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Hudson County Circuit Court

Anthony Nitti, Plaintiff, *vs.* Public Service Railway Co., Defendant.	Action at Law.

Notice of Appeal.

Take notice that the plaintiff appeals from the whole of the judgment entered in this cause to the New Jersey Court of Errors and Appeals on the following grounds:

1. The court directed the jury to render a verdict in favor of the defendant.

2. The court denied the motion to direct a verdict in favor of the plaintiff.

3. The court ruled that the plaintiff was concluded by a former judgment.

4. The court erroneously, improvidently and in abuse of discretion, ordered the entry of judgment *nunc pro tunc* in an alleged former action.

5. The court admitted in evidence proof of the entry of an order for judgment *nunc pro tunc* in an alleged former action, wherein the plaintiff was not represented by a next friend.

6. The court admitted in evidence proof of the entry of an alleged judgment *nunc pro tunc* subsequent to the institution of the present action.

Richard Doherty,
Attorney of Plaintiff.

Summons.

THE STATE OF NEW JERSEY to PUBLIC SERVICE RAILWAY COMPANY:

You are summoned to answer the annexed complaint of Anthony Nitti in an action at law in the Hudson County Circuit Court.

And take notice that unless you file your answer to said complaint with the Clerk of the Hudson County Circuit Court at Jersey City, within twenty days after service upon you of this writ and the annexed complaint, the plaintiff may proceed in the suit and judgment may be entered against you.

Witness, HENRY E. ACKERSON, JR., Judge of the Hudson County Circuit at Jersey City, N. J. this twenty-ninth day of May nineteen hundred and twenty-five.

JOHN J. McGOVERN,
Clerk.

RICHARD DOHERTY,
Attorney of Plaintiff.

Complaint.

HUDSON COUNTY CIRCUIT COURT.

ANTHONY NITTI,
Plaintiff,

vs.

PUBLIC SERVICE RAILWAY COMPANY,
Defendant.

Action at Law.

The plaintiff residing at Jersey City, in the County of Hudson and State of New Jersey says:

Complaint.

1. June 15, 1910, the defendant was a Street Railway Corporation, owning, and by its servants and agents, operating a certain trolley car upon and along Park Avenue, in the Town of Union, at a point thereon where the same intersects Homboldt Street, and which trolley car was then and there operated in a northerly direction.

2. At said time and place, the plaintiff was lawfully in and upon said Park Avenue, crossing the same.

3. The plaintiff was then and there struck and run over by the said car of the defendant, sustaining amputation of his leg and divers others injuries upon and about the head, body and limbs.

4. Said injury to the plaintiff resulted from the negligence of the defendant in this: by its servant and agent, aforesaid, it drove and operated the said car at an excessive rate of speed; failed to have and maintain the same under control so as to avoid inflicting injury upon the plaintiff; failed to exercise and maintain proper vigilance and observance to ascertain the presence of the plaintiff so lawfully upon the highway; and failed to give to the plaintiff due and timely warning of the approach of the said car.

5. The plaintiff thereby underwent and suffered great pain of body and agony of mind, and has so suffered hitherto and will so suffer for the remainder of his life; has been compelled to expend and will, in the future, be compelled to expend large sums of money in and about seeking to be cured of his said injuries, and in the purchase of crutches and artificial limbs; and has lost and will for the remainder of his life, lose large sums of money which he would otherwise have gained

in the pursuit of lawful occupations, except for the said wrongful and negligent conduct of the defendant.

6. At the time of the said injury and negligent conduct of the defendant, the plaintiff was a child of the age of six years, and this action is brought within two years of the attainment by the plaintiff, of the age of twenty-one years.

Plaintiff demands as damages, $50,000.

RICHARD DOHERTY,
Attorney of Plaintiff.

I hereby deputize John Daly to serve the within Writ. Witness my hand and Seal this 29 day of May, 1925.

JOHN M. HANNAN,
Sheriff.

By HUGH H. MARA,
Under Sheriff.

Served within Summons and Complaint May 29/25, on the defendant Public Service Railway Company (A Corporation) by delivering A, true copy thereof to Royal Perrin, Agent of the said defendant Company,

JOHN M. HANNAN,
Sheriff.

By JOHN DALY,
S. D. S.

Filed Clerk's Office
July 13, 1925
Hudson County, N. J.
JOHN J. McGOVERN,
Clerk.

Answer.

HUDSON COUNTY CIRCUIT COURT.

ANTHONY NITTI,
Plaintiff,

vs.

PUBLIC SERVICE RAILWAY COMPANY,
Defendant.

Action at Law.

The defendant, a corporation of New Jersey, having its principal office at the City of Newark, in the said State of New Jersey, in answer to the plaintiff's complaint, says that:—

1. It admits the allegations contained in paragraph one of the complaint.

2. As to the allegations contained in paragraphs two and six of the complaint, it has no knowledge or information thereof sufficient to form a belief.

3. It denies the allegations contained in paragraphs three, four and five of the complaint.

FIRST DEFENSE.

1. It avers that the negligence of the plaintiff contributed to the happening of the said alleged accident, in that he endeavored to proceed across a track upon which a trolley car was being operated, when the said trolley car was in such a position as to endanger his safety.

Answer.

SECOND DEFENSE.

1. It avers that on the 22nd day of December, 1910, the plaintiff, by his next friend, Vito Nitti, did recover a judgment against the said defendant in the Hudson County Circuit Court for the sum of Five Hundred ($500) Dollars for the same cause or causes of action in the said complaint alleged, which said judgment has been paid by the said defendant.

JOSEPH COULT,
Attorney of Defendant.

Filed Clerk's Office
Jun 18, 1925
Hudson County, N. J.

JOHN J. McGOVERN,
Clerk.

Reply.

HUDSON COUNTY CIRCUIT COURT.

ANTHONY NITTI,
Plaintiff,

vs.

PUBLIC SERVICE RAILWAY COMPANY,
Defendant.

Action at Law.

The plaintiff, in reply to the defendant's answer says that:—

1. He denies the allegations contained in the first defense of said answer.

2. He denies the allegations contained in the second defense of said answer.

FIRST SEPARATE REPLY TO SECOND DEFENSE.

The plaintiff says there is no such record as that of the judgment alleged in said defense.

SECOND SEPARATE REPLY TO SECOND DEFENSE.

The plaintiff says that in the proceeding referred to in said defense, Vito Nitti, therein named, was not the next friend nor guardian *ad litem* of the plaintiff.

RICHARD DOHERTY,
Attorney of Plaintiff.

Filed Clerk's Office
Jun 22, 1925
Hudson County, N. J.

JOHN J. McGOVERN,
Clerk.

Testimony.

HUDSON COUNTY CIRCUIT COURT.

ANTHONY NITTI,
Plaintiff,

vs.

PUBLIC SERVICE RAILWAY COMPANY.

Before Hon. HENRY E. ACKERSON, JR., J., and a Jury.

Jersey City, N. J., May 5, 1926.

Appearances:

RICHARD DOHERTY, Esq., for the Plaintiff.
JOSEPH COULT, Esq., Jr., for the Defendant, by JAMES O. BOYD, Esq.

A jury was duly empanelled; being found satisfactory, they were sworn.

Counsel opened to the jury.

ANTHONY NITTI, sworn:

Direct examination by Mr. Doherty:

Q. You are the plaintiff in this action? A. Yes, sir.

Q. How old are you? A. 22.

Q. You suffer from the loss of a leg; how did you lose your leg? A. I was coming home from school at 12 o'clock and I was on the side of the

street. I was crossing the street and it was a rainy day, and gloomy, and while I was crossing the street, he came right down without ringing a bell or anything and ran me down.

Q. You were a pretty young boy? A. Six years old at the time.

Q. Have you got a recollection of it? A. Yes, sir.

Mr. Boyd: We will admit for today and for the purpose of this argument that the plaintiff could make out a prima facie case of the negligence of the defendant and that such negligence would be the proximate cause of the accident.

The Court: In other words, a prima facie case against the defendant company.

Mr. Boyd: Yes; on the plaintiff's case.

Mr. Doherty: Plaintiff rests.

Mr. Boyd: Will Mr. Doherty admit that the party in this suit is the same party that was involved in the suit in 1910.

Mr. Doherty: That the plaintiff is the infant alleged to have had the accident and referred to in the pleadings in the earlier suit.

Mr. Boyd: And the cause of action on which he is suing now arose out of the same facts and circumstances as the accident which was described in the former proceeding.

The Court: The only thing at issue is whether or not the Rule and Order permitting judgment to be entered *nunc pro tunc* should be affirmed.

Mr. Doherty: In order we dispose of that, the Court may consider as having be-

fore it all the proceedings of the former suit, as well as all the proceedings on the entry of judgment *nunc pro tunc* and the Rule to Show Cause upon that Order.

Mr. Boyd: Also the judgment which was filed and docketed as a result of the issuing of that Order *nunc pro tunc.*

The Court: That would include also the affidavits presented to me on both sides at the time.

JAMES O'NEILL, sworn:

Direct examination by Mr. Boyd:

Q. What is your position, Mr. O'Neill? A. General clerk, County Clerk's Office, Custodian of Records.

Q. You have custody of all the records in the Clerk's Office? A. Yes, sir.

Q. Have you there the complaint in the action which was instituted in 1910 in the name of Anthony Nitti against the Public Service Railway Company? A. Yes, sir.

Mr. Boyd: I move to introduce the Declaration which was filed in the Anthony Nitti case.

Cross-examination by Mr. Doherty:

Q. What date was that filed, Mr. O'Neill? A. September 13th, 1910.

Q. What was the name of the Plaintiff and the name of the Defendant? A. Anthony Nitti, who sues by Vito Nitti, his next friend, Plaintiff versus

the Public Service Railway Company, the Defendant.

Mr. Boyd: I move to introduce that into evidence.

Mr. Doherty: No objection, only the technical objection that the papers do not relate to any judgment of record that was regularly entered in connection with the papers.

Mr. Boyd: You do admit the filing.

Mr. Doherty: I admit that these papers were actually filed.

Mr. Boyd: And that the parties involved in this suit are the parties involved in the prior suit in 1910.

Mr. Doherty: I have already admitted that.

JAMES O'NEILL recalled:

Direct examination by Mr. Boyd:

Q. Mr. O'Neill, have you a copy of the judgment which was recorded as a result of the Order discharging the Rule to show cause herein? A. Yes. (Papers produced.)

Q. Mr. O'Neill, have you the record of the verdict which was returned in the case of Anthony Nitti and Vito Nitti against the Public Service Railway Co.? A. Yes, sir.

Q. What book is that in your hand? A. Trial Book Circuit Court.

Q. (By the Court): What Number?

James O'Neill—Cross.

The Witness: This book is 216, it runs from January 20, 1910 to February 8, 1912 inclusive.

Q. On what page is the verdict recorded? A. On page 170.

Q. What does that page 170 show? A. It shows a return of a verdict, the jurors and the date and so forth.

Q. Have you a record of the judgments which have been paid into the County Clerk's office? A. Not here; I have a recollection, knowledge of this money. I haven't the record with me.

Q. You can testify of your own knowledge that the judgment of $500 has been paid into the County Clerk's office? A. Yes, sir.

Q. Is it still in the County Clerk's office? A. Yes, sir.

Q. It has not been drawn out? A. No, sir.

Cross-examination by Mr. Doherty:

Q. The papers you produced are all the papers that have been filed in the former proceeding? A. Yes, sir.

Q. You produced no record of any judgment that was entered between December 22nd, 1910 and November 19th, 1925? Except the judgment *nunc pro tunc?* A. That is right.

[Record in Clerk's Register, Former Action.]

Mr. Boyd: I offer in evidence File No. 22986 in the case of Anthony Nitti, by Vito Nitti his next friend *vs.* Public Service Railway Company, and all the papers contained therein, being:

Summons and Declaration.

Plea.

Notice of Trial.

Warrant to Satisfy.

Petition and Order directing the deposit of $500. with the Clerk.

Affidavit of Raymond Dawson on application for judgment *nunc pro tunc.*

(Accepted as Defendant's Exhibit D-1 of this date.)

(Exhibit D-1 is as follows):

[Summons and Declaration, Former Action.]

Hudson County Circuit Court, }
Hudson County, } ss.:

The State of New Jersey to the Sheriff
(Seal) of our County of Hudson, aforesaid.
Greeting

You are hereby commanded to summon the Public Service Railway Company, a domestic corporation, so that it be and appear before our Circuit Court in and for the County of Hudson on the fifteenth day of September, instant, to answer unto Anthony Nitti, an infant, who sues by Vito Nitti his next friend, in an action of tort, to his

damage Twenty-five thousand dollars ($25,000.) as is said. And have you then and there this writ.

WITNESS FRANCIS SWAYZE, Esq., a Judge of our said Circuit Court at Jersey City, aforesaid, this 31st day of August, One thousand nine hundred and ten.

JOHN F. CROSBY,
Clerk.

PIERRE P. GARVEN,
Attorney.

HUDSON COUNTY, ss.:

The defendant in this suit, the Public Service Railway Company, a domestic corporation, having been duly summoned to answer unto Anthony Nitti, an infant, who sues by Vito Nitti, his next friend, in an action of tort, to his damage, Twenty-five thousand dollars ($25,000.) and thereupon the said plaintiff by Pierre P. Garven, his attorney, complains:

For that the defendant now is and was at all times hereinafter mentioned a domestic corporation.

For that the defendant, by its servants and agents on the 15th day of June last, operated an electric street car along New York Avenue, a public highway, in the Town of Union, in the County of Hudson, and negligently, by its servants and agents, ran the said car against and upon the plaintiff, who was lawfully upon the said highway; and the negligence aforesaid consisted in this, that the defendant, by its servants and agents, did not use reasonable care to keep and

maintain control over the motion of the said car so that it might be propelled without injury to persons upon the said highway, and did not use reasonable care to keep a lookout for persons upon the said highway, who might be struck by the said car, and did not use reasonable care to give a warning of the approach of the said car to persons in the way of the passage thereof, and did not use reasonable care to operate the said car at a rate of speed safe to persons upon the said highway, and did not, although it knew that there were children habitually at the point on the said highway at which the plaintiff was, the plaintiff being an infant of tender years, use reasonable care by its servants and agents to keep and maintain a lookout for the said infants so as to use reasonable care in the operation of the car to prevent injury to the said children, and as a result of the said striking of the said plaintiff by the said car, by reason of the negligence of the defendant by its servants and agents aforesaid, he was painfully and permanently hurt and his leg was cut off, to the damage of the plaintiff Twenty-five thousand dollars ($25,000.).

WHEREFORE the plaintiff saith that he is injured to his damage Twenty-five thousand dollars ($25,000.) and therefore he brings his suit.

PIERRE P. GARVEN,
Attorney for Plaintiff.

Summons and Declaration, Former Action.

Served within Summons and Declaration Sept. 6.10 on the defendant Public Service Railway Company by leaving a true copy thereof with Royal Perrin, Agent of the said defendant company.

JAMES J. KELLY, Sheriff,
by Thos. Madigan, SDS

I hereby deputize Thos. Madigan to serve the within Writ. Witness my hand and seal this 6th day of Sept. 1910.

JAMES J. KELLY,
Sheriff.
by N. P. Wedin, Under Sheriff.

To the Defendant above named:

Take notice that unless you appear and plead, answer or demur, to the within declaration within twenty days from the day of service of the same upon you, judgment will be entered against you.

JOHN F. CROSBY,
County Clerk.

Filed in the Clerk's Office of Hudson Co. Sept. 13, 10.

[PLEA, FORMER ACTION.]

HUDSON COUNTY CIRCUIT COURT.

ANTHONY NITTI, who sues by VITO NITTO, his next friend, Plaintiff, *vs.* PUBLIC SERVICE RAILWAY COMPANY, Defendant.	In Tort.

And the said defendant, by Edwards & Smith, its attorneys, comes and defends the wrong and injury, when &c and says that it is not guilty of the said supposed grievances above laid to its charge, or any or either of them, in manner and form as the said plaintiff hath above thereof complained against it and of this it, the said defendant, puts itself upon the country, &c.

EDWARDS & SMITH,
Attorneys of Defendant.

STATE OF NEW JERSEY, } ss.:
County of Essex, }

of full age, being duly sworn, upon his oath says, that he is a Vice-President of the above named defendant, a corporation; that the plea by the said defendant above pleaded is not intended for the purpose of delay; and that this deponent verily believes that the

said defendant has a just and legal defense to said action on the merits of the case.

Sworn and subscribed before me at Newark, N. J. this day of , nineteen hundred and

Consent that the within plea be filed as in time, and affidavit thereto be waived,

PIERRE P. GARVEN,
Attorney for Plaintiff.

Filed in the County Clerk's Office, Hudson County, Oct. 7, 10.

JOHN F. CROSBY,
Clerk.

[NOTICE OF TRIAL, FORMER ACTION.]

HUDSON COUNTY CIRCUIT COURT.

NOTICE OF TRIAL.

ANTHONY NITTI, who sues by VITO NITTO, his next friend,
Plaintiff,

vs.

PUBLIC SERVICE RAILWAY COMPANY,
Defendant.

Sir:

Please to take notice, that I shall move the trial of the issue joined in this cause, before said Court,

on the Second Tuesday of December, next, at the Court House in Jersey City, at ten o'clock in the forenoon, or as soon thereafter as the said Court can attend to the same.

Dated, October 14 A. D. 1910.

Your obedient servant,

PIERRE P. GARVEN,
Atty.

To Edwards & Smith, Esq.,
Att'y for Def't.

I hereby acknowledge service of a copy of the within notice on me, this 14th day of October, 1910.

EDWARDS & SMITH.

Filed in County Clerk's Office, Hudson Co. Oct. 17, 10.

JOHN F. CROSBY,
Clerk.

[Notice of Trial, Former Action.]

HUDSON COUNTY CIRCUIT COURT.

Anthony Nitti, who sues by Vito Nitti, his next friend, Plaintiff, *vs.* Public Service Railway Co., Defendant.	In Tort. Notice of Trial.

Sir:

Please to take Notice, that I shall move the trial of the issue joined in this cause, before said Court, on the Tuesday of December next, at the Court House in the City of Jersey City, at ten o'clock in the forenoon, or as soon thereafter as the said Court can attend to the same.

Dated December 13, A. D. 1910.

Your obedient servant,

Pierre P. Garven,
Att'y.

To Edwards & Smith, Esq.
Att'y for Def't.

Filed in County Clerk's Office, Hudson Co., Dec. 15/10.

John F. Crosby,
Clerk.

I hereby acknowledge service of a copy of the within notice on me, this fourteenth day of December, 1910.

Edwards & Smith,
Attys for Defendant.

[Trial Book Entry, Former Action.]

CIRCUIT COURT, HUDSON COUNTY,

Dec. 22nd, 1910.

B. A. Vail, Judge.

Anthony Nitti by next friend *vs.* Public Service Railway Co.	Tort.

For Plaintiff
Alex Simpson

For Defendant
Edwards & Smith.

Jurors

1. Wm. O'Donnell
2. Henry J. Jachens
3. Bernard Hinse
4. Chas. King
5. Edward McLaughlin
6. Henry Ahlmeyer
7. Thomas Andrews
8. William Barr
9. George Glock
10. Louis Heinberger
11. George Scharfenberg
12. John Clancy.

Evidence

Anthony Nitti.

By direction of the Court the Jury finds in favor of the plaintiff and against the defendant, and assess the damages at Five Hundred Dollars ($500.).

And so say they all.

[Satisfaction of Judgment, Former Action.]

To the Clerk of the Circuit Court of Hudson County of the State of New Jersey:

Whereas Antonio Nitti, an infant ..... heretofore, to wit, on the twenty-third day of December in the year of Our Lord One Thousand Nine Hundred and Ten obtained final judgment in the Circuit Court of The County of Hudson in the State of New Jersey, against Public Service Railway Company for Five Hundred Dollars ($500) ..... and ..... NO ..... costs as by the record thereof may appear:

And whereas, Antonio Nitti has ..... received satisfaction for the same, these are, therefore, to desire and authorize you to enter an acknowledgment of satisfaction upon the record of the said judgment, and for your so doing this shall be your sufficient warrant and discharge in that behalf.

In Witness Whereof, I, Pierre P. Garven, Attorney of record for the said Antonio Nitti—hereunto set my hand and affixed my seal, the twenty-third day of December in the year of Our Lord One Thousand Nine Hundred and Ten.

Signed, sealed and Delivered in the presence of

George T. Vickers.

Pierre P. Garven. (Seal)

Satisfaction of Judgment, Former Action.

State of New Jersey, Hudson County } ss.:

Be it remembered, That on this Twenty-third day of December in the year One Thousand nine Hundred and Ten before me personally appeared Pierre P. Garven—who I am satisfied, is the person named in, and who executed the foregoing instrument, 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.

George T. Vickers,
Master in Chancery of New Jersey.

Filed Clerk's Office,
Dec. 28, 1910
Hudson County, N. J.

John F. Crosby,
Clerk.

[Petition and Order, Former Action.]

To His Honor William H. Speer, Judge of the Circuit Court.

Anthony Nitti who sues by Vito Nitti, his next friend, Plaintiff, *vs.* Public Service Railway Company, Defendant.	Petition.

The petition of Pierre P. Garven, respectfully shows:

That he is the attorney of record of the plaintiff in the above entitled cause.

That the plaintiff above named is an infant.

That judgment was recovered for the Plaintiff for the sum of Five Hundred Dollars and the said sum of money was paid to your petitioner as attorney of the plaintiff on the 23rd day of December, 1910.

That your petitioner has endeavored to have the father of the plaintiff assume the duties of guardianship so that the said money can be paid to him.

That the said father although so requested has neglected to assume the duties of guardianship.

Your petitioner therefore prays that an order may be made permitting him to pay the said sum of Five Hundred Dollars into Court.

And your Petitioner will ever pray &c.

Pierre P. Garven.

Petition and Order, Former Action.

State of New Jersey } ss.:
County of Hudson }

Pierre P. Garven being by me duly sworn on his oath according to law, deposes and says: That he is the petitioner in the foregoing petition named, and the same is true.

Pierre P. Garven.

Sworn and subscribed to before me at Jersey City, N. J. on this 17 day of February, 1911.

Alex Simpson,
Master in Chancery of New Jersey.

Anthony Nitti who sues by Vito Nitti, his next friend, Plaintiff, *vs.* Public Service Railway Company, Defendant.	

Upon Petition of Pierre P. Garven, verified, it is ordered: That the sum of Five Hundred Dollars, now in his hands, received by him as attorney for the plaintiff in the cause above entitled to be paid to the clerk of the Court to await further orders of the Court.

William H. Speer,
Judge.

Filed Feb. 20, 1911
Clerk's office
Hudson County, N. J.

John F. Crosby, Clerk.

[Affidavit of Raymond Dawson, Former Action.]

HUDSON COUNTY CIRCUIT COURT.

Anthony Nitti, by Vito Nitti, his next friend,
Plaintiff,

vs.

Public Service Railway Company,
Defendant.

Affidavit

State of New Jersey } ss.:
County of Hudson }

Raymond Dawson being duly sworn according to law, on his oath says that summons were issued in the above matter on August 31st, 1910, by Pierre P. Garven, as attorney for the plaintiff, and answer was filed on behalf of the defendant by Edwards & Smith as its attorneys. Notices of trial were served herein on October 17th, 1910 and on December 15, 1910, and the case came on for trial before Judge Vail in the Circuit Court on December 22, 1910, at which time Alexander Simpson appeared for Mr. Garven as attorney for the plaintiff, and this deponent appeared on behalf of the defendant. A jury was empanelled and sworn, and Anthony Nitti, father of the infant plaintiff, was sworn as a witness. This deponent consented to the entry of a verdict against the defendant for the sum of $500.00. The matter was submitted to the jury and they returned a verdict of $500.00 against the said defendant.

Affidavit of Raymond Dawson, Former Action.

The defendant paid the amount of said judgment on December 28th, 1910 to Pierre P. Garven, attorney of the plaintiff and obtained a warrant for the satisfaction of the judgment for that amount, and filed the same with the Clerk of this Court.

On February 20th, 1911 the said Pierre P. Garven filed a petition in this Court stating that he had received the sum of $500.00, being the amount of said verdict, and had requested the father of said infant plaintiff to take out papers of guardianship so that the said sum could be paid to him as such guardian, but that the father had refused so to do, and prayed that an order might be made directing the payment of said money to the Clerk of the Court. On the said day an order was made by Judge William H. Speer directing the payment of said money to the Clerk of this Court to await the further order of the Court. Said sum is now on deposit with the Clerk of said Court.

Deponent further says that the Clerk's Register, Book No. 22, case #22986, is a record of the above case and enumerates the following items:

"September 13, 1910	Summons and Narr,
October 17, 1910	Notice of Trial
December 15, 1910	Notice of Trial
December 28, 1910	Satisfaction of Judgment filed
February 21, 1911	Order entered".

The Clerk's Trial Book of December 22, 1910, at page 170, under the caption of the above case, recites: "Trial before Benjamin A. Vail, Judge, Alexander Simpson for the plaintiff and Edwards & Smith for the defendant. The jury sworn, enumerating the twelve jury men sworn, and

Affidavit of Raymond Dawson, Former Action.

under the heading of "Evidence", states "Anthony Nitti", and then continues, "By direction of the Court the jury finds in favor of the plaintiff and against the defendant and assesses the damages at $500.00, and so say they all".

Deponent further says that it now appears that no formal judgment was ever entered on said verdict, and prays that an order may be entered directing the entry of the judgment *nunc pro tunc.*

RAYMOND DAWSON.

Sworn and subscribed to before me
this 16th day of November, 1925

IRMA MIRROP
Notary Public of New Jersey
Filed Clerk's Office,
November 23, 1925
Hudson County, N. J.

JAMES J. McGOVERN, Clerk.

Mr. Boyd: I now offer in Evidence the Order made by Judge Ackerson dated November 18, 1925, directing that judgment be entered *nunc pro tunc.*

(Accepted as Defendant's Exhibit D-2 of this date.)

(Defendant's Exhibit D-2 reads as follows:—

[ORDER FOR JUDGMENT NUNC PRO TUNC, FORMER ACTION.]

HUDSON COUNTY CIRCUIT COURT

ANTHONY NITTI by VITO NITTI his next friend Plaintiff *vs.* PUBLIC SERVICE RAILWAY COMPANY Defendant.	ORDER.

It appearing by the affidavit of Raymond Dawson, of the firm of Edwards & Smith, filed herein, that issue was joined in the above entitled cause and that the same came on for trial before Hon. Benjamin A. Vail, Judge, and a jury, in this Court on December 22, 1910, and that a jury was empanelled and sworn, and by direction of the Court the jury returned a verdict in favor of the plaintiff and against the defendant in the sum of $500.00, and it further appearing that although the record of said trial and the rendition of a verdict against the defendant appears in said Trial Book, that no judgment was entered on said verdict, and application now being made by the attorneys of the defendant for the entry of such judgment *nunc pro tunc,* it is thereupon, on this 18th day of November, 1925.

ORDERED that judgment be entered in favor of the plaintiff, Anthony Nitti, by Vito Nitti, his next friend, and against the defendant, Public Service Railway Company, for $500.00 as of December 22,

Order for Judgment Nunc Pro Tunc, Former Action.

1910 in accordance with the record of said case in the Clerk's Trial Book above mentioned.

HENRY E. ACKERSON, JR.,
C. C. J.

Filed Clerk's Office,
Nov. 23, 1925.
Hudson County, N. J.

JOHN J. McGOVERN,
Clerk.)

By Boyd: I now offer the Record in the present suit, which consists of the following:

Summons and Complaint
Answer
Reply
Notice of Trial
Rule to Show Cause
Memorandum of Judge Ackerson
Rule discharging Rule to Show Cause
Notice of Trial

(Accepted as Defendant's Exhibit D-3 of this date.)

(Defendant's Exhibit D-3 is as follows:—Summons, Complaint, Answer, Reply and Notice of Trial in Present Action.)

HUDSON COUNTY CIRCUIT COURT.

ANTHONY NITTI, Plaintiff, *vs.* PUBLIC SERVICE RAILWAY COMPANY, Defendant.	Action at Law. NOTICE OF TRIAL.

TAKE NOTICE that I will move the trial of the above entitled cause before the Hudson County Circuit Court, at the Court House in Jersey City, on the third Tuesday in September, 1925, at ten o'clock in the forenoon of that day or as soon thereafter as counsel can be heard.

Dated July 13th, 1925.

Respectfully,

RICHARD DOHERTY,
Attorney of Plaintiff.

To JOSEPH COULT, Jr.,
Attorney of Defendant.

Service acknowledged this 14th day of July, 1925.

JOSEPH COULT,
Attorney for Defendant.

Filed Clerk's Office
August 25, 1925

JOHN J. McGOVERN,
Clerk.

[Affidavit of Richard Doherty, Former Action.]

HUDSON COUNTY CIRCUIT COURT.

Anthony Nitti, Plaintiff, *vs.* Public Service Railway Company, Defendant.	Action at Law. Affidavit.

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

Richard Doherty, being duly sworn on his oath according to law, says that he is the attorney of Anthony Nitti, in an action pending in the above entitled cause wherein the said Anthony Nitti is plaintiff, and Public Service Railway Co. is defendant. The action was commenced by the issue of a summons May 29, 1925, and was brought to recover damages for injury sustained by the plaintiff through being run over by an electric car of the defendant, June 15, 1910, when the plaintiff was a boy of six years of age. The plaintiff attained the age of twenty-one years shortly before the institution of the action referred to. Before the commencement of said action deponent investigated the records of the court in respect of an alleged action claimed to have been brought heretofore in this court, and likewise interviewed Vito Nitti, supposed to have represented the plaintiff in said action as next friend. The search of the court records disclosed that no judgment had been entered, nor rule for judgment entered, and that

no rule appointing a next friend or guardian *ad litem* had been made. Deponent's inquiries of Vito Nitti as to his participation in the former procedure elicited from him that at the time he was an immigrant recently arrived from Italy and was wholly unfamiliar with legal procedure in this country and could at the time neither speak nor understand the English language, his only recollection of the matter was that an Italian friend brought him to Pierre P. Garven who was then the Prosecutor of the Pleas, and enlisted Garven's interest in the case; that he signed no papers whatever; that he was notified to appear at the Court House and upon arriving entered a court room where there was a judge sitting; Pierre P. Garven was not present, that a jury was sitting in the case and that he was called before the judge and some inquiry was made as to whether he had to pay a doctor's bill for his boy; that he did not consent to the settlement of the case for $500 or for any amount; that Garven later told him that the case had been settled for $500 and offered to give him a check for that amount which he refused to accept.

December 2, 1925, deponent, while searching for the records of another case pending in this court, casually observed the affidavit of Raymond Dawson, Esq., and the order made in the suit so started in 1910, by which order judgment *nunc pro tunc* was entered in favor of the plaintiff for $500. Neither Anthony Nitti nor Vito Nitti, his father, received any notice of motion or other application for said order. The action brought by deponent has been on the calendar of the Circuit Court for the term of September, 1925, and has been numbered 152 on the list of the approaching December term. By an answer filed therein by the de-

Affidavit of Richard Doherty, Former Action.

fendant, June 20, 1925, it sets up that a judgment was rendered in a former action, and deponent by his reply, pleaded that there was no such record and that no guardian *ad litem* had been appointed in the former action. Deponent says that the making of the said order for entry *nunc pro tunc* was legally unwarranted because the former action was never ripe for the entry of judgment at any time in view of the failure to appoint a guardian *ad litem,* and deponent further says that the alleged award of $500 by the verdict said to be rendered therein was inadequate, unconscionable and fraudulent as to the plaintiff, Anthony Nitti.

The said Pierre P. Garven is no longer a resident of this State, and for more than two years past, has been a resident of Reno in the State of Nevada.

RICHARD DOHERTY.

Sworn to and subscribed before me this 3rd day of December, 1925.

MOLLIE SWED,
Notary Public of New Jersey.

[RULE TO SHOW CAUSE, FORMER ACTION.]

HUDSON COUNTY CIRCUIT COURT.

ANTHONY NITTI, Plaintiff, *vs.* PUBLIC SERVICE RAILWAY CO., Defendant.	Action at Law. RULE TO SHOW CAUSE.

Upon reading the affidavit of Richard Doherty, attorney for Anthony Nitti, plaintiff, of full age, it is on this 3rd day of December, 1925,

ORDERED that the defendant, Public Service Railway Co., show cause before the Hudson County Circuit Court on Saturday, the 19th day of December, instant, why the order made herein November 18, 1925, authorizing the entry of judgment in favor of the plaintiff, Anthony Nitti, suing by next friend, and against the defendant, Public Service Railway Co., *nunc pro tunc,* and which order has been entered in the minutes of this court in Book 71, page 279, should not be vacated and set aside on the ground that the same was entered improvidently and to the prejudice of the plaintiff, Anthony Nitti.

It is further Ordered that in the meantime either party has leave to take testimony upon two days' notice.

It is further Ordered that a copy of this rule to show cause and of the affidavit referred to herein, be served upon Edwards & Smith, attorneys of the defendant in the original action, and Joseph Coult, attorney of the defendant in the sec-

ond action between the parties, within three days from the making hereof, which affidavit and rule to show cause may be certified by the present attorney of the plaintiff.

HENRY E. ACKERSON, JR.,
Judge.

Service of a copy of the within rule to show cause and affidavit is hereby acknowledged this 3rd day of December, 1925.

JOSEPH COULT,
Atty. of Deft.
EDWARDS & SMITH.

Filed Clerk's Office,
Hudson County.
May 17, 1926 1.52 p. m.

John J. McGovern,
Clerk.

[MEMORANDUM DISCHARGING RULE TO SHOW CAUSE, FORMER ACTION.]

HUDSON COUNTY CIRCUIT COURT.

ANTHONY NITTI, Plaintiff, *vs.* PUBLIC SERVICE RAILWAY CO., Defendant.	MEMORANDUM.

ACKERSON, J.:

This matter comes before me upon a Rule to Show Cause why the Order made by this Court

herein on November 18, 1925, authorizing the entry of judgment in favor of the plaintiff, Anthony Nitti, suing by his next friend, and against the defendant, Public Service Railway Company, *nunc pro tunc,* should not be vacated and set aside on the ground that the same was entered improvidently and to the prejudice of the plaintiff, Anthony Nitti.

Depositions were taken under this Rule from which it appears that Anthony Nitti was born in Italy on March 16, 1904 and that he came to this country in the same year, with his father, Vito Nitti and located in Hudson County, where they have ever since lived. The depositions supplemented by the record of the Court further show that sometime in June, 1910, Anthony Nitti, the son, was run into by a trolley car of the defendant Company and his right leg cut off at the hip, that thereupon the father, who could not write and did not speak English well, went with the boy to Pierre P. Garven, an attorney of this court, and authorized him to bring suit against the defendant company, and that at this time, a friend of the Nittis by the name of Marice went with them to the lawyer's office. It appears that the attorney Garven, sent the Nittis over to Hon. Alexander Simpson, also an attorney of this court, who was to represent them at the trial. Thereafter, the case came on for trial in the Hudson County Court House, before Judge Vail and a jury and that Mr. Simpson appeared, representing Anthony Nitti, who was there with his father and that the defendant company was represented by Edwards & Smith, Mr. Dawson of that firm appearing as the trial attorney, and that a settlement was effected, whereby $500. was to be awarded to the boy Anthony Nitti.

Memorandum Discharging Rule to Show Cause, Former Action.

Vito Nitti, the father of the boy, in his deposition admits all of this, although he intimates that the $500. was to be paid to him; apparently, however, for the use of the boy and he further admits that he was sworn as a witness and took the witness stand and that Mr. Simpson, the boy's attorney, asked him questions and on cross-examination he admitted that he was asked on the witness stand whether he wanted to settle the case for $750. and his answer was "He asked to settle the case for $750. for myself," and then he was asked "And what did you say", Answer, "I said yes". He was unable to remember whether the Judge talked to the jury or not, but he says that Mr. Simpson, his son's attorney, talked before the Judge and the jury, although he does not remember what was said. He further stated that thereafter he went over to Mr. Simpson's office and signed a paper and that later he went back to get the money, but Mr. Simpson told him he would have to give a bond, as the money was for the boy.

The affidavit of Mr. Dawson who appeared as the trial attorney for the defendant company, states that the case was regularly brought on for trial and that Vito Nitti, father of the infant plaintiff was sworn as a witness and that the deponent thereupon consented to a verdict against the defendant company for the sum of $500. which was submitted to the jury and that they returned a verdict for that amount against the defendant, and that the defendant paid this amount on December 28, 1910 to Pierre P. Garven, attorney for the plaintiff and obtained a warrant for the satisfaction of the judgment for that amount and filed the same with the Clerk of this Court.

The records in the County Clerk's Office show that Summons and Narr were filed September 13,

Memorandum Discharging Rule to Show Cause, Former Action.

1910, Notice of Trial, October 15, 1910, Notice of Trial, December 15, 1910, Satisfaction of Judgment filed December 28, 1910, Order directing the payment of the $500. into Court filed February 21, 1911.

There is no record anywhere of any formal judgment having been entered, but the Clerk's Trial Book of December 22, 1910, at page 170, under the caption of the above case, shows the following:

> "Trial before Benjamin A. Vail, Alexander Simpson for the plaintiff, and Edwards & Smith for the defendant. The jury sworn, enumerating the twelve men sworn, and under the head of evidence states 'Anthony Nitti' and then continues, "By direction of the court the jury finds in favor of the plaintiff and against the defendant and assesses the damages at $500. and so say they all".

There is an inherent common-law power in the courts, to cause the entry of judgments *nunc pro tunc* in proper cases and in furtherance of justice. 23 Cyc. 840.

A motion for the entry of judgment *nunc pro tunc* is addressed very largely to the discretion of the Court. 23 Cyc. 841.

There is nothing whatever before me to suggest that any advantage was taken of the infant plaintiff or that the proceedings were in any way tainted with fraud. The attorneys involved on both sides, were careful, competent and efficient officers of this Court, and the infant plaintiff, although only six or seven years of age at the time of the trial, was not only represented by competent counsel, but appeared in court with his father, who in turn had the benefit of the advice

of his friend Marice, who spoke and understood English, and a careful reading of the deposition of Vito Nitti, the father of the boy, leads irresistibly to the conclusion that his only complaint of what happened at the time is, that the boy was awarded the verdict and that he could not get the money for his own use. The verdict was in favor of the boy and the money is still in court and can be obtained by him upon proper application and so far as the father is concerned, he was under no disability at the time of the trial and could have brought an independent action to recover damages for himself, or he could, immediately after the trial, have recovered such damages as he was entitled to by instituting a separate suit.

Some courts have said that the evidence to justify the entry of a judgment *nunc pro tunc,* must be a matter of record, that is, some entry, note or memorandum from the records or quasi records of the Court, which shows in itself, without the aid of parole evidence, that the alleged judgment was rendered, and what were its character and terms, and that it would not rest upon the judge's recollection of what the situation was, etc. In the present case, however, the Clerk's Minute Book of the trial clearly shows what happened, and this, coupled with the papers filed in the cause, clearly shows that a verdict was rendered by a jury, to which a proposition of settlement had been submitted, and it is not necessary to resort to any parole evidence whatsoever, to ascertain what the real situation was.

It is insisted, however, that there is no record whatever that Anthony Nitti was represented by a next friend in accordance with the requirements

of the Practice Act. The cause, however, is entitled "Anthony Nitti by Vito Nitti, his next friend, plaintiff". Section 18 of the Practice Act provides as follows:

> "If an infant is entitled to an action or if an action is brought against him, his guardian duly appointed or specially admitted for that purpose, shall be permitted to prosecute or defend; but in no case shall the action be staid until the infant arrives at full age".

and it is undoubtedly the rule that a father has the first and best right to act as the next friend of his infant child, in any litigation necessary for the protection of his child's rights.

Rue v. *Meyers,* 45 Stewart, 377.

It would appear, therefore, that if an infant appeared in court as a party litigant, accompanied by his father, that the Court could, without the necessity of a formal written order, "Admit" the father to represent the son for the purpose of such a suit and inasmuch as the suit was apparently started under the caption above mentioned, it is reasonable to assume that the able Circuit Court Judge, who by the record took the verdict in this case, admitted the father to appear and prosecute the suit as the representative or next friend of his son.

It would appear, therefore, that this is a proper case for the entry of a judgment *nunc pro tunc* upon the verdict of the jury, thus clearly proven to have been rendered, provided such entry would be in the furtherance of justice. The case was instituted and the verdict rendered in the year 1910 and it is reasonable to assume that the wit-

nesses who might be produced on the part of the defendant company had dispersed or the recollection of the evidence become clouded or eradicated entirely and this would be much more likely on the part of the witnesses for the defendant company than it would be on the part of the plaintiff, himself, so the defendant company would be put to a great disadvantage, for having consented to a verdict properly rendered, it might naturally rely upon such proceedings as a finality and in making the settlement of $500. for the boy, the father, as well as the attorneys representing the boy, undoubtedly took into consideration, the question of liability and may have concluded that it was better to accept the $500. than to take a chance of losing everything, and while it may be said that $500 is not at all adequate for the loss of a leg, nevertheless, all of these matters must be taken into consideration in deciding the question as to whether the furtherance of justice required the entry of the judgment *nunc pro tunc* in this matter, and I conclude that it did.

There is only one circumstance which would impel me to set aside the order of this court made on November 18, 1925, directing the entry of a judgment *nunc pro tunc* in the above entitled matter, and that is the absence of Notice to the other side of the application for such an Order, but inasmuch as the Rule to Show Cause granted to the plaintiff's attorney, permitted the taking of depositions and the parties seem to have fully availed themselves of that opportunity, it would serve no useful purpose to set aside the judgment with leave for the attorney of the defendant to apply again for such an order upon notice. All of the parties are now in court on this Rule to

Show Cause and if there is any further testimony or evidence which the attorney for the plaintiff desires to present to the Court, he may do so within ten days from January 18, 1926, otherwise the Rule to Show Cause will be discharged and an Order may be presented accordingly.

HENRY E. ACKERSON, JR.,
Judge.

[RULE DISCHARGING RULE TO SHOW CAUSE, FORMER ACTION.]

HUDSON COUNTY CIRCUIT COURT.

ANTHONY NITTI by Vito Nitti his next friend, Plaintiff, *vs.* PUBLIC SERVICE RAILWAY CO., Defendant.	Action at Law. RULE DISCHARGING RULE TO SHOW CAUSE.

The rule, heretofore granted in the above entitled cause at the instance of the plaintiff directing the defendant to show cause why the order made by this court herein on November 18th, 1925, authorizing the entry of judgment in favor of the plaintiff Anthony Nitti, suing by his next friend, and against the defendant Public Service Railway Company, *nunc pro tunc,* should not be vacated and set aside on the ground that the said was entered improvidently and to the prejudice of the

Rule Discharging Rule to Show Cause, Former Action.

plaintiff Anthony Nitti, and depositions having been taken under the said rule, and the court having considered the same, and having heard the argument of counsel for the respective parties herein.

It is on this 4th day of February Nineteen Hundred and Twenty Six ordered that the rule to show cause aforesaid, be, and the same hereby is, discharged.

Henry E. Ackerson, Jr.,
Circuit Court Judge.

On motion of
Edwards & Smith,
Attorney of Defendant.

Mr. Boyd: Under the Rule to Show Cause, depositions were taken before Warren Dixon, Supreme Court Commissioner under Order of December 11, 1925. Edwards & Smith by Mr. Raymond Dawson appeared as attorney for the Defendant and Mr. Richard Doherty appeared as attorney for the Plaintiff.

Anna Joel was the stenographer and was duly sworn, and signatures of the witnesses were first duly waived.

I offer a copy of the said depositions in evidence.

(Accepted and Marked as Defendant's Exhibit D-4 of this date.)

[Depositions, Former Action.]

HUDSON COUNTY CIRCUIT COURT.

Anthony Nitti, Plaintiff, *vs.* Public Service Railway Co., Defendant.	On Rule to Show Cause.

Depositions taken this 11th day of December 1925, at four P. M., before Warren Dixson, Esq., Supreme Court Commissioner, at his office, room 606, Trust Co. of New Jersey Building, Jersey City. Appearances, Edwards & Smith (Mr. Raymond Dawson), attorneys for defendant, Richard Doherty, attorney for plaintiff. Anna Joel was duly sworn well and truly to take and transcribe the testimony as stenographer. Signatures of witnesses were first duly waived.

Vito Nitti, being first sworn and examined by Richard Doherty on behalf of the plaintiff, testified as follows:

Q. What is your name? A. Vito Nitti.

Q. Where do you live now? A. 55 Jordon Avenue.

Q. You're the father of Anthony Nitti? A. Yes, sir.

Q. Where were you born? A. Italy.

Q. And when did you come to this country? A. 1904.

Q. Where did you live when you first came here? A. In Jersey City.

Q. Did you ever live in the Town of Union? A. After about five years we went to Union City.

Q. After you were here five years you moved to Union City? A. Yes.

Q. Were you living there when your son, Anthony, was born? A. No, he was born in Italy.

Q. Where was your son born? A. In Italy.

Q. When was he born? A. March 16, 1904.

Q. How old is he now? A. Twenty-one years.

Q. Is that right? A. Yes.

Q. Were you able to read and write when you came to this country? A. No.

Q. Were you able to read and write at the time of the injury to your son? A. No.

Q. What was your business from the time you came to this country up to the time when he was hurt? A. Hod carrier.

Q. And were you able to speak English at the time when he was hurt? A. I don't speak very well now.

Q. I am asking you if you were able to speak English at the time he was hurt? A. No.

Q. Were you able to understand English? A. I don't understand everything, I talk a little.

Q. Had you associated with people who talked English? A. I talk Italian.

Q. You were with people who talked Italian? A. Yes.

Q. When Anthony was hurt, how badly was he hurt? A. He had his leg cut off.

Q. Which leg? A. The right leg.

Q. Where was it cut off? A. I don't know.

Q. Was it up at his hip? A. Yes.

Q. When he was hurt, did you see any lawyer about bringing a case in court? A. A fellow named Marice brought me to Garven.

Q. Who was Garven? A. The lawyer.

Q. Where did Marice live at that time? A. I don't remember the number, Third Street, down town, Jersey City. He was a friend of mine.

Q. Where did you see Garven? A. He brought me to see Garven who was in the old court house.

Q. When Marice brought you to Garven, what took place, what did you do? A. Marice asked Garven if he would take the case, and Garven said yes. The next time I went there Garven sent me to Alexander Simpson.

Q. Where did you see Simpson? A. In an office across the street from the court house.

Q. What happened there? A. Simpson asked me some questions.

Q. What did you next hear about the case? Did you afterwards go to the court house on the case? A. I went to the court house and I went to a court room where there was a judge sitting and a jury in a jury box.

Q. Was Garven there? A. Garven was not there, but Simpson was there.

Q. Did Mr. Simpson tell you what you were there for? A. Simpson said in front of the judge, "This man is the father of this boy. This boy was hurt by the Public Service; he had his leg cut off. The Public Service is willing to give $750—$250 for my work and $500 for this man."

Q. Were you sworn there? A. I was sworn but I did not give any testimony. Mr. Simpson was the only one who talked.

Q. Was Marice there? A. No, Marice's brother was there.

Q. Did you know at that time that the $500 was to pay Anthony for losing his leg? A. I knew after.

Q. Did you know at that time? A. Marice told me Simpson was going to give it to me. After we were in court Simpson brought me over to his office and he had me sign some papers.

Q. What did he say then? A. He said, "Sign this paper" and I made a cross.

Q. Go ahead, then what? A. About a week later, when I went to take the money Simpson told me, "If you want to take this money you will have to get two bondsmen."

Q. Go ahead. A. He told me the money did not belong to me; it belonged to the boy, and when he said that I would not do anything.

Q. Why didn't you do anything when you heard the money was for the boy? A. Because I saw the boy with only one leg, and I had a lot of trouble myself running up and down every week for five or six months to Simpson's office.

Q. Did you have any doctor's bills for Tony? A. No, he was in the hospital.

Q. Do you know what the papers were that you signed in Mr. Simpson's office after the time you went to court? A. I don't know what the papers were which I signed in Mr. Simpson's office after we left the court.

Q. Did you ever sign any papers before you went to court? A. No.

Q. Did you ever sign any papers asking the court to make you the boy's guardian before you went to court? A. No.

Q. Do you remember seeing this man in court? A. No, I don't remember, it was fifteen years ago.

Q. Did you ever get the $500? A. I did not get the $500 nor did I get anything at all out of the case.

Cross-examination by Mr. Dawson:

Q. Was there anybody else in court besides the jury in the box, the judge, Simpson and you, was there any lawyer there? A. No, just Simpson.

Q. Was there a lawyer there for the Public Service? A. I don't know, there were so many men there.

Q. Did you know Marice's brother very well, the man who went up to court with you? A. Yes.

Q. How long did you know him before the boy was hurt? A. I knew him about four or five years, more than that.

Q. You knew him in the old country? A. No.

Q. In this country? A. As long as he lived in Jersey City.

Q. Did he work with you, this fellow Marice? A. No.

Q. How many times did you go to Garven's office before you went to Simpson's office? A. I remember it was one or two times, no more than that.

Q. When you went to Garven's office with Marice, did Marice ask him if he would take the case? A. Yes.

Q. And what did he say? A. He said Yes.

Q. And what did you say? A. I said nothing.

Q. Did you tell Garven you wanted him to take the case? A. That fellow told Garven.

Q. Did he tell you that he would ask Garven to take the case? A. Yes.

Q. Did Garven ask any questions about the case, how the boy was hurt, etc.? A. Yes.

Q. Did you tell him what you knew about it? A. Marice told Garven.

Q. Could Marice speak English pretty good? A. Yes, sure.

Q. When you first went to Simpson, did Marice go there with you? A. Yes.

Q. Did you sign any papers the first time you went to Simpson's office? A. No.

Q. Did you talk to Simpson about the case? A. Yes.

Q. Did he ask you about the accident? A. Yes.

Q. Did he ask you if you were the father? A. Yes.

Q. Did he tell you that he would take the case, that he was going to court with you? A. Sure, he told me he would take the case for Garven.

Q. Did he tell you when to come to court? A. Yes.

Q. But you're sure you did not sign any paper before you went to court? A. No, I did not sign any.

Q. You're sure about that? A. I remember.

Q. Did Simpson tell you what you had to do to bring suit for the boy? A. Yes.

Q. Did you sign some papers then? A. No.

Q. How long was it after you were in Simpson's office that you went over to court? A. I don't remember.

Q. Do you think it was quite a while or pretty soon after? A. I don't remember the date. I went there a lot of times before I went to court.

Q. Was Anthony with you when you went to court? A. Yes.

Q. Who else was with you when you went to court besides Marice and the boy? A. Anthony was there.

Q. Was there a doctor there in court? A. No.

Q. Were you sworn before you went on the witness stand? A. Yes.

Q. If you were sworn, who asked you questions? A. Nobody.

Q. What did you do when you got on the witness stand? A. The judge did not ask me any questions at all, just Simpson, that's all.

Q. What did Simpson ask you? A. I said before, he said, "This man is the father of this boy, this boy got hurt."

Q. Did he ask you if you were the father? A. He knew I was the father.

Q. When you were on the stand, what did Simpson ask you then? A. He asked me if I was the father of the boy.

Q. What else, did he ask you if you wanted to settle the case for $750? A. He asked to settle the case for $750 for myself.

Q. And what did you say? A. I said, yes.

Q. Did he ask you any more questions? A. No.

Q. Did the judge ask you any questions? A. No.

Q. That was all that took place? The jury was there. Did the judge talk to the jury? A. I don't remember.

Q. Did Simpson say anything to the jury after that? A. He talked before the judge and the jury.

Q. Then did the jury stand up and bring in a verdict for $750? A. The jury did not say anything.

Q. Did the judge say anything to the jury? A. I don't remember.

Q. Then you got down out of the stand? A. Yes.

Q. Did you go out with Simpson? A. Yes.

Q. Over to Simpson's office? A. Yes.

Q. Marice go with you? A. Yes.

Q. When you were over there Simpson said you had to sign a paper with two names on it before you could get the money? A. Yes.

Q. Did you go over there right after the trial? A. Yes.

Q. What did you go over there for? A. He wanted me to sign some paper.

Q. Did he tell you what the papers were for then? A. For taking the $750.

Q. Anybody else sign the papers that day? A. No.

Q. Did he tell you what those papers were? A. No.

Q. Did Marice tell you what those papers were? A. No.

Q. Did Simpson read the papers to Marice? A. I don't remember.

Q. Where is Marice now? A. I don't know.

Q. When did you see him last? A. About a couple of years ago.

Q. What is his work? A. He's a tailor.

Q. When you were in court, did they ask you anything about doctor's bills? A. I don't remember.

Q. You don't remember much about what took place in court so long ago? A. No; it was in the new court house.

Q. Did you ever ask Simpson for the money? A. Sure, he said I needed bonds.

Q. Did you try to get the bonds? A. No.

Q. Why didn't you try to get the bonds? A. I tried, I thought the money belonged to me.

Q. Could you get anybody to sign the bond? A. No.

Q. Did you think the money belonged to you? A. I thought it belonged to me.

Q. What did Simpson say? A. After he told me the money belonged to the boy.

Q. Then you did not try to get it after that? A. Simpson told me that it belonged to the boy.

By Mr. Doherty:

Q. You told me when I was questioning you that you did not give any testimony when you sat alongside the judge, then you told Mr. Dawson that they did ask you if you were the boy's father and if you wanted to take $750. Which was right?

Did they ask you questions or did Mr. Simpson do all the talking? A. Mr. Simpson.

Q. Did they ask you any questions at all? A. No, I was only about five minutes in the court. That's all.

Affidavit of Richard Doherty.

STATE OF NEW JERSEY, }
COUNTY OF HUDSON, } ss.:

RICHARD DOHERTY, being duly sworn on his oath, testifies as follows: I am the attorney of Anthony Nitti in an action now pending in the Hudson County Circuit Court, wherein he is the plaintiff and the Public Service Railway Co. is the defendant. I was retained in the action in the spring of the present year, to bring suit for the recovery of damages sustained through the amputation of the plaintiff's leg when run over by a car of the defendant in the year 1910, when he was a child of six years. Upon information given me I searched the records of the Hudson County Circuit Court and learned therefrom that in September 1910, a summons was issued by Pierre P. Garven, purporting to act in behalf of the plaintiff, against the defendant at the alleged suit of Vito Nitti, as next friend of the plaintiff, Anthony Nitti. The files of the court showed that the summons were served, a declaration filed and that the case was noticed for trial. No plea was filed by the defendant, and no rule was entered appointing anyone as next friend of the plaintiff, no rule for judgment was entered, but on December 28th, 1910, there was filed what purported to be a satisfaction of judgment executed by Pierre P. Garven, as attorney of the plaintiff. The records further disclosed

Affidavit of Richard Doherty.

that Mr. Garven presented to Judge Speer, a petition setting forth the obtaining of a judgment for $500 and the refusal of Vito Nitti to qualify as general guardian and praying leave to pay the sum of $500 which he had received from the defendant, into court. Judge Speer made an order to that effect which was entered February 21, 1911.

In the present action, the defendant in its answer, after responding to the allegations of negligence set up as a second defense that the plaintiff December 22, 1910, by his next friend, Vito Nitti, recovered a judgment against the defendant in the sum of $500 for the same cause of action sued upon, and that such judgment was paid.

For reply, the plaintiff set up that there was no such record as that of the judgment referred to, and further set up that Vito Nitti was not the next friend of the plaintiff in the proceedings mentioned.

I received no notice of the motion for the entry of the judgment *nunc pro tunc,* which was alleged in the former proceeding on November 18, 1925 and became aware of the same casually on December 2, when it was brought to my attention while I was in the County Clerk's office examining the files in another matter. The action in which I represent the plaintiff is at issue and is duly on the list for trial of the present December 1925 Term.

Sworn to and subscribed before me this day of December, 1925.

Filed Clerk's Office
May 17, 1926
Hudson County, N. J.

JOHN J. McGOVERN,
Clerk.

Plaintiff's Motion to Direct Verdict.
Defendant's Motion to Direct Verdict.
Direction of Verdict for Defendant.

Mr. Doherty: The plaintiff moves for a direction of verdict in favor of the plaintiff on the ground that the record produced here does not constitute any bar to the present action.

On the ground that at the time of its institution, there was no semblance of a judgment of record against the defendant, and that the action of the Court since the institution of the present suit in connection with the judgment *nunc pro tunc,* was improper, beyond its jurisdiction and abusive of its judicial discretion.

The Court: I deny the motion and will allow you an exception.

Mr. Doherty: Exception.

Mr. Boyd: I move for a direction of verdict in favor of the defendant on the ground that there is a judgment on record, which has been introduced in evidence, and which is a bar to this action; that it has been stipulated by Mr. Doherty that the same parties are involved in this suit as were involved in the suit in 1910, and that it arose out of the same cause of action, and therefore the judgment filed *nunc pro tunc* is a bar of this action.

The Court: I will grant this motion and allow Mr. Doherty an exception.

Gentlemen of the Jury: I direct that you find a verdict in favor of the defendant and against the plaintiff in this present suit, of no cause of action.

The jury thereupon retired and returned and say that in accordance with the direction of the court they find in favor of the defendant and against the plaintiff of no cause of action.

Rule for Judgment.

#35117

HUDSON COUNTY CIRCUIT COURT.

ANTHONY NITTI, Plaintiff, *vs.* PUBLIC SERVICE RAILWAY CO., Defendant.	Action at Law. RULE FOR JUDGMENT.

This cause having come regularly before the Hudson County Circuit Court, the cause was tried before the Honorable Henry E. Ackerson, Jr., and a jury in the presence of counsel for respective parties on May 5th, 1926.

At the conclusion of the defendant's case, by direction of the court, the jury found in favor of the defendant, Public Service Railway Co., and against the plaintiff, Anthony Nitti.

It is therefore ORDERED that judgment final be entered in favor of the defendant, Public Service Railway Co., and against the plaintiff, Anthony Nitti, and let the defendant's costs be taxed.

HENRY E. ACKERSON,
Judge.

On Motion of
JOSEPH COULT,
Attorney of Defendant.

Rule actually entered this 13th day of May, 1926.

Recorded in Liber 36 of Circuit Court Judgment page 38.

Judgment.

#35117

ANTHONY NITTI, Plaintiff, *vs.* PUBLIC SERVICE RAILWAY CO., Defendant.	Entered May 13, 1926. Damages Costs Total JOSEPH COULT, Attorney.

Judgment on verdict in the above entitled cause was entered in this court on the 13th day of May in the year of Our Lord One Thousand Nine Hundred and 26 in favor of the defendant, Public Service Railway Co. and against the plaintiff, Anthony Nitti, in a plea of action at law for the sum of and cents, damages, and cents costs of suit.

Judgment entered and signed this 13th day of May 1926.

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New Jersey Court of Errors and Appeals

ANTHONY NITTI,
Plaintiff-Appellant,

vs.

PUBLIC SERVICE RAILWAY CO.,
Defendant-Appellee.

On Appeal From Hudson County Circuit Court.

BRIEF FOR APPELLANT.

This appeal is from a judgment entered in the Hudson County Circuit Court upon a verdict for defendant directed by the Court in a case wherein the plaintiff sought damages for the loss of a leg when run over by a trolley car of the defendant. The injury occurred June 15, 1910, when plaintiff was a boy of six years. The present action was commenced after his attainment of the age of twenty-one and the verdict was directed upon the theory that the action was barred by a former judgment. The proof concerning the circumstances of the former action was submitted to the Court in the form of records which made full disclosure of the former litigious gestures, the attendant circumstances and the attitude of the parties towards same.

The facts thus shown were as follows:

At the time of the injury, the plaintiff was the son of Vito Nitti who had come to this country from Italy in 1904, bringing with him the plaintiff, born the same year. When the injury occurred, the father was illiterate, did not understand English and associated only with people

who talked Italian (pp. 45-46). An Italian friend named Maurice interested himself in the case and brought the father to the office of Pierre P. Garven, an attorney, who on August 31st, 1910, commenced, by summons, an action against the defendant in behalf of the plaintiff, reciting in the summons and declaration that the plaintiff sued by Vito Nitti, his next friend (pp. 13-14-15). The Sheriff's return shows that the summons and declaration were served simultaneously on September 6th, 1910, and they were filed with the clerk on September 13th (p. 16). To this declaration the defendant filed a plea of general issue October 7th, and a notice of trial was given for the ensuing December term. According to the clerk's records (p. 13, ll. 10-20), the next activity in the case was the filing of a warrant to satisfy a supposed final judgment for $500 executed by Mr. Garven, December 23rd (p. 22). Next in sequence was a petition by Mr. Garven, February 17th, 1911, setting forth that "a judgment" was recovered for $500, the amount of which was paid to himself, and that the plaintiff's father neglected to assume the duties of guardianship, and praying leave to pay the sum so received into Court. An order was made to that effect (pp. 24-25). The money was paid into, and has since remained in, the clerk's office (p. 12, l. 20).

In the former action, Vito Nitti was not specially admitted to prosecute the same as next friend; there was no formal minute or entry of any verdict; and there was no judgment entered.

After reaching full age, the plaintiff retained his present attorney to institute action and the latter, upon search of the Court records, learned that no guardian had been appointed in the former case, and no verdict or judgment entered therein, (pp. 32-33). Accordingly the present action was instituted and the defendant set up as a second

defense that plaintiff was barred by the recovery of a former judgment December 22, 1910, (p. 6). The plaintiff's replies were *null tiel record* and that Vito Nitti was not the plaintiff's next friend, nor guardian *ad litem,* (p. 7). On the issue thus joined, the case was noticed for trial at September, 1925 term, (p. 31), and was on the list awaiting trial November 18th, 1925, when Mr. Dawson, of the firm of Edwards & Smith, the defendant's attorneys of record in the former case, without notice to the plaintiff or his alleged next friend, presented to the Circuit Court judge, an affidavit setting forth the rendition of a verdict December 22, 1910, as disclosed by an entry in the clerk's trial book, averring that no formal judgment was ever entered on said verdict and praying for an order to direct entry of judgment *nunc pro tunc,* (pp. 26-27-28). The order so applied for was made and entered *ex parte.* Two weeks later, knowledge of the order was obtained casually by the plaintiff's attorney who without delay, applied for, and was allowed, a rule to show cause why it should not be vacated because of having been entered improvidently and to the prejudice of the plaintiff, (p. 35). The affidavit accompanying the application set forth the absence of order admitting next friend and of records of verdict and judgment, and further that the alleged award of $500 by the verdict was inadequate, unconscionable and fraudulent as to the plaintiff. Under the rule to show cause, testimony was taken and Vito Nitti, the supposed next friend, testified to his illiteracy; to the retainer of Mr. Garven; the latter's relinquishment of the case to Mr. Simpson; to his own presence in a courtroom where there were a judge and jury sitting; to having heard Mr. Simpson say, "This man is the father of this boy. This boy was hurt by the Public Service; he had his leg cut off. The Public Service is willing

to give $750—$250 for my work and $500 for this man;'' that he was then sworn but did not give any testimony. Subsequently, he made a cross on a paper that Mr. Simpson gave him to sign and a week later, Mr. Simpson told him that the money belonged to the boy and that the father should get two bondsmen. The father refused to accept the money in satisfaction of the boy's injuries, because he deemed it inadequate for the loss of the leg and considered it sufficient only to compensate his own damages, as to which he understood the settlement had been arranged. (Vito Nitti's testimony at p. 45, *et seq.*). No depositions were offered on the part of the defendant and following the return of the rule it was discharged, (p. 43), in accordance with a memorandum by Judge Ackerson, (p. 36) wherein he observed (1) that no advantage had been taken of the infant defendant, (2) that the proceedings were not in any way tainted with fraud; (3) that he adopted the entry respecting the verdict in the clerk's trial book as sufficient index to what the real situation was; (4) expressed the view that parol evidence was unnecessary to that end; (5) construed ~~that~~ the act (C. S., p. 4055, Sec. 18) as not requiring a formal written appointment or admission of next friend; (6) assumed that the Circuit Court judge who took the verdict had admitted the father as next friend; (7) held that the entry *nunc pro tunc* would be in furtherance of justice because of the reasonable assumption that the defendant's witness had dispersed or their recollection clouded by lapse of time; (8) concluded that such peril was more imminent to the defendant than to the plaintiff, and (9) that defendant company would be at disadvantage through having relied upon the former proceedings as a finality.

The opinion, without any basis of proof, further pronounced that the father of the boy and the attorneys undoubtedly concluded that it was better to accept $500 than to take a chance of losing everything, but it was conceded that $500 was not adequate for the loss of a leg. (Memorandum, p. 36, *et seq.*)

The present case coming on for trial, the plaintiff testified that while going home from school he was crossing the street on a rainy day, the car ran him down without ringing a bell and cut off his leg. On behalf of the defendant it was admitted that the plaintiff had a *prima facie* case of negligence, and rested its defense entirely on the contents of the record in the former case, including the recent entry of judgment *nunc pro tunc*. Both plaintiff and defendant made motions for the direction of a verdict and the Court directed the verdict in favor of the defendant that is here complained of.

The contentions on the present appeal are:

1. The bar of a former recovery results from a duly entered judgment only.

2. The failure to admit specially a next friend in the former proceedings rendered the attempted settlement voidable by the plaintiff.

3. The defendant, having waived the protection which a duly entered judgment would have afforded it in the settlement of an infant's claim, cannot bar the present action by the former abortive proceedings.

4. The *status quo* of the parties being substantially preserved, the entry of the judgment *nunc pro tunc* was in disparagement, and not in furtherance, of justice, and was abusive of judicial discretion.

5. No proof was submitted of circumstances sufficient to warrant the entry of judgment *nunc pro tunc.*

6. The former proceedings were a colorable, and not an actual, adjudication of the rights of the infant plaintiff, and therefore not a bar.

7. The assumptions by the Circuit Judge that a next friend had been specially admitted, and that the defendant would be prejudiced by the prosecution of the present action, were assumptions of fact and unwarranted.

I.

The bar of a former recovery results from the existence of a judgment, and a verdict alone is not an estoppel.

The power to adjudicate controversies is reposed in courts which in the accomplishment of their purpose, must be attended by certain auxiliaries, *e. g.* a sheriff to serve its process and execute its judgments, a clerk to record its transactions, suitable quarters wherein to officiate, etc.; among these adjuncts is included a jury with a definite and circumscribed function to perform, to inform the Court as to the conditions of fact whereto the Court is to apply the law in the pronouncing of a judgment. The Court invokes its information only when the same is necessary and should the facts be undisputed or sufficiently clarid, the court, by way of non-suit, or direction, ceases to invoke the aid of the jury's information.

A verdict is defined, "The answer of a jury made upon any cause, civil or criminal, committed

by the court to their examination." Burrill Law Dict.: "The answer of the jury given to the court concerning the matter of fact in any case committed to their trial," Jacob Law Dict.

Davis vs. *Township of Delaware,* 41 N. J. L. 56.

After the rendition of a verdict and before the entry of the court's judgment thereon, the parties may waive it and the court, in respect of the judgment, will be controlled by the conduct *inter partes.*

Gilman vs. *Sorrentino,* N. J. Court E. & App., Feb., 1926, Term.

The practice of trial before the court alone is a species of waiver of verdict through the act of the parties.

The office of a verdict is to guide the Court in the declaration of judgment only when the parties, by their conduct, assent to the entry of a judgment on its authority, but they may, by divers means, indicate that the verdict is not to be the sanction for a judgment.

It is not the finding of the court or verdict of the jury which concludes the parties, *but the judgment entered thereon.*

Denike vs. *Denike,* 60 N. Y. Supp. 110.
Nav. Co. vs. *Van Laun,* 22 T. L. R. 26.
Purcell vs. *Power,* 29 Cal. A. 504, 156 Pac. 1009.
Jones vs. *Jones,* 141 Georgia, 727, 82 S. E. 451.
Robinson vs. *Marr,* 181 Ill. App. 605.
Mallory vs. *Olympia,* 83 Wash. 499, 145 Pac. 627.

II.

The failure to appoint a next friend for an infant plaintiff rendered the former proceedings voidable upon the attainment of his majority.

In some jurisdictions it was considered that the express admission of a next friend was unnecessary, the admission of the *prochein ami* named in the writ being implied until disallowed.

Judgson vs. *Blanchard,* 3 Conn. 579.

In others, that the next friend would be admitted by the Court without any other record than a recital in the count.

Miles vs. *Boyden,* 3 Pickering (Mass.) 213.
Brothers vs. *McCall,* 3 Ala. 449.

But neither view was adopted in this state, and it was laid down as early as May Term, 1810, that the proper practice is the appointment of a *prochein ami* before declaration is filed.

Goff vs. *Goff,* 3 N. J. L. 556, cited in *Gillett* vs. *D. L. & W. R. R. Co.,* 91 N. J. L. 220, 2 Arch. Prac. 940, 6 Ed.

C. S., Section 18 of the Practice Act, page 4055 was apparently declaratory in providing that if an infant is entitled to an action, his guardian *duly appointed or specially admitted for that purpose* shall be permitted to prosecute it.

The competent appointment of a next friend is, by force of the foregoing doctrine and statute, necessary to impart to the latter that vicarious character which will render his acts binding upon

the infant; in the absence of such a character, he is a mere volunteer acting without binding effect except in so far as the infant, upon the acquirement of legal competency accepts the benefits which have been negotiated for him. The standing of such a non-qualified next friend assimilates that of any agent who acts without authority for another, executors *de son tort,* trustees transcending their powers, etc., in which cases the one whose representation is undertaken may either adopt or repudiate the transaction when legally competent to act for himself. This view in respect of infants is sounded by the reasoning in the case of *Newman* vs. *Phillipsburg Railroad Co.,* 52 N. J. L. 449, which rejected the doctrine that the contributory negligence of a parent was imputable to an infant. Chief Justice Beasley uses the following language:

> "Infants have always been the particular object of the favor and protection of the law. In the language of an ancient authority, this doctrine is thus expressed: 'The common principle is that an infant in all things which sound in his benefit have favor in preferment of law as well as another man, but shall not be prejudiced by anything in his disadvantage'; 9 Vin. Abr. 374; and it would appear to be plain that nothing could be more to the prejudice of an infant than to convert, by construction of law, the question between himself and his custodian into an agency to which the harsh rule of *respondeat superior* should be applicable."

On the issue of a summons by one undertaking to prosecute as next friend of an infant, the former is, *pro tempore,* a volunteer assuming to act for another, and it is the "special admission" referred to in the statute that raises him to the dignity of a judicial representative. So long as such

special admission is withheld he continues in his conventional character, and acts at the peril of having his performances adopted or repudiated by the infant.

The authorities are harmonious that it is the right of an infant to disaffirm on reaching his majority, any release for personal injuries given even by himself while a minor.

Worthy vs. *Jonesville Oil Co.*, 11 L. R. A. (N. S.) 690.

In the present instance it was a sufficient act of avoidance when the plaintiff, promptly on attaining majority, relinquished his right to claim the money deposited in court and instituted the present action.

If, at that time, a judgment existed of record, it would be his right to apply to have it set aside. Such an application may be made by an infant for fraud in obtaining the judgment:

Seward vs. *Clark,* 67 Ind. 289.
Bennett vs. *East,* 7 Ind. 147.
Wright vs. *Miller,* 1 Sandf. Ch. (N. Y.) 193.
Massie vs. *Matthews,* 12 Ohio 351.
Zirkle vs. *McCue,* 26 Gratt. (Va.) 517.

Or for surprise:

Lafferty vs. *Lafferty,* 42 West Va. 783, 26 S. E. 262.

Or for mistake:

Seward vs. *Clark,* 67 Ind. 289.

Or for irregularity:

Heir vs. *Hollohm,* 94 N. Car. 14.
England vs. *Gardner,* 90 N. Car. 197.

The privilege to move to set aside the judgment on any of the foregoing considerations was precluded by the fact that *no judgment whatever was entered* to which such an application might be addressed. Its subsequent entry was in clear disparagement of the plaintiff's rights in the prosecution of the present action.

A judgment rendered against an infant defendant for whom no guardian *ad litem* is appointed is invalid.

Foulkes vs. *Young,* 21 N. J. L. 438.

Upon the same considerations an infant plaintiff is entitled to like protection where a judgment to his disadvantage is relied on.

In *Story* vs. *Dayton,* 22 Hun (N. Y.) 450, on application to set aside a decree on the ground of the irregular appointment of a guardian *ad litem* of an infant defendant, while the original right to such relief was not denied, it was held that it would not be granted to the infant on motion made after the time to appeal had expired.

It is the general rule that the doctrine of estoppel has no application to infants, except in case the conduct of the infant on which the estoppel is sought to be based, has been intentional and fraudulent and the infant was at the time of years of discretion.

22 Cyc. 512 and cases cited.

This immunity, in a case like the present, will operate, unless upon the plain showing that the infant should be precluded by the acts of a competent next friend.

III.

A judgment entered in the course of settling an infant's cause of action, will not bar a subsequent action brought after his majority unless in the former proceeding there was an actual, fair and regular adjudication of his rights.

A next friend cannot bind the infant by any settlement, which can only become effective by due judicial examination and adjudication. Where the proceedings in court are merely formal and are instituted and carried on only to give apparent sanction to the settlement, and there is no judicial investigation of the facts upon which the right or extent of the recovery is based, a judgment entered in pursuance of the agreement, and by consent merely, is only colorable and will be set aside when its effect, if allowed to stand, would be to bar the defendant's substantial rights.

> *Missouri Pac. R. R. Co.* vs. *Lasca* (Kans.), 21 L. R. A. (N. S.) 338, 66 Pac. 616.

In the latter case the facts were similar to those that are suggested in the present matter. There was a preliminary agreement between the defendant and the father and mother of the infant plaintiff. A friendly suit was instituted in which were filed petition, answer and reply. The matter was presented to the Court, the judge of which inquired of the mother and father whether the settlement was satisfactory and informed them that if a judgment was entered it would cut off all claims of the child for further damages; thereupon a judgment was entered for $95 and costs by consent of the parties. There was no trial of

the issues and no evidence was introduced except the statement of the parties present to the effect that the child had been injured by the defendant company, that the parents had effected a compromise and settlement, and that the amount agreed upon was satisfactory. The money was paid to the parents who gave a release of all claims which they, or the infant, might have by reason of the injury.

To the point that the judicial inquiry in such case must be actual and not perfunctory, the opinion cites:

> *Tenn. Coal Etc. Co.* vs. *Hayes,* 97 Alab. 12 So. 98.
> *Tripp* vs. *Gifford,* 155 Mass. 108.
> *Walsh* vs. *Walsh,* 116 Mass. 108.

The comment on the proceedings had in court were:

> "While in this case the court did exercise some supervision over the agreement it did not judicially examine the facts to determine whether the agreement was reasonable and proper. The court merely approved what the next friend had done, not because it found that it was for the best interests of the infant, but because the consent of the parents had been given and they were still satisfied. The duty of the court to protect the interests of the infant was not performed by inquiring of the parents if they were satisfied with the agreement."

The uncontradicted proof before this court as to the transactions at the trial of the former case are shown by the record to be as follows:

> Vito Nitti, the father, was sworn but did not give any testimony. Mr. Simpson was the only one who talked (p. 47, l. 35).

Neither Mr. Simpson nor did the judge ask him any questions (p. 51, l. 15).

Anthony Nitti, the plaintiff, was in court (p. 50, l. 30).

The entry in the clerk's trial book under the title of "Evidence" states that the only witness was Anthony Nitti, the plaintiff himself (p. 28, l. 1; p. 30, l. 20).

The plaintiff at the time, appeared as a boy of six years with a leg cut off at the hip, and if his testimony was in fact received, and was at all evincive of negligence, an award of $500 was outrageously inadequate and should not have received judicial sanction.

It is significant that on the rule to show cause in the present matter, the defendant did not disclose any stenographic record of testimony taken, or the unavailability thereof, and this circumstance tends to corroborate the deposition of Vito Nitti that no testimony whatever was taken.

On the application for the order *nunc pro tunc,* Mr. Dawson averred in an affidavit that *Anthony Nitti,* who was sworn, was the father of the plaintiff (p. 26, l. 35), and the Circuit Court Judge, in his memorandum, translates the name from Anthony to Vito (p. 38, l. 28) and attributes to Vito Nitti the admission that he was sworn as a witness, took the stand and answered questions. It is entirely clear from the deposition of the latter that he did not give any testimony and that the reference *to taking the stand* was an unwarranted assumption incorporated into a question asked him on cross-examination (p. 51, l. 10), which was clarified by his statement on re-direct examination that he did not testify at all (p. 53, ll. 1-10).

The record contained in the clerk's book, the fortifying depositions of the father and the absence of any stenographic record of testimony, make plain that in the former matter the infant himself and the father were merely sworn, and without any testimony having been taken, and upon the mere consent of the defendant, as shown by the affidavit of Mr. Dawson, a verdict for $500 was rendered.

In *Leslie* vs. *Procter & Gamble Mfg. Co.,* 102 Kans. 159, 169 Pac. 193, an infant who was the victim of an inadequate settlement by his next friend, sanctioned by a colorable judgment, brought suit upon his attainment of majority and it was claimed on demurrer that he was precluded by such supposed judgment.

The syllabi in the case are:

> 1. Where a minor has sustained personal injuries which the father and the wrong-doer settled for an inadequate sum, such minor on attaining his majority may bring an action against the wrong-doer for his injuries notwithstanding the settlement negotiated by the father.
>
> 2. An inadequate settlement by a father for his minor son's injuries, does not bar an action by the son on attaining his majority, although the father and the wrong-doer had, by agreement, filed in a city court, (like that of the Justice of the Peace) for the agreed sum and judgment had been taken thereon against the wrong-doer without evidence, without judicial consideration, and with only the perfunctory entry of the judgment by the city court for the agreed sum.

In *Tripp* vs. *Gifford,* 155 Mass. 109, 29 N. E. 208, it was said:

> "It is necessary that an investigation of the fairness of a proposed adjustment should be made or ordered by the court before disposing of the cause. The next friend is entrusted with the rights of the infant as far

as they are involved in the cause, and acts under responsibility both to the court and the plaintiff. It may well be considered to be within his official duty to negotiate, if possible, a fair adjustment, without subjecting the plaintiff to the expense and risk of a trial. When, however, he assumes finally to conclude a settlement out of court and to discharge the cause of action, by an agreement *in pais,* under which he accepts less than the plaintiff's entire demand, he does more than is clearly within his authority to prosecute the action, and more than we think ought to be allowed with due regard to the protection of the infant; unless such settlement is affirmed, by the court or, by an entry of judgment in regular course, it may fairly be held invalid.''

There is in New Jersey no practice or precedent for the judicial approval of such a settlement except ''by an entry of judgment in regular course,'' as above expressed. In the present instance, such judgment was the objective of the former proceedings and it bore upon the wrongdoer, if it would validate the adjustment, to see that such entry had been made before paying over the compromise money. Its failure to do so was a relinquishment of any benefit which might have enured from the submission of the settlement to a court.

In *Pittsburg, C. C. & St. L. R. Co.* vs. *Harley,* 170 Ill. 1060, 48 N. E. 920, it was held that a judgment for a small sum against a railroad in favor of a minor as damages for the loss of a leg, will be set aside and held not to bar a subsequent suit, where it appears that the judgment was entered in pursuance of a compromise agreement between an attorney for the company and an attorney assuming to act for the minor.

IV.

The defendant in former proceedings waived the benefit of the settlement, not only by failing to have judgment entered, but by paying the settlement money to the attorney of the next friend.

The right of the *prochein ami* to receive payment of, and satisfy, a judgment recovered in behalf of an infant is generally denied. Such money should be paid by the defendant into court, subject to the order of the legally appointed guardian of the infant.

Benton vs. *Pope,* 5 Humph. 392.
Wood vs. *Claiborne,* 82 Ark. 514, 102 S. W. 219.
Isaacs vs. *Boiyd,* 5 Port. (Ala.) 338.
Collins vs. *Gellespy* (Ala.) 41 So. 930.
Cody vs. *Roane Iron Co.,* 105 Tenn. 515, 58 S. W. 850.
American Lead Pencil Co. vs. *Davis,* 108 Tenn. 251, 66 S. W. 1129.
Dicta in Tripp vs. *Gifford,* 155 Mass. 108.
Miles vs. *Kaigler,* 10 Weig. 10, 30 Am. Dec. 425.

In Michigan it was held that a payment of a judgment to the next friend will absolve the debtor from further liability, under a statute permitting the appointment of such next friend, and authorizing the requirement of a bond from him to account to the infant for moneys collected.

Baker vs. *Pere Marquette R. R. Co.,* 142 Mich. 497, 105 N. W. 1116.

In *Cody* vs. *Roane Iron Co., supra,* a satisfaction of judgment executed by the next friend was vacated, and it was ruled that such payment made to the next friend will not operate as a satisfaction.

According to the data in the present case the payment was made to, and a satisfaction of the fictitious judgment was taken from the attorney of the next friend.

No stronger proof could be found that the verdict in this case was merely colorable, than the laxity of the defendant's conduct subsequent thereto; no more cogent proof could be found that the terms of the verdict were advantageous to the defendant, and detrimental to the infant plaintiff, than the zeal of the present defendant to have this supposedly adverse judgment entered *nunc pro tunc.*

V.

The order directing that judgment be entered nunc pro tunc was illegal, and in abuse of judicial discretion.

The application was made fourteen years and eleven months after the action in the former proceeding. On the day after the rendition of the verdict and before the entry of judgment, $500 was paid to Mr. Garven who, as attorney for the next friend, gave a warrant to satisfy a non-existent judgment.

The present action had pended almost six months. The application was made *ex parte* without notice to the plaintiff or to the next friend. The affidavit submitted on the application states that the case came on to trial before Judge Vail; that Anthony Nitti (not Vito Nitti) father of the

plaintiff, was sworn as a witness; that deponent consented to the entry of a verdict for $500. The matter was submitted to a jury and they returned a verdict for that amount; that the amount of said "judgment" was paid to the attorney of the plaintiff who gave a warrant to satisfy the "judgment;" that the money was subsequently paid into Court on the petition of the attorney for the next friend; that the clerk's register shows no reference to the verdict or the judgment, but that the clerk's trial book shows the conduct of the trial, impanelling of a jury, evidence by Anthony Nitti, and the direction of a verdict by the Court. The affidavit then continues:

> "Deponent further says that it now appears that no formal judgment was ever entered on said verdict and prays that an order may be entered directing the entry of judgment *nunc pro tunc.*"

It will be observed that the application was made upon the assumption that the right to have a judgment entered after the expiration of the term is absolute, irrespective of the reason for such omission, and of the elements both of furthering justice and the consequences to the adversary. No attempt was made to disclose the circumstances surrounding the failure to enter the verdict and judgment seasonably; nothing is suggested by way of hardship to the applicant, its freedom from fault, its right to be relieved from a fortuity, or the harmlessness of the order to the plaintiff.

The affidavit sedulously concealed the important fact that the plaintiff had attained his majority, had started an action in his own behalf and had been allured by the absence from the record of a precluding judgment.

On the clearest principle of estoppel, the appli-

cation should have been denied; but the judicial learning on the subject is to the point that, apart from the consideration of estoppel, such an order should not be made except upon showing affirmatively that the entry *nunc pro tunc* is demanded in furtherance of justice. Here no exigency of justice was shown on the application, and the features of injustice were suppressed.

It has never been considered that the indifference of the parties should move the court to the entry of a judgment *nunc pro tunc*. Such relief is granted when the delay has been caused by the court or through some misfortune beyond the control of the parties.

Hess vs. *Cole,* 23 N. J. L. 116.
Teneick vs. *Flagg,* 29 N. J. L. 25.
Ruckman vs. *Decker,* 23 N. J. Eq. 244.
McNamara vs. *New York Etc. R. R. Co.,* 56 N. J. L. 56.
Clark vs. *Van Cleef,* 75 N. J. Eq. 152.

In all the foregoing it was stressed, either expressly or impliedly, that the order should be made when necessary to effect justice and not otherwise, and that it was not available as a palliative for past negligence.

In the matter *sub judice* the defendant's concession of negligence in respect of not seeing to the entry of the judgment, is reinforced by the undisputed circumstances that the verdict was inadequate, and that it was rendered in a cause in which an infant defendant was not represented by a next friend admitted with due regard to the statutory requirements.

A judgment will not be entered *nunc pro tunc* to the prejudice of a third party.

Clark & Leonard Inv. Co. vs. *Rich,* 15 L. R. A. (N. S.) 692 (Annotated).

The memorandum filed by the Circuit Judge ignores the question of justice being furthered by the entry, and proceeds entirely upon the theory that it was his obligation to make the order because of the apocryphal entry in the clerk's trial book. Having referred to this, by resort to intendments and assumptions, he reached the conclusion that the entry was imperative. The first principle of his decision was expressed:

> "There is nothing before me whatever to suggest that any advantage was taken of the infant plaintiff or that the proceedings were in any way tainted with fraud" (p. 39, l. 30). "In the present case however, the clerk's minute book of the trial clearly shows what happened, and this, coupled with the papers filed in the cause, clearly shows that a verdict was rendered by a jury" (p. 40, l. 30).

This disclosed an erroneous conception that the defendant was entitled to the entry as of absolute right, unless the plaintiff successfully impugned the former proceedings for oppression or fraud.

In the memorandum, the Court, as heretofore stated, concluded that the plaintiff's father testified, although the clerk's trial book states that the witness was the child himself.

In disposing of the objection that no next friend had been admitted the memorandum ruled that the Court could,

> "without the necessity of a formal order, admit the father to represent the son for the purpose of such a suit, and inasmuch as the suit was apparently started under the caption above mentioned, it is reasonable to assume that the able Circuit Court Judge, who by the record, took the verdict, admitted the father to appear and prosecute the suit as the representative or next friend of the son" (p. 41, l. 25).

This was not even the posture of the law before the enactment of the statute that required that a next friend be "specially admitted." It introduced a novel principle that the rights of an infant might be sacrificed by assumpton, and that he is precluded from disaffirming the conduct of a volunteer representative, and is estopped from inquiring even into his vicarious constitution.

The statute requiring "special admission" was designed to obviate this very mischief by requiring that an order admitting a next friend should be made with such formality as to constitute a memorial of the fact that the infant was duly represented with judicial sanction.

Without any intimation from the defendant either through the original affidavit or depositions, the Court further concluded:

> "it is reasonable to assume that the witnesses who might be produced on the part of the defendant company had dispersed, or the recollection of the evidence become clouded or eradicated entirely, and this would be more likely on the part of the witnesses for the defendant company than it would be on the part of the plaintiff himself" (p. 41, l. 40 *et seq.*), "so the defendant company would be put to a great disadvantage for having consented to a verdict properly rendered."

It is submitted that the Court had no right to assume the foregoing when no complaint in respect thereto had been made by the defendant; it is submitted that even had such complaint been made the defendant, in view of its remissness, would not have been entitled to the consideration of having the judgment entered *nunc pro tunc.*

The memorandum further sets forth:

> "It might naturally rely upon such proceedings as a finality, and in making the settlement of $500 for the boy, the father, as well as the attorneys representing the boy, undoubtedly took into consideration the question of liability and may have concluded that it was better to accept the $500 than take the chance of losing everything and *while it may be said that $500 is not at all adequate for the loss of a leg,* nevertheless, all of these matters must be taken into consideration in deciding the question as to whether the furtherance of justice required the entry of the judgment *nunc pro tunc* in this matter, and I conclude that it did" (p. 40, l. 15).

With the exception of the observation that $500 is not at all adequate for the loss of a leg, the foregoing views of the judge were without the support of any proof, were purely speculative and fanciful, but were, nevertheless according to his own announcement, the factors on which he relied in deciding the question of whether the furtherance of ~~judgment~~ motion required the entry *nunc pro tunc.*

This judicial view, viz.: that such entry should be favored until the plaintiff showed that its denial was required by the necessity of justice, is contradicted by all the New Jersey cases above cited.

No presumption or intendment cured the failure to admit a next friend. The omission to do this robbed the judicial proceedings of all preclusory character.

The maxim "*Omnia esse rita acta praesumuntur*" cannot be invoked in respect of the elements of jurisdiction, but is limited to the intendment of regularity in respect of judicial procedure only.

VI.

It is beyond the power of a Court to direct the entry nunc pro tunc of an order not previously made, in fact.

The former proceeding came to a stop with the reception of the verdict.

It was thereafter feasible to enter a rule for judgment which would be evidential until the judgment record was made up and signed by the judge;

Pract. Act., Sec. 173 C. S. P. 4106,

and for the clerk to enter a record of the judgment, "unless otherwise directed by one of the parties."

Ib., Sec. 168 P. 4105.

By amendment (1912) the judgment record might be signed by the judge, or the clerk, but the act in force when the proceedings were had required signature by the judge ~~above~~ alone

Pract. Act., Sec. 171 C. S. 4106.

According to these provisions it was optional to the parties, after verdict, to enter a rule for judgment, and thereupon optional to them to have the judgment record prepared and signed. As to both of these processes the parties were supine and sought nothing in the nature of a judicial order for a judgment.

The following is the view of this court of the rights of parties in such situation:

> "The underlying question which the case presents, therefore, is whether it was within the power of the Court (of Chancery) to make a *nunc pro tunc* order the effect of which—if it was valid—was to destroy the then ex-

FAILURE TO ENTER JUDGMENT ON RENDITION: In any case where a judgment was actually rendered, order made, or decree signed, but the same has not been entered on the record, in consequence of any accident or mistake, or the neglect or omission of the clerk, the court has power to order that the judgment be entered up nunc pro tunc, the fact of its rendition being satisfactorily established and no intervening rights being prejudiced. 23 Cyc 842, and cases cited.

> mistake so as to make the record show the order which the court actually made as of the time when it was in fact made; but no court has power to make an order *nunc pro tunc,* the purpose of which is to give effect to its mandate as of a time anterior to that when it was in reality made. Wilson *vs.* Vance, 55 Ind. 394; Hegeler *v.* Henckell, 27 Cal. 491; Priest *v.* McMaster, 52 Mo. 60; Cyc. vol. 29, p. 1516, Par. B, and cases cited."
>
> *Davis White Markets Inc.* vs. *Lefas*, 126 Atl. 430.

The appellee here can refer to no order for the entry of judgment previously made, the entry of which was omitted and which the order *nunc pro tunc* served to validate.

VII.

The verdict directed for the defendant on the view that there was the estoppel of a former recovery should be set aside, the judgment reversed and the cause remitted for new trial.

Respectfully submitted,

RICHARD DOHERTY,
Attorney of and of Counsel
with Appellant.

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According to these provisions it was optional to the parties, after verdict, to enter a rule for judgment, and thereupon optional to them to have the judgment record prepared and signed. As to both of these processes the parties were supine and sought nothing in the nature of a judicial order for a judgment.

The following is the view of this court of the rights of parties in such situation:

> "The underlying question which the case presents, therefore, is whether it was within the power of the Court (of Chancery) to make a *nunc pro tunc* order the effect of which—if it was valid—was to destroy the then existing status of the present appellants. We think it was not. The office of an order *nunc pro tunc* is only to supply some omission in the record of an order which was really made, but omitted from the record. If an order is actually made by the court, but there is a failure to enter it, the court may correct the mistake so as to make the record show the order which the court actually made as of the time when it was in fact made; but no court has power to make an order *nunc pro tunc*, the purpose of which is to give effect to its mandate as of a time anterior to that when it was in reality made. Wilson *vs.* Vance, 55 Ind. 394; Hegeler *v.* Henckell, 27 Cal. 491; Priest *v.* McMaster, 52 Mo. 60; Cyc. vol. 29, p. 1516, Par. B, and cases cited."
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The appellee here can refer to no order for the entry of judgment previously made, the entry of which was omitted and which the order *nunc pro tunc* served to validate.

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New Jersey Court of Errors and Appeals

ANTHONY NITTI, *Plaintiff-Appellant,* *vs.* PUBLIC SERVICE RAILWAY COMPANY, *Defendant-Appellee.*	*Action at Law.* *On Appeal from Hudson County Circuit Court.*

BRIEF FOR DEFENDANT-APPELLEE.

This is an appeal from a judgment entered in the Hudson County Circuit Court upon a verdict for defendant directed by the Court May 13, 1926 (Printed State of the Case, p. 57).

The grounds of appeal as contained in the notice of appeal (p. 1) differ from the points raised by the plaintiff-appellant in his brief (Plaintiff-appellant's brief, p. 5).

The grounds of appeal as contained in the State of the Case (p. 1) are as follows:

1. The Court directed the jury to render a verdict in favor of the defendant.
2. The Court denied the motion to direct a verdict in favor of the plaintiff.
3. The Court ruled that the plaintiff was concluded by a former judgment.
4. The Court erroneously, improvidently and in abuse of discretion, ordered the entry of judgment *nunc pro tunc* in an alleged former action.
5. The Court admitted in evidence proof of the entry of an order for judgment *nunc pro tunc* in an alleged former action, wherein the plaintiff was not represented by a next friend.

6. The Court admitted in evidence proof of the entry of an alleged judgment *nunc pro tunc* subsequent to the institution of the present action.

The points as raised by the plaintiff-appellant in his brief (Plaintiff-appellant's brief, pp. 5-6), are as follows:

1. The bar of a former recovery results from a duly entered judgment only.

2. The failure to admit specially a next friend in the former proceedings rendered the attempted settlement voidable by the plaintiff.

3. The defendant, having waived the protection which a duly entered judgment would have afforded it in the settlement of an infant's claim, cannot bar the present action by the former abortive proceedings.

4. The *status quo* of the parties being substantially preserved, the entry of the judgment *nunc pro tunc* was in disparagement, and not in furtherance, of justice, and was abusive of judicial discretion.

5. No proof was submitted of circumstances sufficient to warrant the entry of judgment *nunc pro tunc*.

6. The former proceedings were a colorable and not an actual, adjudication of the rights of the infant plaintiff, and therefore not a bar.

7. The assumptions by the Circuit Judge that a next friend had been specially admitted, and that the defendant would be prejudiced by the prosecution of the present actions, were assumptions of fact and unwarranted.

The alleged injury, for which the plaintiff sought damages, was for the loss of a leg when run over by a trolley car of the defendant, July 15, 1910, when plaintiff was a boy six years of age. In its answer the defendant set up as an affirmative defense, an averment (p. 6), "that

on the 22nd day of December, 1910, the plaintiff, by his next friend, Vito Nitti, did recover a judgment against the said defendant in the Hudson County Circuit Court for the sum of five hundred ($500) dollars for the same cause or causes of action in the said complaint alleged, which said judgment has been paid by the said defendant."

At the trial of this action, in support of such affirmative defense, it was admitted (p. 9) that the plaintiff in this suit is the same party that was involved in the suit of 1910; that he is the infant alleged to have had the accident referred to in the pleadings in the earlier suit, and that this cause of action arose out of the same facts and circumstances as the accident which was described in the former proceedings.

There was received in evidence the pleadings, in the Hudson County Circuit Court in a suit of Anthony Nitti, an infant, who sues by Vito Nitti, his next friend, plaintiff, *vs.* Public Service Railway Company, defendant (pp. 13-30); and the record in the previous suit showing by an entry on the trial book (p. 21) that on December 22, 1910, the parties were represented in court by their respective counsel, a jury was impaneled, evidence was taken, and a verdict rendered in favor of the plaintiff and against the defendant in the sum of $500.

The record also shows (pp. 22-23) that the judgment was paid, and a warrant to satisfy the judgment was filed in the office of the clerk of the said court December 28, 1910; that subsequently a petition was filed in that action by the attorney of record for the plaintiff (p. 24), and an order entered (p. 25) that the sum of $500—then in the hands of the said attorney of

record, received by him in satisfaction of the said judgment—be paid to the clerk of said court.

Subsequently a petition was filed November 23, 1925 (pp. 26-28) for an order directing the entry of judgment *nunc pro tunc* on such verdict and in accordance with such petition an order was entered and filed in the office of the clerk of said court November 23, 1925 (pp. 29-30), wherein it was "ORDERED that judgment be entered in favor of the plaintiff, Anthony Nitti, by Vito Nitti, his next friend, and against the defendant, Public Service Railway Company, for $500 as of December 22, 1910, in accordance with the record of said case in the Clerk's Trial Book above mentioned," which said order was signed by Henry E. Ackerson, Jr., *C. C. J.*

Subsequently, upon the filing of an affidavit of Richard Doherty, the attorney in the case now before this Court (pp. 32-34), a rule to show cause was made by the Hudson County Circuit Court entitled in the present action (pp. 35-36), why the order made November 18, 1925, authorizing the entry of judgment *nunc pro tunc,* should not be vacated, with leave to either party to take testimony.

The matter came on to be heard before Henry E. Ackerson, Jr., *C. C. J.,* who, after hearing the arguments of the attorneys of the respective parties, and considering the depositions taken under the rule to show cause, made an order (pp. 36-43) discharging the rule to show cause, and rendered a lengthy opinion thereon, which was received in evidence with the record of the case (pp. 36-43), as was also received in evidence the testimony taken under the said rule to show cause (pp. 45-54).

ARGUMENT.

The grounds of appeal relied upon by the plaintiff-appellant all relate to the propriety of the trial court in receiving in evidence the Hudson County Circuit Court records of the judgment and payment thereof in the suit brought by Anthony Nitti, by his next friend, and in directing a verdict for the defendant in this suit.

This is not an appeal in the action brought by Anthony Nitti, an infant, by Vito Nitti, his next friend, against the Public Service Railway Company, but is an appeal from the judgment entered in the case of Anthony Nitti, Plaintiff, *v.* the same defendant, in the suit instituted by the summons (p. 2), issued May 29th, 1925. This is an attempt to attack collaterally the judgment in the former suit.

An attack on the validity of the judgment record in the suit by the plaintiff, through his next friend, was made before the Hudson County Circuit Court, and no appeal has been taken in that action from such judgment, so that the judgment entered November 23, 1925, in favor of the plaintiff, Anthony Nitti, by Vito Nitti, his next friend, and against this defendant, for $500 as of December 22, 1910, in accordance with the record of said case in the clerk's trial book in that suit remains unimpeached.

It has been repeatedly held in this State that a judgment of a court having jurisdiction cannot be attacked collaterally, and that notice to vacate or appeal are the only methods of procedure.

In the case of *Crawford* v. *Lees,* 84 New Jersey Equity 324, 93 Atl. Rep. 201, our Court of Chancery has gone thoroughly into the subject,

and in a learned opinion by Leaming, *V.-C.*, the Court says:

"Nothing can be said to be more firmly ingrafted in our jurisprudence than the principle that, in the absence of fraud of the parties, a judgment of a court of general jurisdiction cannot be collaterally impeached if the court had jurisdiction of the subject-matter of the controversy and the parties. White *v.* Crow, 110 U. S. 183, 4 Sup. Ct. 71, 28 L. Ed. 113. Jurisdiction, in the sense thus used, has been defined by our Federal Supreme Court to be 'the power to hear and determine a cause.' In the exercise of the power to hear and determine a cause which has been properly instituted, a court is necessarily called upon to determine matters on which its jurisdiction to proceed and award final judgment depends. It has accordingly been uniformly held that in the application of the principle first stated to cases in which the jurisdiction of a court of general jurisdiction embraces cases of the class to which the case belongs, and the collateral attack is based upon a claim of want of jurisdiction by reason of an alleged error of the court in determining a question upon which its jurisdiction was dependent, the determination of the court touching matters upon which its jurisdiction was thus dependent is conclusive as against such collateral impeachment, whether or not the court has fallen into error in such determination. The case of Plume *v.* Howard Saving Institution, 46 N. J. Law (17 Vroom) 211, was a case of that nature. In that case an administrator, to whom letters had been granted by the orphan's court, had brought suit for the recovery of money deposited in bank by plaintiff's intestate. The defense was a collateral attack on the order of the orphans' court appointing

plaintiff as administrator, and was based on a claim of want of jurisdiction of the orphans' court to appoint plaintiff as administrator by reason of want of proof before the orphans' court of the death of plaintiff's intestate (the only evidence of death having arisen from a legal presumption of death by reason of long absence), and also other alleged errors of the orphans' court touching its own jurisdiction. The Supreme Court of this State held that, the proceeding before the orphans' court having been one of a class over which that court had jurisdiction, no inquiry could be made by another court, except on appeal, whether the orphans' court had fallen into error in determining facts upon which its own jurisdiction depended. At page 229, the opinion proceeds:

"'Consequently, when the orphans' court of the county of Essex, having the matter by the requisite proceedings before it, awarded letters of administration in the present case, it will be intended, by force of the rule of law just stated, that it decided all facts requisite to validate its action. If it had not been deemed to be satisfactorily shown that the alleged intestate was dead, and that he was not resident at the time of his death in this State, and that the plaintiff, although not the original petitioner, could be legally appointed the administrator, the decree which was made could not have been lawfully made, and the consequence is it must be held in this incidental proceeding that such matters were passed upon by the court. To such a procedure the maxim, "*Omnia praescumuntur rite esse acta,*" is applicable. And with respect to the present inquiry it matters not at all whether the clause of the statute that regulates the proceedings on applications for authority to ad-

minister the estates of non-resident decedents was rightly construed by the orphans' court, inasmuch if an error exists in that particular it cannot be corrected except in a direct appellate review.'

"The Lessees of Grignon *v.* Astor, 2 How. 319, 11 L. Ed. 283, and the several cases there cited, are to the same effect.

"The principles above stated relate alike to proceedings *in rem* and *in personam.* In proceedings *in rem* there are no adversary parties, and the only question of jurisdiction in such proceedings is the power of the court over the thing—over the subject-matter before the court—without regard to the persons who may have an interest in it. 'All the world are parties.' Lessees of Grignon *v.* Astor, *supra.*

"If the principles above stated touching the exemption of judgments of courts of general jurisdiction from collateral impeachment are applicable to a grant of probate by a surrogate's court, I think it clear the proposed amendment here in question cannot be allowed. The claim made by the proposed amendment is not strictly a claim of want of jurisdiction. As already stated, want of jurisdiction over the subject-matter will subject the judgment of any court to collateral impeachment. The surrogate had jurisdiction of the proceedings before him. The statute confers upon the surrogate a general jurisdiction touching matters of probate of wills, and defines his duties, and provides an appeal for errors of judgment in the performance of those duties. The concrete claim here made is that the surrogate erred in the performance of his duties in a matter intermediate to the inception of his jurisdiction of the cause and his final decree

therein, and that his error was in determining that no doubts arose on the face of the will, and was therefore an error in adjudicating a matter upon which his jurisdiction depended. The matter of probate was by proper proceedings brought before the surrogate in a case of a class within his jurisdiction, and his jurisdiction over the individual case thereby attached. He was then required to determine, in a case properly before him, whether he should grant probate or issue citations, and to determine this he was obliged to determine whether doubts arose on the face of the will which was then before him for the purpose of enabling him to so determine. Thus, with the evidence for and against the existence of doubts before him, he determined that no such doubts in fact arose. It is through this claim of error of judgment in the adjudication of a matter which the surrogate was required to adjudicate that it is now sought to collaterally impeach the probate. All of the evidence upon which such an adjudication can be based was before him. Can we now inquire if he fell into error? The real question now presented is not whether doubts arose on the face of the will; it is whether, in a collateral proceeding, it can be asserted that doubts so arose.

"From the decisions already referred to, it is obvious that, if the present probate had been granted by the orphans' court, the present proposed collateral impeachment of that probate could not be entertained; but a distinction has long been recognized between judgments of courts of general jurisdiction and those of certain inferior tribunals of special and limited jurisdiction. Judgments of courts of the latter class have been denied that degree of exemption from collateral impeachment which is uniformly ac-

corded to judgments of courts of the former class. The difference, in this respect, between the two classes of judgments, I understand to be this: In the former class, initial jurisdiction of the subject-matter of the proceeding being made to appear, another court will not, by way of collateral impeachment, look through or behind the judgment or decree for errors of judgment either in matters relating to jurisdiction or otherwise, while in the latter class the court may, on collateral impeachment, look through or behind the judgment to ascertain whether there appears on the face of the proceedings every requisite to sustain the judgment. If these requisitions are found to appear on the face of the proceedings of the inferior tribunal, the judgment is regarded as conclusive, as against collateral attack. In 23 Cyc. p. 1082, this latter statement is summarized as follows:

"'And if the judgment of an inferior court does affirmatively show the facts necessary to confer jurisdiction, then the same presumptions are indulged in favor of regularity and validity of its proceedings as are extended to the superior courts, and the record can be impeached and contradicted only in like cases and to the same extent.'

"See, also, Graham *v.* Whitely, 26 N. J. Law (2 Dutch.) 254, 262; Clark *v.* Costello, 59 N. J. Law (30 Vroom) 234, 236, 36 Atl. 271."

This Court in the case of *Lippincott v. Godfrey,* 136 Atl. Rep. 174, Vol. 5 N. J. Advance Reports 291, the Court said in an opinion written by Mr. Justice Kalisch:

"The plaintiff-appellant appeals from a judgment entered in the Supreme Court for the defendants, and against her, in an action of eject-

ment brought by her testator against them to recover the possession of certain premises situate in Cape May county. The case was tried at the Cape May Circuit, before Judge Schimpf, sitting without a jury, upon an agreed state of facts; and it is his findings upon which the judgment appealed from was entered for the defendants.

"The agreed state of the case discloses that the plaintiff's testator took title to the said premises on the 29th day of September, 1911, and occupied the same as a summer residence until March 13, 1917; that on or about March 13, 1917, proceedings, in attachment, were instituted against the plaintiff's testator in the Cape May County Circuit court, at the suit of one W. A. Parke Thompson; that final judgment was entered in said action on October 18, 1917, for the sum of $577.65, against the plaintiff's testator; that, by virtue of said judgment and execution issued thereon, the premises were sold by the sheriff of Cape May county to W. A. Parke Thompson, who, on the 1st day of October, 1918, conveyed the premises to the defendants-respondents who entered into possession of the same at that time, and have continued in possession ever since.

"Counsel of appellant, at the trial in the court below, sought to attack the validity of the judgment in the attachment proceedings because of procedural errors.

"The particular point stressed by counsel in this respect is that in the rule for judgment, which was not signed by the court, the rule recites *inter alia,* 'and the defendant having entered his appearance,' whereas this was not a fact, and points to the docket of the case, which does not disclose any entrance of appearance,

and, in addition, counsel produced a certificate of the county clerk of Cape May county, certifying that no appearance was ever entered in the 'clerk's book' in the case of Thompson *v.* Lippincott, and therefore the court was without jurisdiction to order the entry of the judgment.

"Assuming all the irregularities indicated by counsel of appellant existed, they did not deprive the court of jurisdiction of the subject-matter of the controversy. The court had jurisdiction to order a judgment, and, if its procedure in that regard was erroneous, nevertheless the validity of the judgment could only be properly subject to an attack by a motion to vacate the judgment in the court where such judgment was entered, or by an appeal therefrom, and not in the collateral manner, as is attempted here.

"A complete refutation to the argument advanced by counsel of appellant in support of his contention is to be found in Plume *v.* Howard Savings Institution—" *supra.*

An unsuccessful effort was made before the court below to vacate the judgment in the prior suit, and no appeal has been taken from that judgment.

Assuming the irregularities indicated by counsel of appellant existed, they did not deprive the court of jurisdiction of the subject-matter of the controversy. The court had jurisdiction to order a judgment, and, if its procedure in that regard was erroneous, nevertheless the validity of the judgment, as the court said in *Lippincott* v. *Godfrey, supra,* could only be properly subject to an attack by a motion to vacate the judgment in the court where such judgment was entered, or by an appeal from that judgment, and not in the collateral manner, as is attempted here.

While it has been shown that the validity of the judgment in the action brought by Anthony Nitti, an infant, by Vito Nitti, his next friend, is not properly raised in an appeal in this suit of Anthony Nitti instituted after he attained full age, yet, nevertheless, the defendant contends that such judgment in the prior suit was properly and authoritatively entered *nunc pro tunc* by the Hudson County Circuit Court.

The record in that suit shows the pendency of that action, instituted in the infant's name by Vito Nitti, his next friend; it shows that Vito Nitti was, and is, the father of the plaintiff; that the suit was instituted by Pierre P. Garven, as attorney of the plaintiff; summons was issued; declaration filed; a plea filed; and the case was noticed for trial; that a trial was had where both parties were represented by attorneys; a jury was impaneled; evidence was taken; and a verdict for $500 rendered for the plaintiff.

The statute provides, Compiled Statutes p. 4055, Section 18—

"If an infant is entitled to an action or if an action is brought against him, his guardian duly appointed or specially admitted for that purpose shall be permitted to prosecute or defend; but in no case shall the action be stayed until the infant arrives at full age."

It has been held in *Rue* v. *Meirs,* 43 N. J. Eq. 377, that—

"A father has the first and best right to act as the next friend of his infant child, in any litigation necessary for the protection of his child's rights."

The Practice Act provides—Compiled Statutes p. 4105, section 168—

"When in any civil action a rule for final judgment for a sum of money only shall be entered in the minutes, the clerk shall, unless otherwise directed by one of the parties, enter in a well-bound book an abstract of such judgment * * *."

Compiled Statutes p. 2957, Section 4—"That it shall be the duty of the clerk of the supreme court, and of the clerks of the several and respective circuit courts and courts of common pleas in this state, to enter on record in a book, the proceedings and judgments, and to make a complete alphabetical index to the same, as required and directed by the one hundred and ninety-second section of the act entitled 'An act to regulate the practice of courts of law,' within six months after the final judgment in every civil cause, in which by law such final judgment is required to be entered as aforesaid; and no clerk shall charge any fee therefor, until such service shall have been actually performed; provided always, that nothing herein contained shall affect the validity or legal effect of any such judgment as shall not be recorded within the time herein limited."

Compiled Statutes, p. 4106, Section 171—

"The record of judgments shall be signed by a judge of the court as of the day on which such judgments were entered, and judgments signed by a judge in office, though not in office at the time of rendering such judgments, shall be as good and effectual in law as if such judgments had been signed by a judge who was in office at the time of rendering and recording the same."

The latter act was amended in Pamphlet Laws of 1912, Chapter 264, page 470, Cumulative Supplement to Compiled Statutes p. 2807, Sections 163-171, by inserting therein the words "or the clerk."

In reference to Supreme Court cases, rule 117 provides —

"Unless the postea be filed within ten days after the first day of the term next after the trial, such failure shall be considered, at the option of the opposite party, a waiver of the verdict or finding, unless the court, in its discretion, shall order otherwise."

In *Higgins* v. *Egg,* 85 N. J. Law, 56, our Supreme Court held, in an opinion written by Mr. Justice Swayze, in a case brought up on certiorari instituted in the Circuit Court tried before the judge of the Common Pleas, who had been requested to hold the Circuit Court, where the judgment upon a verdict was entered in the Common Pleas—

"It was erroneous, therefore, to enter the judgment in the Common Pleas. This error does not lead to a new trial. It is an error after verdict. The entry of a nugatory judgment does not deprive plaintiff of the benefit of the verdict; and upon proper application to the Circuit Court a rule for judgment upon the verdict will no doubt be entered. * * * The present judgment, however, of the Common Pleas must be reversed and the record remitted to that court. Upon the entry of judgment on the verdict in the Circuit Court, the appellants may take such course with reference thereto as they may be advised."

As to the power and authority of courts to enter judgments *nunc pro tunc* it is said in 23 Cyc. p. 840-841—

"There is an inherent, common-law power in the courts to cause the entry of judgments *nunc pro tunc* in proper cases and in furtherance of justice. This power belongs to all courts of record, and may be exercised by an appellate court as well as by the trial court, but does not appertain to the clerk of a court. It can be exercised, however, only in cases where the cause was ripe for judgment, that is, where the case was in such a condition at the date to which the judgment is to relate back that a final judgment could then have been entered immediately. And this relief will not be granted where the failure to enter the judgment at the proper time was due to the party's own carelessness or negligence, or to enable him to gain an advantage over the other party to which he would not have been entitled at the proper time for entering the judgment, or generally unless it is shown that some injury or injustice would result from the refusal to take the action demanded, a motion for such an entry being addressed very largely to the discretion of the court."

Our Court of Errors and Appeals in an opinion by Mr. Justice Parker, in *Weinberger* v. *Erie Railroad Company,* 86 N. J. Law, 259, said:

"The question raised on this appeal is whether a judgment entered in the Supreme Court on a verdict in favor of the plaintiff below must be reversed on the ground that the successful party failed to see to it that the circuit record and postea were returned into the clerk's office of the Supreme Court at the next term after the verdict."

After reciting the facts in that case, and the statute and rule requiring the filing of postea in Supreme Court cases, the court continued:

"And it is safe to say that from that date to this the remedy for omission to file the postea at the next term has been, by common understanding and practice, an application to the court, such as was made in this case.

"This understanding may be grounded upon two sufficient reasons—first, that the statute applies to the trial court and not to the party; second, that if applicable at all it is directory and not mandatory.

"As to the first reason, it will be observed that the duty of returning the circuit record or transcript, with the verdict and other proceedings, into court at the next term, is by the statute imposed, not on the party or attorney, but on the trial judge. It is plain that the party must procure the circuit record in the first instance and present it to the trial judge before he can have his trial (Practice Act 1903, §207); but after it is in custody of the judge, the act seems to say that he, and not the party, is to return it into court. That the attorney habitually draws the postea for the judge to sign, and that the long standing practice has been for the attorney to relieve the judge of the responsibility of returning the circuit record into court, are facts generally known, but they do not operate to crange the statute into a requirement that parties undertaking the duty must perform it on peril of losing the benefit of their verdicts. At common law, apparently, the successful party might enter up his judgment on verdict at any time within reason. May *v.* Wooding, 3 Maule & S. 500. If that was the rule, a statute that undertakes to change it should be distinct in its terms.

"These views lead to the second proposition that the statute is simply directory, notwithstanding the word 'shall' is used. It cannot be that the legislature intended a successful party to lose the benefit of his verdict by the inaction of a trial judge. The case is similar to *Morrel* v. *Buckley,* 20 N. J. L. 667, where it was the duty of the clerk on issuing an attachment to make certain entries in a particular book. As was said by Chief Justice Beasley, commenting on that case in Proprietors *ads.* Jones, 36 *Id.* 206, 210, 'the inconvenience and unjust consequences of such a circumstance would have been so great as to forbid the court from concluding that such a purpose was intended in the absence of express terms, or something equivalent compelling to such a conclusion.' Similar cases may readily be imagined, as for example, the lapse of a certiorari or a writ of error for failure or refusal to make a return. Where the relief depends on an act of a party, the rule is of course different, as for example, in the case mentioned in Warwick *v.* Cox, of failure to give recognizance in error within the fifteen days, and in the case of Haythorn *v.* Van Keuren, 79 *Id.* 101, where jury was not demanded in due season.

"Whether upon the passage of this act of 1799 it became the practice for the trial justice to gather up the circuit records in cases tried before him at *nisi prius,* and himself return them into court; and if so, when and how the practice sprang up of this function being assumed by the attorney of the successful party, are questions that it would require some research to answer; but it is plain that since the adoption of the rule of 1868 the statute has been more or less of a dead letter, and its transplantation from the 'act relative to the Supreme and Circuit Courts'

of 1799 and its revision in 1846, into the Practice acts of 1874 and 1903, may well be due to a spirit of sound legal conservatism that bids us rather bear the ills we have than fly to others that we know not of.

"We conclude, then, that the statute, if applicable to a party at all, is directory only, and this result seems to be supported by the great weight of authority. 23 Cyc. 839, and cases cited in note 15. The Supreme Court properly followed the rule and acted within the discretion conferred thereby. The judgment will therefore be affirmed."

Our Supreme court in the case of *McNamara* v. *N. Y., L. E. & W. R. R. Co.,* 56 N. J. Law, 56, held:

"Whenever delay in entering a judgment is caused by the action of the court, judgment *nunc pro tunc* will be allowed as of the time when the party would otherwise have been entitled to it, if justice requires it."

It appears conclusive that the defendant had its verdict, and the court was authorized and justified in recognizing that verdict and ordering the entry of judgment thereon.

For the reasons argued it is respectfully submitted that the judgment in this case should be affirmed.

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New Jersey Court of Errors and Appeals

ANTHONY NITTI,
Plaintiff-Appellant,
vs.
PUBLIC SERVICE RAILWAY COMPANY,
Defendant-Appellee.

On Appeal from Hudson County Circuit Court.

SUPPLEMENTAL BRIEF OF DEFENDANT-APPELLEE.

Plaintiff-appellant brought his first action in the Hudson County Circuit Court. On December 22, 1910, as appears by the Clerk's Trial Book, a trial was had before Benjamin A. Vail, Judge, Alexander Simpson appearing for plaintiff (who appeared for what the declaration therein described as "Anthony Nitti, an infant, who sues by Vito Nitti, his next friend"), and Edwards and Smith appearing for defendant, who has filed a plea of the general issue to said declaration. The jury was sworn, enumerating by name the twelve men, and evidence given, and then continues "By direction of the Court the jury finds in favor of the plaintiff and against the defendant and assesses the damages at $500.00, and so say they all."

Later, on December 28, 1910, defendant paid the amount of said verdict to Pierre P. Garven, attorney of the plaintiff, and obtained a warrant for the satisfaction of the judgment for that amount, which recited that the infant on December 23, 1910, had obtained final judgment thereon, and filed the same with the Clerk of the Hudson County Circuit Court. On February 20,

1911, said Pierre P. Garven filed a petition in said Circuit Court stating that he had received the sum of $500, being the amount of said verdict and had requested the father of said infant plaintiff to take out papers of guardianship so that the said sum could be paid to him as such guardian, but that the father had refused to do so, and prayed that an order might be made directing the payment of said money to the clerk of the court. On that day such an order was made. This petition was in the name of "Anthony Nitti, who sues by Vito Nitti, his next friend."

On November 18, 1925, an order was made by the Hon. Henry E. Ackerson, Jr., Circuit Court Judge, "That judgment be entered in favor of the plaintiff, Anthony Nitti, by Vito Nitti, his next friend, and against the defendant, Public Service Railway Company, for $500.00 as of December 22, 1910, in accordance with the record of said case in the Clerk's Trial Book above mentioned."

On December 3, 1925, a rule to show cause was granted to Anthony Nitti "why the order made herein November 18, 1925, authorizing the entry of judgment in favor of the plaintiff, Anthony Nitti, suing by next friend, and against the defendant, Public Service Railway Co., *nunc pro tunc* * * * should not be vacated and set aside on the ground that the same was entered improvidently and to the prejudice of the plaintiff, Anthony Nitti." Leave was granted to take testimony thereon. All parties interested in this action and the one subsequently brought were noticed to appear. Testimony was taken and Judge Ackerson (see State of Case, pp. 36 et fol.) wrote a very comprehensive and conclusive opinion discharging the said rule to show cause. I ask a careful reading of this opinion by this court, as it epitomizes the facts and accurately applies the law on the points involved.

On May 29, 1925, the plaintiff in the former action, Anthony Nitti, being then over twenty-one years of age, brought another suit admittedly for the same cause of action as the former suit hereinbefore mentioned, *in the same court* as the former suit had been brought in, and admittedly between the same parties. Defendant to plaintiff's complaint in this second action pleaded (1) a general denial and (2) "that on the 22d day of December, 1910, the plaintiff, by his next friend, Vito Nitti, did recover a judgment against the said defendant in the Hudson County Circuit Court for the sum of five hundred dollars ($500) for the same cause or causes of action in the said complaint alleged, which said judgment has been paid by the said defendant." This second cause came on for trial before the said Hudson County Circuit Court and the court directed a verdict for defendant therein on the ground that the former judgment barred the action, on which final judgment was entered May 13, 1926.

On the oral argument in this court, leave was given me to file this supplemental brief.

No dispute was made on the oral argument or in the prior briefs herein that the former recovery would ordinarily be a bar under the authorities cited in our original brief herein, but counsel for plaintiff-appellant expressly confined his argument to three points, which he stated to the court in the following language:

1. Effect of the failure to appoint a next friend for plaintiff.

2. Effect of failure to enter judgment for fifteen years.

3. Legality of the order for entry of that judgment *nunc pro tunc* where no equitable grounds therefor were presented to the court making the order.

I answered these points seriatim in the oral argument and cited many authorities in support of my positions, which the court ordered I should be permitted to incorporate in a supplemental brief. This is that brief.

1. Effect of the Failure to appoint a Next Friend for Plaintiff—if there was such a Failure. The record shows that there was a next friend appearing for plaintiff. It is true that the record does not show any formal written order appointing him. But it is confidently contended that no formal written order there was necessary. He appeared in the *narr.* as next friend to the infant. He was so treated in defendant's plea. He appeared in court at the trial as next friend. (See Case, p. 47.) He was sworn as a witness in said cause and court at the trial and gave testimoney therein (Case, pp. 50-51). The Court accepted him as such next friend or at least acquiesced in his acting as such, and it is my contention that the facts constituted him such and would estop him to deny that he was such.

But if a formal written order was necessary, the law seems to be settled by the overwhelming weight of authority that the want of a guardian *ad litem* or next friend is a mere irregularity and not jurisdictional. In 31 C. J., p. 1121, section 266, the law is laid down as follows: "While in some jurisdictions it has been held that a judgment against a minor not represented is void, subject to collateral attack, without resort to an appeal or action of nullity, the weight of authority is to the effect that, where the court has otherwise jurisdiction, a judgment or decree

rendered against an infant without the appointment of a guardian *ad litem,* while it may be erroneous, and subject to be reversed or set aside or to be ground for a new trial, at most is only voidable, but not absolutely void; and it may not be even necessarily erroneous and subject to reversal; the error may be amended or cured. It remains in full force and effect until it is reversed on appeal or error or set aside by direct proceedings, and is not subject to collateral attack; and this rule applies to decrees in equity as well as judgments at law." The authorities cited in the foot-notes in support of this state of the law are overwhelming.

Wherever the subject has received careful consideration, it seems to be the undoubted rule that a judgment in a case where a *prochein ami* or guardian *ad litem* has not been appointed remains in full force and effect until it is reversed on appeal or error or set aside by direct proceedings, and is not subject to collateral attack.

In 31 C. J., p. 1126, section 274, it is said, "On general principles, there must be an authority somewhere to allow or prohibit a suit to be brought in the name of an infant, by any person assuming to act for him. Hence, in theory of law, it is only by permission of the court that the suit is permitted to be brought in the name of the infant by the person who assumes to act for him. Theoretically, such person is appointed by the court, and there are some cases that seem to hold that a formal appointment is necessary, and in some jurisdictions, by force of statute, a next friend must be duly appointed. But it is generally held that no formal order is necessary, the admission of the next friend by the court being implied; it being neces-

sary only that the court should recognize the representative capacity of the person acting as next friend. A recital or allegation in the pleadings that plaintiff sues by next friend is sufficient without a formal order. Even though the court itself fails in its duty to appoint the next friend, its approval or ratification of the judgment will cure the omission. Mere irregularities in the proceedings for the appointment of a next friend are not ground for reversal of the judgment." Cases which support these rules of law, which are conclusive of the point now under consideration, are *Butler* v. *Winchester,* 216 Mass. 567, 104 N. E. 451; *Hamilton* v. *Foster,* 3 S. C. L. 464; *Gillespie* v. *Collier,* 224 Fed. 298; *Williams* v. *Cleveland,* 56 Atl. 850; *Judson* v. *Blanchard,* 3 Conn. 579; *Usher* v. *Cornwell,* 3 Ind. 210. Other cases bearing on this subject are *Watkins* v. *Lawton,* 69 Ga. 671; *Deford* v. *State,* 30 Md. 179; *Klaus* v. *State,* 54 Miss. 644; *Ramesey's Est.,* 29 Pa. Dist. 603; *Owen* v. *Appalachian Power Co.,* 78 W. Va. 596, 89 S. E. 262; *Packewie* v. *East St. Louis, etc. R. Co.,* 197 Ill. A. 1; *Chudleigh* v. *Chicago, etc Co.,* 51 Ill. A. 491; *Baxter* v. *St. Louis Transit Co.,* 198 Mo. 1, 95 S. W. 856; *Lutcher* v. *Allen,* 43 Tex. Civ. A. 102, 95 S. W. 572; *McCarrick* v. *Kealy,* 40 Atl. 603; *Sick* v. *Michigan Aid Assoc.,* 12 N. W. 905; *Turner* v. *Partridge,* 3 Penr. & W. 172; *Dehart* v. *Kerlin,* 4 Pa. Co. 396; *Exp. Kirkman,* 3 Head. 517; *Apthorp* v. *Backus,* Kirby 407, 1 Am. D. 26; *Resor* v. *Resor,* 9 Ind. 347; *Miles* v. *Boyden,* 3 Pick. 213; *Bent* v. *Maxwell, etc.,* 3 N. M. 158, 3 P. 721; *McDowell* v. *Nims,* 9 Oh. Dec. (Reprint) 624, 15 Cinc. L. Bul. 359; *Hafern* v. *Davis,* 10 Wis. 501; *Colt* v. *Colt,* 111 U. S. 566.

Even if it should be true that no *prochein ami* was appointed or accepted by the court in this

case, still the neglect to make such appointment under the laws of this State and the facts of this case make the omission a mere irregularity, which cannot be taken advantage of by collateral proceedings. This is so in New Jersey not only by force of the decisions of the court but also by the declaration of the legislature.

If it is borne in mind that the appellant contends that no next friend was appointed and therefore the appearance of the infant was by attorney, his position is legally unsustainable. By 21 Jac. 1 Ch. 13, and 4 and 5 Anne Ch. 16 (amendments), after verdict and after confession and default the error of an infant suing by attorney is cured. The case of *Smith* v. *Van Houten,* 9 N. J. L. 381, 382, calls attention with approval to the fact that similar provisions are contained in our statute respecting amendments and jeofails. This provision of these statutes which were in force in England before the American Revolution will be found in 1 Comp. Statutes of N. J., pages 44 and 45, section 10 of the chapter on Amendments. The language of that statute is: "10. Judgment not to be reversed after verdict, for variance in form between writ and declaration, or want of averment, etc. That if any verdict of twelve men or more hath been or shall be given for the plaintiff or demandant, or for the defendant or tenant, bailiff in assize, vouchee, prayee in aid, or tenant by receipt, in any action, suit, bill, plaint, or demand, in any court of record, the judgment thereupon shall not be stayed or reversed for any variance, in form only, between the original writ or bill, and the declaration, plaint, or demand, or for lack of averment of any life or lives of any person or persons, so as, upon examination, the said person be proved to

be in life, or by reason that the venire *facias, habeas corpora,* or *distringas,* is or shall be awarded to a wrong officer, upon any insufficient suggestion, or by reason that any of the jury, which tried the said issue, is or shall be misnamed in the christian name, surname, or addition, in any of the said writs, or in any return upon any of the said writs, so as, upon examination, it be proved to be the same man, who was meant to be returned, or by reason that there is or shall be no return upon any of the said writs, so as a panel of the names of the jurors be returned and annexed to the said writ or writs, or for that the name of the sheriff or other officer, having the return thereof, is not set to the return of any such writ, so as, upon examination, it be proved, that the said writ was returned by the sheriff or undersheriff, or any such other officer, *or by reason that the plaintiff in any action of ejectment, or in any personal action or suit (being an infant under the age of twenty-one years) did or shall appear by attorney therein, and the verdict pass in favor of such plaintiff* (Rev. 1877, p. 10)."

An interesting case from another jurisdiction is *Hanberg* v. *Morgan,* 105 N. E. 720, at p. 722. It is there held that, "At the time the proceedings were had to fix the tax to which the property passing to appellants was liable, Robert C. Burton was a minor. The record fails to show that any guardian *ad litem* was appointed for him, and it is contended that for this reason the order of the county judge fixing the tax was void as to him. The report of the appraiser shows that certain attorneys representing the Security Title & Trust Company, guardian of the estate of Robert C. Burton, attended the proceedings before the appraiser and were present during the taking of testimony. The minor was therefore represented in the proceedings by his guardian. But conceding that a guardian *ad litem* should nevertheless have been appointed, proceeding to appraise the property and fix the tax without such appointment was a mere irregularity and would not subject the order of the county judge to collateral attack. *Peak* v. *Shasted,* 21 Ill. 137, 74 Am. Dec. 83; *Millard* v. *Marmon,* 116 Ill. 649, 7 N. E. 468; *Van Matre* v. *Sankey,* 148 Ill. 536, 36 N. E. 628, 23 L. R. A. 665, 39 Am. St. Rep. 196."

It must also be borne in mind that the appointment of a next friend under the practice in the State of New Jersey is not required to give jurisdiction to the court to entertain the suit brought by an infant as plaintiff. This will be found in the case of *Gillette* v. *D., L. & W. R. R. Co.,* 91 N. J. L. 221, and the case cited therein of *Groff* v. *Groff,* 3 N. J. L. *656.

Another consideration which demonstrates that the non-appointment of a *prochein ami* or guardian *ad litem* is a mere irregularity is found in the case of *Mayhew* v. *Ford,* 32 Vroom 534. It is there held that a plea that a plaintiff is an infant and has declared by attorney instead of by guardian or next friend duly appointed by the court to prosecute is a dilatory plea. "This plea does not deny or strike at the right of action. It tends only to delay the trial on the merits of the case. It questions not the cause of action, but the mode in which the remedy is sought."

It is trite law, which will be found in Stephen on Pleading and the other text-books on the subject, that pleas are to be pleaded in their regular order, and that if one shall neglect to file a

dilatory plea when one is required, if advantage would be taken of matter fit for such plea, he thereby waives his right to thereafter advantage himself of such slip. All these considerations make it conclusive that the effect of the failure—if there was a failure—to appear by next friend cannot be availed of collaterally, as was sought to be done in this case, and that consequently there is no substance in the first point made by appellant.

I have not dealt with the matter of the proceeding taken before Judge Ackerson in the former suit, wherein plaintiff did not challenge the non-appointment of a next friend but challenged solely the entry of the judgment *nunc pro tunc*. The effect of this, now that the former infant is an adult, would seem to be an acquiescence in the record of the former suit in that particular.

2. Effect of Failure to Enter Judgment for fifteen years, and 3. Legality of the Order for Entry of that Judgment *nunc pro tunc* where no Equitable Grounds therefor were presented to the Court making the Order. These grounds may more conveniently and profitably be considered together.

In addition to the decision of Judge Ackerson granting leave to enter the judgment *nunc pro tunc* hereinbefore referred to, and to the authorities, statutes, and reasons referred to in our original brief, I call to the Court's attention the recent work of Harris on Pleading and Practice in New Jersey, at page 580, where, under the title "The rule for judgment entered in the minutes considered as legal evidence," the author says: "In an action which has been finally determined, the verdict or the rule for judgment

entered in the minutes will be accepted in evidence as the record of the judgment in the court in which such judgment was obtained, until the record of the judgment is entered by the clerk."

In volume 3, Compiled Statutes of New Jersey, page 4106, section 173, under the title "Practice," sub-title "Minutes as Evidence," is found the following statutory enactment: "In any action which has been finally determined, until the clerk shall enter the record of the judgment, the verdict or rule for judgment entered in the minutes shall be held and taken in the court in which the same is obtained to be the record of the judgment in such action and shall be received in evidence in said court as such judgment, as fully as if the record had been made up and signed." It will thus appear that inasmuch as the second action was brought in the same court in which the original action proceeded to verdict, the statute is explicit that "until the clerk shall enter the record of the judgment, the verdict * * * entered in the minutes shall be held and taken in the court in which the same is obtained to be the record of the judgment in such action and shall be received in evidence in said court as such judgment, as fully as if the record had been made up and signed." It is therefore apparent that for the purposes of the second suit, it having been brought in the same court in which the former action was brought and verdict recovered, the clerk's minutes setting forth the verdict were evidence of the judgment in the court in which the second action was then pending as fully as if the record had been made up and signed.

Further, on the subject of the operation and effect of the judgment *nunc pro tunc,* I furnished

to the court the following authorities: 34 C. J., page 81, section 222, "Except as to the rights of third parties, a judgment *nunc pro tunc* is retrospective, and has the same force and effect, to all intents and purposes, as if it had been entered at the time when the judgment was originally rendered. It aids and cures proceedings which otherwise would be defective and irregular for want of a proper entry of judgment to sustain them. But the effects of such an entry by relation will be confined to the rights and interests of the original parties, and it will not be allowed to prejudice the intervening rights of third persons without notice. A *nunc pro tunc* entry of record is competent evidence of the facts which it recites, it is conclusive upon any other court in which the record is offered in evidence, and it cannot be impeached collaterally." A cloud of authorities is cited in support of the propositions above set forth, and I will not take the space to reiterate them, except to say that in *Jones* v. *Lewis,* 47 American Decisions 338, it is declared that "the court may amend its records *nunc pro tunc,* and when amendment is ordered, the clerk must alter the record itself so as to conform to the amendment. After this the amended record stands as if it had never been defective, and no court can incidentally inquire into its verity." In *Ware* v. *Kent,* 82 American State Reports 132, it is declared that "the power resides in every court to correct and amend the entries on its minutes, *nunc pro tunc,* and no court can incidentally or collaterally question the verity of the record as amended. The remedy against an improper amendment is by appeal, or by some other method of direct attack. The record evidence of the rendition of a judgment at a prior term, and of the failure of the clerk to make a proper entry

thereof on the minutes of the court, supplies every fact necessary to the entry of a perfect judgment, and authorizes the entry thereof *nunc pro tunc.*" The same doctrine will be found stated in Black on Judgments, section 136.

As between the parties a *nunc pro tunc* entry of the judgment so operates as to save an execution which had heretofore been issued. *Doughty* v. *Meek,* 105 Iowa, 16, 74 N. W. 744; *Burns* v. *Skelton,* 29 Tex. Civ. A. 453, 68 S. W. 527. It is perfectly settled that the entry of judgment *nunc pro tunc* may be ordered by the court upon it own motion. *Groton Bridge Co.* v. *Clark Brick Co.,* 136 Federal, 27. Mr. Freeman, in his work on Judgments, at section 67, says: "With the exception pointed out in the previous section (relating to the rights of third persons), a judgment entered *nunc pro tunc* must be everywhere received and enforced in the same manner and to the same extent as though entered at the proper time * * *. Though an execution may have issued * * * when there was nothing on the record to support it, yet the omission is one of evidence, and not of fact; and, the evidence being supplied in a proper manner, full force and effect will be given to the fact, as if the evidence had existed from the beginning."

"The nature of a judicial record, the accuracy of which is the peculiar concern of the court and which for that reason and to that extent remains within the court's control, forbids that its correctness as an expression or evidence of judicial action should depend upon the inauguration of a proceeding by the parties; and it is therefore plain that such a proceeding only invokes an authority which the court may exercise of its own accord." *Coleman* v. *Zapp,* 151 S. W. 1040, 1041. It is furthermore perfectly settled that a

judgment *nunc pro tunc* directed without notice to anyone is not void. *Smith* v. *Kiene,* 231 Mo. 215, 132 S. W. 1052; *Long* v. *Stafford,* 103 N. Y. 274, 8 N. E. 522. "Ordinarily, a court would require notice of the motion to be given to all parties interested, but it has the power to make the correction without such notice." *Crim* v. *Kessing,* 89 Cal. 478, 486, 26 Pac. 1074.

Furthermore, the non-entry of the judgment, if it should be held there was no entry thereof, was not the fault of the party moving for judgment *nunc pro tunc.* While it is held in some cases that relief by entry *nunc pro tunc* will not be granted where the failure to enter the judgment was due to the applicant's own fault or negligence, it is obvious in the case now *sub judice* that the duty to enter the judgment was the duty of the plaintiff or the clerk of the court, but was certainly not the duty of the defendant against whom the verdict had been rendered, nor was it in any way chargeable with fault or negligence in that respect. But it is perfectly clear that whether the entry of the judgment *nunc pro tunc* was a proper exercise of discretion on the part of the trial court or not, it cannot be impeached collaterally, as was sought to be done in the instant case. *Ware* v. *Kent, supra; Montgomery County* v. *Auchley,* 15 S. W. 626; *Courtney* v. *Barnett,* 166 Pac. 207; *State* v. *Koontz,* 83 Mo. 323, and cases cited.

It is furthermore thoroughly settled that a judgment will be directed to be entered *nunc pro tunc* where it is shown that some injury or injustice will result from a refusal to do so.

Something was said on the oral argument relative to the inability of an infant to so be found by a settlement as to preclude him from ques-

tioning it when he reached his majority. I answered then, as I answer now, that if the settlement were attempted to be made by the attorney or next friend of the infant without the sanction of the court, of course such settlement would not be binding upon the infant, and he might, upon reaching his majority, disaffirm it. In *Rubin* v. *Trowbridge,* 122 Atl. 763, this court held that a father as next friend could not make an offer of compromise which would be legally binding on his son, and quoted from 22 Cyc. 663 the following language, "A guardian *ad litem* or next friend has no authority to compromise or settle the suit, *except by leave of the court.*"

In *Butler* v. *Winchester,* 104 N. E. 451, at p. 452, the Supreme Court of Massachusetts said, "An infant ordinarily is bound by the acts done in good faith by his solicitor or counsel in the course of proceedings to the same extent as a person of full age." Section 18 of the New Jersey Practice Act provides that "in no case shall the action be stayed until the infant arrives at full age." Does the legislature direct the progress of the suit during infancy, and yet leave every step in its orderly progress, including the orders made in the cause, the verdict and judgment rendered, merely tentative until the infant shall have reached his majority?

It is furthermore perfectly settled that an infant is liable to other persons in actions of tort. Can it be possible that in such actions the adjudication does not bind him until after he has reached his majority?

It is obvious that the answer to these inquiries is that when judicial action has lent its sanction to the proceedings in a suit, the infant is bound

by such proceedings to the same extent as a person of full age. In logic the same conclusion would flow from the consideration hereinbefore mentioned relative to the statute of amendments and jeofails, that if an attorney shall appear for an infant and no *prochein ami* shall have been appointed, that after verdict the error of such proceeding is cured. See Compiled Statutes, Amendments, section 10; *Smith* v. *Van Houten,* 4 Halsted, 381, 382.

To the suggestion that no equitable grounds for making the order for entry of judgment *nunc pro tunc* were offered to the court in the former action, the conclusive answer is that the legality of that order cannot be challenged collaterally, but only by direct proceedings, according to the authorities hereinbefore cited. But even if the court were considering the propriety of the decision of the trial judge on that motion, his opinion reported on page 36, *et fol.,* of the State of Case, coupled with the facts that the clerk's register and the clerk's trial book showed that all the proceedings in the orderly progress of the cause had been regularly gone through with, and that plaintiff on December 28, 1910, through his attorney, Pierre P. Garven, had furnished defendant, who had paid the amount of the verdict to plaintiff, a warrant for the satisfaction of the judgment for that amount, which recited that plaintiff had obtained final judgment in the Circuit Court of the County of Hudson against Public Service Railway Company for $500, as by the record might appear, and that plaintiff, having received satisfaction for the same, defendant was authorized to enter an acknowledgment of satisfaction upon the record of said judgment; and that on February 20, 1911, plaintiff's attorney had filed a petition stating that

judgment had been recovered for the plaintiff for the sum of $500, and that the said sum of money was paid to the petitioner as attorney of the plaintiff on the 23d day of December, 1910, as will appear from the State of the Case, p. 24, furnished sufficient equitable grounds to the court for making an order for the entry of judgment *nunc pro tunc.*

All that remained, therefore, uncompleted was the entry of the judgment on the records of the court, and this defendant had a right to suppose had been done from the representations made to it in the warrant for the satisfaction of the judgment, and in the petition for leave to pay the money into court. That this is a mere negligible and formal thing appears from the cases that have been decided in such cases. "The office of a *nunc pro tunc* order is to supply on the record something which has actually occurred in the court, but omitted to be noted of record." *Jett* v. *Farmer's Bank,* 76 S. W. 385. "If there is simply a general verdict in a case, with failure to announce a judgment or a correct judgment thereon, such verdict alone authorizes the entry of a *nunc pro tunc* judgment, correctly pronouncing the legal consequences resulting from the verdict, since in such case the judge has nothing to do but simply enter upon his docket the fact of the return of the verdict, and judgment follows as a matter of course." *Carwile* v. *Cameron,* 114 S. W. 100. It is furthermore settled that "The power to enter a judgment *nunc pro tunc* can be exercised only in cases where the cause was ripe for judgment, that is, where the case was in such a condition at the date to which the judgment is to relate back that a final judgment could have been then entered immediately." See 34 C. J., p. 72, section 209,

and cases cited in note 51. "The record must show a verdict whereon to base a judgment *nunc pro tunc*. If there is no verdict in the record, the court cannot at a subsequent term order a verdict, and judgment to be entered *nunc pro tunc*." *Gray* v. *Thomas*, 20 Miss. 111.

That the judgment may be entered in a case such as the one now *sub judice* is evidenced by the text and cases cited in support thereof in 34 C. J., 79-80. See especially p. 80, note 3, where it is abundantly established that "the pleadings, the minutes of the court, and the verdict in an action are sufficient record evidence to sustain the action of a court in ordering an entry of a judgment *nunc pro tunc*, although more than six months have elapsed from the rendition of the verdict." *Marshall* v. *Taylor*, 32 Pac. 515.

Some suggestion was made by attorney for plaintiff-appellant that the judgment *nunc pro tunc* should have been pleaded by plea *puis darrein* continuance. This is obviously not so. (1) Defendant had pleaded a judgment of December 22, 1910, in bar. The effect of the order for the entry of the judgment *nunc pro tunc*, as shown by the authorities hereinbefore cited, was to give it "the same force and effect, to *all* intents and purposes, as if it had been entered at the time when the judgment was originally rendered. It aids and cures proceedings which otherwise would be defective and irregular for want of a proper entry of judgment to sustain them." After the entry of judgment *nunc pro tunc* "the record stands as if it had never been defective." (2) The minutes being in the same court the verdict "was evidence of the judgment in the court in which the second action was pending as fully as if the record had been made up and signed."

To conclude therefore on this branch of the case, it is manifest that Judge Ackerson had ample material before him to justify him in ordering the entry of judgment *nunc pro tunc* in the former action, and that his action therein if it could be inquired into collaterally would be utterly unassailable, but the authorities are uniform that the making of such order is merely a step in the progress of the cause, and cannot be inquired into as is sought to be done in this case collaterally, but only through direct application to the trial court or in a direct course of appeal.

It must not be lost sight of that an application was made by plaintiff to the trial court by rule to show cause to set aside the order, and that after a full hearing on the merits of the case the trial judge discharged the rule to show cause, and that if plaintiff would be relieved from the consequences of that proceeding his only remedy would be by a direct appeal from the order discharging said rule then entered.

Upon the whole case, therefore, it is clear that the judgment in the former case is a complete bar to the action now under review, and that judgment should therefore be entered against plaintiff-appellant and in favor of defendant-appellee on this record.

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