

New Jersey Court of Errors and Appeals

PERTH AMBOY CITY MARKET, Prosecutor-Appellant, vs. SAMUEL BAUM, Respondent-Appellee.	On certiorari. On appeal from Supreme Court. Brief of Appellant.
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BRIEF OF JOS. E. STRICKER, ATTORNEY FOR
PROSECUTOR-APPELLANT.

STATE OF FACTS

This is an appeal from the Supreme Court affirming the judgment of the Perth Amboy District Court rendered against the appellant on March 25th 1915, for the sum of \$46.43 and \$5.92 costs (Page 54, Lines 5-9). The action was commenced on the 20th day of March, 1915, and was returnable on the 26th of March of the same year. (P. 53, L. 1-5). On the 2nd day of July of the same year the parties appeared by their attorneys (P. 53, L. 30-36). The case was not completed but was "adjourned to allow defendant to locate a Mr. Shostak" (P. 54, L. 1-2). On September 7th, 1915, judgment was rendered for the above sum (P. 54, L. 3).

A writ of certiorari was allowed to review this judgment on the ground the same was rendered without notice to the defendant, and hence, that the Court had no jurisdiction to render the same, the case having been adjourned to an indefinite day. (See Reasons, P.P. 17, 64). After the writ of certiorari was served

and the record returned into the Supreme Court the plaintiff below and respondent in certiorari, without notice to the prosecutor, alleged dimunition of record (P. 18-20) and obtained a return to the rule which recited that "decision had been reserved and judgment entered on September 7th, 1915." (P. 21, L. 23-40). This statement contradicted the record which is found on page 11, lines 1-8. The defendant below thereupon obtained a rule to show cause why this return should not be stricken from the files of the Court on the ground that the same was signed by the District Court Judge under a misapprehension (P. 25-26). Said rule having been allowed upon the said Judge's affidavit (P. 22-23), setting forth substantially that the record of the District Court as originally returned was correct. Depositions were taken under this rule (P. 30-45) by which it clearly appears that the judgment had been entered without notice to the defendant below. When the writ of certiorari reached the Supreme Court for argument the Court had before it:

1. Original return (P. 10-11).
2. The amended return (P. 21).
3. The Judge's affidavit stating that such return was incorrect (P. 22-23).
4. The rule to show cause why such return should not be stricken from the files as having been inadvertently signed. (Page 25-26.)

In this situation the Court directed that the Judge of the Perth Amboy District Court, having made two contradictory returns, make a final return. (See P. 47-48). In obedience to this order the Judge made another return which is found on pages 52-54 in the printed book. This return is identical with the original return excepting that it recites that "on the 7th day of September, 1915, Thomas Brown, Attorney for

the plaintiff, appeared in the District Court of the City of Perth Amboy and moved for judgment for the plaintiff which was granted." So that when the Supreme Court finally considered this case it had before it the correct record (P. 52-54) by which it appears "that on the 2nd day of July, 1915, the case was called (P. 53, L. 28) and that the same was "adjourned to allow the defendant to locate a Mr. Shostak" (P. 54, L 1-2) and that judgment was entered on September 7th, 1915.

ARGUMENT

The appellant bases its claim for the reversal of the judgment on the ground that the same was rendered in its absence and without notice, to wit, the hearing of the case having been adjourned to a day uncertain. It hence follows that the Court was without jurisdiction to render its judgment. Why the judgment of the District Court was affirmed and not reversed does not appear by the opinion of the Supreme Court which occupies one and a half lines on page 55, L. 29-30. .

The settled law of this State is quoted in the following cases:

WOODWORTH vs. WOLVERTON

24 N. J. L. 419.

MONEYWEIGHT SCALE CO. vs. FRIEDMAN

79 N. J. L. 215

An adjournment is either without day or to a day certain. The distinction is vital. An adjournment without day ends the power of the Court over the business and record of the term.

ENCYCLOPEDIA OF PLEADING AND PRACTICE

Vol. 1, page 243

The case at bar being parallel with the authorities hereinabove cited it is respectfully submitted that the judgment of the New Jersey Supreme Court and the Perth Amboy District Court should be reversed.

JOSEPH E. STRICKER,

Attorney for Prosecutor-Appellant.

New Jersey Court of Errors and Appeal.

PERTH AMBOY CITY MARKET,
a corporation,

Prosecutor-Appellant

—vs—

SAMUEL BAUM,

Respondent-Appellee.

On Certiorari.

On Appeal from

Judgment of Su-
preme Court.

BRIEF OF THOMAS BROWN,
Attorney for Respondent-Appellee.

STATEMENT OF FACTS

The Statement of facts as contained in the brief of the Appellant, on page 2, are controverted wherein it states that judgment was entered without notice to the defendant below, and wherein it states on page 3 of the printed Case of the Appellant's brief, that the Supreme Court had before it the correct return as shown on pages 52 and 54 of the printed Case, when the three returns made by the District Court Judge, pertaining to the judgment entered in the District Court are as follows:—

First return—page 11 State of the Case:

“(Adjourned to allow defendant to locate a Mr. Shostak.)

September 7th, 1915. Judgment was rendered for Plaintiff for the sum of forty-six dollars and forty-three cents damages (\$46.43) and five dollars and ninety-two cents, costs of suit (\$5.92).”

Second return—made by the Court on allegation of diminution of the record, appears on page 21 and 22 of the State of the case, and is as follows:—

“I do hereby certify that on the second day of July, Nineteen hundred and fifteen, at the conclusion of the trial of said cause, the defendant, The Perth Amboy City Market, through its attorney, requested permission to produce a Mr. Shostak, as a witness in the defendant's behalf, and after hearing the argument of counsel, and of the testimony in the cause, I reserved decision, stating that if the defendant produced Mr. Shostak before judgment was entered, I would open the case for the purpose of taking his testimony; otherwise judgment would be entered. The defendant having failed to produce Mr. Shostak, the decision that was reserved by me, was rendered on the seventh day of September, Nineteen hundred and fifteen, in which judgment was given in favor of the Plaintiff, for the sum of Forty-six dollars and forty-three cents (\$46.43) damages and costs of suit.”

And the last return made by the Judge of the District Court appears on page 54, State of the Case, and reads as follows:

“On the seventh day of September, nineteen hundred and fifteen, Thomas Brown, Attorney for the plaintiff, appeared in the District Court in the City of Perth Amboy, and moved for judgment for the plaintiff, which was granted.”

BRIEF OF THE ARGUMENT

The Appellee contends for an affirmance of the judgment of the Supreme Court on two grounds.

First Ground: That the testimony taken on the Rule to Show cause attacking the return of the District Court Judge, should not be considered in the argument of this case, as it was not taken according to the rules of the Supreme Court, and the return of a Judge of the District Court cannot be attacked by an ordinary rule to take testimony.

Second Ground: The judgment of the Supreme Court should be affirmed, as the returns from the District Court discloses a judgment legally entered of record within the jurisdiction of the Court.

POINT I.

THE APPELLANT HAS ENDEAVORED BEFORE THE SUPREME COURT AND IS ENDEAVORING BEFORE THIS COURT, TO SHOW BY TESTIMONY TAKEN UNDER AN ORDINARY RULE, THAT THE DISTRICT COURT HAD LOST JURISDICTION OF THIS CAUSE, AND THAT, THEREFORE, THE JUDGMENT WAS IMPROVIDENTLY ENTERED. THIS CANNOT LEGALLY BE DONE FOR RULES 163 AND 164 OF SUPREME COURT PROVIDE AS FOLLOWS:

“Nor shall any rule to complete a return by affidavit be granted, as to any matter which ought to have been entered on the docket of the judge, or which is alleged to have taken place in the presence of the Judge acting on such unless a rule to amend shall have been first served on the Judge, nor even then unless the rule for taking affidavits shall particularly set forth the matter.”

The rule to show cause, (see page 25 State of the case), does not particularly set forth the matters to be supplied by the testimony to be taken on the rule; consequently, this court should not consider the testimony printed from pages 31 to 45 of the State of the case. And again, the prosecutor cannot attack the return of the Judge under an ordinary rule to take testimony. See

South Brunswick Township vs. Cranbury,
23 Vroom, beginning page 298.

Hill vs. Adams, 45 Vroom, page 339.

Wahrman vs. Horan, 17 Vroom, page 465.

Quinn vs. Police Commissioners, 40 Vroom,
page 571.

POINT II.

THIS COURT SHOULD LOOK ONLY AT THE RECORD AS CERTIFIED BY THE RETURNS OF THE JUDGE OF THE DISTRICT COURT, AND AS FAR AS THE JURISDICTION OF THE LOWER COURT IS CONCERNED, THE FOLLOWING ARE THE THREE RETURNS MADE:

First return: The part of the first return dealing with jurisdiction, appears on page 11 of the State of the case, as follows:

“(Adjourned to allow defendant to locate a Mr. Shostak.)

September 7th, 1915. Judgment was rendered for Plaintiff for the sum of forty-six dollars and forty-three cents damages (\$46.43), and five dollars and ninety-two cents costs of suit (\$5.92).”

Second Return: Made in pursuance of a rule on allegation of a diminution in the record, appears on page 21 of the State of the case, as follows:

“I do hereby certify that on the second day of July, nineteen hundred and fifteen, at the conclusion of the trial of said cause, the defendant, The Perth Amboy City Market, through its attorney, requested permission to produce a Mr. Shostak, as a witness in the defendant's behalf, and after hearing the argument of counsel, and of the testimony in the cause, I reserved decision, stating that if the defendant produced Mr. Shostak before judgment was entered, I would open the case for the purpose of taking his testimony; otherwise judgment would be entered. The defendant having failed to produce Mr. Shostak, the decision that was reserved by me, was rendered on the seventh day of September, Nineteen hundred and fifteen, in which judgment was given in favor of the Plaintiff, for the sum of forty-six dollars and forty-three cents (\$46.43) damages and costs of suit.” and the

Third and Last Return made in pursuance of the rule in the Supreme Court is entitled “Amended return,” and appears on page 54 of the State of the case, as follows:

“On the seventh day of September, nineteen hundred and fifteen, Thomas Brown, attorney for the plaintiff, appeared in the District Court in the City of Perth Amboy, and moved for judgment for the plaintiff, which was granted.”

The three foregoing returns are not inconsistent nor contradictory, and show a judgment legally entered within the jurisdiction of the Court.

See Prudential Insurance Company vs. Taylor, 30 Vroom, pages 353-355.

It is respectfully submitted that the record of the District Court discloses a judgment legally entered; therefore, the judgments of the District Court of the City of Perth Amboy and the New Jersey Supreme Court, should be affirmed with costs.

THOMAS BROWN,

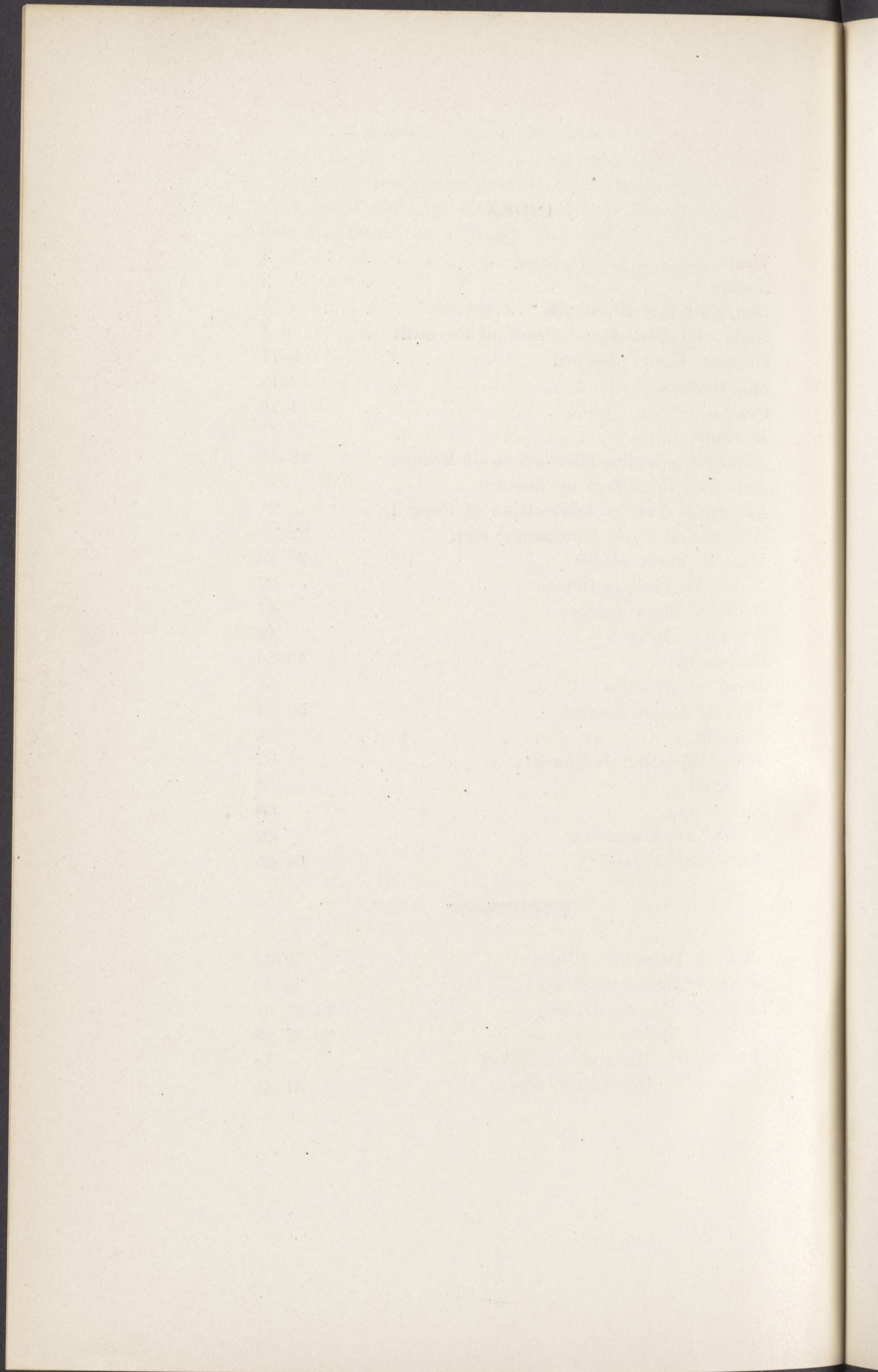
Attorney for Respondent-Appellee.

INDEX

Writ	3
Return	3
District Court Summons	5
State of Demand and Proof of Account	6-8
District Court Record	9-11
Supersedeas	12-13
Bond	14-16
Reasons	17
Affidavit Alleging Diminution of Record	18-19
Rule re Diminution of Record	20
Return of Rule re Diminution of Record	21
Affidavit of C. C. Hommann, Esq.	22-24
Rule to Show Cause	25-26
Notice to Thomas Brown	27
Order to Show Cause	47
Amended Return	48
Statement	49-50
Proof of Account	51
District Court Record	52-54
Opinion	55
Rule Affirming Judgment	57
Affidavit	58
Subpoena	60
Notice of Argument	62
Notice of Appeal	64-65

WITNESSES

John A. Delaney—Direct	30-31
John A. Delaney—Cross	32-33
John J. Quinn—Direct	34-35-38
John J. Quinn—Cross	36-37-38
Charles C. Hommann—Direct	40
Charles C. Hommann—Cross	41-45



WRIT

Middlesex County, ss:—

The State of New Jersey, to the Judge of the District Court of the City of Perth Amboy, Greeting: We being willing for certain reasons to be certified of a judgment, order and proceedings given and made in the said District Court of the City of Perth Amboy in a certain action brought by Samuel Baum, plaintiff, against Perth Amboy City Market, a corporation of New Jersey, defendant, we command you that you send under your seal to our New Jersey Supreme Court, at Trenton, on the twenty-third day of October instant next, the judgment, order and proceedings aforesaid, with all things attached concerning the same as fully and entirely as they remain in said Court before you, together with this writ, that we may further cause to be done thereupon what of right should be done.

10

Witness, William S. Gummere, Chief Justice of the Supreme Court, at Trenton, the second day of October, Nineteen hundred and fifteen.

20

WM. C. GEBHARDT, Clerk.

RETURN

To the Honorable, the Chief Justice and Associate Justices of the New Jersey Supreme Court:

30

The judgment, order and proceedings herein, with all things touching and concerning the same as fully and entirely as they remain in the District Court of Perth Amboy, I do hereby certify under the seal of the court in the schedule hereto annexed, as within I am commanded.

C. C. HOMMANN,
Judge of District Court,
City of Perth Amboy, N. J.

40

ENDORSEMENT

NEW JERSEY SUPREME COURT

10	PERTH AMBOY CITY MARKET, A Corporation of New Jersey, Prosecutor, vs. SAMUEL BAUM, Defendant.	} On Certiorari. Writ.
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JOSEPH E. STRICKER, Attorney for Prosecutor,
 117-119 Smith Street, Perth Amboy, N. J.

Ret'b. October 23d, 1915.

20 I allow the within writ; let it be sealed.

J. J. BERGEN,
 Justice of Supreme Court.

Oct. 2, 1915.

30

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DISTRICT COURT SUMMONS

STATE OF NEW JERSEY, MIDDLESEX COUNTY, CITY OF PERTH AMBOY,	}	ss:
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THE STATE OF NEW JERSEY

10

[L. S.] To the Sergeant-at-Arms of the District
Court of the City of Perth Amboy or any
Constable of the County of Middlesex:

SUMMON—Perth Amboy City Market, a corporation,
to appear before the DISTRICT COURT OF THE
CITY OF PERTH AMBOY, to be held at the City
Hall, in said City, on the twenty-sixth day of March,
1915, at ten o'clock in the forenoon, to answer unto
SAMUEL BAUM COMPANY, in an action Upon Con-
tract, Demand One Hundred Dollars (\$100).

20

Hereof fail not

Witness Charles C. Hommann, Esq., Judge of said
District Court at Perth Amboy aforesaid the twentieth
day of March, in the year One Thousand Nine Hundred
and Fifteen.

30

THOMAS BROWN, Plaintiff's Attorney

JESSE COLYER, Clerk.

40

ENDORSEMENT

DISTRICT COURT OF THE CITY OF
PERTH AMBOY

10	SAMUEL BAUM CO., <div style="text-align: right;">Plaintiff,</div>	}	Summons Upon Contract.
	vs.		
	PERTH AMBOY CITY MARKET, <div style="text-align: right;">Defendant.</div>		

STATE OF DEMAND

20	Demand	\$100.00
	Court Costs	3.60
	Returnable March 26th, A. D., 1915, at 10 o'clock A. M.	

I served the within summons March 20th, 1915, on Morris Shumsky, President of Perth Amboy City Market, defendant, by reading the same to him and delivering to him a copy thereof.

30 WM. HOFFNER, Sergeant-at-Arms.

STATEMENT

Perth Amboy, N. J., Mar. 24, 1915.

Perth Amboy City Market,

To SAMUEL BAUM CO., Dr.,
dealer in

40 Paper, Paper Bags, Stationery and Notions
203-205 New Brunswick Avenue.

July 10/14	Mdse.	1.75	
25		40.12	
Aug. 15		4.40	
		<hr/>	\$46.27

Duplicate Perth Amboy City Market,
Smith St., City.

July 10/14.

1 Case 12/40 Candles	1.75	10
----------------------	------	-----------

(Pencil note) Delivered to Stevens for Shumsky.

July 25/14

1 roll 20 in. mogle; 51 lbs.		
25 roll 20 in. mogle; 1255 lbs., at \$2.85	\$37.22	
1 M-Handles	2.90	
	<hr/>	
	\$40.12	20

(Pencil note) Delivered by driver Dominick Trolo

Geo. Burns saw delivery

August 15/14

1 case fly paper	\$2.50	
500 Poultry sacks	1.90	
	<hr/>	
	\$4.40	30

(Pencil note) Delivered by Tirrola

DISTRICT COURT OF THE CITY OF
PERTH AMBOY

	SAMUEL BAUM, trading as Samuel Baum Co., <div style="text-align: right;">Plaintiff,</div>		
	vs.		} On Contract. State of Demand.
10	PERTH AMBOY CITY MARKET, a corporation. <div style="text-align: right;">Defendant.</div>		

The plaintiff demands of the defendant the sum of One Hundred Dollars (\$100) upon a certain book account, a true copy of which is hereto annexed.

20 Judgment will be claimed for the sum of Forty-six dollars and twenty-seven cents (\$46.27), besides legal interest from August 15th, 1914, and costs of suit.
 Dated, March 25th, A. D., 1915.

THOMAS BROWN, Plaintiff's Atty.

PROOF OF ACCOUNT

30 STATE OF NEW JERSEY,)
 COUNTY OF MIDDLESEX,) ss:

40 SAMUEL BAUM, being duly sworn according to law upon his oath says, that he is the plaintiff in the above stated action, that he is familiar with the books of account of said plaintiff, that annexed to this affidavit is a true copy of the entries in the original book or account of entries of said plaintiff against the defendant so far as they relate to the plaintiff's demand, together with a statement of all credits or allowances to which the defendant is entitled, and that

Forty-six dollars and twenty-seven cents (\$46.27) together with interest from August 15th, 1915, the sum claimed by the plaintiff from the defendant, is justly due and owing to plaintiff from said defendant.

(Signed) SAMUEL BAUM.

Sworn and subscribed to before me this twenty-fifth day of March, A. D., 1915.

10

(Seal)

EDNA M. WITTNEBERT,

Notary Public of N. J.

DISTRICT COURT RECORD

20

DISTRICT COURT OF PERTH AMBOY, N. J.

SAMUEL BAUM, trading as
Samuel Baum Company,
Plaintiff,

vs.

PERTH AMBOY CITY MARKET,
a corporation,
Defendant.

On Contract. 30
Demand \$100.00.

THOMAS BROWN, Plaintiff's Attorney.

JOSEPH E. STRICKER, Defendant's Attorney. 40

		Costs		
		City al		
	Summons	1.50		Filed A. D., 19
	Service		.60	Summons was issued tested
	Mileage			March 20th, A. D., 1915, return-
				able March 26th, A. D., 1915.
10	Trial Fee	1.50		The Summons was returned as
				follows, viz.:
				I served the within summons
				March 20th, 1915, on Morris
				Shumsky, President of Perth
				Amboy City Market, the De-
				fendant, by reading the same to
				him and delivering to him a
				copy thereof.
				WM. HOFFNER,
				Sergeant-at-Arms.
20	Subpoenas			Plaintiff's demand was filed
	Service			March 26th, A. D., 1915.
	Witness			Defendant's offset was filed
				March 26th, A. D., 1915. This
				cause adjourned until May 14th-
				21st; time to time to July 2d,
				1915.
				July 2d, 1915. This cause
				was called at ten o'clock in the
				forenoon.
30	Order			
	Execution	.60		
	Service		.75	
	Mileage			
	Transcript			

Plaintiff appeared by Thomas Brown (who moved to amend title of case).

Defendant appeared by John A. Delaney for Joseph E. Stricker.

Original books of entry produced.

40 Samuel Baum; Dominick Terrola; Dora Baum and Ida Sacarny sworn for Plaintiff.

(Adjourned to allow defendant to locate a Mr. Shostak.)

September 7th, 1915. Judgment was rendered for Plaintiff for the sum of Forty-six Dollars and forty-three cents damages (\$46.43) and five dollars and ninety-two cents, costs of suit (\$5.92).

September 22, A. D., 1915, execution was issued. The execution was returned as follows, viz.:

10

I, JOHN J. QUINN, Clerk of the District Court of the City of Perth Amboy, do hereby certify that the foregoing is a true and correct copy of a certain judgment record, together with all papers appertaining thereto, as the same are recorded in my office.

[Seal] IN WITNESS WHEREOF, I have here-
unto set my hand and affixed the seal of
said Court this fifteenth day of October,
nineteen hundred and fifteen.

20

JOHN J. QUINN, Clerk.

[Seal] IN WITNESS WHEREOF, I have here-
unto set my hand and affixed the seal of
said Court this fifteenth day of October,
nineteen hundred and fifteen.

JOHN J. QUINN, Clerk.

30

40

SUPERSEDEAS

NEW JERSEY, ss:.

The State of New Jersey, to William H.
Hoffner, Sergeant-at-Arms of the District
[L. S.] Court of the City of Perth Amboy,

10

Greeting:

Whereas, by a certain writ of execution
under the hand and seal of the District Court of the
City of Perth Amboy, to you delivered, you were com-
manded that of the goods and chattels of Perth Amboy
City Market, you should levy and make a certain debt
of Forty-six dollars and forty-three cents and Five
20 dollars and ninety-two cents, besides costs of execu-
tion, which writ of execution was issued on a certain
judgment recovered by Samuel Baum in the said Dis-
trict Court of the City of Perth Amboy.

Now, for as much as the said Perth Amboy City
Market, a corporation, hath complained that the said
judgment was unjustly obtained against it, and is
illegal and erroneous, and that said execution has
unduly issued thereon, and that the said Perth Amboy
30 City Market hath sued out a writ of certiorari directed
to the Judge of the District Court of the City of Perth
Amboy, commanding and directing him to certify and
send to our Supreme Court at Trenton, the said judg-
ment, and proceedings aforesaid, that what is right
according to law might be done. Therefore, we com-
mand you that you desist levying the said execution,
and in case before the serving of this writ upon you,
you shall have levied the same, or received the money
thereon, or arrested the said Perth Amboy City Market.
40 you are not to proceed to make sale of said goods and

chattels by you levied on, or taken, or pay the money to the said Samuel Baum, until you shall receive our further writ or order herein.

Witness, William S. Gummere, Chief Justice of our Supreme Court, at Trenton, on the second day of October, Nineteen hundred and fifteen.

WM. C. GEBHARDT, Clerk.

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JOSEPH E. STRICKER, Attorney.

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ENDORSEMENT

NEW JERSEY SUPREME COURT

10	PERTH AMBOY CITY MARKET, a corporation of New Jersey, Prosecutor, vs. SAMUEL BAUM, Defendant,	} On Certiorari. Supersedeas.
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JOSEPH E. STRICKER, Attorney for Prosecutor.
 117-119 Smith Street, Perth Amboy, N. J.

20 I allow this writ, let it be served.

J. J. BERGEN,
 Justice of the Supreme Court.

Oct. 2d, 1915.

BOND

30 KNOW ALL MEN BY THESE PRESENTS: That we, the Perth Amboy City Market and Hyman Friedman, are held and firmly bound unto Samuel Baum in the sum of Three hundred and fifty dollars, for the payment of which sum we bind ourselves, our heirs, executors and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated the First day of October nineteen hundred and fifteen.

40 The condition of this obligation is such, whereas a judgment has been rendered in the Perth Amboy

District Court in the City of Perth Amboy in favor of Samuel Baum against the Perth Amboy City Market for the sum of forty-six and 43/100 dollars, and the said Perth Amboy City Market has applied to James J. Bergen, a Justice of the Supreme Court, for a writ of certiorari to review said judgment, because said Court was without jurisdiction in the premises.

Now, therefore, if the said Perth Amboy City Market shall prosecute said certiorari in the Supreme Court and shall pay the sum recovered in the Perth Amboy District Court of the City of Perth Amboy, with interest and costs, if the judgment shall be affirmed, and shall in all things stand to and abide the judgment of the Supreme Court respecting the judgment, order and proceedings given or made by the court below, then this obligation to be void; otherwise, to remain in full force and virtue.

10

Signed, sealed and delivered in the presence of

20

PERTH AMBOY CITY MARKET,

By Morris Shumsky, President.
Hyman Friedman [L. S]

Attest:

Wm. P. Shumsky, Secretary (Seal)
John A. Delaney

STATE OF NEW JERSEY,
COUNTY OF MIDDLESEX,

}

ss:

30

HYMAN FRIEDMAN being duly sworn on his oath says, that he is surety in the within bond named; that he is worth the sum of five hundred dollars over and above all his just debts and liabilities and has property to the extent of three hundred and fifty dollars within the limits of the County of Middlesex subject to execution.

HYMAN FRIEDMAN,

40

Sworn to and subscribed to before me this 27th day
of September, 1915.

JOHN A. DELANEY,
Atty. at Law of N. J.

ENDORSEMENT

10

PERTH AMBOY DISTRICT COURT

SAMUEL BAUM,

Plaintiff,

vs.

20

PERTH AMBOY CITY MARKET,

Defendant.

BOND

Dated September 27th, 1915

30 JOSEPH E. STRICKER, Attorney for Defendant

I approve the within Bond as to form and sufficiency.
Let it be filed.

J. J. BERGEN,
Justice of the Supreme Court.

Filed October 2d, 1915.

40 WM. C. GEBHARDT, Clerk.

NEW JERSEY SUPREME COURT

PERTH AMBOY CITY MARKET,
a corporation of New Jersey,
Prosecutor.

vs.

SAMUEL BAUM,

Defendant.

On Certiorari.
Reasons.

10

REASONS

The judgment of the District Court of the City of Perth Amboy in a suit in which Samuel Baum is plaintiff and Perth Amboy City Market is defendant, is illegal, erroneous and unlawful, for the following reasons:

20

1. Because the said Court had no jurisdiction to render said judgment.

2. If said Court did have jurisdiction the same was lost by the continuance of the case to an indefinite day.

3. Because said judgment was entered without notice and in the absence of Prosecutor, and without its consent.

4. Because the case was partly tried and judgment rendered without giving the Prosecutor an opportunity to have its side heard.

30

5. Because the Judge of the said Court gave judgment for the plaintiff and against the Prosecutor in the sum of Forty-six dollars and forty-three cents (\$46.43).

6. Because the said judgment is illegal, erroneous and unlawful for divers reasons.

JOSEPH E. STRICKER,
Attorney for Prosecutor.

Filed November 2d, 1915.

40

NEW JERSEY SUPREME COURT

PERTH AMBOY CITY MARKET,
a corporation,

Prosecutor,

vs.

10 SAMUEL BAUM,

Respondent.

On Certiorari.
Affidavit.

STATE OF NEW JERSEY, }

COUNTY OF MIDDLESEX, } ss:

20 Thomas Brown of full age being duly sworn on his oath deposes and says: that he is the attorney for the respondent in the above cause; that the writ of certiorari therein was allowed in the month of October, 1915, to review a judgment of the District Court of the City of Perth Amboy found in favor of the respondent; that the following sentence appears as a part of the return to said writ: "Adjourned to allow defendant to locate a Mr. Shostak."

30 Deponent further says that the trial of said case took place in said District Court on the second day of July, 1915, before Charles C. Hommann, Esq., Judge, without a jury; that after hearing all the testimony the said judge made the following disposition of said cause: "I will reserve decision in this cause for a week or so and in the meantime if the defendant can produce Mr. Shostak I will hear his testimony, otherwise judgment will be entered for the plaintiff." Deponent further says that the defendant company failed to produce Mr. Shostak, and judgment was entered by the judge in favor of the plaintiff on the 7th day of
40 September, 1915.

Deponent further says, that the reservation of said judgment does not appear in the return made to the writ of certiorari in this case; your deponent therefore prays for a rule directing the said Judge of the District Court of said City and the Clerk of said Court, to certify whether or not said judgment was reserved as hereinbefore stated and the manner in which said judgment was reserved and judgment finally entered.

THOMAS BROWN.

10

Sworn and subscribed to before me this 14th day of January, 1916.

RICHARD A. BOLGER,
Notary Public of New Jersey.

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40

NEW JERSEY SUPREME COURT

	PERTH AMBOY CITY MARKET, a corporation,	Prosecutor,	} Rule: On Certiorari.
		vs.	
10	SAMUEL BAUM,	Respondent.	

To Charles C. Hommann, Esq., Judge of the District Court of the City of Perth Amboy, and John J. Quinn, Clerk of said Court:

20 On allegation of dimunition in the record and the return made in the above entitled cause on certiorari, it is ordered, on motion of Thomas Brown, attorney for the respondent, that Charles C. Hommann, Judge of the said Court, do forthwith after service of a copy of this rule, certify to this Court, whether or not at the conclusion of the trial of said cause in the District Court in the City of Perth Amboy, on the second day of July, 1915, the decision of the Judge of said Court was reserved and if so, to certify to this Court the conditions upon which said decision was reserved if any, and the

30 manner in which judgment was entered thereon. January 15th, 1916.

On motion of

THOMAS BROWN,
Attorney of respondent.

Let the above rule be entered on the minutes.

40 J. J. BERGEN,
Judge Supreme Court.

NEW JERSEY SUPREME COURT

PERTH AMBOY CITY MARKET,
a corporation,

Prosecutor,

vs.

SAMUEL BAUM,

Respondent.

On Certiorari.
Return of Rule.

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In obedience to an order of the Supreme Court of the State of New Jersey, made on the fifteenth day of January, Nineteen hundred and sixteen, directing me to certify whether or not at the conclusion of the trial of the cause of Samuel Baum against the Perth Amboy City Market, in the District Court of the City of Perth Amboy, on the second day of July, Nineteen hundred and fifteen, the decision was reserved, and if so the conditions upon which said decision was reserved, and the manner in which the judgment was entered thereon. I do hereby certify that on the second day of July, Nineteen hundred and fifteen, at the conclusion of the trial of said cause, the defendant, The Perth Amboy City Market, through its attorney, requested permission to produce a Mr. Shostak, as a witness in the defendant's behalf, and after hearing the argument of counsel, and of the testimony in the cause, I reserved decision, stating that if the defendant produced Mr. Shostak before judgment was entered, I would open the case for the purpose of taking his testimony; otherwise judgment would be entered. The defendant having failed to produce Mr. Shostak, the decision that was reserved by me, was rendered on the seventh day of September, Nineteen hundred and fifteen, in which

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judgment was given in favor of the Plaintiff, for the sum of Forty-six dollars and forty-three cents (\$46.43), damages and cost of suit.

CHARLES C. HOMMANN,

Judge of the District Court of the City of Perth Amboy.

Dated, Jan. 19th, 1916.

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NEW JERSEY SUPREME COURT

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PERTH AMBOY CITY MARKET,
Prosecutor,

vs.

SAMUEL BAUM,
Respondent.

On Certiorari.
Affidavit

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STATE OF NEW JERSEY, }
COUNTY OF MIDDLESEX, } ss:

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Charles C. Hommann being duly sworn according to law upon his oath deposes and says: I am the Judge of the Perth Amboy District Court and sat in the trial of the above entitled action on the 2nd day of July, 1915. I signed the return to the writ of certiorari allowed in the above entitled action. On the 19th day of January, 1916, Thomas Brown, Esquire, attorney for the above named respondent, submitted to me a rule alleging a dimunition of the record, which I signed,

a copy of which rule is hereto annexed and made part of this affidavit. What had actually occurred before me on the 2nd day of July, 1915, had passed out of my mind and I relied to a great extent on what Mr. Brown had stated to me in connection therewith. Yesterday my attention was directed by John A. Delaney, an attorney connected with Mr. Stricker's office, and Joseph E. Stricker himself to the fact that the record as returned by me was correct and that the statement contained in the return of the rule was erroneous, whereupon I consulted the record in the District Court this morning and consulted with John J. Quinn, the Clerk of said Court, who was present on the 2nd day of July when the above case was partly heard, and I now find to my complete satisfaction that I did not hear all the testimony in the case; that I did not reserve decision, that I did not say if defendant produced Mr. Shostak before judgment was entered I would open the case for the purpose of taking his testimony, otherwise judgment would be entered, on the contrary I postponed the further trial of the case in order to give Samuel Baum, the above named respondent, an opportunity to produce Mr. Shostak, which was never done. I also find that the defendant's side was not heard and was not to be heard until Mr. Shostak was produced by the plaintiff. The judgment was rendered in September last on my then recollection that I had reserved decision in the case and without consulting the record.

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C. C. HOMMANN.

Sworn and subscribed to before me this 4th day of February, 1916.

STEPHEN F. SOMOGYI,
M. C. C. of N. J.

iled February 7th, 1916.

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NEW JERSEY SUPREME COURT

10	PERTH AMBOY CITY MARKET, a corporation, Prosecutor, vs. SAMUEL BAUM, Respondent.	} On Certiorari. Return of Rule.
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20 In obedience to an order of the Supreme Court of
 the State of New Jersey, made on the fifteenth day of
 January, Nineteen hundred and sixteen, directing me
 to certify whether or not at the conclusion of the trial
 of the cause of Samuel Baum against the Perth Amboy
 City Market, in the District Court of the City of Perth
 Amboy, on the second day of July, Nineteen hundred
 and fifteen, the decision was reserved, and if so the
 conditions upon which said decision was reserved, and
 the manner in which the judgment was entered thereon.
 I do hereby certify that on the second day of July,
 Nineteen hundred and fifteen, at the conclusion of the
 30 trial of said cause, the defendant, The Perth Amboy
 City Market, through its attorney, requested permis-
 sion to produce a Mr. Shostak, as a witness in the de-
 fendant's behalf, and after hearing the argument of
 counsel, and of the testimony in the cause, I reserved
 decision, stating that if the defendant produced Mr.
 Shostak before judgment was entered, I would open
 the case for the purpose of taking his testimony; other-
 wise judgment would be entered. The defendant hav-
 ing failed to produce Mr. Shostak, the decision that
 was reserved by me, was rendered on the seventh day
 40 of September, Nineteen hundred and fifteen, in which

judgment was given in favor of the Plaintiff, for the sum of Forty-six dollars and forty-three cents (\$46.43), damages and cost of suit.

CHARLES C. HOMMANN,
 Judge of the District Court of
 the City of Perth Amboy.

Filed February 7th, 1916.

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Dated, Jan. 19th, 1916.

NEW JERSEY SUPREME COURT

PERTH AMBOY CITY MARKET,

Prosecutor,

vs.

SAMUEL BAUM,

Respondent.

On Certiorari. 20
 Rule to Show
 Cause.

The affidavit of Charles C. Hommann, Judge of the District Court of Perth Amboy, having been submitted to me, and it appearing therein that a certain rule signed by him on the 19th day of January, 1916, amending the record returned with the writ in the above entitled cause, was so signed by him under a misapprehension, and application having been made to me by the prosecutor in the above entitled cause for an order to strike from the files of this Court the said rule to amend the record in the above entitled matter signed by said Charles C. Hommann, Esquire, Judge of the District Court of the City of Perth Am-

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boy, and dated January 19th, 1916, aforesaid; It is on this 5th day of February, 1916, on motion of Joseph E. Stricker, attorney for the prosecutor, ordered that the above named Samuel Baum, show cause before the Supreme Court at the State House in the City of Trenton on the 15th day of February, 1916, at the hour of ten o'clock A. M., why the amended return aforesaid should not be stricken from the files of this Court; It is further ordered that a copy of this order and the affidavit aforesaid be served on the respondent within three days from the date hereof, and that the said prosecutor and defendant have leave to take depositions, to be used on the return of this rule.

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Let this rule be entered in the minutes.

J. J. BERGEN, Judge.

Filed February 7th, 1916.

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NEW JERSEY SUPREME COURT

PERTH AMBOY CITY MARKET,
a corporation,

Prosecutor,

vs.

SAMUEL BAUM,

Respondent.

On Certiorari.
Notice.

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Sir:—

Please take notice, that the said prosecutor will, in pursuance of the rule heretofore taken in the above stated cause, take the depositions and make exhibits on its part, before Adrian Lyon, Esquire, a Supreme Court Commissioner, at his office in the Madison Building on the corner of Smith Street and Madison Avenue, in the City of Perth Amboy, in the County of Middlesex and State of New Jersey, on the eleventh day of February, A. D. 1916, at 2 o'clock in the afternoon, and you are requested to be present and cross examine if you see fit.

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Dated February 7th, 1916.

Your obedient servant,

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JOSEPH E. STRICKER,
Attorney for Prosecutor.

To Thomas Brown, Esq.,
Attorney for Respondent.
Filed Feb. 14, 1916.

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ENDORSEMENT

	PERTH AMBOY CITY MARKET, <div style="text-align: right;">Prosecutor,</div>	} On Certiorari. Notice.
	vs.	
10	SAMUEL BAUM, <div style="text-align: right;">Respondent.</div>	

JOSEPH E. STRICKER, Attorney for Prosecutor.
Perth Amboy, N. J.

Service of a copy of the within notice acknowledged,
this fifth day of February, A. D. 1916.

20	THOMAS BROWN, Attorney for Respondent.
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NEW JERSEY SUPREME COURT

	PERTH AMBOY CITY MARKET, a corporation, <div style="text-align: right;">Prosecutor,</div>	} On Certiorari. Affidavit.
	vs.	
30	SAMUEL BAUM, <div style="text-align: right;">Respondent</div>	

STATE OF NEW JERSEY,)	
COUNTY OF MIDDLESEX,)	ss :

40	Walter J. Rielly being duly sworn according to law upon his oath deposes and says: that on the seventh
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day of February, 1916, deponent served upon Thomas Brown, attorney for the respondent in the above, a true copy of the Rule to Show Cause in the above, filed on February 7th, 1916, together with a copy of the Affidavit of Charles C. Hommann, Esquire, and Return of Rule attached thereto, by handing the same to him personally.

WALTER J. REILLY.

Sworn and subscribed to before me this Seventh day of February, 1916. 10

HYMAN FRIEDMAN,
Notary Public, New Jersey.

Filed Feb. 14, 1916.

NEW JERSEY SUPREME COURT

PERTH AMBOY CITY MARKET,
Prosecutor,

vs.

SAMUEL BAUM,
Respondent.

On Certiorari.
Depositions.

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Depositions and examination of witnesses taken before Adrian Lyon, a Supreme Court Commissioner, at his office, No. 168 Smith Street, in the City of Perth Amboy, New Jersey, on Friday, the eleventh day of February, 1916, at two o'clock in the afternoon, in the above stated cause by virtue of an order made therein on the fifth day of February, 1916, in the presence of Joseph E. Stricker, attorney for the prosecutor, and Thomas Brown, attorney for the respondent.

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JOHN DELANEY, a witness produced on the part of the prosecutor, being duly sworn according to law deposes and says as follows:

Direct examination by Mr. Stricker:

Q. Mr. Delaney, you are an attorney at law of this city?

A. Yes, sir.

10 Q. And represented me in the trial of the case of Samuel Baum Company against the Perth Amboy City Market?

A. Yes, sir.

Q. Was the name of the plaintiff in that action amended?

A. I don't remember that.

Q. Did you appear in that case as attorney for me?

A. Yes, sir.

20 Q. And did you appear on the second day of July when the plaintiff commenced taking the testimony?

Objected to by Mr. Brown on the ground that it is not intelligible.

A. I don't know if it was the second. I appeared at the time the testimony was taken in the case of Baum against the City Market.

Q. Was the taking of the testimony completed at that time?

30 A. Only the testimony for the plaintiff.

Q. Was the plaintiff's case closed?

A. After the completion of the testimony that they had there Judge Hommann called upon the plaintiff to produce a Mr. Shostak.

Q. Was anybody in court on that day on behalf of Samuel Baum?

A. Mr. Brown.

Q. Mr. Thomas Brown, the attorney whose name appears in these papers?

40 A. Yes, sir.

Q. What did Judge Hommann say, if anything, in the presence of Mr. Brown regarding Mr. Shostak or the production of Mr. Shostak?

A. He requested Mr. Brown to produce Mr. Shostak.

Q. Was Mr. Baum in court at that time?

A. Well, at the time the request was made, I don't know whether he was or not.

Mr. Brown moves that testimony be stricken out as being hearsay and not relevant.

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Q. Did Mr. Brown, attorney for Baum, say anything after Judge Hommann had spoken?

A. Yes, sir; he turned to me and told me that it would probably be easier for me to produce Mr. Shostak than it would be for him to produce him and he wanted to know whether or not I would produce Mr. Shostak and I told him I would try to do so.

Q. Anything else said by yourself, Mr. Brown or Mr. Hommann at that time?

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A. Why, yes; before we left the court room Judge Hommann adjourned the case pending the production of Mr. Shostak.

Q. Well, how was that done?

A. Judge Hommann simply adjourned the case pending his production, to no specific date.

Q. What did Judge Hommann do or say, if anything?

A. Why, I don't remember what it was he said.

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Q. Well, how was that adjournment brought about?

A. Why, the adjournment was brought about because Judge Hommann didn't seem to have the evidence clear on certain points in the plaintiff's case.

Q. I want to know how the adjournment was made; not what seemed. What action was taken by Judge Hommann?

Mr. Brown submits that witness has answered the question.

40

A. Judge Homman says the case is adjourned pending the production of Mr. Shostak.

Cross examination by Mr. Brown:

Q. You don't want to change your testimony in regard to your last answer, do you?

10 A. No, sir.

Q. The testimony in this case was finished in the morning, wasn't it?

A. No, sir.

Q. Wasn't all the testimony taken in the morning?

A. No, sir.

Q. Who testified in the afternoon?

A. The only testimony that was taken was taken in the afternoon.

Q. You were there in the morning, were you not?

20 A. I was.

Q. And your client, Mr. Shumsky, who is the President of the City Market, was there?

A. Yes, sir.

Q. But didn't come back in the afternoon, did he?

A. No, sir.

Q. This Mr. Shostak was the Secretary of the Perth Amboy City Market, wasn't he?

A. I don't think he was at that time.

30 Q. Well, he had been at the time those goods were sold as mentioned in the state of demand?

A. I don't know what the state of demand shows. It may show that.

Q. There were four witnesses produced on the part of the plaintiff, wasn't there?

A. I don't know how many were produced.

Q. And the books of entry were produced?

A. I suppose they were. Yes, they were.

Q. And you were in court without any witnesses were you not?

40 A. Yes.

Q. And after all the testimony was taken it was then that you suggested Mr. Shostak as being a witness, was it not?

A. That I couldn't say.

Q. And isn't it a fact that you admitted three or four of the deliveries of the articles that were being sued for and you wanted Shostak to prove one or two of the other items as not being delivered?

A. Well, I couldn't say that either.

Q. Well, why is it that you say the plaintiff wanted to produce Mr. Shostak? 10

A. I didn't say the plaintiff wanted to produce Mr. Shostak.

Q. Well, what did you say?

A. I said that the court asked the plaintiff to produce a Mr. Shostak.

Q. How did the court know anything about Shostak? What brought his name up?

A. I think it came in the testimony. Mr. Shostak's name came up in the testimony. 20

Q. Didn't you mention Mr. Shostak as a witness you wanted there?

A. No, sir.

Q. So you didn't want Mr. Shostak as a witness for the defendant?

A. I don't know whether I did or not.

Q. You know, though, that the defendant didn't want to produce Mr. Shostak? 30

A. No, sir; I don't know that either.

Q. You do know it or don't know it?

A. I don't know it.

Q. Then if the record in this case states that the case was adjourned for the defendant to produce Mr. Shostak, that is not a proper entry?

A. No, sir.

Q. You have seen the record, haven't you?

A. Yes, sir. 40

Q. And that is the entry made by Mr. Quinn in there?

A. Yes, sir.

Q. And you say that entry is wrong?

A. Yes, sir.

Q. As far as this case is concerned, you never offered to produce a witness of any kind?

A. No, sir; except what I told you a little while ago about Mr. Shostak; or as I told Mr. Stricker about
10 Mr. Shostak.

JOHN J. QUINN, a witness produced on the part of the prosecutor, being duly sworn according to law deposes and says as follows:

Direct examination by Mr. Stricker:

Q. Mr. Quinn, directing your attention to your
20 docket, what is the page?

A. 7450; that's the number of the case.

Q. What's the number of that docket?

A. No. 12.

Q. The page on which this case is entered?

A. The number of the page is the number of the case.

Q. Case No. 7450, docket 12, case of Samuel Baum, trading as Samuel Baum Company vs. Perth Amboy City Market; I notice that the plaintiff's name is
30 amended on that record. By whom was the amendment entered?

A. Well, it wasn't entered by me, and judging from the writing here it was entered by the former clerk, Mr. Colyer.

Q. What was the title originally of this case?

A. Samuel Baum Company is the way it is here.

Q. Now, were you the Clerk of the District Court on the second day of July, last?

A. I was.

40 Q. When this case was called?

A. I was.

Q. Were there any appearances in that case?

A. There was an appearance in the case for the plaintiff. That's all. An appearance for the plaintiff; also for the defendant through Mr. Delaney.

Q. Who appeared for the plaintiff?

A. Mr. Brown.

Q. Mr. Thomas Brown?

A. Yes, Mr. Thomas Brown.

Q. I notice there is entered on the record a statement as follows: "Adjourned to allow defendant to locate a Mr. Shostak." Is that your entry?

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A. It is.

Q. And how did you come to make that entry?

A. Well, in all trials where there is any exhibits, any witnesses, why I have a pad and on that pad I write the name of each witness for each side, each exhibit and a description of everything offered in evidence and at the end I make a note whatever the Judge decides, so that is where I must have got that entry?

20

Q. Have you any recollection as regards to this particular case?

A. Well, the only recollection I have of the case is that it was tried in the afternoon. I know that, and Mr. Brown was there with his witnesses and Mr. Delaney was there representing you as counsel for defendant. That's really about all I remember about the case.

30

Q. Do you remember whether or not Judge Hommann reserved his decision in the case?

A. Well, only so far as this is concerned that wherever a decision is reserved I mark it "decision reserved" in the docket and in my list.

Q. I am speaking about this case. What have you to say as to what occurred in this particular case?

A. Well, in this particular case, of course, I would say was adjourned to allow defendant to locate Mr.

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Shostak, and I assume that because I have this entered here.

Cross examination by Mr. Brown:

- Q. You haven't that slip, Mr. Quinn?
- A. No, I haven't, Mr. Brown.
- 10 Q. You have heard Mr. Delaney's testimony, haven't you?
- A. I have.
- Q. That Judge Hommann said "this case is adjourned pending the production of Mr. Shostak by the plaintiff." You heard that testimony, didn't you?
- A. Yes, I heard that.
- Q. Is that true or not?
- A. Well, I don't remember any such arrangement as that.
- 20 Q. You know that there was a great deal of talk about the adjournment or about the production of this witness?
- A. There was as I remember. I don't remember much about the case.
- Q. How long had you been clerk at that time, Mr. Quinn?
- A. About two months; a little over two months.
- Q. And you didn't attempt to put down in the record all that was said concerning the adjournment, did you?
- 30 A. Well, I usually do.
- Q. Well, wasn't this a conclusion of what you heard that you wrote in the record?
- A. Well, I heard it, but when I make any entries in my docket I always have the idea, don't you know, they must remain there and I am very particular about getting it from the right source.
- Q. What you entered there is a result of everything you heard; your conclusion about it, you wrote it in there?
- 40 A. Heard from who, Mr. Brown?

Q. That is, from the court and counsel speaking?

A. Yes.

Q. So that entry there doesn't contain all that was said about the adjournment?

A. Well, maybe not everything that was said about the adjournment but it really was the arrangement I arrived at what I heard from the court.

Q. Didn't you hear Mr. Delaney say that he had a Mr. Shostak that he wanted to produce in regard to two of the items?

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A. I don't remember, Mr. Brown.

Q. You do know, however, that the plaintiff was there with his witnesses and exhausted his case?

A. The plaintiff was there with his witnesses; yes, sir.

Q. What do you do with the slips such as you referred to?

A. I destroyed it, Mr. Brown, because it really isn't any good to me; isn't any record that we have to keep and I only kept it for my own convenience.

20

Q. Since you have been clerk you have never made such an entry as in that case?

A. This is the only entry of this nature that I have made since I have been clerk.

Q. Is it not a fact, Mr. Quinn, that that record was your conclusion of what occurred in the conversation or argument that was had with counsel and the court regarding the adjournment of the case?

A. Well, an entry of that kind only must be a conclusion.

30

Q. And did you hear Judge Homman say that as far as the case then stood he would have to give decision for the plaintiff?

A. I don't remember that, Mr. Brown.

Q. And if Mr. Delaney wanted to produce Shostak that he could do so and he would hear him if he wanted him to?

A. I don't remember that part.

40

Q. And he would reserve decision until he got hold of Shostak; give him a chance to get Shostak?

A. I don't remember.

Q. Didn't you hear Mr. Delaney say that Shostak lived in Jamesburg and that it might take him a little while to get him?

A. I know there was some question about where he was.

10 Q. And as a fact didn't Judge Hommann hear all this testimony in the case and because of Delaney's insistence he would give him a chance to produce Mr. Shostak?

A. I don't remember that.

Q. And after he produced him he would permit his testimony to be taken?

A. I don't remember that.

Q. That was the nature of the talk and colloquy between the court?

20 Objected to by Mr. Stricker.

A. I don't remember, Mr. Brown.

Q. You know there was considerable talk of that nature?

A. There was considerable talk about Mr. Shostak. I know that.

Re-direct examination by Mr. Stricker:

30 Q. You have testified that that record—that entry—contains your conclusion? In forming that conclusion have you anything in mind that Judge Hommann said at the time?

A. Nothing whatever, now at this time.

Q. Now, as regards to the making of this particular entry. In other words, is this your own conclusion on the record or is it something Judge Hommann directed you to do?

A. I wouldn't say it was my own conclusion.

40 Q. Well, what have you to say about Judge Hom-

mann directing you to do it or wasn't something in the nature of a direction?

A. I would say that this adjournment to allow defendant to locate Mr. Shostak was entered really at the conclusion of the court; my conclusion, therefore, of the order of the court.

Q. And what the court said?

A. I would imagine so. Of course, I really do not enter things in my own conclusion.

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By Supreme Court Commissioner:

Q. You put down in your own words what you understand the conclusion or the judgment of the court to be? Is that it?

A. Yes; that's just what I mean.

Further cross examination by Mr. Brown:

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Q. After you heard what the court had to say and counsel, that was the entry that was made from all the conversation that was had?

A. I made the record, as I said, my conclusion in my own words. It represents the conclusion I form.

Q. In your words?

A. In my words.

Q. Did the court direct you to enter in that record "adjourned to allow defendant to locate a Mr. Shostak"?

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A. I wouldn't say they didn't.

Q. You wouldn't say they told you to make that entry?

A. Well, I may have been told to make it that way.

Q. You have no recollection of it though?

A. No recollection.

Q. You wouldn't say that Judge Hommann would ask you to adjourn a case in that manner?

A. He never has; no.

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(Original record of District Court appeared at hearing.)

CHARLES C. HOMMANN, a witness produced on the part of the prosecutor, being duly sworn according to law deposes and says as follows:

10 Direct examination by Mr. Stricker:

Q. Mr. Homman, you are Judge of the District Court of the City of Perth Amboy?

A. I am.

Q. And sat as such Judge in the case of Samuel Baum vs. the Perth Amboy City Market?

A. I did.

Q. You are the Judge who signed the return to the writ of certiorari which issued in this case?

20 A. Undoubtedly I did.

Q. And you also signed an amended rule at the request of Mr. Brown, the attorney for the respondent, who served you with a copy order of the Supreme Court?

A. I did.

Q. At the instance of Thomas Brown, Esq., attorney for the respondent, you certified an amended return on an allegation to the diminution of the record in this case?

30 A. I did.

Q. Did you sign the paper which is now in your hand at the instance of Mr. Brown?

A. I signed the original. This is a copy I firmly believe of the return that I signed on the 19th day of January, 1916.

40 It is admitted that the paper referred to by Judge Hommann is a true copy of the original amended return made to the order alleging a diminution of the record.

Q. I now direct your attention to case No. 7450 in docket No. 12 of the Perth Amboy District Court and ask you to look at the proceedings had on July 2d, 1915. Which is correct the record or the amended return to which your attention has just been directed?

A. Well as the record was made at the time and the amended return was made on recollection, I think the record is correct.

Q. When you signed the return to the allegation of diminution of the record for Mr. Brown, did you consult the record of the District Court?

10

A. I did not. I never saw the record of the District Court until a few days ago, that is, the clerk's record.

Q. When the application for the certificate based on the allegation of diminution was presented to you, did you have the record before you?

A. No.

20

Cross examination by Mr. Brown:

Q. Mr. Hommann, you signed an affidavit in this case for Mr. Stricker, did you not?

A. I did.

Q. And in that affidavit you swore that—

A. Well, just one minute. Won't the affidavit speak for itself? I don't remember what I swore to directly in that affidavit. All I remember is I made that affidavit after looking at this record. I was requested by Mr. Stricker to look at the record of the District Court to refresh my memory from that and I did and then made that affidavit.

30

Q. You swore in this affidavit, a copy of which has been served on me, as follows: "I postponed the further trial of the case in order to give Samuel Baum, the above named respondent, an opportunity to produce Mr. Shostak."

A. Samuel Baum?

40

Q. Now, you made that affidavit after looking at the record, didn't you?

A. Yes; I did.

Q. Judge, isn't it a fact that the case has been so long ago that you really do not know what did occur at the trial?

10 A. Well, I don't recollect what disposition was made of the case at the trial definitely. I remember the trial in a general way. I remember that the trial was brought on by the plaintiff to recover on a book account, as I recollect it, for a lot of paper bags alleged to have been sold and delivered to the Perth Amboy City Market and that there was a dispute as to the delivery of some of the consignments of paper bags and that Shostak's name was brought as being a witness that could possibly clear up the question as to whether they had been delivered or not. Now, that's as far as I recollect it.

20 Q. Judge, don't you remember me going to your office before I made application for the rule and showing you an affidavit signed by me, containing a copy of the record, wherein it was pointed out to you that the case was adjourned without a definite date?

A. No; I don't remember that you had a copy of the record. I remember that we talked about it and I took your recollection; that you would recollect the case better than I did.

30 Q. Didn't you say that in any event you didn't think you adjourned a case so as to lose jurisdiction, was the word you used?

A. I certainly didn't intend to. I didn't intend to adjourn it so as to lose jurisdiction. I knew if I adjourned it indefinitely I would lose jurisdiction. I might have done it.

Q. You won't say that you did or didn't?

A. I won't because I can't recall.

40 Q. So that when you say that you rely upon the record you are not sure that the record is exactly what occurred?

A. I went up before signing this affidavit for Mr. Stricker. I went up and inspected this record. Mr. Stricker requested me when I went up to court to look at this record and see what it said, and I did, and Mr. Quinn showed it to me and I asked him when he made that entry there and he said he made it right after the trial and took it for granted that it was correct.

Q. So that what you mean is that you don't know whether that is exactly what occurred but as long as the clerk has made that entry you would rather that to stand than your memory about it?

10

A. That's it.

Q. So that you can't say, Judge, positively, whether that is the very thing that happened at the trial or not?

A. No; I really can't recall exactly what did happen at the close of that case. It was tried on the second day of July and I gave judgment in September, which was several months after.

20

Q. This affidavit that is purported to have been signed by you—

A. It says to give Baum a chance?

Q. In which it says "my attention was directed by John A. Delaney, an attorney connected with Mr. Stricker's office, and Mr. Stricker himself" and in which it states that you postponed the trial in order to give Baum a chance to produce Shostak. You had nothing to do with the drawing of that affidavit did you?

30

A. No, I didn't draw the affidavit.

Q. And you didn't read it over carefully before signing it?

A. Well, I thought I did.

Q. Well, you didn't know that was in there?

A. I didn't recall Baum was the plaintiff at that time. I thought the affidavit conformed with this record in the docket because that was the best evidence of what I had of what occurred.

Q. You do know, Judge, from your long years of

40

experience that if a case was adjourned, as it is entered on the record there, that it was contrary to your long term of years to lose jurisdiction of a case in that way?

Objected to by Mr. Stricker.

10 A. Yes; I know directly that if I adjourned a case without adjourning it to some definite period that I would lose jurisdiction of it, yet I say I might have done it.

Q. Well, the chances are that you might have done it?

Objected to by Mr. Stricker.

20 Q. Aren't you more inclined to the belief that you would follow the practice that you have been since you have been Judge or since you have been practicing law in saying that case was not adjourned to an indefinite day rather than to the belief that you did adjourn it to an indefinite day and if it wasn't for the record in the docket?

A. Yes.

Q. You knew that Mr. Quinn was a clerk recently appointed at the time?

A. He had been clerk two months then.

30 Q. Would you rely upon his entry or conclusion made by him after request for adjournment as he has testified rather than you would on your own memory about it?

A. Yes; made several months after; that is, my memory several months after.

Q. You won't say then, Judge, that is exactly what occurred in that trial as in the entry there?

40 A. Well, I haven't any clear and positive recollection of what did occur at the conclusion of that trial

and for that reason I regard the entry of the clerk made at the time as being the best evidence that can be produced as to it better than any recollection I might have because there was nothing that impressed itself on my mind.

Q. It wasn't your intention to adjourn a case so as to lose jurisdiction of it?

Objected to by Mr. Stricker.

10

A. I shouldn't have done it.

Q. You know that you didn't intend to do that if you did do it?

A. Well, if I did it, it was a mistake because I should not have done it and I knew better than to do it.

Q. So, therefore, you didn't intend to do it if it was done?

A. Didn't intend to do what?

Q. To have the case adjourned in that way?

20

A. Why, no; I can't say positively. Well, I say what I intended because I don't recall.

Q. You are about to say you could state positively you wouldn't?

A. I wouldn't have adjourned it that way if I had thought for a moment of what the effect of such an adjournment would be.

Q. Well, do you say now that you did adjourn it that way, Judge?

30

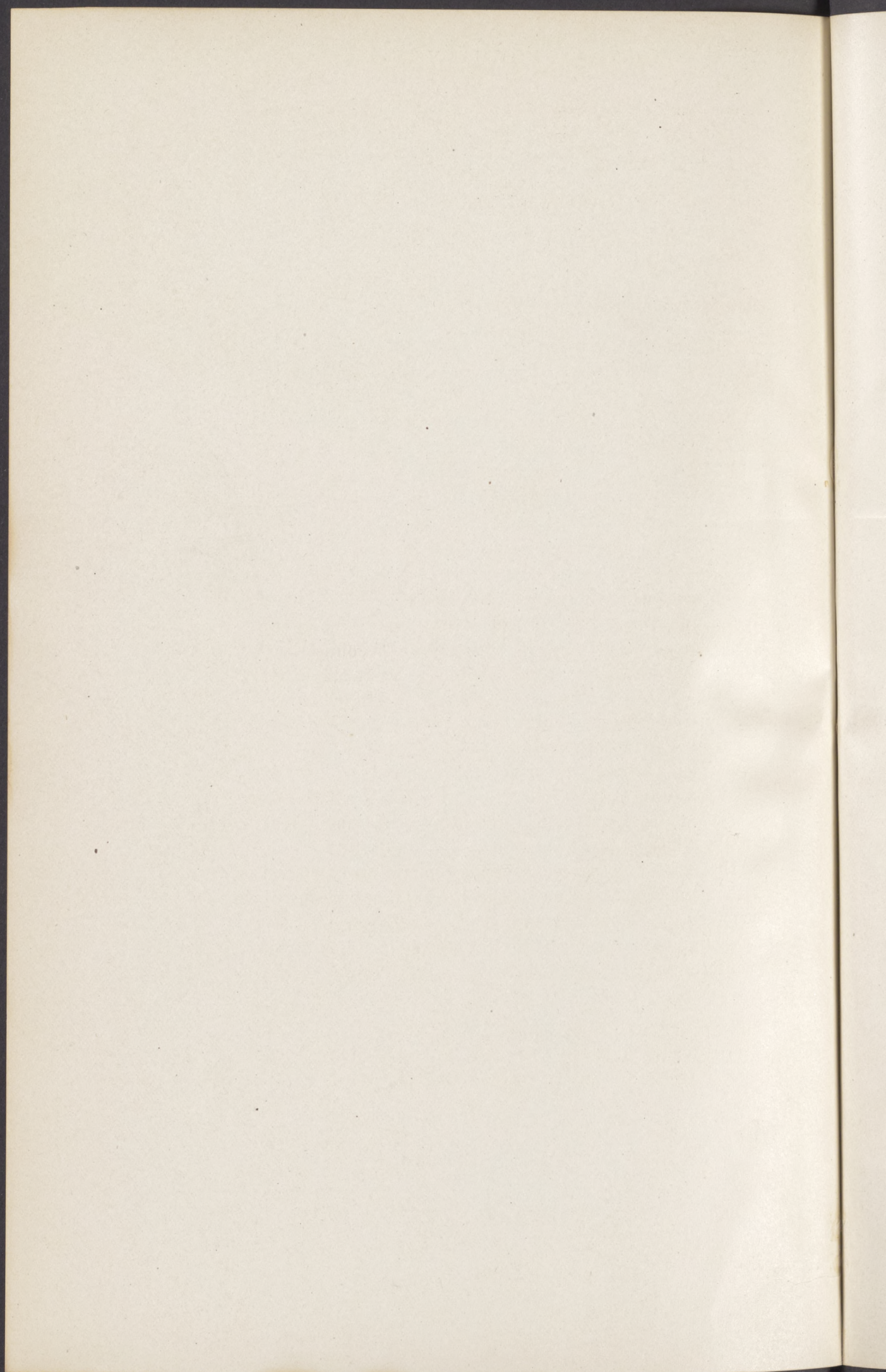
A. I say that I have no present recollection of just exactly what I did at the conclusion of that case and for that reason I regard the record made by the clerk at that time as being most likely what happened and occurred.

Q. In the manner that he has testified and the way he entered it?

A. Yes; the way he has got it here.

Both parties agree to waive the signatures of the witnesses.

40



NEW JERSEY SUPREME COURT

PERTH AMBOY CITY MARKET,
Prosecutor,

vs.

SAMUEL BAUM,
Respondent.

On Certiorari. 10
On rule to show
cause.
Order.

This motion coming on to be heard in the presence
of the attorneys for the prosecutor and respondent
herein and after hearing the argument of counsel and
reading the State of the Case herein and it appearing
that the return made to the writ of certiorari by the
judge of the District Court of the City of Perth Amboy
as appears by his deposition is uncertain and not posi-
tive and it further appearing that in order to consider
the return to said writ that said return should be
positive and certain; It is on this 15th day of February,
1916, ordered and directed that the judge of the Dis-
trict Court of the City of Perth Amboy do forthwith
upon the service of a true copy of this order upon him
certify to this Court the disposition or judgment made
by him in said cause and that he make a positive and
certain return to the writ of certiorari granted herein.

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30

It is further ordered that the consideration of the
rule to show cause in this case be reserved until the
coming in of the return of said judge as ordered herein

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without costs to either party as against the other in said rule to show cause.

We consent to the entry of this rule.

JOSEPH E. STRICKER, Atty. of Prosecutor.

THOMAS BROWN, Atty of Respondent.

Enter

C. G. Garrison, J. S. C. for the Court.

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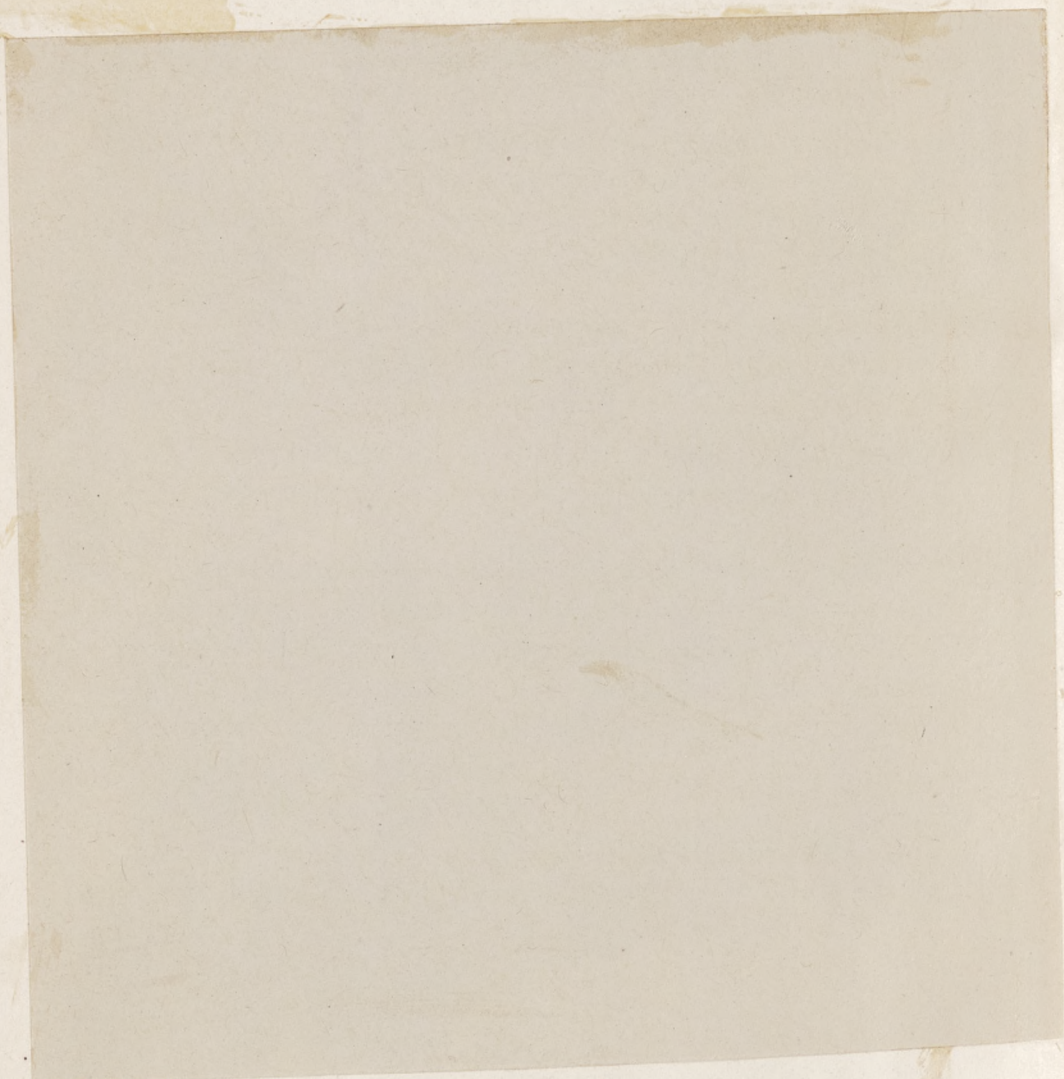
Entered Feb. 15, 1916

On motion of

JOSEPH E. STRICKER, Attorney

Filed Feb. 15, 1916

W. C. G., Clerk.



ENDORSEMENT

DISTRICT COURT OF THE CITY OF
PERTH AMBOY

SAMUEL BAUM CO.,

Plaintiff,

vs.

PERTH AMBOY CITY MARKET,
Defendant.

Summons Upon Contract. 10

STATE OF DEMAND

Demand	\$100.00	
Court Costs	3.60	20

Returnable March 26th, A. D., 1915,
at 10 o'clock A. M.

I served the within summons March 20th, 1915, on Morris Shumsky, President of Perth Amboy City Market, defendant, by reading the same to him and delivering to him a copy thereof.

WM. HOFFNER, Sergeant-at-Arms. 30

STATEMENT

Perth Amboy, N. J., Mar. 24, 1915.

Perth Amboy City Market,

To SAMUEL BAUM CO., Dr.,
dealer inPaper, Paper Bags, Stationery and Notions
203-205 New Brunswick Avenue. 40

July 10/14	Mdse	1.75	
25		40.12	
Aug. 15		4.40	
			\$46.27

Duplicate Perth Amboy City Market,
Smith St., City.
July 10/14.

10 1 Case 12/40 Candles 1.75
(Pencil note) Delivered to Stevens for Shumsky.

July 25/14

1 roll 20 in mogle; 51 lbs.	
25 roll 20 in. mogle; 1255 lbs. at \$2.85	\$37.22
1 M-Handles	2.90
	<hr/> \$40.12

20 (Pencil note) Delivered by driver Dominick Trolo

Geo. Burns saw delivery

August 15/14

1 case fly paper	\$2.50
500 Poultry sacks	1.90
	<hr/> \$4.40

30

(Pencil note) Delivered by Tirrola

40

DISTRICT COURT OF THE CITY OF
PERTH AMBOY

SAMUEL BAUM, trading as
Samuel Baum Co.,

Plaintiff,

vs.

PERTH AMBOY CITY MARKET,
a corporation,

Defendant.

On Contract.
State of Demand.

10

The plaintiff demands of the defendant the sum of One Hundred Dollars (\$100) upon a certain book account, a true copy of which is hereto annexed.

Judgment will be claimed for the sum of Forty-six dollars and twenty-seven cents (\$46.27), besides legal interest from August 15th, 1914, and costs of suit.

20

Dated, March 25th, A. D., 1915.

THOMAS BROWN, Plaintiff's Atty.

PROOF OF ACCOUNT

STATE OF NEW JERSEY,)

COUNTY OF MIDDLESEX,)

ss:

30

SAMUEL BAUM, being duly sworn according to law upon his oath says, that he is the plaintiff in the above stated action, that he is familiar with the books of account of said plaintiff, that annexed to this affidavit is a true copy of the entries in the original book or account of entries of said plaintiff against the defendant so far as they relate to the plaintiff's demand, together with a statement of all credits or allowances to which the defendant is entitled, and that

40

Forty-six dollars and twenty-seven cents (\$46.27) together with interest from August 15th, 1915, the sum claimed by the plaintiff from the defendant, is justly due and owing to plaintiff from said defendant.

(Signed) SAMUEL BAUM.

Sworn and subscribed to before me this twenty-fifth day of March, A. D., 1915.

10

(Seal)

EDNA M. WITTNEBERT,

Notary Public of N. J.

20.

DISTRICT COURT RECORD

DISTRICT COURT OF PERTH AMBOY, N. J.

30

SAMUEL BAUM, trading as
Samuel Baum Co.,

Plaintiff,

vs.

PERTH AMBOY CITY MARKET,
a corporation,

Defendant.

On Contract.
Demand \$100.00.

THOMAS BROWN, Plaintiff's Attorney.

40

JOSEPH E. STRICKER, Defendant's Attorney.

Costs
City al

Summons	1.50		Filed	A. D., 19	
Service		.60	Summons was issued tested		
Mileage			March 20th, A. D., 1915, return- able March 26th, A. D., 1915.		
Trial Fee	1.50		The Summons was returned as follows, viz.:		10
Venire			I served the within summons		
Jury Fee			March 20th, 1915, on Morris		
Constable			Shumsky, President of Perth		
			Amboy City Market, the De-		
			fendant, by reading the same to		
			him and delivering to him a		
			copy thereof.		
Subpoenas			WM. HOFFNER,		
Service			Sergeant-at-Arms.		20
Witness					
Order			Plaintiff's demand was filed		
			March 26th, A. D., 1915.		
			Defendant's offset was filed		
			March 26th, A. D., 1915. This		
Execution	.60		cause adjourned until May 14th-		
Service		.75	21st; time to time to July 2d,		
Mileage			1915.		
Transcript			July 2d, 1915. This cause		
			was called at ten o'clock in the		30
			forenoon.		

Plaintiff appeared by Thomas Brown (who moved to amend title of case).

Defendant appeared by John A. Delaney for Joseph E. Stricker.

Original books of entry produced.

Samuel Baum; Dominick Terrola; Dora Baum and Ida Sacarny sworn for Plaintiff.

40

(Adjourned to allow defendant to locate a Mr. Shostak.)

September 7th, 1915. Judgment was rendered for Plaintiff for the sum of Forty-six Dollars and forty-three cents damages (\$46.43) and five dollars and ninety-two cents, costs of suit (\$5.92).

10 September 22, A. D., 1915, execution was issued. The execution was returned as follows, viz.:

I, JOHN J. QUINN, Clerk of the District Court of the City of Perth Amboy, do hereby certify that the foregoing is a true and correct copy of a certain judgment record, together with all papers appertaining thereto, as the same are recorded in my office.

20 [Seal] IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said Court this fifteenth day of October, nineteen hundred and fifteen.

JOHN J. QUINN, Clerk.

AMENDED RETURN

On the seventh day of September, nineteen hundred and fifteen, Thomas Brown, attorney for the plaintiff, appeared in the District Court in the City of Perth Amboy and moved for judgment for the plaintiff, which was granted.

CHARLES C. HOMMANN,
Judge District Court of the City of Perth Amboy.

To the Honorable, the Chief Justice and Associate Justices of the New Jersey Supreme Court:

The judgment, order and proceedings herein, with all things touching and concerning the same as fully and entirely as they remain in the District Court of the City of Perth Amboy, I do hereby certify under the seal of the Court in the schedule hereto annexed, as within I am commanded.

Dated, March 7th, 1916.

CHARLES C. HOMMANN,
Judge District Court of the City of Perth Amboy.

NEW JERSEY SUPREME COURT

February Term, 1916

PERTH AMBOY CITY MARKET, a corporation, Prosecutor, vs. SAMUEL BAUM, Defendant.	}	10
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Argued February 15, 1916; Decided April 10, 1916.

On certiorari, etc.,

Before Justices Garrison, Trenchard and Black. 20

For the prosecutor, Joseph E. Stricker.

For the Defendant, Thomas Brown.

Per Curiam:

The judgment for the plaintiff in the District Court
 will be affirmed, with costs. 30

40

ENDORSEMENT

NEW JERSEY SUPREME COURT

February Term, 1916

10	<p>PERTH AMBOY CITY MARKET, a corporation,</p> <p style="text-align: right;">Prosecutor,</p> <p style="text-align: center;">vs.</p> <p>SAMUEL BAUM,</p> <p style="text-align: right;">Defendant.</p>	} Opinion, Per Curiam.
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Filed Apr. 10, 1916,

WM. C. GEBHARDT, Clerk.

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NEW JERSEY SUPREME COURT

PERTH AMBOY CITY MARKET,
a corporation,

Deft. Prosecutor,

vs.

SAMUEL BAUM,

Pltff. Respondent.

On Certiorari.
Rule Affirming
Judgment.

10

The Court having inspected the transcripts, returns and the proceedings of the District Court of the City of Perth Amboy, and the proceedings under rule to take testimony in this cause, all of which was returned with the writ of Certiorari herein, together with the reasons for reversing the judgment in the Court below. and the Court having heard the argument of Counsel thereon, and having duly considered the same do order that the judgment of the District Court of the City of Perth Amboy, in said cause, be in all things affirmed, with costs.

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Entered Apr. 14, 1916,

On motion of Thomas Brown,

Attorney of Respondent.

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NEW JERSEY SUPREME COURT

10	PERTH AMBOY CITY MARKET, a corporation, Prosecutor, vs. SAMUEL BAUM, Defendant.	} On Certiorari. Affidavit.
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STATE OF NEW JERSEY, }
 COUNTY OF MIDDLESEX, } ss:

20 Joseph E. Stricker being duly sworn on his oath says that he is the attorney of the above prosecutor against which a judgment for the sum of \$46.43 damages and \$5.92 costs was rendered in the Perth Amboy District Court on Sept. 7th, 1915. That such judgment was rendered in the absence of the defendant and without its consent after the trial in said Court had been adjourned to an indefinite date as appears by the certified record hereto attached.

JOSEPH. E. STRICKER.

30 Sworn and subscribed to before me this first day of October, 1915.

RICHARD F. JONES,
 Master in Chancery of New Jersey.

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ENDORSEMENT

NEW JERSEY SUPREME COURT

PERTH AMBOY CITY MARKET,
a corporation,

Prosecutor,

vs.

SAMUEL BAUM,

Defendant.

On Certiorari.
Affidavit.

10

JOSEPH E. STRICKER, Atty for Prosecutor.

Filed Oct. 2, 1916

W. C. GEBHARDT, Clerk.

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NEW JERSEY, ss:

The State of New Jersey, to Charles C.
Hommann, John J. Quinn and John A.
[L.S.] Delaney,

Greeting:

10 We command you, that laying aside all and singular
business and excuses, you personally and severally be
and appear before Adrian Lyon, Esq., a Supreme
Court Commissioner, at his office, No. 168 Smith Street
in the City of Perth Amboy, in the County of Middle-
sex, on Friday, the eleventh day of February, A. D.,
nineteen hundred and sixteen, at two o'clock in the
afternoon, to testify all and singular, what you know
in a certain cause now pending in the Supreme Court,
20 and wherein the Perth Amboy City Market is prose-
cutor, and Samuel Baum is respondent, and this you
are in no wise to omit, under penalty of one hundred
dollars.

Witness: William S. Gummere, Esq., Chief Justice
at Trenton, this eleventh day of February, A. D., nine-
teen hundred and sixteen.

WILLIAM C. GEBHARDT, Clerk.

30

JOSEPH E. STRICKER, Attorney.

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ENDORSEMENT

NEW JERSEY SUPREME COURT

PERTH AMBOY CITY MARKET,
a corporation,

Prosecutor,

vs.

SAMUEL BAUM,

Respondent.

On Certiorari.
Subpoena ad
Testifiandum.

10

JOSEPH E. STRICKER, Attorney for Prosecutor,

Perth Amboy, N. J.

Filed Feb. 11, 1916

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W. C. GEBHARDT, Clerk.

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NEW JERSEY SUPREME COURT

10	<p>PERTH AMBOY CITY MARKET, Prosecutor,</p> <p style="text-align: center;">vs.</p> <p>SAMUEL BAUM, Defendant.</p>	<p>On Certiorari. Notice of Argu- ment.</p>
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20 Take notice of argument of the issue joined in this cause before the New Jersey Supreme Court holden at Trenton in and for the County of Mercer, on the third Tuesday of February next, at ten o'clock in the forenoon, or as soon thereafter as the said Court can attend to the same.

Dated January 10th, 1916.

Yours respectfully,

JOSEPH E. STRICKER, Atty.

To THOMAS BROWN, ESQ.,
Attorney of Defendant,
or whom it may concern.

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NEW JERSEY SUPREME COURT

10	<p>PERTH AMBOY CITY MARKET, Prosecutor,</p> <p style="text-align: center;">vs.</p> <p>SAMUEL BAUM, Respondent.</p>	} On certiorari. Notice of Appeal.
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To Thomas Brown, Esq., Attorney for Samuel Baum,
respondent:

20 Please take notice that the Prosecutor, Perth Amboy City Market, appeals to the Court of Errors and Appeals of the State of New Jersey, from the judgment entered in the New Jersey Supreme Court affirming the judgment of the District Court of the City of Perth Amboy in the above entitled cause on the following grounds:

1. Because the said District Court had no jurisdiction to render said judgment.

30 2. If said Court did have jurisdiction the same was lost by the continuance of the case to an indefinite day.

3. Because said judgment was entered without notice and in the absence of the prosecutor, and without its consent.

40 4. Because the case was partly tried and judgment rendered without giving the prosecutor an opportunity to have its side heard.

5. Because the Judge of said Court gave judgment for the plaintiff and against the prosecutor in the sum of \$46.43.

6. Because the said judgment is illegal, erroneous and unlawful for divers reasons.

Yours respectfully,

JOSEPH E. STRICKER,
Attorney for Prosecutor.

10

Dated, April 17th, 1916.

ENDORSEMENT

NEW JERSEY SUPREME COURT

PERTH AMBOY CITY MARKET,
Prosecutor,

20

vs.

SAMUEL BAUM,
Respondent.

On Certiorari.
Notice of Appeal.

JOSEPH E. STRICKER, Attorney for Prosecutor,

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117-119 Smith Street, Perth Amboy, N. J.

Service of a copy of the within notice is hereby acknowledged this 17th day of April, A. D., 1916.

THOMAS BROWN,
Attorney for Respondent.

Filed April 20th, 1916.

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MEMORANDUM
FOR THE RECORD

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