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NOTICE OF APPEAL.

UNION COUNTY CIRCUIT COURT.

Filed November 6, 1919.

LIMPERT BROS., INC., a corporation, *Plaintiff,* *vs.* WILLIAM H. STITT, *Defendant.*	}	*Action at Law.*

NOTICE OF APPEAL.

TAKE NOTICE, that the plaintiff appeals to the Court of Errors and Appeals of the State of New Jersey, from the whole of the judgment entered in this case, upon the following ground:

The Trial Court directed a judgment of non-suit against the plaintiff and in favor of the defendant when thereunto moved by counsel for the defendant, whereas said court should have denied said motion.

E. A. MERRILL,
Attorney for Appellant.

To A. C. Nash,
Attorney for Defendant.

ORIGINAL COMPLAINT.

Served April 17, 1918.

Filed May 1, 1918.

UNION COUNTY CIRCUIT COURT.

LIMPERT BROS., INC., a corporation, *Plaintiff,*		*Action at Law.*
vs.		
WILLIAM H. STITT, Constable *Defendant.*		*In Tort.*

Plaintiff, Limpert Bros., Inc., a corporation of the State of New York, and having its principal place of business at No. 625 Greenwich street, City, County, and State of New York, says that:

1. On September 23, 1915, certain goods and chattels, the property of Charles Clay, Thomas Takis, and Harry Rally, partners, trading as "Diana Sweets," and being on the premises at No. 140 East Broad street, Westfield, Union County, N. J., were attached by the Sheriff of Union County in the suit in attachment, in the Union County Circuit Court, of Limpert Bros., Inc., against said Charles Clay, Thomas Takis, and Harry Rally, partners, trading as "Diana Sweets." A schedule of said certain goods and chattels so attached is annexed hereto, and made a part hereof.

2. The said sheriff was unable to take said goods and chattels into his custody and possession because said goods and chattels had been seized, prior to said attachment at the suit of Limpert Bros., Inc., by William H. Stitt, constable, the defendant herein, under attachments issuing out of a Small Cause Court of Union County at the suit of John C. Tobin *vs.* Clay and Takis, partners, trad-

ing as "Diana," Jaburg Bros. *vs.* Clay and Takis, partners, trading as "Diana," R. M. French & Son *vs.* Clay and Takis, partners, trading as "Diana," and Welch Bros., Inc., *vs.* Clay and Takis, partners, trading as "Diana," and the said William H. Stitt, constable, then refused, and continued to refuse, to deliver the said goods and chattels to said sheriff.

3. On February 3, 1916, Rule for Judgment in favor of the plaintiff was entered in said suit of Limpert Bros., Inc., *vs.* Charles Clay, Thomas Takis and Harry Rally, partners, trading as "Diana Sweets."

4. On March 19, 1918, the right, title, and interest of Charles Clay, Thomas Takis, and Harry Rally, partners, trading as "Diana Sweets," in and to said certain goods and chattels, schedule of which is annexed hereto and made a part hereof, were sold in the Town of Westfield, and County of Union, after due and legal notice of said sale, by virtue of an order of the Union County Circuit Court, by William H. Orr, the auditor appointed by said Union County Circuit Court in said suit of Limpert Bros., Inc., *vs.* Charles Clay, Thomas Takis, and Harry Rally, partners, trading as "Diana Sweets," to, and purchased by, Limpert Bros., Inc., the plaintiff herein, which then became, and has since remained, lawfully entitled to the immediate possession of said goods and chattels.

5. The said auditor was unable to deliver the said goods and chattels to the said purchaser, the plaintiff herein, because said William H. Stitt, constable, refused, and still refuses, to deliver said goods and chattels to said William H. Orr, auditor.

6. Thereafter said purchaser, Limpert Bros., Inc., the plaintiff herein, demanded in writing, in Westfield, in the County of Union, of said William H. Stitt, constable, that he, the said William H. Stitt, constable, deliver to it, the said Limpert Bros., Inc., the said goods and chattels so purchased, but

the said William H. Stitt, constable, refused, and still refuses, to deliver said goods and chattels to said Limpert Bros., Inc.

FIRST COUNT.

1. The said certain goods and chattels were seized in said suits in said Small Cause Court, by said William H. Stitt, constable, as the property of "Clay and Takis, partners," but the said goods and chattels were not the property of the said "Clay and Takis, partners," but were the property of "Charles Clay, Thomas Takis, and Harry Rally, partners."

2. The said goods and chattels seized in said suits in said Small Cause Court as the goods and chattels of "Clay and Takis, partners," then being the goods and chattels of "Charles Clay, Thomas Takis, and Harry Rally, partners," were wrongfully seized by the said William H. Stitt, constable, and being now the property of Limpert Bros., Inc., the plaintiff herein, the said William H. Stitt, constable, wrongfully withholds them from the said plaintiff.

SECOND COUNT.

1. No defendant is named, in a legal sense, in the proceedings had in the said attachment suits in the Small Cause Court against "Clay and Takis, partners, trading as Diana."

2. No defendant being named, in a legal sense, in the proceedings had in the said attachment suits in the Small Cause Court against said "Clay and Takis, partners, trading as Diana," the said Small Cause Court had no jurisdiction therein, over persons or property, and the said William H. Stitt, constable, acquired no right to seize said goods and chattels, and wrongfully withholds them from the plaintiff.

THIRD COUNT.

1. The ownership of the said certain goods and chattels was in three partners, Charles Clay, Thomas Takis, and Harry Rally, and the goods and chattels of the three partners were seized, but the suits in said Small Cause Court were against two individuals only, as defendants.

2. The ownership of said goods and chattels being in three individuals, and the proceedings in said Small Cause Court, and the allegations being against two individuals only no jurisdiction was acquired over said goods and chattels by said Small Cause Court, the said William H. Stitt, constable, acquired no right of seizure of said goods and chattels, and wrongfully withholds them from the plaintiff herein.

FOURTH COUNT.

1. The plaintiffs in each several suit in said Small Cause Court referred to in paragraph 2, failed to prove the posting of notices of attachment, in accordance with the statute in such case made and provided as is proved by the failure of the justice of the peace, before whom said suits were tried, to make any entry in his docket of proof of posting notices of attachment.

2. The plaintiffs in said suits in said Small Cause Court having failed to prove the posting of notices of attachment, the said Small Cause Court never acquired jurisdiction to render judgment against said goods and chattels, and the said William H. Stitt, constable, thereby lost any right he may have theretofore had to hold said goods and chattels, and wrongfully withholds them from the plaintiff herein.

Plaintiff demands the possession of said goods and chattels, or, in case they cannot be returned, $2,000 for said goods and chattels, and $500 damages for their detention.

E. A. MERRILL,
Attorney for Plaintiff.

NOTICE OF MOTION TO STRIKE OUT ORIGINAL COMPLAINT.

Served May 30, 1918.
Filed May 2, 1919.
UNION COUNTY CIRCUIT COURT.

LIMPERT BROS., INC., a corporation, *Plaintiff,* *vs.* WILLIAM H. STITT, Constable, *Defendant.*	*Action at Law. Notice to Strike Out.*

TAKE NOTICE that I shall apply to His Honor, George S. Silzer, Judge of the Union County Circuit Court, at the Court House, in the City of Elizabeth, on Saturday, the eighth day of June, 1918, at half-past nine o'clock in the forenoon, or as soon thereafter as counsel can be heard thereon, for an order to strike out the complaint herein on the grounds:

1. The allegations in the complaint do not sustain the demand for relief.

2. The complaint discloses no cause of action.

3. The complaint is argumentative and is not a statement of facts.

4. The action is barred by statute.

5. The complaint is irregular, defective, and so framed as to embarrass or delay a fair trial.

And, in the event that said motion is refused as to the complaint as a whole, then take notice that I shall then move to strike out severally the preamble of six paragraphs and the various counts of the complaint on the same grounds applied severally to the said preamble of six paragraphs and to the said various counts. Respectfully,

VINCENT W. NASH, JR.,
Attorney for Defendant.

To E. A. Merrill, Esq., Attorney for Plaintiff.

MEMORANDUM.
Filed April 30, 1919.
UNION COUNTY CIRCUIT COURT.

LIMPERT BROS., INC., *Plaintiff,* *vs.* WILLIAM H. STITT, *Defendant.*	*On Motion to Strike out Complaint.*

Mr. E. A. Merrill, for plaintiff.
Mr. W. S. Angleman, for defendant.

Memorandum.

The motion to strike out the complaint must be granted.

Plaintiff's whole contention is based upon the assumption that the judgment of the justice of the peace is *void*, not voidable.

If void the right to attack in this manner would exist.

The Supreme Court however has decided that the judgment was "*not void*, but at best only voidable," and this court is bound by that finding. The result is that the judgment is not subject to collateral attack.

The method of attack is provided by Sec. 43 of the Attachment Act. It appears by the record that the plaintiff's attorney attempted this method, but failed to present the requisite proof.

It might also be stated in passing that the complaint does not comply with the rules.

The motion will be granted, with costs.

GEO. S. SILZER,
Judge.

ORDER STRIKING OUT COMPLAINT.

Filed April 30, 1919.

UNION COUNTY CIRCUIT COURT.

LIMPERT BROS., INC., a corporation, *Plaintiff,*		*Action at Law.*
vs.		
WILLIAM H. STITT, Constable, *Defendant.*		

Notice of an application for an order to strike out the complaint herein having been given the plaintiff, and the same coming on to be heard on June 8, 1918, and the Court having heard W. S. Angleman, of counsel with the defendant, in support of said application, and E. A. Merrill, of counsel with the plaintiff, in opposition thereto, and briefs by the respective parties having been submitted, and the Court having duly considered the matter, and being of the opinion that the said complaint should be stricken out.

IT IS ORDERED that the complaint filed herein be stricken out, with costs.

AND IT IS FURTHER ORDERED that the plaintiff have twenty days from the service of a copy of this order upon the plaintiff or its attorney, which copy need not be certified, in which to file a new complaint and to serve a copy thereof on the defendant's attorney, and that in default of the plaintiff so doing judgment may be entered against the plaintiff and for the defendant without further notice.

On motion of

VINCENT W. NASH, JR.,
Attorney for Defendant.

Let the above order be entered.

Dated September , 1918.

GEO. S. SILZER,
Circuit Court Judge.

NEW COMPLAINT.
Served April 19, 1919.
Filed April 21, 1919.
UNION COUNTY CIRCUIT COURT.

LIMPERT BROS., INC., a corporation, *Plaintiff,* *vs.* WILLIAM H. STITT, *Defendant.*	*Action at Law.* *In Tort.* *Complaint.*

Plaintiff, Limpert Bros., Inc., a corporation of the State of New York, and having its principal place of business at No. 625 Greenwich street, City, County and State of New York, says that:

1. On September 23, 1915, certain goods and chattels, the property of Charles Clay, Thomas Takis, and Harry Rally, trading as "Diana Sweets." and being on the premises at No. 140 East Broad street, Westfield, Union County, New Jersey, were attached by the Sheriff of Union County in the suit in attachment, in the Union County Circuit Court, of Limpert Bros., Inc., against said Charles Clay, Thomas Takis, and Harry Rally, trading as "Diana Sweets." A schedule of said certain goods and chattels so attached is annexed hereto, and made a part hereof.

2. On September 23, 1915, the said goods and chattels were in the possession, or under the control, of one William H. Stitt, the defendant herein, who then refused, and continued to refuse, to surrender possession or control of said goods and chattels to said sheriff.

3. The said William H. Stitt, on September 23, 1915, was not, nor did he thereafter become, the owner of said goods and chattels, or any part

thereof, nor did he then have or thereafter acquire any interest therein, or lien thereon.

4. On February 23, 1916, Rule for Judgment in the sum of $1,532.24 in favor of the plaintiff was entered in said suit of Limpert Bros., Inc., *vs.* Charles Clay, Thomas Takis, and Harry Rally, trading as "Diana Sweets."

5. On March 19, 1918, the right, title and interest of Charles Clay, Thomas Takis and Harry Rally, trading as "Diana Sweets," in and to the goods and chattels so attached as aforesaid, were sold in the Town of Westfield, and County of Union, by virtue of an order of the Union County Circuit Court, by William H. Orr, the auditor appointed by said Union County Circuit Court in said suit of Limpert Bros., Inc., *vs.* Charles Clay, Thomas Takis, and Harry Rally, trading as "Diana Sweets," to, and purchased by Limpert Bros., Inc., the plaintiff herein, for the sum of $1,332.54.

6. Thereafter, and on or about April 13, 1918, said purchaser, Limpert Bros., Inc., the plaintiff herein, demanded in writing, in Westfield, in the County of Union, of said William H. Stitt, that he, the said William H. Stitt, deliver to it, the said Limpert Bros., Inc., the said goods and chattels so purchased, but the said William H. Stitt wrongfully refused, and still refuses, to deliver said goods and chattels to said Limpert Bros., Inc.

Plaintiff demands the possession of said goods and chattels and $1,000 damages for their detention or, in case they cannot be returned, $2,000 for said goods and chattels, and $1,000 damages for their detention.

E. A. MERRILL,
Attorney for Plaintiff.

ANSWER TO NEW COMPLAINT.
Filed May 9, 1919.
UNION COUNTY CIRCUIT COURT.

LIMPERT BROS., INC., a corporation, *Plaintiff,* *vs.* WILLIAM H. STITT, *Defendant.*	*Action at Law.* *Answer.*

Defendant, residing in Westfield, Union County, New Jersey, says:

FIRST DEFENSE.

1. Defendant, on information and belief, denies the first paragraph.

2. As to the second paragraph, defendant says that the said goods and chattels were not in the possession or under the control of the defendant personally on September 23, 1915, but were under his control as a constable of the County of Union by virtue of certain writs of attachment issued out of the Small Cause Court, and that as such officer, he refused to surrender possession or control of the same to the sheriff.

3. As to the third paragraph, defendant says that he was not on September 23, 1919, nor did he thereafter become, the owner personally of said goods and chattels, or any part thereof, nor did he then have, or thereafter acquire, any interest or lien thereon, except that acquired by him as constable by virtue of certain writs of attachment issued out of the Small Cause Court and executions issued thereon.

4. Defendant has no knowledge as to paragraph four.

5. Defendant, on information and belief, denies the statements in paragraph five.

6. Defendant admits the demand set forth in paragraph six, and that he refused and still refuses to comply with the same, but denies that said refusal was wrongful.

7. Defendant further says that prior to the time that the demand set forth in paragraph six was made, defendant, by virtue of executions issued out of the Small Cause Court in suits in which the said writs of attachment were issued, had sold, as constable, the said goods and chattels, and the buyers had removed the said goods and chattels, and the defendant, as constable, had turned over the proceeds of said sale to the persons entitled to receive the same.

8. Defendant further says that the legality of the proceedings in the Small Cause Court under which said sales were held was attacked by the plaintiff herein, and that the proceedings were sustained by the Supreme Court and by the Court of Errors and Appeals, and that said sales did not take place until said proceedings were sustained.

SECOND DEFENSE.

The matters contained in the complaint are *res adjudicata* by virtue of the decisions of the Supreme Court and the Court of Errors and Appeals set forth in paragraph eight of First Defense.

THIRD DEFENSE.

1. This action is barred by the statute of limitations in such case made and provided, as this action was not brought within two months from the time of the making of the demand set forth in paragraph two.

2. This action is barred by the statute of limitations in such case made and provided, as this action was not brought within two months from the time of the making of the demand set forth in paragraph six.

VINCENT W. NASH, JR.,
Attorney of Defendant.

REPLY.
Filed June 25, 1919.
UNION COUNTY CIRCUIT COURT.

LIMPERT BROS., INC., a corporation,	*Plaintiff,*	*Action at Law.*
vs.		*Amended*
WILLIAM H. STITT,	*Defendant.*	*Reply.*

The plaintiff replies to the defendant's answer as follows:

1. Plaintiff has no knowledge as to the allegations made in paragraphs 2, 3 and 7 of the defendant's First Defense, and leaves defendant to his proof.

2. Plaintiff denies that the matters contained in the complaint are *res adjudicata* as alleged in the defendant's Second Defense.

3. Plaintiff denies that this action is barred by the statute of limitations as alleged in paragraphs 1 and 2 of the Third Defense, and says that this action is within the spirit and the terms of the order of this court, filed April 30, 1919, on a motion to strike out the complaint in the case of *Limpert Bros., Inc.,* vs. *William Stitt, Constable.*

E. A. MERRILL,
Attorney for Plaintiff.

JUDGMENT.

Filed October 21, 1919.

UNION COUNTY CIRCUIT COURT.

LIMPERT BROS., INC., *Plaintiff,* *vs.* WILLIAM H. STITT, *Defendant.*	*Judgment.*

This cause being regularly on the calendar, at the present October Term, 1919, and the parties having appeared, and the plaintiff having moved his case, and the defendant having moved for a non-suit, and having considered the matter, and being of the opinion that the motion of the defendant should be granted, and the plaintiff non-suited:

It is, on this 20th day of October, 1919, ordered, that judgment of non-suit be entered in favor of the defendant, William H. Stitt, and against the plaintiff Limpert Bros., Inc., on the ground that the action is barred by the statute of limitations as set up in the second paragraph of the Third Defense, in the defendant's answer.

Costs to be taxed against the plaintiff.

GEO. S. SILZER,
Judge.

Judgment entered October 21, 1919.

Baker Printing Co., Law Printers, 251 Market St., Newark, N. J.

New Jersey Court of Errors and Appeals

LIMPERT BROS. INC., *Plaintiff-Appellant,* *vs.* WILLIAM H. STITT, *Defendant-Appellee.*	*Action at Law.* *On Appeal.*

PLAINTIFF'S BRIEF.

This appeal is brought to review a judgment of non-suit entered, in the Union County Circuit Court, on the ground that the action was barred by the Statute of Limitations, but under circumstances which seem to the appellant to render the judgment violative of justice, and erroneous as a matter of law.

The plaintiff, after demand and refusal, brought an action for the recovery of the value of certain goods belonging to the plaintiff, which had been wrongfully sold by the defendant, a constable, as the goods of another, but the complaint was dismissed. The order dismissing the complaint, however, reserved to the plaintiff the right to file and serve a "new complaint" within twenty days (R., p. 8), the purpose of the reservation being to preserve to the plaintiff its right of action, notwithstanding more than the statutory limitation of two months between demand and action brought had elapsed between the demand and the dismissal of the complaint.

Thereupon the plaintiff served and filed a new *summons* and complaint, and the defendant, after waiting until the twenty days had expired, asked for a non-suit on the ground that the plaintiff should have served merely an *amended* complaint. As the defendant's motion admits the allegation that the property in question belongs to the plaintiff, the judgment of non-suit deprives the plaintiff of its property without a trial and without due process of law, notwithstanding it acted promptly and in good faith while the defendant sat silently by and, by his conduct, led the plaintiff to believe, and to act upon the belief, that the new complaint complied with the terms and purpose of the order granting further time.

The circumstances were as follows:

On March 19, 1918, certain goods and chattels were purchased by Limpert Bros. Inc., the plaintiff herein, at an execution sale by an auditor appointed by the Union County Circuit Court in the attachment suit of Limpert Bros. Inc. *vs.* Charles Clay, Thomas Takis and Harry Rally.

Prior to this attachment, the said goods and chattels were in the possession of one William H. Stitt, the defendant herein, a constable, who claimed to have seized the same goods as the property of another, and who refused to deliver the goods to the sheriff when attached in the attachment suit of Limpert Bros. Inc.

On April 13, 1918, the said purchaser, Limpert Bros. Inc., the plaintiff herein, demanded the said goods and chattels of the said Stitt, the defendant herein, on the ground that, the said Limpert Bros. Inc. being the true owner, the said goods and chattels were wrongfully detained by said Stitt.

This demand being refused, Limpert Bros. Inc. served a summons and complaint upon the said Stitt on April 17, 1918 (R., p. 2), in an action at

law in the Union County Circuit Court, for the recovery of the goods or their value, and damages for their detention.

An application by the defendant to strike out the complaint (R., p. 6), was argued on June 8, 1918, and an order striking out the complaint, but reserving further time to the plaintiff, was filed in the Union County Circuit Court April 30, 1919 (R., p. 8).

This reservation was in the following terms:

> IT IS ORDERED that the complaint filed herein be stricken out, with costs.
>
> AND IT IS FURTHER ORDERED that the plaintiff have twenty days from the service of a copy of this order upon the plaintiff or its attorney, which copy need not be certified, in which to file a new complaint and to serve a copy thereof on the defendant's attorney, and that in default of the plaintiff so doing judgment may be entered against the plaintiff and for the defendant without further notice.
>
> On motion of
>
> VINCENT W. NASH, JR.,
> *Attorney for Defendant.*

Neither in the record nor in the plaintiff's file is there any record of the service of the above order, but the Circuit Court advised the plaintiff of the order by letter dated April 10, 1919, and a new complaint was served on April 19, 1919 (R., p. 9).

The case was set down for the October term, 1919, and upon being moved on October 20, the defendant moved for a non-suit on the ground that the new complaint, not being merely an amended complaint, did not comply with the terms of the order, and that, more than two months having elapsed after demand made, the action was barred under the following statute:

STATUTE OF LIMITATIONS.

23. Actions against sheriffs or other officers to enforce claims to personal property attached, etc.—

Sec. 1. In all cases where any sheriff or other officer shall attach, levy upon, take or sell any personal property, under and by virtue of any writ of attachment or execution issuing out of any court of this state, and such personal property or any title or interest therein, shall be claimed by any person or corporation other than the defendant in attachment or execution, by notice in writing delivered to such sheriff or officer, his attorney or agent, then such claimant shall, within two months from the time of making such claim in writing, bring an action for the enforcement of said claim against such sheriff or officer, his agent or person acting for him, or be forever thereafter debarred from bringing any action against such sheriff or officer, either as such sheriff or officer, or individually, or against his agent or person acting for him, for such attachment, levy, taking or sale, or to recover the proceeds of any such sale (P. L. 1896, p. 358) (3 C. S., 3171).

The court granted the motion and ordered a nonsuit (R., p. 14), and this appeal is brought to reverse that judgment.

The chronology is as follows:

Goods purchased by the plaintiff March 19, 1918.

Goods demanded of the defendant by the plaintiff April 13, 1918.

Summons and complaint served on defendant April 17, 1918.

Motion to strike out complaint argued June 8, 1918.

Order striking out complaint and granting further time filed April 30, 1919.

New complaint served on defendant April 19, 1919.

It is the defendant's contention that, admitting the goods to be the property of the plaintiff, nevertheless the plaintiff should be deprived of its property because, forsooth, it did not place the same construction upon the terms of the order as did the defendant, notwithstanding the defendant was in nowise prejudiced thereby, and acquiesced in the procedure adopted until the time granted had expired.

The plaintiff contends that it being the purpose of the order to preserve to the plaintiff a right of action, and having come within the terms and spirit of the order, without prejudice to the defendant, and the defendant having acquiesced in the procedure adopted and sat silently by, the right of action vested under the original summons and complaint was preserved, and it would be grossly unjust and inequitable to be now barred of its action and the right to recover its property.

POINT I.

The Defendant is Estopped to Raise the Statute of Limitations.

In the late case of *Crawford* vs. *Winterbottom*, 88 N. J. L., 588, it was held that the doctrine of Equitable Estoppel has been adopted and applied by courts of law, and that defendants may be estopped from setting up the statute of limitations where such action would be inequitable.

This plaintiff brought its action four days after demand made, and the complaint was dismissed with the reservation that the plaintiff have twenty

days from the service of a copy of the order in which to file and serve a "new complaint," and this requirement was complied with.

The defendant knew that the plaintiff acted in good faith, depending upon the reservation expressed in the order, and with the intention of complying with the terms and spirit of the order. The defendant, by his silence and by his apparent acquiescence in the course adopted by the plaintiff, led the plaintiff to believe that the new complaint, as served and filed, complied with the order, and the plaintiff having acted in the belief, induced by the conduct of the defendant, that its right of action was preserved, the defendant will not now be permitted to object for the sole purpose of preventing a trial of the issue upon the merits in order to deprive the plaintiff of its property.

POINT II.

The Statute of Limitations was Waived.

It is the general rule that statutes of limitation are "for the benefit and repose of individuals, and not to secure general objects of policy or morals," and may, therefore, be waived.

This rule is laid down in *Quick* vs. *Corlies*, 39 N. J. L., 11, the leading case in this state and one widely cited, and has never been questioned.

The order granting the plaintiff further time was on the motion of the defendant's attorney, and was a waiver of the statute. The essence and purpose of the order was the preservation of a right of action in the plaintiff, and not the service of a new complaint in a particular form. So far as the defentant was concerned it was of absolutely no consequence in what form the new complaint was served, and it was only incumbent on the plaintiff to avoid the

error complained of in the original complaint. The plaintiff having acted upon the waiver in a manner to preserve its right of action, the waiver cannot now be withdrawn and the right of action destroyed.

POINT III.

The Defendant has not been Prejudiced.

The original complaint contained four counts. The new complaint contains but one count (R., p. 9), which is the first count in the original complaint (R., p. 4). The issue, then, has not been changed in form or substance, and the defendant has not been prejudiced in any manner or degree. It made not the slightest difference to the defendant *how* the "new complaint" was served.

This point should be emphasized because this court might conclude, from the language used in the memorandum filed by the Circuit Court with the order dismissing the original complaint, that the new complaint differs substantially from the original complaint. That memorandum says, referring to certain judgments in the Justice's Court actions in attachment in which the goods were seized by this defendant: "Plaintiff's whole contention is based upon the assumption that the judgment of the justice of the peace is *void*, not voidable."

The Circuit Court is in error. It is true that the second, third and fourth counts of the original complaint were based on that assumption, but *the very first count*, and the count upon which the plaintiff now wholly depends, went straight to the issue of ownership (R., p. 4) and had no connection whatever with the judgments referred to, as will be evident upon a reference thereto.

The plaintiff claims that the service of the new complaint was within the terms and the spirit of the order, but even admitting that it was defective, nevertheless the non-suit should be set aside on the further ground of surprise. The true rule is expressed as follows in the head note to *Jackson* vs. *Waldron,* 5 Fed Rep., 245:

> "If no injury results to the defendant the court will set aside a non-suit where it appears that the suit is meritorious, and that the plaintiff has been surprised by some defect which he did not discover in time to remedy."

This plaintiff's position is especially strong because not only is the single count in the new complaint identical with the first count in the original complaint, and therefore without prejudice to the defendant, but the defendant deliberately and wilfully surprised the plaintiff by waiting until the time granted had expired before calling the plaintiff's attention to an alleged defect of which the defendant was always cognizant, and for the sole purpose of depriving the plaintiff of property which, so far as this Court is concerned, the defendant admits to belong to the plaintiff.

POINT IV.

The Plaintiff should have its day in Court.

The issue raised in the Circuit Court goes to the ownership of certain goods and chattels. If they are the goods and chattels of the plaintiff, and the defendant's motion admits such to be the fact in this Court, the plaintiff is entitled to recover, and should not lightly be debarred of its right to its property upon any such unsubstantial and inequitable pretext as is interposed by the defendant. The plaintiff should not be deprived of its right to a day

in court for the trial of its claim of ownership except upon the soundest of reasons.

If the order of the Circuit Court expressed a purpose to preserve to the plaintiff the right of action it then had and was exercising, then the decision of this Court should effectuate that purpose.

And if it was the purpose of the defendant, by his conduct, to entrap the plaintiff, then the doctrine of waiver and estoppel should be interposed for the plaintiff's protection.

It is the contention of the plaintiff that the judgment of non-suit gives the defendant an unfair advantage, and that, in the words of Mr. Justice Depue in writing the unanimous opinion of this Court in *Walker* vs. *Hills' Executors,* 22 N. J. Eq., 513, it being "the province of the court to so control the conduct of a cause and regulate its practice, that *no unfair advantage* is taken by either side in presenting the merits of the cause for decision," the judgment should be reversed.

Respectfully submitted,

E. A. MERRILL,

Attorney for Plaintiff-Appellant.

November Term, 1919.