INDEX

New Jersey Court of Errors and Appeals

Complaint

(*Filed Nov. 15th, 1921*)

Plaintiffs residing in the State of California, say that:

1. On September 7, 1916, the last will and testament of Herman N. Walter was duly admitted to probate in the Surrogates' Court of the County of New York and letters testamentary were duly issued to these plaintiffs and that they have duly qualified as executors thereunder and are now such executors.

2. On July 14, 1921, plaintiffs recovered a judgment against the defendant Anna Keuthe, otherwise known as Anna Keuthe Walter, in the Supreme Court of the State of New York, a court of record of general jurisdiction.

3. That said judgment adjudged that the plaintiffs herein are the owners and entitled to the possession of and to recover from the defendant the chattels described in the schedule attached hereto and marked Schedule "A", (for schedule "A" see p. 32 this case book) all of which chattels had been replevied by the Sheriff, except the following chattels which have not been replevied but

which defendant has wrongfully detained, the value of which is respectively as follows, to wit:

Watch, gold, Swiss, open face, with enamel monogram, repeating the hours, quarters and minutes, on richly toned gongs.	$200.00
Scarf pin, gold, studded with large smoked pearl	175.00
Scarf pin, gold studded with ten small diamonds and one centre pearl pear shaped	1500.00
Scarf pin, gold studded with fourteen small diamonds and one large pink pearl	233.00
Scarf pin, gold, studded with large pear shaped pearl, diamond base, Oriental	352.50
	$2460.50

It was further adjudged that the plaintiffs recover from the defendant the sum of $639.72 damages for detention of said chattels and that they recover possession of said chattels not delivered to said plaintiffs as aforesaid and in case possession of said chattels is not delivered to the plaintiffs that the plaintiff shall recover the value of the chattels aforesaid not delivered *viz*: and in case any of same $2,460.50 is delivered, plaintiffs shall recover the sum of $2,460.50 less value aforesaid of any such chattels not delivered.

And it was further adjudged that the plaintiffs recover from the defendant $1,217.75 for their costs and disbursements in said action.

4. Execution was duly issued upon said judgment and due demand was made on the defendant for the possession of said chattels not delivered hereinabove enumerated. Defendant refused and neglected to return said chattels or any of them and the execution has been returned unsatisfied in that respect and in all other respects.

5. Plaintiffs are still the owners and holders of said judgment and said judgment still remains in full force and effect not in any way reversed, satisfied, annulled or in anywise vacated.

Plaintiffs demand as damages the sum of $4,317.97 with interest from July 14, 1921, together with costs incurred in the State of New York as well as in this action.

TREACY & MILTON,
Attorneys of Plaintiffs.

Affidavit on Assessment of Damages

(*Filed Dec. 8, 1921*)

NEW JERSEY SUPREME COURT

HUDSON COUNTY CIRCUIT

MORITZ WALTER, ISAAC N. WALTER, CLARENCE R. WALTER and MOSES HELLER, as Executors of the Last Will and Testament of Herman N. Walter, deceased, Plaintiffs, vs. ANNA KEUTHE, otherwise known as ANNA KEUTHE WALTER, Defendant.	Action at Law Affidavit

State of New York, County of New York, ss:

James E. Duross, being duly sworn according to law on his oath deposes and says:

That he is an attorney and counsellor at law of the State of New York having an office at #154 Nassau Street, New York, New York; that he was in actual charge of the litigation in New York State in which the judgment sued hereon was recovered and he has since that time been in actual charge of this matter on behalf of the plaintiffs, and that the said New York judgment was sued on in the State of New Jersey under and by his direction; that the plaintiffs herein are all residents

of the State of California, and that this deponent has full charge of the above entitled case for them and is duly authorized to make this affidavit on their behalf.

That on September 7, 1916, the last will and testament of Herman N. Walter was duly admitted to probate by the Surrogate of the County of New York and that letters testamentary were duly issued to plaintiffs; that they have duly qualified as executors and are now such executors.

That after the recovery of the judgment in the State of New York, of which annexed hereto is an exemplified copy, execution was duly issued and demand was made upon the defendant for the return of the chattels enumerated in the judgment; that defendant refused and still refuses to return the said chattels and to pay the judgment and that the said execution has been returned unsatisfied in that respect and in all other respects. That plaintiffs are still the owners and holders of said judgment; that said judgment still remains in full force and effect not in any way reversed, satisfied, annulled, or in any wise vacated.

Said judgment was recovered in the Supreme Court of the State of New York, which is a court of record of general jurisdiction; that none of the said chattels has been returned; that no part of said judgment has been paid.

The total amount due on said judgment is the sum of $4,317.97 with interest from July 14, 1921; that deponent has computed the interest due on said judgment to date, which said interest, up to December 7, 1921, amounts to $102.84. That plaintiffs have incurred costs in procuring the attached exemplified copy of judgment amounting

to $7.70. The total amount due from defendant to plaintiffs on December 7th, 1921 is $4,428.51.

JAMES E. DUROSS.

Sworn and subscribed to this
6th day of December, 1921, at
the City of New York, County of
New York and State of New York,
before me, the undersigned, a
Notary Public in and for said
County and State, duly commissioned and sworn,
M. A. Taub,
Notary Public.

New York County No. 124.
Register's No. 2080.
Certificate filed Kings Co. No. 53.
Register's No. 2056.

(Seal)

Exemplified Copy of New York Proceedings

THE PEOPLE OF THE STATE OF NEW YORK BY THE GRACE OF GOD FREE AND INDEPENDENT:

To all to whom these presents shall come or may concern, GREETING:

KNOW YE, That we have examined the records and files in the office of the Clerk of the County of New York and Clerk of the Supreme Court of said State for said County, do find a certain Judgment Roll there remaining, in the words and figures following, to wit:

(Seal)

Summons

SUPREME COURT

NEW YORK COUNTY

MORITZ WALTER, ISAAC N. WALTER, CLARENCE R. WALTER and MOSES HELLER, as Executors of the last Will and Testament of Herman N. Walter, deceased,

Plaintiffs,

against

ANNA KUETHE, otherwise known as ANNA KUETHE WALTER,

Defendant.

To the above-named defendant:

YOU ARE HEREBY SUMMONED to answer the complaint in this action, and to serve a copy of your answer on the Plaintiffs' Attorney within 20 days after the service of this summons, exclusive of the day of service, and in case of your failure to appear, or answer, Judgment will be taken against you by default for the relief demanded in the complaint.

Dated, March 10th, 1917.

HENRY WALTER,
Plaintiff's Attorney,
Office and P. O. No. 100 Broadway,
Borough of Manhattan,
New York City, N. Y.

Complaint

The plaintiffs above-named complaining of the defendant above-named respectively show to the court:

I. That on and prior to the 28th day of April 1913, one Herman N. Walter was the owner of and in possession of certain chattels, more particularly described in Schedule A hereto annexed, which is hereby made a part of this complaint, (in Schedule "A" see p. 32 this case book,) and that all of said chattels on said date were located in the residence of said Herman N. Walter at 465 West 140th Street, New York County.

II. That on or about the 17h day of March 1913, in proceedings duly instituted in the Supreme Court of this State in and for the County of New York, said Herman N. Walter was by a jury in the Supreme Court, New York County, found to be incompetent by reason of lunacy to manage himself or his affairs, and thereafter, by virtue of an order duly made and entered on or about the 28th day of April 1913, in the Clerk's office of the County of New York, the verdict of the said jury was duly confirmed, and said Herman N. Walter was duly adjudged to be incompetent by reason of lunacy to manage himself or his affairs, and Moritz Walter, Clarence R. Walter and Edwin J. Walter were duly appointed a Committee of the Person and Property of said Herman N. Walter, and they thereupon duly qualified as such Committee, entered upon the discharge of the duties of their said office, and continued to act as such Committee down to the death of the said Herman N. Walter.

III. That from the said 28th day of April 1913, the said Moritz Walter, Clarence R. Walter and

Edwin J. Walter, as such Committee of the Person and Property of the said Herman N. Walter, an Incompetent, were the owners of and entitled to the possession of said chattels.

IV. That the said Herman N. Walter on the 27th day of March 1916, died a resident of the State and County of New York, leaving a last Will and Testament, appointing these plaintiffs Moritz Walter, Isaac N. Walter and Clarence R. Walter and Moses Heller, as Executors thereof, and that thereafter, and on the 7th day of Sept-ember 1916, said Will was duly admitted to probate in the Surrogate's Court of the County of New York, and letters testamentary were duly issued to these plaintiffs out of said Surrogates' Court and the said plaintiffs thereupon duly qualified as executors thereunder, and entered upon the discharge of their duties and are now such executors.

V. That prior to the commencement of this action these plaintiffs duly demanded that the defendant deliver and surrender said articles and chattels to the plaintiffs as executors of said Estate, which said defendant refused and still refuses to do, to the damage of the plaintiffs in the sum of $2,000.00.

VI. That as such executors, these plaintiffs are the owners of and entitled to the immediate possession of each of the articles mentioned in said Schedule A hereto annexed.

VII. That all of said chattels, as plaintiffs are informed and verily believe, are now in the possession of the defendant herein at 465 West 140th Street, New York County, and are wrongfully detained by the said defendant at said

address, and that the reasonable value of said chattels is the sum of $12,000.00.

WHEREFORE, plaintiffs demand judgment against the defendant for the possession of the said chattels mentioned and described in Schedule A hereto annexed, or for the sum of $12,000.00, in case possession thereof cannot be given to plaintiffs, and for the sum of $2,000.00 damages, together with the costs of this action.

HENRY WALTER,
Plaintiffs' attorney,
100 Broadway,
Borough of Manhattan,
New York City, N. Y.

Answer

The defendant, answering the complaint of the plaintiff herein respectfully shows to the Court as follows:

I. That the defendant's maiden name was Anna Kuethe; that for more than 25 years she was the wife, and at his decease became and still is the widow of Herman N. Walter; and her real name is Anna Kuethe Walter.

II. She denies that on and prior to the 28th day of April, 1913, her husband, Herman N. Walter, was the owner and in possession of the goods and chattels set forth in Schedule A attached to the complaint herein, and which were in said 465 West 140th Street, Borough of Manhattan, City and State of New York.

III. She admits that her said husband, Herman N. Walter was declared an incompetent by this

court, and that the persons named in paragraph II of said complaint were named as a Committee of his person and property, and continued as such committee until the alleged death of her said husband.

IV. She denies all the allegations set out in paragraph III of said Complaint.

V. She admits it was claimed by the plaintiffs herein that her said husband died in March 1916, and that a paper claimed to be his last Will and Testament was offered for probate by them on or about September 7th, 1916, in the Surrogate's Court in New York County and that said paper was there produced and that Letters Testamentary thereunder were issued to the plaintiffs hereunder who still claim to act as such executors.

VI. Upon information and belief, she denies that any legal and proper demand was made upon her to deliver said goods and chattels to the said executors, the plaintiffs herein.

VII. She denies each and every allegation in the complaint herein not expressly herein admitted to be true.

AND FOR A SEPARATE AND FIRST DISTINCT DEFENSE TO THE SAID COMPLAINT THE DEFENDANT ALLEGES:

VIII. That she is the sole owner and was in legal possession of all the goods and chattels set forth in said schedule.

AND FOR A SEPARATE AND SECOND DISTINCT DEFENSE TO THE SAID COMPLAINT THE DEFENDANT ALLEGES:

IX. That after her said husband, Herman N. Walter, had been adjudged as an incompetent by this Court, and said plaintiffs had been appointed

as the Committee of the person and property of said Incompetent, they, as such committee and also personally as next of kin, commenced an action in this Court to annul the marriage of this defendant and said incompetent; that an order had been duly made by this Court in said matter, upon the motion of defendant in said case (being also the defendant herein) dismissing said complaint as to said Committee and from such an Order an Appeal by said Committee was then pending in the Appellate Court, that said Annulment Action was then upon the Preferred Calendar of this Court for trial.

X. That upon the alleged death of her husband, said Herman N. Walter, there was offered for probate in the office of the Surrogate of New York County by the individuals named as plaintiffs herein, a paper which it was claimed by them to be the Last Will and Testament of said Herman N. Walter. That this defendant was cited to appear in said matter, and duly filed her objections as the widow of said decedent, to the probate of said paper upon the grounds that it was not the Last Will and Testament of said Herman N. Walter, and that it has been obtained by fraud; and that said Herman N. Walter was not domiciled in the State of New York but was a resident of the State of California; and that it was made under undue influence exercised by the beneficiaries thereunder upon said decedent.

XI. That while the question of said probate was still pending and undecided in said Surrogates' Court, was entered into on August 23rd, 1916, a certain agreement in writing between the said plaintiffs herein both "individually and as executors in and under the Last Will and Testament

of Herman N. Walter, deceased," wherein after setting forth the pending of said annulment action in this Court and the objections made by this defendant to the probate of said alleged will, and all the other matters as hereinbefore set out, it was declared that it was "desired by all the parties hereto that all matters should be amicably adjusted and settled;" and in consideration of such premises, "and the mutual promises herein made," it was covenanted (1) that said annulment action should by said plaintiffs be discontinued without costs; (2) that this defendant should at once in writing "withdraw her objections to the probate of said Will of Herman N. Walter and waive all citations thereunder and consent that said Will shall be probated;" (3) And that "all pending motions, appeals &c., arising from said probate proceedings be withdrawn and waived."

Said agreement further provided that "immediately upon the signing of these presents *** they would duly execute and deliver" to this defendant a life interest in a certain real property, No. 465 West 140th Street, Manhattan, New York City," and at the same time they shall execute and deliver to her a Bill of Sale or Proof of ownership in her of all the personal property now in said premises, excepting only the articles named in a certain list attached hereto, which articles are claimed by the party of the second part as her property, and which claim is disputed by the parties of the first part," (the plaintiffs herein) "and the title to and right of possession of which are expressly reserved for the determination of the Surrogate under appropriate proceedings therefore" and the payment of a certain amount in cash by the said executors to this defendant; and this

defendant "at the same time" to "duly execute and deliver to the parties of the first part a release duly acknowledged whereby she releases the parties of the first part, the Estate of Herman N. Walter and the Committee of "his person and property," as said Committee and individually, from any and all claims of every nature whatsoever * * * in any property owned, possessed or acquired by Herman N. Walter in his lifetime, except the articles referred to in the annexed list."

XII. That the list of articles referred to in said agreement are the articles named in the complaint herein and which were replevined herein from defendant's possession.

XIII. That in pursuance of the terms of said agreement of said August 23rd, 1916, this defendant withdrew her objections to the probate of said paper alleged to be the Last Will and Testament of Herman N. Walter and did and performed each and every of the acts and things required to be done, under the terms of said agreement.

XIV. That there was paid to this defendant by these plaintiffs the stipulated amount of cash, and they delivered to her the deed setting forth her life estate in said real property, and also the Bill of Sale of all the personal property belonging to said Herman N. Walter at his decease, excepting the articles named in said list.

XV. That the articles named in the list attached to this complaint, were all left undisturbed in the possession and custody of this defendant from the time of said agreement, to wit: August 23rd, 1916, to and including the replevin thereof on or about March 10th, 1917.

XVI. That no action has been taken or pro-

ceedings of any kind had or commenced before the Surrogate as to the ownership of said articles; nor has any demand been made at any time that said question of the ownership of said articles should in any way be brought before said Surrogate for adjudication thereof;

XVII. That the covenant in said agreement submitting the question whether this defendant or these plaintiffs own said articles has not in any way been revoked, cancelled or annuled and is still in full force and effect.

Wherefore defendant demands that the complaint herein be dismissed with costs.

GEORGE R. BRISTOR,
Attorney for Defendant,
154 Nassau Street,
Borough of Manhattan,
City of New York.

Usual verification by defendant March 28th, 1917.

State of New York,
County of New York, } ss:
City of New York.

Anna M. Kuethe Walter, being duly sworn, says she is the defendant in the foregoing action; that she has read the foregoing answer and knows the contents thereof; that the same is true to her own knowledge except as to the matters therein stated to be alleged on information and belief, and that as to those matters she believes it to be true.

ANNA M. KUETHE WALTER.

Sworn to before me this
28th day of March, 1917.
Harry C. Schook,
Commissioner of Deeds of the City of New York,
Residing in the Borough of Brooklyn,
Certificate filed in Kings and New York County.

Reply

The plaintiffs herein for their reply to the "Second Distinct Defense" set forth in defendant's answer, and pursuant to the order of Mr. Justice Giegerich herein, dated June 4, 1917, respectfully show to the Court:

First: They deny each and every allegation contained in paragraph numbered "IX" except that an action brought by Moritz Walter, Edwin J. Walter and Clarence R. Walter against defendant to annul an alleged marriage between this defendant and Herman N. Walter was pending prior to and on August 23rd, 1916.

Second: They deny each and every allegation contained in paragraph numbered "X" in said defense, except that they admit that there was pending in New York County Surrogates' Court a proceeding for the probate of the Will of Herman N. Walter on and prior to August 23, 1916, in which proceeding Anna Kuethe, otherwise known as Anna Kuethe Walter, claiming to be the widow of Herman N. Walter, deceased, was cited as a party, and they admit that she filed certain objections to the probate of the said Will, the original of which objections are on file in the Surrogates' Court.

Third: They admit that while the question of the probate of the Will of Herman N. Walter, deceased, was pending and undecided in the said Surrogates' Court, these plaintiffs on August 23rd, 1916, entered into a certain agreement in writing, a copy of which is annexed hereto, and made a part of this reply, as Exhibit A; and they deny each and every other allegation in Paragraph numbered "XI."

Reply

FOURTH: They admit that the list of articles referred to in the said agreement, Exhibit A, annexed thereto, are the articles named in the complaint herein; but they deny that all of the same have been replevied herein from defendant's possession.

FIFTH: They admit the allegations contained in paragraph numbered "XIII."

SIXTH: They admit the allegations contained in paragraph numbered "XIV" except that they deny that they delivered a bill of sale to defendant of any personal property belonging to Herman N. Walter, deceased, except certain personal property located in the premises No. 465 West 140 Street, New York City.

SEVENTH: They admit the allegations contained in paragraphs numbered "XV" and "XVI."

EIGHTH: They deny each and every allegation contained in paragraph numbered "XVII" except that they admit that said alleged covenant has not been revoked or cancelled.

Further replying to said alleged "Second Distinct Defense" plaintiffs allege:

NINTH: That the alleged facts set forth in said "Second Distinct Defense" do not constitute a defense.

Wherefore plaintiffs demand judgment as set forth in the complaint herein.

HENRY WALTER,
Attorney for Plaintiffs,
Office and Post Office Address,
100 Broadway, Borough of Manhattan,
New York County, N. Y.

Exhibit A

Annexed to reply

This agreement, made this 23rd day of August 1916, by and between CLARENCE R. WALTER, MORITZ WALTER, ISAAC WALTER AND MOSES HELLER, individually and as executors in and under the Last Will and Testament of Herman N. Walter, deceased, parties of the first part, and ANNA KUETHE WALTER, as party of the second part, WITNESSETH:

That whereas differences have arisen between the parties hereto, and there is now pending an action in the New York Supreme Court, known as Moritz Walter, *et al.*, as plaintiffs, against Anne Kuethe Walter, as defendant; and also in the New York Surrogates' Court, where the Will of said Herman N. Walter has been offered for probate, and objections thereto have been duly filed by said Anna Kuethe Walter, and concerning which certain motions and appeals are now pending; and

WHEREAS it is desired by all the parties hereto that all matters should be amicably adjusted and settled;

NOW THEREFORE, in consideration of the above premises, and the mutual promises herein made, and the sum of one dollar paid by each to all the other parties hereto, the receipt thereof being hereby acknowledge, it is hereby covenanted and agreed as follows, *viz*:

FIRST: That the action now pending in the New York Supreme Court, known as Moritz Walter, *et al.*, against Anna Kuethe Walter, be discontinued, without costs to either party as against the other, and that a stipulation to be at once duly made by which either of the parties to said action may enter an order to that effect, without notice.

SECOND: That Anna Kuethe Walter at once, in writing shall withdraw her objections to the probate of said will of said Herman N. Walter, and waive all citations thereunder, and consent that said Will shall be probated in the City of New York, where the said Herman N. Walter was a resident and domiciled at the time of his death, and shall acknowledge the said instrument to be the Last Will and Testament of said Herman N. Walter, and that all pending motions, appeals, etc., arising from said probate proceedings, be withdrawn, and waived, and that a stipulation to that effect be duly made, and that an order thereunder may be entered by any party thereto, without notice.

THIRD: The parties of the first part hereby covenant that immediately upon the signing of these presents, they will probate said Will, as offered, and have issued thereunder Letters Testamentary to the said executors, and that immediately thereupon they, the parties of the first part hereto, shall duly execute and deliver to the party of the second part hereto and her assigns, a life-interest in the real property known as No. 465 West 140th Street, New York City, belonging to said Herman N. Walter during his lifetime, the said real property, at the time of the execution and delivery free of all mortgages, liens and claims of every kind; and at the same time they shall execute and deliver to her a bill of sale or proof of ownership in her of all the personal property now in said premises, excepting only the articles named in a certain list attached hereto, which articles are claimed by the party of the second part as her property and which claim is disputed by the parties of the first part and the title to and right of possession of which are expressly

reserved for the determination of the Surrogate under appropriate proceeding therefore; and at the same time they shall pay to Anna Kuethe Walter one hundred thousand dollars ($100,000.00) in form as follows: by delivering to said Anna Kuethe Walter a duly certified check for $90,000.-00 made to her order, and at the same time delivering a like check to James A. Gray, Esq., for $10,000.00, as extra counsel fee; and at the same time said Anna Kuethe Walter shall duly execute and deliver to the parties of the first part, a release duly acknowledged, whereby she releases the parties of the first part, the Estate of Herman N. Walter, and the Committee of the Person and Property of Herman N. Walter as said committee and individually, from any and all claims of every nature whatsoever, including all dower, rights of dower and community property rights, which she may have or claim to have in said estate, or in any property owned, possessed or acquired by Herman N. Walter in his life time, except the articles referred to in the annexed list and shall further deliver a waiver of any and all citations, publications or notices of the accounting of said Committee or of any proceeding in said Estate.

In the execution of this agreement and in the settlement of the matters involved, the party of the second part represents that she has made no transfer or assignment whatsoever of any interest in the estate of Herman N. Walter, or any claim or or rights which she may have had at any time against said estate, and that no person whatsoever has any rights or cause of action against said Estate derived from the party of the second part.

In witness whereof the parties have hereunto

set their hands and seals the day and year first above written.

ANNA MARIA KUTHE WALTER,
CLARENCE R. WALTER, Ind. and Ex.

MORITZ WALTER,
ISAAC N. WALTER,
MOSES HELLER, } by Clarence R. Walter.

In the presence of,
B. B. Calhoun,
Jas. A. Gray.

State of New York,
County of New York, } ss:
City of New York,

On the 5th day of September, 1916, before me personally came Anna Kuethe Walter, to me known and known to me to be the person described in and who executed the foregoing instrument, and she thereupon duly acknowledged to me that she executed the same.

BENJAMIN F. FARRAR,
Commissioner of Deeds, New York City,
Residing in Borough of Brooklyn, No. 70.

State of New York,
County of New York, } ss:
City of New York.

On this 5th day of September, 1916, before me personally came Clarence R. Walter, to me known and known to me to be the individual described in and who executed the foregoing instrument, and he thereupon duly acknowledged to me that he executed the same individually and as executor of the Estate of Herman N. Walter, deceased.

B. B. CALHOUN,
Commissioner of Deeds, N. Y. Co.
Clk's No. 78 N. Y. Reg. No. 18028,
Expires Mch 22, 1918.

Reply—Exhibit A

1. Two water color by Robinson
2. One oil painting by Keith, given by Mrs. D. E. Walter
3. Two oil paintings by Thompson
4. Oil painting by Batjieu
5. One oil painting Chopin
6. Two oil paintings, Z. Adjukiewies
7. One oil painting Jonen
8. One oil painting Dustin
9. One oil painting Vimmer
10. One oil painting Duval
11. One oil painting Thomas Hill
12. One oil painting A. W. Kowalski given by D. N. Walter
13. One oil painting "Young Woman" unsigned
14. One oil painting by Schulz
15. One oil painting by Gebler
16. One oil painting by Codoezo
17. One oil painting by Bertsik
18. One oil painting by Knooller
19. Painting on Porcelain Auber
20. One oil painting by Chartaang
21. One oil painting by Mali
22. Two minatures portraits on Limoges enamel
23. Seven minatures portraits on ivory
24. Three antique portraits on ivory
25. One oil painting Corot
26. One oil painting by Hartwick
27. One oil painting Van Beest
28. One oil painting Mueller
29. One oil painting Blackeman
30. One oil painting landscape, unsigned
31. One oil painting Roctor
32. One oil painting Henner given by I. N. Walter
33. Two oil paintings by Sir Thomas Lawrence
34. Painting on porcelain "Young Woman" unsigned

Reply—Exhibit A

35. One oil painting by Seitz
36. One oil painting by Weber
37. Oil painting, Young Woman with Auburn Hair
38. Etching by Muelor
39. Etching by Duscher
40. Etching by Sclombe
41. Crayon drawing by Edgar Walter
42. One water color by Lucius Rossi
43. Fencing Mistress
44. Oil painting by V. Dangon
45. Oil painting by George Washington
46. Oil painting by Th. von der Beek
47. All family photographs

JEWELRY

1. Seven scarf pins
2. One repeating watch, chain and seal
3. One key chain
4. Two gold lead pencils
5. One gold cigar cutter
6. One gold cigar lighter
7. One tie clasp

RUGS:

1. One antique Kazak rug, 3′-10″ x 10′-6″
2. Bidjar rug 7 x 4
3. Princess Bokara rug, 3 x 3, 5
4. Kurdistan rug 3, 6 x 7
5. Two Persian rugs silk 3 x 6
6. One very large antique royal rug

BRONZES

1. One Jardiniere, Japanese bas-relief bronze, melon bowl
2. Bronze figure La Baigbeuse, by Cambos

Reply—Exhibit A

3. One French Bronze figure
4. One canton bowl
5. Figure of Nude Girl, Carrara Marble
6. Figure of Fiddler, bronze by Gaudez
7. Figure of "Primitive Man" by Edgar Walter
8. Figure of Nude Girl, bronze, black marble base
9. Jar and cover, royal serves
10. Two vases, antique opal glass
11. Figure of woman partially nude, Berlin porcelain, arranging sandals
12.
13. Pair of bronze cherubs
14. One Serves vase
15. One vase enamel Cloisonne, sky blue, white and light green
16. One Japanese tray 10¾ diameter
17. Bronze figure of Woman by Moleau
18. Pair of French Pottery vases
19. Vase, Japanese Cloisonne
20. One bronze desk set, including lamp
21. Pair antique English china vases
22. Two Cloisonne Vases
23. Group in Japanese carved ivory
24. Figure of man, Japanese carved ivory, in armor
25. Japanese carved ivory sword
26. Two Minton china vases
27. Jar, Minton China
28. Pair decorated bronze figures six inches high
29. China Vase, blue flower with bird decoration
30. One Japanese vase, Cloisonne
31. Cup and saucer, Satsuma
32. One Japanese Cloisonne vase
33. One Japanese Cloisonne vase fish and flower motifs

34. Silver tea set
35. Center table
36. Two Japanese screenes
37. Humidor

All, books in library, but not bookcases
Uncut piece of silk

Stipulation

Stipulated, that this cause and the issues of law and fact therein be referred to John A. Hardiman, Esq., of New York City, Counsellor at Law, as sole referee, to hear and determine, and that an order may be entered without further notice to either party.

Dated, New York, October 21, 1920.

HENRY WALTER,
Attorney for Plaintiffs.
FRANCIS P. BURNS,
Attorney for Defendant.

Order of Reference

On reading and filing the stipulation herein dated October 21, 1920, referring the issues herein to John A. Hardiman, Esq., as referee, it is

ORDERED, That the issues of law and fact in the above entitled action be and the same hereby are referred to John A. Hardiman, Esq., of New York City, Attorney and Counsellor at Law, to hear and determine.

Enter

Wm. F. Schneider,
Clerk.

Dated New York, October 21st 1920.

Findings of Referee

This cause having duly come on for trial before me as referee, appointed to hear, try and determine the issue of law and fact herein, pursuant to an order of reference made herein dated October 26th, 1920, and entered in the Clerk's Office of the County of New York on October 26th, 1920, and the undersigned having tried the said cause, and the allegations and proofs of evidence of the parties having been heard,

Now after hearing James E. Duross, Esq., of counsel for the plaintiffs, and Francis P. Burns, Esq., attorney for the defendant, and due deliberation having been had, I decide and find, as follows:

FINDINGS OF FACT

1. That on or about the 17th day of March, 1913, proceedings were duly instituted in the Supreme Court of the State of New York, County of New York, wherein Herman N. Walter was duly found by a jury in the Supreme Court, New York County, to be incompetent, by reason of lunacy, to manage himself or his affairs, and thereafter by virtue of an order duly made and entered on or about the 28th day of April, 1913, in the Clerk's Office of the County of New York, the verdict of the said jury was duly confirmed and said Herman N. Walter was duly adjudged to be incompetent by reason of lunacy to manage himself or his affairs, and Moritz Walter, Clarence R. Walter and Edwin J. Walter were duly appointed a Committee of the Person and Property of said Herman N. Walter.

11. That said Moritz Walter, Clarence R. Walter and Edwin J. Walter duly qualified as

such Committee, entered upon the discharge of the duties of their said office, and continued to act as such Committee down to the death of the said Herman N. Walter.

111. That from the said 28th day of April, 1913, the said Moritz Walter, Clarence R. Walter and Edwin J. Walter, as such Committee of the Person and Property of the said Herman N. Walter, an Incompetent, were entitled to the custody and possession of the chattels belonging to said Herman N. Walter, down to the date of the death of said Herman N. Walter.

IV. That annexed hereto, marked Schedule "A" is a list of chattels and personal property that were in said house on the 12th day of October, 1912, and continued therein down to and including the date of the beginning of this action.

V. That all and singular the chattels and personal property described in said Schedule "A", (for schedule "A" see page 32 this book) were replevied by the Sheriff in this action under a writ of replevin herein, except the following chattels, and that the value of said chattels in the month of March, 1917, were respectively, as follows:

Chattels not Replevied.	Value.
Watch, gold, Swiss, open face, with enamel monogram, repeating the hours, quarters and minutes on richly toned gongs	200.00
Scarf pin, gold, studded with large smoked pearl	175.00
Scarf pin, gold, studded with ten small diamonds and one centre pearl pear shaped	1,500.00

Scarf pin, gold, studded with fourteen small diamonds and one large pink pearl	233.00
Scarf pin, gold, studded with large pear shaped pearl, diamond base, Oriental	352.50
	2,460.50

VI. That all and singular the chattels and personal property described in said Schedule "A" hereto annexed belonged to and were the property of said Herman N. Walter, now deceased, on the 28th day of April, 1913, and that on said date Moritz Walter, Clarence R. Walter and Edwin J. Walter, as such Committee of the Personal Property of said Herman N. Walter, an Incompetent, became entitled as such Committee to the custody and possession of all of said chattels for Herman N. Walter and they continued to be so entitled to the date of the death of Herman N. Walter, which was

VII. That after the probate of the Will of Herman N. Walter, by which he appointed the plaintiffs Moritz Walter, Issac N. Walter, Clarence R. Walter and Moses Heller, his executors, and on the 7th day of September, 1916, Letters Testamenary on the Estate of Herman N. Walter were duly issued to them out of the Surrogate's Court, New York County, and as such the plaintiffs became entitled to the immediate possession of all of said chattels mentioned and described in Schedule "A" hereto annexed.

VIII. That on the 9th day of March, 1917, these plaintiffs, on behalf of the Estate of Herman N. Walter, duly demanded from the defendant the delivery and possession of all of said chattels described in Schedule "A" hereto annexed.

IX. That the said defendant refused to comply with said demand and denied that the said chattels, or any of them, belonged to and were the property of the plaintiffs, and refused to deliver the said chattels or any of them.

X. That the said defendant wrongfully detained all and singular the chattels described in Schedule "A" hereto annexed, and wrongfully refused to deliver the same to these plaintiffs.

XI. That the said Herman N. Walter did not part with or dispose of any of said chattels described in Schedule "A" in his life time, or except as provided in his Will.

XII. That the plaintiffs are entitled to damages for the wrongful detention by the defendant of the chattels sought to be replevied herein, as follows:

Interest on the value of the jewelry not taken by the sheriff and still retained by the defendant $639.73.

XIII. That neither the defendant, nor her attorney at any time has served in this action any notice upon the plaintiffs, or their attorney, that the defendant demands judgment for the return of the chattels, or any of them or for their value, either with or without damages for the detention thereof.

XIV. That since this action was brought, neither the defendant, nor her attorney, has ever served upon the sheriff, a notice that she required the return of the chattels replevied or any of them.

CONCLUSIONS OF LAW

1. That the agreement dated August 23, 1916, is not a bar to the maintenance of this action.

2. That the plaintiffs are entitled to the possession of, and to recover, from the defendant these chattels described in Schedule "A" annexed to these findings and conclusions of law, all of which have been replevied by the sheriff except the following chattels, which have not been replevied, but which defendant has wrongfully detained, and the value of which is respectively as follows, to wit:

Watch, gold, Swiss, open face with enamel monogram, repeating the hours, quarters and minutes on richly toned gongs	$200.00
Scarf pin, gold, studded with large smoked pearl	175.00
Scarf pin, gold, studded with ten small diamonds and one centre pearl pear shaped	1500.00
Scarf pin, gold, studded with fourteen small diamonds and one large pink pearl	233.00
Scarf pin, gold, studded with large pear shaped pearl, diamond base, Oriental	352.50
	2460.50

3. That the plaintiffs are also entitled to judgment herein for the sum of $639.72 for detention of said chattels, and to the possession of said chattels not delivered to plaintiffs as aforesaid, and in case possession of said chattels is not delivered to the plaintiffs, the plaintiffs shall also be entitled to judgment for the value of said chattels as aforesaid not delivered, *viz:* $2460.00

and in case any of the above chattels are delivered to these plaintiffs, then the value of same as above stated, is to be deducted from the said sum of $2460.50

4. That the plaintiffs are also entitled to judgment for taxable costs and disbursements, to be taxed by the Clerk of this Court and included in the judgment.

5. Judgment for plaintiffs is ordered accordingly.

Dated, New York, July 14th, 1921.

JOHN A. HARDIMAN.

Referee.

Judgment

This action having been referred by an order duly made and entered herein, dated October 21st, 1920, and entered in the Clerk's Office of the County of New York on October 22nd, 1920, which said order was entered upon the written consent duly filed of the parties by which said order it was referred to John A. Hardiman, Esq., as Referee to hear, try and determine all the issues herein and after trial had on due notice to all the parties, said Referee having on the 14th day of July, 1921, duly made and filed his report herein stating the findings of fact herein and conclusions of law thereon and directing judgment as hereinafter stated and the costs of the plaintiffs having been duly adjusted at $1217.75 now on motion of Henry Walter, Esq., attorney for the plaintiffs, it is

Adjudged that the plaintiffs are the owners and entitled to the possession of, and to recover from the defendant the chattels described in Schedule "A" annexed hereto and made a part of this judgment, to wit:

Schedule A

Annexed to judgment

Pictures:

Water color drawing, by A. Robinson, venders and street scene in winter, 21″ x 30″ drawing, in 6½ gilded frame.

Water color drawing, houses bridge and stream by A. Robinson, 22″ x 35″ gilded frame.

Oil painting, by Wm. Keith, interior woods and stream, canvas 29″ x 19½″, in 6″ massive gilt and composition frame.

Oil painting by E. Thompson, landscape and stream in autumn, canvas 23″ x 19″, in 6″ massive gilt and composition frame.

Oil painting by J. Batjieu, chickens, canvas 21½ x 9½″ in 6″ gilt and composition frame.

Oil painting, by H. F. Schopin, depicting the return of David, finely portrayed, canvas 24″ x 38″ in 16″ massive gilt and composition frame.

Oil painting, by Z. Ajdukiewicz, depicting horses, men and wagons with shelving in open field, panel 7″ x 9½″ in 6″ gilt and composition frame.

Oil painting by Z. Ajdukiewicz, depicting sleighs on snow laden roadway, seemly the close of day, panel 15½″ x 9½″ in 5″gilt and composition frame.

Oil painting, still life, by E. O. Jonen, canvas 14″ x 20″ in 5″ gilt and composition frame.

Oil painting, cattle and landscape, by Dustin, canvas 20½″ x 16″ in 5″ gilt and composition frame.

Oil painting by Vimmer, Munich, depicting interior wood scene and hunter, canvas 35″ x 48″ in 8″ gilt and composition frame.

Oil painting, by Thomas Hill, depicting interior

woods and peasant figures, canvas 8″ x 11″ in 5″ gilt and composition frame.

Oil painting by Prof. A. W. Kowaski, snow and sleigh scene, 16″x 9½″ canvas, 6″ massive gilt and composition frame, unsigned.

Oil painting, young woman, partially nude, leaning against wall midst trees and flowers, 22″ x 37″ canvas in 6″ massive gilt and composition frame, unsigned.

Oil painting by Adrien Schulz, interior woods and stream, clear sky, exquisitely portrayed in every detail, canvas 25″ x 31″, in 6″ massive gilt and composition frame.

Oil painting, by A. Gebler, depicting sheep and landscape panel 11½″ x 10″ in 4½″ gilt and composition frame.

Oil painting, by T. D. Codezo, nude girl in reeling attitude 10″ x 7½″ panel, in 7″ gilt and composition frame.

Oil painting, in porcelain, Ruth, by Knooller, 12½″ x 7½″ panel, in 5″ gilt carved frame.

Painting on porcelain, by Auber, panel 9½″ x 7″ in 5″ plush and carved open gilt frame.

Oil painting by D. Charteang, 1892, landscape, valley and stream, canvas 19″ x 11½″ in 7″ massive gilt and composition frame.

Oil painting, by Christian Mali, foreground depicts stream with wading and drinking cattle, to right is boat and old men seated in same, background showing mountains and pine trees, portrayed at extreme top of mountains in faint ray of sun, seemingly close of day, canvas 36½″ x 62″ in 9″ massive gilt and composition frame.

Oil painting by Corot, wood and landscape, canvas 14″ x 10″ in 6″ massive gilt and composition frame, shadow box.

Oil painting by A. VanBeest, marine scene,

figures pulling in net from the water, canvas 12″ x 7″ in 5″ gilt and composition frame, shadow box.

Oil painting, by Ernest Muller, portrait of old man smoking pipe, canvas 9″ x 13″ in 6″ massive gilt and composition frame, shadow box.

Oil painting, by C. E. Proctor, lion and lioness, canvas 12″ x 17½″ in 5″ gilt and composition frame.

Oil painting, by H. Henner, girl with auburn hair, canvas 14½″ x 17½″ in 6″ massive gilt and composition frame.

2 oil paintings, portraits, Night and Morning, by Sir Thos. Lawrence, canvas 6″ x 6″ in shadow boxes and 4″ gilt and composition frames.

Painting on porcelain young woman, 6″ x 4″ in ½″ gilt and composition frame.

Oil painting, by Otto Seitz, depicting lovers, canvas 24″ x 19″ in 6″ gilt and composition frame.

Oil painting, by M. Weber, Gretchen from Faust, with 2 attendants, canvas 51″ x 40″ in 5″ gilt and composition frame.

Etching by Charles Muelor, depicting landscape and stream plate 19½″ x 29½″ in 3″ white enamel and gilt frame.

Etching by A. Duscher, depicting woods and lake, plate 19½″ x 29½″ in 3″ white enamel and gilt frame.

Crayon drawing, buffalos, by Edgar Walter, drawing 14″ x 18″ in 3″ white enamel and gilt decorated frame.

Walter color, by Lucius Rossi, fencing Mistress, 9½″ x 7″ drawing in 4″ gilt and composition frame, in shadow box.

Oil painting, by George Washington, depicting figures on camels, canvas 10½″ x 8″ in 5″ gilt and composition frame.

Family photographs

Jewelry:

Watch, gold Swiss, open face, with enamel monogram repeating the hours, quarters and minutes on richly toned gongs.

Scarf pin, gold, studded with 10 small diamonds and 1 centre pearl, pear shaped.

Scarf pin, gold, studded with 14 small diamonds and 1 large pink pearl.

Scarf pin, gold, studded with large smoked pearl.

Scarf pin, gold studded with large pear shaped pearl, chip diamond base, Oriental.

Rugs

Rug, Bidjar 7′ x 4′

Rug, Princess Bokhara, 3′ x 3′5″

Rug, Kurdistan, 3′6″ x 7′

1 very large antique royal rug, Namaded, 9′ x 12′

Bronzes

Figure, La Baigneuse, French bronze by Cambos, 30″ high.

Figure, Nuits de Printemps, French bronze, 25″ high.

Bowl, canton decorated green and gold medallion, 12″ diameter, colored enamel bird, butterfly etc. motifs, teakwood stand.

Figure of nude girl, carrara marble, finely executed 48″ high.

Figure of fiddler, bronze, 20″ high, exquisite detail by A. Caudez.

Group, bronze, by E. Walter, The Primitive Man, 30″ high.

Figure of nude girl, bronze, 32″ high, black marble base.

Jar and cover, royal sevres, footed, with tray base decorated cobalt blue field, traced in lines of gold, 8″ diameter and 6″ high.

2 Vases, antique opal glass, club shaped, finely decorated with painted panels, child surrounded by rabbits and puppies, 12″ high.

Figure of woman, partially nude, Berlin porcelain, standing posture, arranging her sandals, decorated in brilliant colors, 18″ high.

Tray, Japanese cloisonne, 10¾″ diameter, interior decorated with tree branches, blossoms and bird motifs.

Figure of woman, bronze, 29″ high, 12″ x 12″ base, by a Moleau.

Pair vases, French pottery, oviform, gilt rims and bases, hand painted floral and bird decorations, 14″ high, 6″ diameter overall.

Desk set, bronze, comprising desk pad, 16″ x 26″ blotting pad, 7″ x 3½″ ink stand and pen tray surmounted with bear, 11″ high overall, 7″ x 11½ base.

Figure of man, Japanese carved ivory, in armor, 11″ overall, finely carved, signed.

Sword, Japanese carved ivory, in profusely carved ivory scabbard, in bold relief, carved sword guard and handle, whole carved in splendid detail, 43″ long.

Vase, Mintons china, oviform, footed and with cover 2 handles, finely decorated body in cobalt blue glaze, showing whitebird and butterfly motifs in flight, pate-suepate design, gold handles, foot and neck, 11″ high.

Jar, Mintons china, gilt edges, decorated with floral relief glaze in rich colors, inset panel in blue and gold on greenish blue field, 5″.

Pair figures, decorated bronze, 6″ high.

Vase, unusually fine Cloisonne enamel on silver

steeple shaped, Cloisonne enamel embellishment presents beautifully colored watery wave and splash motifs, emerging from wave is finely colored sea serpent in bold-relief, 12″ high.

Table, teakwood, unusually fine, Canton marble top, 40″ x 71″ top, profusely carved and open frieze terminating into carved and open dragon and cloud motif legs and feet.

Screen, four fold, Japanese silk embroidered, fold 66″ by 20″, Japwood frame.

Screen, four fold embroidered silk, lacquered frame, fold 65″ x 25½″.

Humidor, porcelain, nickel trimmed, 12″ x 11½″ x 14″.

Books:

Carlyle, Thos., Works of, 12 mo. ¾ calf gilt tops, Dana Estes, Boston, no date; 26 volumes.

Stevenson, Robert Louis, Works of 8 vo. Cloth portraits, uncut, Charles Scribner's Sons, 1905, 24 vols.

Lytton Right Honorable Lord, Works of, 8 vo. ½ calf marble edges, London, Geo. Routledge Sons 1878; 26 vol.

Dickens, Charles, Works of, 12 mo. ½ calf, illustrated by Phiz, marble edges, London, Chapman and Hall, no date; 30 volumes.

Jesse, John Heneage, Works of, 8 vo. illustrated ¾ crushed Turkey morocco, gilt tops, uncut Boston, L. C. page MDCCCCI; 30 volumes.

Jefferson, Thomas, Works and writings of, illustrated, 8 vo. ½ morocco, collected and edited by P. L. Ford, gilt tops, uncut, edition #719 limited to 750 sets, C. P. Putnam's Sons, 1892, 10 volumes.

Greece The History of, 8 vo. by George Grote, Esq., full polished tree calf, gilt edges, illustrated,

London John Murray, 1851, scarce and perfect condition; 12 vol.

Motley, John L., Works of, United Netherlands History portraits 8 vo. ½ calf, New York, Harpers Bros. 1876 4 volumes.

Grant, U. S., Personal Memoirs of, portraits, 8 vo. ½ Turkey morocco, New York, 1885, 2 volumes.

Congress, Twenty Years of, by Jas. G. Blaine, illustrated 8 vo. ¾ crushed levant morocco, Norwich, Conn., 1884, 2 volumes.

France, The History of, by M. Guizot, 4 vo. illustrated, ½ calf, Estes and Lauriat, Boston, no date, 6 volumes.

England, History of by Chas. Knight, 8 vo. ½ calf finely illustrated, Boston, Estes and Lauriat, 1874, 8 vol.

Gladstone, Life of, by John Morley, 8 vo. ¾ English red calf, portrait, N. Y., Macmillian Co., 1903, 3 volumes.

Chesterfield, Earl of, The Letters of the 8 vo. edited with notes by Lord Mahon, portraits, ½ English calf, London, Richard Bentley, 1847, scarce edition, 5 vol.

Darkest Africa, by H. M. Stanley, 8 vo. illustrated, ½ morocco, gilt edges, Chas. Scribner's Sons, N. Y., 1890 with maps, 2 volumes.

Emin Pasha, by A. J. M. Jephson, illustrated, 8 vo., gilt edges, ½ morocco, Chas. Scribner's Sons, 1890.

25 Volumes Encyclopedia Brittannica, 9th edition.

Webster, Daniel Works of, portrait, 8 vo., ¾ Turkey morocco, gilt tops, Little Brown Boston, 1860, 6 volumes.

Decline and Fall of the Roman Empire, The

History of the, by Edward Gibbon, full calf, portraits, London, 1820. 12 volumes.

Thackeray, William Makepeace, Works of, 12 mo., ½ English calf, portrait, Smith Elder Co., 1877, 12 volumes.

Eliot, George, Works of, 12 mo., ½ English calf, illustrated cabinet edition, W. Blackwood Sons, London no date, 25 volumes.

Don Quixote de la Manche, translated from the Spanish by P. A. Motteux, illustrated, 4 mo. ¾ crushed and polished levant green morocco, uncut, gilt tops, John Grant, Edinburgh, 1902, edition de luxe, limited to 130 copies, this #72, 8 volumes.

Retrospections of an Active Life, by John Bigelow, 8 vo. cloth, illustrated, Baker and Taylor, New York, 1899, 3 volumes.

Lives of the Queens of Scotland, by Agnes Strickland portraits, 12 mo. ½ red Turkey morocco, gilt tops, W. Blackwood, Edinburgh, no date, 8 volumes.

Wilkie Gallery, finely illustrated, 4 mo. full gilt edges, gilt tooled Turkey morocco, Geo. Barrie, Philadelphia, no date.

Scott, Sir Walter, Prose Works of, 16 mo. portraits, ½ English calf, R. Cadell, Edinburgh, 1834; 100 volumes.

Rabelais, Francois, Works of, illustrated by Louis Chalon, 4 mo. vellum, London, Lawrence and Bullen 1892, edition #125, limited to 210 2 volumes.

Hawthorne, Nathaniel, Works of, illustrated 12 mo. ¾ red Turkey morrocco, gilt tops, Boston, Houghton Mifflin Co., 1884; 25 volumes.

Disraeli, Isaac, Works of, 12 mo. ½ calf, New York, 1875, W. J. Widdleton Co., 8 volumes.

Twain, Mark, Works of, 8 vo. frontispiece, uncut, gilt tops, ¾ crushed levant morocco Hart-

ford, Conn., American Publishing Co., 1901, 22 volumes.

Reade, Charles, Works of, 12 mo. ½ calf, frontispiece, marble edges, Boston, DeWolfe, Fiske Co., no date; 16 volumes.

American Statesmen, edited by John T. Morse, 12 mo. ½ polished crushed morocco, Boston, Houghton, Mifflin Co., 1889, 31 volumes.

Ruskin, John, Works of, 12 mo. ¾ polished levant gilt tops, uncut, Boston, Dana Estes Co., no date, 26 volumes.

Dore Gallery, 250 beautiful engravings, gilt edges decorated cloth, 14¼″ x 12″, London, Cassell, Peter and Calpin; no date all of which chattels have been replevied by the Sheriff except the following chattels which have not been replevied but which defendant has wrongfully detained, the value of which is respectively as follows, to wit:

Watch, gold, Swiss, open face, with enamel monogram, repeating the hours, quarters and minutes on richly toned gongs	$200.00
Scarf pin, gold, studded with large smoked pearl	175.00
Scarf pin, gold, studded with ten small diamonds and one centre pearl pear shaped	1,500.00
Scarf pin, gold, studded with fourteen small diamonds and one large pink pearl	233.00
Scarf pin, gold, studded with large pear shaped pearl, diamond base, Oriental	352.50
Total	$2,460.50

Judgment—Schedule A

FURTHER ADJUDGED that plaintiffs recover from defendants the sum of $639.72 damages for detention of said chattels and that they recover possession of said chattels not delivered to said plaintiffs as aforesaid, and in case possession of said chattels is not delivered to the plaintiffs, the plaintiffs shall recover the value of said chattels as aforesaid not delivered, viz., $2460.50 and in case any of same is delivered, plaintiffs shall recover the sum of $2460.50 less value as aforesaid of any of such chattels so delivered.

FURTHER ADJUDGED that plaintiffs recover from defendants $1217.75, their costs and disbursements in this action.

Judgment this 14th day of July, 1921.

WILLIAM F. SCHNEIDER,
Clerk.

L. S.

ALL which we have caused by these presents to be exemplified and the Seal of our said Supreme Court to be hereunto affixed.

WITNESS, Hon. H. D. Hotchkiss, a Justice of the Supreme Court for the County of New York, the 26 day of October, in the year of our Lord One thousand nine hundred 21, of our independence the one hundred and 46.

W. F. SCHNEIDER,
Clerk.

(seal)

H. D. Hotchkiss a Presiding Justice at a Special Term of the Supreme Court of the State of New York for the County of New York, do here-

by certify that WILLIAM F. SCHNEIDER, whose name is subscribed to the preceding exemplification is the Clerk of the said County of New York and Clerk of the Supreme Court for said County duly elected and sworn, and that full faith and credit are due to his official acts. I further certify that the Seal affixed to the exemplification is the seal of our said Supreme Court, and that the attestation thereof is in due form.

Dated, New York, October 26, 1921.

H. D. HOTCHKISS,
Justice of the Supreme Court of the State of New York.

———

I, WILLIAM F. SCHNEIDER, Clerk of the Supreme Court of said State in and for the County of New York, do hereby certify that Hon. H. D. Hotchkiss whose name is subscribed to the preceding certification, is Presiding Justice at a Special Term of the Supreme Court of said State in and for the County of New York, duly elected and sworn, and that the signature of said Justice to said certification is genuine.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of the said Court this 26 day of October, 1921.

WM. F. SCHNEIDER,
Clerk.

(Seal)

Assessment on Default

(*Filed Dec. 8, 1921*)

State of New Jersey, ss:

I being satisfied that the above statement and calculation are correct, in pursuance of the statute in such case made and provided, do assess the damages of said plaintiffs at the sum of $4,428.51 besides costs to be taxed.

Dated, Dec. 8, 1921.

ENOCH I. JOHNSON,
Clerk.

Judgment Interlocutory by Default

(*Entered Dec. 8, 1921*)

The defendant having failed to appear and defend this action within the time allowed by law, Judgment by default is entered against her for the sum of four thousand four hundred twenty-eight dollars and fifty-one cents, besides costs to be taxed.

Entered December 8, 1921.

On motion of
TREACY & MILTON, Attys.

Final Judgment

(Entered Dec. 8, 1921)

$4428.51
36.78
———
$4465.29

Judgment entered this eighth day of December, A. D., nineteen hundred and twenty-one in favor of plaintiffs and against the defendant for the sum of four thousand, four hundred twenty-eight dollars and fifty-one cents damages and thirty-six dollars and seventy-eight cents costs.

Wm. S. GUMMERE,
C. J.

Notice of Appeal

(Filed Dec. 6, 1922)

To Messrs. Treacy & Milton,
Attorney of Plaintiffs,

TAKE NOTICE, that the defendant appeals to the New Jersey Court of Errors and Appeals from the whole of the judgment entered against her in this cause.

Dated December 6th, 1922.

STOVER & PELLET,
Attorneys of Appellant.

Grounds of Appeal

(Filed Jan 5, 1923.)

The appellant files the following grounds of appeal upon which she will rely to reverse the judgment entered against her in the above entitled cause.

(1) The complaint discloses that the plaintiffs-respondents had no legal right, power or authority to institute or maintain their action against the defendant-appellant in the court below. It fails to show that the plaintiffs-respondents, who brought their suit as foreign executors, had before bringing their action complied with P. L. 1887 page 154, which reads as follows:

> "any executor or administrator, by virtue of letters obtained in another state, may prosecute any action or sue out execution upon any judgment or decree in any court of this state; provided, that such executor or administrator shall first file in the office of the clerk of the court in which he is about to proceed, an exemplified copy of his letters"

and with P. L. 1896 page 173; Comp. State page 2265. pl. 21, section 1, which reads as follows:

> "any executor or adminstrator by virtue of letters obtained in another state may prosecute any action or sue out execution upon judgment or decree in any court of this state as if his letters had been granted in this state; provided that such executor or administrator shall first file in

the office of the register of the prerogative court an exemplified copy of his letters, and upon such filing may bring all necessary actions in any of the courts of this state ''

(2) The complaint discloses no cause of action because

(a) It is apparent from said complaint that the judgment recovered against the defendant-appellant in the Supreme Court of New York, did not create a definite and absolute indebtedness against her, and will not support an action in this state because the same can not be enforced by a like judgment to be rendered in this state.

(b) It is apparent from said complaint that the judgment recovered against the defendant-appellant in the Supreme Court of New York is not such an one as could be rendered in an action of replevin at common law, and is valid only by reason of some statute of the State of New York, and said statute is not pleaded.

(3) That by the record of these proceedings it is apparent that the judgment entered against the defendant-appellant in the court below is void because the exemplified copy of the New York judgment relied upon as proof of the plaintiff's cause of action does not prove a definite and absolute indebtedness against the defendant-appellant in the sum of $4,417.97, in which sum judgment was entered against her in the court below.

(4) That by the record of these proceedings it is apparent that said judgment is void because the plaintiffs have produced no proof of a definite and absolute indebtedness of record

against the defendant in the State of New York, capable of being enforced by suit against the defendant-appellant in this state.

(5) That by the record of these proceedings it is apparent that the judgment entered against the defendant-appellant in the court below is void, because the same was entered without proof of the jurisdiction of the Supreme Court of the State of New York to render a judgment of the kind sued upon by the plaintiffs in the court below.

(6) The judgment entered against the defendant-appellant in the court below was entered without proof of a cause of action.

(7) The judgment entered against the defendant appellant in the court below is unlawful and fatally defective because it does not accord with and is not supported by the pleadings.

(8) The judgment entered against the defendant-appellant in the court below is unlawful and void because it works an unauthorized and unlawful change in her rights as fixed by the New York judgment, by depriving her of the right which she has under the New York judgment to satisfy it in whole or in part by returning the goods, damages for the detention of which are awarded against her.

(9) The judgment entered against the defendant-appellant in the court below is unauthorized, unlawful and void because it is more exacting than the New York judgment sued upon and the court below had no right, power or authority to render a judgment against the defendant-appellant which would give the plaintiffs a greater measure of relief than what they are entitled to

under the New York judgment upon which they sued.

(10) The judgment entered against the defendant-appellant in the court below is in violation of and contrary to the fourteenth amendment of the Constitution of the United States, reading as follows:

> "Nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

(11) The judgment entered against the defendant-appellant in the court below is in violation of and contrary to Article 4, Section 1 of the Constitution of the United States reading as follows:

> "Full faith and credit shall be given, in each state to the public acts, records and judicial proceedings of every other state.

(12) The judgment was unlawfully entered against the defendant-appellant in the court below because the damages claimed by the plaintiffs were not of such a nature that they were ascertainable by the Clerk of the court below, and the defendant was entitled to have them assessed against her upon a writ of enquiry or under rule 90 of the Supreme Court, that is, by a jury drawn from the general panel of jurors for the County of Hudson, and judgment final could only be entered against her upon an assessment made by a jury on notice to her and upon order of the court below.

(13) The judgment entered against the defendant-appellant is void because entered without

authority by the Court below, or a judge thereof as required by the rules of practice in the Supreme Court.

(14) The judgment entered against the defendant-appellant in the court below is void, unlawful and unconstitutional for one or more of the grounds of appeal above stated, and is in other respects unlawful, unconstitutional and void.

STOVER AND PELLET,
Attorneys for Defendant-Appellant.

New Jersey Court of Errors and Appeals

Moritz Walter, Isaac N. Walter, Clarence R. Walter and Moses Heller, as Executors under the Last Will and Testament of Herman N. Walter, deceased,
Plaintiffs-Respondents,

v.

Anna Keuthe, otherwise known as Anna Keuthe Walter,
Defendant-Appellant.

On Appeal from Supreme Court.

BRIEF FOR PLAINTIFFS-RESPONDENTS.

Facts.

This is an appeal from a default judgment entered in the New Jersey Supreme Court on December 8, 1921. The judgment in the New Jersey Supreme Court was predicated upon a New York judgment recovered by plaintiffs-respondents against defendant-appellant. The record shows that the judgment in New York was bitterly litigated.

We hereby acknowledge service of 3 copies of within brief in due time

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Attys of Deft-Appellant.

Dated Feb 13th, 1923.

ARGUMENT.

POINT I.

A default judgment is not appealable.

It would seem that by analogy to the case of New Jersey Building Loan and Investment Company *v.* Lord, 66 N. J. Eq., 344 (Errors and Appeals), that no appeal can be taken from a default.

POINT II.

The complaint sets out a good cause of action.

The complaint alleges probate of the will of Herman N. Walter, the issuance of letters testamentary to the plaintiffs, the recovery of the judgment in New York in the Supreme Court of the State of New York, *a court of record of general jurisdiction,* the adjudication in the judgment, that the plaintiffs recover certain chatels or their value, viz., $2,460.50, in default of their return, that the plaintiffs further recover $639.72 damages for detention of said chattels and further recover $1,217.75 for costs and disbursements.

The complaint further sets forth the issuance of execution, its return unsatisfied. That plaintiffs are still the owners of said judgment, that said judgment still remains in full force and effect, not in any way reversed, satisfied, annulled or in anywise vacated.

This complaint we contend is sufficient under the law.

23 *Cyc.*, 1514.

> "In suing on a judgment it is not necessary to set out the judgment in *haec verba*, but it is sufficient to set it forth according to its legal

effect. A complaint in such an action is sufficient if it describes the court in which the alleged judgment was rendered, the place where it was held, the names of the parties, the date at which it was entered, and the amount of the judgment. The plaintiff, if not plaintiff in the original action, but claiming as assignee or otherwise, must allege facts showing his ownership of the judgment; and if the defendant is not the same as in the original action, the nature and cause of his liability on the judgment must be set forth. It is not necessary to allege that the judgment has not been appealed from, but the declaration must show that it remains in full force and unpaid. It is of course not necessary to plead the contract or claim on which the judgment was rendered; but on the contrary, care should be taken to declare on the judgment itself and not on the original demand.

* * * * * *

"In suing on a judgment rendered by a superior court of general jurisdiction, it is not necessary to set out the facts conferring jurisdiction * * *."

In Pennington *v.* Gibson, 14 Law Edition, 847—16 Howard, 65:

"A declaration was sufficient which averred that 'at a general term of the Supreme Court in equity for the State of New York,' etc., etc.

"Being thus averred to be a court of general jurisdiction no averment was necessary, that the subject-matter in question was within its jurisdiction."

The complaint in the case at bar meets the test laid down in Cyc., *supra.*

1. It describes the court where judgment was rendered and the place where it was held.

2. The names of the parties, the date of entry and the amount.

3. That it is still in full force and unpaid.

New Jersey State Library

POINT III.

It was not necessary to set out New York Statute in complaint.

It is contended by appellant that it was necessary for respondents to allege in the complaint that the New York Supreme Court acquired jurisdiction by virtue of some statute. The allegation in the complaint is that the New York Supreme Court is a court of record of general jurisdiction. The default is an admission of the court's jurisdiction.

23 *Cyc.*, 752.

The presumption is in the absence of proof to the contrary that the Supreme Court of New York had jurisdiction, Barlow *v.* Marrone, 88 Law, 187 (Errors and Appeals):

> "In a suit upon a judgment of a superior court of a sister state, the presumption, upon the offer of an exemplified copy thereof, is that the recitals therein that are essential to jurisdiction over the defendant are true, which casts upon the defendant the duty of going forward with testimony that shall rebut such presumption."

Anthony *v.* Wilson, 74 Law, 630;
Hazel *v.* Jacobs, 78 Law, 459;
McDermott Dairy Co. *v.* Dixon, 68 Law, 48.

> "In a suit on a judgment obtained in New York, the question of jurisdiction in this New York Court can be raised by plea only and not by demurrer. If there was any question of the jurisdiction of the New York Court to render the judgment, it should have been raised by plea or answer. No plea or answer having been filed and the judgment having been entered by default, the jurisdiction of the New York Court cannot be questioned."

POINT IV.

The judgment recovered against the defendant in the State of New York is a final judgment and as such is entitled to full faith and credit under the United States Constitution.

Only those judgments which leave the Court with something further to determine come within the scope of judgments, which are not final. The judgment at bar when rendered in the State of New York was a final judgment because there was nothing further for the Court to pass upon or adjudicate.

In Freund *v.* Freund, 71 Equity, 524, cited by appellant the Court held that the decree for maintenance of a wife *which is subject to subsequent modification* by the Court is not a final judgment within the full faith and credit clause of the Federal Constitution.

The appellant states that the judgment in New York on which the judgment at bar was rendered is by its very terms subject to change or modification; but as a matter of fact the judgment itself is final and complete. The reduction in the amount of money to be paid by the act of the defendant in returning the chattels works no change whatever in the judgment itself.

The return of the chattels by the defendant would entitle the defendant merely to a credit on account of the money judgment, but would not thereby make judgment subject to review or modification by the court, any more than would a judgment which in its first instance was for money only and upon which the defendant pays part.

In this latter instance the defendant would become entitled to a credit on account of the amount

of the judgment but the judgment itself would not be modified, but merely reduced by the amount of payment. It would nevertheless be a final judgment as is the judgment in New York upon which suit was brought in the case at bar.

The Courts of New York, decided in Morris *v.* Morange, 38 N. Y., 172:

> "A final judgment, in an action to foreclose the equity of redemption in mortgaged premises, directing the sale of the premises for the satisfaction of the debt, and that defendant pay any deficiency appearing after such a sale, is final and not interlocutory merely. It leaves nothing further to be adjudicated or reviewed by the Court."

23 *Cyc.*, page 672:

> "Judgments may be either final or interlocutory. A final judgment is one which disposes of the case, either by dismissing it before a hearing is had upon its merits, or after trial, by rendering judgment either in favor of plaintiff or defendant. An interlocutory judgment is one which determines some preliminary or subordinate point or plea, or settles some step, question, or default arising in the progress of the cause, but does not adjudicate the ultimate rights of the parties. No judgment is final which does not determine the rights of the parties in the cause and preclude further inquiry as to their rights in the premises. But it is not essential, for a judgment to be final, that it should settle all the rights existing between the parties to the suit; all that is required is that it should determine the issues involved in the action; and the judgment is none the less final because some future orders of the court may become necessary to carry it into effect."

The proposition is raised that on the New York judgment this Court was not authorized to enter

judgment for $4,317.97, because the judgment in New York adjudicated that the plaintiffs were entitled to certain chattels, that in default of the return of said chattels they were entitled to $2,460.50. It is respectfully submitted that this contention is not sound.

Carr v. Welborne—Dallas decisions 624, Texas 1824, and the same case in 1 Texas, 462.

POINT V.

It was not necessary for the respondents to file letters testamentary in this State.

Appellant cites in its brief the case of Green *v.* Heritage, 63 N. J. L., 456, and Riddle v. Slack, 115 Atlantic, 741, as deciding that in the case at bar it was necessary for the respondents to file their letters in this State.

Justice Collins, who wrote the opinion in the case of Green *v.* Heritage, says:

> "The plaintiffs-in-error and two other persons sued the defendant-in-error and others in the Supreme Court of New York and were defeated in the action, the defendants recovering several judgments for costs. Suit was brought on one of such judgments in a District Court of Jersey City. Summons was issued against the six judgment-debtors, but was served on only only four of them. The state of demand was against all and correctly stated the judgment. The allegations are meagre, but sufficient for a District Court where no great particularity in pleading is requisite. On the return day of the summons, discontinuance was entered as to the two who were not served and the District Court gave judgment against the four remaining defendants. On appeal, the Circuit Court of the county af-

firmed the District Court and the judgment of affirmance is now before us for review.

* * * * * *

"It is assigned as error that a foreign administrator has no standing to sue in this state without first filing in the court in which he brings his action an exemplified copy of his letters of administration. That is true only when he sues in the right of his intestate, not in a case where he is a party to the transaction, although as administrator."

In Riddle *v.* Slack, 115 Atlantic, 741, the rule in Green *v.* Heritage is approved; however, the facts in the case of Riddle *v.* Slack are entirely different from the case at bar.

In Morse *v.* King, 73 N. J. L., 548, this Court held:

"A foreign executor may sue in his representative capacity, without filing an exemplified copy of his letters testamentary, whenever the cause of action arises out of a contract or transaction to which he himself is a party."

The opinion of the Court, which is short, follows:

"The plaintiffs in this case sued as executors of Robert King, deceased. King was a resident of New York at the time of his death, and the letters testamentary of the plaintiffs were issued to them in that state. The subject-matter of the suit is a promissory note, given by the defendant to the plaintiffs, as executors, in payment of the purchase price of the business of Robert King, which was sold to the defendant by the executors. At the close of the trial the Court directed a nonsuit to be entered, upon the ground that the plaintiffs had failed to comply with the statutory provisions which require a foreign executor to file, either in the office of the registrar of the Prerogative Court or in the office of the clerk of the

court in which he is about to proceed, an exemplified copy of his letters testamentary, as a prerequisite to his right to bring suit.

"The correctness of this ruling is challenged by the assignments of error.

"The statutory provisions which were made the basis of the direction of a non-suit apply in those cases in which the executor sues in the right of his decedent; in other words, where the cause of action accrued to the decedent during his lifetime. Where the contract or transaction which is the basis of the suit is one to which the executor himself is a party—for instance, where the subject-matter of the litigation is a promise made by the defendant, not to the testator, but to the executor—the executor may bring the suit, either in his individual or in his representative character, as he may elect (Myers *v.* Weger, 33 Vroom., 432), and if he elects to sue in his representative capacity he may do so without filing an exemplified copy of his letters. This is the general rule laid down in the text-books and supported by authority, as will be found by a reference to the cases cited in 13 Am. & Eng. Encycl. L. (2nd Ed.), 950, 951. It is the rule in this state, and was so declared by the Supreme Court in Green, Administrator *v.* Heritage, 34 Vroom., 455. In that case, like this, the contention was that the plaintiff, a foreign administrator, had no standing to sue without first filing in the court in which he brought his suit an exemplified copy of his letters of administration. The court held the contention untenable, saying, 'that is true only when he sues in the right of his intestate, not in a case where he is a party to the transaction, although as administrator.' Green *v.* Heritage was afterward reversed in this court (35 Vroom, 567), but the reversal went upon a ground which did not involve the merits of the case, which we expressly declined to consider.

> "The direction of a non-suit was erroneous, and the judgment under review must be reversed."

The case at bar comes directly within the ruling of these two cases.

When the original suit was brought in New York the executors were then suing in the right of their testator. The judgment recovered was and is in their names as executors. When they sued in this state they sued in their own right as executors of the last will and testament of Herman N. Walter, deceased.

Part of the amount sued for was costs recovered in the New York judgment.

POINT VI.

The assessment by the Clerk cannot be questioned on appeal.

There seems to be no contention on the part of appellant that the interlocutory judgment was not properly entered. She contends, however, that the assessment was erroneous and that the assessment should have been made by a writ of inquiry, that the judgment is not supported by the pleadings, etc.

The question of the assessment cannot be raised on appeal. It should have been raised by motion to set aside the assessment or by certiorari.

Creamer *v.* Dikeman, 39 Law, 195.

Scudder, J., Said:

> "In this case it appears that there was a judgment by default for want of a plea. The declaration contained the common counts, with a copy of a check and promissory note, upon which the action was brought. The de-

> fendant, therefore, had notice of the claim made against him, and voluntarily submitted to a judgment. He now desires to have the judgment vacated upon writ of error, because the proceedings for assessment of damages by the clerk, were irregular and illegal. The allegation is made that there was no proof of demand, refusal and notice of non-payment of the check nor any proof of the amount due. In the first place, there is nothing legally before the court, upon the return to the writ of error, to show the facts on which the objection rests. The assessment of damages by the clerk is not brought here by the writ of error *ex proprio vigore*. It is an outbranch of the record, and should be brought here, if required, by a writ of certiorari. But this is not the usual practice, the defendant might move in the Circuit Court to vacate the assessment, or for a re-assessment, if there is any cause for so doing. This is more convenient and better course."

In any event the assessment was correct. The only matter which was not determined by the New York Court was the interest, which is a mere matter of computation.

The defendant-appellant's brief (the bottom of p. 31, top of p. 32), sets forth a quotation, which is given as 20 *Cyc.*, 1480-1481.

The first sentence of this quotation is taken from 22 *Cyc.*, page 1480, the second sentence beginning,

> "As a rule of law," which in the brief reads as if taken from the text is taken from a foot note on page 1480.

The text reads as a matter of fact,

> "*but in many other cases it has been held that interest upon a foreign judgment is recoverable only as damages not eo nomine, and*

the recovery will be controlled by the law of the place where suit on such judgment is brought even though such judgment in terms provides for a rate different from that authorized by the lex fori."

The Clerk of the Supreme Court was justified in assessing the damages as the amount of the New York judgment plus the legal interest allowable in this State.

It is respectfully submitted that the judgment appealed from should be affirmed.

TREACY & MILTON,
Attorneys of Plaintiffs-Respondents.

JOHN MILTON,
Of Counsel.

[9291]

Appeal Printing Co., 22 Thames St., N. Y. City.

46 MAR. T. 1923

New Jersey Court of Errors and Appeals

MORITZ WALTER, ISAAC N. WALTER, CLARENCE R. WALTER AND MOSES HELLER, as Executors under the Last Will and Testament of Herman N. Walter, deceased, Plaintiffs-Respondents, vs. ANNA KEUTHE, otherwise known as ANNA KEUTHE WALTER, Defendant-Appellant.	On appeal from Supreme Court.

BRIEF IN BEHALF OF DEFENDANT-APPELLANT

Statement of the Case

The appeal in this case is taken from a judgment by default entered in the New Jersey Supreme Court on the 8th day of December, 1921, in favor of the respondents (hereinafter called the plaintiffs) and against the appellant (hereinafter called the defendant for the sum of Four thousand Four hundred and twenty-eight dollars and fifty-one ($4,428.51) cents and costs.

The action was one brought by the plaintiffs as executors of the estate of Herman N. Walter, deceased, to recover from testator's widow, the

defendant, the sum of Four thousand three hundred and seventeen dollars and ninety-seven ($4,317.97) cents with interest, alleged to be due the estate of their testator by reason of a certain judgment recovered by them against her in the Supreme Court of New York on the 14th day of July, 1921, in an action there brought to recover from her the possession of certain chattels said to be wrongfully detained by her, or their value and damages for their wrongful detention. The judgment is in the following words:

> "Adjudged that the plaintiffs are the owners and entitled to the possession of, and to recover from the defendant the chattels described in Schedule A annexed hereto and made a part of this judgment, to wit: (here follows list of chattels. See C. B. pp. 32 to 40 inclusive), all of which chattels have been replevied by the Sheriff except the following chattels which have not been replevied but which defendant has wrongfully detained, the value of which is respectively as follows, to wit: (Here follows list of chattels not replevied. See C. B. p. 40).
>
> FURTHER ADJUDGED that plaintiffs recover from defendant the sum of $639.72 damages for detention of said chattels and that they recover possession of said chattels not delivered to said plaintiffs as aforesaid, and in case possession of said chattels is not delivered to the plaintiffs, the plaintiffs shall recover the value of said chattels as aforesaid not delivered, viz: $2460.50 and in case any of same is delivered, plaintiffs shall recover the sum of $2460.50 less value as aforesaid of any such chattels so delivered.
>
> FURTHER ADJUDGED that plaintiffs recover from defendant $1217.75 their costs and disbursements in this action."

After setting forth this judgment, the complaint alleged:

> "4. Execution was duly issued upon said judgment and due demand was made on the defendant for the possession of said chattels not delivered hereinabove enumerated. Defendant refused and neglected to return said chattels or any of them and the execution has been returned unsatisfied in that respect and in all other respects.
>
> 5. Plaintiffs are still the owners and holders of said judgment and said judgment still remains in full force and effect, not in anyway reversed, satisfied annulled or in anywise vacated.
>
> Plaintiffs demand as damages the sum of $4,317.97 with interest from July 14, 1921, together with costs incurred in the State of New York as well as in this action."

The defendant having failed to answer said complaint within the time required by law judgment interlocutory by default was entered against her on the 8th day of December, 1921, and on the same day, upon an affidavit of one James E. Duross, (C. B. pp. 4 to 6 inclusive), an attorney of the State of New York, claiming to have authority to act for the plaintiffs, who are all residents of the State of California, to which affidavit was annexed an exemplified copy of the New York Judgment Roll, the Clerk of the Supreme Court assessed the plaintiffs' damages at $4,317.97, and entered final judgment against defendant in that amount.

The grounds of appeal will be found on pages 45 to 49 inclusive of the Case Book.

In each point hereinafter to be discussed, reference will be made to the number of the ground of appeal to which it relates.

POINT I

A default judgment is appealable.

Hugg v. The Inhabitants of Camden, 20 N. J. L., 583, 588.

In 3 C. J. 605, the learned author says:

> " * * * questions of jurisdiction of the subject matter or of the person, as where defendant was not served with process and did not appear and of the sufficiency of the complaint, upon whether the facts stated constituted a cause of action, are not waived by default; and to raise these questions appeal or error will lie from or to a final judgment by default as in case of any other final judgment, unless prevented by statute."

See also *Koenigsberger v. Mial,* 101 Atl., page 184.

POINT II

A default admits only what is well and properly pleaded.

A default cannot be taken to cure or waive radical defects, going to the authority of the court to enter the judgment or to the foundation of the plaintiff's cause of action: 23 Cyc, 751, 752.

A default admits only what is well pleaded; and consequently a judgment by default cannot be sustained if plaintiff's declaration or complaint does not state a good cause of action or lacks those averments which are necessary to show his right to recover. The test proposed by some of the decisions is that the declaration or complaint must

be sufficient to withstand a general demurrer. 23 Cyc, 740, under heading "Pleadings to Sustain Judgment."

In *Harris v. Hardeman, et al.,* 14 How., 334, 14 U. S. (L. Ed.) 444, Mr. Justice Daniel, speaking for the United States Supreme Court at page 446, says:

> "That in all judgments by default, whatever may affect their competency or regularity, every proceeding indeed, from the writ and indorsements thereon, down to the judgment itself, inclusive, is part of the record, and is open to examination; that such cases differ from those in which there is an appearance and a *contestatio litis,* in which the parties have elected the grounds on which they choose to place the controversy, expressly or impliedly waiving all. In support of the rule just stated, many authorities might be adduced; we cite for it the case of *Nadenbush v. Lane,* 4 Ran., 413 and of *Wainright v. Harper,* 3 Leigh, 270."

POINT III

(Grounds of Appeal 2 and 4)

The complaint does not disclose a cause of action.

(a)

The New York judgment sued upon will not support an action in debt or the statutory action which has taken the place of debt.

In *Elizabethtown Savings Institution v. Gerber,* 34 N. J. E., 130, 132, Vice Chancellor Van Fleet said:

> "The judgments of the courts of record of one state are entitled to recognition by the courts of sister states, but they have no extra-territorial force whatever as judgments. Properly authenticated, they afford conclusive evidence of a debt in external jurisdictions, in virtue of the constitutional provision entitling the public acts, records and judicial proceedings of each state to full faith and credit in every other State, but they possess no other virtue or efficacy."

The case of *Curtis v. Gibbs,* 2 N. J. L., 377, 378, is to like effect.

In 13 Am. & Eng. Enc. of Law (2nd Ed.) 1026, the learned author says:

> "The only proper or permissible form of action by which the enforcement of such a judgment can be obtained is debt or the statutory action which has taken the place of debt."

The cases in support of the text above quoted will be found in the note thereto under the heading "Debt the Only Proper Form of Action on Sister State Judgment."

In *Andrews v. Montgomery,* 19 Johnson, 162, Chief Justice Spencer, speaking for the New York Supreme Court, said:

> "The party must proceed in debt or covenant, where the contract is under seal, or in debt if it be of record, even though the debtor after such contract were made expressly promised to perform it. (1 Chitty, 94 and the numerous cases there referred to)."

In 18 C. J. Sec., 6, under the heading "Medium of Payment," the learned author says:

> "For the action to lie it is essential that the obligation be of such a character that it is payable in money only. So if the obligation is to be discharged by the delivery of stock, merchandise, or articles of trade or value, the action cannot be maintained."

And at page 7, in the same volume, Sec., 10, under the heading "Obligations of Record," the same learned author says:

> "The judgment which is enforcible by an action of debt must be a final personal judgment for the payment of a certain sum of money."

The New York judgment sued upon in the case at bar provides, *inter alia,* that the plaintiffs "*recover possession of said chattels not delivered to said plaintiffs as aforesaid, and in case possession of said chattels is not delivered to the plaintiffs, that the plaintiffs shall recover the value of the chattels aforesaid not delivered, viz: $2,640.50,*

and in case any of same is delivered, the plaintiffs shall recover the sum of $2,460.50 less value aforesaid of any such chattels not delivered.''

In the State of New York the unsuccessful party in an action in replevin may satisfy a judgment of the character of that rendered against the defendant in this case, by returning the chattels or paying the value of the same, and the prevailing party is obliged to accept the chattels, when tendered in the same condition as at the time of the trial. *Allen v. Fox.* 51 N. Y., 562, 10 Am. Rep., 641; *Pabst Brewing Co. v. Rapid Safety Filter Co.* 56 Misc., 445, 107 N. Y. Suppl., 163.

In *Thorner v. Batory,* 41 Md., 593, the Court of Appeals of Maryland held that an action of debt could not be maintained in that state on a judgment rendered in a replevin suit in the State of Tennessee in the following words: *''that the plaintiffs return said goods to the defendant, and if he fails to do so, that the defendant recover of the plaintiff and his security in the replevin bond given in said cause, the value of said goods as found* by the jury.'' This case came to the Court of Appeals from the Superior Court of Baltimore City in which the trial judge, Dobbins, filed the following opinion:

> ''After a careful consideration of this case, I am of opinion that the judgment ought to be arrested, the judgment sued upon not being such an one as this court can carry into effect by a like judgment to be rendered here. Any other judgment than one presenting the same alternative would be transcending the powers of this court, which must be limited to precisely the same measure of relief which the plaintiff was entitled to in the State of Tennessee. The only case known to the law of Maryland in which an alternative judgment,

> such as this, can be entered is in the action of detinue, long disused, but still, perhaps, in force. *But the action brought on this Tennessee judgment is the action of debt, in which the only judgment is for a certain sum of money. It must be apparent that such an unconditional judgment would take from the defendant the right which he had under the Tennessee judgment to satisfy it by returning the property, and to that extent would be more exacting than the Tennessee judgment. Such a change of rights is not within the powers conferred by the constitution of the United States, which extend only to the same measure of right. This view is, I think fully sustained by C. J. Redfield, in Dimick v. Brooks, 21 Vt., 569.* The clerk will, therefore, enter the arrest of judgment.

In affirming the action of the trial judge in arresting the judgment in the court below, Judge Miller, delivering the opinion of the Court of Appeals of Maryland said:

> In this case Thorner and Heidelbach, brought an action of debt against Batory and Jackson, upon a judgment recovered by the plaintiffs against the defendants in the State of Tennessee. Batory was summoned and Jackson returned *non est.* The first count of the declaration is upon an absolute judgment for a certain sum of money. *Nul Tiel* record was pleaded to this count, and on production of the record of the judgment sued on this plea was properly sustained. A similar plea to the second count was overruled, and under instruction from the Court the jury rendered a verdict in favor of the plaintiffs for $2,039.96. Subse-

quently on motion of the defendant, the Court arrested judgment on this verdict and the plaintiffs have appealed.

The record of the Tennessee judgment shows that Batory obtained a writ of replevin for certain goods in possession of Thorner & Heidelbach, which he claimed as his, and Jackson became his surety on the replevin bond. Under the writ the goods were taken by the sheriff and delivered to Batory, who then filed a declaration against the defendants "for the goods" (specifying them), "which he says the defendants wrongfully detained from him" and "for $2,000 damages for the detention thereof." The defendants pleaded not guilty. The plaintiff failing to prosecute the suit, judgment by default (as it is termed) was rendered against him by which the Court adjudged "That the defendants recover of the plaintiff their damages occasioned by the unlawful seizure and detention of the property in the pleadings mentioned," and under a writ of inquiry to assess these damages, the jury found and assessed" the defendants damages for the detention of the goods in the declaration mentioned from them by the plaintiff to $161.10, and they find the value of said goods to be $1283." Upon this verdict the Court gave judgment "that the plaintiff return said goods to the defendant, and if he fail to do so, that the defendant recover of the plaintiff and H. C. Jackson his security in the replevin bond given in this cause, the value of the goods as found by the jury." And further, "that the defendants recover of the plaintiff and his security, H. C. Jackson, the sum of $161.10 damages for the detention

thereof, and also the costs of this suit, for which execution may issue." *We have thus stated the proceedings and judgment at length in order to show that this judgment is valid only by virtue of some statute law of Tennessee. Neither in this State nor at common law could such a judgment be rendered in an action of replevin.*

The second count of the declaration sets out this alternative judgment, and avers that it remains in full force, unreversed and unsatisfied, and that Batory has not returned to the plaintiffs the said goods or any part of them "whereby an action hath accrued to the plaintiff to have and demand of and from the defendants the sum of $1469.55." that being the aggregate of the value of the goods, the damages assessed for their detention and the costs of suit. *We entirely concur with the learned judge of the Superior Court in arresting the judgment upon this verdict, and with the reasons he has assigned therefor. The judgment sued on is not such an one as the Courts of this State can carry into effect by a like judgment to be rendered here. Any other judgment would be transcending the powers of our Courts, which must be limited to the same measure of relief which the plaintiffs were entitled to in the State of Tennessee. The action brought on this judgment is an action of debt in which the only judgment that can be rendered is for a certain sum of money.*

It is clear that such an unconditional judgment would take from the defendant the right which he had under the Tennessee judgment to satisfy it by returning the property, and to that extent would work an

> unauthorized change of the rights of the parties. The views of Judge Redfield in the case of *Dimick v. Brooks,* 21 Verm., 569 cited in the opinion of the Court below), seem fully to sustain the position here taken, and we have no hesitation in adopting them.
>
> Decided 5th, March, 1875. Order affirmed.

A judgment for a certain sum of money is the only judgment that could be rendered in an action in debt or in the statutory form of action which has taken the place of debt. Such a judgment as is very clearly pointed out in the case of *Thorner v. Batory, supra,* would take from the defendant the right which she had under the New York Judgment to satisfy it by returning the goods. *Allen v. Fox; Pabst Brewing Co. v. Rapid Safety Filter Co., supra.* It should also be borne in mind that neither at common law (*Thorner v. Batory; John v. Boehme,* 71 Pac., 243, 244) or in this state under our statute, could such a judgment as that rendered against the defendant in this case, be rendered, and that the judgment rendered against the defendant is only valid by reason of some statute of the State of New York which is not pleaded.

We might also add that the judgment recovered against the defendant in the State of New York, is partly *in rem* and partly *in personam,* but primarily *in rem,* whereas the only judgment which could be rendered in an action of debt or the statutory form of action which has taken the place of debt in this State is a personal judgment, and such a judgment would accord the New York judgment greater effect or finality than would be accorded to in the State of New York, where it was rendered.

(b)

The facts conferring jurisdiction upon the New York Supreme Court to render a judgment of the kind sued upon should have been alleged.

At common law replevin did not lie unless there had been an unlawful taking of property. This was held to be the law in this state until the passage of the act of 1862. See *Bruen v. Ogden,* 11 N. J. L., 370, 20 Am. Dec., 593; *Harwood v. Smethurst,* 27 N. J. L., 195, 20 Am. Dec., 207. The action which resulted in the judgment sued upon was an action in replevin to recover chattels said to have been unlawfully detained. The extension of the action in replevin to cases of unlawful detention is the result of statutes. At common law no such an alternative judgment as the one rendered against the defendant could have been rendered. The action in replevin at common law tested only the right of possession of the replevied property at the time of the commencement of the action, and provided no method whereby the successful party might have judgment for the value of the goods in case the adjudged return could not be had. *John v. Boehme,* 71 Pac., 243, 244; *Thorner v. Batory,* 41 Md., 593. Under our statute no such a judgment as the one sued upon could be rendered. The judgment sued upon is therefore only valid by reason of some statute of the State of New York. As the jurisdiction of the Supreme Court of New York rested solely upon some statute, its jurisdiction to render a judgment of the kind sued upon cannot be presumed, and this, although it is a court of record of general jurisdiction whose jurisdiction will generally be presumed. The present case is an exception to the general rule. The statute should have been pleaded, because in the absence of allegation and proof of the

statute this court must presume that the common law rule, which did not recognize replevin as the proper remedy to recover goods unlawfully detained, or their value, and does not allow an alternative judgment in a replevin suit, prevails in the State of New York, and that a judgment of the kind sued upon is unauthorized.

In *Rankin v. Central R. R. Co.*, 77 N. J. L., 175, Mr. Justice Bergen, in delivering the opinion of the Supreme Court said:

> "The declaration in this case shows that the suit was instituted to recover damages for the death of plaintiff's intestate caused by an accident which happened in the State of Pennsylvania, which it is charged, resulted from the negligent act of the defendant, but there is no averment in the declaration that there is a statute in that state which would entitle the defendant to recover, and no proof can be introduced to support an action for damages resulting from the death of the deceased through the negligence of the defendant, because in the absence of such statute the presumption is that the common law rule prevails, and in order to prove that there is such a statute in a sister state it must be averred in the pleadings."

In 13 Am. & Eng, Enc. of Law (2nd Ed.) 995, 996, the learned author says:

> "Where reliance is placed on a foreign judgment rendered by a court of record and of general jurisdiction, the presumption is that such court had authority to render the judgment in question, and that the necessary jurisdiction was acquired properly, and the party who denies the same must

> assume the burden of proof. *There is, however, no such presumption* in the case of a court of inferior and limited jurisdiction, or *where the authority of the court to render such a judgment rests solely upon some statute.''*

See cases in note to the above text, page 997, under the heading ''No Presumption of Jurisdiction Where Such Jurisdiction Rests Solely Upon Some Express Statute.''

In *Hanley v. Donoghue,* 116 U. S., 1, 29 Law Ed. page 536, 537, the United States Supreme Court held that the law of the State where judgment was rendered must be proved. In this case, Mr. Justice Gray, in delivering the opinion of the Court, said:

> ''No court is charged with knowledge of foreign laws; but they are well understood to be facts which must, like other facts, be proved before they can be received in a court of record. * * *. It is equally well settled that the several states of the Union are to be considered in this respect foreign to each other and that the courts of one state are not presumed to know, and therefore not bound to take judicial notice of the laws of another state. * * *. Judgments recovered in one State of the Union when proved in the courts of another, differ from judgments in a foreign state in no other respect than that of not being reexaminable upon the merits, nor impeachable for fraud in obtaining them, if rendered by a Court having jurisdiction of the cause and the parties (citing numerous cases). * * *.
>
> Congress, in the execution of the power conferred upon it by the Constitution, having prescribed the mode of attestation of

records of the courts of another State to entitle them to be proved in the courts of another state, and having enacted that records so authenticated shall have such faith and credit in every court within the United States as they have by law or usage in the State from which they are taken, a record of a judgment so authenticated doubtless proves itself; and if it appears upon its face to be a record of a court of general jurisdiction, the jurisdiction of the Court over the cause and the parties is to be presumed unless disproved by extrinsic evidence or by the record itself (citing numerous cases). *But Congress has not undertaken to prescribe in what manner the effect that such judgments have in the courts of the State in which they are rendered shall be ascertained, and has left that to be regulated by the general rules of pleading and evidence, applicable to the subject.*

Upon principle therefore, and according to the great preponderance of authority (as is shown by cases collected in the margin) whenever it becomes necessary for a court of one state in order to give full faith and credit to a judgment rendered in another State, the law of that State must be proved, like any other matter of fact.

(c)

The law of the State of New York upon which the jurisdiction to render the judgment rested should have been pleaded so that the court below might know what effect to give to said judgment upon the failure of the defendant to return said chattels. The law was not pleaded and proof of

the same could not be made, and no proof of the same was made.

If the failure of the defendant to return the chattels operated to convert the judgment into an absolute money judgment, proof of that fact should have been made and the New York law should have been pleaded to authorize such proof. In *Hanley v. Donoghue,* 116 U. S. page 1, Mr. Justice Gray, speaking for the United States Supreme Court, said:

> "According to the great preponderance of authority, whenever it becomes necessary for a court of one state, in order to give full faith and credit to a judgment rendered in another state, the law of that state must be proved, like any other matter of fact."

In *Rankin v. Central R. R. Co.,* 77 N. J. L., 175, Mr Justice Bergen said:

> "In order to prove that there is such a statute in a sister state it must be averred in the pleadings."

The authorities cited in the preceding subdivision are cited in support of this proposition.

(d)

The Judgment Recovered Against the Defendant in the State of New York was Not a Final Judgment and Therefore Not Entitled to Full Faith and Credit Under the United States Constitution and not available as a cause of action.

In 23 Cyc., page 1053, under the heading, "Judgments on Which Action May be Brought," the learned author says:

> "To be available as a cause of action the judgment must be a definite and personal judgment for the payment of money, final in its character and not merely interlocutory, remaining unsatisfied, and capable of immediate enforcement."

And in 23 Cyc., 1559, 1560, the same learned author says:

> "In order that an action may be maintained in one state upon a judgment recovered in another state, it is necessary that it should be of a nature to create a definite and absolute indebtedness against the judgment defendant."

The judgment sued upon in the court below is by its very terms subject to change or modification by the act of the defendant in returning the chattels or any part of them, and hence it cannot be said to be a final judgment within the full faith and credit clause of the federal constitution, and available as a cause of action.

The Court is also requested to read the opinion of the late Vice Chancellor Emery in the case of *Freund v. Freund,* 71 N. J. E., 524, in which he held that a decree for maintenance of a wife subject to subsequent modification is not a final judgment within the full faith and credit clause of the federal constitution.

POINT IV

(Grounds of Appeal 1)

The complaint fails to disclose a right of action in the plaintiffs.

The complaint fails to show that the plaintiffs, who brought their action in the court below as foreign executors, had, before bringing their action, complied with P. L., 1887, page 154, which reads as follows:

> "Any executor or administrator, by virtue of the letters obtained in another state, may prosecute any action or sue out execution upon any judgment or decree in any court of this state; provided, that such executor or administrator shall first file in the office of the clerk of the court in which he is about to proceed, an exemplified copy of his letters."

and with P. L., 1896, page 173, Comp. Stats. of N. J., page 2265, p. 1, 21, sec. 1, which reads as follows:

> "Any executor or administrator by virtue of letters obtained in another state may prosecute any action or sue out execution upon judgment or decree in any court of this state as if his letters had been granted in this state; provided, that such executor or administrator shall first file in the office of the register of the prerogative court an exemplified copy of his letters, and upon such filing may bring all necessary action in any of the courts of this state."

In the case at bar, neither the complaint nor the record shows compliance with either of the above statutory provisions. Compliance with either or both of them was a condition precedent to the right of the plaintiffs to maintain their suit in this state, and should have been pleaded, or if not required to be pleaded, proof should have been made that the plaintiffs had complied with the law in this respect before instituting their suit. In the present case no compliance whatever was shown.

In *Babbitt v. Fidelity Trust Co.,* 70 N. J. Eq., at page 656, 63 Atl., at page 20, Vice Chancellor Garrison, said:

> "The general rule is well settled that an executor or administrator cannot, in his representative capacity, maintain any action, suit or proceeding, either at law or in equity, in the courts of any sovereignty other than those under whose laws he was appointed or qualified, without obtaining an ancillary grant of probate or letters from the court of probate of such other sovereignty, unless power to sue in the foreign jurisdiction has been conferred upon him by statute. *Lewis v. Grognard,* 17 N. J. Eq., 425; *Porter v. Trall,* 30 N. J. Eq., (3 Stew.), 106; (Chancellor Runyon, 1878); 13 Am. & Eng., Encycl., L. (2d Ed.) 945."

In *Green v. Heritage,* 63 N. J. Law, Justice Collins, speaking for the Supreme Court, at page 456, 43 Atl., at page 699, said:

> "It is assigned as error that a foreign administrator has no standing to sue in this state without first filing in the court in which he brings his action an exemplified copy of his letters of administration.

> This is true only when he sues in the right of his intestate, not in a case where he is a party to the transaction, although an administrator.

In *Buecker v. Carr,* 60 N. J. Eq., 300, 47 Atl., 34, Vice Cancellor Grey expressed some doubt as to whether the act of 1896 repealed the act of 1887, and, if it did not, then a foreign administrator, in order to qualify himself to sue in this state, would be obligated to file an exemplified copy of his letters in the Prerogative Court and with the clerk of the court in which the action was instituted.

See also the recent case of *Riddle v. Slack,* 115 Atl. Rep., page 741, in which the opinion was written by Mr. Justice Kalisch.

POINT V

(Grounds of Appeal 3, 4, 5 and 6)

The judgment was entered without proof of a cause of action.

(a)

The New York judgment, sued upon in the court below as a debt of record was not proved by the record as it should have been proved.

In *Miller v. Dungan,* 35 N. J. L., 391, Judge Dalrimple, speaking for the Supreme Court, adopting the language of Judge Redfield in the case of *Dimick v. Brooks,* 21 Vt., 578, said:

> "The general rule on this subject is very clearly stated by Judge Redfield in the case of *Dimick v. Brooks,* 21 Vt., 578, as follows: It is of the very essence of debt

> upon judgment or upon any matter of record, that the obligation should result from the record itself. The record imports absolute and complete verity. It is neither to be increased nor diminished by averment out of, or beyond, the record. It is to the record as the law and the testimony upon which the pleader refers his claim. The record is generally vouched in the conclusion of the declaration as the basis of the claim. The defendant may crave oyer of the record, and have it set forth in terms, as part of the pleading, and if it does not sustain, and fully sustain the declaration, may demur."

In *Dimick v. Brooks,* 21 Vt., 578, it was held that in order to sustain an action of debt upon a judgment, or upon any matter of record, the obligation must result from the record itself, and must be shown by the record, without requiring averments of additional matter. The record must show a still subsisting obligation, perfect in its inception, and still unsatisfied. In this case, Judge Redfield, speaking for the Supreme Court of Vermont, said:

> "Upon general principles and sound analogy it seems to us there is no good reason for allowing this action of debt upon this record. It is of the very essence of debt upon judgment or upon any matter of record, that the obligation should result from the record itself. The record imports absolute and complete verity. It is neither to be increased nor diminished by averment out of, or beyond, the record. It is to the record as the law and the testimony upon which the pleader refers his claim. The record is generally vouched in the

conclusion of the declaration as the basis of the claim. The defendant may crave oyer of the record, and have it set forth in terms, as part of the pleading, and if it does not sustain, and fully sustain the declaration, may demur.

"But in the present case, the plaintiff's claim to recover of the defendant rests mainly in pais. It has to be made out by averments in addition to the record, and of facts which have, in the very nature of the case transpired since the former adjudication. So that the claim, so far from being matter of record, rests in pais; and if denied, instead of being determined by the court, upon inspection of the record, it must be determined by the jury, upon testimony of witnesses. We believe it will be found to be an universal rule, in regard to the action of debt upon any matter of record, that the record itself must show a still subsisting obligation, perfect in its inception and still unsatisfied."

The only proof offered in support of the plaintiff's cause of action was an affidavit of one James E. Duross, claiming to have authority to act for the plaintiffs, to which was annexed an exemplified copy of the New York judgment roll. Duross in his affidavit states:

"That after the recovery of the judgment in the State of New York, execution was duly issued and demand was made upon the defendant for the return of the chattels enumerated in the judgment; defendant refused and still refuses to return the said chattels and to pay the judgment and that the said execution has been re-

> turned unsatisfied in that respect and in all other respects."

If the fact that execution had been issued and returned unsatisfied, operated under the laws of the State of New York to convert the judgment into an absolute money judgment, the execution and the sheriff's return showing the execution to have been returned unsatisfied, were essential parts of the record and should have been included therein. This, however, was not done, and the obligation of the defendant to respond to a money judgment, results if at all, from averments in the complaint and affidavit aforesaid in this action and out of or beyond the record and not from the record as it should according to the authorities above cited.

See also 23 Cyc, 1568, where it is said:

> "It is necessary that the transcript produced should be a complete copy of the record in the case, and not merely a transcript of the minutes or a part of the record."

And 13 Am. & Eng. Enc. of Law, p. 1046, where it is said:

> "That if a judgment of a sister state is relied upon to establish any particular state of facts, * * * then a duly authenticated copy of the proceedings in which the judgment was rendered ought to be introduced."

(b)

There was no proof made that the failure of the defendant to return the goods, operated to convert the judgment into an absolute money judgment.

If the New York judgment was entitled to be given the effect of an absolute money judgment because of the defendant's failure to return the chattels, the law of the State of New York, showing such to be the case, should have been proved. Not only was the law of the State of New York on this phase of the case not proved, but no proof of the same could have been made under the pleadings because of the absence of proper averments authorizing such proof.

In *Hanley v. Donoghue,* 116 U. S., page 1, Mr. Justice Gray, speaking for the United States Supreme Court, said:

> "According to the great preponderance of authority, whenever it becomes necessary for a court of one state, in order to give full effect and credit to a judgment rendered in another state, the law of that state must be proved, like any other matter of fact."

In *Rankin v. Central R. R. Co.,* 77 N. J. L., 175, Mr. Justice Bergen said:

> "In order to prove that there is such a statute in a sister state, it must be averred in the pleadings."

As the New York proceedings were not in accordance with the common law and were of a nature unknown to us in this state, proper proof of the statute authorizing the New York proceedings and the relief granted should have been made.

The authorities cited in subdivisions "a," "b," and "c" to Point III of this brief should be considered in connection with this point.

(c)

The facts conferring jurisdiction upon the New York Supreme Court to render a judgment of the kind sued upon, should have been proved.

The authorities cited in subdivision "b" to Point III, are relied upon in support of this point.

POINT VI

(Grounds of Appeal 7)

The judgment entered against the defendant is not supported by the pleadings and it is therefore fatally defective.

In 23 Cyc, 816, it is said:

> "A judgment must accord with and be warranted by the pleadings of the party in whose favor it is recovered. If it is not supported by the pleadings, it is fatally defective."

See also *Marshman vs. Conklin,* 21 N. J. L., page 546.

If the complaint does not state a cause of action in debt for the reasons we have already pointed out, then the judgment entered by the clerk as upon an action in debt is fatally defective upon the authorities hereinabove cited.

POINT VII

(Grounds of Appeal 8, 9 and 11)

The judgment entered against the defendant in the Court below, violates the full faith and credit clause of the United States Constitution.

Under Point III, subdivision "a," we have pointed out that under the laws of the State of New York, the defendant could satisfy the judgment there recovered against her by returning the goods or paying their value; and that the plaintiffs were obliged to accept the goods in satisfaction of the judgment when tendered to them in the same condition as at the time of the trial. The judgment entered against the defendant in the court below, gives the defendant no choice in the matter and requires her to pay a certain sum of money. The Court below, in dealing with the New York judgment, was limited to the same measure of relief that the parties were entitled to under the laws of the State of New York, and the court below in rendering the unconditional judgment which it did, gave the plaintiffs a greater measure of relief than what they were entitled to in the state where the original judgment was rendered and did not, therefore, give full faith and credit to the New York judgment as it was required to do under the United States Constitution. See *Thorner v. Batory,* 41 Md., 593. (The opinion in this case will be found in full under Point I, subdivision "a" of this brief). Other authorities which may be cited on this point are the following:

The judgment of a court of one state, when sued on, pleaded or introduced in evidence in

another state, is entitled to receive the same faith and credit and respect that is accorded to it in the state where rendered, so that if valid and conclusive there, it is so in all other states. But a judgment from another state is entitled to no greater effect or finality than would be accorded to it in the state where rendered. The validity and effect of a judgment must be determined by reference to the laws of the state where it was rendered. See 23 Cyc, 1546-1547. If a judgment operates in the state where it was rendered only *in rem;* it will not elsewhere be enforced *in personam;* and if it has not the effect of binding personally defendant in the suit in which it was rendered, no greater effect will be given to it in any other state where it is sought to be enforced. *Wood v. Watkinson,* 17 Conn., 500, 44 Am. Dec., 562. So a judgment which is no bar to another suit in the state where it was rendered, will not be a bar in another state. *Matoon v. Clapp,* 8 Ohio, 248. And where a judgment against a corporation by the laws of the state where it was rendered, is not conclusive against a stockholder who was not a party to the action, if it was obtained through fraud or collusion, no greater effect will be given to it in an action against a stockholder in a court of another state. *Ball v. Warrington,* 108 Fed., 472, 47 C. C. A., 447. And if the original judgment was expressed to be payable in gold coin only, a judgment recovered upon it will be entered payable only in the same money. *Wallace v. Eldredge,* 27 Cal, 498. See also 23 Cyc, page 1522.

POINT VIII

(Grounds of Appeal 10)

By the judgment in the Court below, the defendant is deprived of her property without due process of law, contrary to the United States Constitution.

Due process of law means a timely and *regular proceeding* to judgment and execution. *Dwight v. Williams,* 4 *McLean,* 586. It generally implies and includes parties, judge, *regular allegations,* and a trial according to some settled course of judicial proceedings. *Murray v. Hoboken, etc., Co.,* 18 How., 272.

In the case at bar, we contend that the defendant has been deprived of her property without due process of law, through the entry of the judgment against her in the court below without regular allegations or proper proof of a cause of action being made.

POINT IX

(Grounds of Appeal 12 and 13)

The defendant had the right to have the damages against her, assessed by writ of inquiry or by a jury drawn from the general panel of jurors in pursuance of Rule 90 of the Supreme Court, and judgment final could only be entered against her after such an assessment and upon order of the Court below.

The plaintiffs in their complaint, claimed interest on the New York judgment from the date of its rendition, and the clerk of the court below allowed interest without proof that judgments carried interest in the State of New York. As proof was required, what the law, with reference to interest, is, in the State of New York, our contention is that the case at bar was not one of the class in which the clerk could assess the damages, and as under our practice where a writ of inquiry is required, judgment final cannot be entered without order of the court, the final judgment entered in this case without a proper assessment and an order of the court (P. L. 1917, p. 848), is unlawful and void.

In *Peacock v. Haney, et al.*, 37 N. J. L., page 179 at page 180, Depue, J., speaking for the Supreme Court, said:

> "Where the amount of damages is a mere matter of computation which can be as well ascertained by the court or a master or prothonotary as by a jury, the assessment may be made without a writ of inquiry. But where the damages are for an

> uncertain sum to be ascertained on the hearing of testimony and the exercise of judgment upon the effect of proof, they must, in cases not within the statute, be determined by a writ of inquiry. 1 Tidd's Practice, 569; 2 Saund., 107 and note c."

Where evidence was necessary to ascertain the rate of interest of another state, in an action upon a note, it was held, in *Evans v. Irwin,* 1 Port (Ala.), 390, that under the Alabama Statute, judgment by default could not be rendered without a jury.

In an action of debt on a foreign judgment and for damages to the extent of interest, it was held in *Murray v. Cone,* 8 Port (Ala.), that it was necessary to have a jury on an inquiry as to damages. The statute or usage of the place of judgment should be proved.

So the rate of interest of another state will not be judicially noticed, and must be proved. It was held that in an action of debt on a judgment of another state asking interest, it was necessary to have a jury on default. *Clarke v. Pratt,* 20 Ala., 470, cited in notes.

In a suit upon a judgment or decree of another state, no interest can be allowed without the intervention of a jury and proof of the law prescribing the rate of interest in the state where the judgment was rendered. *Clarke v. Pratt,* 20 Ala., 629; 56 Am. Dec., 227. See also 13 Am. & Eng. Ency. of Law, page 1037 and cases cited in notes.

The allowance of interest upon judgments recovered in one jurisdiction and sued upon in another jurisdiction, has frequently been held to depend upon the law of the place where the original judgment was rendered. As a rule of law, interest will not be allowed on foreign judgments,

the common law doctrine that judgments do not bear interest, being presumed to apply thereto * * * 20 Cyc, pages 1480-1481.

In an action of assumpsit on a foreign judgment, on a rule being taken to show cause why it should not be referred to the master without executing a writ of inquiry, it was held that the rule should be discharged, as this was an attempt to carry the rule further than has yet been done, and the defendant may go into the consideration of a foreign judgment. *Messin v. Massareene,* 4 T. R., 493.

And in an action of debt on a judgment which had been obtained on a bill of exchange, a default was rendered. It was held that a reference to a master to ascertain the damages should be refused, and it should be left to the jury to consider whether any and what damages should be given. *Nelson v. Sheridan,* 8 T. R. P., 395.

In West Virginia, it was held that under Const. art. 3, sec. 3, providing that in suits at common law where the value in controversy, exceeds $20, exclusive of interest and costs, the right to trial by jury, if required by either party, shall be preserved, it was held there could be no final judgment by default, without a writ of inquiry in an action at law where the value in controversy exceeds $20, where the action was for damages, or where the sum which the plaintiff was entitled to recover was not definitely ascertainable from the contract. *Hickman v. Baltimore & O. R. Co.,* 30 W. Va., 296, 4 S. E., 654, 7 S. E., 455.

In Virginia, in an action of debt on a judgment, it was held that a writ of inquiry ought to have been awarded under 1 Rev. Code, chap. 128, sec. 79, page 508, providing for a default judgment on a specialty, bill or note in writing. *Shelton v. Welsh,* 7 Leigh, 175.

In *Smith v. Vanderhorst,* 1 McCord. L., 328, 10 Am. Dec., 674 (South Carolina), the court said: "In cases of this description, it should be left to a jury to consider the damages."

See also 20 L. R. A. (N. S.), page 24, and N. J. cases therein cited.

POINT X

The judgment entered against the defendant in the Court below, is unlawful, unconstitutional and void, and the same should be reversed, annulled and altogether held for nought and the defendant restored to all things which she has lost by occasion of the said judgment.

Respectfully submitted,

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