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EXPLANATION.

The record in the Supreme Court and brought up consists of (*a.*) Petition for Rule; (*b.*) Affidavit of Relator with Letter of Respondent; (*c.*) Certified Copy of Circuit Court Record; and (*d.*) Opinion and Judgment complained of. The following state of case is made up of (*a.*), (*b.*), (*d.*), assignment of and joinder in error, and so much of (*c.*) as is necessary to show the issue raised here and sustain the assignment of errors, to wit: Petition to open judgment and order opening judgment (9 N. J. Eq., 655). The application for mandamus was based upon an amended declaration and failure to replead thereto. The opinion of the Supreme Court admits that relator showed that he filed an amended declaration, ruled the defendants to plead, and that they failed to do so, although duly served. Hence, any papers in (*c.*) bearing on these points, we submit, need not be printed in the state of case, as, being admitted, they are eliminated from the issue.

The assignments of error, *i. e.*, that judgment was not passed upon the issue presented, and that the rule was denied upon a question not before the court, raise here the issue, (1) did the Supreme Court have before it a *prima facie* case upon which it was bound to issue the rule (4 N. J. L. J., 275)? (2) Did it go outside this *prima facie* case and refuse the application upon a ground not shown in the record? and (3) Did it abuse legal discretion in so doing?

The petition to open judgment discloses to this court that a meritorious defense was *not* alleged; *nor* fraud or improvidence in entering the judgment averred; *nor* negligence of attorney assigned as a reason for not repleading. On the contrary, it shows that the attorney for defendants deliberately failed to replead because he did not consider that he was obliged to replead. The order opening the judgment is in ordinary form and gives only general reasons. The letter from respondent (*b.*) discloses the reason for the order, to wit: the negligence of the clerk of the court in failing to note on the docket the amendment to the decla-

ration; while the opinion of the Supreme Court admits that relator showed that he *filed* an amended declaration. All of which disclose the issue raised under the application—Was the negligence of the clerk a legal reason for the order of opening? The statute of amendment and the decisions clearly make such reason an illegal one and hence a *prima facie* case was made out and was a subject for mandamus.

The fact that the petition to open the judgment does not assign negligence of defendants' attorney, and the letter of respondent making no reference to any such negligence, prove that no such question was before the Supreme Court and that said court went outside the record and issue presented.

When counsel for defendant in error, S. H. Richards, Esq., was requested to agree to the diminution of (*c.*) the most he would do was to say that he would object to any document being in the "Case" not presented to the Supreme Court. Your Honors will note that the petition to open and the order opening the judgment are a part of (*c.*).

Plaintiff in error also explains that at the time this state of case is sent to press, May 31st, the Clerk of the Supreme Court had not yet returned any paper to this court of use in showing the question involved, *i. e.*, (*a.*), (*b.*), (*c.*) and (*d.*); and this, notwithstanding the issue and service upon him of a writ of error and two *certiorarii,* the last one particularly specifying the said papers. Therefore, if these documents are not in this court when wanted, your Honors will know the reason. Of course, this contempt by the clerk of the lower court of the writs from this court cannot possibly prejudice this appeal.

(*a.*)

PETITION FOR RULE.

FILED FEBRUARY 10TH, 1910.

The State, Ex Rel. *Joshua Matlack,*

vs.

Frank T. Lloyd, Judge of the Circuit Court for the County of Burlington.

PETITION FOR RULE TO SHOW CAUSE WHY MANDAMUS *SHOULD NOT* ISSUE.

TO THE HONORABLE, THE JUSTICES OF THE SUPREME COURT OF NEW JERSEY:

Your petitioner, relator, respectfully represents that he is a citizen of New Jersey, and is, and has been a resident of Mt. Holly, in said State, since 1874; that he is a lawyer by profession and a member, since 1889, of the Bar of Philadelphia; that he is not and never has been a member of the Bar of New Jersey; that he is the plaintiff in the suit hereinafter referred to and attorney *pro se* therein.

And your petitioner further shows that on December 8th, 1908, he instituted suit in his own behalf in the Circuit Court for the county of Burlington against Annie Haines, William H. Haines, Elmer Haines, Frank P. Haines, Mary Haines, Anna Hunter, Emma Hunter and Fannie Gillette, all of said county, which suit was in contract to recover a commission previously agreed upon for services rendered the said defendants in a matter in damages they had against the Public Service Corporation of New Jersey for the death of their son and brother on August 12th, 1908, all of which services had been rendered them ouside the courts of New Jersey.

And your petitioner further shows:—

1. That three of the said defendants, to wit: Annie Haines, William H. Haines and Mary Haines, were duly served; that two days prior to the expiration of their time for pleading the respondent herein extended their time twenty days; that at the expiration of twenty days from the date of said order, no pleas having been filed, petitioner entered judgment by default; that on the same day, but subsequently to the entry of said judgment, respondent extended said defendants' time for pleading ten more days; that your petitioner had no notice of any extensions until the orders were filed; that Joseph Kaighn, Esq., counsel for defendants, prepared and had sworn to by William H. Haines on January 21st, 1909, a petition for rule on your petitioner to show cause why said judgment should not be opened, averring therein a meritorious defense for said three defendants, alleging want of time for filing pleas, and falsely accusing this petitioner with having entered his said judgment *nunc pro tunc* back of respondent's last order of extension, thus placing your petitioner in jeopardy and liable to serious charges; that the said Kaighn knew that said allegations were false when he prepared the petition; that depositions were taken which disclosed to this respondent a want of meritorious defense and that said allegations of counsel for defense were false and that he knew they were false when he made them; that respondent did not open the said judgment upon any averment in the said petition; that he did open it upon the ground that your petitioner was two days premature in entering said judgment.

2. That thereupon, after due service upon all of said defendants, the following three pleas were filed in their behalf:—

First.—The general issue.

Second.—That the Public Service Corporation was not responsible to said defendants.

Third.—That petitioner was not a member of the Bar of New Jersey.

3. That your petitioner then moved respondent to strike off Pleas first and second as frivolous, and the respondent struck off Plea second, but allowed Plea third to remain because under the then allegations in the declaration said plea might be good.

4. That thereupon your petitioner moved the respondent for leave to amend his declaration by a positive statement that all the services rendered by him for the said defendants were rendered outside the courts of New Jersey which no statute prohibited; *that said amendment was allowed by this respondent as per his order written thereon.*

5. *That your petitioner filed the said amendment and order with the Clerk of the Court at Mt. Holly on July 2d, 1909.*

6. *That thereupon your petitioner filed a demurrer to Plea third and this respondent overruled said demurrer and stated that relator's rule was to rule the defendants to plead anew to the amended declaration.*

7. *That thereupon your petitioner, being reverted to his other remedy at law, did, on July 27th, 1909, enter a rule on defendants to plead anew to the amended declaration.*

8. *That a copy of this rule was duly served on counsel for the defense on the said twenty-seventh day of July, 1909, as admitted by him in his petition for rule to show cause.*

9. That at the end of twenty days, no pleas having been filed, your petitioner notified counsel for defense of this failure.

10. *That at the end of thirty-five days from service of said copy, no pleas having been filed, your petitioner did, on September 1st, 1909, enter judgment by default for want thereof.*

11. That on October 1st, 1909, your petitioner notified counsel for defense that if the amount of said judgment was not paid by October 6th, execution would issue.

12. *That on October 5th, 1909, the respondent granted a rule on your petitioner to show cause why said judgment should not be stricken off.*

13. *That the affidavit upon which this rule was granted was made by Joseph Kaighn, counsel for defense; that said affidavit does not aver a meritorious defense, nor does it account or make any excuses for affiant's* laches *in not pleading; on the other hand the affidavit admits having received the copy of rule to plead in due order but avers certain alleged errors on the part of relator which he deemed sufficient excuses for not pleading; that said affidavit falsely alleges that the files in the office of the County Clerk, in said cause, did not show any declaration that had not been pleaded to.*

14. And your petitioner further shows that he filed with this respondent a brief of argument and referred him to substantial law in opposition to said affidavit.

15. *That notwithstanding this, respondent did, on October 23d, 1909, enter an order setting aside the said judgment.*

16. That said respondent has filed no opinion although requested to do so by your petitioner. But, on the same day that respondent set aside this judgment he addressed a letter to your petitioner, a copy of which is as follows:—

"Oct. 23, 09.

"My Dear Sir:—On hearing the rule to open judgment in Matlack *vs.* Haines, counsel brought me a copy of the record which does not disclose that an amended declaration had been filed, or that judgment on the demurrer has been formally entered. If this be true or either be true, the judgment will necessarily be opened, and if the amended declaration was filed and the clerk

has failed to enter it the defense would be entitled to have the judgment opened, or addressed to the equity power of the court.

"Yours &c.

"F. T. LLOYD."

17. That notwithstanding respondent's assertion in said letter that judgment would have to be opened if judgment overruling the demurrer had not been formally entered, respondent did, at the same time and on the same day, enter such formal judgment overruling said demurrer.

18. That the setting aside of said judgment therefore, was done solely upon the ground set out in respondent's letter, to wit:—

Upon the copy of the record furnished by counsel for the defense showing no amended declaration. And even though such amended declaration be on file, upon the failure of the clerk to enter it on the docket.

19. That *prior* to said action by respondent in striking out this judgment, he gave your petitioner no opportunity to show that said copy was a false copy, or that the non-feasance of the clerk was no ground for opening a judgment.

20. That the file being the record and not the docket, which is only a part of the record and an index to the file, the copy upon which respondent set aside this judgment, was a false copy in that it was confined to the docket and did not show the papers in the file.

21. That since the respondent is bound upon application to him, to direct the entry on the docket of a paper left off by the clerk, *nunc pro tunc,* the non-feasance of the clerk is no reason for setting aside or opening a judgment.

22. That on December 10th, 1909, your petitioner filed a petition with respondent requesting him to vacate his order of October 23d, setting aside the said judgment to which

relator attached the affidavit of the then clerk of the court to the effect that said amendment of July 2d, 1909, was filed on that day, and was so placed in the file; but this respondent has ignored the said petition and treated your petitioner with contempt.

23. That, therefore, your petitioner did, on January 3d, 1910, make formal demand upon this respondent to vacate his said order, and gave him notice of this present petition, in the following form:—

"PHILADELPHIA, PA. Jan. 3, 1910.

"*Hon. Frank T. Lloyd.*

"SIR:—*In re* opening of judgment in above cause I hereby make formal demand upon you to vacate your order of October 23, 1909, and unless you do so on or before January 10, 1910, I shall present a petition to the Supreme Court of New Jersey for a rule upon you to show cause why a Mandamus should not issue to compel such vacation.

"Respectfully,

"JOSHUA MATLACK,
"*Atty.* pro se."

24. That said respondent has made default in that he has not as yet vacated his said order.

25. And your petitioner further shows that he has no other adequate means for redress other than by mandamus.

Therefore, the defendants in said cause, having made no claim of meritorious defense, or set up any excuse for their *laches,* in not pleading; and this respondent having set aside this judgment upon a false copy of the record and upon the non-feasance of the clerk of the court whereby this respondent exceeded his power and abused his discretion, and his said order being illegal and void on that account, your petitioner prays that a rule be granted on said Frank T. Lloyd, judge of the Circuit Court for the county of Burlington, to show cause why a mandamus should not issue to

compel him to vacate his order of October 3d, 1909, in the case of Joshua Matlack *vs.* Annie Haines and others, in said court.

And your petitioner will ever pray, &c.

JOSHUA MATLACK.

STATE OF NEW JERSEY,
COUNTY OF BURLINGTON, } *ss.*

Joshua Matlack, being duly sworn according to law, deposes and says that he is the petitioner in the foregoing petition; that he is the plaintiff in the suit mentioned therein; that the facts, matters and things set forth in the said foregoing petition are positively true.

JOSHUA MATLACK.

Sworn to and subscribed before me this 9th day of Feby. 1910.

HALLOWELL,
N. P.

(*c.*)

PETITION TO OPEN JUDGMENT.

FILED OCTOBER 5TH, 1909.

BURLINGTON COUNTY CIRCUIT COURT.

Joshua Matlack

vs.

Annie Haines et al.,

ON CONTRACT.

STATE OF NEW JERSEY, }
COUNTY OF CAMDEN, } *ss.*

AFFIDAVIT.

Joseph Kaighn, of full age, alleging himself to be conscientiously scrupulous against taking an oath, being duly affirmed on his solemn affirmation, says that he is attorney for all of the defendants in the above stated cause and that deponent filed to the amended declaration in the above stated cause on the thirty-first day of March, nineteen hundred and nine, an affidavit of merits for all of the defendants in the above stated cause and afterwards, on the seventh day of April, nineteen hundred and nine, filed for said defendants, pleas in said cause, one of which pleas was a general issue; and that afterwards the plaintiff attacked one of the pleas filed by the defendants and an opinion was filed indicating that the demurrer to said plea would be overruled, which memorandum or opinion is in words and figures following:

LLOYD, J.:

"When the defendants third plea was filed, on a motion to strike out, it was held good as the declaration then stood. The plaintiff by modifying his declaration cannot change the legal status of that plea, although it may be now inoperative. His rule is to rule the defendant to plead anew to the amended declaration. The demurrer is overruled."

No formal order has been entered overruling the demurrer and the costs of defendants thereon have not been taxed or paid subsequently the complainant sent to deponent an uncertified copy of an alleged rule to plead in the above stated cause. *Affirmant believes that his plea of general issue already on file still stood to the amended declaration* as that plea has never been challenged and as no costs have been paid to affirmant on either the overruling of the demurrer or the filing of amended declaration and *has not filed any further or additional pleas thereto.*

5. Affirmant further says that he has examined the sealing docket and files in the office of the County Clerk in the above stated cause and has been unable to find that any declaration has been filed that has not been pleaded to.

JOSEPH KAIGHN.

Affirmed and subscribed before me this fifth day of October, 1909.

DANIEL V. SUMMERILL, JR.,
Master in Chancery of New Jersey.

(*c.*)

ORDER OPENING JUDGMENT.

FILED OCTOBER 23RD, 1909.

BURLINGTON COUNTY CIRCUIT COURT.

Joshua Matlack

vs.

Annie Haines et al.,

} ON CONTRACT.

RULE OPENING JUDGMENT.

The rule to show cause made on the fifth day of October 1909, being continued to this day and it appearing that the judgment entered in the above stated cause on the third day of September, 1909, was irregularly and improperly entered.

It is on this twenty-third day of October, 1909, ordered that said rule to show cause be made absolute and said judgment be and the same is hereby opened and set aside with costs.

Let this rule be entered.

FRANK T. LLOYD,
Circuit Court Judge.

(*b.*)

LETTER OF RESPONDENT.

OCT. 23rd, 1909.

MY DEAR SIR:—On hearing the rule to open judgment in Matlack *vs.* Haines, counsel brought me a copy of the record which does not disclose that an amended declaration had been filed, or that judgment on the demurrer has been formally entered. If this be true or either be true, the judgment will necessarily be opened, and if the amended declaration was filed and the clerk has failed to enter it the defense would be entitled to have the judgment opened, or addressed to the equity power of the court.

Yours, &c.,

F. T. LLOYD.

This letter is attached to an affidavit by relator that he received said letter from the respondent.

(*d.*)

OPINION AND JUDGMENT COMPLAINED OF.

FILED NOVEMBER, 1910.

SUPREME COURT OF NEW JERSEY.

Joshua Matlack
vs.
Frank T. Lloyd.
} June Term, 1910.

APPLICATION FOR MANDAMUS.

Before Justices SWAYZE and VOORHEES.

JOSHUA MATLACK, *pro se.*

SWAYZE, J.:

This is an application for a mandamus to compel a circuit judge to vacate an order made by him opening a judgment by default. Taking the statements of the relator most strongly in his favor, the case he makes is that he filed an amended declaration with the clerk of the court, ruled the defendant to plead, and the defendant failed to do so although the rule was served upon his attorney. The application to open the judgment was made within one year. Section 112 of the Practice Act, P. L., 1903, 569, makes it the duty of the court to open a judgment by default where the default is due to the failure of the attorney to file the proper pleading, if in the opinion of the court or judge injury or wrong has resulted or may result from such failure. The circuit judge was of opinion that injury or wrong might result from the failure of the attorney of the defendant to plead to the amended declaration. It is not for this court to control him in the exercise of his judgment. Of the numerous cases it will suffice to cite Ferris *vs.* Munn, 2 Zabriskie, 161, at page 164; Drake *vs.* Camp, 16 Vroom, 293, at page 295. The case is even stronger against the present application, since the statute makes it the duty of the court to open the judgment where injury or wrong may result.

The application is denied with costs.

FORMAL ENTRY OF JUDGMENT.

FILED MARCH 17TH, 1911.

NEW JERSEY SUPREME COURT.

Joshua Matlack

vs.

Frank T. Lloyd, Judge.

} Application for *Mandamus.*

ORDER DENYING APPLICATION.

Application being made for a writ of *mandamus* to compel the judge of the Burlington County Circuit Court to vacate an order made by him opening a judgment by default and the arguments on behalf of the respective parties being heard and considered and the court being of opinion that the order opening the judgment was within the judgment and discretion of the judge making the same, and that such discretion was properly exercised.

It is ordered that the application be, and the same is denied with costs.

On motion of

FRENCH & RICHARDS,
Attorneys for Respondent.

ASSIGNMENT OF ERROR.

FILED APRIL 28TH, 1911.

AND NOW, this day, the plaintiff in error assigns the following causes of error:—

1. Because the Supreme Court decided (copy of decision, see page 14):

2. Because the said court decided that "the application is denied with costs."

3. Because the said court refused to grant the rule to show cause.

4. Because the said court did not pass judgment upon the issue and facts shown by the record presented.

5. Because the said court denied the application upon an issue not shown by the record presented.

JOSHUA MATLACK,
Attorney pro se.

Filed April 28th, 1911.

JOINDER IN ERROR.

FILED APRIL 29TH, 1911.

NEW JERSEY COURT OF ERRORS AND APPEALS.

Joshua Matlack, Plaintiff in Error,

vs.

Frank T. Lloyd, Judge, Defendant in Error.

} JOINDER IN ERROR.

ERROR TO SUPREME COURT.

And the said defendant in error, by French & Richards, his attorneys comes into court and says, that there is no error, either in the record and proceedings aforesaid, or in giving the judgment aforesaid, and he prays here that the court here may proceed to examine as well the record and proceedings aforesaid as the matters aforesaid assigned for error, and that the judgment aforesaid, in manner aforesaid given, may, in all things be affirmed.

FRENCH & RICHARDS,
Attorneys for and of Counsel with Defendant in Error.

Court of Errors and Appeals, State of New Jersey.

Joshua Matlack, Plaintiff in Error,

vs.

Frank T. Lloyd, "Judge," Defendant in Error.

MANDAMUS.

June Term, 1910.

No. 234.

IN ERROR TO THE SUPREME COURT.

BRIEF FOR PLAINTIFF IN ERROR.

Plaintiff in error was a plaintiff in an action on contract brought in the Burlington County Circuit Court and entered a judgment by default for failure of the defendants therein to plead anew to the amended declaration (although ruled to do so) as permitted under Rev. Secs., 144, 148; 1851, page 317, Sec. 2.

The defendant in error, as Judge of said court, set aside that judgment because, *as he stated, the clerk of the court did not note the amendment on the docket.* The amendment was in the file.

A petition by plaintiff in error to defendant in error to vacate said order, was *ignored* by the latter.

A rule to show cause why a *mandamus* should not issue was asked for upon the ground that the order was made in violation of the statute of amendment which does not permit of any judgment being disturbed on account of the misprision of the clerk of the court.

The rule to show cause was refused, not because the neglect of the clerk of the court was a sufficient reason for the order, but because the failure of the attorney for the defendants to plead anew was sufficient, although such reason had never been averred.

The writ of error brings this decision here for review, and the record brought up consists of:—

1. Petition for rule.

2. Certified copy of Record in the Circuit Court.

3. Letter of respondent to relator disclosing the reason for setting the judgment aside.

4. Judgment and opinion of the Supreme Court refusing the rule.

Your Honors will note that the writ was not issued because a *mandamus* was refused, or because a rule to show cause was discharged; such a refusal is not reviewable. (28 N. J. L., 575; 59 N. J. L., 156 and 426; 73 N. J. L., 816.)

It was issued upon the ground of Abuse of Legal Discretion.

FIRST.—*Because the rule to show cause was refused.*

We know of no case in which it is held that to refuse the rule is not appealable. Such a refusal denies to relator the right to prove his case and relieves the respondent from the necessity of showing a legal reason for his order. In Lee *vs.* Township, &c., 4 N. J. L. J., 275, the Supreme Court itself held that *the rule must issue* upon re-

lator showing a *prima facie* case. The silence of that court upon the issue presented in the case at bar, is an admission that a *prima facie* case was shown. Therefore, the rule should not have been denied.

SECOND.—*Because the rule was refused upon an issue never in the case and not shown by the record.*

The issue before the Supreme Court was the negligence of the clerk of the court. That is, was this a legal reason for the order?

The opinion states that relator showed that he filed an amended declaration with the clerk of the court; that he ruled the defendants to plead, and that they failed to do so, although duly served. Aside from this, the opinion is absolutely silent upon the case presented.

The petition to open the judgment was made and sworn to by defendants' attorney. It did not aver a meritorious defense, or allege fraud or improvidence in entering the judgment, as required by Sec. 147, 2 Rev., 2558. On the contrary the attorney asserted, as a reason for not repleading, that he believed his plea of general issue still stood to the amended declaration. As this was no reason (Porter *vs.* Moffit, Morris, Iowa Reports, 58), the respondent himself fixed the issue in his letter to relator, to wit:—

> *"and if the amended declaration was filed and the clerk has failed to enter it the defense would be entitled to have the judgment opened, or addressed to the equity power of the court."*

The record shows that the amendment was filed, but that the clerk did fail to note it on the docket.

The Statute of Amendment (1 N. J. Rev., page 25) provides that such misprision, upon its discovery, shall be instantly amended, either before or after judgment, without giving advantage to the party challenging the same; and for which rasures no judgment of record shall be

reversed or annulled. Thompson *vs.* Pippitt, 18 N. J. L., 176, directs the Judge, upon petition to him, to cause the clerk to correct such misprision. As before stated, the relator herein did so petition, but the respondent ignored it, not even dismissing the petition. And in Young *vs.* R. R. Co., 38 N. J. L., 502, the Supreme Court held that under the statute of amendment no objection could be taken, after a judgment by default, for the want of a *judicial writ* in the *file* even.

Therefore when the defendant in error based his order upon the negligence of the clerk of the court, that order violated the Statute of Amendment, and was made in derogation of these decisions, and such order was, therefore, an

ABUSE OF LEGAL DISCRETION.

Because, legal discretion is action by the court in accordance with law, and is not a mental discretion, or a matter of grace by the Judge (15 Enc. P. & P., 283; 9 Enc. of Law, 473; 50 N. J. Eq., 625; 29 Cal., 423; 90 Pa., 321 and 329; 91 Pa., 319; 155 Pa., 74; 173 Pa., 33); and equity must follow the law and cannot enjoin to the contrary, or dispense with any obligation thereof (1 Story's Equity, 60). Hence, there was no discretion or equitable power in the defendant in error to ignore the statute of amendment and these decisions, and when he did so, he exceeded his authority and abused legal discretion as he failed to proceed according to law (6 Enc. P. & P., 207; 2 Watts, Pa., 373).

MANDAMUS.

While such writ will not issue to direct a court *how* to proceed (10 N. J. L., 57; 39 N. J. L., 221; 51 N. J. L., 479); or, where the court acts lawfully and violates no statute (22 Vr., 479; 24 Vr., 594; 2 Zab., 161; 16 Vr., 293), it will issue to compel a judge to take definite action and vacate an order that is made in violation of law, and cause him to proceed according to law, *i. e.,* to vacate an

order dismissing an appeal and to restore that appeal, Roberts *vs.* Holworth, 10 N. J. L., 57; allow sufficient time for argument. *Re* William Carle, 60 N. J. L., 83, citing Sullivan *vs.* State, 18 Vr., 151; proceed according to the rules of court, Wells *vs.* Stackhouse, 17 N. J. L., 355; vacate an order made in violation of a statute and make an order in accordance with that statute, Cortelyou *vs.* Ten Eyck, 22 N. J. L., 45. This is not controlling a judge in his legal discretion because he has none to control. The Constitution, statutes, rules of court and the record are as much law to the judge as they are to the parties and he has no discretion in him to ignore them.

———o———

This was the case presented to the Supreme Court. Instead of passing judgment upon that however, it ignored the record and refused the rule upon an entirely different issue which was not on the record and was never in the case.

It denies the rule under Section 112 of the Practice Act (P. L., 1903, Sec. 569), and states that this section:—

> "makes it the duty of the court to open a judgment by default where the default is due to the failure of the attorney to file the proper pleading, if in the opinion of the court or judge injury or wrong has resulted or may result from such failure."

First.—To extend this section to the mere *"failure"* of the attorney would broaden its scope unconstitutionally since an attorney might "fail" to file a plea because of pretended ignorance of the law of pleading, or to embarrass the plaintiff, or simply fail to do so because he did not wish to. This would be permitting a party to take advantage of his own wrong and defeat the ends of justice. It would be far more sensible to relieve him from pleading at all. Such a construction of the section would nullify every other statute upon the subject. To apply it to every judgment by

default (as the learned court here does) would destroy both the statute permitting such a judgment to be entered, and that requiring a defendant to show a legal reason for setting it aside. It would make of the section a distinctive weapon of injustice, rather than a means of protecting an honest defendant from the carelessness of his attorney.

But the case of Lenz *vs.* Rowe, 37 Vr., 131, fixed the limit of this section and confined it to the "neglect, fault, error, or mistake of an attorney and injury results therefrom to the defendant." Therefore, it does not include every failure of the attorney to act, since negligence, error, fault, or mistake, by their definitions, *exclude* an *intentional act.*

Even though such a reason could now be injected into this case, the facts disclosed by the record would preclude it. Thus, the reason assigned by the attorney himself was, that the law did not require him to plead anew. He specifically asserts in his petition to open—

> "Affirmant believed that his plea of general issue still stood to the amended declaration."

Deliberate, premeditated action which is excluded by Section 112 as held in Lenz *vs.* Rowe.

The opinion states that "the statute makes it the *duty* of the court to open the judgment where injury or wrong may result." How could injury or wrong result when the petition to open *did not aver a meritorious defense?* The defendants having no defense, as they thus admitted, injury or wrong to them could not possibly occur because of the judgment since they acknowledged the debt. In Smith *vs.* Livezey, 38 Vr., 269, the defendants claimed under the neglect of their attorney, and *even averred a meritorious defense,* but the court refused to open the judgment. An appeal was taken under Section 112, but was dismissed because such section could not interfere with the legal discretion of the lower court. Therefore, injury or wrong must be shown by a proof of a meritorious defense; and it is not the duty of the Judge to open the judgment irrespective of the facts before him.

Second.—But this "negligence of the attorney" must be specifically assigned in the petition to open and thereby made an issue. And it must be affirmatively proven before the lower court, like any other reason, as evidenced by Lenz *vs.* Rowe. It cannot be raised in the upper court for the first time by either the attorney or the Judge, let alone by the upper court itself.

Negligence of the attorney is an entirely different issue from the negligence of the clerk of the court because for the former a judgment by default can be opened, but for the latter it cannot be; a very important distinction, may it please the Court.

Negligence of the attorney was never in the case. The attorney himself never asserted that he was negligent. Neither did the respondent ever refer to it. Therefore, when the Supreme Court refused the rule upon that ground, it went outside the record before it and an abuse of legal discretion resulted, because:

The Supreme Court is bound by the facts alleged in the petition and shown in the Record presented.

The petitioner is held strictly to the facts and record he presents and a variance between the case made by his pleadings and his proof would be fatal to his right (13 Enc. P. & P., 804, Note 2). Facts not stated in the petition cannot be considered on appeal (65 S. W. Rep., 827; 97 N. W. Rep., 798; 62 N. Y. Supp., 966). Likewise must the court confine itself to those facts and that record since the only question is whether the *petition* discloses sufficient grounds for the allowance of the writ (13 Enc. P. & P., 801); and the court looks into the whole *record* to determine the appropriateness of the remedy (*Id.*, 800). If the issue before the defendant in error had been the negligence of the attorney, the plaintiff in error could not have secured the writ because of the negligence of the clerk of the court. Neither can the court refuse the writ by injecting into the case the former when the record shows the latter. For instance, in Cortelyou *vs.* Ten Eyck, 22 N. J. L., 45, the lower court refused to render judgment on the verdict, but set it aside and ordered a new trial. The relator presented this record to the Supreme Court and referred to a certain statute as

having been violated by the order of the Judge. Upon what line of reasoning could the Supreme Court in that case have ignored this record and issue and refused the rule or the writ upon entirely different grounds not shown in the record? In a petition for *mandamus* the Supreme Court has a fact and a record before it to just the same extent as it has in an appeal, and your Honors know that an appellate court can consider nothing not contained in the record, nor pass on a question not raised by the record.

ABUSE OF LEGAL DISCRETION.

To grant or refuse a *mandamus* rests in discretion, but this discretion is a legal one and can be abused by failing to base the order upon the law. The Supreme Court in the present case abused its discretion, we submit, when it failed to follow its own law as laid down in Lee *vs.* Kearny, 4 N. J. L. J., 275. And, as it is the law that a court must confine itself to the petition, facts and record presented, the Supreme Court abused legal discretion when it failed to follow the law by going outside the record placed before it.

Upon this ground, may it please the court, this writ of error was properly issued since a judicial abuse of discretion affects a substantial right and appeal may be taken therefrom under a statute allowing appeals in such cases (2 Enc. P. & P., 94).

The statute of New Jersey (2 Rev., 1391, Section 4) provides that any party *"aggrieved"* by any judgment rendered in the Supreme Court can sue forth a writ of error to be directed to the justices of the said Supreme Court, commanding them to cause the record of such judgment, and all things concerning the same, to be brought before the Court of Errors and Appeals. And no allowance of such writ is necessary. (16 N. J. L., 271; 55 Atl. 1042; 1 N. J. L., 82 and 105; 3 N. J. L., 668).

In interpreting this statute, this court in Transportation Co. *vs.* Stewart, 21 N. J. Eq., 484, stated that it gave a wide scope to appeals, the only limit being that the party must be *"aggrieved"* by the order to be reviewed; that it was not practicable to settle any test which would be applicable in

every case and that no standard could be devised, citing Beach *vs.* Fulton Bank, 2 Wend. (N. Y.) 225. That the restriction excluded all orders that lay wholly in discretion which had *no tendency* to affect any *right* in litigation, or reach the *merits* of the controversy, or affect the *substantial rights* of the litigant. The order, to be appealable, must go *to some extent,* to the merits or substantially affect equitable or legal rights. If the court below has erroneously *suppressed* that which the appellant insists is of moment to the complaint or defense, then obviously he has been aggrieved; that is, he has been deprived of his legal right to a fair statement of the whole of his case. As Lord Eldon said in Hampson *vs.* Hampson, 3 Ves. & B., 42: "I agree that a mistake in refusing to send the cause to a jury, is a just ground of appeal, if the Court of Appeals should think that the contrary decision would have been a sounder exercise of discretion."

One is aggrieved where his premises are to be sold by an illegal sale for an inadequate price, caused by mistake and misrepresentation, and all relief is denied. (Woodward *vs.* Bullock, 27 N. J. Eq., 507.) An order of the Court of Chancery, giving authority to a trustee under a will to erect buildings, is appealable under this statute as it affects the equitable, if not the legal, rights of the other parties in interest. *Re* Miller, 62 N. J. Eq., 764, referring to 21 N. J. Eq., 484.

For the defendant in error to destroy relator's judgment (which was properly entered) because of the misprision of the clerk of the court in direct violation of the statute of amendment, affected relator's legal right under that statute, as well as his legal rights under the statutes permitting such a judgment to be entered and requiring the defendants to show a legal reason for setting it aside.

For the Supreme Court to refuse to allow relator to prove his case by issuing a rule to show cause and compel respondent to disclose a legal reason for his order, was to aggrieve the relator, suppress that which was of moment to his complaint, and deprive him of his legal right to a fair statement in the shape of a proof of his allegations. To go outside of the record presented by the relator and

deny him his rights upon a ground never in the case, was not proceeding according to law, was an abuse of legal discretion and affected the legal and substantial rights of the relator. In each instance the *merits* of the controversy and relator's rights under statutes were obviously affected.

Matters resting in discretion are appealable when an abuse of discretion is shown. (State *vs.* Bassett, 33 N. J. L., 26.)

It is therefore submitted that this court has jurisdiction of this appeal. And, having jurisdiction, it will, upon the entire record, determine whether a peremptory writ of *mandamus* should have issued. (Jones Co., Relators *vs.* The Town, 66 N. J. L., 58 and 659.)

Plaintiff in error has shown by respondent's own admission, that respondent opened the judgment because of the misprision of the clerk of the court. Hence, a rule to show cause would but delay the matter since respondent could not be permitted to deny his own action.

Plaintiff in error has shown that to open the judgment because of the misprision of the clerk of the court was in direct violation of the statute of amendment and therefore a case for a *mandamus*.

The Supreme Court by its silence upon the record, admits that relator's position is well taken and that a *mandamus* should issue.

Respectfully submitted,

Joshua Matlack

Attorney pro se.

NEW JERSEY COURT OF ERRORS AND APPEALS.

JOSHUA MATLACK, Plaintiff in Error, vs. FRANK T. LLOYD, JUDGE, Defendant in Error.	ERROR TO SUPREME COURT.

BRIEF FOR DEFENDANT IN ERROR.

In this matter there was no record upon which any affirmative action could be taken before the Supreme Court and there is none here.

No testimony was taken by which any fact could be brought to the attention of the Supreme Court.

The Justices of the Supreme Court who heard this application very graciously overlooked the fact that there was nothing before them. After listening to the applicant they say, "Taking the statements of the relator most strongly in his favor," and proceed to show that it was the duty of the respondent to make the order in question.

Upon receipt of the printed state of the case, we promptly gave Mr. Matlack notice that we could not consent to it as an abridgement of the record, that we object to the fact that the record consisting of the writ of error

and return thereto had not been printed, and also object to pages 1 to 13 inclusive, which are not part of the record.

THE ORDER OPENING THE JUDGMENT WAS PROPERLY MADE.

The suit in question was brought in the Burlington County Circuit Court by Joshua Matlack against eight defendants.

Plaintiff entered judgment by default at a time when defendants' right to plead had not expired. Judge Lloyd opened the judgment and at plaintiff's request gave him leave to file an amended declaration, which he did. Defendants then promptly filed three pleas—the general issue and two special pleas. Plaintiff demurred to the third plea, and Judge Lloyd, in July, 1909, filed an opinion in favor of overruling the demurrer, but no rule to that effect was entered until October 23, 1909.

In July, 1909, plaintiff obtained leave to file a second amended declaration, and took a rule to plead thereto, but apparently forgot to file the declaration, as neither the docket entries nor the files produced before Judge Lloyd on October 23, 1909, showed any declaration to which defendants had not pleaded.

On September 3, 1909, plaintiff took another default judgment. On October 23, 1909, Judge Lloyd opened and set aside that judgment.

There could be no jurisdiction to enter a default judgment upon a declaration not filed.

There could be no default while the record showed a demurrer upon which no judgment had been entered.

THE DISCRETION OF THE CIRCUIT JUDGE IN REFUSING TO VACATE HIS ORDER IS NOT REVIEWABLE.

The application to Judge Lloyd appears in the letter on page 8 of the printed State of the Case.

The denial of such an application does not entitle the applicant to a mandamus.

Wells vs. Stackhouse, 17 N. J. L., 355.

Squier vs. Gale, 6 N. J. L., 157.

THE REFUSAL OF THE SUPREME COURT TO GRANT A WRIT OF MANDAMUS IS NOT REVIEWABLE ON ERROR.

American, &c., vs. R. R. Co., 59 N. J. L., 156.

FRENCH & RICHARDS,
For Defendants.

NEW JERSEY COURT OF ERRORS AND APPEALS

JOSHUA MATLACK, Plaintiff in Error, vs. FRANK T. LLOYD, JUDGE, Defendant in Error.	ERROR TO SUPREME COURT.

SUPPLEMENTAL BRIEF FOR PLAINTIFF IN ERROR

The assertions in behalf of respondent can be briefly answered:

1. There was a Petition, a Certified Copy of the Record of the Circuit Court, and Letter of Respondent, before the Supreme Court. What else, pray, could have been before it in asking for a rule? A *prima facie* case was only necessary.

2. How could any testimony be taken in support of a rule, if that rule was not issued?

The only fact involved was as to the reason the judgment was opened, and that was and is proven by respondent's letter. All other questions involved are ones of law.

3. The fact that the Supreme Court refused the application is sufficient proof that an application was before it. It certainly could not act upon something that did not exist!

4. To allege that a Court is "gracious" is to say that it has abused legal discretion, since it is not the business of a Court, under the law, to be *gracious* to any one. We do

not deny that graciousness has been extended surprisingly in this matter, but it is very clear that plaintiff in error has received none of it.

5. The true story concerning the State of Case is told in the "Explanation," none of which is denied by counsel.

Rule 19 does not specify the writ of error and return as a part of printed State of Case, as it does assignments of error and joinder. The "record" in the case at bar consists of the Petition, Copy of Circuit Court Record, and Letter of Respondent.

6. Any reference here to the opening of the first judgment by default is irrelevant, since that opening was never questioned and it is not before the Court.

7. Likewise is any reference to the filing of a formal judgment overruling the demurrer referred to. Respondent's letter, of which there is no denial, states that counsel brought him a copy of the record which did not disclose:

(*a*) That judgment on the demurrer had been formally entered.

The overruling of this demurrer being in favor of the defendants, it was their business to enter the formal judgment instead of attempting to take advantage of their own wrong. At most, it was but a formal defect curable by amendment, which the respondent himself admitted by entering such formal judgment at the same time that he opened the second judgment by default, which entry by him at the behest of the defendants' counsel cured any defects that could possibly be claimed by reason of its not being there. Why respondent referred to it in his letter, while at the same time entering that formal judgment, we are unable to answer.

(*b*) This copy of the record (according to the letter) also showed that an amended declaration had not been filed.

The Certified Copy of the Record presented to the Supreme Court discloses that the amendment to which the respondent refers was in the file on July 2, 1909, at the time this alleged copy was taken off by defendants' counsel; and

the Supreme Court in its conclusion admits that relator showed that an amended declaration had been filed. In view of this, for the respondent to insist upon saying that plaintiff forgot to file it is beyond comprehension!

Therefore, the first defect (if defect it was) having been cured by the respondent himself, and the copy of the Circuit Court Record furnished him by defendants' counsel having been false, the only ground upon which the judgment was opened was the last one set out in the letter; *i. e.*,

> (*c*) "and if the amended declaration was filed and the clerk has failed to enter it, the defense would be entitled to have the judgment opened."

By respondent thus adopting a contingency for opening the judgment in case the amended declaration was on file, was clearly an admission that he had knowledge that such amendment was there, else the statement of a contingency would have been unnecessary, for the clerk could not possibly fail to enter on the docket something that did not exist. The failure of plaintiff to file the amendment would have been entirely sufficient to destroy the judgment.

8. The law requires a formal demand to vacate an order before a petition for a rule can be presented. Hence, the letter on page 8 of the State of Case.

The Statute of Amendment and Thompson *vs.* Pippitt, 18 N. J. L. 176, left no discretion in the Circuit Judge to refuse to vacate his order when its illegality was plainly shown him, aside from the fact that he was bound to take judicial notice of this statute and decision. Wells *vs.* Stackhouse, 17 N. J. L. 355, while holding that a mandamus would not issue where a judge acts upon a matter purely in his discretion and according to lawful rules of practice, also expressly finds that "we have interfered by mandamus, in cases where the Court below have acted contrary to, or in disregard of, their own rules of practice, or have evidently misapplied them to the case." Kennedy *vs.* Nixon, 6 N. J. L. 157, held that such writ would not issue where a judge

has only done that which he had a right to do by statute. No rule of Court could be adopted giving a judge discretion to ignore the Statute of Amendment or the decision of a higher Court; and counsel can refer to no statute that confers upon a judge any such authority. Hence, these two cases are decidedly adverse to respondent's cause, as under them mandamus will issue to compel the vacation of an order made in violation of a statute or the rules of Court.

9. The Supreme Court did not refuse to grant a mandamus. It denied a *rule* to show cause why one should not issue. We challenge counsel to cite one case wherein it has been held that to refuse a rule is not appealable. We also call upon them to refer to one case that will justify the Supreme Court going outside the record before it and injecting into the matter for the first time an issue that had not been even suggested by the defense.

Lastly, the Brief for Respondent is conspicuous in its failure to attack the merits of the controversy. Its whole effort is aimed to prevent a hearing of relator's case, both by clouding the issue and keeping him out of Court.

The fact remains that plaintiff in error has been denied the equal protection of the laws guaranteed him by the XIV. Amendment; *i. e.,* the privileges of the statute permitting him to enter a judgment by default; the statutes compelling a defendant to show a legal reason for opening it; and the statute of amendment, in that the Circuit Judge relieved the defendants from showing legal reasons and opened the judgment in violation of the Statute of Amendment; and plaintiff in error respectfully asks this Court to grant him the equal protection of these statutes in accordance with the XIV. Amendment, by applying them to his case.

Respectfully submitted,

Joshua Matlack

Atty. *pro se.*