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New Jersey Court of Errors and Appeals.

Between ROBERT W. PRYOR, Receiver, etc., Complainant and Appellee, AND ALLAN J. GRAY, Defendant and Appellant.	Brief of Defendant and Appellant.

The complainant, Robert W. Pryor, who is the Receiver of the E. C. Faitoute Hardware Co., filed a bill in the Court of Chancery asking that the said Allan J. Gray should answer make to the allegations set forth in said bill, and that a certain chattel mortgage made by the said E. C. Faitoute Hardware Co. to the said Allan J. Gray might be declared fraudulent and void and null and void, and that the said Allan J. Gray should account for money received from the sale of certain property covered by said chattel mortgage up to December 17th, 1904.

Page 7 of Book.

To this bill the defendant demurred.

Page 23 of Book.

Which demurrer was sustained and the complainant filed an amended bill.

Page 4, &c., of Book.

To this amended bill the defendant demurred.
Page 8, &c., of Book.

Which demurrer was overruled.
Page 11 of Book.

In an opinion filed by Vice-Chancellor GRAY.
Page 14, &c., of Book.

The E. C. Faitoute Hardware Co., on the eighteenth day of July, 1904, executed a chattel mortgage to Allan J. Gray for five thousand dollars, which chattel mortgage, as alleged in the bill of complaint asking for the appointment of a Receiver, was placed on record in the Essex County Register's office on the same date. This chattel mortgage was executed by the proper officers of the E. C. Faitoute Hardware Company, and was proved, as the defendant claims, according to the statute of the State of New Jersey, applying to the proof or acknowledgment of mortgages, and was duly recorded in the Essex County Register's office in Book 151 of Chattel Mortgages, page 208.
Printed Book, page 5, line 12, &c.

The complainant does not set forth a copy of the chattel mortgage in his bill of complaint, nor does he annex a copy thereof to said bill, but he acknowledges in said bill that said chattel mortgage was recorded as aforesaid, but claims that it was illegally recorded, and alleges that it was not acknowledged or proved by a subscribing witness.
Printed Book, page 5, lines 18, 19 and 20.

The facts then set forth in the amended bill are that a chattel mortgage was given; that it was forthwith recorded in the Register's office of the County of Essex, as required by law, but the claim is made that it was illegally recorded because the said E. C. Faitoute Hardware Co. "did not acknowledge the said mort-

gage, nor was said mortgage proven by the subscribing witness." The bill of complaint does not show in what way the mortgage was acknowledged or proved, and we must rely upon the wording of said bill to draw the conclusion that the mortgage was not proved by the subscribing witness. It therefore was proved by some other person other than the subscribing witness.

The other defects in the bill are set forth in the demurrer filed to the bill.

Printed Book, page 8.

The main reasons therein set forth are, in connection with the one above set forth, that the said complainant does not show that even though the said chattel mortgage is void as against subsequent creditors, &c., the money is necessary to pay the creditors of the E. C. Faitoute Hardware Co. In other words, there is no denial of the validity of the mortgage as between the mortgagor and mortgagee, and if there is sufficient funds in the hands of the Receiver of the E. C. Faitoute Hardware Co. to pay the debts of said company, the mortgage will not be set aside even though invalid.

Printed Book, page 9, reasons 4 and 5.

I.

Acknowledging that the allegations of the bill are true; that the chattel mortgage given by the E. C. Faitoute Hardware Co. to Allan J. Gray was not acknowledged or proved by the subscribing witness, but was proved by other than the subscribing witness, and was recorded immediately as required by law, is the chattel mortgage void, or has the chattel mortgagee complied with the statute.

The Conveyancing Act of 1898, Section 21 (P. L. 1898, page 677), provides:

"All deeds or instruments of the nature or description following * * * may be acknowledged *or proved and then recorded in the office of the clerk of the court of common pleas*, &c. (Register's office) * * * and all other instruments that may have been heretofore or may be hereafter directed by any statute to be acknowledged *or proved and recorded;* and also in the office of the clerk, &c., in which the goods, chattels and personal property lie, &c. * * * chattel mortgages, assignments, &c."

It will be seen that there is nothing in said section which requires a chattel mortgage to be acknowledged or proved by the subscribing witness—the said section merely requires that a chattel mortgage shall be acknowledged or proved, and does not specify by whom proved or in what manner it shall be proved—the inference being that it may be proved by any person having the necessary or requisite knowledge to make said proof.

There is nothing in the Conveyancing Act which calls for a proof to be made by the subscribing witness. The Conveyancing Act does provide that no deed or instrument, &c., spoken of in the said 21st section shall be recorded unless first acknowledged or proved.

SECTION 52—CONVEYANCING ACT—P. L. 1898—page 690. This section provides that it must be "first acknowledged or proved and certified in the manner hereinbefore directed, except as herein stated." The only manner hereinbefore directed is that the same should be acknowledged or proved.

Section 53 of said act provides that when said instrument is duly executed, acknowledged *or proved and shall be duly recorded*, such record shall be notice to all subsequent judgment creditors, &c., of the execution of said instrument and the contents thereof.

Section 54 of said act provides that every such instrument, until duly recorded, shall be void and of no

effect, &c., except against subsequent judgment creditors, purchasers and mortgagees.

The aforesaid Conveyancing Act repeals all subsequent acts relating to conveyances.

P. L. 1898, page 711, &c.

We therefore see that there is nothing in the Conveyancing Act which requires an instrument to be proved by the subscribing witness, but that the same must be acknowledged or proved before it can be placed on record. *If it is acknowledged or proved and placed on record, it is good, valid and effectual as against subsequent purchasers, creditors, &c.* The amended bill in this case merely alleges that the chattel mortgage was not proved by the subscribing witness. It states the facts to be that the chattel mortgage was executed and does not claim that the execution was wrong ; that it covered the property at numbers 97–99 Market street, and was given for a good and valid consideration. It does not claim that the mortgage was illegal or fraudulent or without consideration. It acknowledges that the mortgage was for five thousand dollars, and that it was recorded in the Register's office of the County of Essex, and that the said Allan J. Gray took possession of the property covered by the said mortgage on the sixth day of December, 1904. In other words, the bill acknowledges that all of the requirements of the statute were complied with ; that there was a good and valid chattel mortgage for a good and valid consideration ; that the same was properly executed and that it was proved and placed on record, so that it became notice to every one from the thirteenth day of July, 1904. The Receiver now tries to have the mortgage declared void, and the recording of the same set aside on the ground that it was not proved by the subscribing witness, although acknowledging that it was proved and recorded as required by statute. This case is not like some of the cases reported in the

Reports, for the reason that the Conveyancing Act (Gen. St., Vol. 1, page 853) has been changed by the Conveyancing Act of 1898. The old Conveyancing Act of 1874 provided in Section 4 that any deed or conveyance, &c., if acknowledged or proved "by one or more of the subscribing witnesses to it," the same so acknowledged or proved and certified shall be received in evidence in any Court of this State as if the same was then and there produced and proved. It will be seen that the Legislature in passing the Act of 1898 has omitted the words "by one or more of the subscribing witnesses."

Section 55 of the Conveyancing Act of 1898 takes the place of Section 4 of the Conveyancing Act of 1874.

Section 13 of the Conveyancing Act of 1874 (Gen. St., page 855) provided that all instruments should be first acknowledged or proved and certified "in the manner herein directed," which is to say, the manner set forth in Section 4 of said act. As I have said before, it is obvious that this act in these sections have been repealed, and the Law of 1898 does not provide for the proving of documents by subscribing witness. The contention of the demurrant, therefore, is that the complainant does not show any grounds in his bill of complaint for the setting aside of the said chattel mortgage and having the same declared fraudulent and void.

II.

The complainant does not allege in his bill that this five thousand dollars, for which the said chattel mortgage was given, was not and is not due from the E. C. Faitoute Hardware Co., the mortgagor, to Allan J. Gray, the mortgagee. It is, therefore, obvious that the

said Allan J. Gray is a creditor of the E. C. Faitoute Hardware Co. to the extent of five thousand dollars. If the chattel mortgage is void, it would merely transform the said Gray from a preferred to a general creditor. There is nothing in the bill to show that there are not sufficient funds in the hands of the Receiver or sufficient assets to pay all of the debts of the said corporation. If such is the case, then there would be no object in setting aside the said chattel mortgage, for if there are enough assets, exclusive of the property covered by the chattel mortgage, to pay all the liabilities of the corporation, no one is injured by the chattel mortgage. The bill shows that the property covered by the chattel mortgage was sold for three thousand nine hundred and thirty-five dollars, and that the lien of the mortgage was transferred to that money. That would reduce the claim of Gray against the Receiver to a little less than fifteen hundred dollars, he being credited with the amount the property brought at sale. The bill goes on to show that claims amounting to seventeen thousand four hundred and eleven dollars have been filed, but does not show what the assets of the said company are.

III.

The learned Vice-Chancellor has failed to consider certain grounds of demur, because they might have been filed against the original bill. Vice-Chancellor Emery sustained the demurrer to the original bill without filing an opinion, and, as a matter of fact, sustained the said demurrer because the complainant had alleged in his original bill of complaint that the chattel mortgage was "illegally proved," that being a conclusion of law, and, stating facts that no defendant could an-

swer, the bill was dismissed. The demurrant now also claims that he cannot answer the present bill as to the acknowledgment or proof for the same reason. It will be seen in the demurrer filed to the original bill, that the reasons filed therein, if they had been considered by the Vice-Chancellor who sustained the demurrer to the original bill, would have been sufficient to have based the fourth and fifth grounds of demur set forth in the demurrer to the amended bill. It, therefore, seems that the Vice-Chancellor erred in not considering the fourth and fifth grounds of demur filed to the amended bill.

Respectfully submitted,

MALCOLM MACLEAR,

Of Counsel with Defendant and Appellant.

NEW JERSEY COURT OF ERRORS AND APPEALS.

Between

Robert W. Pryor, Receiver of E. C. Faitoute Hardware Company
Complainant and Appellee
and
Allan J. Gray
Defendant and Appellant

BRIEF OF FRANK BENJAMIN, COUNSEL FOR APPELLEE

1. The bill of complainant sets forth a good cause of action as to the monies collected from the sale of the goods between the sixth day of December to the seventeenth day of December. Therefore the first, second and third grounds for demurrer should be overruled; because if a demurrer is general to the whole bill, and there is any part, either as to the relief or the discovery, to which the defendant ought to put in an answer, the demurrer being entire must be overruled.

Daniel Chancery Pleading and Practice, volume 1, page 599, 5th. ed.; page 584, 1st. ed.

2. The bill of complaint shows that the defendant not only claims a lien but that he has a lien on the money derived from the sale of of the chattels provided the title of his mortgage is valid. The agreement between the solicitor for the complainant and the solicitor for the defendant

expressly contracts that the defendant shall have a lien.

Pomeroy's Equity Jurisprudence, vol. 3, p. 233, sec. 1235.

3. If the mortgage is invalid as to creditors of the E. C. Faitoute Hardware Company, it is invalid as to the receiver.

Graham Button Co. v. Spielman 5Dick. 120; affirmed 5 Dick., 796; *Roe v. Neding* 8 Dick., 368.

4. The bill of complaint shows that the E. C. Faitoute Hardware Company was a defendant in a suit brought by Russel& Erwin Mfg. Company to have it decreed insolvent and a receiver appointed, and that a decree of insolvency was entered and a receiver appointed. As this is admitted by the demurrer it appears that Russell & Erwin Mfg. Company have an interest.

5. The mere appointment of the receiver, gives him power to attack the validity of the chattel mortgage. There can be no defense that the receiver has sufficient assets or that there are no other creditors than the defendant. If such defenses were admitted, it would be to decide issues in a collatoral suit that only belong to the receivership and the proceedings in which he was appointed. Such a course might affect the rights of creditors without their having an opportunity to be heard. If there are sufficient assets to pay all claims, or all the claims are paid excepting the defendants, his remedy is by a proceeding to close up the receivership.

6. If a defendant could plead that there are no creditors, the question of the validity of a claim would be decided in a suit to which the creditor was not a party; and the decision would affect

the amount he would receive on his claim. The general power of a receiver should not be attacked in a collateral suit.

Alderson on Receivers, p. 777, sect. 572 and cases cited.

7. The fourth and fifth grounds of demurrer could have been alleged against the original bill, but were not; the defendant therefore waived his right.

Bean v. Ayres, 69 Maine 128.

FRANK BENJAMIN,
Counsel for Appellee.

over

The question involved in the fourth ground of demurrer is one affecting the proper adjustment of the mutual rights of the creditors, stockholders and debtors of the insolvent corporation. If it be necessary to allege in the bill of complaint that certain claims exist as to which the chattel mortgage would be void according to the statute, the mortgagee has a right to contest this allegation. This form of procedure would affect the rights of a creditor in an action to which he is not a party ; and the issue would involve the validity of the whole or part of his claim. Under the practice governing the administration of receiverships, every creditor has a right to be heard upon the question of the validity of his claim. Nor can the receiver as a trustee represent him in this regard.

Smith vs. Gaines, 39 N. J. Eq., 549,550. Encyc. Pl. & Pr., vol. 22, page 177, section 4.

Nor do I think that the receiver's allowance or disallowance of a claim should be conclusive as a judgment. In re Mutual Fire Ins. Co., 46 Atl. Rep. 273. There are reasous against adopting such a view other than those given in this case. An appeal may have been taken from the decision of the receiver which may be pending at the time the receiver brings his suit to test the validity of a chattel mortgage. A reversal of the decision of the receiver might require the re-opening of the receiver's suit. Another serious objection is that the mortgagee would in no case be bound by a proceeding between a creditor and the receiver.

The proper way seems to be to regard the receiver as a creditor of the insolvent corporation.

Re Wilcox etc. Co., 39 Atl. Rep. 163.

And he does not represent a class or portion of the creditors.

Enc. of Pleading and Practice, vol. 17, p. 814.

The adjustment of the several rights of creditors and of those who claim liens on the funds in the hands of the receiver antagonistic to a class of cred-

itors, may be arrived at in the proceedings involving the administration of the corporate assets, when all parties interested may be heard. The decree in the present suit may be so drawn as to leave the final question of the adjustment open. If the chattel mortgage is valid as to any class of creditors, the decrre may be so worded; and no creditor will be thereby precluded from showing that he does not belong to that class. But if the pleading filed by the receiver must show a class of creditors then existing as to whom the chattel mortgage is invalid, a decree made at an early stage of the receivership might preclude a large number of creditors whose claims, subsequently established, might be paramount to the mortgage.

If the bill of the receiver need not allege the claims of the creditors, the fifth ground of demurrer is also without any force.

Encyc. Pl. & Pr., vol. 17, page 826. Note. Alleging Necessity to Collect Assets.

"A complaint in an actiou by the receiver for a corporation to recover assets need not allege facts showing that the assets sued for are necessary to pay debts, as is frequently required in suits against stockholders to recover their statutory liability."

The d cree of insolvency cannot be attacked in a collateral suit, and it establishes the lack of assets to pay debs. Nor can an accounting be had in any suit other than that in which the receiver was appointed.

National Bank vs. Sprague 6, C. E., Gr. 530-538

The fact that the defendant tcok possession of the mortgaged chattels under his mortgage did not give validity to it as against the receiver.

Williamson vs. N. J. S. R. R. Co., 2 stew 311.

FRANK BENJAMIN,

Counsel for Complainant and Appellee.

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In Chancery of New Jersey. 10

Between ROBERT W. PRYOR, Receiver of the E. C. Faitoute Hardware Company, Complainant, and ALLAN J. GRAY, Defendant.	Notice of Appeal. 20

The defendant hereby appeals from the order made on the twenty-eighth day of December, nineteen hundred and five, in the above stated cause, over-ruling with costs the demurrer filed to the bill of complaint filed in the aforesaid case, to the Court of Errors and Appeals, in the last resort in all cases. 30

Dated January 3d, 1906.

MALCOLM MACLEAR,
Solicitor for Defendant.

I can see there is good cause for appeal in the above stated cause. 40

MALCOLM MACLEAR,
Counsel for Defendant and Appellant.

Petition of Appeal.

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

The petition of Allan J. Gray, the appellant in the above stated cause, respectfully shows that your petitioner finds himself aggrieved by an order made in the Court of Chancery by his Honor, William J. Magie, Chancellor of New Jersey, bearing date the twenty-eighth day of December, nineteen hundred and five, wherein Robert W. Pryor, Receiver of the E. C. Faitoute Hardware Company was complainant and the said Allan J. Gray was defendant, in this respect, to wit, that the demurrer filed to the bill of complaint filed in the aforesaid cause by the said Robert W. Pryor, Receiver as aforesaid, should be over-ruled with costs, and that the said defendant should answer the said complainant's bill of complaint within twenty days from the date thereof, and in failing so to do, the said complainant's bill shall be taken as confessed against him.

And your petitioner humbly appeals from that part of the order of the Chancellor which orders as aforesaid, upon the ground that the same is erroneous, in that it ordered and decreed that the said demurrer was improper and should be over-ruled with costs, and that the defendant should answer the complainant's bill of complaint within twenty days, and that in failing so to do the complainant's bill should be taken as confessed against the said defendant.

Your petitioner, therefore, 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.

NEW JERSEY COURT OF ERRORS AND APPEALS.

Between

ROBERT W. PRYOR, Receiver of the E. C. Faitoute Hardware Co.,
Complainant and Respondent,

and

ALLAN J. GRAY,
Defendant and Appellant.

Answer to Petition of Appeal.

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The answer of the above-named respondent to the petition of appeal of the above-named appellant.

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This respondent not acknowledging all or any of the matters which in said petition of appeal are contained to be true for answer thereto, nevertheless, says and admits, that an order was on the twenty-eighth day of December, nineteen hundred and five, 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 to refer thereto when the same shall be produced. And this respondent is advised and believes that the said order is agreeable to equity and he prays that the same may be affirmed with costs to be adjudged to this respondent.

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IN CHANCERY OF NEW JERSEY.

Between ROBERT W. PRYOR, Receiver of the E. C. Faitoute Hardware Co., Complainant, and ALLAN J. GRAY, Defendant.	Amended Bill, etc.

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To William J. Magee, Chancellor of the State of New Jersey:

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Your orator Robert W. Pryor of the City of Newark, New Jersey, by leave of the Court files this his amended bill and humbly complaining shows unto your Honor that on the tenth day of December, 1904, suit was commenced in the Court of Chancery of New Jersey by Russell & Erwin Mfg. Co., against the E. C. Faitoute Hardware Co., a corporation organized and existing under the laws of the State of New Jersey, for the appointment of a Receiver of said corporation upon the grounds of its insolvency; that on the fifteenth day of December, 1904, a decree was entered in said suit whereby said corporation was decreed insolvent and your orator was appointed Receiver thereof, and duly qualified as such Receiver by taking the oath of the Receiver and filing the same and a bond for the faithful performance of his duties.

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Your orator further shows unto your Honor that on the thirteenth day of July, 1904, the said E. C. Faitoute Hardware Co., executed a chattel mortgage on all its stock in trade and fixtures in Nos. 97 and

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99 Market Street, Newark, New Jersey, and on its horses and wagons and after-acquired stock to be placed in said store, all of which were reasonably worth the sum of Eleven thousand dollars ($11,000.00) to the said defendant Allan J. Gray to secure the sum of Five thousand dollars ($5,000.00); and that from the date of said mortgage said E. C. Faitoute Hardware Co., remained in possession of said goods and chattels up to December sixth, 1904, and sold the same in the ordinary course of business.

Your orator further shows unto your Honor that said mortgage was illegally recorded in the Essex County Register's Office in Book 151 of Chattel Mortgages, pages 208, etc., in that the mortgagor, the said E. C. Faitoute Hardware Co., did not acknowledge the said mortgage, nor was said mortgage proven by the subscribing witness.

Your orator further shows that on the sixth day of December, 1904, said Allan J. Gray took possession of all the said mortgaged chattels, under said mortgage and proceeded to sell the same at retail in continuation of the business of said E. C. Faitoute Hardware Co., at Nos. 97 and 99 Market Street, Newark, N. J. and continued to sell the same in the conduct of said business up to December seventeenth, 1904 at noon.

Your orator further shows unto your Honor that on the seventeenth day of December, 1904 at noon your orator, as said Receiver took possession of all of said mortgaged chattels under an agreement with Malcolm MacLear, solicitor for said Allan J. Gray whereby it was agreed that your orator should have possession of all of said chattels and that said Allan J. Gray would consent that the same should be sold free and clear of said mortgage and that the lien thereof if of any validity should attach to the moneys received from their sale; that

said consent was given on the tenth day of January, 1905 and that according to an order of the Court of Chancery dated January twenty-fourth, 1905, all said goods and chattels were sold at public auction to said Allan J. Gray free from his lien of said mortgage for the sum of Three thousand nine hundred and thirty-five dollars ($3,935.00), ten per cent. of which sum was paid in cash and ninety per cent. secured by a bond duly approved by this Court with condition that if said mortgage should be declared illegal and said Allan J. Gray should pay the sum of Three thousand five hundred and forty-one dollars and fifty cents ($3,541.50) with lawful interest thereon and perform such order of the Court in relation to the said purchase money, that the said bond should be void, otherwise to remain in full force and virtue.

Your orator further shows that said defendant Allan J. Gray claims a lien upon said purchase money and upon the money due under said bond; and that he has in his possession a large sum which he collected from the sale of the goods and chattels as aforesaid from December sixth, 1904, to December seventeenth at noon.

Your orator further shows unto your Honor that claims against said E. C. Faitoute Hardware Co., have been duly proven and filed with your orator as Receiver amounting to seventeen thousand four hundred and eleven dollars and seven cents ($17,411.07) half of which arose before July thirteenth and half subsequent to that date.

And your orator further shows that the proceeds from the sale of said goods and chattels are all the assets in his possession to pay the said claims.

In consideration of the premises and to the end that the said Allan J. Gray may full and true and perfect answer make to all and singular the matters aforesaid without oath, answer under oath being

hereby expressly waived; and that said mortgage be decreed fraudulent and void as to your said orator and the lien thereof null and void; and that said Allan J. Gray may account to your orator for all moneys received upon the sale of said chattels up to December 17 at noon; and that your orator may have such other and further relief in the premises as the nature of the case may require and as may be agreeable to equity and good conscience. 10

May it please your Honor the premises considered to grant unto your orator the State's writ of subpœna issuing out of and under the seal of this Honorable Court, to be directed to the said Allan J. Gray therein and thereby commanding him to appear before your Honor, according to law and the course of this Court, at a certain day and under a certain penalty therein to be expressed then and there to answer the premises and to stand to 20 and abide and perform such decree as to your Honor shall seem meet.

And your orator will ever pray, etc.

FRANK BENJAMIN,
Solicitor and of Counsel
with Complainant.

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IN CHANCERY OF NEW JERSEY.

Between ROBERT W. PRYOR, Receiver of the E. C. Faitoute Hardware Company, Complainant, and ALLAN J. GRAY, Defendant.	On Bill. Demurrer.

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The demurrer of Allan J. Gray, the defendant in the aforesaid action to the bill of complaint of Robert W. Pryor, Receiver of the E. C. Faitoute Hardware Company.

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This defendant, by protestation, not confessing all or any of the matters and things in the complainant's bill of complaint contained to be true in such manner and form as the same are therein set forth and alleged, demurs thereto and for cause of demur shows that:

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(1) That the said complainant does not show any facts in said bill of complaint, which gives the Court jurisdiction over the subject matter. The bill of complaint showing that the goods and chattels mentioned therein have been sold, free and clear of said mortgage and there are no facts alleged which show that the said defendant claims any lien by virtue of said mortgage upon either the goods and chattels or the money for which they were sold.

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(2) That the said bill of complaint shows that

the said property covered by said chattel mortgage had been transferred to said defendant and taken possession of by him in payment of an existing debt without any fraud, before the appointment of the said complainant, as Receiver of the E. C. Faitoute Hardware Company, and that the adjudication as to the insolvency of the said Company; and that, therefore, the said Receiver is not entitled to the said property or any control there over.

(3) That said bill of complaint does not show that the said defendant claims any lien upon the money received for the sale of the goods covered by said mortgage or upon the moneys due under said bond, by virtue of the said chattel mortgage, nor does it set forth any facts which show that the said defendant has filed any claim with said Receiver, claiming money due him under said mortgage or claiming any lien on said moneys paid or due by virtue of said chattel mortgage.

(4) That said bill of complaint does not show that there are any moneys due by said E. C. Faitoute Hardware Company to others than said defendant, or that any persons are interested in the estate of the E. C. Faitoute Hardware Company excepting said defendant.

(5) That said bill of complaint does not show that there is not sufficient money to pay all of the debts of the said E. C. Faitoute Hardware Company.

Wherefore, and for divers other good cause of demur appearing in the said bill, this defendant doth demur thereto and humbly prays the judgment of this Honorable Court whether he should be compelled to make any further or other answer to the

said bill, and prays to be hence dismissed with his costs and charges in this behalf most wrongfully sustained.

MALCOLM MacLEAR,
Solicitor and of Counsel for Defendant.

State of New Jersey, }
County of Essex, } ss.:

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Allan J. Gray, of full age, being duly sworn, according to law, on his oath says: That the foregoing demurrer is not interposed for delay, but in good faith for the causes therein set forth.

ALLAN J. GRAY.

Sworn and subscribed before me }
this day of June, 1905. }

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I certify that I have read the complainant's bill in the above-stated cause, and that the above demurrer is well founded in point of law.

MALCOLM MacLEAR,
Solicitor of and Counsel for Defendant.

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IN CHANCERY OF NEW JERSEY,

Between ROBERT W. PRYOR, Receiver of E. C. Faitoute Hardware Company, Complainant, and ALLEN J. GRAY, Defendant.	Order Overruling Demurrer.

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This cause coming on to be heard at the regular term of this Court in the presence of Frank Benjamin, of counsel, with complainant and Malcolm MacLear, of counsel, with defendant, and the Chancellor having heard the arguments of the counsel of the respective parties on the demurrer filed in the above stated cause: It is on this 28th day of December, nineteen hundred and five, on motion of Frank Benjamin, counsel with complainant, ordered that the said demurrer be overruled with costs and that the defendant answer the complainant's bill within twenty days and that if he fail so to do, the complainant's bill be taken as confessed against him.

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IN CHANCERY OF NEW JERSEY

Between ROBERT W. PRYOR, Receiver of E. C. Faitoute Hardware Company, Complainant, and ALLAN J. GRAY, Defendant.	On Bill, &c. Demurrer to Amended Bill. Memorandum.

The bill of complaint in this cause as amended alleges that the complainant was on December 16th, 1904, appointed Receiver of the defendant, a corporation of the State of New Jersey, because of its insolvency, and that he has duly qualified as such Receiver. That on July 13th, 1904, the defendant corporation executed to the defendant a chattel mortgage on its stock in trade, fixtures and other personal property in Newark, New Jersey, reasonably worth $11,000 to secure the payment of the sum of Five thousand dollars.

That the mortgaged chattels remained in the possession of the defendant Company until December 6th, 1904. That the said chattel mortgage was illegally recorded in Essex County Register's office, because it was neither acknowledged by the defendant mortgagor, nor was the execution thereof proven by the subscribing witness.

The bill further alleges that on the sixth day of December, the defendant Gray took possession of the mortgaged chattels, and proceeded to sell the same at retail, and continued to do so until December 17th, 1904, when the complainant, as Receiver, of the insolvent corporation, took possession of the mortgaged chattels under a stipulation with the de-

fendant's solicitor, whereby it was agreed that the said Receiver should have possession of the chattels; that they should be sold clear of the mortgage, and that the lien thereof, if of any validity, should attach to the moneys received from the sale. That all of the said chattels were under an order of this Court sold at public auction to the defendant for the sum of $3,935.00, part of which was paid in cash, and part secured to be paid by the complainant's bond conditioned that if the mortgage should be declared illegal, and the defendant should pay the sum of $3,541.50 with interest thereon, and perform the order of the Court in relation to the purchase money, the bond should be void.

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The bill further alleges that the defendant claims a lien on the purchase money and on the money due under said bond, and that he has in his possession a large sum of money collected from the sale of the said mortgaged chattels between December 6th, and December 17th, 1904.

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That claims against the insolvent Company have been filed with the complainant, as Receiver, to the amount of $17,411.07, and that the proceeds from the sale of the mortgaged chattels are all the assets of the insolvent Company in possession of the Receiver.

The complainant prays that the mortgage may be decreed fraudulent and void as to him, and the lien thereof null and void; that the defendant may account to the complainant for moneys received from the sale of chattels up to December 17th, at noon, and for further relief, &c.

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The only defendant is the chattel mortgagee who demurs to the whole amended bill, and sets forth five several causes of demurrer which will be hereafter stated,

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MR. MALCOLM MACLEAR,
For Demurrant.

MR. FRANK BENJAMIN,
For Complainant.

GREY, V. C.:

The first cause of demurrer challenges the bill, because it does not show any facts which give this Court jurisdiction, and particularly the demurrant insists that the bill shows that the mortgaged chattels have been sold clear of the mortgage, and no facts are alleged which show that the defendant claims any lien by virtue of the mortgage on either the mortgaged chattels or the money proceeds of their sale, &c.

A sufficient ground of equitable jurisdiction is stated in the allegations that the defendant, under a void chattel mortgage obtained from the insolvent corporation, has by taking possession and sale of that Company's chattels wrongfully, realized unknown sums of money, for which the bill prays he may be decreed to account to the Receiver of that Company.

The bill, taking it as a whole, is also sufficiently definite in its statements of fact to show that it charges that the defendant wrongfully claims under his void chattel mortgage to have been entitled to sell the insolvent Company's chattels, and keep the proceeds. That the moneys in dispute were realized under an order of this Court upon an agreement of the defendant that the mortgaged chattels should be sold clear of the disputed chattel mortgage and that the lien thereof, if it had any validity, should attach to the moneys proceeding from that sale.

The averments of the amended bill inform the defendant that the subject regarding which he is called upon to respond, is his claim to a lien, by virtue of his chattel mortgage upon the goods of the insolvent Company, and upon the fund raised by the sale of the chattel mortgaged goods, which chattel mortgage the complainant charges is void, because not lawfully recorded. This notifies the defendant

of the purpose of the suit, which the Court of Appeals has held is all that is required in bills in equity (Mutual Life Ins. Co. vs. Sturges, 6 Stew., 337). The first ground of demurrer is overruled.

The second ground of demurrer avers that the complainant's attack on the chattel mortgage is inefficient, because, on the face of the bill, it appears that the defendant had, in fact, taken possession of the mortgaged property before the complainant was appointed Receiver for the insolvent Company, mortgagor.

The statute, in dealing with the sort of possession, which may validate an unrecorded chattel mortgage, declared that it must be immediate. The complainant's contention is, that the entry of the defendant's chattel mortgage in the mortgage book without either certificate of its acknowledgment or proof of its execution was, in law, not a recording. The pleadings show that the chattel mortgage was made on the thirteenth day of July, 1904, and that possession of the mortgaged goods was taken under it on the Sixth day of December, 1904, nearly six months after its execution.

In Roe vs. Meding, 8 Dick., 368, the Court of Appeals declared that the requirement of the State regarding chattel mortgages, is for immediate recording or immediate taking possession, for the obvious reason that one or the other is necessary to give notice to possible creditors of the mortgagor of the mortgagee's interest in the goods. In that case the delay in recording was less than three months, yet it was held to invalidate the chattel mortgage. The Receiver is not limited in challenging the defendant's wrongful acts to those done after his appointment. The second ground of demurrer is overruled.

The third ground of demurrer contends that the bill of complaint does not show that the defendant

claims any lien on the moneys received from the sale of the mortgaged chattels, by virtue of the mortgage; and does not show that the defendant has filed any claim with the Receiver for moneys due under the chattel mortgage, or due by virtue thereof.

This is substantially answered in the above discussion of the first ground of demurrer. Upon the whole case as exhibited by the said bill of complaint, it obviously appears that the complainant, as Receiver, &c., alleges that the defendant, by virtue of his void chattel mortgage, and of the stipulation with the Receiver, claims a lien upon the proceeds of the sale of the mortgaged goods. This ground of demurrer, therefore, should be overruled.

The fourth ground of demurrer is, that the amended bill of complaint does not show that there are any moneys due by the insolvent Company to persons other than the defendant, or that persons other than the defendant are interested, in the estate of the insolvent Company.

The fifth ground of demurrer is, that the amended bill of complaint does not show that there are not sufficient moneys to pay all the debts of the insolvent Company.

Both these grounds of demurrer, challenging the amended bill (and, indeed, most of the others), might have been assigned against the original bill of complaint, before it was amended. The defendant demurred to that bill, and did not then see fit to present these criticisms as grounds of demurrer. He thereby waived any right of objection for that cause to the same extent as if he had pleaded over (Bean vs. Ayers, 69 Maine, 128). He may not reserve existing grounds of demurrer to an original bill, and by presenting those defects successively against amendments, unreasonably protract litigation and unjustly enhance the costs. *Ib.*

The demurrer should be overruled, with costs.

The Schultz-Gasser Co., Law Case Printers, 68-70 Market Street Newark

In Chancery of New Jersey

Between

ROBERT W. PRYOR, Receiver of E. C. Faitoute Hardware Co.,

Complainant,

and

ALLAN J. GRAY,

Defendant

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To William J. Magie, Chancellor of the State of New Jersey:

Your orator, Robert W. Pryor, of the City of Newark, N. J., humbly complaining, shows unto your honor, that on the 16th day of December, 1904, he was appointed receiver of the E. C. Faitoute Hardware Company, an insolvent corporation, by your honorable court and duly qualified as such by filing a bond and taking receiver's oath; that on the 13th day of July, 1904, the said E. C. Faitoute Hardware Company executed a chattel mortgage on all its stock in trade, and fixtures in Nos. 97 and 99 Market street, Newark, New Jersey, and on its horses and wagons, and upon after acquired stock placed in said store, all of which were reasonably worth the sum of $11,000.00, to the said defendant, Allan J. Gray, to secure the sum of $5,000; that from the date of said mortgage said E. C. Faitoute Hardware Company remained in possession of said chattels up to December 6, 1904, and sold the same in the ordinary course of business; that said mortgage was *illegally* recorded in the Essex County Register's Office, in Book 151 of Chattel Mortgages, pages 208, etc., in that the mortgage was neither acknowledged or proven according to the statute in such case made and provided; that on the 6th day of December,

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1904, said defendant, Allan J. Gray, took possession over said mortgage of all the said mortgaged chattels and proceeded to sell the same at retail in continuation of the business of said E. C. Faitoute Hardware Company, at Nos. 97 and 99 Market street, Newark, N. J., and continued to sell in the conduct of said business up to December 17, at noon.

Your orator further shows, unto your Honor, that on the 17th day of December, 1904, at noon, your orator took possession of all of said mortgaged chattels under an agreement with Malcolm MacLear, solicitor for said Allan J. Gray, whereby it was agreed that your orator should have possession of all of said chattels and that said Allan J. Gray would consent that the same should be sold free and clear of said mortgage and that the lien thereof if of any validity should attach to the moneys received from their sale; that said consent was given on the 10th day of January, 1905, and that according to an order of the Court of Chancery, dated January 24th, 1905, all said goods were sold at public auction to said Allan J. Gray, free from the lien of said mortgage, for the sum of $3,935; ten per cent. of which sum was paid in cash and ninety per cent. secured by a bond duly approved by this court, with condition that if said mortgage should be declared illegal and said Allan J. Gray should pay the sum of $3,541.50 with lawful interest therein and perform such order of the court in relation to the said purchase money, that the said bond should be void, otherwise to remain in full force and virtue.

In consideraton of the premises and to the end that the said Allan J. Gray may full and true and perfect answer make to all and singular the matters aforesaid without oath, answer under oath being hereby expressly waived; and that said mortgage be decreed fraudulent and void as to your said orator and the lien thereof null and void; and that said Allan J. Gray may account to your orator for all moneys received upon the sale of said chattels up to December 17th, at noon; and that your orator may have such other and further relief in the premises as the nature of the case may require and as may be agreeable to

equity and good conscience.

May it please your Honor, the premises considered, to grant unto your orator the State's writ of subpoena, issuing out of and under the seal of this honorable court, to be directed to the said Allan J. Gray therein, and thereby commanding him to appear before your honor, according to law and the course of this court, at a certain day and under a certain penalty therein to be expressed, then and there to answer the premises and to stand to and abide and perform such decree as to your honor shall seem meet.

And your orator will ever pray, etc.

FRANK BENJAMIN,
Sol'r and of Counsel with Compl't.

IN CHANCERY OF NEW JERSEY.

Between RUSSELL & ERWIN MFG. CO., Complainant, and E. C. FAITOUTE HARDWARE CO., Defendant.	On Bill, etc.

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To his Honor, William J. Magie, Chancellor of the State of New Jersey:

Complaining, shows unto your Honor, your orator, Russell & Erwin Manufacturing Co., a corporation of the State of Connecticut, a judgment-creditor of the E. C. Faitoute Hardware Co., for and on behalf of themselves and all other creditors of said Company who shall come in and contribute to the expense of this suit; that on the 7th day of October, 1903, the certificate of incorporation of the defendant E. C. Faitoute Hardware Co., was filed at Trenton, in the office of the Secretary of State, under and by virtue of the Corporation Act of 1896, and thereby the incorporators named in said certificate were created a body politic and corporate, in fact and in law, by the name and style of the E. C. Faitoute Hardware Co., for the purpose of buying and selling hardware and carrying on the business incident thereto, and for such purpose the said Company was authorized to raise by subscription as capital stock, $40,000; and said Company was also authorized to use, hold, possess and enjoy such real estate as should be necessary and expedient for the uses of such corporation, and to possess the powers and be subject to the general

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restrictions set forth in an act entitled, "An Act Concerning Corporations, Revision of 1896."

And your orator further shows that after the filing of said certificate of incorporation, books of subscription to the the capital stock of the said Company were duly opened and the whole amount of said capital stock was subscribed for.

And your orator further shows that after the organization of said Company, it opened a store at No. 97 Market Street, Newark, New Jersey, for the sale of hardware, and has ever since continued to conduct business there up to December 7th, 1904, when the possession of all its stock and fixtures were handed over to Allan J. Gray, who holds a chattel mortgage, dated July 18, 1904, upon said stock, for the sum of Five thousand dollars ($5,000), which was duly placed upon record in the Essex County Register's Office, July 14, 1904; and said mortgagee has advertised to sell all of said stock and fixtures on Wednesday, the fourteenth of December, instant, under and by virtue of said mortgage.

And your orator further shows unto your Honor that on the seventh day of December, inst., its attorney, Frank Benjamin, presented at said No. 97 Market Street, Newark, New Jersey, a protested note for Two hundred and twenty-seven dollars and forty-six cents ($227.46), payable September 14th, 1904, to the order of Gilbert & Bennett Mfg. Co. to Matthias Ludlow, Assistant Treasurer, and to Burton L. Hare, President of said defendant, for payment, and said attorney was informed by them that the defendant could not pay it for it had no money and that all its stock had been taken possession of by Allan J. Gray, the mortgagee.

Your orator further shows unto your Honor, that on December ninth, inst., a judgment by default, for Four hundred and twenty-two dollars ($422.00)

was entered in the Essex County Circuit Court against said defendant.

And your orator further shows unto your Honor that it recovered a default judgment in the First District Court of Newark, New Jersey, on the eighth day of December, instant, against said E. C. Faitoute Hardware Co., for the sum of One hundred and eighty-nine dollars and twenty-seven cents ($189.27); and Matthias Ludlow, the Assistant Treasurer of said defendant, informed the attorney for your orator that the said E. C. Faitoute Hardware Co. owned nothing, and had no money wherewith to pay your orator's said judgment.

Your orator shows unto your Honor, that he does not know and has not the means of knowing the true character and value of the assets of said defendant, excepting that he believes them to be of great value, consisting of a general line of hardware; and that your orator and other creditors will be greatly prejudiced by the sale of said stock by virtue of said chattel mortgage.

And your orator further shows and charge the fact to be that said Company is insolvent; and has not the funds to carry on the ordinary business of said corporation; and that it has been carrying on said business at a great pecuniary loss to the stockholders and creditors of said company; and that, owing to the possession of all the stock of said Company being taken by the said mortgagee, the business of said corporation cannot be conducted so as to enable the said corporation to pay its just debts or carry on its operations with safety for its creditors; and that it has suspended its ordinary business, and that the further prosecution by the said Company of its said business would necessarily tend to the sacrifice, injury and depreciation of the rights of its stockholders and creditors.

In consideration whereof and for as much as your orator is without adequate remedy without the assistance of this Honorable Court:

To the end therefore, that the said Company may full, true and perfect answer make to all and singular the matters and things hereinbefore stated; and that it may set forth and discover the goods and chattels, rights and credits, moneys and effects and real estate of every kind and description belonging to said corporation; and that your orator and other creditors and stockholders of the said Company may be paid what is justly due them; and that the Company may be enjoined from exercising any of its franchises and from receiving any debts due to it, and from paying and transfering any of its money and effects and from continuing its said business; and that it may be decreed to be insolvent; and that a Receiver may be appointed, according to the form of the statute in such case made and provided; and that your orator may have such other and further relief in the premises as the nature of the case may require, and as may be agreeable to equity and good conscience.

May it please your Honor, the premises considered to grant unto your orator the State's writ of injunction, issuing out of and under the seal of this Honorable Court, directed to the said E. C. Faitoute Hardware Co., its officers and agents enjoining and restraining them and each of them from exercising any of the privileges or franchises granted by the act incorporating said Company, and from collecting or receiving any debts due to said corporation, and from paying out, selling and assigning or transferring any of the estate, money, funds, lands, tenements or effects of said corporation; and also an injunction enjoining and restraining said Allan J. Gray, his agents or attorneys from selling or disposing of the said goods and chattels

under and by virtue of his said mortgage until the further order of this Court; and also the State's writ of subpœna, likewise issuing out of and under the seal of this Honorable Court to be directed to the said, the E. C. Faitoute Hardware Co., therein and thereby commanding the said corporation to appear before your Honor according to law and the course of this Court at a certain day and under a certain penalty therein to be expressed, then and there to answer the premises and to stand and to abide and perform such decree as to your Honor shall seem meet.

And your orator will ever pray, etc.

FRANK BENJAMIN,
Solicitor and of Counsel with Complainant.

Bill of Complaint.

State of New Jersey, }
County of Essex, } ss.:

Frank Benjamin, being duly sworn, according to law on his oath says: That he is the solicitor for the complainant Russell & Erwin Mfg. Co., and that he has read the bill of complaint and knows the contents thereof, and the same is true except as to matters stated therein upon information and belief and as to these matters he believes it to be true.

And this deponent further says that on December 8th, inst., he recovered for said complainant a judgment by default on a protested check for $189.96, against said defendant, in the First District Court of Newark and which is still unpaid.

And this deponent further says that the defendant the E. C. Faitoute Hardware Co. is a corporation, and that its certificate of incorporation was filed in the office of the Secretary of State, on the 7th day of October, 1903, for the purchase and sale of hardware with the principal office at No. 97

Market Street, Newark, N. J.; that it had a capital stock of $40,000, and the Company commenced business with $40,000; that the assets of said corporation consists of hardware which is its stock in trade, at No. 97 Market Street, Newark and book accounts, the true value of which assets this deponent is unable to state.

And this deponent further says that all the hardware in said store including fixtures and after acquired property, were on the 13th day of July, 1904, mortgaged to Allan J. Gray, for $5,000 with interest at 6%; that on the 7th day of December, inst., said Allan J. Gray by his agent Matthias Ludlow took possession of said stock-hardware and fixtures under the power of his mortgage and entered into the possession of said premises by virtue thereof and now holds possession and has declared his intention to sell all said stock, hardware and fixtures on the 14th of December instant, to satisfy his said mortgage, of all of which facts this deponent has personal knowledge.

And this deponent further says that on December 7th instant he presented for payment a protested note made by said defendant for $227.46 to the order of Gilbert & Bennett Mfg. Co. to Matthias Ludlow, assistant treasurer and Burton L. Hare president of said defendant, and they said that the defendant was unable to pay it, because the Company had no money and all its stock and fixtures were in the possession of Allan J. Gray the said mortgagee, and that the defendant had suspended business.

This deponent further says that he has examined the record of the Essex County Circuit Court and finds that on December 9th inst., a judgment by default for $422.00 was entered against said defendant.

And this deponent further says that there is a

large number of claims against said defendant, and that said defendant is unable to continue its business and pay its debts in the ordinary course of trade, and that it has suspended its ordinary business.

FRANK BENJAMIN.

Subscribed and sworn to before me this 10th day of December, 1904. 10

Wm. M. Brown,
Master in Chancery,
Of New Jersey.

IN CHANCERY OF NEW JERSEY.

Between ROBERT W. PRYOR, Receiver of the E. C. Faitoute Hardware Co., Complainant, and ALLAN J. GRAY, Defendant.	On Bill. Demurrer.

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The demurrer of Allan J. Gray, the defendant in the aforesaid action, to the bill of complaint of Robert W. Pryor, Receiver of the E. C. Faitoute Hardware Company.

This defendant by protestation in confessing all or any of the matters and things in the complainant's bill of complaint contained to be true in such manner and form as the same are therein set forth and alleged, demurs thereto and for cause of demur shows that: 40

(1) The said bill of complaint does not show the nature and extent of the interest of the complainant in the aforesaid suit, from which the Court can determine that the complainant has any interest therein.

(2) That the said bill of complaint does not state any facts which show that the chattel mortgage, mentioned in said bill of complaint, was illegally recorded under the laws of the State of New Jersey, regulating the recording of such instruments.

(3) That the said bill of complaint does not state such facts in relation to the averment, that the said chattel mortgage, mentioned in said bill of complaint, was illegally recorded, that this defendant has clear information as to what he is called upon to answer.

(4) The said bill of complaint asks that the said chattel mortgage, therein mentioned, may be declared fraudulent and void when the said complainant does not allege any facts in said bill which constitute or show fraud.

(5) That said complainant does not show any facts in said bill of complaint which give the Court jurisdiction over the subject matter. The bill of complaint showing that the goods and chattels mentioned therein have been sold free and clear of the said mortgage, and there are no facts alleged which show that the said defendant claims any lien by virtue of said mortgage upon either the goods and chattels or the money for which they were sold.

(6) That said bill of complaint improperly combines two distinct subjects.

Wherefor, and for divers other good causes of demur appearing in the said bill, this defendant doth demur thereto and humbly prays the judg-

ment of this honorable Court, whether he should be compelled to make any further or other answer to the said bill, and prays to be hence dismissed, with his costs and charges in this behalf most wrongfully sustained.

MALCOLM MacLEAR,
Solicitor and of Counsel for Defendant.

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State of New Jersey, }
County of Essex, } ss.:

Allan J. Gray, of full age, being duly sworn according to law, on his oath saith, that the foregoing demurrer is not interposed for delay, but in good faith for the causes therein set forth.

ALLAN J. GRAY.

Sworn and subscribed before me }
this day of March, 1905. } 20

I certify that I have read the complainant's bill in the above stated cause, and that the above demurrer is well founded in point of law.

MALCOLM MacLEAR,
Solicitor of and Counsel for Defendant.

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