

New-Jersey Court of Errors and Appeals.

IN CHANCERY OF NEW JERSEY.

BETWEEN

MARIA VAN MATER and ELLENOR VAN
MATER, administratrixes of Daniel Van Mater,
deceased, complainants,

and

JOHN ELY and JOSEPH HOLMES, administra-
tors of Daniel Holmes, deceased, defendants,

} Bill.

BILL OF COMPLAINT.

Humbly complaining, show unto your Honor your oratrixes Maria Van Mater and Ellenor Van Mater, administratrixes of Daniel Van Mater, late of the county of Monmouth, and state of New Jersey, deceased; that Joseph H. Van Mater and Holmes Van Mater, also of the county of Monmouth, and state aforesaid, being justly indebted to the said Daniel Van Mater, in his lifetime, in the sum of two thousand dollars, did, on the twenty-fifth day of January, in the year one thousand eight hundred and forty-two, in order to secure the payment of said debt, execute, under their respective names and seals, and deliver to the said Daniel Van Mater, their 10
certain bond or obligation in writing, in the penal sum of four thousand dollars, conditioned for the payment of two thousand dollars, on or before the first day of February then next ensuing; and, in order further to secure the payment of said debt, the said Joseph H. Van Mater and Holmes Van Mater did at the same time execute, under their respective names and seals, and deliver to the said Daniel, their warrant of attorney, directed to any attorney at law of any court of record of the state of New Jersey, authorizing and directing such attorney, in their names, to confess judgment on the aforesaid bond or obligation, for the sum mentioned therein, 20
with costs, by virtue of which said warrant the said Daniel Van Mater, in his lifetime, to wit, on the third day of February, one thousand eight hundred and forty-two, caused a final judgment to be entered against the said Joseph H. Van Mater and Holmes Van Mater in the Court of Common Pleas in and for the county of

Monmouth for the sum of two thousand dollars debt, and four dollars cost of suit, as by the record of said judgment now remaining in said court, and to which reference being had will more fully and at large appear; upon which said judgment a writ of execution *de bonis et terris* was duly issued and recorded in the clerk's office of said court, and, after being so recorded, was delivered to Abraham Neafie, esquire, then sheriff of said county of Monmouth, to be levied and executed against the said defendant, and who, in pursuance of the direction of said writ, did levy upon the real and personal estate of the said defendants in his bailiwick, as, by reference to said writ of execution, and the return made thereon by the said sheriff, will fully appear.

And your oratrixes further show to your Honor, that at the time the aforesaid judgment was entered against the said Joseph Van Mater and Holmes Van Mater, they, the said defendants, were also indebted to divers other persons in divers large sums of money, and for which final judgments had been entered against them in courts of record of the state of New Jersey, and writs of execution *de bonis et terris* issued and duly recorded, and delivered to the sheriff thereon, which said judgments and executions were prior in time to the judgment and execution of the said Daniel Van Mater. Among other judgments against the said Joseph H. and Holmes Van Mater, prior in date to that of the said Daniel Van Mater, was a judgment executed in favor of Garret H. Hendrickson and Cyrenius Hendrickson in the Court of Common Pleas of the said county of Monmouth, on the fourth of April, eighteen hundred and forty, for the sum of four thousand nine hundred and sixteen dollars and forty-five cents debt, and four dollars costs of suit, the real debt being two thousand four hundred and sixty-three dollars, or thereabouts; also another judgment, in favor of the Middletown Point Bank, for the sum of two thousand and five hundred dollars, or thereabouts; and another, in favor of Daniel Holmes, for ten thousand dollars, or thereabouts: upon all which said several judgments executions had been issued, recorded, and levied upon both the personal and real estate of the said defendants therein named, and which were, by law, prior liens on said estate to the judgment and execution of the said Daniel Van Mater.

And your oratrixes further show unto your Honor, that after the judgment, execution, and levy as aforesaid, in favor of the said Daniel Van Mater, other judgments were obtained against the said Joseph H. Van Mater and Holmes Van Mater, to wit, another judgment in favor the said Daniel Holmes against the same defend-

ants, in the Court of Common Pleas of the said county of Monmouth, on the fifth of April, eighteen hundred and forty-two, for the sum of eight thousand one hundred and six dollars, or thereabouts; also another judgment, in the said Court of Common Pleas of Monmouth county, in favor of Elisha Laird, against the same defendants, entered on the twenty-sixth day of July, eighteen hundred and forty-two, for the sum of two thousand dollars, or thereabouts, upon which said last two judgments executions had been issued, recorded, and levied on the said personal and real property of the said Joseph H. and Holmes Van Mater, and were subsequent in date and priority to the lien of the said Daniel Van Mater on the same property, in virtue of the said judgment and execution. 10

And your oratrixes further show unto your Honor, that after the several judgments, above mentioned, had been obtained and entered as aforesaid, and the several executions thereon severally levied on the real and personal estate of the defendants, therein named as aforesaid, the said Garret H. Hendrickson and Cyrenius Hendrickson and the said Elisha Laird, judgment creditors as aforesaid, became urgent for a sale of said property, for the purpose of collecting their respective debts, and were pressing the sheriff to advertise and make sale thereof, whilst the other judgment creditors, believing their several debts secure by virtue of their said several judgments and executions, were willing that such sale should be delayed, and the said Joseph H. Van Mater and Holmes Van Mater, being the owners of a very large and valuable personal and real estate, all of which, in their opinion, by proper and prudent management and a little delay and indulgence extended to them by their said creditors, would be amply sufficient to satisfy said debts, and wishing to avoid, if possible, the sacrifice ordinarily attending a forced sale by the sheriff, and being disposed to appropriate and apply all their property, of every description, to the payment of said debts, and in the order of their respective priorities, did propose to the said Daniel Holmes to take an assignment and transfer of the said judgments in favor of Garret H. Hendrickson and Cyrenius Hendrickson, and in favor of the said Elisha Laird, and, as an additional security for the payment of the said judgments last mentioned, further proposed to assign and transfer to him, the said Daniel, a certain accepted draft, upon which was then due the sum of five thousand two hundred dollars, or thereabouts, and which was amply sufficient to pay off and satisfy the said last two judgments, and relieve the property so levied upon from the en- 20 25 30 40

cumbrance and lien of said judgments, and prevent a sale thereof; and the said Daniel, assenting to such proposal, did receive and take to himself an assignment of the said judgment of Elisha Laird, and did receive and take to himself, and one Thomas G. Haight and one Hendrick Longstreet, a transfer and assignment of the said Hendrickson judgment, whereby he acquired the control of said judgments, and had it in his power to postpone and delay the sale of the property of the defendants.

And your oratrixes further show, that at or about the time when
 10 the said two judgments were assigned to the said Daniel Holmes, in manner aforesaid, to wit, on the seventh day of December, eighteen hundred and forty-two, the said Joseph H. Van Mater and Holmes Van Mater did assign and transfer to the said Daniel Holmes, in conformity with their said proposal, the said accepted draft, as an additional and collateral security for the payment of the said two last mentioned judgments, and, at the same time, the said Daniel Holmes executed, under his hand and seal, and delivered to the said Joseph H. and Holmes Van Mater, the following agreement in writing, that is to say:

20 “Whereas Joseph Van Mater and Holmes Van Mater hath this day assigned to me, as collateral security, a certain draft or bill of exchange, drawn by the said Joseph H. Van Mater, and endorsed by the said Holmes Van Mater, and accepted by W. W. Bacon, John L. Blane, R. Pendell, George R. Blackburn, and R. J. Jackson, of Lexington, Kentucky, for six thousand dollars, which said draft or bill was due and payable on or about the first day of February, eighteen hundred and forty-two, on which there is supposed to be now due some five thousand four hundred dollars—Now the
 30 object of this certificate is to declare, that I, the said Daniel Holmes, hold the said assigned bill or draft, as collateral security, to pay and satisfy to me two certain judgments against the said Joseph H. Van Mater and Holmes Van Mater, one at the suit of Elisha Laird, and the other at the suit of Cyrenius Hendrickson and Garret Hendrickson, amounting to some five thousand dollars in the aggregate, and that I am, on the receipt of the balance due on said bill of exchange or draft, to apply the proceeds thereof, in the first place, to the payment of Elisha Laird’s judgment, assigned to me, and secondly, to be applied to the payment and satisfaction of the said assigned Hendrickson’s judgment; and if more than sufficient for
 40 such purposes, I am to account to the said Joseph H. Van Mater and Holmes Van Mater for such surplus; this certificate being

given with the assignment, and to be considered as part thereof, as evidence of the purposes of said assignment."

Which agreement in writing, signed and sealed by the said Daniel Holmes, and delivered by him to the said Joseph H. Van Mater and Holmes Van Mater, and now in their hands, or in the hands of one of them, and a true copy of which is now in the hands of your oratrixes, they beg leave, for greater certainty, to refer.

And your oratrixes further show unto your Honor, that after the assignment and transfer of the two last mentioned judgments to the said Daniel Holmes, as aforesaid, and after the assignment of the said bill of exchange or draft, as aforesaid, to wit, on or about the sixth day of March, one thousand eight hundred and forty-three, the personal property of the said Joseph H. Van Mater and Holmes Van Mater was sold by the sheriff of Monmouth, by virtue of the several judgments and executions before mentioned, and shortly after the real estate of said Joseph and Holmes Van Mater was also sold by the said sheriff to pay and satisfy what still remained due on said judgments and executions; that your oratrixes have been informed, and believe, that the said sales were made by the said sheriff pursuant to instructions given him by the said Daniel Holmes, and contrary to the agreement and understanding had between him and the said Joseph H. Van Mater and Holmes Van Mater at the time the said several assignments were made; and they further show, that the proceeds of said sales were, in the first place, applied to the payment and satisfaction of the judgment and execution in favor of the said Garret H. Hendrickson and Cyrenius Hendrickson, which was fully paid and satisfied by the said sales, and the balance of the proceeds of said sales was then applied to the payment and satisfaction of the other judgments, above mentioned, as far as the same were sufficient for that purpose, and that the same were sufficient to satisfy all the said judgments that were prior to the judgment of the said Daniel Van Mater, except a small balance, which it is alleged still remains due on first judgment of the said Daniel Holmes, and no part of said proceeds were applied to the payment of the said Daniel Van Mater's judgment, but the whole remains still due and unsatisfied.

And your oratrixes further show unto your Honor, that prior to the sale of the personal and real property of the said Joseph H. Van Mater and Holmes Van Mater by the sheriff, as aforesaid, to wit, on the twenty-third day of February, eighteen hundred and forty-three, the said Daniel Holmes received on the said bill of exchange or draft, from the acceptors thereof, the sum of one thousand six hundred and fifty dollars, and afterwards, to wit, on the

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twenty-ninth day of April, eighteen hundred and forty-three, he received on said draft the further sum of two thousand three hundred and fifty dollars, and on the thirty-first day of October, in the year last aforesaid, he received the further sum of one thousand two hundred and eighty-seven dollars and fifty-two cents, making, in the aggregate, received on said bill of exchange or draft, the sum of five thousand two hundred and eighty-seven dollars and fifty-two cents, no part of which was applied by the said Daniel Holmes to the payment of the said Hendrickson judgment (which was the 10 first lien on the said personal and real property of the defendants in said judgment), as by the said written agreement and certificate he had, under his seal, bound himself to do; nor did he, the said Daniel Holmes, in his lifetime, since deceased, in any way account to the said Joseph H. Van Mater and Holmes Van Mater for the proceeds of the said bill of exchange or draft, further than to pay and satisfy the judgment of the said Elisha Laird, which had been assigned to him as aforesaid, and to accept and pay a draft drawn upon him by the said Joseph H. Van Mater and Holmes Van Mater, in favor of one Hendrick Longstreet, for the sum of four hundred and 20 forty dollars and sixty-seven cents; nor did he appropriate and pay any part or portion of said moneys, so as aforesaid received by him on said draft or bill of exchange, towards the payment and satisfaction of the said judgment of the said Daniel Van Mater (which was next in priority as an encumbrance or lien upon the property of the said defendants to the first judgment of the said Daniel Holmes), although he was often expressly requested so to do by the said Joseph H. Van Mater and Holmes Van Mater, and as in equity and good conscience he was bound to do; but on the contrary, and without the order and direction, and against the express will of the 30 said Joseph H. Van Mater and Holmes Van Mater, appropriated and applied the same to the payment and satisfaction of his own second judgment against the said Joseph and Holmes Van Mater, which was subsequent and subject to the judgment of the said Daniel Van Mater.

And your oratrices further show unto your Honor, that the said Daniel Van Mater, in his lifetime, since deceased, at the desire and by the express direction of the said Joseph H. and Holmes Van Mater, frequently called upon the said Daniel Holmes, and requested him to appropriate and pay so much of the proceeds of the 40 said draft or bill of exchange, as had been received by him, to the payment and satisfaction of his, the said Daniel Van Mater's, judgment, as had not been applied to the payment and satisfaction of

the Hendrickson and Laird judgments, as would be sufficient to pay and satisfy his said judgment, and that the said Daniel Holmes, in his lifetime, since deceased, always refused to comply with such request; and they further show, that after such refusal by the said Daniel Holmes, the said Joseph H. and Holmes Van Mater also frequently applied to him in person, and requested him to account to them for the proceeds of the said bill of exchange or draft, or the balance thereof, which he had not applied to the payment of the said Hendrickson and Laird judgments, as by the express terms of his said agreement he was bound to do, and as in equity 10 and good conscience he ought to have done, but that he always refused to comply with such reasonable request.

And your oratrixes further show unto your Honor, that on or about the twenty-seventh day of October, eighteen hundred and fifty-one, the said Daniel Holmes departed this life, without having paid or appropriated any part of the moneys so as aforesaid received by him on the said bill of exchange to the payment and satisfaction of the said Hendrickson judgment, or to the payment and satisfaction of the said Daniel Van Mater's judgment, or in any wise accounted to the said Joseph H. and Holmes Van Mater 20 for the same, as by his said covenant he was bound to do; but having, in violation of his trust, applied the balance of the said moneys, so received, (after paying the said Laird judgment and the draft of Hendrick Longstreet of four hundred and forty dollars and sixty-seven cents) to the payment of his own second judgment, which was subsequent to the said judgment of the said Daniel Van Mater; that he died intestate, leaving a large personal and real estate, and that letters of administration were in due form of law granted to John W. Ely and Joseph Holmes, who have assumed the trust and taken upon themselves the duty of settling his estate, 30 and who, in their representative capacity, are made defendants to this bill of complaint.

And your oratrixes further show, that the said Daniel Van Mater has also departed this life, to wit, on the sixteenth day of May, eighteen hundred and fifty-two, also intestate, and that letters of administration in due form of law have been granted to your oratrixes, and that they have assumed the trust of settling his estate, and are thereby fully invested with the legal and equitable right of presenting in this honorable court the claim set up in this bill of complaint against the personal representatives of the said Daniel 40 Holmes, touching the misapplication of the moneys so as aforesaid received by him on the said bill of exchange, under the trust re-

posed in him by the terms of its transfer and assignment to him as aforesaid.

And they further show, that in the term of April, eighteen hundred and forty-five, a bill was filed in this honorable court, by one Joseph Van Mater, against the said Daniel Holmes, and an injunction obtained, by the order of this court, restraining the defendant in that suit from selling, under and by virtue of the execution issued upon his first judgment, above mentioned, certain real estate, purchased by the complainant in said bill from the said Joseph H. and
 10 Holmes Van Mater, and by them conveyed to him a few days after the entry of the said first judgment of the said Daniel Holmes, to which said bill of complaint the said Daniel Holmes filed his answer, and thereupon moved the dissolution of said injunction, which was refused by this honorable court, and the said injunction still continues in full force, and the said suit still remains pending in this court, never having been finally determined; that one of the questions involved in said suit, and fully and fairly presented by the said bill and answer for the consideration of the Chancellor, was,
 20 whether the said Daniel Holmes had fulfilled his covenant and agreement made with the said Joseph H. and Holmes Van Mater, touching the moneys received by him on the said bill of exchange, which question, so involved in said suit, is still undecided, and your oratrixes beg leave to refer your Honor to the said bill and answer, and the other proceedings in that cause, as the reason for the delay in the prosecution of this suit by their intestate, and by themselves, as his personal representatives, and as an answer to any defence set up against this bill of complaint on the ground of the statute of limitations.

And now so it is, may it please your Honor, that the said Daniel
 30 Holmes, in his lifetime, did neglect and refuse to comply with, and fulfil the true spirit, intent, and meaning of his said agreement, so as aforesaid made with the said Joseph H. and Holmes Van Mater, on the seventh day of December, eighteen hundred and forty-two, and to pay the moneys so as aforesaid received by him on said draft, either to the payment of the said Hendrickson judgment against the said Joseph H. and Holmes Van Mater, which were prior to the judgment of the said Daniel Van Mater, or to the payment of the said last mentioned judgment, or in any way to account to the said Joseph H. and Holmes Van Mater for the same,
 40 or to comply with their frequent requests so to do, but, in violation of the trust so reposed in him, and in violation of the rights of the said Daniel Van Mater, appropriated the same to the payment of

his own second and subsequent judgment; and the said John Ely and Joseph Holmes, administrators as aforesaid, since his death have also neglected and refused to make such appropriation of said moneys, or to account for the same, as by the terms of their said intestate's agreement they were bound to do, and as in equity they ought to have done, but well knowing the premises, are combining and confederating together, and with divers other persons unknown to your oratrixes, but whose names, when discovered, they pray may be inserted herein as parties defendants hereto, and contriving to injure and oppress your oratrixes, who are the next of kin to the said Daniel Van Mater, deceased, give out and pretend that the said Daniel Holmes did not receive the transfer and assignment of said bill of exchange for the purpose and upon the terms herein before set forth, and that the paper so signed and sealed by him, at the time of said assignment, was only intended to show the fact, that such assignment had been made by him, and that the same was made without any trust whatever, but that, in virtue of such assignment, he had lawful right and authority to appropriate the moneys received by him on said draft to the liquidation of any claim he then had, or might have, against the said Joseph H. and Holmes Van Mater, whether the same was secured by judgment or otherwise, or whether such judgment was prior to the judgment of the said Daniel Van Mater or not, the contrary whereof your oratrixes charge to be true; and they further charge, that the said moneys, when received, were upon the special trusts specified in said agreement. 10

At other times the said John Ely and Joseph Holmes, administrators as aforesaid, give out and pretend that the said Daniel Holmes, in his lifetime, did apply the proceeds of said bill of exchange, or part thereof, to the payment of the said Hendrickson judgment, and other part thereof to the payment of the said Laird judgment, and the balance thereof to the payment of his own first judgment, and that he never was, in his lifetime, requested or directed, by the said Joseph H. and Holmes Van Mater, to make any other application of said proceeds, or otherwise to account for the same, the contrary whereof your oratrixes also charge to be true; and that they further expressly charge, that although he did, in his lifetime, apply a portion of the proceeds of said draft towards the payment of the Laird judgment, and another portion to the payment of the draft in favor of Hendrick Longstreet, yet he applied 40 no part of the balance of said proceeds, which amounted to three thousand dollars, or thereabouts, to the payment either of the Hen-

drickson judgment or his own first judgment, but, against the will and consent of the said Joseph H. and Holmes Van Mater, and in violation of his trust, and against the rights of the said Daniel Van Mater, acquired from the said Joseph and Holmes, applied the whole of said balance to the payment of his said second judgment, which he had neither a legal or equitable right to do. And they also charge, that he did not pay, but refused to pay, to the said Daniel Van Mater any part of said balance to the said Daniel Van Mater on his said judgment, though requested by the said Joseph
 10 and Holmes so to do, nor in any other way accounted to them for said balance; nor have the said John Ely and Joseph Holmes, administrators as aforesaid, since the death of said Daniel Holmes, made such application or rendered any such account, as in equity they were bound to do, but have wholly neglected and refused so to do.

In tender consideration whereof, and for that your oratrixes are remediless in the premises by the strict rules of the common law, and relievable only in a court of equity—

To the end, therefore, that the said John Ely and Joseph Holmes,
 20 administrators as aforesaid, and their said confederates, when discovered, may, upon their several and respective corporal oaths, make full, true, and perfect answer, according to their respective knowledge, information, and belief, to all and singular the matters and charges aforesaid, and, more especially, that they may answer and declare, according to their knowledge, information, and belief, whether, at the time the said bill of exchange was assigned to the said Daniel Holmes, it was not the true intention and meaning of the parties thereto to provide, by means thereof, for the payment of the said two judgments, to wit, the Hendrickson judgment and
 30 the Laird judgment, under which a sale of the property of the defendants in said judgments was strongly urged, and thereby secure a postponement of said sale, and save to the said defendants the sacrifice and mortification of a public sale by the sheriff, and also to enable them to make such arrangements, as they then had in contemplation, to pay off and satisfy all the encumbrances on their said property without such public sale thereof; and whether it was not the true intention and meaning of the parties to said assignment to pay and satisfy the said Hendrickson judgment out of the proceeds of said draft, in order that the said subsequent judg-
 40 ment creditors might have the better security for the payment of their respective judgments, in the order of their respective priorities, out of the personal and real estate of the said Joseph and

Holmes Van Mater; and whether, if the said moneys received by the said Daniel Holmes on the said bill of exchange had been applied by him to the payment of the said Hendrickson judgment, according to his said agreement, the personal and real estate of the said defendants in said judgments would not have been sufficient to pay and satisfy all other judgments and liens on said property prior to the said Daniel Van Mater's judgment as well as his judgment; and whether the said Daniel Holmes did not himself urge and procure a sale of the said personal and real estate of the said Joseph H. and Holmes Van Mater immediately or very soon after he had taken an assignment of the said Hendrickson and Laird judgments and of the said bill of exchange, and in violation of his said agreement; and whether the said Joseph H. and Holmes Van Mater did not frequently request him, the said Daniel Holmes, to pay over to the said Daniel Van Mater the moneys he had received on said bill of exchange, or the balance thereof, or so much of said balance as would be sufficient to satisfy his, the said Daniel Van Mater's, judgment, in the place and stead of the moneys which were intended to satisfy the said Hendrickson judgment, and had not been applied to that object; and whether the said Daniel Van Mater did not frequently, by the order and direction of the said Joseph H. Van Mater and Holmes Van Mater, call upon him, the said Daniel Holmes, to apply said balance to the liquidation of his said judgment, and whether he did not, on all such occasions, refuse to comply with such request; and whether the said Joseph H. Van Mater and Holmes Van Mater did not frequently call on the said Daniel Holmes, and request him to comply with his covenant and agreement, and to account to them, as by his said agreement he was bound to do, and whether the said Daniel did not always, in his lifetime, refuse to comply with such request; and whether Daniel Holmes did not apply the balance of the proceeds of the said draft or bill of exchange to the payment of his own second judgment, without the order and against the express will and consent of the said Joseph H. and Holmes Van Mater; and whether they, the said John Ely and Joseph Holmes, administrators as aforesaid, have not always, since the death of their intestate, refused to account for the proceeds of said draft or bill of exchange to the said Joseph H. and Holmes Van Mater or to the complainants in this bill, otherwise than their intestate did in his lifetime.

And that the said John Ely and Joseph Holmes, administrators as aforesaid, may, by the decree of this honorable court, and in consideration that the estate of the said Daniel Holmes has been

unjustly accumulated by the proceeds of said bill of exchange, and in contravention of the true intent and meaning of the parties to said assignment, be compelled to pay to your oratrixes, out of the estate of their said intestate, the amount due on the said judgment of the said Daniel Van Mater, or to render an account to your said oratrixes, as the assignees of the said Joseph H. Van Mater and Holmes Van Mater, of such part of the proceeds of said bill of exchange as had not been appropriated by the said Daniel Holmes to the object and purposes expressly mentioned in his said agreement, and that your oratrixes may have such further and other relief in the premises, as to your Honor may seem meet and proper and as may be agreeable to equity and good conscience—

10 May it therefore please your Honor, the premises being considered, to grant unto your oratrixes the state's writ of subpœna, issuing out of and under the seal of this honorable court, to be directed to the said John Ely and Joseph Holmes, administrators of the said Daniel Holmes, deceased, therein and thereby commanding them, and each of them, on a certain day and under a certain penalty, therein to be inserted, personally to be and appear before your Honor in this honorable court, then and there to answer all
20 and singular the said premises, and to stand to and abide by such order and decree therein as to your Honor shall seem meet and shall be agreeable to equity and good conscience.

And your oratrixes will ever pray, &c.

The demurrer of the above defendants to the bill of complaint of the above complainants.

These defendants by protestation, not confessing or acknowledging all or any of the matters or things in and by said bill set forth and complained of to be true, in manner and form as the same are therein and thereby set forth and alleged, say, that they are advised
30 by their counsel that there is no matter or thing in the said bill contained good and sufficient in law to call these defendants in question in this court for the same, but that there is good cause of demurrer thereunto, and therefore these defendants do demur thereto, and for cause of demurrer these defendants say, that the said bill of complaint contains not any matter of equity wherein this court can ground a decree or give the complainants any relief or assistance, as against these defendants, wherefore, and for divers other errors and imperfections in the said bill appearing, these defendants do demur in law thereto, and humbly demand the judgment of this

court whether they shall be compelled to put any further or other answer to the said bill, and pray to be hence dismissed with their reasonable costs in this behalf wrongfully sustained.

P. VREDENBURGH,
Solicitor and of counsel with defendants.

New Jersey, Monmouth county, to wit—Joseph H. Holmes, one of the above defendants, being duly sworn according to law, deposeseth and saith, that the above demurrer is not interposed for delay, but in good faith.

JOSEPH H. HOLMES. 10

Sworn and subscribed, this twentieth day of February, 1854, before me, a master in chancery in said state.

CHARLES A. BENNETT, *M. C.*

I, the subscriber, of counsel with the above defendants, do hereby certify, that I have perused the complainant's bill, and that the above demurrer, in my opinion, is well founded in point of law.

Witness my hand, this 20th February, 1854.

P. VREDENBURGH.

New Jersey, Monmouth county, to wit—John W. Ely, one of the above defendants, being duly sworn according to law, deposeseth 20 and saith, that the above demurrer is not interposed for delay, but in good faith.

JOHN W. ELY.

Sworn and subscribed, this 27th day of February, 1854, before me, a master in chancery in and for said state.

CHARLES A. BENNETT, *M. C.*

Joinder in demurrer.

Decree sustaining the demurrer, and dismissing the bill with *out* costs.

OPINION OF CHANCELLOR.

WM. HAIGHT and JAMES S. NEVIUS, for complainants.

P. VREDENBURGH, for defendants.

The CHANCELLOR. The bill is filed by the personal representatives of Daniel Van Mater, deceased, against the administrators of Daniel Holmes, deceased. A general demurrer was filed to the bill. The question submitted is, whether the complainants show any equity entitling them to relief.

Joseph Van Mater and Holmes Van Mater were possessed of
 10 considerable real and personal estate in the county of Monmouth. They became embarrassed in their pecuniary circumstances, and confessed judgment to a very large amount. Several judgments were also recovered against them by due course of law. The priorities of the judgments are important. The first judgment was in favor of Garret H. and C. Hendrickson, for \$2000, the second in favor of Middletown Point Bank, for \$2500, the third in favor of Hier, Mairs & Co., for \$10,000, the fourth in favor of Daniel Holmes, for \$10,000, the fifth in favor of Daniel Van Mater (the complainant's intestate), for \$2000, the sixth in favor of Daniel
 20 Holmes, for \$8000, and the seventh and last in favor of Elisha Laird, for \$2000.

Upon all these judgments executions were issued, and levies made by the sheriff upon all the real and personal estate of the debtors. The judgment creditors were pressing for their money, and, in order to avoid a sale of their property and give them some indulgence, Joseph H. and Holmes Van Mater, the debtors, proposed to Daniel Holmes to take an assignment of the first and last judgments, and, as additional security for the payment of those
 30 judgments, offered to assign to him a certain accepted draft. The proposition was accepted. The last judgment, the one in favor of Elisha Laird, was assigned to Holmes, and the first judgment, which was the one in favor of the Hendricksons, was assigned to Holmes, Thomas G. Haight, and Hendrick Longstreet. At the same time, Joseph and Holmes Van Mater assigned to Holmes a draft, which had been accepted by several individuals residing in Kentucky, which had been passed due some ten months, and upon which there was due about five thousand four hundred dollars.

On the assignment of this draft, Daniel Holmes gave to Joseph

and Holmes Van Mater a writing, which, after reciting the assignment of the draft, is as follows: "Now the object of this certificate is to declare, that I, the said Daniel Holmes, hold the said assigned bill or draft as collateral security to pay and satisfy to me two certain judgments against the said Joseph H. Van Mater and Holmes Van Mater, one at the suit of Elisha Laird, and the other at the suit of Garret H. Hendrickson and Cyranus Hendrickson, amounting to some five thousand dollars in the aggregate, and that I am, on the receipt of the balance due on the said bill of exchange or draft, to apply the proceeds thereof, in the first place, to the pay- 10
ment of Elisha Laird's judgment assigned to me, and secondly to be applied to the payment and satisfaction of the said assigned Hendrickson judgment, and if more than sufficient for said purposes, I am to account to the said Joseph H. Van Mater and Holmes Van Mater for such surplus. This certificate being given with the assignment, and to be considered as part thereof, as evidences of the purposes of said assignment."

The assignment was made on the 7th of December, 1842. On the 23d of February, following, Daniel Holmes received on the draft, from the acceptors, \$1650. 20

On the sixth of March, following, he ordered the sheriff to sell on the executions in his hands. The sheriff sold all the real and personal estate he had levied on, and, with the money raised by the sale, he paid off the Hendrickson judgment, the Middletown Point Bank judgment, the Hiers, Mairs & Co.'s judgment, and all but a small balance of the next judgment in order, which was Daniel Holmes' first judgment. After these judgments were thus paid, Daniel Holmes received the balance due on the draft, about \$5200 in all, and more than enough to satisfy the Hendrickson and Laird judgments, as security for the payment of which the draft had been 30
assigned to him. But when he received the money, the Hendrickson judgment had been paid by the proceeds of the sheriff's sale, as before stated. With the money thus received on the draft, Holmes paid off the Laird judgment, which left a balance in his hands of upwards of \$3000. Of this balance, he paid, on an order drawn upon this specific fund by Joseph and Holmes Van Mater for \$440.67, leaving in his hands about \$3000 unaccounted for. Joseph and Holmes Van Mater requested Holmes to pay it on the judgment of the complainant's intestate, which judgment was next in order to Daniel Holmes' first judgment, which had been very 40
nearly satisfied by the proceeds of the sheriff's sale. This Holmes refused to do, but applied it to the payment of his own second

judgment, and which was subsequent in time to Daniel Van Mater's judgment, represented by the complainants.

The complainants insist that Daniel Holmes appropriated the proceeds of the draft in violation of his trust; that it ought to have been paid on the Hendrickson judgment; that if it had been so appropriated the common fund in the sheriff's hands would have been relieved, so that Daniel Van Mater's judgment would have been paid by the fund in the hands of the sheriff.

10 The bill prays that the defendants may be compelled to account for as much of the proceeds of said draft as will pay the judgment of Daniel Van Mater, their intestate.

All the allegations of the bill in any manner material to the case I have stated as facts. They must all be taken as true in deciding this demurrer. No equity can arise in favor of the complainants entitling them to recover of the defendants upon the mere fact that Joseph and Holmes Van Mater ordered Daniel Holmes to pay the money over to Daniel Van Mater. If the money was really due and owing from Daniel Holmes to Joseph and Holmes Van Mater, and if Daniel Holmes had no legal right to hold the money
20 as against them, yet Joseph and Holmes Van Mater could not institute any one as the creditor of Daniel Holmes in their stead without his consent. No principle can be more familiar than this. If they had given a written order, and Daniel Holmes had refused to accept it, the payees could have had no claim, either at law or equity, against the person upon whom it was drawn. In the present case the order was a mere verbal one, and there is not the slightest foundation for the complainants to maintain a suit upon this ground. If the complainants are entitled to relief, their right must, in some way, be derived from the application of the principle, that when
30 there are two funds, one only being common to both creditors, the creditor having a lien on the two funds may be compelled in equity, first to exhaust the fund upon which he has an exclusive lien before he will be permitted to resort to the common fund.

Waiving, for the present, the consideration of the question, whether the complainants have not lost their equity by remaining quiescent, and permitting the common fund to be taken in payment of the Hendrickson judgments, let us see what would have been the equities of the respective parties, if, when the common fund was in the hands of the sheriff, Daniel Van Mater had filed a bill
40 claiming the benefit of the collateral security which Daniel Holmes held as the assignee of the Hendrickson judgment.

The Hendrickson judgment and Daniel Van Mater's judgment

were liens upon a common fund. Daniel Holmes, who owned the Hendrickson judgment, had in his hands another fund sufficient to pay off the Hendrickson judgment. If so appropriated it would relieve the common fund, so as to pay off the Daniel Van Mater's judgment. But Daniel Holmes would have answered, "true, I have another fund which is sufficient to pay off the Hendrickson judgment, but I have another judgment of my own against the common debtor, and which, like yours, is a lien upon the common fund, but it is subsequent to your judgment, and my only means of payment is to pay the Hendrickson judgment out of the common fund." 10
 Daniel Holmes had a right, as against the common debtor, to appropriate the collateral to the payment of his judgment, which was subsequent to Daniel Van Mater's judgment. By taking the collateral, as between himself and his debtor, he relinquished no lien which the Hendrickson judgment had, and he might resort to any of the securities he saw fit. 1 *Story* 640. He did not bind himself to appropriate first the collateral, before resorting to the real and personal property bound by the judgments.

Here then is a case where, if the creditor is driven from the common fund, he is injured by being deprived of the means of payment of another debt. What superior equity has Daniel Van Mater's judgment to this fund in Daniel Holmes hands over Daniel Holmes' judgment? Only this, that it is a prior judgment, and therefore is entitled to the equities of the most diligent creditors. But, to counterbalance that equity, Daniel Holmes' vigilance has got a fund into his possession which neither judgment could reach. Neither judgment was a lien upon the fund. The only question is, which has the most equity? But if the equities are equal the court will not interfere. The court will not compel the creditor to resort to the common fund to his own prejudice or injury. 30

In looking at the case from this point, there is another consideration which is not to be lost sight of. When the Hendricksons and Daniel Van Mater obtained their judgments, they took out executions upon them, and perfected their liens upon the property of their debtors. It was subsequent to this that Holmes, upon consideration that he would advance the money and take the assignment, received the collateral. He took it for his own safety. There is no allegation that he received it for the purpose or with the view of bettering the condition of the other judgment creditors; on the contrary, it is evident that such was not the intention of either the assignees or assignee of the collateral, for the acknowledgment of its receipt, given by Daniel Holmes, expressly bound him to ac-

count to Joseph and Holmes Van Mater. The security of the complainants is not at all lessened by any thing Daniel Holmes has done.

But the position of the complainants is not as favorable as if they had filed their bill before the funds had actually been appropriated. The real and personal estate of the debtors was sold under the judgments and executions, without any remonstrance or interference of the complainants. Daniel Holmes had then realized nothing on the collateral to pay the Hendrickson judgment. The common
 10 fund was appropriated for the purpose, and by it the judgment was satisfied. Subsequently the money was received upon the collateral, and Daniel Holmes, as he had a right to do, both in law and equity, applied the money to pay a judgment debt which the debtors owed him.

Under these circumstances, I cannot see upon what principle of equity the defendants can be called upon to account to the complainants for the proceeds of the collateral held by Daniel Holmes.

B. WILLIAMSON, C.

PETITION OF APPEAL.

20

NEW JERSEY COURT OF ERRORS AND APPEALS.

BETWEEN

MARIA VAN MATER and ELLENOR VAN
 MATER, administratrixes of Daniel Van Mater,
 deceased, appellants,

and

JOSEPH HOLMES and JOHN W. ELY, administra-
 tors of Daniel Holmes, deceased, respondents,

} On bill and demurrer.

*To the Honorable the Court of Appeals in the last resort in all causes
 of law.*

The humble petition of Maria Van Mater and Ellenor Van Ma-
 30 ter, administratrixes of Daniel Van Mater, deceased, the appel-
 lants in the above stated cause, respectfully shows, that your peti-
 tioners find themselves aggrieved by a final decree, made in the

Court of Chancery by his Honor Benjamin Williamson, Chancellor of New Jersey, bearing date the 12 day of *Oct* A. D. 1854, wherein your said petitioners were complainants, and the said Joseph Holmes and John W. Ely, administrators of Daniel Holmes, deceased, were defendants, in this respect, to wit, that said decree adjudges that the said demurrer to said bill of your petitioners was well taken, and that your petitioners had no equitable right to have the proceeds, or any part thereof, of the draft mentioned in said bill of complaint applied towards the payment of the judgment of the said Daniel Van Mater, deceased, set forth in said 10 bill, and that the demurrer to said bill should be sustained.

And your petitioners humbly appeal from said decree, upon the ground that the same is erroneous; they therefore pray that said decree may be reversed, set aside, and for nothing holden.

And that your petitioners may have such further and other relief in the premises as to this honorable court shall seem meet.

Dated

GEO. W. ROBESON,

Solicitor for and of counsel with appellants.

Court of Chancery by his Honor the Chancellor
 of New Jersey, bearing date the 22nd day of
 A. D. 1831, wherein your said petitioners and
 the said Joseph Holmes and John W. administrators of Daniel
 Holmes, deceased, were defendants, in respect to wit, that said
 petitioners alleged that the said debtors or to said bill of your peti-
 tioners was well taken, and that your petitioners had no equitable
 right to have the proceeds of any part of the debt more
 thaned in said bill of complaint applied towards the payment of the
 judgment of the said Daniel Van Matre, deceased, set forth in said
 bill, and that the petitioner to said bill should be sustained.
 And your petitioners humbly express their said decree upon the
 ground that the same is erroneous; they therefore pray that said
 decree may be reversed, set aside, and set nothing holden.
 And that your petitioners may be heard in further and other relief
 in the premises as to this honorable court shall seem meet.

Date

Geo. W. ROBINSON

Solicitor for one of several other applicants