve an effective notice. But I shall not make the mistake of ruling (as I believe that it would be a mistake to rule) that any effective order can be based upon this defective notice.

MR. LANE: Well, I have finished, except that I desire an opportunity to serve an effective notice.

THE VICE-CHANCELLOR: I am inclined to grant that. I will say that unless counsel for Mrs. Brockhurst, who received this notice and acknowledged it as solicitor for the complainant, will now respond to the notice as if it had been directed to Mrs. Brockhurst, and had been served upon him or acknowledged by him as her solicitor, I will grant an adjournment for the purpose of permitting the Receiver to serve an effective notice, or a subpœna *duces tecum,* or take whatever method he may be advised is the proper one to obtain the checks and memoranda that are relevant in this matter from Mrs. Brockhurst.

MR. ENGELKE: I would like to be heard on that, your Honor. The testimony taken before Mr. Lane on this hearing is very voluminous, and I cannot conceive of any reason for any further cross-examination of Mrs. Brockhurst, for that reason.

THE VICE-CHANCELLOR: That question I have not reached, sir. I am not talking about whether she shall be present for cross-examination. That is entirely another matter. I am talking about the demand on her for certain books and papers.

MR. ENGELKE: If your Honor will grant me

just a moment I think I can find her testimony here where she says she hasn't them.

MR. LANE: If counsel wishes to make that response, that is all I want.

THE VICE-CHANCELLOR: Well, Mr. Lane, if you stand upon your technical right, I shall grant the motion.

MR. ENGELKE: In reply to the notice, without the postscript, I will say that we have not the books therein demanded, as Mrs. Brockhurst has testified as I recall it.

THE VICE-CHANCELLOR: The stenographer will note that counsel for Mrs. Brockhurst now stipulates that this notice, which was not directed to her, was as a fact received by him as her solicitor; and now responds that she has not in her possession or under her control the books, papers and memoranda therein called for.

MR. LANE: In reference to the postscript, I simply want to show that counsel received that part of the notice as solicitor for Mrs. Brockhurst. I shall not move to strike out the testimony. I do not intend to. I will withdraw that part of the notice, the postscript to the notice.

THE VICE-CHANCELLOR: All right. He has answered in regard to the other part of it, that she has not got the papers. Now, is there anything to be offered on the part of the creditors opposed to Mrs. Brockhurst's claim?

MR. HASTINGS: The other day I offered, as solicitor for Edward D. Depew, the transcript of the judgment recovered against the partnership. I think I did not state that we took the position of claiming to be preferred creditors———

THE VICE-CHANCELLOR: I want to know what evidence you are going to put in in this matter? If your evidence is in, then your argument will come afterwards.

MR. HASTINGS: It is in.

THE VICE-CHANCELLOR: Is there any further testimony on behalf of those who are opposed to the claim of Mrs. Brockhurst?

MR. LANE: Not on the part of the Receiver.

THE VICE-CHANCELLOR: Mr. Engelke, have you any further testimony that you desire to introduce?

MR. ENGELKE: None for the claimant.

TESTIMONY CLOSED.

CONCLUSIONS OF VICE-CHANCELLOR GARRISON.

Proceedings with respect to the claim of Elizabeth A. Brockhurst.

(Decided July 12, 1906.)

The bill in this cause was filed on the fifth day of May, 1905, and is the ordinary bill for the dissolution of a partnership and an accounting, together with a prayer for a Receiver.

A temporary Receiver was appointed, and subsequently in December, 1905, a decree of dissolution of the partnership was made, a permanent Receiver and Manager was appointed, and it was decreed that an accounting should be taken and stated between the parties, "that the creditors of the said firm should be ascertained and the amounts due to each of them."

Among the claims filed with the Receiver was one by Elizabeth A. Brockhurst for the sum of Eight Hundred Dollars, with interest, from the eighth day of December, 1904. This claim was secured by a chattel mortgage to her dated May 2, 1905.

Some testimony was taken before the Receiver sitting as a Master, but the case actually was heard before the Court as if upon a petition by her as chattel mortgagee to be paid the amount of her chattel mortgage out of the funds in the hands of the Receiver.

The funds in the hands of the Receiver are

slightly in excess of the amount of this mortgage and interest, and are mainly composed of the monies received upon a sale of the assets of the firm held on the nineteenth day of May, 1905. The assets are insufficient to pay the debts.

ADOLF L. ENGELKE, for Elizabeth A. Brockhurst.

J. MERRITT LANE, Receiver, *pro se.*

F. W. HASTINGS, for E. D. Depew & Co., a judgment creditor.

J. E. PYLE, for Evening Journal Association, a judgment creditor.

GARRISON, V. C. (after stating facts):

Harry B. Brockhurst and John H. Cox entered into a partnership about the fourth of December, 1904, for the purpose of selling dairy products. On the eighth day of December, 1904, Harry B. Brockhurst purchased a quantity of butter, and alleges that for the purpose of paying for this butter he borrowed from his mother, Elizabeth A. Brockhurst, the sum of $800. He alleges that this butter was sold, and the proceeds therefrom kept by the firm of Brockhurst & Cox.

On the third day of May, 1905, Harry B. Brockhurst executed and acknowledged, on behalf of the firm of Brockhurst & Cox, a chattel mortgage, upon practically all of its assets, to Elizabeth A. Brockhurst, to secure the payment of $800 borrowed on the eighth day of December, 1904. On the same day Elizabeth A. Brockhurst makes affidavit to the consideration of this mortgage.

On the fifth day of May, 1905, Harry B. Brockhurst filed his bill in this suit, and a Receiver was appointed who entered into possession of the property. On the eighteenth day of May, 1905, the mortgage in question was duly recorded in the proper office of Hudson County, New Jersey.

On the twenty-first day of February, 1906, Edward D. Depew & Co. obtained a judgment against the partnership aforesaid for $264.04. On the

twenty-third day of February, 1906, the Evening Journal Association obtained a judgment against the partnership for $107.17.

The assets of the firm were sold by the temporary Receiver appointed in this suit on the nineteenth day of May, 1905.

While the proofs concerning the loan by Mrs. Brockhurst to the firm of Brockhurst & Cox lack clearness and create suspicions, I cannot say, after mature deliberation, that there is not sufficient proof to sustain her claim that she loaned $800 to the firm for which the chattel mortgage in question was subsequently given.

The Receiver denies her right under this chattel mortgage because he contends that the same is void as to the creditors of the mortgagors, and that he, as such Receiver, represents those creditors to such an extent as to enable him to set up their rights as against this mortgagee.

The provisions of the Chattel Mortgage Act (P. L. 1902, p. 487, secs. 4 and 5), have been construed by the Courts to require an immediate possession by the mortgagee, or an immediate recording of the mortgage, in default of which the same is absolutely void as against the creditors of the mortgagors. "Immediate possession" or "immediate recording" is held to mean "as soon as may be by reasonable dispatch under the circumstances of the case." Roe vs. Meding, 53 N. J. Eq., 350 (Court of Errors, 1895). Five days have been held to be too long a delay under the circumstances. Hardcastle vs. Stiles, 69 N. J. Law, 551 (Sup. Ct., 1903; aff'd 70 N. J. Law, 829).

The mortgage in the case at bar was dated May 2, 1905, and was actually delivered to the mortgagee on the third of May, 1905, upon which day she made an affidavit which is endorsed on the mortgage itself. The mortgagee at that time was at Red Bank, Monmouth County, New Jersey, and her sons were each in business in and about Jersey City

and were in constant communication with her. She could, either by messenger or mail, have easily and readily gotten this mortgage to the Register's office in Jersey City on the fourth or fifth of May at the outside. The mortgage was not filed for record until the eighteenth of May, 1905. No attempt at any explanation or reason for this delay is made, and I therefore find that this mortgage was not recorded as required by the statute so as to protect it as against subsisting creditors of the mortgagors.

Under the statute the effect of not immediately recording the mortgage is to make the same absolutely void as to the creditors of the mortgagor. There has been considerable discussion as to the meaning of these words, and various reasons have been suggested for the interpretations placed thereon.

By reason of the ninth section of the Act, as construed in Roe vs. Meding, *supra,* those who become creditors after the recording are deprived of the right of attacking the mortgage. But with respect to the fourth section it has been suggested, and is argued in this case at bar, that the statute only applies to those creditors who became such after the time of giving the mortgage and before possession is taken or record of the mortgage is made. The argument is that such creditors are the only ones who are injured by the failure to take possession or to record the mortgage.

Laying aside, for the moment, the obvious answer that the Legislature did not, by any language used by it, specify any restricted class but used general language inclusive of all creditors, I cannot agree with the reasoning which results in such interpretation. It is, of coure, true that by leaving the mortgagor as the apparent owner of unencumbered chattels injury is done to those who trust him upon such apparent ownership. It is, nevertheless, true that injury accrues to creditors whose debts are in existence prior to the giving of the mortgage. Such

creditors may delay taking either legal or other means at their command to collect their debts so long as no one apparently has any preference to them and all of the creditors of the common debtor are on the same plane.

By permitting secret preferences to be given by chattel mortgages not recorded other creditors would be lulled into security and would be likely to refrain from pressing the debtor at law or otherwise, to the great benefit of the debtor and the preferred creditor, but to the serious injury in many cases of the unsecured creditor.

But, as I have suggested above, I do not see that the Court is called upon to determine what influenced the Legislature in protecting a class, the duty of the Court being to determine what class is protected.

The language of the statute is clear. The mortgage unrecorded is absolutely void as to the creditors of the mortgagor. This certainly must mean the creditors of the mortgagor existing at the time that the mortgage was given, whatever else of a more inclusive character it may also mean.

Since all of the creditors in the case at bar were such at the time of the giving of the mortgage, it is not necessary in this case to go further than I have just done in the matter of the construction. That the construction I have placed upon this act is justified by the authorities will be found by consulting the following: Bank of Metropolis vs. Sprague, 21 N. J. Eq., 530 (Ct. of Er., 1870); Williamson vs. R. R. Co., 29 N. J. Eq., 336 (Ct. of Er., 1878); Roe vs. Meding, 53 N. J. Eq., 350 (Ct. of Er., 1895).

A creditor whose debt was subsisting at the time of the giving of a chattel mortgage, by subsequently obtaining judgment and levying upon the property, places himself in a position to attack the chattel mortgage, or to resist its enforcement. But this is not the only way in which the right of a creditor

to attack the validity of the chattel mortgage or to resist its enforcement may be asserted. It has been held that such right may be asserted by a Receiver appointed in pursuance of the General Corporation Act. Graham Button Company vs. Spielman, 50 N. J. Eq., 120 (Van Fleet, V. C., 1892; aff'd Idem., 796).

On the other hand, it has been held that a general assignee by a voluntary assignment is not such a representative of creditors as to enable him to assert, on their behalf, this right of attacking the validity of an otherwise valid chattel mortgage. Wimpfheimer vs. Perrine, 67 N. J. Eq., 597 (Ct. of Er., 1904).

The real question for decision in this case, therefore, is, Does a receiver of a partnership, who is appointed after a decree of dissolution for the purpose of winding up its affairs and distributing the money to its creditors, so far represent such creditors as to be invested with power in their behalf to attack the validity or to resist the enforcement of a chattel mortgage given by the partners?

From the proofs in this suit it appears that this partnership is insolvent. Before a decree of dissolution the Receiver appointed pending the suit is nothing more than a custodian of the property, and represents nobody excepting the Court, and represents it solely for the purpose of conserving the property until the further order of the Court. The Court, having taken the property in charge solely for the purpose of conservation, has not, by that act, attempted to adjudicate any claims nor to settle any rights. The suit may be discontinued, or in any one of a number of ways it may result in some disposition, other than a final decree of dissolution, the effects of which would be to reinvest the partnership with its property.

After a decree of dissolution, however, the situation is entirely changed. The Court, by such decree, determines that the partnership is dissolved, that

its property must first go to pay the creditors of the partnership, and that such creditors will be ascertained by the Court, their rights passed upon and their debts, to the extent that the property will go toward that end, paid.

Under such circumstances it appears to me that the correct holding is that from the time of the decree of dissolution there is, by virtue thereof fastened upon the assets of the company a lien in favor of subsisting creditors. The Receiver appointed in such final decree of dissolution becomes the representative of the creditors, and, as such, may, by suit or defence, avoid any instrument which is void as against them.

After the decree of dissolution the distribution of the property of the partnership among the creditors is an involuntary proceeding. In Wimpfheimer vs. Perrine, *supra,* Mr. Justice Van Syckel (p. 600), says: "In an involuntary proceeding as in the case of a receivership, or assignee appointed by the Court, the proceeding is adverse to the debtor. The law takes the property in the position in which it is with reference to the rights of creditors and appropriates it exclusively and irrevocably to the payment of debts. Anyone claiming a superior right must show his title *stricti juris.* The Receiver is the embodiment of creditors; he stands as and for them; when he challenges the validity of the mortgage, he does so in the character of creditor, having in virtue of his receivership debts fastened upon the mortgagor's property. It is then a question strictly between creditors and the mortgagee, and the statute, declaring the mortgage void as to creditors for want of recording, applies as fully as if it was a suit between a single judgment creditor and the mortgagee."

The effect of the decree of dissolution and the settlement of the affairs of the partnership through the Court has been held to be, so far as creditors are concerned, analogous to be a creditor's bill, and the

debts existing are held to be fastened on the assets. Ross vs. Titsworth, 37 N. J. Eq., 337 (Runyon Chan., 1863); Kirkpatrick vs. McElroy, 41 N. J. Eq., 539 (Ct. of Er., 1886); Smith vs. Crater, 43 N. J. Eq., at p. 641 (Ct. of Er., 1887); Van Alstyne vs. Cook, 25 N. J., 495.

Since the Court will not permit the creditors of the partnership to enforce their rights as against the property in the possession of the Receiver (Ross vs. Titsworth, *supra*), it would seem that after dissolution it must necessarily be held that the Receiver represents the rights of all the creditors whose debts have thus become fastened upon the property. Lawson vs. Dunn, 66 N. J. Eq., 90 (Reed, V. C., 1900). To hold otherwise would be clearly inequitable. It would prevent the creditors from protecting themselves without extending to them a substitute for the rights thus taken away from them.

I therefore conclude that the Receiver of this insolvent partnership after the decree of dissolution became vested with the rights of the creditors to such an extent as to enable him to resist the enforcement of this chattel mortgage; and that he has successfully done so by showing that the same was not immediately recorded under the circumstances of the case.

The result is that Elizabeth A. Brockhurst, the claimant, will not be given the benefit of the chattel mortgage as a preference, but will be considered as a general creditor of the partnership for the sum of $800 and interest.

This finding makes it necessary to determine the question raised by two of the creditors of the insolvent firm who obtained judgments after the decree of dissolution and who proved their judgments in this proceeding. Since I have held that the Receiver represents all the creditors, and since by obtaining these judgments they can get no preference, there is no necessity to make any finding con-

cerning their claims in this suit.

I will advise a decree in accordance with the views above expressed.

DECREE.

(Filed July 17, 1906.)

The matter of the claim of Elizabeth A. Brockhurst to a preference upon the moneys in the hands of the Receiver of the partnership of Brockhurst & Cox coming on to be heard before the Court, and testimony in open Court having been taken, and the matter having been argued by Adolf L. Engelke, of Counsel for Elizabeth A. Brockhurst; Merritt Lane, of Counsel for pro se; Frank W. Hastings, for Edward Depew & Co.; James E. Pyle, of Counsel for the Evening Journal Association, and the Court having considered the said testimony and arguments of Counsel,

IT IS on this sixteenth day of July, nineteen hundred and six, ORDERED, ADJUDGED AND DECREED by his Honor, William J. Magie, Chancellor of the State of New Jersey, and the said Chancellor doth, by virtue of the power and authority of this Court, ORDER, ADJUDGE and DECREE that the claim of Elizabeth A. Brockhurst to a preference upon the moneys in the hands of the Receiver by virtue of her alleged chattel mortgage be denied and that the claim of Elizabeth A. Brockhurst be admitted as a general claim against the partnership.

Respectfully advised,

LINDLEY M. GARRISON, V. C.

W. J. MAGIE, C.

PETITION OF APPEAL.

To the HONORABLE THE COURT OF ERRORS AND APPEALS IN THE LAST RESORT IN ALL CAUSES:

The petition of Elizabeth A. Brockhurst, one of the creditors and the appellant in the above stated

cause, respectfully shows that your petitioner finds herself aggrieved by a final decree made in the Court of Chancery, by his Honor William J. Magie, Chancellor of the State of New Jersey, bearing date the sixteenth day of July, in the year A.D. nineteen hundred and six, wherein the said Elizabeth A. Brockhurst is claimant upon a claim filed with J. Merritt Lane, Receiver of the partnership of Brockhurst & Cox in the above stated cause, in this respect, to wit:

That the said decree adjudges that the claim of Elizabeth A. Brockhurst to a preference upon the moneys in the hands of the Receiver by virtue of her alleged chattel mortgage be denied.

And your petitioner humbly appeals from that part of the decree of the Chancellor which decreed as aforesaid upon the ground that the same is erroneous for that the said claim of Elizabeth A. Brockhurst against the said partnership of Brockhurst & Cox should be entitled to a preference upon the moneys in the hands of the said receiver by virtue of said chattel mortgage held by said Elizabeth A. Brockhurst covering the assets of said partnership, which assets were converted into moneys by said Receiver by order of the said Court of Chancery and said moneys are now held by said Receiver and that said moneys so held by said Receiver should be first applied to the payment of the said claim of said Elizabeth A. Brockhurst before applying any part of it to any of the other claims of the other creditors.

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

ADOLF L. ENGELKE,
Solicitor for and of Counsel with
Appellant.

ANSWER

Ordinary form of answer to petition filed by Receiver, Edward E. Depew & Co. and Evening Journal Association.

EXHIBIT B1.

HARRY BROCKHURST, with Third National Bank, Jersey City.

Interest Account for December, 1904.

	Dr.	Cr.
Balance Dec. 5, 1904.....		207.24
6, ...		
7, ...		
8, ...		825.00
9, ...	30.00	
	14.91	15.00
10, ...1,000.00		
11, ...		
12, ...	45.00	169.00
		125.00
Balance Dec. 12, ...	251.33	

EXHIBIT B1.

First page contains items of moneys received by Harry B. Brockhurst for month of January, 1905, in store No. 245, Newark, then continue at bottom of page:

Loans to Corydon.....$	.25
Owe Corydon	.80
Loan	800.00
Loan.....	1200.00
Loan to Corydon.....	2.00
Loan to Bradley.....	.85
Loan to Corydon.....	

Then follows three pages containing items of moneys received by Harry B. Brockhurst, in said store, for months of February, March and April, 1905.

EXHIBIT B2.

Ordinary form of chattel mortgage covering all stock and fixtures in store No. 245 Newark Avenue, Jersey City, containing following clause:

"It is the intention of this mortgage to cover all and every article now in said store and which may hereafter be bought and brought into said store for the purpose of replenishing the stock thereof.

"Also thirty cases of eggs now in the Merchants' Refrigerating Company; also all fixtures of every kind and description."

Acknowledged as follows:

State of New Jersey,
County of Hudson. ss.

BE IT REMEMBERED, That on this third day of May in the year of our Lord One Thousand Nine Hundred and Five, before me, one of the Masters of the Court of Chancery of the State of New Jersey, personally appeared Harry B. Brockhurst, member of and agent for the firm of Brockhurst & Cox, who, I am satisfied, is the grantor mentioned in the foregoing Chattel Mortgage, to whom I first made known the contents thereof, and thereupon he acknowledged that he signed, sealed and delivered the same as the voluntary act and deed of said firm of Brockhurst & Cox for the uses and purposes therein expressed.

DANIEL P. BYRNES,
Master in Chy. of New Jersey.

Affidavit annexed as follows:

State of New Jersey,
County of Monmouth. ss.

Elizabeth A. Brockhurst, of full age, being duly sworn, on her oath, saith that she is the mortgagee and holder of this mortgage. That the amount due and to grow due on said mortgage is the sum of

Eight Hundred ($800) Dollars and no cents, together with interest on said sum at the rate of six per centum per annum. That the consideration of said mortgage is as follows: The sum of Eight Hundred Dollars ($800) loaned to said firm of Brockhurst & Cox on the eighth day of December, A. D., one thousand nine hundred and four, the same being in cash money, and being loaned for the purpose of buying and partly paying for a lot of butter purchased by said firm and placed in storage by them; that nothing has been paid to deponent or any one for her in full or part payment of said sum and that the full sum of Eight Hundred Dollars, together with lawful interest thereon from the eighth day of December, A. D., 1904, is still due and owing to deponent.

ELIZABETH A. BROCKHURST.

Subscribed to and sworn, this third day of May, A. D., 1905, before me.

D. H. APPLEGATE,
Master in Chancery of New Jersey.

Testimonium clause as follows:

In Witness Whereof, we the said party of the first part have hereunto set our hand and seal, the second day of May, one thousand nine hundred and five.

BROCKHURST & COX [L.S.]
HARRY B. BROCKHURST [L.S.]

Sealed and delivered in the presence of
DANIEL P. BYRNES.

Mortgage, dated May 2, 1905.

Recorded, May 18, 1905, at 1.30 P. M.

EXHIBIT B3.

THE THIRD NATIONAL BANK OF JERSEY CITY, N. J.,
in account with Harry B. Brockhurst.
Entry as follows:
Dec. 1.
8. G. Het. 825

EXHIBIT E.B4.

To cash moneys loaned by Elizabeth A. Brockhurst to the firm of Brockhurst & Cox, which moneys is secured to be paid to me by a certain Chattel Mortgage made by said firm to me, dated May 2d, 1905, and recorded in Liber 231, of Chattel Mortgages on page 380, etc., in Hudson County Register's Office $800.00

Interest from December 8, 1904, eight months at 6 per cent..... 32.00

$832.00

State of New Jersey,
County of Monmouth, ss.

ELIZABETH A. BROCKHURST, of full age, being duly sworn according to law upon her oath, deposes and says: That she is the Elizabeth A. Brockhurst named in the above claim; that said claim is for cash moneys loaned to said firm of Brockhurst & Cox on the eighth day of December, A. D., nineteen hundred and four, at its request, upon which sum said firm agreed to pay interest at the rate of six per cent. per annum; that no part of said sum nor any interest thereon has been paid to deponent on said amount, and that said firm is not entitled to any credits or allowances thereon, but that the full sum of eight hundred and thirty-two dollars ($832) is justly due and owing to deponent.

ELIZABETH A. BROCKHURST.

Subscribed and sworn to this eleventh day of July, A. D., 1905, before me.

DANIEL P. BYRNES,
Notary Public of New Jersey.

"EXHIBIT A OF MARCH 12."

Report of Receiver, showing a list of claims filed, as follows:

In re Brockhurst & Cox. List of claims filed:

Charles H. Zinn, 331 Greenwich St., New York	$230.15
E. Pritchard, 331 Spring St., New York	11.25
E. D. Depew & Co., 14 Harrison St., New York	250.38
John M. Wittpenn, 2 Gouverneur Lane, New York	10.80
John W. Hamblet, 35 Vesey St., New York.	27.44
Evening Journal Ass'n, 37 Montgomery St., Jersey City	102.67
J. Liebermann, 293 Newark Ave., Jersey City	8.98
H. J. Voss, 112 Myrtle Ave., Jersey City	9.30
	9.55
Hefferman Paper Co., 142 Worth St., New York	3.51
R. C. Williams & Co., 56 Hudson St., New York	35.66
Elizabeth A. Brockhurst, 54 Leroy Pl., Red Bank, N. J	832.00
National Biscuit Co., 434 York St., Jersey City	58.89
Charles F. Lucas Co., 191 Duane St., New York	264.12
Total	$1,854.70

"EXHIBIT B OF MARCH 12."

(SECOND) DISTRICT COURT OF JERSEY CITY,
JAMES S. ERWIN, ESQ., JUDGE.

State of New Jersey.
County of Hudson, ss.
City of Jersey City,

EDWARD D. DEPEW and FRANK DEPEW, partners, trading as Edw. D. Depew & Co.,
Plaintiff,
vs.
HARRY B. BROCKHURST and JOHN H. COX, partners, doing business as Brockhurst & Cox,
Defendant.

On Contract.

Judgment in the above entitled cause was entered in the (Second) District Court of Jersey City, James S. Erwin, Esq., Judge, in favor of the said Plaintiff, Edward D. Depew and Frank Depew, partners, trading as Edw. D. Depew & Co., and against the said defendant, Harry B. Brockhurst and John H. Cox, partners, doing business as Brockhurst & Cox, on the 21st day of February, A. D., 1906, for the sum of two hundred and sixty-one dollars and four cents, damages, and sixteen dollars end eighty-five cents, cost of suit. No execution was issued thereon.

I do hereby certify, that the foregoing statement is correct, and that said judgment stands open and unpaid of record in this Court.

In witness whereof, I have hereunto affixed my hand as the Clerk of said Court and the seal of said Court as provided by law, this 23d day of February, 1906.

HOWARD R. CRUSE,
Clerk.

[SEAL.]

State of New Jersey,
County of Hudson, ss:

Frank W. Hastings, Jr., being duly sworn according to law on his oath saith that he is attorney for the within named plaintiff; that there is due at the present time upon the within judgment as entered in the (Second) District Court of the City of Jersey City, the sum of two hundred and sixty-one dollars and four cents damages, and sixteen dollars and eighty-five cents costs.

Sworn and subscribed this 26th day of February, A. D., 1906, before me.

GEO. W. BLACK, FRANK W. HASTINGS, JR.
Master in Chancery of New Jersey.

"EXHIBIT C OF MARCH 12."

(SECOND) DISTRICT COURT OF JERSEY CITY,

JAMES S. ERWIN, ESQ., JUDGE.

State of New Jersey.
County of Hudson, ss.
City of Jersey City,

EVENING JOURNAL ASSOCIATION, a Corporation,
Plaintiff,
vs. On Contract.
HARRY B. BROCKHURST & JOHN H. COX, partners, trading as Brockhurst & Cox,
Defendant.

Judgment in the above entitled cause was entered in the (Second) District Court of Jersey City, James S. Erwin, Esq., Judge, in favor of the said Plaintiff, Evening Journal Association, a Corporation, and against the said defendant, Harry B. Brockhurst and John H. Cox, partners, trading as Brockhurst & Cox, on the 23d day of February, A. D., 1906, for the sum of one hundred and seven dollars and seventeen cents, damages, and nine dollars and fifty-five cents, cost of suit. No execution

was issued thereon.

I do hereby certify, that the foregoing statement is correct, and that said judgment stands open and unpaid of record in this Court.

In witness whereof, I have hereunto affixed my hand as the Clerk of said Court and the seal as said Court, as provided by law, this 23d day of February, 1906.

HOWARD R. CRUSE,
Clerk.

[SEAL.]

State of New Jersey,
County of Hudson, ss.

....., being duly sworn according to law on his oath saith that he is ....., the within named plaintiff; that there is due at the present time upon the within judgment as entered in the (Second) District Court of the City of Jersey City, and which is about to be docketed in the Court of Common Pleas of the County of Hudson, the sum of..... dollars.....cents, being a sum not less than ten dollars.

Sworn and subscribed this.....day of..... A. D., 190 , before me.

We consent that the above testimony and the abridgment of the pleadings, orders, reports, decrees, exhibits and other papers filed and used in this cause shall constitute the state of the case on appeal.

ADOLF L. ENGELKE,
Solicitor for and of Counsel with Elizabeth A. Brockhurst.

MERRITT LANE,
Receiver, Solicitor and Counsel pro se.

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