New Jersey Court of Errors and Appeals

ABRAM J. DRAKE, Plaintiff & Respondent, vs. MILLER N. MOWDER, Defendant & Appellant.	On Appeal.

BRIEF OF APPELLANT

Preliminary Statement

This is an appeal by Miller N. Mowder to review a judgment obtained against him by Abram J. Drake in the District Court of the First Judicial District of the County of Morris, and affirmed in the Supreme Court under a Writ of Certiorari and all proceedings had thereon on the ground that the Court was without jurisdiction and the papers defective and proceedings illegal, and Judgment of Supreme Court erroneous.

Statement of Facts

The facts upon points raised by defendant are as follows:

Miller N. Mowder had no knowledge of being served with summons in the suit before the District Court and made no appearance when judgment was taken although he had a good defense to the action.

The State of Demand was not attached to the supposed summons but was filed later upon which was endorsed a notice that defendant file a written specification of defenses, but as to this suit and this notice, Prosecutor had no knowledge.

The suit before the District Court was based upon several causes of action, one being upon a note for $237.60, purporting to have been signed by M. Aletta Mowder and M. N. Mowder, neither of whom were served and the said M. Aletta Mowder not being a party to the action.

The amount sued for as appears by the summons in this cause was $331.08, whereas the judgment rendered, without notice to Prosecutor, was for $415.54, with costs.

There was no execution issued out of the District Court upon said judgment but a statement for docketing was issued on March 2, 1915, and the judgment docketed in Morris Common Pleas on March 2, 1915, shows that the affidavit accompanying said statement is defective.

Specification of Error

There were six reasons assigned in the Supreme Court why the Judgment should not be set aside but upon the single question of service the Judgment was affirmed. The appellant (Prosecutor below), feels that there were other points of merit going to question of irregularity and defective judgment and particularly the fact that judgment was entered for more than amount claimed and no execution against personal property, which would warrant a reversal and for that reason an appeal was taken. The same brief used in Supreme Court is now used on appeal and references therein to prosecutor are to be taken as synonymous with appellant.

Points

1. If the summons was not served upon Prosecutor and he had no knowledge of the suit the Court was without jurisdiction, and the judgment is illegal and should be set aside.

2. If there was a failure to join proper parties or the action improperly instituted the judgment cannot stand and should be set aside.

3. If Prosecutor had no knowledge of pending suit and notice to file specification of defenses, then judgment was illegal.

4. Prosecutor having no knowledge of the suit the District Court could not enter judgment or increase the amount sued for without notice.

5. Execution should have issued from the District Court as against personal property before docketing in the Common Pleas Court and failure to do so invalidates the judgment as docketed so that no further proceedings could be had thereon.

6. If the affidavit accompanying statement was defective then judgment is not proper in Common Pleas Court and all proceedings had thereon are illegal.

I

If the summons was not served upon prosecutor and he had no knowledge of the suit, the Court was without jurisdiction and the judgment is illegal and should be set aside.

Section 44 of the District Court Act, P. L. 1898, page 567, provides that the first process to compel appearance is a summons and under Section 45 of the District Court Act, Laws 1898, the said summons shall be served at least five days before the time of appearance mentioned therein

> "By reading the same to defendant and delivering to him a copy thereof if he shall be found, and if not found, by leaving a copy thereof at his or her dwelling house or place of abode," etc.

This manner of service has been construed by our Courts repeatedly and in the case of *Rogers against Jarman*, reported in 3 New Jersey Law, page 117, the Court held that service must be personally on defendant or by leaving the summons at his usual place of abode.

In the present case before the Court the affidavit of Presecutor (p. 3, state of case), shows that the summons was not properly served if served at all. In other words the construction to be placed on the affidavit is to the effect that the summons if served was left at the butcher shop of Prosecutor and that he had no personal knowledge that a suit was pending, at any rate, no paper was read to him so far as he can recall relative to the suit now being certioraried.

The defendant in certiorari may argue that the return of the constable shows that the summons was served upon the defendant by reading it to him and giving him a copy and that this is conclusive but the Supreme Court in the case of *Chapman v. Cumming,* reported in 17 New Jersey Law, page 11, held that affidavit was proper to show a defective service.

Also in the case of *Loewenthal v. Wagner,* in 68 New Jersey Law, page 214, it was held that service may be attacked and set aside.

It is quite evident from the record in this case that the prosecutor had no knowledge of the pending suit. He made no appearance although he states in his affidavit to have had a perfectly good defense.

As to the question of service see:

Boylan & Nesbit vs. Hooper, 2 N. J. L., p. 95.

Moore & Fisher vs. Miller, 16 N. J. L., p. 233.

Steidford v. Ferris, 4 N. J. L., p. 108.

In re Mullineaux, 76 N. J. L., at p. 396.

It is of course customary for a constable to make the regular return and under the cases cited the prosecutor feels that either the judgment should be set aside on account of the illegal notice or that the Supreme Court under the authority of the statute in Section 92 of the District Court Act, Pamphlet Laws 1898, page 593, direct that the case be returned to the District Court for a re-hearing upon terms and conditions so that the prosecutor may have opportunity to present his defense.

II

If there was a failure to join proper parties or the action improperly instituted the judgment cannot stand and should be set aside.

The State of Demand as filed (case, pp. 16 & 17), shows that one of the claims sued upon is a note signed by M. Aletta Mowder and M. N. Mowder but by reference to the summons (case, pp. 14 & 15), suit was instituted against Miller N. Mowder only.

The Court of Errors and Appeals in the case of *Stehr* and *Clements v. Allbermann,* and others, reported in 49 Law, page 633, held that:

"Where the defendants are joint debtors

judgment cannot be entered against one alone."

It will also be noted by reference to the case (pp. 16 & 17), that the second and third counts are upon checks and notes signed by one M. N. Mowder, whereas the suit was instituted against Miller N. Mowder and judgment (case, p. 20), was against defendant Miller N. Mowder for $415.54.

It will be perceived from the record of the case that the demand contains the claim not only against two parties upon one of which it appears there was no service at all but also various other claims not appearing to be against the defendant, Miller N. Mowder and under the theory of the case of *Potts vs. Clarke, in* 20 Law, page 536, a verdict under such circumstances would be erroneous.

III

If prosecutor had no knowledge of pending suit and notice to file specification of defenses then judgment was illegal.

Admitting for the sake of argument that summons was served upon prosecutor, by reference to the case (pages 14, 15 and 16) there is a notice directed to the defendant to file specification of defenses but there is nothing in the case to show that this demand was served upon the prosecutor or that he had any knowledge whatsoever of such a demand. The notice on the summons (pages 15 and 16) is to the effect that the State of Demand had been filed with the Clerk and it is very singular that the plaintiff should have proceeded in this way. The only inference that the prosecutor can draw from such a situation is that the

plaintiff desired to take a judgment without giving an opportunity to present a defense. If they made a service of the summons and wanted the prosecutor to know the nature of the suit then why file the State of Demand with the Clerk at the time of issuing the summons, upon which state of demand there was a notice to file specification of defenses and upon which summons there was no such notice. Does not this indicate irregularity in the very beginning?

Section 2 of Pamphlet Laws 1910, page 497, provides that specification of defenses may be demanded in the District Court where the amount sued for is over Three Hundred Dollars and that a failure to file same bars the defendant.

Under Section 1 of the Act of 1910, page 497, it clearly appears to be the intention that the defendant be given notice of such demand.

See 5 N. J. L. 718.

It is urged by prosecutor that there was irregularity in the manner of filing the papers and in the proceedings before the District Court and for that reason and failure to give notice, the judgment should be set aside or returned to the District Court for a re-hearing.

IV

Prosecutor having no knowledge of the suit the District Court could not enter judgment or increase the amount sued for without notice.

From the standpoint of the Prosecutor and according to his affidavit it would clearly appear that he had no knowledge of the proceedings before the District Court.

In addition to that fact the summons, purported to have been served upon prosecutor, claimed the amount of $331.08, whereas by record of the case (page 20) it appears that a judgment was entered for $415.54, and that under the State of Demand (page 18) the claim is as follows:

> "Judgment will be claimed for the aforesaid sum of $331.08 together with lawful interest and costs of suit."

There being no claim for $415.54 and the demand not be sufficiently broad enough to allow this amendment and the allegations in the declaration in the State of Demand being for specific amounts and Prosecutor having no notice, the Court had no right to increase the amount sued for.

In the case of *Cortleyou v. Cortleyou* decided by the Supreme Court and reported in 2 New Jersey Law, page 318, the Court reversed a judgment for more than the demand.

The Court of Errors and Appeals in the case of *Excelsior Electric Co. v. Sweet,* 59 N. J. L., at page 444, said:

> "There is another error upon the record in that the verdict and judgment are for greater damages than the declaration claims." Citing cases.

The question of remitting excess damages and amending record was discussed by the Court and disapproved of and the language used by Lord Kenyon in *Thomlison v. Blacksmith* was referred to as follows:

> "It would be going too far to make the amendment required without sending the cause to a new trial as the defendant

> might have gone to trial relying that no more than (the stated) damages could be recovered against him."

Upon the authority cited and the limitations appearing in the State of Demand, the prosecutor feels that the increased judgment was without authority and should be set aside.

V

Execution should have issued from the District Court as against personal property before docketing in the Common Pleas Court and failure to do so invalidates the judgment as docketed so that no further proceedings could be had thereon.

The District Court Act Pamphlet Laws 1898, page 618 paragraph 170 provides the mode of docketing judgments in the Common Pleas Court.

The statute is similar to the statute concerning docketing of judgments from the Justice Court to the Common Pleas Court Pamphlet Laws 1903, page 274, Section 72 and which statute concerning docketing if judgments was construed by the Court of Errors and Appeals in the case of *Tasto v. Klopping,* 43 Law, 448, wherein the Court said:

> "The rule that, in special statutory proceedings, it must appear on the certificate or record that everything was done which the statute requires, is a familiar one, and is applicable. The statute requires that an execution shall have been issued, and returned by the officer endorsed to the effect that he could not find any personal

> property of the party against whom the execution was issued on which to levy," etc.

The judgment of the Court being as follows:

> "Inasmuch as one of the requisites of the docketing is absent the docketing is void."

It may be argued by the defendant that Section 170 and Section 171 of the District Court Act do not require the issuing of an execution before docketing and that the opinon of the Court of Errors and Appeals above cited cannot apply, but in referring to Section 178 of the District Court Act we find as follows:

> "When judgment shall be given against the plaintiff or defendant by virtue of this act execution SHALL issue therefrom under the seal of said Court and the hand of the Clerk commanding the constable or Sergeant at Arms to levy and make the debt or damages and costs of the goods and chattels of the judgment debtor."

This Section of the District Court Act evidently made it imperative that the plaintiff should issue execution against goods and chattels because it states that it SHALL be done and the legislature of 1902 realizing that this was a necessary requisite before the docketing of judgments in the Common Pleas Court and the Court of Errors and Appeals having already decided the matter under a similar statute, attempted to pass a supplement to the District Court Act in Pamphlet Laws 1902, page 248, to do away with the necessity of an affidavit containing a statement "that deponent believes the debtor is not pos-

sessed of goods and chattels sufficient to satisfy the amount due,'' etc.

And the defendant in certiorari may further argue that the passing of this supplement disposes of this point beyond all question. The prosecutor in certiorari alleges that this supplement to the District Court Act is void and unconstitutional because its object is not expressed in the title of the act and it gives no notice as to what Section or part of the District Court Act it is to be a supplement. In the case of *New York and Greenwood Railroad Co. v. Inhabitants of Township of Montclair,* the Court of Errors and Appeals in 47 Equity, page 591, held that:

> ''The title of 'An Act entitled ''A supplement to an Act entitled 'An act to authorize the formation of railroad corporations and regulate the same,' '' approved April 2d, 1873' (P. L. of 1887, p. 226), which supplement was approved March 31st, 1882, does not express the subject of the legislation but is vague and misleading and therefore the act is void.''

The Supreme Court held in the case of *Hawkins v. American Copper Co.,* 69 Law, page 126, that an Act to provide uniform procedure for the enforcement of all laws relating to fish, game, birds and so forth, was unconstitutional because its object is not expressed in the title of the Act.

See Article 4 Section 7, Paragraph 4 of the Constitution of the State of New Jersey.

Therefore, the act of 1902 cannot be considered as in any way relieving the necessity of having execution issued from the District Court before docketing or in having the statement filed for docketing include the requirements of the Statute.

In furtherance of this point the Court of Errors and Appeals in the case of *Grimshaw against Carroll,* reported in 62 New Jersey Law, page 730 in construing the District Court Act of 1882, which on the subject discussed was similar to the present District Court Act and particularly Sections 170 and 171, said on page 732:

> "Bearing in mind that the object of docketing a judgment in the Common Pleas is to reach the debtors lands and that the legislative policy in this State has generally been not to resort to lands for the satisfaction of judgment if goods and chattels are available, we think the legislature intended to leave untouched the requirements of this affidavit as some safeguard against the unnecessary alienation of the debtor's land. We are, therefore, of the opinion that the docketing was unauthorized and void."

For the reasons advanced under this point the prosecutor urges that the proceedings be set aside as the judgment was improperly docketed in the Common Pleas Court.

See case McLaughlin v. Cross, 68 Law, 599.

VI

If the affidavit acompanying statement was defective then judgment is not proper in Common Pleas Court and all proceedings had thereon are illegal.

The papers show on their face an irregularity in that the statement for docketing as prepared

by the Clerk of the District Court (case page 7) shows that there was a judgment of $415.54 damages, whereas the affidavit attached to the statement (case page 8) shows that there is due only $415.50, and the clerk being limited in his authority had no lawful right to docket the judgment in the Common Pleas Court. The case of *McLaughlin v. Cross* reported in 68 N. J. L., page 599 seems to be a good authority upon ths point and the Court at page 601 said:

> "It is true that the docket entry is not the force of a common law judgment, and that lack of conformity to the authorizing statute will render the docket void; * * * The Clerk can lawfully docket only when the papers tendered are regular. His authority is limited. If he exceeds it, remedy must lie with the Court whose minister he is. The prerogative writ of this Court will indeed, afford relief."

The Court further said:

> "Void judgments may be vacated at any time." Citing cases.

The judgment being improperly docketed, the Clerk of the Court of Common Pleas had no right to issue execution and all proceedings had thereon are illegal.

For all the reasons advanced in this argument the judgment should be set aside or returned to the District Court for re-hearing.

ELMER W. ROMINE,
Attorney and Counsel for Prosecutor.

The Evening Post Job Printing Office, Inc., 156 Fulton St., N. Y.

New Jersey ~~Supreme Court.~~ Court of Errors and Appeals

MILLER N. MOWDER, Prosecutor in Certiorari, + Appellant VS. ABRAM J. DRAKE, Defendant in Certiorari. + Appellee	**Brief on Behalf of Defendant.** Appellee

A summons returnable February 18, 1915, was issued out of the District Court of the First Judicial District of Morris County on February 10, 1915, at the suit of Abram J. Drake, Plaintiff, demanding the sum of $500.00 in an action upon contract from Miller N. Mowder, defendant. This summons was served personally upon the defendant February 13, 1915.

The State of Demand filed the same day set forth that the suit was brought to recover $331.08, on four separate counts; first for the amount of a note signed by defendant and M. Aletta Mowder; second upon a note signed by defendant alone; third, for amount due on defendant's check; and fourth for rent due from defendant from June 30th, 1913, to July 31, 1914. These four counts totaled $424.16, upon which plaintiff gave defendant credit for $93.08, leaving a balance due of $331.08.

Neither on the return day nor the adjourned day, February 25, 1915, did the defendant appear. Before judgment was entered, on plaintiff's motion Court permitted the State of Demand to be amended by including in the amount claimed for rent, the

rent due for August, September, October, November, December, 1914, and January and February, 1915, also by increasing the credit to be given by plaintiff to defendant from $93.08 to $112.71; so that plaintiff's demand as amended upon which judgment was entered was made up as follows:

1st Count (note)	$239.16
2nd Count (note)	19.00
3rd Count (check)	10.00
4th Count (rent)	240.00
	$508.16
Credit to defendant	112.71
	$395.45
Interest	20.09
	$415.54

Said judgment was thereafter docketed in the Office of the Clerk of the Court of Common Pleas and execution issued thereon.

+ Appellants

Prosecutor's First Reason for Reversal.

I.

Because the District Court of the First Judicial District of the County of Morris did not have jurisdiction of the subject matter, or of the parties, as the summons was improperly served.

(A) The Court had jurisdiction of the subject matter.

Compiled Statutes, Volume 2, Page 1962, Section 30.

> "Every suit of a civil nature at law, or to recover any penalty imposed or authorized by

any law of this state, where the debt, *balance,* penalty damage or other matter in dispute does not exceed exclusive of costs, the sum or value of five hundred dollars, shall be cognizable in the district courts of this state."

(B) The summons was properly served.

Compiled Statutes, Volume 2, Page 1966, Paragraph 45.

> "The summons * * * shall be served * * * by reading the same to the defendant and delivering to him a copy thereof if he or she shall be found * * *."

By the constable's return on summons, State of Case, page 15, it appears that summons was served in accordance with the statute, and there is no proof to the contrary.

Prosecutor's Second Reason for Reversal.

II.

The papers as left at the Prosecutor's butcher shops was not proper service upon him, and also because the defendant resided outside the jurisdictional district of said District Court.

(A) The summons was properly served.

(B) The District Court of the First Judicial District of Morris County, established under an Act of the Legislature, Pamphlet Law, 1909, page 287, has jurisdiction co-extensive with the limits of Morris County.

Compiled Statutes, Volume 2, Page 1962, Paragraph 29:

> "The territorial jurisdiction of every district court shall be coextensive with the limits of

the county wherein the city or judicial district is situated, in which such district court is established."

The Prosecutor, admitting himself to be a resident of the County of Morris can be sued in the District Court for the First Judicial District of Morris County. The service was made in the shop of Prosecutor, also in Morris County.

of Appellant

Prosecutor's Third Reason for Reversal.

III.

The Court did not have jurisdiction because the proper parties were not mentioned in the suit as the demand filed shows that a note was signed by M. Aletta Mowder and M. N. Mowder and the check by M. N. Mowder, there being no service on M. Aletta Mowder or M. N. Nowder.

(A) Joint debtors are separately liable.

Compiled Statutes, Volume 3, Page 3777, Paragraph 2:

> "That all persons jointly indebted to any other person or persons, upon any joint contract, obligation matter, or thing, for which a remedy might be had at law against such debtors, in case all were taken by process issued out of any court of this state, shall be answerable to their creditors separately for such debts; that is to say, such creditor or creditors may issue process against such joint debtors, and in case any of such joint debtors shall be taken and brought into court, by virtue of such process, such of them so taken and brought into court shall answer to the plaintiff or plaintiffs; and if judgment shall pass for the plaintiff or plaintiffs, he, she, or they shall have his, her, or their judgment and execution against such of them so brought into court,

and against the other joint debtor or debtors named in the process, in the same manner as if they had been all taken and brought into court by virtue of the said process."

(B) The District Court before the entering of the judgment must of necessity found that M. N. Mowder was Miller N. Mowder, the defendant, and its finding as to that fact will not be reviewed.

Somers *vs.* Wescott, 66 N. J. L. 551, at 552:

"The rule is well settled that, upon certiorari, this court will not review finding of fact, by the trial court."

New Jersey Produce Company *vs.* Nathan Gluck, 79 N. J. L. 115, at 117:

"Since no attempt is made to dispute the findings of the trial judge, we will not assume that he found as a fact, that which had no evidence to support it.

No intendment will be taken against the judgment below, but rather in favor of it."

Prosecutor's Appellants Fourth Reason for Reversal.

IV.

The court had no jurisdiction over the subject matter because the demand as filed was defective and also because judgment was entered in excess of the amount claimed.

(A) The State of Demand is not defective.

Compiled Statutes, Volume 3, Page 1970, Paragraph 60:

"The plaintiff, shall, on or before the time specified for appearance in the * * * sum-

mons * * * file with the clerk a copy of his account or state of demand against the defendant * * *."

"That State of Demand need only state a cause of action in such form as will make it appear what the plaintiffs cause of action is."

O'Donnell *vs.* Weiler, 72 N. J. L. 142.

De Jeanne *vs.* Citizens Protective Association, 79 N. J. L. 107.

Kennell *vs.* Gershoavitz, 87 (Atl.) 130.

(B) The judgment was not in excess of $500, the amount claimed, by summons, State of Case, page 14, and the State of Demand as amended, State of Case, page 31.

(C) The District Court had power to amend.

Compiled Statutes, Volume 2, Page 2002, Section 161:

"In order to prevent the failure of justice by reason of mistakes and objection of form, it shall be lawful for any district court or the circuit court, on an appeal taken thereto, at all times, to amend all defects and errors in any suit or proceeding, whether there is anything in writing to amend by or not, and whether the defect or error be that of the party applying to amend by or not, and all such amendments may be made with or without costs, and upon such terms as to the court may seem fit; and all such amendments as may be necessary for the purpose of determining in the existing suit the real question in controversy between the parties shall be so made."

Prosecutor's Fifth Reason for Reversal.

V.

The record of the Judgment is also defective upon the proof and entry of Judgment, and the same

could not be docketed in the Common Pleas Court so as to bind lands, and proceedings on execution are illegal.

(A) No intendment will be taken against the judgment below but rather in favor of it. See under 4-B above.

(B) Each and every stage of the suit in the District Court properly appears in the record of the judgment and the same could be docketed in the office of the Clerk of the Court of Common Pleas, and execution issued.

Compiled Statutes, Volume 3, Page 2003, Section 168:

> "Any final judgment of any district court, if not less than ten dollars, including costs, remain due thereon may be docketed in the court of common pleas of that county, by the party recovering the same or by his executors, administrators or assigns, in the manner hereinafter directed."

Compiled Statutes, Volume 3, Page 2005, Section 172:

> "Such judgment shall from the time of such docketing in the court of common pleas operate as a judgment obtained in a suit originally commenced in said court, and satisfaction thereof may be entered in the same manner and upon the same evidence as is not provided by law in case of judgments rendered in the courts of common pleas, and execution may issue thereon out of such court of Common Pleas, which shall be of the same effect as to the property of the judgment debtor, either personal or real, as if issued on a judgment originally obtained in such court of common pleas, upon a suit commenced therein."

Prosecutor's Sixth Reason for Reversal.

VI.

The papers filed in the suit are not complete and are defective so that the said District Court did not have jurisdiction over the subject matter.

As above set forth, the District Court did have jurisdiction, and if papers are incomplete and defective, which is denied, this Court has power to correct the same.

Compiled Statutes, Volume 2, Page 1984, Section 93:

> "No judgment, order or proceeding of any district court shall be reversed for any irregularity or informality in the proceedings of such court unless such irregularity or informality tends to defeat or impair the substantial right or interest of the prosecutor in *certiorari*, and no judgment, order or proceeding of any district court removed by *certiorari* to the supreme court shall be reversed in the whole on account of any error or mistake made by the court in which such judgment may have been rendered in the entering, calculating or awarding of the costs of suit, but such error or mistake the supreme court is hereby empowered to correct without costs to either party."

Prosecutor's Seventh Reason for Reversal.

VII.

Execution from the Common Pleas Court, on said judgment obtained in the District Court illegal because said judgment is not properly docketed.

(A) The judgment was docketed in accordance with the statute as appears in State of Case, pages 7, 8, 9 and 10.

Compiled Statutes, Volume 2, Page 2003, Section 170:

> "When a judgment is obtained in any district court, and there remains due thereon an amount not less than ten dollars, including costs, the clerk of such court of common pleas of the county, upon filing in his office a statement, signed by the clerk of the district court under the seal of the court, which statement shall contain the name of the court, the name of the parties, the amount and date of judgment and date of issue and return of execution if any, and also an oath or affirmation of the party, his or their attorney or agent, that at the time of filing such statement a certain amount, not less than ten dollars, is still due thereon, stating the amount, shall enter, in a docket provided for that purpose a transcript of such judgment in words at length containing the name of the district court in which the judgment was obtained, the names at length of the parties to said judgment, the style of the action, the date of the judgment, the amount recovered with costs, the substance of the return of the constable or sergeant-at-arms, and the amount stated to be due in the affidavit; the fee to the clerk of the court of common pleas for filing such statement shall be two dollars, and to the clerk of the district court for certifying the same fifty cents."

(B) A judgment in the District Court can be docketed in the Court of Common Pleas without execution having first been issued against personal property.

Compiled Statutes, Volume 2, Page 2004, Section 171:

> "It shall not be necessary, before obtaining from the clerk of the district court the statement for docketing, that execution shall issue

out of and be returned into the district court, but the statement may be made and taken at any time after judgment in the district court, and be of the same force and effect as if execution had been issued and returned as now required by law; but if execution has been issued, said statement for docketing shall not be made and taken before a return shall have been made to said execution."

+ Appellants

The Prosecutor's Eighth Reason for Reversal.

VIII.

The judgment is not properly docketed in the Common Pleas Court so as to bind lands, as the affidavit and statement are both defective.

As set forth under 7-A supra, said judgment is properly docketed, the affidavit and statement are not defective, both following the statute.

It is respectfully submitted that the judgment of the District Court for the First Judicial District of Morris County and all proceedings thereunder should be sustained.

KING & VOGT,
Attorneys of Defendant. — Appellee

NEW JERSEY ~~SUPREME~~ COURT.
of Errors and Appeals

Miller N. Mowder, Prosecutor in Certiorari, vs. Abram J. Drake, Defendant in Certiorari,	Reply Brief of Defendant. Appellee

The Court's attention is called to the misstatement of facts as the same appears on page ~~two~~ one of the prosecutor's brief, in that it stated that the prosecutor had no knowledge of being served with summons in the suit before the District Court or of the suit there against him. Whereas by prosecutor's affidavit on page 3 of the State of Case, he admits that he was served with some paper, and the return of the constable serving the summons, set forth on page 15 of the State of Case is as follows:—

> "I served the within summons February 13, 1915 on the defendant, Miller N. Mowder by reading it to him and giving him a copy thereof.
>
> "George W. Pierson,
> "Constable."

The prosecutor's brief also incorrectly states that the amount sued for as appears by the summons in this cause was $331.08, whereas the summons set forth at length on page 14 of the State of Case, states that the defendant is summoned to answer under the plaintiff in an action upon contract to the damage of the plaintiff $500.00.

It is further stated that one of the counts of Plaintiff's demand is a joint note of M. N. Mowder and M. Aletta Mowder. The note referred to is set forth at length on page 16 of State of Case and is in part:—

"We or **either of us** promise" &c.

It is respectfully submitted that the constable's return is prima facia proof of the facts therein stated and that the burden of disproving the same is upon the person who attacks it.

Boyd vs. King, 36 N. J. L. 134 at 136.

> "The principle is that when the return shows a legal service of the writ there is a legal intendment in favor of the proceedings."

Hotovitshy vs. Little Russian xxx Church, 78 N. J. E. 576 at 577.

The Court of Errors and Appeals in a per curiam opinion says:—

> "The Sheriffs return is presumptive proof of the fact recited in it."

No evidence has been taken in this proceeding to disprove the facts stated in the constable's return, but the prosecutor under points 1 and 4 in his brief seeks to rely upon the affidavits presented by him at the time of making application for the writ of certiorari in this case, which affidavits under a long line of cases in our State have no evidential value on final argument.

State vs. Gardner, et al, 34 N. J. L. 327 at 329.

> "The ex parte affidavits on which the writ was granted cannot be used in the final-argument."

Approved and followed in

Baldwin vs. Flagge 36 N. J. L. 495 at 497.
Eastwood vs. Russell 81 N. J. L. 672 at 679.
Peer vs. Bloxham 82 N. J. L. 288 at 289.

Respectfully submitted,

KING AND VOGT,
Attorneys for Defendant.—
Appellee

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Notice of Appeal

NEW JERSEY SUPREME COURT

MILLER N. MOWDER, Defendant & Appellant, vs. ABRAM J. DRAKE, Plaintiff & Respondent.	In Certiorari.

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To Messrs. King & Vogt, Attorneys for Plaintiff & Respondent:

TAKE NOTICE that the defendant and appellant appeals to the Court of Errors and Appeals from the whole of the judgment rendered in this cause in the Supreme Court on the following grounds:

1. Because the District Court of the First Judicial District of the County of Morris did not have jurisdiction of the subject-matter or of the parties, as the summons was improperly served. 20

2. The papers as left at defendant's and appellant's butcher shop was not proper service upon him and also because the defendant resided outside the jurisdictional district of the said District Court.

3. The Court did not have jurisdiction because the proper parties were not mentioned in the suit as the demand filed shows that the note was signed by M. Aletta Mowder and M. N. Mowder, and the check by M. N. Mowder there being no service on M. Alletta Mowder or M. N. Mowder. 30

4. The Court had no jurisdiction over the subject-matter because the demand as filed was defective and also because judgment was rendered in excess of amount claimed.

5. The record of the Judgment is also defective upon the proof and entry of Judgment and the same could not be docketed in the Common Pleas 40

Court so as to bind lands and proceedings on execution are illegal.

6. The papers filed in the suit are not complete and are defective so that the said District Court did not have jurisdiction over the subject-matter.

10 7. Execution from the Common Pleas Court on said judgment obtained in the District Court is illegal because the said judgment is not properly docketed, and does not bind lands as the execution must first be exhausted against personal property by execution out of the District Court before being docketed in Common Pleas Court.

8. The Judgment is not properly docketed in the Common Pleas Court, so as to bind lands as the affidavit and statement are both defective.

20 9. The Supreme Court did not render its decision upon all the points raised by defendant and particularly on the question of whether the Court had the right to render a verdict for $415.54, whereas the State of Demand called for only $331.-08 and also failed to determine whether the judgment as docketed and upon which execution was issued was a proper judgment because of the failure of the plaintiff and appellee to have execution issue from the District Court before the same

30 was docketed and also failed to determine whether the judgment was proper because of the record of the judgment being defective on the proof and entry of the judgment.

10. The decision of the New Jersey Supreme Court in said cause was erroneous as it confirms the judgment of the District Court of the First Judicial District of the County of Morris in this case for $415.54 and in refusing to grant a new trial.

Dated, February 4, 1916.

ELMER W. ROMINE,

40 Attorney for defendant & appellant.

Supreme Court
of the
State of New Jersey

Affidavit of Elmer W. Romine

(Filed, July 23, 1915)

NEW JERSEY SUPREME COURT

MILLER N. MOWDER, Prosecutor in Certiorari, vs. ABRAM J. DRAKE, Defendant in Certiorari.	In Certiorari.

20

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

Elmer W. Romine, of full age, being duly sworn according to law, upon his oath deposes and says 30 that he is an Attorney and Counsellor-at-Law of the State of New Jersey, representing the prosecutor in the above stated certiorari, that there was a judgment rendered in the District Court of the First Judicial District of the County of Morris on February 25, 1915, in favor of Abram J. Drake, plaintiff, and against Miller N. Mowder, defendant, on contract, that no execution was is- 40

sued thereon from the District Court of the First Judicial District of the County of Morris, but that a statement for docketing was issued by the Clerk of said District Court on March 2, 1915, and the affidavit accompanying said statement was taken on March 2, 1915, and said judgment docketed in the Common Pleas Court of Morris County on March 2, 1915, that the affidavit accompanying said statement is defective because the amount mentioned in the statement is not the same mentioned in the affidavit, and deponent further says that an execution was issued by the Clerk of the Common Pleas Court of the County of Morris on July 15, 1915, and that the Sheriff of the County of Morris has in pursuance of said execution, caused the real property of Miller N. Mowder to be advertised for sale on August 9, 1915, that said judgment has not been paid and still remains open and unsatisfied of record and from which judgment as originally rendered and all proceedings had and taken thereon the defendant, Miller N. Mowder, desires to obtain a writ of certiorari to the Supreme Court.

ELMER W. ROMINE.

Sworn and subscribed to before
me this 21st day of
July A. D. 1915.
Lillian Edna Romine,
Notary Public,
Morris Co., N. J.

Affidavit of Miller N. Mowder

(Filed, July 23, 1915)

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

Miller N. Mowder, of full age, being duly sworn according to law, upon his oath deposes and says that he is the prosecutor in the application for a writ of certiorari in the case heretofore mentioned, that he was never served with a summons in the case of Drake v. Mowder, upon which a judgment was entered in the District Court of the First Judicial District of the County of Morris, nor did he know the nature of the suit pending, deponent does say that he remembers someone coming into his butcher shop on an occasion when he was very busy with customers and leaving some paper there without reading it, and going away in a great hurry, that said paper was mislaid and deponent made no appearance in Court, as he did not know that judgment was to be taken against him on February 25, 1915, and deponent further says that if a Summons had been served upon him, he knowing the same to be a summons, would have interposed a defense as he does not owe said claim. Deponent further says that he resides in Netcong in the extreme northern part of Morris County, which he is informed and believes is outside the Judicial District of the District Court of the First Judicial District of the County of Morris.

MILLER N. MOWDER.

Subscribed and sworn to before
me this 21st day of
July, A. D. 1915.
Lillian Edna Romine,
Notary Public,
Morris Co., N. J.

Writ of Certiorari

New Jersey, ss:

The State of New Jersey to Joseph Hinchman, Judge of the District
10 (Seal) Court of the First Judicial District of the County of Morris, Elias Bertram Mott, Clerk of the Court of Common Pleas of the County of Morris:

We being willing for certain reasons to be certified of a certain judgment lately made and rendered in our said District Court of the First Judicial District of the County of Morris in and for said County of Morris on March 2, 1915, in
20 favor of Abram J. Drake, plaintiff, and against Miller N. Mowder, defendant, in an action on contract whereupon the Court awarded a judgment for Four Hundred and Fifteen Dollars and fifty-four cents and Twenty-six Dollars and fourteen cents costs and also to be certified of said judgment by Elias Bertram Mott as the same was docketed in his office as Clerk of the Common Pleas Court of Morris County and the execution issued thereon, and do hereby cause you and each
30 of you that you send under your seal to our Justices of our Supreme Court of Judicature at Trenton, on the second Tuesday of November next, as well the judgment aforesaid with all things touching and concerning the same as fully and entirely as they remain in our said District Court of the First Judicial District of the County of Morris and the Common Pleas Court of the County of Morris by whatever names the parties
40 may be called therein together with this our writ,

that we may further cause to be done there upon what of right we shall see fit to be done.

WITNESS William S. Gummere, Esq., Chief Justice at Trenton, aforesaid, this day of July A. D. 1915.

WILLIAM C. GEBHARDT, 10
Clerk.

Elmer W. Romine,
Attorney.

Endorsement of Writ

NEW JERSEY SUPREME COURT

20

MILLER N. MOWDER,
Prosecutor in Certiorari,
vs.
ABRAM J. DRAKE,
Defendant in Certiorari.

WRIT OF CERTIORARI

Elmer W. Romine, 30
Atty. of Prosecutor,
24 Washington St.,
Morristown, N. J.

I allow this Writ. Let it be sealed. July 23/15.

JAMES F. MINTURN,
J. S. C. 40

Service of a copy of the within Writ is hereby acknowledged this day of

Attorney of Defendant.

10

Return to Writ by Clerk of Common Pleas Court

To The Honorable, the Justices of the Supreme Court of Judicature of New Jersey:

In obedience to the command of the writ to me directed, I, Elias Bertram Mott, Clerk of the Com-
20 mon Pleas Court of the County of Morris, within named, do send, under my seal, to you, the Honorable Justices of the Supreme Court of Judicature of New Jersey, the judgment lately docketed in our said Court of Common Pleas of the County of Morris, wherein Abram J. Drake was plaintiff and Miller N. Mowder was defendant, together with the execution issued thereon and all things touching and concerning the same, as fully and entirely as they remain before me as appears in
30 the schedule hereto annexed and as I have been commanded.

In witness whereof, I have hereunto set my hand and seal at Morristown, in the County of Morris, this seventh day of August A. D. 1915.

ELIAS BERTRAM MOTT,
(Seal) Clerk of the Common Pleas Court of the County of Morris.

40

Form of Statement of Judgment for Docketing

FIRST DISTRICT COURT

of the first Judicial District of the County of Morris. 10

ABRAM J. DRAKE, Plaintiff, vs. MILLER N. MOWDER, Defendant.	On Contract. Statement for Docketing Judgment.

Judgment in the above entitled cause was entered in the District Court of the First Judicial 20 District of the County of Morris, on the 25th day of February A. D., 1915, for the sum of Four hundred and fifteen dollars and fifty-four cents damages, and twenty-six dollars and fourteen cents costs of suit, in favor of the Plaintiff Abram J. Drake and against the Defendant Miller N. Mowder.

I hereby Certify, that the foregoing statement is correct and that said Judgment stands open and unpaid of record in this Court. 30

In Witness Whereof, I have hereto affixed my hand as the Clerk of said Court, and the seal of said Court as provided by law, this 2d day of March A. D., 1915.

(L. S.) HARRY G. ZWENGER,
Clerk of the District Court of
the first Judicial District of
the County of Morris. 40

Form of Statement of Judgment for Docketing

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

Martin R. O'Keefe being duly sworn, on his oath, says that he is the Attorney of the above named Plaintiff, and acted for him in the above
10 suit, that there is due at the present time upon the within Judgment as entered in the District Court of the First Judicial District of the County of Morris, and which is about to be Docketed in the Court of Common Pleas of the County of Morris, the sum of Four hundred & fifteen dollars and fifty cents *cents,* besides costs, being a sum not less than ten dollars.

MARTIN R. O'KEEFE.

Sworn and subscribed before me
20 the 2d day of March A. D., 1915.
Lawrence Day,
Master-in-Chancery
of N. J.

MORRIS COUNTY COMMON PLEAS.
1128

ABRAM J. DRAKE, Plaintiff, vs. MILLER N. MOWDER, Defendant.	On Contract.

Statement of Judgment in the above entitled cause from the District Court of the First Judicial District of the County of Morris, for Docketing in this
40 Court.

Record of Judgment Docketed

$415.54	Judgment
26.14	Costs
	Execution
.50	Statement
	Drawing Affidavit
	Taking Affidavit
	Interest
	Docketing.
$	

Received
Morris County
Clerk's Office
Mar. 2, 1:56 PM 1915
Morristown, N. J.
E. BERTRAM MOTT,
Clerk.

Record of Judgment Docketed

MORRIS COMMON PLEAS
No. 296

ABRAM J. DRAKE, Plaintiff, vs. MILLER N. MOWDER, Defendant.	On Docketed Judgment. On Contract.

Before: OLIVER K. DAY, Judge of the District Court of the First Judicial District of the County of Morris.

Execution

February 25th A. D., 1915

Amount of Recovery	$415.54
Amount of Costs	26.14
Amount of Costs on Execution	
10 Amount of Costs of Docketing, and issuing Execution	3.00
Whole amount of Recovery & Costs	$444.68

Amount stated in affidavit, $415.50.

The above stated Judgment was Docketed in the Court of Common Pleas of the County of Morris, New Jersey, on the Second day of March A. D., Nineteen Hundred and Fifteen at 1:56 o'clock p. m.

20

ELIAS BERTRAM MOTT,
Clerk.

Martin R. O'Keefe,
Attorney of Plaintiff.

Recorded in Book "A" of Judgments Docketed from the District Court, page 148.

Execution

30

MORRIS COMMON PLEAS

ABRAM J. DRAKE,
vs.
MILLER N. MOWDER.

Fi.Fa. de bo. et ter on Docketed Judgment Returnable October Term, 1915.

40

King & Vogt, Att'y.

Execution

Judgment in District Court	$415.54	
Costs ..... do	26.14	
Interest from Feb. 25, 1915 till paid	$	
Cost of Docketing and Execution	$4.48	
Interest from Mar. 2, 1915	$	10
Besides Sheriff's Execution Fees	$	
	$	

Morris County, ss:

The State of New Jersey, To the Sheriff of the County of Morris, Greeting:

(L. S.) We command you, that of the Goods and Chattels of Miller N. Mowder, 20 Defendant, in your County, you cause to be made the sum of Four hundred and fifteen dollars and fifty-four cents damages and Twenty-six dollars and fourteen cents costs of suit, which Abram J. Drake Plaintiff, lately in the District Court of the First Judicial District of the County of Morris by the Judgment of the said Court, recovered against the said Defendant, which Judgment was afterwards Docketed in our Court of Common Pleas in and for our said County of Morris, pur- 30 suant to the statute in such case made and provided, as appears to us of record; and also, the sum of Four dollars and forty-eight cents costs of Docketing the said Judgment, and of issuing Execution thereon; And if sufficient Goods and Chattels of the said Defendant, in your County, you cannot find whereof to make the damages aforesaid, then we command you that you cause the whole 40

or the residue, as the case may require, of the moneys aforesaid, to be made of the lands, tenements, hereditaments and real estate whereof the said Defendant was seized on the Second day of March in the year of our Lord one thousand nine hundred and fifteen or at any time afterwards, in whosesoever hands the same may be; And have you those moneys before our Court of Common Pleas aforesaid at Morristown in the County aforesaid, the second Tuesday of October next, to render unto the said plaintiff, for his recovery and costs aforesaid; and have you then there this writ.

Witness. Joshua R. Salmon, Esquire, Judge of our said Court of Common Pleas, at Morristown, aforesaid, the 14th day of July in the year of our Lord One thousand nine hundred and fifteen.

ELIAS BERTRAM MOTT,
Clerk.

King and Vogt,
Attorneys.
Recorded, July 14th A. D., 1915.

ELIAS BERTRAM MOTT,
Clerk.

Recorded in Book "P" of Common Pleas Executions, page 81.

Clerk's Certificate

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

I, Elias Bertram Mott, Clerk of the County of Morris and also Clerk of the Court of Common Pleas holden in and for said County do hereby certify that the foregoing are full, true and correct copies of the Statement for Docketing, the record of the Judgment docketed, and the Execution issued in the case of Abram J. Drake, Plaintiff vs. Miller N. Mowder Defendant as fully and entirely as the same remain on file and of record in my office.

In Testimony Whereof I have hereunto set my hand and affixed the seal of said Court at Morristown this Seventh day of August, A. D., Nineteen hundred and fifteen.

ELIAS BERTRAM MOTT,
(Seal) Clerk.

Return to the Writ by Clerk of District Court

To the Honorable, the Justices of the Supreme Court of Judicature of New Jersey:

In obedience to the command of the writ to me directed, I, Joseph Hinchman, Judge of the District Court of the First Judicial District of the County of Morris, within named, do send under my seal to you, the Honorable Justices of the Supreme Court of Judicature of New Jersey, the judgment lately made and rendered in our said

Return to the Writ by Clerk of District Court

District Court of the First Judicial District of the County of Morris in an action upon contract wherein Abram J. Drake was complainant and Miller N. Mowder was defendant, together with all things touching and concerning the same, as fully and entirely as they remain before me as appears in the schedule hereto annexed and as I have been commanded.

In witness whereof, I have hereunto set my hand and seal in open Court, this thirty-first day of July, A. D., 1915.

JOSEPH HINCHMAN,
Judge, &c.

The State of New Jersey, }
Morris County, } ss:

To any Constable in said County, or to the Sergeant-at-arms of the District Court, of the First Judicial District of the County of Morris

SUMMON: MILLER N. MOWDER to appear before the District Court of the First Judicial District of the County of Morris to be held at the Court House, Washington Street, (entrance on Court Street) in the Town of Morristown, on the 18th, day of February, 1915, at 10 o'clock in the forenoon to answer unto Abram J. Drake in an action upon Contract to the damage of the plaintiff Five Hundred Dollars hereof fail not.

WITNESS: Oliver K. Day, Esq., Judge of the said Court at Morristown aforesaid, the tenth day of February in the year One Thousand Nine Hundred and fifteen.

HARRY G. ZWENGER,
Clerk.

Summons on Contract

DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE COUNTY OF MORRIS

ABRAM J. DRAKE, v. MILLER N. MOWDER.	Summons on Contract

10

Demand	$331.08
Costs	2.10
Mileage	1.76
Listing fee	1.50
Atty. fee	16.55

Returnable Feb. 18, 1915.

20

MARTIN R. O'KEEFE,
Attorney for Plaintiff,
Morristown, N. J.

I served the within summons Feb. 13, 1915, on the defendant, Miller N. Mowder by reading it to him and giving him a copy thereof.

GEORGE W. PIERSON,
Constable.

30

DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE COUNTY OF MORRIS

TAKE NOTICE, that the plaintiff's state of demand in the within action has been filed with the

clerk of this Court, and that a trial will be demanded upon the return day of this summons.

Yours, etc.
MARTIN R. O'KEEFE,
Attorney for Plaintiff.

10 To the within named defendant or to who it may concern.

Morristown N. J. Feb. 10, 1915.

State of Demand

DISTRICT COURT OF THE FIRST JUDI-
20 CIAL DISTRICT OF THE COUNTY
OF MORRIS

ABRAM J. DRAKE, v. MILLER N. MOWDER.	On Contract.

The plaintiff demands of the defendant Five Hundred Dollars on the following causes of ac-
30 tion.

1. Note dated June 30, 1913 payable three months after date, made by defendant and M. Aletta Mowder to the order of plaintiff for Two Hundred thirty-seven Dollars and sixty cents, of which the following is a true copy:

$237.60 Netcong, N. J. June the 30, 1913.

Three months after date we or either of us
40 promise to pay to the order of A. J.

State of Demand

Drake Two hundred thirty-seven and 60/100 Dollars. Value received at the Citizens National Bank of Netcong.

M. ALETTA MOWDER,
M. N. MOWDER.

No. Due Sep. 30 10
endorsed A. J. Drake.
Note $237.60
Protest fees 1.56

$239.16

(2) Demand note made by defendant to plaintiff, dated Jan. 10, 1914, of which the following is a true copy.

Jan. the 10th, 1914. Due A. J. Drake on demand Nineteen Dollars. 19.00

M. N. MOWDER. 20

(3) Check made by defendant to order of plaintiff dated Aug. 29, 1913, of which the following is a true copy.

The Citizens National Bank of Netcong, N. J.

No. 11 Aug. 29, 1913

Pay to the order of A. J. Drake Ten Dollars 10.00 30

M. N. MOWDER.

(4) Thirteen months rent of store or shop in Netcong, rented from Plaintiff by Defendant and occupied by defendant from June 30, 1913 to July 31, 1914, at Twelve Dollars per month 240.

State of Demand

Credit by book account of defendant against plaintiff for meat &c., from June 30, 1913 to July 3, 1914	112.71	127.29
		$331.08

10 Judgment will be claimed for the aforesaid sum of Three hundred thirty-one Dollars and eight cents, together with lawful interest and costs of suit.

MARTIN R. O'KEEFE,
Attorney for Plaintiff.

Note the above figures 240-112.71 and 127.29 appear on the state of demand in pencil.

20 *To Miller N. Mowder, the within named defendant:*

TAKE NOTICE, That the within named plaintiff demands that on or before the time specified for appearance in the summons herein, you file with the Clerk of the District Court in and for the First Judicial District of the County of Morris and serve upon the plaintiff or upon Martin R. O'Keefe, his attorney, a written specification of the defenses you intend to make to the above
30 stated action.

MARTIN O'KEEFE,
Attorney for Plaintiff.

Docket Entries

THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE COUNTY OF MORRIS

Docket page 2692—Entry docket No. 6

10

ABRAM J. DRAKE, Plaintiff, and MILLER N. MOWDER, Defendant.	On Contract.

Plaintiff's Costs.

Summons	2.10
Mileage	1.76
Listing fee	1.50
Atty. fee	20.78
Total	26.14
Statement	.50

20

A summons in the above stated cause was issued on the tenth day of February 1915, returnable on the Eighteenth day of February 1915, wherein the plaintiff demands of the defendant the sum of Five Hundred Dollars.

30

The plaintiff filed his State of Demand February 10, 1915.

The summons was served and returned as follows:

I served the within summons February 13, 1915 on the defendant by reading it to him and giving him a copy thereof.

GEORGE W. PIERSON,
Constable.

40

This cause was adjourned to Feb. 25, 1915.

The Plaintiff appeared and the Defendant not appearing and no reason being assigned for his absence, the cause was tried and determined at this time.

10 Witness Plaintiff.

Abram J. Drake.

P. 1. I. O. U. Jan. 10, 1914

P. 2. Check Aug. 29, 1913, $10.00

P. 3. Note $237.60 June 30, 1913.

The evidence being closed the Court rendered Judgment in favor of the plaintiff and against the defendant, in the sum of Four Hundred and Fifteen Dollars and fifty-four cents damages with costs, whereupon judgment is entered in favor of 20 the plaintiff and against the defendant in the sum of Four Hundred fifteen dollars and fifty-four cents damages with costs.

Statement for docketing issued March 2d, 1915.

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

I. Harry G. Zwenger, Clerk of the District Court of the County of Morris do hereby certify that the foregoing is a true and correct copy of 30 the summons issued and state of demand and record of the judgment and all proceedings in the case of Abram J. Drake against Miller N. Mowder as freely and entirely as the same remains of record and is filed in my office.

In Witness whereof I have hereunto set my hand and affixed the seal of said Court at Morristown this 30th day of July, 1915.

HARRY G. ZWENGER,
Clerk.

40 (Seal)

Bond in Certiorari

Know all men by these presents, That we, Miller N. Mowder, Prosecutor in Certiorari, and Albert G. Oxley of Hanover Township Morris County, New Jersey, are held and firmly bound unto Abram J. Drake, of the Borough of Netcong, in the County of Morris and State of New Jersey, in the sum of One Thousand Dollars, lawful money, to be paid to the said Abram J. Drake, or his certain attorney, executors, administrators or assigns, to which payment well and truly to be made, we bind ourselves, our heirs, executors, administrators and assigns, jointly and severally, firmly by these presents.

Sealed with our seals and dated this
21st day of July, A. D. 1915.

The condition of the above obligation is such that whereas said Abram J. Drake in the District Court of the First Judicial District of the County of Morris, before Oliver K. Day, Esq., Judge of said District Court, in and for the County of Morris, by the judgment of said Court, recovered a judgment against the above bounden Miller N. Mowder in an action on contract for the sum of Four Hundred and Fifteen Dollars and fifty-four cents, and costs of Twenty-six Dollars and fourteen cents.

And whereas the said judgment was docketed in the Court of Common Pleas of the County of Morris on March 2nd, 1915, in Book A, page 148, and an execution issued thereon with costs of Four Dollars and forty-eight cents.

And whereas the above bounden, Miller N. Mowder, intends to prosecute a Writ of Certiorari out of the Supreme Court of Judicature to

remove the judgment, order and proceedings given or made in said action,

Now THEREFORE, if the said Miller N. Mowder, shall prosecute the said certiorari in the said Supreme Court, pay the amount of the said judgment rendered against him in the said District Court of the First Judicial District of the County of Morris, interest and costs, if the said judgment be affirmed, and shall in all things stand to and abide the judgment of the said Supreme Court respecting the judgment, order or proceedings given or made in the said Court of Common Pleas for the County of Morris, then this obligation to be void, else to be and remain in full force and virtue.

MILLER N. MOWDER, (LS)
ALBERT G. OXLEY (LS).

Signed, sealed and delivered
In the presence of
Elmer W. Romine.

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

Albert G. Oxley, of full age, being duly sworn according to law, on his oath says that he is the surety in the within named bond; that he is a freeholder of the County of Morris and has property subject to execution worth the sum of One Thousand Dollars over and above all his just debts and liabilities.

ALBERT G. OXLEY.

Subscribed and sworn to before me this
22d day of July, A. D. 1915.
Elmer W. Romine.
Master in Chancery
of New Jersey.

Bond in Certiorari

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

Be it remembered, that on this twenty-first day of July in the year of our Lord one thousand nine hundred and fifteen, before me, the subscriber, a Master in Chancery of New Jersey, 10 personally appeared Miller N. Mowder, to me known to be one of the parties who executed the foregoing bond, and I having first made known to him the contents thereof, he did acknowledge that he signed, sealed and delivered the same as his voluntary act and deed for the uses and purposes therein expressed.

ELMER W. ROMINE,
Master in Chancery
of New Jersey. 20

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

Be it remembered, that on this twenty-second day of July in the year of our Lord one thousand nine hundred and fifteen, before me, the subscriber, a Master in Chancery of New Jersey, personally appeared Albert G. Oxley, to me known to be one of the parties who executed the 30 foregoing bond, and I having first made known to him the contents thereof, he did acknowledge that he signed, sealed and delivered the same as his voluntary act and deed for the uses and purposes therein expressed.

ELMER W. ROMINE,
Master in Chancery
of New Jersey.

I approve the within bond. Let it be filed. 40

Reasons in Certiorari

NEW JERSEY SUPREME COURT

MILLER N. MOWDER, Prosecutor in Certiorari, vs. ABRAM J. DRAKE, Defendant in Certiorari.	On Certiorari

10

Miller N. Mowder, by Elmer W. Romine, his attorney, comes and prays that the judgment of the District Court of the First Judicial District of the County of Morris, rendered against him in an action of contract wherein the said Abram J. Drake was plaintiff and Miller N. Mowder was defendant, and which judgment has been docketed in the Common Pleas Court of the County of Morris and execution had therein from said Court, may be reversed and set aside for the following reasons:

20

1. Because the District Court of the First Judicial District of the County of Morris did not have jurisdiction of the subject matter or of the parties, as the summons was improperly served.

30

2. The papers as left at Prosecutor's butcher shop was not proper service upon him and also because the defendant resided outside the jurisdictional District of the said District Court.

3. The Court did not have jurisdiction because the proper parties were not mentioned in the suit as the demand filed shows that the note was

40

signed by M. Aletta Mowder and M. N. Mowder, and the check by M. N. Mowder, there being no service on M. Aleta Mowder or M. N. Mowder.

4. The Court had no jurisdiction over the subject matter because the demand as filed was defective and also because judgment was rendered in excess of amount claimed. 10

5. The record of the Judgment is also defective upon the proof and entry of Judgment and the same could not be docketed in the Common Pleas Court so as to bind lands and proceedings on execution are illegal.

6. The papers filed in the suit are not complete and are defective so that the said District Court did not have jurisdiction over the subject matter. 20

7. Execution from the Common Pleas Court on said judgment obtained in the District Court is illegal because the said judgment is not properly docketed, and does not bind lands as the execution must first be exhausted against personal property by execution out of the District Court before being docketed in Common Pleas Court.

8. The Judgment is not properly docketed in the Common Pleas Court, so as to bind lands as the affidavit and statement are both defective. 30

The Court in many other respects was without jurisdiction and the judgment was improper and all proceedings thereon illegal.

ELMER W. ROMINE,
Attorney for Prosecutor.

Petition for Stay of Sale

(*Filed, July 23/15*)

NEW JERSEY SUPREME COURT

10 MILLER N. MOWDER,
Prosecutor in Certiorari,
vs.
ABRAM J. DRAKE,
Defendant in Certiorari.

In Certiorari
PETITION.

To James F. Minturn, Justice of the Supreme Court:

Your petitioner, Miller N. Mowder, respectfully
20 shows that on February 25th, 1915, a judgment was rendered against him in favor of Abram J. Drake, as plaintiff, in the District Court of the First Judicial District of the County of Morris, on contract, and that said judgment was docketed in the Common Pleas Court of the County of Morris on March 2nd, 1915.

And your petitioner further shows that execution was issued by the Clerk of the Court of Common Pleas of the County of Morris on said dock-
30 eted judgment from the District Court of the First Judicial District of the County of Morris directed to the Sheriff of the County of Morris, on July 15, 1915.

And your petitioner further shows that the Sheriff of the County of Morris in pursuance of said execution did levy upon and advertise for sale certain property, real estate, of Miller N.
40

Mowder situate, lying and being in the Borough of Netcong, in the County of Morris and State of New Jersey, and that a sale as advertised is to take place on Monday, the 9th day of August, 1915.

And your petitioner further shows that he has applied for a writ of certiorari to review said judgment and all proceedings had thereon on the ground that the Court was without jurisdiction and said judgment as obtained and docketed is illegal and erroneous. 10

And your petitioner prays that an order may be made by this Court restraining the Sheriff of the County of Morris from proceeding with a sale on said execution until the determination of the writ for certiorari or until the further order of this Court. 20

Dated, July 21st, 1915.

MILLER N. MOWDER,
Petitioner.

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

Miller N. Mowder, of full age, being duly sworn according to law, upon his oath deposes and says that he is the petitioner in the foregoing petition, that on February 25th, 1915, a judgment was rendered against him in favor of Abram J. Drake, as plaintiff, in the District Court of the First Judicial District of the County of Morris, on contract and that said judgment was docketed in the Common Pleas Court of the County of Morris on March 2nd, 1915, that execution was issued on 30 40

July 15th, 1915, by the Clerk of the Court of Common Pleas of the County of Morris on said docketed judgment from the District Court of the First Judicial District of the County of Morris directed to the Sheriff of the County of Morris, that the Sheriff of the County of Morris in pursuance of said execution did levy upon and advertise for sale certain property, real estate of deponent, situate, lying and being in the Borough of Netcong, in the County of Morris and State of New Jersey, and that a sale as advertised is to take place on Monday, the 9th day of August, 1915, and that deponent has applied for a writ of certiorari to review said judgment and all proceedings had thereon on the ground that the Court was without jurisdiction and said judgment as obtained and docketed is illegal and erroneous.

MILLER N. MOWDER.

Sworn and subscribed to before me this
21st day of July, A. D. 1915.
Lillian Edna Romine,
Notary Public,
Morris County, New Jersey.

Order in Certiorari

NEW JERSEY SUPREME COURT

MILLER N. MOWDER, Prosecutor in Certiorari, vs. ABRAM J. DRAKE, Defendant in Certiorari.	In Certiorari, ORDER.

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Application being made to me, one of the Justices of the Supreme Court, for a writ of certiorari in the above stated cause, which has been allowed, and a petition being presented setting forth that execution has been issued on a docketed judgment in the above stated cause and that the Sheriff of the County of Morris is about to make sale of real property of the prosecutor and a restraining order being prayed for in said petition and it appearing to me that a bond and reasons for certiorari have been filed, it is, therefore, on this 23d day of July, A. D. 1915,

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ORDERED, that all further proceedings in the Common Pleas Court on the execution under the docketed judgment of Abram J. Drake against Miller N. Mowder, be stayed, and that the Sheriff of the County of Morris is hereby restrained from making a sale of said premises until the determination of the certiorari or until the further order of this Court.

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JAMES F. MINTURN,
J. S. C.

Entered July 24th, 1915, on motion of Elmer W. Romine, Attorney.

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Stipulation as to Statement of O. K. Day

NEW JERSEY SUPREME COURT

MILLER N. MOWDER, Prosecutor, vs. ABRAM J. DRAKE, Defendant.	In Certiorari

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It is hereby on this fifteenth day of September, A. D. 1915 stipulated and agreed by and between the parties hereto that the annexed statement by Oliver K. Day, former Judge of the District Court of the First Judicial District of the County of Morris be filed in the Supreme Court in connection with the return in the above stated certiorari and be used and referred to for such purposes and with the same effect as if the testimony of said Oliver K. Day had been taken concerning said amendment therein mentioned.

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ELMER W. ROMINE,
Attorney for Prosecutor.

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KING & VOGT,
Attorney for Defendant.

Statement

DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE COUNTY OF MORRIS

ABRAHAM J. DRAKE, Plaintiff, vs. MILLER N. MOWDER, Defendant.	In Certiorari

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I, Oliver K. Day, former Judge of the District Court of the First Judicial District of the County of Morris do hereby certify that I presided at the trial of the above entitled cause, that on the day set for trial Martin O'Keefe, Esquire, appeared for the plaintiff and that the defendant did not appear. Before judgment was taken plaintiff's attorney moved that the state of demand be amended as follows:

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FIRST: By adding to the statement of rent due plaintiff upon lease of his store, Eighty-four dollars being the amount due for the months of August, September, October, November and December, Ninteen Hundred and Fourteen, and January and February, Nineteen Hundred and Fifteen, making the total amount due for rent Two Hundred and Forty Dollars.

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SECOND: That the state of demand be amended by allowing defendant a credit of One Hundred Twelve Dollars and Seventy-one Cents instead of Ninety-three Dollars and Eight Cents which said credit was the amount due defendant from plain-

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tiff for meat purchased by plaintiff of defendant up to the time of this suit. The motion to amend was granted and judgment entered accordingly.

OLIVER K. DAY.

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Stipulation Submitting Case for November Term

NEW JERSEY SUPREME COURT

MILLER N. MOWDER, Prosecutor in Certiorari, vs. ABRAM J. DRAKE, Defendant in Certiorari.	In Certiorari

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It is hereby agreed between the Counsel for the respective parties that the above stated case be submitted and argued on briefs at the November Term of this Court, 1915.

Dated, October 28, 1915.

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ELMER W. ROMINE,
Attorney for Prosecutor in Certiorari.

KING & VOGT,
Attorney for Defendant in Certiorari.

Opinion Supreme Court

NEW JERSEY SUPREME COURT

November Term, 1915.

MILLER N. MOWDER, Prosecutor, vs. ABRAM J. DRAKE, Respondent.	On Certiorari.

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Submitted November 3d, 1915; decided January, 1916.

Before: JUSTICES GARRISON, TRENCHARD, and BLACK. 20

Elmer W. Romine, Esq., for Prosecutor.
King & Vogt, Esqs., for Respondent.

Per Curiam:

This was a certiorari to review the action of the District Court of the First Judicial District of the County of Morris in giving judgment for plaintiff and against the defendant in the sum of $415.-54 damages with costs, which judgment was subsequently docketed in the Common Pleas Court and execution issued thereon. The certiorari was allowed on July 23, 1915, by Mr. Justice Minturn and a stay of execution granted. One of the reasons filed for setting aside the judgment, is that the Court had no jurisdiction because the defendant was not served. The record shows that the summons was served and returned as follows: 30 40

"I served the within summons Feb. 13, 1915, on the defendant, Miller N. Mowder by reading it to him and giving him a copy thereof. George W. Pierson, Constable." There was no testimony taken in this case to prove the facts set up, in the reasons. The constable's return in *prima facie* evidence of the facts therein stated, and the burden of disproving the same is on the one who attacks it. Boyd v. King, 36 N. J. L., 134; Hotovisky v. Little Russian etc. Church, 78 N. J. Eq., 577. "The sheriff's return is presumptive proof of the fact recited in it" *ib.* No evidence has been taken in the proceedings to disprove the facts stated in the constable's return. *Ex parte* affidavits on which the writ was granted cannot be used on final argument. Baldwin v. Flagg, 43 N. J. L., 497; Eastwood v. Russell, 81 *ib.*, 679; Peer v. Bloxham, 82 *ib.*, 289. The writ in this case should be dismissed and the judgment affirmed with costs.

Rule Affirming Judgment

NEW JERSEY SUPREME COURT

November Term, 1915

MILLER N. MOWDER, Prosecutor, vs. ABRAM J. DRAKE, Respondent.	On Certiorari.

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The Court having inspected the transcript and proceedings of the District Court for the First Judicial District of the County of Morris, at the suit of Abram J. Drake against Miller N. Mowder returned with the certiorari in this cause, and the reasons for reversing the judgment below, and read the briefs of counsel submitted in this cause, and having duly considered the same,

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It is on this Seventh day of February, One Thousand Nine Hundred and Sixteen, ORDERED that the above mentioned judgment of the District Court for the First Judicial District of the County of Morris, be in all things affirmed, with costs.

On motion of

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WILLIAM C. GEBHARDT,
Clerk.

KING & VOGT,
Attorneys for Respondent.