

MACCRELLISH & QUIGLEY, PRINTERS, TRENTON, N. J.

NEW JERSEY
Court of Errors and Appeals.

Between

JOSEPH WHITEHEAD ET AL.,
Appellants,

and

ANNA W. BAIRD,
Respondent.

Brief for
Appellants.

STATEMENT.

These appeals are from an order of the Court of Chancery, directing Frank A. Magowan, the receiver of the Hamilton Rubber Company, and one of the appellants, to pay to Anna W. Baird, the respondent, the sum of \$54,000 due her in respect of certain promissory notes made by that company, and by her endorsed, for its benefit and accommodation, at different times between January 7th, 1891, and March 13th of the same year, aggregating \$49,500; and also in respect of \$4,000 by her loaned to it, the payment of which sums, with interest, were secured by a chattel mortgage executed by it to her on May 18th, 1891, and the payment of which the order appealed from directed the receiver to make out of the proceeds of the goods and chattels comprised in said chattel mortgage, realized from the sale thereof by the receiver.

The total amount of creditors' claims presented to, and allowed by, said receiver is \$231,221.11.

The total amount of the insolvent company's property available for the payment of such claims is \$50,334.90.

By the fourth section of the Chattel Mortgage act, 1885, approved May 2d, 1885 (*Supp. Rev., page 491*), it is prescribed (omitting matter not pertinent):

“That every mortgage or conveyance intended to operate as a mortgage of goods and chattels * * * which shall not be accompanied by an immediate delivery, and followed by an actual and continued change of possession of the things mortgaged, shall be absolutely void as against the creditors of the mortgagor, * * * unless the mortgage, having annexed thereto an affidavit or affirmation made and subscribed by the holder * * * stating the consideration of said mortgage and as nearly as possible the amount due and to grow due thereon, be recorded as directed in the succeeding section of this act.”

The 5th section of the same statute prescribes where such chattel mortgages shall be recorded.

And by the 5th section of the statute entitled “An act relative to oaths and affidavits,” approved March 27th, 1874 (*Rev., page 740*), it is prescribed (omitting matters not pertinent):

That “any oath, affirmation or affidavit required or authorized to be taken in any suit or legal proceeding in this State, or for any lawful purpose whatever * * * when taken out of this State, may be taken before any notary public of the state, territory, nation, kingdom or country in which the same shall be taken, or before any officer who may be authorized by the laws of this State to take the acknowledgment of deeds in such state, territory, nation, kingdom or country, and a recital that he is such notary or officer in the jurat or certificate of such oath, affirmation or affidavit, and his official designation annexed to his signature, and attested under his official seal, shall be sufficient proof that the person before whom the same is taken is such notary or officer.”

POINTS.

I.

The respondent is not entitled to be paid as a preferred creditor of said insolvent corporation in respect of her said chattel mortgage, the same being absolutely void as against its creditors, because of the respondent's failure to have annexed thereto and recorded therewith a sufficient affidavit according to law.

1. The fourth section of the "Chattel Mortgage Act, 1885," statute declares that every mortgage of chattels not accompanied by an immediate delivery and continued change of possession of the things mortgaged *shall be absolutely void as against the creditors of the mortgagor*, unless the mortgage having annexed thereto the statutory affidavit be recorded (*Supp. Rev. 491, paragraph 11*).

The recording of a sufficient affidavit annexed to the chattel mortgage along with such chattel mortgage, is thus made a condition precedent to the life of the chattel mortgage.

And in the case of an affidavit required to be annexed to a chattel mortgage, when taken out of this State before a notary or officer of another State, the statute of this State conferring authority to take the same prescribes what "shall be sufficient proof that the person before whom the same is taken is such notary or officer."

In case such an affidavit be taken out of this State before a notary of another State, the statute above recited conferring the power to take the same in that manner, prescribes certain requisites:

First—That in the jurat or certificate of such affidavit there shall be a recital that the person before whom the same is taken is such notary public.

The "recital" here meant is the statement of a fact in the jurat or certificate as evidence of the fact stated, namely, that such person before whom such affidavit is taken is in truth a notary or officer of the State in which the same is taken.

Second—That such affidavit be signed by such notary.

Third—That to his signature there shall be his official designation annexed.

Fourth—That such recital, signature and official designation shall be attested under his official seal.

These statutory requisites of an affidavit taken out of this State before a foreign notary, (*a*) recital of official character, (*b*) signature of officer, (*c*) annexation of official designation, and (*d*) authentication by official seal, must all be observed.

In conferring this special authority upon foreign officers to be exercised beyond the jurisdiction of this State, the Legislature probably intended to prescribe a method of authenticating their proceedings as a substitute for the more formal method of authentication under the great seal of the State where such proceedings were taken, and this special authority must be strictly pursued.

Every step must appear to have been taken in compliance with the statute, and a failure in the affidavit to observe these necessary steps, or to follow this method thus prescribed by the Legislature, renders such affidavit a nullity.

The affidavit annexed to the chattel mortgage in question does not recite in the *jurat*, or in any other place, the official character of the person before whom such affidavit was taken, nor is that fact in any manner authenticated under his official seal, as prescribed by the statute; consequently, the affidavit in question comes short of the "sufficient proof" prescribed by the statute in two particulars: first, it is wanting in a statement of the official character of the person before whom it was taken, and secondly, it is wanting in the authentication thereof under his official seal.

Consequently, this affidavit is a nullity.

For if this be not the effect, then the failure to observe the whole of what the Legislature prescribed as "sufficient proof" is of no consequence; and what becomes of the law?

The United States Circuit Court for this district, in *Sutherland v. J. C. & B. R. R. Co.*, reported in *Vol. 8 of N. J. Law Journal, page 45, 1885*, which involved a like omission of a like recital, held that a *jurat* taken in another State, which does not contain a recital of the official character of the officer, is not in accordance with the New Jersey statute, and the affidavit with such a *jurat* is insufficient.

And in Georgia an affidavit taken outside the State and lacking the authentication of the official character of the person administering the oath is not recognized in that State.

Behn v. Young, 21 Ga. 207.

"Nearly all the States prescribe a method of authenticating foreign affidavits, with which there must be a substantial compliance, or they will generally be void.

1 *Encyc. Pl. and Pr.*, 333, citing *Phelps v. Phelps*, 6 Civ. Fro. Rep. (N. Y. Supreme Ct.), 117; *Cream City Furniture Co. v. Squier*, 2 Misc. Rep. (N. Y.) 438; 21 N. Y. Supp. 972; see, also, *Wood v. St. Paul City Ry. Co.*, 42 Minn. 411; *Hyatt v. Swivel*, 52 N. Y. Superior Ct. 1.

Where a statute requires a subscription to the affidavit, the absence of it renders the affidavit a nullity.

Nave v. Ritter, 41 Ind. 301.

2. If the affidavit in question be a nullity, then the respondent's chattel mortgage having annexed thereto an affidavit as prescribed by the Chattel Mortgage act, has not been recorded; and what is the consequence as respects creditors?

The statute declares that such a chattel mortgage shall be absolutely void as against the creditors of the mortgagor.

It will be observed that the 4th section of the Chattel Mortgage act of 1885 is word for word the same with the 1st section of the act entitled "An act concerning chattel mortgages," approved March 24th, 1864 (*Rev.* 709, § 39), and which was in force until its place was taken by this act of 1885, except as to what defaults they declare shall void the mortgage.

On the one hand, the act of 1885 declares that the default which shall void the mortgage is a failure to record the same with the statutory affidavit annexed; and, on the other hand, the act of 1864 declared that the default which should void the mortgage was a failure to file or refile within the time specified.

And in declaring the effect upon creditors of the mortgagor of a default or failure of the mortgagee to file his chattel mortgage, this Court, in *Williamson v. N. J. Southern R. R. Co.*, 2 Stew. 336, said:

There is a distinction made in the statute between the creditors of the mortgagor and subsequent purchasers or mortgagees, with respect to the avoidance of the mortgage for neglect to file the same, or to take immediate possession. Purchasers or mortgagees, in order to take advantage of the failure of another mortgagee of chattels to comply with the statute, must be subsequent purchasers or mortgagees, taking their title under the mortgagor in good faith. A purchaser or mortgagee acquiring his rights with notice of the existence of the antecedent mortgage, does not obtain his title in good faith.

Consequently, possession taken of the mortgaged property under a prior chattel mortgage, however long postponed, will give it priority over a subsequent purchase or mortgage if possession be taken in fact before such subsequent sale or mortgage was made. But no such qualifications apply as against the creditors of the mortgagor.

Their rights may have accrued prior or subsequent to the mortgage, and yet they will be entitled to the benefit of the statute. Knowledge of the existence of a chattel mortgage executed by the debtor will not preclude a creditor from availing himself of the objection that the mortgage is void because it was not accompanied by immediate delivery of the things mortgaged, followed by an actual and continued change of possession."

The distinction between creditors and subsequent purchasers or mortgagees in this respect was recognized in the opinion of this Court, in *National Bank of Metropolis v. Sprague*, 6 C. E. Gr. 530.

II.

The receiver, as the representative of the creditors, has the capacity to take the objection that the chattel mortgage in question is void.

This the receiver may do either by suit or defence.

Such was the decision of this Court in *Spielman v. Knowles, Receiver of the Graham Button Co.*, 5 Dick. 796, affirming *S. C.*, 5 Dick. 120, for the reasons given in the Court of Chancery. See, also, *Miller v. MacKenzie*, 2 Stew. 291;

Werner v. Murphy, Receiver, 17 *N. J. Law Jour.* 297 (U. S. Circuit).

In the case at bar, the bill to wind up the insolvent corporation, The Hamilton Rubber Company, was filed May 27th, 1891.

The entire assets of the corporation have been converted into money. The amount realized from all sources is small, and it is apparent that the unsecured creditors will receive only a small fraction of their debts.

III.

The objection to the insufficiency of the affidavit in question cannot be met and overcome by extrinsic proof.

As already stated, the bill to wind up the insolvent corporation was filed May 27th, 1891, and the moment it was adjudged to be insolvent and a receiver was appointed, the debts of the unsecured creditors became fastened on the chattels comprised in the questioned mortgage. *Graham Button Co. v. Spielmann*, 5 *Dick.* 124.

But the respondent did not present her petition until March 7th, 1895, and did not offer such extrinsic proof until long afterwards.

Meanwhile, by an act approved March 5th, 1895, and which went into effect immediately, (*P. L. 1895, p. 166*), entitled "A further supplement to an act entitled 'An act concerning corporations,' approved April 7th, 1875," the Legislature re-enacted the second section of the act entitled "An act to prevent frauds by incorporated companies," approved April 15th, 1846 (*R. S. 129*), which had been repealed in 1874, by the repealer in the Revision (*Rev. p. 1395, § 411*), thereby declaring to be null and void, as against creditors of an insolvent company, every transfer of its property made by it when insolvent or in contemplation of insolvency.

Now there can be no doubt that this questioned mortgage, which was made April 18th, 1891, was executed by the company in contemplation of insolvency in view of its

magnitude and comprehensiveness and in view of the other mortgages executed by it at or about the same time.

Coryell v. New Hope Del. Bridge Co., 1 Stock. 457.

Wells v. Rahway Rubber Co., 4 C. E. Gr. 402.

It is, therefore, not only against the policy of this law to permit the supplying of extrinsic proofs, but its effect will be to relate back and give life to a mortgage which before was void.

Can the respondent now, for the purpose of giving life to her mortgage—bringing it within the statute—offer extrinsic proofs to meet the exigencies of the case?

We think not. The rights of all parties were fixed by the operation of the law upon the filing of the bill to wind up. As they stood then they should stand now.

The objection is to an imperfection which cannot be removed.

It would require a statute to cure such an imperfection, just as in the case of defective proofs or acknowledgements, familiar instances of which are to be found in *Supp. to Rev.*, page 136, § 27, and (*Note 1*).

Respectfully submitted,

G. D. W. VROOM,
JAMES BUCHANAN,
Counsel.

Court of Errors and Appeals

Between	}	On Bill &c. On Petition &c.
FRANK A. MAGOWAN,		
Receiver		
Appellant.		
and		
ANNA W. BAIRD,	Appellee.	

**Brief of Edwin Robert Walker, of counsel for
Anna W. Baird, Appellee.**

This appeal arises in this way. Mrs. Baird, the Appellee, presented to the receiver of the Hamilton Rubber Company two mortgages, made by the company to her, one dated April 18th, 1891, covering all the goods and chattels, of every kind and description, in the buildings and on the premises of the company, and the other on the 15th day of April, 1891, covering the real estate of the company; both of which mortgages were duly recorded in the Clerk's office, of the county of Mercer. 10

These mortgages were given to secure the payment of a loan of \$4,000.00, made by Mrs. Baird to the Hamilton Rubber Company, as well as to secure other loans, not exceeding \$100,000.00, and also to secure her for all principal and interest money, costs and expenses, which she might be compelled to pay in consequence of the failure of the company, to pay

and take up at maturity the notes described therein, or any note which might be given in renewal thereof, or of either of them, and which might be indorsed by Mrs. Baird. After the appointment of the receiver for the Hamilton Rubber Company, Mrs. Baird presented her claim to him on account of money loaned and notes endorsed by her for the benefit of the company, and upon which there was and is due, upwards of the sum \$88,500.00, and demanded of him to be paid as a preferred creditor out of the proceeds or avails of the property comprised in her mortgages, and the receiver, whilst admitting and allowing her claims, refused to pay the same by way of preference out of the avails or proceeds of the property comprised in the mortgages. From this decision of the receiver Mrs. Baird appealed to the Chancellor, who made an order to show cause thereon why the prayer of her petition of appeal should not be granted, and upon the hearing of the matter made an order reversing the decision of the receiver, so far forth as it affected her right to preference under her real estate mortgage and directed that it be paid by way of preference, expressly reserving the question as to whether or not the chattel mortgage should be allowed as a preference, for further hearing. This reservation was made because upon the hearing counsel for the receiver objected to the admission of the chattel mortgage in evidence and to the allowing of the amount due thereon as a preferred claim for the reason, as alleged, that the affidavit attached to the chattel mortgage lacked any authentication of the official character of the notary taking the same, and urged therefore that the mortgage was void as against creditors of the company.

The affidavit and jurat are admittedly formal and correct, but the official character of the person before whom it was taken, it was insisted, did not sufficiently appear.

The Vice Chancellor held that we had the right to establish, by extraneous evidence, the official character of the notary who took the affidavit, see his opinion, *paper book*, p.

28 to 33 and this proof we supplied at a further hearing, see *paper book*, p. 25 to 28.

The only question presented on this appeal, therefore is, as to the sufficiency of the jurat to this affidavit, and as to the correctness of the Vice Chancellor's order permitting us to supply what he conceived to be a defect of form, by proof aliunde.

I contend, on behalf of Mrs. Baird, the appellee, that the affidavit and jurat are sufficient to establish her chattel mortgage in every particular under the law; but that if the court is inclined to a contrary opinion, that then any formal defect which existed upon the face of the paper has been supplied by the proof taken under the order for that purpose, and that the court had the power to make such order. These propositions will be argued together.

Mrs. Baird, the mortgagee, is a resident of Philadelphia, and the affidavit was taken in that city before a notary of the State of Pennsylvania. The jurat is attested with the name of Alexander Ramsey, who signs himself "*Notary Public*," and by his official seal upon which is the following inscription: "*Alexander Ramsey, Notary Public, Philadelphia, Pa.*"

The question for judicial determination is, whether or not the affidavit is properly executed; that is to say, does it sufficiently appear, by the signature and seal of the person taking it, to be an affidavit by the mortgagee, in compliance with *Section 4*, of the Statute concerning *Chattel Mortgages*, *Rev. Sup.*, p. 491.

While the decisions of our own courts are meagre upon the question of the authority of notaries public, of a foreign State or country to take affidavits, yet, the question seems to have commanded the attention of other courts as well as text writers.

A Notary Public is not merely an officer of the country by which he is appointed, and in which he is authorized to act, but he is an officer recognized by all countries; and a

special importance has always been attached to the office for the reason that certain official acts performed by him, within the territory in which he is appointed, are recognized as authority the world over; and among the acts which he is thus recognized as having the authority to perform, is that of administering an oath.

- Brooke, Notaries*, p. 19; *Cole v. Sherard*, 11 *Exch.* 482; *Omealey v. Newell*, 8 *East*, 364; *Haggitt v. Iniff*, 5 *DeG. M. & G.* 910; *Ex parte Worsley* 2 *H. Bl.* 275; *Walrond v. Van Moses*, 8 *Mod.* 321

It is generally recognized in the courts of this country, that affidavits may be taken by notaries public in the other states, and that they may have the same effect and authenticity as if taken in the state where they are used.

- Conolly v. Riley*, 25 *Md.*, 402; *Stephens v. Williams*, 46 *Iowa*, 540; *Denmead v. Maack*, 2 *McArth.*, 477; *Fellows v. Menasha*, 11 *Wis.*, 562; *Marshall v. Mott*, 13 *Johns.*, 423; *Tucker v. Ladd*, 4 *Cow.*, 47; *United States v. Libby*, 1, *Woob. & M.* 221.

- 20) A Notary Public being an officer recognized the world over, his signature proves itself, and it is not necessary that it should be authenticated.

Conolly v. Riley, *Stephens v. Williams* and *Fellows v. Menasha*, *supra*.

In the absence of any evidence upon the matter, the presumption would be that the laws of Pennsylvania, like the laws of our own state, authorize notaries public to administer oaths.

- Cooper v. Reaney*, 4 *Minn.*, 528 *Brimhall v. VanCam-*
30 *pen*, 8 *Minn.*, 13; *Conolly v. Riley*, *supra*; *Rape v. Heaton*, 9. *Wis.*, 328; *Walsh v. Dart*, 12 *Wis.*, 635; *Shumway v. Leakey*, 67 *Cal.*, 458; *Marsters v. Lash*, 61 *Cal.*, 622; *Hickman v. Alpaugh*, 21 *Cal.*, 226, *Allen v. Watson*, 2 *Hill, L.*, 319; *Crafts v. Clark*, 38 *Iowa*, 237; *Wright v. Delafield*, 23 *Barb.*, 498-513; *Hall v. Pillow*, 31 *Ark.*, 32; *Wharton, Ec. pp.* 314.

All that the statute requires is that the mortgagee shall subscribe an affidavit or affirmation, stating the consideration of the mortgage, and, as near as possible, the amount due and to grow due thereon.

An oath is a pledge given by the person making it, that his attestation is made under an immediate sense of his responsibility to God. 2 *Bowyer's Law Dict.* 248.

This pledge may be given, and this oath may be made in any country, and before any officer authorized to administer an oath.

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In this case the jurat, the signature and seal prove that the oath was administered, and this complies with the statute. The impression on the notary's seal seems to me to be a clear certification by himself, of the fact that he is a Notary Public of the State of Pennsylvania. "Pa." is such an abbreviation of the name of the commonwealth just mentioned, that this court will, I submit, take notice of.

In England, as far back as the memory of man extends, Notaries Public were authorized to administer oaths, and by the statutes of England, and the statutes of every state in the United States, they are now so authorized. Brooke on Notaries, pp. 19-20.

In the case of *Wood v. St. Paul City, R. Co.*, decided in the Supreme Court of Minnesota, in 1890, 42 Minn., 411; the question as to the sufficiency of an affidavit, similar to the one before this court, in this case, was raised and discussed. The reasoning upon the law in the opinion in that case, seems so appropriate that I give the text in full, at the risk of seeming prolix:

"Mitchell, J.—Gen. Stat. 1878, Chap. 90, part 6, 7 (relating to mechanics' liens, provides that the statement of the account, required to be filed and recorded, shall be verified by the oath of the party or his agent, but is entirely silent as to where or before whom such affidavits shall be made. To hold that the statute requires them to be made within the State, or, if without the State, that the oath must be admin-

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istered by a Commissioner for the State of Minnesota, would be to put a construction upon the act at once unauthorized by its language, and unsuited to the business habits and necessities of the country. Nothing short of express legislation would justify any such rule.

We think these affidavits may be made in another State, before any officer authorized by the laws of such State to administer oaths. Of course, if taken in another State, they must be duly authenticated, so as to show on their
10 face the official character of the officer, as well as his authority to administer oaths.

In each of the present cases the affidavit was sworn to in Pennsylvania before a Notary Public of that State, who authenticated it by signing the jurat, and affixing his notarial seal. If, instead of being affidavits, these had been certificates of protest or authentications of similar commercial documents, it is elementary law that the notary's seal would prove itself, without any further proof of his official character or of his authority to do the act. A public notary is
20 considered, not merely an officer of the country where he is admitted or appointed, but as a kind of international officer, whose official acts, performed in the State for which he is appointed, are recognized as authoritative the world over. Defendant's counsel concedes that this is true as to all his acts in the way of the authentication of what he terms commercial documents, but insists that, outside of such matters, a notary has no power, in the absence of statutory authority, to administer oaths. Although this is sometimes stated in the books as being the law, yet its correctness may well be
30 doubted.

The powers of a notary, which is a very ancient office, are largely founded on customary law. The English notaries have always considered themselves authorized to administer oaths, and whatever chance for doubt there might have been was set at rest by the *Act of 5 and 6 Wm. IV., chap. 62, pp. 15 Brooke, Notaries 20.*

Affidavits taken before notaries in foreign countries have uniformly been received by the courts of England in judicial proceedings without any other proof of their official character, or their authority to administer oaths than their notarial seals. *Omealey v. Newell*, 7 East 364; *Walrond v. Van Moses*, 8 Mod. 322, *Haggitt v. Iniff*, 5 DeG. M. & G. 910; *Cole v. Sherard*, 11 Exch. 482.

It was said in *Omealey v. Newell*, *supra*, that this had been the uniform practice "as far back as living memory could trace it." The same practice seems to have obtained in the American Courts. *United States v. Libby*, 1 Woodb. & M. 221; *Denmead v. Maack*, 2 McArth, 472; *Tucker v. Ladd*, 4 Cow. 47; *Connolly v. Riley*, 25 Md. 402.

This practice has also long prevailed in this State, especially in the probate courts and in the proof of claims in insolvency proceedings. It is true, as counsel suggests that these are rules of practice as to which the courts are to some extent a law unto themselves; but the fact is important, and in point, as a recognition, not only of the regularity of affidavits sworn to outside the State, but also of the general power of notaries to administer oaths without proof of statutory authority to do so.

As a matter of fact, in every State and territory in the Union, notaries have power to administer oaths, and for the last forty years affidavits sworn to before a notary in any State of the Union, and authenticated by his notarial seal, have been admissible in all the federal courts, without any proof of their authority to administer oaths. It is true, that perhaps in every state the powers of notaries, including that of administering oaths, have been regulated by statutes, which, however are largely declaratory in their nature. But whether this authority be of statutory origin, or founded on customary law, the recognition of its existence has become so general, if not universal, that there is now no good reason why it should not be judicially recognized as one of the general powers of notaries, and affidavits authenticated

Note, dated January 12, 1891, at four months, for \$2,500.00.

Note, dated January 12, 1891, at four months, for \$5,000.00.

Note, dated January 19, 1891, at four months, for \$5,000.00.

Note, dated January 29, 1891, at four months, for \$6,500.00.

Note, dated February 16, 1891, at four months, for \$5,000.00.

Note, dated February 16, 1891, at four months, for \$5,000.00.

Note, dated February 27, 1891, at four months, for \$6,000.00.

Note, dated March 3, 1891, at four months, for \$7,000.00.

Note, dated March 13, 1891, at four months, for \$5,000.00

Aggregating forty-nine thousand five hundred dollars; 10

that as nearly as this deponent is able to state, the amount due and to grow due on said mortgage is the above named four thousand dollars loaned with interest, and so much of the above named notes as this deponent may legally be compelled to pay because of her said indorsements, together with interest, and such costs and expenses as may actually be incurred by this deponent in the premises in accordance with the terms, tenor and effects of said mortgage.

ANNA W. BAIRD.

Sworn and subscribed before me,

this 8th, May, 1891.

ALEX. RAMSEY,

Notary Public.

{ ALEXANDER RAMSEY,
NOTARY PUBLIC,
PHILADELPHIA, PA., }

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The Oaths Act provides that an oath, when taken out of this state, may be taken before a Notary Public of the state in which the same shall be taken. In the same section of the act it is then conjunctively provided that a recital that he is such notary in the jurat or certificate of such oath shall be sufficient proof of the fact, &c.

This latter provision makes that plenary evidence of the notary's official character which was, before the passage of the act, not such evidence. 30

The *Chattel Mortgage Act, Rev. Sup. p. 491, Sec. 11*, provides, that these mortgages shall be void as against creditors, &c, unless the mortgage having annexed thereto an affidavit, &c., be recorded, &c. The direction simply is,

that it shall have such an affidavit annexed to it. That simply means that anybody authorized by law to take an affidavit may take such affidavit. There is no requirement in the act that the affidavit so taken shall be accompanied by any proof of the official character of the notary or other officer taking it.

I fail to see that the case of *Sutherland v. J. C. & Bergen R. R. Co.*, 8 *N. J. L. J.*, 45; and *Minford v. Taylor*, 12 *N. J. L. J.* 282, govern the question at issue here. Those
10 cases were applications to a court in the course of judicial procedure, and objections being made that the affidavits were not sufficient by reason of a lack of proof of the official character of the notaries taking them, the objections were sustained and the effect of the determination was only to arrest the particular proceedings at the particular time, there being no doubt but that the applications could be renewed upon the making of the proof, which was formerly lacking.

In law everything is presumed to be what it purports to
20 be. The Chattel Mortgage Act does not require that proof of the official character of an officer taking an affidavit to any such mortgage shall be produced to the clerk at the time the instrument is lodged for record.

The presumption of the authenticity of the affidavit and the official character of the officer taking it obtains from the very beginning, and this mortgage in this case would be received, even though proof of the official character of the Notary be not produced with it, if such proof be needed,
30 interests. The objection being made we were, for the first time, challenged to produce plenary proof of the official character of this officer, and we did it, by leave of the court.

The *Conveyancing Act*, *Sec. 29, Rev. p.* 158, provides that the record of a deed or conveyance certified by the Clerk, &c., shall be received in evidence in any court, &c. It does not, however, make that method of proof the only evi-

dence. The 13th Section of the last mentioned Act, Rev. p. 155, provides that no deed or conveyance shall be recorded unless acknowledged or proved and certified in the manner provided in the act. This mortgage was duly acknowledged and recorded and the world had notice of its existence. *No plea of want of notice is set up by the other side and their case therefore lacks equity.* The *Chattel Mortgage Act* does not provide that proof of the official character of an officer taking the affidavit to it shall be made a pre-requisite to the recording of the mortgage. It will be remembered that formerly it was only necessary to file a chattel mortgage, without recording it. The statute now requires an affidavit, and recording as a pre-requisite to validity, but it does not require plenary proof to be made of the official character of the officer taking the affidavit at the time that it is lodged for record and recorded. 10

I submit that it is competent for the holder of any such mortgage to show affirmatively the official character of such an officer at any time when his official character shall be attacked, as, in such cases the only question is: *was the affidavit in fact made,*—not whether the other side know whether it was made. 20

In *Hunter vs. Le Conte & Ellis*, 6, Cowen, p. 732, where an affidavit did not show on its face that a party taking it was a magistrate authorized to administer oaths, and where the fact was *neither proved nor offered to be proved* or disproved in the Court below, it was held that it was fairly inferable that the fact of his being a justice was conceded. In answer to the contention that his official character should appear affirmatively, the court said: "*We think that the fact of Mr. Abell's taking an affidavit and of the clerk's receiving and filing it, were prima facie sufficient; and threw on the other side the burden of proving the want of authority.*" 30

That decision will be seen to be directly in point with this case. In that case, as in this, the affidavit which was

taken was one that could be made before any officer authorized to administer oaths.

If the affidavit being made and filed with the clerk in New York was *prima facie* evidence of its regularity in all respects, including the official character of the officer taking it, then the fact of this affidavit's having been taken by the mortgagee, before one signing himself as Notary Public, and affixing his official seal to the jurat, and its being received and recorded by the clerk, is *prima facie* evidence of the
10 regularity, legality, and validity of that affidavit, and this being so, the mortgage should be sustained.

That the court below did not err in admitting proof aliunde, to show that the person who administered the oath and signed the jurat in this case, was, at the time, a notary public of the State of Pennsylvania, abundantly appears from the decisions in this state, which are cited with approval by the Vice Chancellor in his opinion in this case, see *paper book*, pp. 31 to 33.

The consensus of the law upon this subject, seems to be
20 this: that if an affidavit be taken, the fact can be made to appear by extraneous evidence, if any of its formal authentication be lacking, and perjury can be assigned upon it if it be false.

See the *State v. Green*, 3 Gr., 90; *Capner v. The Flemington Mining Co.*, 2 Gr. Ch. 468; *Dinsmore v. Westcoat*, 10 C. E. Gr. 302; *Den. v. Applegate*, 7 Hals. 321; These cases are cited by the Vice Chancellor in his opinion.

Besides the decisions just referred to there are other cases in this State upon the same subject.

30 One is the case of the *State v. Hutchinson*, 5 Hals. 242, the first syllabus of which is, "If the proceedings in the matter for a road are reviewed in the Supreme Court and an objection is there taken that the surveyors did not take the oath prescribed by law; unless it appears in some way either upon the face of the affidavit or otherwise, that the person before whom it was taken was a justice of the peace,

the proceedings will be set aside." Here is a plain intimation that the official character of the person taking the surveyor's oath could have been made to appear by testimony upon the hearing. The court remarked, *on p. 244*, "The papers, as filed with the town clerk, did not set out in the jurat, or in any other place, that he, (the person taking the affidavit,) was a justice of the peace; neither in words at length, nor by the accustomed abbreviation, nor by any reference whatever. It is not shown to us that he was, at or about the time of taking the oaths, in the performance of official acts; and if indeed he was appointed by the joint meeting a justice, we are not to take judicial notice of the appointment, or that he accepted the commission and acted under it." With reference to the case in hand, it will be observed, that we showed all of these things on the hearing before the Vice Chancellor. *We showed that Mr. Ramsey, at the time of taking the oath of Mrs. Baird, was a notary public of the State of Pennsylvania and in the performance of official acts; that he was appointed by the Governor of the State of Pennsylvania; that he accepted and acted under his commission; that he was sworn to perform his duty; and that he actually took the affidavit in his capacity as notary. See paper book, pages 25 to 28.*

Again, in the case of the State vs. Bergen, 1 Zab., p. 344, the Court remarked: "Another objection taken to these proceedings is, that it does not appear that the oaths of the surveyors were taken, or that the persons before whom they purport to be taken, were justices of the peace living in or near the townships where they were appointed. I find, among the papers, an admission under the hands of the attorneys in the case, that the several persons before whom the oaths of the surveyors of the highways were taken, were justices living in the respective townships at the time the oaths were taken. Although it does not appear upon the face of the papers that the persons before whom the

oaths were taken were justices of the peace living in the county, it is competent to make out the fact by proof aliunde. The admission of the counsel removes all difficulty from this part of the case."

10 Still another case is that of *Dunn v. Perth Amboy*, 22 *Vr.*, p. 406. On p. 407, the Court said: "The only reason assigned for the reversal of this judgment is that the jurat to the complaint was not signed by the recorder until the return day of the summons, when the case was heard. The complaint was made in writing, signed by the person making the complaint, and the oath taken in due form before the recorder; but, by inadvertence, he did not sign the jurat at that time. On return of the summons, which was issued on the complaint made, the defendant appeared and objected that the jurat was not signed; the recorder refused to quash the summons for that cause; immediately amended it by signing his name; proceeded to try the cause; and the defendant was convicted on the testimony of witnesses sworn." (On p. 408), "I think it was compe-

20 tent for the recorder at any time when his attention was called to the omission, to sign his name to the jurat, while the action was before him, to amend it by affixing his signature, if the oath was in fact taken before him at the time it purports to have been taken." The judgement was affirmed.

For these reasons it is respectfully submitted that the order appealed from should be upheld.

EDWIN ROBT. WALKER,

Of Counsel with Appellee.

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Court of Errors and Appeals

Between

JOSEPH WHITEHEAD, et al.

Appellants,

and

ANNA W. BAIRD,

Respondent.

} Abridgement of
State of Case
Agreed on.

On May 27th, 1891, Joseph Whitehead and Greenleaf K. Sheridan, John O'Rourke, William T. Richmond and John T. Hoffman, Partners, trading as G. K. Sheridan and Company, creditors of the Hamilton Rubber Company, for and on behalf of themselves and all other creditors of that company who should come in and contribute, exhibited their bill of complaint in the Court of Chancery of this state against The Hamilton Rubber Company, a corporation organized under the laws of this state, thereby stating that it had suspended business and was insolvent, and praying for the appointment of a receiver, according to the form of the statute in such case made and provided; and such proceedings were thereupon had therein that a decree of said Court was then made thereby reciting that said corporation had suspended its ordinary business and was insolvent, and thereby appointing Frank A. Magowan receiver, with full power to demand, sue for, collect and receive, and take into his possession all the property of any and every description belonging to it at the time of its suspension, and to do and perform all the duties imposed upon him and required by law, and especially, by an act of the Legislature of this state

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entitled "An Act Concerning Corporations," approved April 7th, 1875; and immediately after his appointment, the said receiver, duly qualified and took upon himself the administration of his office, and also took into his possession all the property of said corporation.

Shortly after the filing of said bill The Bank of America, The Western National Bank of the City of New York, and The Union National Bank of Frenchtown, New Jersey, filed their petition in the said Court, in said cause setting
 10 forth that they were likewise creditors holding certain negotiable promisory notes made by said company, each payable at four months, and in the usual course of business acquired by said petitioner for value immedietly after their several dates, and then and ever since held by them respectively, the debt of The Bank of America being in the sum of \$5,153.30, with interest and protest fees due on the notes following:

Note, dated February 9th, 1891, for.....	\$2,574.79.
Note, dated February 16th, 1891, for.....	2,575.21.

The debt of The Western National Bank of New York,
 20 being in the sum of \$8,870.94, with interest and protest fees due on the notes following:

Note, dated January 28th, 1891, for.....	\$2,695.97.
Note, dated January 28th, 1891, for.....	1,033.39.
Note, dated February 2d, 1891, for.....	540.45.
Note, dated February 4th, 1891, for.....	2,657.99.
Note, dated May 6th, 1891, for.....	1,943.14.

And the debt of The Union National Bank, of Frenchtown, being in the sum of \$2,685 94, with interest and protest fees due on the notes following:

30 Note, dated March 4th, 1891, for	\$172.22.
Note, dated March 11th, 1891, for.....	2,513.72.

And the said petition stated that said petitioners were willing to contribute to the expenses of said suit, and prayed that they might be admitted as complainants therein; and thereupon an order was made in said suit, admitting the said petitioners as parties complainant

therein accordingly.

Shortly afterwards and within due time, the said creditors and also Anna W. Baird, the respondent, another creditor of said, The Hamilton Rubber Company, presented their several claims against it to said receiver for allowance, properly proved and substantiated by evidence, and the receiver admitted and allowed the said claims, save so far as relates to the allowance of the claim of said Anna W. Baird, as a preferred claim entitled to be paid before the payment of the other claims of the said insolvent, under and by virtue of a chattel mortgage, executed to her by said corporation on April 18th, 1891, hereinafter set forth, and as to such preference, disallowed the claim of said Anna W. Baird.

Thereupon the said Anna W. Baird, thinking herself aggrieved by the receiver's determination, appealed to the Chancellor pursuant to the 82d Section of the Statute above recited, who in a summary way, heard and determined the matter complained of by said Anna W. Baird, and made the order reversing the receiver's determination in relation to Anna W. Baird's claim by way of preference, and admitting it as a preferred claim by virtue of her said chattel mortgage, as hereinafter set forth; to which order of the Chancellor the said parties complainant, and also the said receiver have appealed to this court.

"A."

The total amount of claims presented to and allowed by said receiver as valid claims against the said insolvent corporation, is \$231,221,11, and the total amount of its property, (all of which the receiver has converted into money,) available for the payment of dividends to its creditors amounts to \$50 334,90, part whereof arose from the receiver's sale of the property comprised in said chattel mortgage.

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Court of Errors and Appeals

Between

JOSEPH WHITEHEAD, et al.

Complainants,

And

THE HAMILTON RUBBER

COMPANY, et al.

Defendants.

On Bill, &c.

Appeal of Anna W.

Baird, to Chancel-

lor, from Determi-

nation of Recei-

vers.

To his Honor Alexander T. McGill, Chancellor of the State of New Jersey :

The petition of Anna W. Baird, of the city of Philadelphia and State of Pennsylvania, respectfully shows :

1. That The Hamilton Rubber Company, the defendant corporation above named, at the several dates and times hereinafter in this paragraph mentioned, requested your petitioner to indorse for the said company's accommodation certain promissory notes hereinafter in this paragraph mentioned, and promised your petitioner that if your petitioner would indorse the said notes and deliver the same to it in order that it might negotiate the same for its own use, it would indemnify and save harmless your petitioner from any loss or damage by reason of your petitioner so indorsing and delivering the same to it; your petitioner accordingly indorsed the following notes for the said company's accommodation and delivered the same to it for the purpose and on the terms aforesaid, that is to say, a note dated January 7th, in the year 1891, made by said company for twenty-five hundred dollars, payable at four months;

another note dated January 12th, in said last mentioned year, made by said company for other twenty-five hundred dollars, payable at four months; another note dated January 12th, in the year last aforesaid, made by said company for five thousand dollars, payable at four months; another note dated January 19th, in said last mentioned year, made by said company for other five thousand dollars, payable at four months; another note dated January 29th, in said last mentioned year, made by said company for other sixty-five
10 hundred dollars, payable at four months; another note dated February 16th, in said last mentioned year, made by said company, for other five thousand dollars, payable at four months; another note also dated February 16th, in said last mentioned year, made by said company, for other five thousand dollars, payable at four months; another note dated Feb. 27th, in said last mentioned year, made by said company, for other six thousand dollars, payable at four months; another note dated March 3d, in said last mentioned year, made by said company, for other seven thousand
20 dollars, payable at four months; another note dated March 13th, in said last mentioned year, made by said company, for other five thousand dollars, payable at four months.

2. That on the 18th day of March, in the year 1891, the said company became and was indebted to your petitioner in the sum of other four thousand dollars, for money loaned and advanced to it by your petitioner.

3. That to secure the payment of said four thousand dollars with interest to your petitioner, as well as to secure like advances, not exceeding one hundred thousand dollars,
30 and also to secure your petitioner for all principal and interest money, costs and expenses which she might be compelled to pay in consequence of the failure of the said company to pay and take up at maturity the said notes hereinbefore described in paragraph 1, or any note which might be given in renewal thereof, or of any or of either of them, and which might be indorsed by your petitioner, and to

save your petitioner harmless by reason of her said indorsements the said company, by a deed of mortgage, commonly called a chattel mortgage, bearing date on the 18th day of April, in the year 1891, bargained and sold and conveyed unto your petitioner, her executors, administrators and assigns all the goods and chattels of every kind and description in the buildings and on the premises of the said company, situate on the northerly side of Clinton street, in the city of Trenton, in the county of Mercer, and State of New Jersey, where it was then engaged on the business of a rubber manufacturer in the said deed of mortgage described as follows:

“Said goods and chattels embrace all machinery not constituting realty, all goods manufactured or in process of manufacture, and all raw material,” at the time of the execution of the said mortgage upon said premises or which might afterwards be brought thereon, as if the same were in said indenture of mortgage particularly specified.

4. That said mortgage contained a condition that it should be void upon payment of said sum of four thousand dollars, with interest, and upon the said company paying and satisfying the said promissory notes hereinbefore mentioned in paragraph 1, and indemnifying and saving harmless your petitioner from any loss or damage by reason of your petitioner so indorsing and delivering the same as aforesaid.

5. That said mortgage was on the 11th day of May, in the year 1891, duly recorded in the office of the Clerk of the county of Mercer, at five minutes past eleven o'clock, in the forenoon of that day, in Book No. 10 of Chattel Mortgages, at pages 476, &c., the execution of the same having first been duly proved and such proof certified thereon and affidavit made and subscribed by your petitioner, stating the consideration of the said mortgage and as nearly as possible the amount due and to grow due thereon, having been first annexed thereto, as required by

law.

6. That on the 15th, day of April in the year 1891, by a deed of mortgage dated on that day expressed to be made by and between the said company on the first part, and your petitioner of the second part, in order to secure the payment of the indebtedness hereinbefore mentioned as well as other like obligations and advancements not exceeding one hundred thousand dollars, the said company conveyed to your petitioner and her heirs and assigns forever in fee
10 simple all those tracts or parcels of land situate, lying and being in the city of Trenton aforesaid, bounded and described as follows :

The first—Beginning on the easterly line of a tract of land, late of James T. Sherman, deceased, at a point three hundred feet northerly from the north side of Clinton street, and running thence (1) parallel to Clinton street and distance three hundred feet therefrom north, sixty-four and a half degrees east, two hundred and fifty feet to Mead street ; thence (2) by said Mead street and at right angles to
20 Clinton street north, twenty-five and a half degrees west, one hundred and seventy-five feet ; thence (3) parallel to the first course south, sixty-four and a half degrees west, two hundred and fifty feet to the said Sherman tract, and thence (4) by the line of that tract south, twenty-five and a half degrees east, one hundred and seventy-five feet to the place of beginning, containing one acre of land more or less.

The second—Beginning on the more westerly side of Mead street at the northeasterly corner of the lot of land conveyed by Caleb S. Green to Robert S. Manning and
30 Charles V. Mead and others by deed dated October 1, 1868, and running (1) along Mead street northwestwardly at right angles with Clinton street twenty feet to a point for a corner ; thence (2) along other land of said Caleb S. Green southwestwardly parallel with Clinton street, two hundred and fifty feet to the line of the tract of land formerly of James T. Sherman, deceased ; thence (3) along the line of

that tract southeastwardly, twenty feet to the northwesterly corner of the said lot of land conveyed to Robert S. Manning and Charles V. Mead and others, and thence (4) along the line of that lot of land northeastwardly parallel to Clinton street, two hundred and fifty feet to Mead street and the place of beginning :

And that on the 15th day of April in the year 1891, by another deed of mortgage dated on that day expressed to be made by and between the said company of the first part, and your petitioner of the second part, and made for the same purpose as the said mortgage hereinbefore mentioned in this paragraph the said company conveyed to your petitioner and her assigns forever in fee simple, all that other tract or parcel of land situate, lying and being in the city of Trenton aforesaid, bounded and described as follows, to wit, beginning on the northerly side of Clinton street and at the southeast corner of a lot of land late of James T. Sherman, deceased, and running thence (1) by Clinton street north, sixty-four and one-half degrees east, two hundred and fifty feet to Mead street; thence (2) by Mead street north, twenty-five and one-half degrees west, three hundred feet to the corner of a lot conveyed by Caleb S. Green and wife to Charles V. Mead and others; thence (3) by their line southwesterly parallel to Clinton street, two hundred and fifty feet to the line of the Sherman lot aforesaid, and thence (4) by the line of that lot south, twenty-five and one-half degrees east, three hundred feet to the place of beginning.

7. That said last mentioned two real estate mortgages each contained a proviso that the same should be void upon payment of the sums of money advanced by your petitioner to the said company with interest, and upon the said company paying and satisfying the promissory notes indorsed by your petitioner and delivered to it, and upon the said company indemnifying and saving harmless your petitioner from any loss or damage by reason of your petitioner so

indorsing and delivering such notes to the said company.

8. That said last mentioned two real estate mortgages were each on the 11th day of May, in the year 1891, at the hour of five minutes after eleven o'clock, in the forenoon of that day, duly recorded in the office of the Clerk of the county of Mercer, in Book No. 85 of Mortgages, at pages 110, &c., and 113, &c., the execution of the same having been first duly proved respectively and such proof certified thereon, as required by law.

10 9. That said chattel mortgage and said two real estate mortgages and the said promissory notes secured thereby, and which your petitioner, as indorser as aforesaid, was obliged to and did pay, to which your petitioner refers for certainty, are in her possession ready to be produced and proved.

10 10. That the said company on the 8th day of May, in the year eighteen hundred and ninety-one, by two deeds of mortgage, both dated on that day, one commonly called a chattel mortgage and the other a real estate mortgage, 20 mortgaged said goods and chattels and said lands to Orilla M. Whitehead to secure the payment of seventy-five hundred dollars, with interest, which said last mentioned two mortgages were on the 11th day of May, in said last mentioned year, recorded in said County Clerk's office, at the hour of eleven o'clock in the forenoon of that day, the chattel mortgage, in Book No. 10 of Chattel Mortgages, at pages 474, &c., and the real estate mortgage in Book No. 85 of Real Estate Mortgages, at pages 108, &c.; nevertheless, your petitioner charges that the said two mortgages 30 executed to the said Orilla M. Whitehead were taken by her with full notice of the said mortgages so executed to your petitioner as aforesaid, and your petitioner is entitled to priority in payment over the said Orilla M. Whitehead.

11. That the said company on the 8th day of May, in the year 1891, mortgaged said lands to The Trenton Banking Company to secure the payment of twenty-five hundred

dollars, with interest, which said last mentioned mortgage was on the 11th day of May, in said last mentioned year, at the hour of twelve o'clock noon of that day, recorded in said Clerk's office, in Book 85 of Mortgages, at pages 115, &c.

12. That the said company did not pay to your petitioner the sums of money advanced by her to it and did not indemnify or save harmless your petitioner from loss or damage by reason of her so indorsing and delivering the said promissory notes to the said company, and that there is due to your petitioner for moneys loaned and advanced by her to the said company and on account of promissory notes, which your petitioner as indorser as aforesaid, was obliged to pay and did pay, and which are secured unto your petitioner by the said mortgages so executed to her as aforesaid, the sum of eighty-eight thousand five hundred dollars and upwards; and that your petitioner being such creditor as aforesaid, did heretofore and within due time, present her claims to Frank A. Magowan, the receiver, appointed in this cause for allowance, and demanded to be paid as a preferred creditor out of the proceeds or avails of the property comprised in her said mortgages; that the same were presented in due form, properly proved and substantiated by evidence and submitted to said receiver, and that the said receiver, whilst admitting and allowing her said claims, refused to pay the same to her as a preferred creditor out of the avails or proceeds of the property comprised in her said mortgages.

13. That by the report of the said receiver, filed in this cause on the 15th day of November, in the year 1892, it is stated and set out that the said receiver has in his hands cash receipts amounting to fifty-eight thousand nine hundred and fifty dollars and forty-nine cents, less disbursements of about eighty-six hundred and fifteen dollars and fifty-nine cents, the greater part of which said receipts of cash arose from the conversion of the said property, real

and personal, covered by the said mortgages of your petitioner.

14. And your petitioner conceives that she is aggrieved by said refusal of said receiver to pay her as a preferred creditor out of the proceeds or avails of the property comprised in her said mortgages, and insists that she should be paid thereout as a preferred creditor.

And your petitioner respectfully appeals from said determination of said receiver refusing as aforesaid to this honorable Court and prays that the same may be reversed, and such order made in the premises as shall be agreeable to equity and good conscience.

And your petitioner as in duty bound will ever pray, &c.

EDWIN ROBT. WALKER,

Solicitor for and of Counsel with Petitioner.

STATE OF NEW JERSEY, }
County of Mercer, } ss.

Edwin Robt. Walker, being duly sworn according to law, on his oath, says, that he is the solicitor of Anna W. Baird, the petitioner named in the foregoing petition; that he has read the said petition and knows the contents, and that the matters and things therein contained are true so far as relates to the acts and doings of the said petitioner, and so far they relate to the acts and doings of others he believes them to be true.

EDWIN ROBT. WALKER.

Sworn and subscribed before me this 7th day of March, A. D. 1895.

FRANCIS B. LEE, *M. C. C. of N. J.*

ON BILL, &c., ORDER TO SHOW CAUSE.

Upon reading and filing the petition of Anna W. Baird, of the city of Philadelphia, and State of Pennsylvania, wherein it is recited, among other things, that the said defendant, the Hamilton Rubber Company, did, on the eighteenth day of April, eighteen hundred and ninety-one, make and execute unto the said petitioner a certain mortgage commonly called a chattel mortgage, wherein and whereby it bargained, sold and conveyed unto the said petitioner, her executors, administrators and assigns, all the goods and chattels of every kind and description in the buildings and 10 on the premises of the said company, in the city of Trenton, to secure the payment of the sum of four thousand dollars, with interest, for money loaned and advanced, as well as to secure like advances not exceeding one hundred thousand dollars, and also to secure to the said petitioner all principal and interest money, costs and expenses, which she might be compelled to pay in consequence of the failure of said company to pay, and take up at maturity certain promissory notes in paragraph one, in said petition, particularly mentioned and described, all of which had been endorsed by the said petitioner for the benefit and accommodation of the said defendant company, which said mortgage 20 was duly acknowledged and recorded in the office of the Clerk of the County of Mercer, as in the said petition in that behalf particularly mentioned and set out; and further that on the fifteenth day of April in said year of eighteen hundred and ninety-one, by deed of mortgage dated on that day, the said defendant company, in order to secure the payment of the indebtedness hereinbefore mentioned, as well as other like obligations and advancements not exceeding 30 the said sum of one hundred thousand dollars, granted and conveyed to the said petitioner and her heirs, and assigns forever all those tracts or parcels of land and premises in the said petition in that behalf particularly mentioned and described, which said mortgage was duly acknowledged and

recorded as in said petition mentioned; and further, that there is due to the said petitioner for and on the account aforesaid, secured by said mortgages, upwards of the sum of eighty-eight thousand and five hundred dollars, and that notwithstanding the said petitioner has presented her said claim to the receiver of said company duly verified, and demanded to be paid as a preferred creditor, out of the proceeds or avails of the property comprised and described in her said mortgages, yet, nevertheless, while admitting and
10 allowing her said claims, that he has refused to pay the said claims to her as a preferred creditor, and praying that the said determination of the said receiver, in so refusing as aforesaid, may be reversed;

It is, on this thirteenth day of March, eighteen hundred and ninety-five, on motion of Edwin Robert Walker, of counsel with the said petitioner, ordered, that the said receiver, and all of the parties to the record in this cause, as well as those creditors who have demanded of said receiver payment of their claims against said defendant company by
20 way of preference, do show cause before this court, at the State House, in Trenton, on Tuesday, the nineteenth day of March, instant, at ten o'clock in the forenoon, or as soon thereafter as counsel can be heard thereon, why the determination of said receiver, refusing to admit the aforesaid claims of the said petitioner, to be preferred claims against said defendant company or its assets, should not be reversed, set aside and for nothing holden, and that said receiver be directed to admit the preference prayed by said petitioner for her said claims.

30 And it is further ordered that a copy of this order be served upon the said receiver, each of the parties to the record in this suit, and each of the creditors who have demanded of the said receiver to have their respective claims admitted by way of preference, or upon their several and respective solicitors, at least five days before the return day

of this order, which copies need not be certified.

Respectfully advised,

ALEXANDER T. MCGILL,

JOHN T. BIRD,

Chancellor.

Vice Chancellor.

ON BILL, &c.—ON PETITION OF APPEAL OF ANNA
W. BAIRD FROM FINDING AND DETER-
MINATION OF RECEIVER,
&c.—ORDER.

This matter being opened to the court upon the petition 10
of Anna W. Baird, heretofore filed herein, setting forth,
among other things, that the said defendant The Hamilton
Rubber Company did on the eighteenth day of April, eigh-
teen hundred and ninety-one, make and execute unto the
said petitioner Anna W. Baird a certain mortgage, com-
monly called a chattel mortgage, wherein and whereby it
bargained, sold and conveyed unto the said petitioner, her
executors, administrators and assigns, all the goods and
chattels of every kind and description in the buildings and
on the premises of the said company, in the city of Trenton, 20
to secure the payment of the sum of four thousand dollars
with interest, for money loaned and advanced, as well as to
secure like advances not exceeding one hundred thousand
dollars, and also to secure to the said petitioner all principal
and interest money, costs and expenses which she might be
compelled to pay in consequence of the failure of said com-
pany to pay and take up at maturity certain promissory
notes in paragraph one, in said petition, particularly men-
tioned and described, all of which said notes had been
endorsed by the said petitioner for the benefit and accom- 30
modation of the said defendant company, which said mort-
gage was duly acknowledged and recorded in the office of
the Clerk of the County of Mercer as in the said petition in

that behalf particularly mentioned and set out ; and further, that on the fifteenth day of April, in said year, eighteen hundred and ninety-one, by deed of mortgage dated on that day, the said defendant company, in order to secure the payment of the indebtedness hereinbefore mentioned, as well as other like obligations and advances, not exceeding said sum of one hundred thousand dollars, granted and conveyed to the said petitioner and her heirs and assigns forever, all those tracts or parcels of land and premises in the
10 said petition in that behalf particularly mentioned and described, which said mortgage was duly acknowledged and recorded as in the said petition mentioned ; and further, that there was due to the said petitioner for and on the account aforesaid, secured by the said mortgages, upwards of the sum of eighty-eight thousand and five hundred dollars, and that notwithstanding the said petitioner had presented her claim therefor to the receiver of said company duly verified, and demanded to be paid thereon as a preferred creditor out
20 of the proceeds or avails of the property comprised and described in her said mortgage, yet, that nevertheless, while admitting and allowing her said claims, that said receiver had refused to pay the same to her as a preferred creditor, and praying that the said determination of the said receiver, in so refusing as aforesaid, might be reversed ; and it appearing that due and legal service of the order to show cause made upon the reading and filing of the said petition was duly served upon or due and legal service thereof acknowledged for the said receiver, each of
30 the parties to the record in this suit, and each of the creditors who have demanded of the said receiver to have their respective claims admitted by way of preference, by their several and respective solicitors ; and the matter coming on to be heard in the presence of Edwin Robert Walker, of counsel with the said petitioner, and of Garret D. W. Vroom of counsel with the said receiver and the complainants named in the bill, and of James Buchanan of counsel with

The Bank of America, The Western National Bank of the City of New York and The Union National Bank of Frenchtown, New Jersey; and of Barton B. Hutchinson, of counsel with William A. Betts, William C. DeLong and Francis H. Robinson, late partners &c.; Otto G. Mayer and William Jay, partners &c.; The Farmers' National Bank of Allentown, New Jersey, and Joseph Cantor; and of William M. Lanning of counsel with The Danbury National Bank; and of William L. Dayton, of counsel with The Trenton Banking Company; and of Woodbury D. Holt, of counsel with Orilla M. Whitehead, and Orilla M. Whitehead executive of Joseph Whitehead deceased; Franklin W. Whitehead and Edgar Whitehead; and upon hearing the testimony of the witness produced on the part of the said petitioner, and upon reading and examining the exhibits offered on her behalf, and upon hearing the arguments of counsel thereupon, and duly considering the same,—the court being now of opinion that the said finding and determination of the said receiver, so far forth as it affects the validity, priority and preference of the said real estate mortgage of the said petitioner should be reversed, and that the question of the validity of the chattel mortgage of the said petitioner, should be reserved for further examination and consideration: and no cause being shown or appearing to the contrary:—

It is, on this second day of April, eighteen hundred and ninety-five, on motion of Edwin Robert Walker, of counsel with the said petitioner, ordered, that the finding and determination of the said receiver in this cause, so far forth as he refused to allow to the said petitioner the amount due upon her real estate mortgage in the aforesaid petition and order to show cause, and hereinbefore mentioned and set out, as a preferred claim against the assets in his hands applicable to the payment thereof, of the said defendant company, be, and the same is hereby, reversed, set aside and for nothing holden; and that the said receiver be, and he is hereby, directed to allow unto the said petitioner,

Anna W. Baird, the preference prayed for by her for and on account of her said real estate mortgage.

Respectfully advised,

JOHN T. BIRD,

Vice Chancellor.

ALEXANDER T. MCGILL,

Chancellor.

ON BILL, &c.—ON PETITION OF APPEAL OF ANNA
W. BAIRD FROM FINDING AND DETER-
MINATION OF RECEIVER,
&c.—ORDER.

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This matter being opened to the court upon the petition of Anna W. Baird, heretofore filed herein, setting forth, among other things, that the said defendant the Hamilton Rubber Company did, on the eighteenth day of July, eighteen hundred and ninety-one, make and execute unto the said petitioner Anna W. Baird, a certain mortgage, commonly called a chattel mortgage, wherein and whereby it bargained, sold and conveyed unto the said petitioner, her executors, administrators and assigns, all the goods and chattels of every kind and description in the buildings and on the premises of the said defendant company in the city of Trenton, to secure the payment of the sum of four thousand dollars, with interest, for money loaned and advanced, as well as to secure like advances, not exceeding one hundred thousand dollars, and also to secure to the said petitioner all principal and interest money, costs and expenses, which she might be compelled to pay in consequence of the failure of said company to pay and take up, at maturity, certain promissory notes, in paragraph one in said petition particularly mentioned and described, all of which said notes had been indorsed by the said petitioner, for the benefit and accommodation of the said defendant company, which said chattel mortgage was duly acknowledged and

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recorded in the office of the Clerk of the county of Mercer, as in the said petition in that behalf particularly mentioned and set out; and further, that on the fifteenth day of April, in said year eighteen hundred and ninety-one, by deed of mortgage dated on that day, the said defendant company, in order to secure the payment of the indebtedness hereinbefore mentioned, as well as other like obligations and advances, not exceeding said sum of one hundred thousand dollars, granted and conveyed to the said petitioner and her heirs and assigns forever, all those tracts or parcels of land and premises in the said petition in that behalf particularly mentioned and described, which said mortgage was duly acknowledged and recorded as in the said petition mentioned; and further, that there was due to the said petitioner, for and on account thereof, secured by the said mortgages, upwards of the sum of eighty-eight thousand five hundred dollars, and that notwithstanding said petitioner had presented her claim therefor to the said receiver of the said company, duly verified, and demanded to be paid thereon as a preferred creditor, out of the proceeds or avails of the said property comprised and described in her said mortgages, yet that, nevertheless, while admitting and allowing her said claim, that said receiver had refused to pay the same to her as a preferred creditor, and praying that the determination of the said receiver in so refusing as aforesaid, might be reversed; and the matter coming on to be heard in the presence of counsel for the respective parties in interest, upon due notice, and upon hearing the testimony of the witnesses produced upon the part of the said petitioner, and upon reading and examining the exhibits on her behalf, and upon hearing the arguments of counsel thereupon, and after duly considering the same, it was, on the second day of April last past, by an order made in the above-stated cause and filed therein, ordered that the finding and determination of the said receiver, so far forth as he refused to allow to the said petitioner the amount due

upon her real estate mortgage in the aforesaid petition and order to show cause, and hereinbefore mentioned and set out, as a preferred claim against the assets of the said defendant company in his hands applicable to the payment thereof, be and the same were thereby reversed, set aside and for nothing holden, and the said receiver directed to allow to the said petitioner, Anna W. Baird, the preference prayed for by her for and on account of her said real estate mortgage; the court having, however, in and by the said
10 last mentioned order, expressly reserved the question of the validity of the chattel mortgage of the said petitioner.

And now, the question of the validity of the said chattel mortgage coming on to be heard before the court, and it being objected thereto by the complainants and receiver and by the Bank of America, The Western National Bank of the city of New York, The Union National Bank of Frenchtown, New Jersey; William A. Betts, William C. Delong and Francis H. Robinson, late partners, &c., Otto
20 G. Mayer and William Jex, partners, &c.; The Farmers National Bank of Allentown, New Jersey; and Joseph Cantor, that the said mortgage was and is void as against the creditors of the said defendant company, because the affidavit of the holder thereof annexed thereto, stating the consideration of said mortgage, and as nearly as possible the amount due and to grow due thereon, was defective in this, that the said affidavit having been, or purporting to have been, taken out of the State of New Jersey, did not contain a recital in the jurat or certificate of such oath; that
30 the notary taking, or purporting to have taken, the same, was a notary of the State in which the same was taken, and that his official designation was not annexed to his signature and attested under his official seal; and the court having inspected the said chattel mortgage and the affidavit thereto, and having heard the testimony offered on behalf of the petitioner and the arguments of Edwin Robert Walker, of counsel with the petitioner, and of Garret D.

W. Vroom, of counsel with the receiver and complainants herein, and of James Buchanan, of counsel with the Bank of America, the Western National Bank of the city of New York, and the Union National Bank of Frenchtown, New Jersey, and of Barton B. Hutchinson, of counsel with William A. Betts, William C. Delong and Francis H. Robinson, late partners, &c. Otto G. Meyer and William Jex, partners, &c., The Farmers National Bank of Allentown, New Jersey, and Joseph Cantor, being all of the parties to the record in this cause; and having taken time 10
to consider the same, is now of opinion that the said affidavit and jurat are imperfect and defective in form, but sufficient in substance, and that the said petitioner has established, by due proof, the official character of the notary public of the State of Pennsylvania, who took the affidavit of the said petitioner to the aforesaid chattel mortgage in said State, at the time that he took the same, and that he was then and there a notary public of the State of Pennsylvania, and duly authorized to take the said affidavit, and did actually take the same according to law, and that, 20
therefore, the petitioner is entitled to all of the relief prayed for by her in her aforesaid petition.

It is thereupon, on this third day of September, eighteen hundred and ninety-five, on motion of Edwin Robert Walker, of counsel with the said petitioner, ordered that the finding and determination of the said receiver, so far forth as he refused to allow to the said petitioner the amount due upon her aforesaid chattel mortgage as a preferred claim against the assets of the said defendant company in his hands, applicable to the payment thereof, be, 30
and the same are hereby reversed, set aside and for nothing holden, and the said receiver is hereby ordered and directed to allow to the said petitioner the preference prayed for by her for and on account of her aforesaid chattel mortgage.

Respectfully advised,

JOHN T. BIRD,
Vice Chancellor.

ALEX. T. MCGILL,
Chancellor.

ON PETITION FOR PREFERENCE FOR CHATTEL
MORTGAGE, &c.—NOTICE OF APPEAL.

The receiver herein, hereby appeals from the order made in this court in the above stated cause on the third day of September, eighteen hundred and ninety-five, wherein it is adjudged that the finding and determination of the receiver herein, so far forth as he refused to allow to Anna W. Baird, the petitioner, the amount due upon her chattel mortgage, in the pleadings in the cause mentioned, as a preferred claim
10 against the assets of the said defendant company in his hands applicable to the payment thereof, be, and the same was thereby reversed, set aside and for nothing holden, and the said receiver ordered and directed to allow to the said petitioner the preference prayed for by her for and on account of her aforesaid mortgage, to the Court of Errors and Appeals in the last resort in all causes.

Dated October 15th, 1895.

G. D. W. VROOM,

Solicitor and of Counsel with Receiver.

20 I conceive good cause for appeal in the above stated cause.

G. D. W. VROOM,

Of Counsel with Receiver.

PETITION OF APPEAL.

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

The petition of Frank A. Magowan, receiver of the Hamilton Rubber Company in a cause depending in the Court of Chancery of New Jersey, wherein Joseph Whitehead and others are complainants, and the said Hamilton
30 Rubber Company is defendant, respectfully shows that your petitioner finds himself aggrieved by an order made in the Court of Chancery by Alexander T. McGill, Chancellor of New Jersey, in the cause aforesaid, bearing date on the third

day of September, eighteen hundred and ninety-five, in this respect, to wit, that the said order adjudges that the finding and determination of the receiver herein, so far forth as he refused to allow to Anna W. Baird, the petitioner, the amount due upon her chattel mortgage, in the pleadings in the cause mentioned, as a preferred claim against the assets of said company in his hands applicable to the payment thereof be, and the same was thereby reversed, set aside and for nothing holden, and the said receiver ordered and directed to allow to the said petitioner the preference prayed for by her, for and on account of her aforesaid mortgage. 10

And your petitioner humbly appeals from that part of the order of the said Chancellor, which adjudges as aforesaid, upon the ground that the same is erroneous, for that the said order should have adjudged that the aforesaid finding and determination of said receiver, in refusing to allow to the said petitioner the preference prayed for by her for and on account of her aforesaid chattel mortgage, be in all things affirmed, and the said petition, in that behalf, dismissed 20 with costs.

Your petitioner therefor prays that the said order, 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.

G. D. W. VROOM,

Solicitor and of Counsel with Appellant.

ANSWER TO PETITION OF APPEAL.

The answer of the above named appellee to the petition 30 of appeal of the above named appellant.

This respondent, not acknowledging all or any of the matters and things, which, in the said petition of appeal are contained, to be true, for answer thereto, nevertheless, says

and admits that an order was, on the third day of September, last past, made and entered in the Court of Chancery in the cause for that purpose mentioned in the said petition, as is therein stated, but as to the substance and form thereof this respondent prays a reference thereto when the same shall be produced. And this respondent is advised and believes that the said order is agreeable to equity and prays that the same may be affirmed with costs to be adjudged to this respondent.

EDWIN ROBERT WALKER,

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Solicitor and of Counsel with Respondent.

Exhibit B, 2. CHATTEL MORTGAGE.

KNOW ALL MEN BY THESE PRESENTS that The Hamilton Rubber Company a corporation formed under and existing by the laws of the State of New Jersey, and doing business in the city of Trenton in said State, for securing the payment of the money herein mentioned and referred to and for the further purpose of securing and saving harmless by reason of certain indorsements hereinafter named, Anna W. Baird, of the city and county
 20 of Philadelphia, in the commonwealth of Pennsylvania party of the second part, and in further consideration of the sum of one dollar to them in hand paid before the sealing hereof the receipt whereof is hereby acknowledged, have bargained and sold, and by these presents do bargain and sell unto the said Anna W. Baird, her executors, administrators and assigns all the following named goods and chattels to wit :

All the goods and chattels of every kind and description in buildings and on the premises of The Hamilton Rubber
 30 Company, situate on the northerly side of Clinton street, in the city of Trenton, County of Mercer, and State of New Jersey, now in the use and occupancy of the said Rubber Company, said goods and chattels embrace all machinery

and admits that an order was, on the third day of September, last past, made and entered in the Court of Chancery in the cause for that purpose mentioned in the said petition, as is therein stated, but as to the substance and form thereof this respondent prays a reference thereto when the same shall be produced. And this respondent is advised and believes that the said order is agreeable to equity and prays that the same may be affirmed with costs to be adjudged to this respondent.

EDWIN ROBERT WALKER.

Like petitions of appeal on behalf of other appellants, and also like answers thereto on behalf of respondent.

KNOW ALL MEN BY THESE PRESENTS that The Hamilton Rubber Company a corporation formed under and existing by the laws of the State of New Jersey, and doing business in the city of Trenton in said State, for securing the payment of the money herein mentioned and referred to and for the further purpose of securing and saving harmless by reason of certain indorsements hereinafter named, Anna W. Baird, of the city and county
20 of Philadelphia, in the commonwealth of Pennsylvania party of the second part, and in further consideration of the sum of one dollar to them in hand paid before the sealing hereof the receipt whereof is hereby acknowledged, have bargained and sold, and by these presents do bargain and sell unto the said Anna W. Baird, her executors, administrators and assigns all the following named goods and chattels to wit :

All the goods and chattels of every kind and description in buildings and on the premises of The Hamilton Rubber
30 Company, situate on the northerly side of Clinton street, in the city of Trenton, County of Mercer, and State of New Jersey, now in the use and occupancy of the said Rubber Company, said goods and chattels embrace all machinery

not constituting realty, all goods manufactured or in process of manufacture and all raw material.

AND WHEREAS, some of the goods, chattels and personal property above named and referred to may be sold or worn out and others be brought on said premises, it is therefore understood and agreed that this mortgage shall be a lien on all goods, chattels and personal property hereafter brought on said premises, as fully and completely as if the same were now then and particularly specified herein.

To have and to hold all and singular, the goods and chattels above bargained and sold or intended so to be unto the said Anna W. Baird, her executors, administrators and assigns forever. 10

And the said party of the first part for themselves and their successors all and singular the said goods and chattels above bargained and sold, unto the said party of the second part, her executors, administrators and assigns, against them the said party of the first part and against all and every person or persons whomsoever, shall and will, warrant and forever deferred. 20

WHEREAS, at the special instance and request of the said party of the first part, the said party of the second part has heretofore from time to time become accommodation indorser on certain promissory notes made by said first party for the said first party's use and benefit, by reason whereof, the said second party has become liable and may be compelled to pay large sums of money; and,

WHEREAS, the said Anna W. Baird may in the future indorse other promissory notes and thereby assume other obligations and liabilities; and, 30

WHEREAS, also said Anna W. Baird may hereafter from time to time advance moneys as loans to the said The Hamilton Rubber Company, for each and for all of which said indorsements and loans made or to be made the said first party desire to secure the said Anna W. Baird against all loss and to save her harmless.

Now, therefore, and it is the true intent and meaning of these presents, that if the said The Hamilton Rubber Company or their successors shall, will and truly pay and satisfy, or cause to be paid and satisfied, all of their promissory notes which have been or hereafter shall be indorsed by the said Anna W. Baird, for the benefit and accommodation of the said The Hamilton Rubber Company, as the same shall fall due respectively with all charges and expenes thereon, with interest according to the tenor and effect of said promissory notes, and shall pay or cause to be paid unto said
10 Anna W. Baird, her executors or administrators, such sum or sums of money not exceeding one hundred thousand dollars as said Anna W. Baird may loan and advance to the said The Hamilton Rubber Company with all interest that may fall due thereon, according to the tenor and effect of said loans, to the end and intent that said The Hamilton Rubber Company shall always keep, preserve and save harmless, the said Anna W. Baird, from all loss, damage, expense, costs and disadvantage from having endorsed said
20 notes, and shall fully pay all loans and advancements made by said Anna W. Baird, as aforesaid; then and from thenceforth these presents and every thing herein contained shall cease and become null and void; anything herein contained to the contrary in any wise notwithstanding.

And the said party of the first part for themselves and their successors and assigns, do covenant and agree to and with the said party of the second part, her executors, administrators and assigns, that in case default shall be made in the payment of any of the notes indorsed as aforesaid, or in case any default shall be made in the payment
30 of any loan or advancement made as aforesaid, according to the tenor and effect thereof, or in case the said party of the first part at any time before the date of payment of any note or loan, remove said goods and chattels, or any of them, except in the ordinary course of business, or shall permit or suffer any attachment or other process against

property to be issued against them, or permit or suffer any judgment to be entered up against them, then it shall and may be lawful for the said Anna W. Baird, her executors, administrators or assigns, with the aid and assistance of any person or persons, to seize and take said goods and chattels, wherever the same may be found, and sell and dispose of the same for the best price they can obtain, and to pay said loans and advances and the said promissory notes, and all charges touching and concerning the same, rendering the overplus (if any) unto the said The Hamilton 10
Rubber Company, their successors or assigns.

In witness whereof, the said The Hamilton Rubber Company have, by a resolution of their board of directors, authorized and caused their president to sign and set the common seal of said company to these presents, and thus to sign, seal and deliver this indenture as their voluntary act and deed the day and year first above written.

JOSEPH WHITEHEAD, [L. S.]
President.

Signed, sealed and delivered in the presence of 20

FRED'K WHITEHEAD.

STATE OF NEW JERSEY, }
County of Mercer, } ss.

Be it remembered that on this eighteenth day of April, in the year of our Lord eighteen hundred and ninety-one, before me, a Master in Chancery of the State of New Jersey, personally appeared Frederick Whitehead, who, being duly sworn according to law, on his oath says: That he is secretary of the Hamilton Rubber Company, the within named mortgagors; that he well knows the common and corporate seal of said company; that the seal affixed to the within indenture of mortgage is the corporate seal of said company; that the same was affixed to said indenture of mortgage and the said indenture of mortgage was signed, sealed and delivered by Joseph Whitehead, who was at the date 30

of the said execution thereof, the president of the said company, in the presence of this deponent, as the voluntary act and deed of the said company, and that he, the deponent, then and there, signed his name to the said indenture as subscribing witness.

FRED'K WHITEHEAD.

Sworn, subscribed and acknowledged this 18th day of April, A. D. 1891, before me,

WOODBURY D. HOLT,

10

M. C. C.

STATE OF PENNSYLVANIA, }
 City of Philadelphia, } ss.

Anna W. Baird, of full age, being duly sworn according to law, on her oath deposes and says, that she is the mortgagee named in, and the holder of the foregoing mortgage; that the consideration of said mortgage is money loaned to and notes indorsed for the within named mortgagors, the said The Hamilton Rubber Company, by this deponent, at the special instance and request of said company and for
 20 their benefit; that the money loaned is the sum of four thousand dollars and loaned and paid to said company by deponent, March 18th, 1891; that the said notes indorsed by this deponent, at the request of and for the benefit of said company, are notes made by said company and are as follows, to wit:

- Note dated January 7, 1891, at 4 months, for \$2,500.00.
- Note dated January 12, 1891, at 4 months, for \$2,500.00.
- Note dated January 12, 1891, at 4 months, for \$5,000.00.
- Note dated January 19, 1891, at 4 months, for \$5,000.00.
- 30 Note dated January 29, 1891, at 4 months, for \$6,500.00.
- Note dated February 16, 1891, at 4 months, for \$5,000.00.
- Note dated February 16, 1891, at 4 months, for \$5,000.00.
- Note dated February 27, 1891, at 4 months, for \$6,000.00.
- Note dated March 3, 1891, at 4 months, for \$7,000.00.
- Note dated March 13, 1891, at 4 months, for \$5,000.00.

Aggregating forty-nine thousand five hundred dollars; that as nearly as this deponent is able to state, the amount due and to grow due on said mortgage is the above named four thousand dollars, loaned with interest, and so much of the above named notes as the deponent may legally be compelled to pay, because of her said indorsement, together with interest, and such costs and expenses as may actually be incurred by this deponent in the premises, in accordance with the terms, tenor and effect of said mortgage.

ANNA W. BAIRD. 10

Sworn and subscribed before me,
the 8th, May 1891.

ALEXANDER RAMSEY,

Notary Public.

{ ALEXANDER RAMSEY,
NOTARY PUBLIC,
PHILADELPHIA, PA. }

Received in the clerk's office of the county of Mercer, on the 11th day of May, A. D., 1891, at 11:05 o'clock in the forenoon, and recorded in book 10, of chattel mortgage of said county, on page 476, &c.

R. H. MOORE,

Clerk. 20

Transcript of shorthand notes of testimony taken in the above stated cause, at the State House, in Trenton, New Jersey, on Tuesday, September 3d, 1895, before his Honor John T. Bird, Vice Chancellor.

Appearances.

Mr. E. R. Walker, for Anna W. Baird.

Mr. B. B. Hutchinson, for William A. Betts, and others.

Alexander Ramsey, a witness produced on the part of the petitioner, being, duly sworn, testifies as follows: 30

Direct examination by Mr. Walker.

Q. You are a citizen and resident of what place, Mr. Ramsey?

A. Philadelphia, State of Pennsylvania.

Q. Did you in the year 1891, occupy,—fill any office in the State of Pennsylvania?

A. I was a Notary Public of the Commonwealth of Pennsylvania, residing in Philadelphia.

Q. I show you a paper and ask you what that is ?

A. That is my commission as Notary of the State.

Q. Did you act as Notary Public under this commission ?

A. I did.

Q. Did you act under that commission on the 8th day of May 1891, as Notary Public ?

A. I did.

Q. I show you a paper which is a chattel mortgage, given by The Hamilton Rubber Company to Anna W. Baird, and
10 is already marked "B. 2" in the case, and ask you whose signature that is appended to that jurat ?

A. That is my signature.

Q. And whose seal ?

A. That is my notorial seal.

Q. Do you know Anna W. Baird ?

A. I may say I do, I have frequently taken her affidavit.

Q. Did you on the 8th day of May, 1891, take her affidavit to that chattel mortgage ?

A. I did.

20 By Mr. Walker :—We offer the commission and rest.

By the Court :—Is that all Mr. Walker ?

By Mr. Walker :—I might asked the witness if he was sworn.

Q. Were you sworn as a notary ?

A. I was.

Q. Sworn to faithfully perform your duties as notary public ?

A. Yes, sir.

Q. Under this commission ?

30 A. Yes, sir; to defend the constitution of the State of Pennsylvania.

By Mr. Hutchinson :—I understand that this testimony is now offered formally under the decision of your Honor ?

Q. By the Court—Yes, sir.

By Mr. Walker :—I offer the commission and it had better be marked B. 3.

Commission marked "Ex. B, 3."

EXHIBIT B, 3.

IN THE NAME AND BY AUTHORITY OF THE
COMMONWEALTH OF PENNSYLVANIA,

{ SEAL }

{ VIRTUE, LIBERTY AND INDEPENDENCE. }

10

EXECUTIVE DEPARTMENT.

TO ALL TO WHOM THESE PRESENTS SHALL COME, GREET-
ING: Know ye, That reposing a special trust and confidence
in the prudence, int grity and ability of Alex. Ramsey, of
the County of Philadelphia, and under the authority of the
Constitution and Laws of the said Commonwealth, in such
case made and provided, I have nominated, and, by and
with the advise and consent of two-thirds of all the mem-
bers of the Senate, have appointed and do by these presents
commission him to be a NOTARY PUBLIC for the Common- 20
wealth of Pennsylvania, to reside in the city of Philadel-
phia, in the county aforesaid.

HE IS, THEREFORE, to have and to hold the said office,
together with all the rights, powers, and emoluments there-
unto belonging or by law in anywise appertaining, for the
period of four years, if he shall so long behave himself well.

This appointment to compute from Aug. 5, 1887.

{ SEAL }

Given under my hand and the great seal
of the State, at the city of Harrisburg, this 30
eight day of February, in the year of our
Lord, one thousand eight hundred and
eighty-nine, and of the Commonwealth, the
one hundred and thirteenth.

By the Governor,

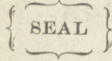
JAMES A. BEAVER.

CHARLES W. STONE,

Secretary of the Commonwealth.

Recorded in the office for recording of deeds, in and for
the city and county of Philadelphia, in Notary Public Com-

mission Book, No. 9, page 235, &c. Witness my hand and seal of office, this twenty-eight day of February, A. D., 1889-



GEO. G. PIERIE,
Recorder of Deeds.

OPINION.

JOSEPH WHITEHEAD vs. HAMILTON RUBBER COMPANY.

The statute respecting oaths, which directs that "When
10 any oath required to be taken in any suit or legal proceeding
in this State or for any lawful purpose whatever * *
when take out of this State, may be taken before any
notary public of the State, Territory, nation, kingdom or
country in which the same shall be taken, or before any
officer who may be authorized by the laws of this State to
take the acknowledgment of deeds in such State, Territory,
nation, kingdom or country, and a recital that he is such
notary or officer in the jurat or certificate of such oath,
affirmation or affidavit and his official designation annexed
20 to his signature and attested under his official seal, will be
sufficient proof that the person before whom the same is
taken is such notary or officer," is not complied with in
the absence of a substantial certification by the notary, that
he is such notary public, as well as to affix his official
designation to the signature of his name and also annex
thereto his official seal.

An imperfection in the jurat to an affidavit which is
required to be annexed to a chattel mortgage does not
render it ineffectual as notice, according to the provisions of
30 our registration laws, when it is acknowledged as deeds of
conveyances of real estate are required to be acknowledged
and recorded.

When the affidavit required by the statute is sufficient
in substance and there is lack of form as to the certification

required by the statute, the court will not hesitate to allow such extraneous proof as would supply the deficiency, where it does not appear that any injustice will be done, and especially where it is manifest that the right of those dependent upon such affidavit will otherwise be absolutely lost.

ON PETITION OF APPEAL BY ANNA W. BAIRD,
FROM THE JUDGMENT OF THE RECEIVER.

Mr. Edwin Robert Walker for the petitioner.

Mr. James Buchanan for the receiver.

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BIRD, V. C. Two questions are presented in this case for determination: First, whether or not the certificate of the notary public, who is purported to have taken the affidavit of Mrs. Baird to the chattel mortgage under which she claims is in compliance with the law or not; and, secondly, if not, whether or not the petitioner may offer proof to show that he was such notary at the time of taking the affidavit. The language of the jurat is as follows:

“Sworn and subscribed before me this 8th May, 1891,
Alex. Ramsey, Notary Public.”

20

It is insisted upon the part of the receiver that this is materially defective. The language of the statute respecting oaths or affirmations is that “When any oath required to be taken in any suit or legal proceeding in this State, or for any lawful purpose whatever, * * * when taken out of this State, may be taken before any notary public of the State, Territory, nation, kingdom or country in which the same shall be taken, or before any officer who may be authorized by the laws of this State to take the acknowledgment of deeds in such State, Territory, nation, kingdom or country, and a recital that he is such notary or officer in the jurat or certificate of such oath, affirmation or affidavit and his official designation annexed to his signature, and attested

30

under his official seal, shall be sufficient proof that the person before whom the same is taken is such notary or officer."

From this it appears that the statute imposes upon the notary himself the duty of certifying to his own official character. But in order to make this complete three things are essential: First, he must certify to his official character; second, he must sign the same and annex thereto his official designation; and third, these things must be attested under
10 his official seal. In the case I have to deal with the first of these is wanting. There is no pretense whatever of any certification of his official character. The second requisite has been complied with, the signature being followed with the words "Notary Public," which I regard as a complete designation of his official character. To all of which is affixed his official seal by clear and distinct impression. It seems to have been the purpose of the legislature to specifically require these three things to be made manifest upon the face of the instrument itself, and this doubtless arose from
20 the consideration that this very important feature of it was submitted to the officer himself, instead of requiring proof of that fact from other sources. I do not suppose that so plain a provision of the statute can be dispensed with by the court. I think this view is sustained by the opinion of Mr. Justice Depue; see *Minford vs. Taylor*, 12 N. J. L. J., 282.

The admission of this instrument when offered in evidence, was objected to because of the defect named. Upon the argument it was insisted that if this objection should
30 appear to be well taken then the petitioner should be permitted to show by proof *aliunde* that the person who administered the oath and who signed his name to the jurat was at the time a notary public. To allow such an amendment of the jurat would not be in violation of any known principle of law or equity, especially since it does not appear that any injustice would result therefrom in

consequence of any creditor of the defendant corporation having in any wise been misled by the imperfection named. It is not the record of the instrument that is objected to, but the instrument itself. It is more than probable that the character of the affidavit or of the jurat annexed thereto is in no wise of importance in considering the validity of a chattel mortgage when offered for record. The only requisite, perhaps, in that particular is provided in the sixth section, which makes it the duty of every clerk or registrar to record chattel mortgages when they are acknowledged 10 or proved as deeds of conveyances of real estate are required to be acknowledged or proved. The instrument having been recorded after having been acknowledged in a manner unexceptionable, the court is bound to give it all the efficacy as to notice intended by the statute. It cannot be contended, therefore, that the record was ineffectual to work such notice.

An imperfection in such an instrument, to be fatal to its admissibility as evidence, must be in matter of substance, and not of form, which is susceptible of amendment. 20

I am aware, that there are substantial reasons for refusing amendments or extraneous evidence in support of such defective proof, and that such reasons are supported by high judicial authority.

In the case of the *State vs. Green*, 3 Gr. L. 90, the court said: "An affidavit when offered to be read in evidence, must appear upon the face of it, to be, what an affidavit ought to be, to entitle it to be read. It must appear to have been taken before the proper officer, and in compliance with all legal requirements. The court cannot stop to inquire 30 into the competency of the officer, or the place where it was taken." In that very case, however, the court allowed other proof to establish the fact that surveyors of the highways had been duly sworn. When the objection to the imperfection of the original affidavits was presented, the proof by which the objection was sought to be overcome, was at

hand and offered, and was deemed sufficient to cure the defect.

In *Westerfield vs. Bried*, 11 C. E. Gr. 359, it was held that an answer to which was affixed an affidavit without the signature of the master to the jurat, could not be regarded as an answer. The question involved here, was not only one of the sufficiency of proof, resulting from an answer under oath, but one of pleading also. The bill required an answer under oath, and the court could not
10 deal with it, as an answer in the absence of the affidavit required.

In the case of *Capner vs. The Flemington Mining Co.*, 2 Gr. Ch. 468, a bill was filed asking for an injunction, to which was attached an affidavit signed by the complainant, but without the signature of the master to the jurat. The court said: "Such an omission should not vitiate the injunction, if the bill was actually sworn to, as was the fact. It was an omission of the court, but one which could not affect the interests of the defendants."

20 In *Dinsmore vs. Westcott*, 10 C. E. Gr. 302, upon a bill filed to foreclose a mortgage, it was held; "A defect in the affidavit of mailing a copy of the notice to an absent defendant, in not showing that the place to which it was directed was the defendant's post office address, may be remedied by supplying the proof by way of amendment."

In *Den. vs. Stockton*, 7 Halstead, 321, the court said: "An affidavit of the service of a declaration in ejectment which states, that the declaration was served on the daughter of the tenant, but does not show that such service was made on the premises in question is insufficient. Such an
30 affidavit may be amended.

In such case, if an affidavit has in fact been properly sworn to, there can be no doubt, but that perjury could be assigned thereupon for any wilfully false statements. Upon this however, a doubt was significantly expressed by the court in the case of the *State vs. Browning*, 3 Dutcher, 535,

536. In the jurat the justice said that certain trustees were sworn or affirmed. I cannot, but with the greatest respect, submit that what the Justice of the Peace certified to in the jurat could not in any wise vary, mitigate or annul what was actually said by the affiants. Should it be made to appear upon indictment for perjury, that one had actually been sworn and the others affirmed, or the contrary, and that their statements were wilfully false, it would be impossible to escape conviction. This very rational view was taken in the case of *Capner vs. The Flemington Mining* 10
Company, supra. The court said: "Perjury could have been assigned upon the affidavit if the facts were untrue."

When the affidavit required by the statute is sufficient in substance, and there is lack of form as to certification, required by the statute, the court should not hesitate to allow such extraneous proof, as would supply the deficiency where it does not appear, that any injustice will be done, and especially where it is manifest that the rights of those which depend upon such affidavit will otherwise be absolutely lost. In the case of *State vs. Green, supra*, it was 20
remarked that the court could not stop to look into such matters. This court in its desire to protect and enforce the rights and interests of every suitor, whether plaintiff or defendant does in its discretion, continue causes from time to time, in order that it may be satisfied that in its determination it has not been guilty of violence. At the same time the court is ever watchful in discouraging all appearances of neglect or indifference upon the part of suitors or their counsel.

In Chancery of New Jersey.

Between
JOSEPH WHITEHEAD, et al. }
Complainants. }
and }
THE HAMILTON RUBBER COM- }
PANY, }
Defendant. }

Transcript of shorthand notes of testimony taken in the above stated cause, before His Honor, John T. Bird, Vice Chancellor at the State House, in Trenton, New Jersey, on Tuesday, March 19th, 1895.

APPEARANCES.

Mr. James Buchanan, for the Union National Bank of Frenchtown.

Mr. W. D. Holt and W. M. Lanning for the First National Bank of Trenton, and others.

Mr. E. R. Walker for Anna W. Baird.

10

Mr. B. B. Hutchinson for the Farmers' National Bank of Allentown, DeLong, Betts & Company, and others.

Mr. G. D. W. Vroom for the Receiver.

Frederick Whitehead, called by Mr. Walker, being duly sworn, testifies as follows :

Q. Mr. Whitehead, you were the secretary of the Hamilton Rubber Co., were you not ?

A. I was.

Q. I hand you a book and ask you what it is ?

A. It is the minute book of the company.

Q. Kept by you as secretary.

A. Yes, sir.

10 Q. Turn to the last minute that appears in it; please read it moderately and let the stenographer take it down ?

A. The whole of it, the date and all ?

Q. Yes, sir.

A. "Trenton, New Jersey, April 9th, 1891; a meeting of the Board of Directors of this company was this day held at the office of the company, in accordance with the notice issued on the 6th instant; there were present Joseph Whitehead, Frederick Whitehead, John Whitehead, Frank W. Whitehead; Frank W. Whitehead moved the following
20 resolution: 'that the President and Secretary be authorized and directed to execute to Anna W. Baird a mortgage upon its real estate, and also a mortgage upon its personal property, and also to transfer to her 5,000 shares of the capital stock of the Northwestern Rubber Company of Chicago, this stock being held by Joseph Whitehead, in his name, for the Hamilton Rubber Company, to secure her for any and all indorsements made by her for the benefit and
accommodation of said company and for any future indorsement for their accommodation, and for any and all loans by
30 her made to said company and for any future loans; the motion was seconded by John Whitehead, and received the unanimous vote of those present, and was declared carried; signed by me as secretary."

Q. That minute speaks of notice having been given on the 6th of May, then instant, 1891; what was that notice, do you remember ?

A. I can't recollect the actual notice.

Q. What was the substance of it?

A. It was given under the advice; it was drawn if I recollect by the advice of Mr. Holt, that there would be a special meeting held at that time for that purpose.

Q. Stating the object for which it would be held?

A. My recollection is that it did.

Q. And was sent to whom?

A. Sent to all the directors.

Cross-examination.

10

By Mr. Buchanan—

Q. Who constituted all the directors at that time, name them?

A. Joseph Whitehead, Edgar Whitehead, John Whitehead, Frank W. Whitehead, Frederick Whitehead and Thomas A. Bell, I think.

Q. The persons actually present at the meeting held April 9th, were Joseph Whitehead, Frederick Whitehead, John Whitehead and Frank W. Whitehead, four of the six, were they not?

20

A. Yes, sir.

Q. I see here under an entry, under date of January 12th, 1891, a minute purporting to be a minute of the stockholders meeting for the election of directors for the year 1891, will you turn to it and see whether what I have seen is the truth, is that a minute of the stockholders meeting?

A. That is a minute, sir.

Q. In whose hand writing is the minute of January 12th, 1891?

A. Mine.

30

Q. Did you make a minute of the persons who were elected as directors for that year, 1891?

A. Yes, Sir.

Q. If so, read the entry; January 12th, who were elected directors for the year 1891?

A. The entry that I made personally ?

Q. Yes, sir.

A. The list is here, Joseph Whitehead, Edgar Whitehead, Frederick Whitehead, John Whitehead, Frank W. Whitehead, Thomas A. Bell and F. A. Magowan—Frank A. Magowan.

Q. At the time of the meeting of April 9th, 1891, where did Edgar Whitehead reside ?

A. Chicago.

10 Q. Chicago, Illinois ?

A. Chicago, Illinois.

Q. He was there managing an agency of the Hamilton Rubber Company ?

A. No, sir ; not exclusively.

Q. What was he doing there ?

A. Manager of the Northwestern Rubber Company.

Q. He had been there for some years, had not he ?

A. Yes, sir.

20 Q. The Northwestern Rubber Company was a concern at Chicago, run in the interests of The Hamilton Rubber Co. and The Star Rubber Co., and your brother was their manager, in the interests of those two concerns ?

A. He was manager of The Northwestern Rubber Co.

Q. And that company handled goods for the two companies, didn't it ?

A. Not exclusively.

Q. You say in the minute of April 9th, 1891, that this meeting of April 9th, was held in accordance with notice issued the 6th, you mean the 6th of April ?

30 A. Yes, sir.

Q. Was that notice in writing ?

A. I think it was, sir.

Q. To what persons was it sent, name them ?

A. Sent to all the Board of Directors.

Q. I want to get at whom you comprehend in the Board of Directors ; name the persons to whom that notice was

sent?

A. It was sent to Joseph Whitehead and Edgar and Frederick and John Whitehead and Frank W. Whitehead and to Thomas A. Bell, and whether F. A. Magowan was a director at that time or not, I am not sure.

Q. The question is to whom was notice sent?

A. Whether it was sent to him or not I can't say; I do not know whether he was a member of the Board of Directors.

Q. I understood you to say you sent the notice? 10

A. I did.

Q. Can you say whether you sent a notice to Mr. Magowan?

A. It is too far back to remember.

Q. What with respect to Frank A. Magowan?

A. I can't say.

Q. Will you swear you didn't send it to him, or that you did?

A. I can't say.

Q. Don't you remember? 20

A. No, sir.

Q. He was present at the meeting of April 9th, 1891?

A. No, sir.

Q. Nor was your brother Edgar, who lived at Chicago, nor was Thomas A. Bell, present?

A. No, sir.

Q. How was notice sent, how was it sent on the 6th of April, 1891?

A. It is too far back to remember.

Q. Do your best? 30

A. That is the best I can do; I don't remember.

Q. What was your usual method of sending out notices?

A. Send them by the common office mail.

Q. Mail them to the directors?

A. With the exception of those in the office, and to those we would not mail them, it wasn't necessary.

Q. How would you give notice to them?

A. I can't recollect, it is too long ago.

Q. Do the best you can?

A. I have done the best I can.

By the Court—

As I understand the witness neither Edgar or Bell were in the office?

By Mr. Buchanan—

No, sir; Edgar was residing at Chicago.

10 Q. And was the manager of the Northwestern Company?

A. Yes, sir; Bell would have been there, but he was occupied himself at that time very largely.

Q. Where, in Trenton?

A. In Trenton.

Q. Do you recollect the time of day when you sent those notices?

A. No, sir; I would like to say that that notice was sent under the advice of Mr. Holt.

Q. What was the advice that Mr. Holt gave you?

20 A. That I cannot recall.

Q. Why do you make any particular or prominent mention of it now?

A. Simply because the question has been brought out, whether there was notice sent.

Q. How long would it take a notice mailed to reach Chicago?

A. It would depend largely when it was mailed.

Q. Suppose it was mailed the 6th of April, when would it reach Chicago?

30 A. Probably the 7th.

Q. What time on the 7th?

A. That would depend on the time it left here.

Q. In due course of mail?

A. I do not know about the mail arrangements.

Q. Do you know whether your brother Edgar Whitehead

got this notice?

A. I do not know.

Q. Did you receive any notice from him before the meeting?

A. Not to my recollection.

Q. This book contains the by-laws of the company, does it not?

A. Yes, sir.

Q. You have stated that this meeting was held on April 9th, 1891, and that this was a special meeting, have you not?

A. I suppose it would be called a special meeting.

Q. I call your attention to the 9th by-law which is in these words, "There shall be stated meetings of the Board of Directors on the second Monday of January, April, July and October of every year." Is what I have read truly the 9th by-law of the company.

A. That I know nothing about, sir; - I think you will find that there have been changes made in those by-laws from time to time through the minute book. 20

Q. Turn to that part of the minute book where any changes have been made?

At this point it was agreed to adjourn and give counsel and witness an opportunity to examine the minute book before the further hearing in the matter.

Transcript of shorthand notes taken in the above entitled cause, on March 28th, 1895, to which time the said cause was adjourned at the previous hearing, before His Honor, John T. Bird, Vice Chancellor, at the State House. 30

Appearances.

Mr. E. R. Walker for Mrs. Baird.

Mr. James Buchanan for the Union National Bank of

Frenchtown.

By Mr. Buchanan—

If Your Honor please, I do not think it worth while to pursue the examination of the witness, who was on the stand at the last hearing.

By Mr. Walker—

I offer in evidence the minute book, the mortgage by the Hamilton Rubber Company to Anna W. Baird, dated April 15th, 1891, and also chattel mortgage from the Hamilton
10 Rubber Company to Anna W. Baird, sworn and subscribed on the 18th day of April, 1891.

Marked Exhibit B, B1, and Exhibit B2, respectively.

By Mr. Buchanan—

I object to the offer of the chattel mortgage.

By the Court—

The book of minutes has been offered and the title papers as I understand are now offered.

By Mr. Walker—

That is true.

2) By Mr. Buchanan—

The chattel mortgage is objected to on the ground that the affidavit thereto annexed is defective, in as much as the jurat or certificate does not set forth the fact that the affidavit is taken before a notary public, it being taken in a foreign state.

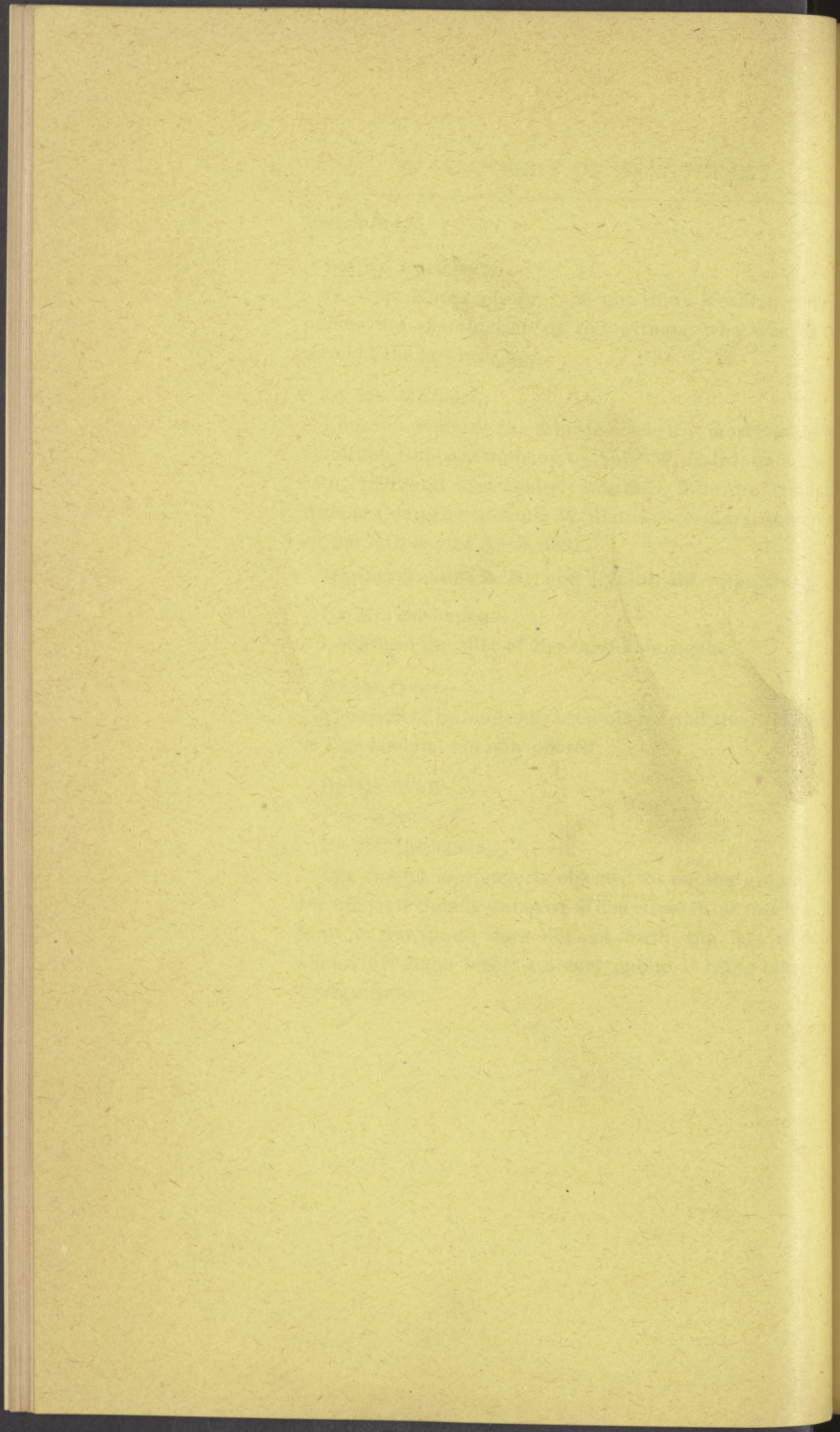
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