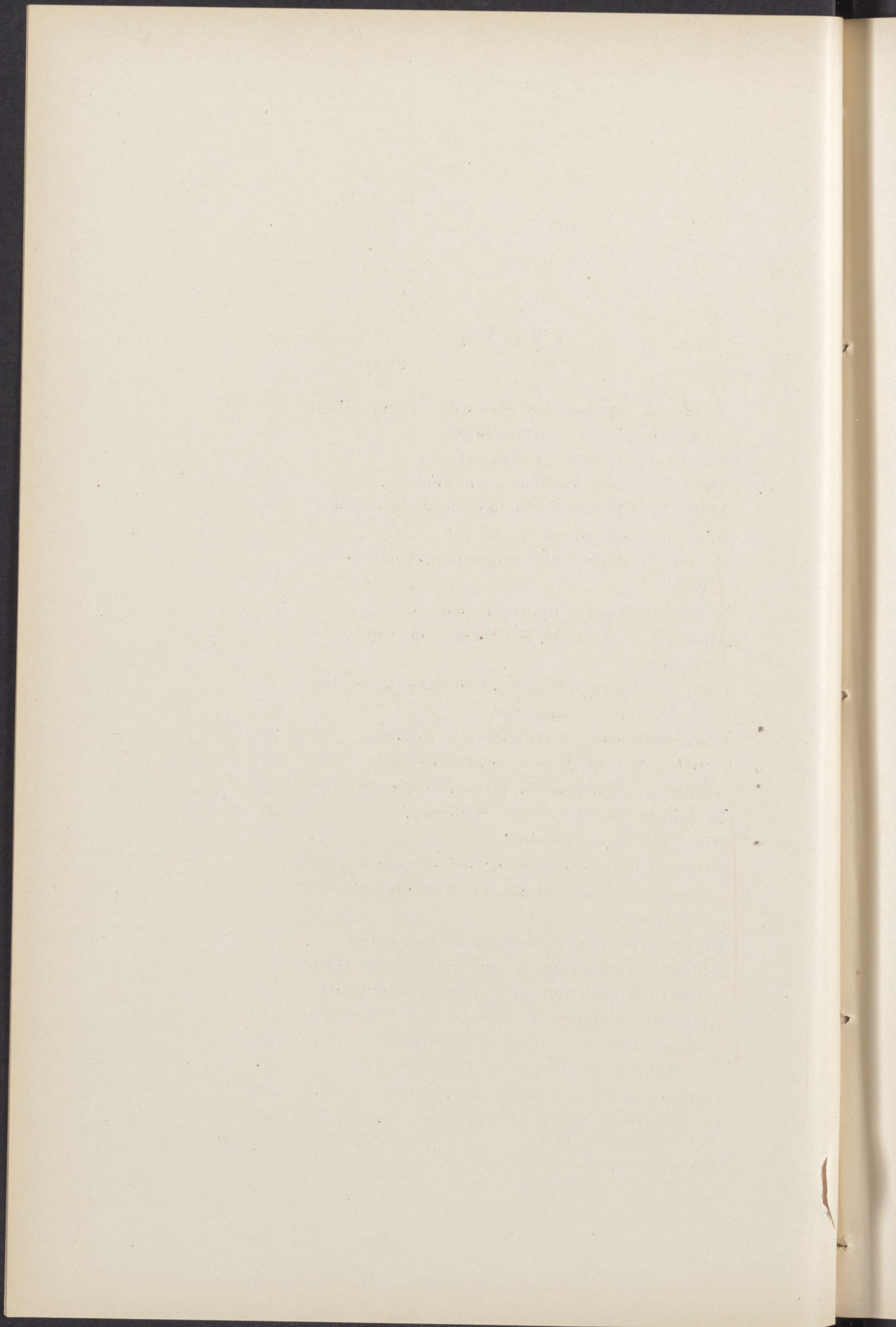


## I N D E X .

	PAGE
Notice of Appeal and Grounds from Order Vacating Writ of Attachment.....	1
Amended Grounds of Appeal.....	4
Order Vacating Writ of Attachment.....	6
Affidavit of Henry T. Stetson on Attachment..	8
Writ of Attachment.....	9
Return of Sheriff as to Manner of Executing Writ .....	10
Notice of Motion by Garnishee.....	12
Affidavit of Thomas H. Wilson on Motion of Garnishee .....	14
Supplementary Affidavit of Thomas H. Wilson on Motion of Garnishee.....	17
Order Directing Publication of Notice.....	20
Continuance of Motion of Garnishee.....	21
Affidavit of Plaintiff in Opposition to Motion.	22
Interlocutory Decree of Divorce.....	26
Final Decree of Divorcé.....	29
Order Denying Change of Custody of Children and Order for Increase of Allowance and for Attorney's Fees, etc.....	31
Certifications of Orders and Judgments.....	34
Affidavit of William J. McCormack for Plain- tiff in Opposition to Motion of Garnishee..	37
Affidavit of Henry T. Stetson for Plaintiff in Opposition to Motion of Garnishee.....	40
Exhibit A—Power of Attorney.....	42
Opinion of Chief Justice on Motion.....	44
Certificate of Clerk of Supreme Court.....	46



Notice of Appeal and Grounds from Order  
Vacating Writ of Attachment.

New Jersey Supreme Court

10

ESSEX COUNTY.

GLADYS T. CLEVELAND,  
Plaintiff-Appellant,

vs.

GUY C. CLEVELAND,  
Defendant,

and

UNITED STATES TRUST COMPANY  
OF NEW YORK, Executor and  
Trustee of the Last Will and  
Testament of GEORGE CLEVELAND,  
Garnishee-Respondent.

Action at Law.

20

In  
Attachment

30

*To J. Harry Hull, Attorney of United States Trust  
Company of New York, Executor and Trustee  
of the Last Will and Testament of George  
Cleveland, Garnishee, or to whom it may con-  
cern:*

*Sir:*

TAKE NOTICE that the plaintiff in the above en-  
titled cause appeals to this Court of Errors and  
Appeals, the last resort in all causes in New Jer-

40

*Notice of Appeal and Grounds.*

---

sey from the whole of the order entered in this cause by the Chief Justice on July 3rd, 1929, on the following grounds:

1. Because the Supreme Court erred in vacating and setting aside the Writ of Attachment in that:

10

(a) The Garnishee is not legally entitled to move to vacate the Writ of Attachment, or the levy made thereunder.

(b) The Garnishee is not legally entitled to question the validity of the Writ of Attachment, or the levy made thereunder.

20

(c) The levy made by Conrad Deuchler, Sheriff of Essex County, upon E. Garfield Gifford, Surrogate of Essex County, as agent of the United States Trust Company of New York, Executor and Trustee of the last will and testament of George Cleveland, is valid.

30

(d) The Power of Attorney executed by the United States Trust Company of New York to the Surrogate of Essex County made the said Surrogate the agent of the said United States Trust Company so that the levy made by the Sheriff upon the Surrogate was a valid levy upon the said United States Trust Company as executor and trustee of the last will and testament of George Cleveland.

40

(e) The levy made by Conrad Deuchler, Sheriff of Essex County, upon E. Garfield Gifford, Surrogate of Essex County, as agent of the United States Trust Company of New York, Executor and Trustee of the last will and testament of George Cleveland, constituted original process within the meaning of the power of attorney executed by said United

*Notice of Appeal and Grounds.*

---

States Trust Company of New York to the  
Surrogate of Essex County, and under P. L.  
1912, Chapter 213.

HORACE & HENRY T. STETSON,  
Attorneys for Plaintiff. 10

(Endorsed: Service of the within Notice of Ap-  
peal and Grounds is hereby acknowledged this 3rd  
day of Sept., 1929. J. HARRY HULL, Att'y for Gar-  
nishee-Respondent. Filed Sept. 4, 1929.)

20

30

40

**Amended Grounds of Appeal.**

NEW JERSEY SUPREME COURT,

ESSEX COUNTY.

10

GLADYS T. CLEVELAND,  
Plaintiff-Appellant,

vs.

GUY C. CLEVELAND,  
Defendant,

and

20

UNITED STATES TRUST COMPANY  
OF NEW YORK, Executor and  
Trustee of the last will and tes-  
tament of George Cleveland,  
Deceased,  
Garnishee-Respondent.

Action at Law.

In  
Attachment

*To: J. Harry Hull, Attorney of United States Trust  
Company of New York, Executor and Trustee  
of the last will and testament of George Cleve-  
land, Garnishee, or To Whom It May Concern:*

30

*Sir:*

TAKE NOTICE that the plaintiff in the above-entitled cause amends the grounds of appeal heretofore set forth in the Notice of Appeal and Grounds in the following particulars:

1. Paragraph E. is amended to read as follows:

40

(e) The levy made by Conrad Deuchler, Sheriff of Essex County, upon E. Garfield Gifford, Surrogate of Essex County, as agent of the United States Trust Company of New

*Amended Grounds of Appeal.*

York, Executor and Trustee of the last will and testament of George Cleveland, constituted original process within the meaning of the power of attorney executed by said United States Trust Company of New York to the Surrogate of Essex County, and under P. L. 1912, Chapter 313. 10

2. Plaintiff adds an additional ground of appeal as follows:

(f) A levy made by the sheriff in accordance with Section 7 of the Attachment Act and service of the notice thereof on the garnishee is original process against the garnishee in the suit of the plaintiff against the defendant and the garnishee thereby becomes a party to the suit; therefore the levy made by the sheriff of Essex County and the notice of garnishment served by him on E. Garfield Gifford, Surrogate of Essex County, as Agent for the United States Trust Company of the City of New York, Executor and Trustee under the last will and testament of George Cleveland, deceased, as garnishee, is in accordance with Chapter 313 of the Laws of 1912 and therefore valid. 20  
30

HORACE & HENRY T. STETSON,  
Attorneys for Plaintiff.

(Endorsed: Service of the within Amended Grounds is hereby acknowledged this 13th day of Sept., 1929. J. HARRY HULL, Attorney for Garnishee-Respondent. Filed Sept. 14, 1929.)

**Order Vacating Writ of Attachment.**

NEW JERSEY SUPREME COURT,

ESSEX COUNTY.

10	GLADYS T. CLEVELAND, Plaintiff,
	vs.
	GUY C. CLEVELAND, Defendant,
	and
20	UNITED STATES TRUST COMPANY OF NEW YORK, as Trustee un- der the last will and testament of George Cleveland, deceased, Garnishee.

An application having been made herein by the  
 United States Trust Company of New York, as  
 trustee under the Last Will and Testament of  
 George Cleveland, deceased, returnable on March  
 30th, 1929, to vacate and set aside the attachment  
 levied upon the United States Trust Company of  
 New York, as trustee under the Last Will and Tes-  
 tament of George Cleveland, deceased, and the said  
 motion having been thereafter continued to May  
 11th, 1929, and said application having come on  
 to be heard on said date, and after hearing J. Harry  
 Hull, Esq., attorney for the United States Trust  
 Company of New York, as trustee, appearing spe-  
 cially in support of said motion, and Henry T.  
 Stetson, Esq., and William J. McCormack, Esq.,  
 attorneys for the plaintiff herein, in opposition

*Order Vacating Writ of Attachment.*

---

thereto, and after reading and filing the affidavit and supplemental affidavit of Thomas H. Wilson, Esq., one of the vice-presidents of the United States Trust Company of New York, in support of said motion, and the affidavit of the plaintiff herein and William J. McCormack in opposition thereto, and due consideration having been had; now, on motion of J. Harry Hull, Esq., attorney for the United States Trust Company of New York, as trustee, etc., it is, on this 3rd day of July, 1929,

10

ORDERED that the writ of attachment heretofore issued in the above-stated cause on the 1st day of March, 1929, be vacated and set aside and for nothing holden, and that the said plaintiff pay to the United States Trust Company of New York, as trustee, etc., garnishee, the costs of this motion to be taxed.

20

HARRY HULL,  
Attorney for the United States  
Trust Company of New York, as  
trustee under the Last Will and  
Testament of George Cleveland,  
deceased, Garnishee, appearing  
specially.

30

Let this rule be entered in the minutes.

WM. S. GUMMERE,  
C. J.

Chief Justice.

(Entered July 8, 1929, on motion of J. HARRY HULL, Attorney for the United States Trust Company of New York, &c. Filed July 8, 1929.)

40

**Affidavit on Behalf of Plaintiff on Attachment.**

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

HENRY T. STETSON, of full age, being duly sworn, according to law, on his oath says:

10 1. That he is a member of the firm of Horace & Henry T. Stetson, attorneys for Gladys T. Cleveland.

2. That Guy C. Cleveland owes to Gladys T. Cleveland a debt, the amount whereof, as nearly as deponent can specify, is \$2,070.00.

20 3. The said Guy C. Cleveland is not, to deponent's knowledge or belief, a resident of the State of New Jersey at this time.

HENRY T. STETSON.

Sworn and subscribed to before me  
 this 27th day of February, 1929.

WILLIAM J. McCORMACK,  
 Master in Chancery of New Jersey.

30 (Endorsed—Rec. in Book #3 at p. 887. Filed  
 Mar. 1, 1929.)

**Writ of Attachment.**

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

The State of New Jersey, to the Sheriff  
 of the County of Essex, GREETING: WE  
 [SEAL] COMMAND YOU, that you attach GUY C. 10  
 CLEVELAND, of and by all his rights and  
 credits, moneys and effects, goods and  
 chattels, lands and tenements in whosoever hands  
 the same may be; and those rights and credits,  
 moneys and effects, goods and chattels, lands and  
 tenements safely keep, so that they may be and  
 appear before the New Jersey Supreme Court, to  
 be held at Trenton, on the 30th day of March, 1929,  
 to answer unto Gladys T. Cleveland in an action 20  
 at law on contract to her damage of Twenty-one  
 Hundred Dollars as is said, and have you then  
 there this writ.

WITNESS, WILLIAM S. GUMMERE, Chief Justice of  
 the New Jersey Supreme Court at Trenton, afore-  
 said, the first day of March, 1929.

FRED L. BLOODGOOD,  
 Clerk.

HORACE & HENRY T. STETSON, 30  
 Attorneys.

(Endorsed. Returnable—March 30, 1929. Affi-  
 davit for \$2070.00 filed before issuing this writ.  
 March 1, 1929. FRED L. BLOODGOOD, Clerk. Filed  
 Mar. 8, 1929.)

**Return of Sheriff as to Manner of Executing  
Writ.**

	Between <div style="text-align: center; margin: 10px 0;">           GLADYS T. CLEVELAND,            Plaintiff,            and            GUY C. CLEVELAND,            Defendant.         </div>	} Returnable } March 30, } 1929. } HORACE AND } HENRY T. } STETSON, } Attorneys.
--	--	--

20 By virtue of the above stated and hereto annexed Writ to me directed, I did on the 5th day of March, 1929, at 10.45 A. M., at the suit of the plaintiff above named in the presence of Donald Strobe (a credible person) attach the rights and credits, moneys, effects, goods, chattel, lands and tenements of the said defendant, and particularly all his right, title and interest of, in and to the hereafter described:

30 Everything due and to come due the defendant under the Will of George Cleveland. Writ served upon E. Garfield Gifford, Surrogate of Essex County, N. J., as Agent of the United States Trust Company of New York, Executor and Trustee of the last Will and Testament of George Cleveland.

No other rights or credits, moneys or effects, goods and chattels, lands or tenements of the said defendant being found in my county.

CONRAD DEUCLER,  
Sheriff,

By: OLIVER WERKHEISER,  
Special Deputy.

*Return of Sheriff.*

---

We the undersigned Oliver Werkheiser, Special Deputy Sheriff, and Donald Strobe, Freeholder, of the County of Essex, hereby value and appraise the rights and tenements of the said defendant at the sum of Amount unknown.

OLIVER WERKHEISER, 10  
Special Deputy Sheriff.  
DONALD STROBE,  
Freeholder.

---

ENDORSEMENTS:

I hereby appoint and depute Oliver Werkheiser to serve the within writ.

Witness my hand and seal this 4th day of March, 1929. 20

CONRAD DEUHLER,  
Sheriff.  
By: RUPERT F. MILLS,  
Under Sheriff.  
(Seal)

Sheriff's Fees.....

Served the within Writ in the manner required by law March 5th, 1929, at 10.45 A. M., in the presence of Donald Strobe (a credible person), as will appear by inventory and appraisal hereunto annexed. 30

CONRAD DEUHLER,  
Sheriff.  
By: OLIVER WERKHEISER,  
Special Deputy.

(Essex County Sheriff's Fees \$6.28 3/4/29 Paid.) 40



*Notice of Motion by Garnishee.*

by making the statutory declaration of attachment and levy in the Surrogate's presence as the representative of the trustee.

2. That the rights levied upon by the Sheriff are exempt from attachment, as no action could be brought by the plaintiff against the trustee upon the debt of the plaintiff against the defendant, Guy C. Cleveland. 10

3. That income to become due the defendant from the trustee is not subject to attachment.

4. That the cause of action in which this attachment is levied, is for moneys awarded by decrees of the Superior Court of Los Angeles County, California, which decrees granted the plaintiff a divorce from the defendant and awarded her alimony and counsel fee, etc., and the decrees of the California court are not such final decrees to which full faith and credit should be given under the Federal Constitution, in that said decrees are subject to modification and alteration by the Superior Court of Los Angeles County, California. 20

This motion is made upon the affidavit of a vice-president of the United States Trust Company of New York, and upon all the papers and proceedings in this suit. 30

J. HARRY HULL,  
Attorney for the United States  
Trust Company of New York, as  
trustee, appearing specially for  
the purpose of this motion and  
for none other,

28 Vreeland Avenue, 40  
Nutley, New Jersey.

(Filed July 8, 1929.)

**Affidavit on Motion of Garnishee.**

NEW JERSEY SUPREME COURT.

10	<p style="text-align: center;">GLADYS T. CLEVELAND, Plaintiff,</p> <p style="text-align: center;">vs.</p> <p style="text-align: center;">GUY C. CLEVELAND, Defendant.</p>
----	---

STATE OF NEW YORK, }  
 COUNTY OF NEW YORK, } ss. :

20 THOMAS H. WILSON, being duly sworn, says :

He is a vice-president of the United States Trust Company of New York, trustee under the Last Will and Testament of George Cleveland, deceased.

This action is brought to collect amounts awarded by three decrees of the Superior Court of the County of Los Angeles, State of California, which decrees were entered in an action between the parties hereto for divorce. The three decrees are as follows: An interlocutory decree dated October 3rd, 1924, a final decree dated October 15th, 1925, which two decrees awarded to the plaintiff a divorce against her husband, the defendant, and inter alia, the sum of \$300.00 a month, and \$100.00 for each of the two children. The third decree was dated June 28th, 1928, and modified the previous and final decree, by awarding to the plaintiff the sum of \$810.00 additional, payable \$90.00 a month; and also awarded to the plaintiff \$1,210.00 additional for other purposes, which were recited in

30

40 the said decree.

*Affidavit of Thomas H. Wilson.*

---

In the action in this court, the plaintiff obtained an attachment against the defendant upon the ground that the defendant was a non-resident of the State of New Jersey and was indebted to the plaintiff in the sum of \$2100.00, the debt being for the unpaid moneys, awarded to the plaintiff by these three decrees of the Superior Court of Los Angeles County of the State of California. 10

The United States Trust Company of New York is the trustee under the Last Will and Testament of George Cleveland, the father of the defendant herein, and was appointed executor and trustee under said Last Will and Testament by the Surrogate of the County of Essex, in whose office the will of the said George Cleveland was probated. The defendant herein is the recipient of income under a trust fund created for his benefit under the said will. The attachment was levied by the Sheriff of the County of Essex, serving the Surrogate of Essex County and making the statutory declaration in his presence. 20

Deponent's information regarding the decrees of the Superior Court of Los Angeles County, California, and the amounts awarded thereunder, is obtained from the testimony of the plaintiff taken January 12th, 1929, before an auditor appointed in an action in the Circuit Court of Essex County. The action in the Essex County Circuit Court was also upon amounts due under the decrees, hereinbefore referred to, and the auditor's report was filed in the office of the Clerk of the County of Essex on March 14th, 1929. 30

Deponent is informed and verily believes that the decrees of the Superior Court of the County of Los Angeles, in the State of California, in the suits referred to herein, are not final decrees, but are subject to modification and alteration and are not, 40

*Affidavit of Thomas H. Wilson.*

---

therefore, such final judgment or final judgments as are entitled to full faith and credit under the Federal Constitution by the courts of this state.

Deponent further says that the trustee herein is appearing specially for the sole purpose of vacating this attachment and for none other.

THOMAS H. WILSON.

Sworn and subscribed to before me  
this 25th day of March, 1929.

HERBERT J. CUSKLEY,  
Notary Public, Bronx Co.  
Cert. filed in N. Y. Co.

(Seal)

(Filed July 8, 1929.)

30

40

**Supplementary Affidavit on Motion of  
Garnishee.**

NEW JERSEY SUPREME COURT.

---

GLADYS T. CLEVELAND,  
Plaintiff,

VS.

GUY C. CLEVELAND,  
Defendant.

---

10

STATE OF NEW YORK, }  
COUNTY OF NEW YORK, } SS.:

20

THOMAS H. WILSON, being duly sworn, says:

This affidavit is supplementary to deponent's affidavit of March 25th, 1929.

The property attached, as set forth in the writ, is as follows:

“All moneys, credits and other property due or to become due the defendant, Guy C. Cleveland, under the will of George Cleveland, in possession of E. Garfield Gifford, Surrogate of Essex County, as agent of the United States Trust Company of New York, as executor and trustee of the Last Will and Testament of George Cleveland.”

30

The report of the auditor filed on March 14th, 1929, in the action in the Circuit Court of Essex County, and which is referred to in deponent's affidavit of March 25th, 1929, shows that under the final decree dated October 15th, 1925, the defend-

40

*Supplementary Affidavit of Thomas H. Wilson.*

---

ant Cleveland was in default for payments due his wife for July, August, September, October, and November, 1928, at \$300.00 a month, amounting to \$1500.00. Under the order dated June 28th, 1928, he was in default for payments due for September, 10 October and November at \$90.00 a month, amounting to \$270.00; also extra allowance for dental and sundry bills, amounting to \$700.00, and attorney's fees, \$500.00; and extra expenses, \$10.00. The auditor, however, refused to allow the sum of \$700.00, as it was to be paid to the trustee of the court, so the amount due at the date of the attachment in the Circuit Court was \$2180.00; and any excess after paying the dental and sundry bills was to be returned to Guy C. Cleveland.

20

This appears from the following extract from the order of the Superior Court of Los Angeles County, dated June 28th, 1928, namely:

30

“That the allowance for dental and surgical bills made by order of this Court in Department 40 thereof on the 10th day of February, 1928, be and the same is modified to read as follows: That on or before Monday, the second day of July, 1928, said Guy C. Cleveland pay to the Trustee of this Court the sum of \$700.00; that bills not exceeding that amount, contracted by the defendant and cross-complainant for dental work for George Cleveland and surgical work for Townsend Cleveland, be presented to the Trustee of said Court and by said Trustee paid out of said deposit; provided said dental work and said surgical work must be begun within 30 days from the date hereof, and evidence of such beginning satisfactory to the Trustee shall be supplied to the Trustee within said 30 days; otherwise said

40

*Supplementary Affidavit of Thomas H. Wilson.*

---

deposit shall be returned to said Guy C. Cleveland. Any overplus remaining unused for the purposes specified shall be returned to Guy C. Cleveland."

Photostatic copies of this order and the interlocutory and final decrees will be submitted on the argument. 10

THOMAS H. WILSON.

Sworn to before me, the undersigned,  
this 16th day of April, 1929.

ALBERT WICK,  
Notary Public, 20  
(Seal) Kings County No. 41.  
Cert. filed in N. Y. Co. No. 196.  
Kings Co. Register's No. 142.  
New York County Register's No. 0-157.

(Filed July 8, 1929.)

30

40

**Order Directing Publication of Notice of  
Issuing Attachment.**

NEW JERSEY SUPREME COURT,

ESSEX COUNTY.

10

GLADYS T. CLEVELAND,  
Plaintiff,

VS.

GUY C. CLEVELAND,  
Defendant.

Action at Law.  
Order.

20

The writ of attachment in this case having been returned, served by the Sheriff of the County of Essex, to the present term duly executed, and no appearance having been entered in the said cause by the defendant, it is on this Third day of March, in the year 1929, on the motion of Horace and Henry T. Stetson, Attorneys of Plaintiff, ordered that a notice of the issuing of said attachment, at whose suit, against whose estate, for what sum and when returned shall be published in the "Daily Courier" once a week for four successive weeks, and it is further ordered that David A. McBride be appointed Auditor, to adjust and ascertain the amount due to the plaintiff and each of the applying creditors.

30

Let this rule be entered on the minutes.

WM. S. GUMMERE,  
*C. J.*

40

HORACE & HENRY T. STETSON,  
Attorneys of Plaintiff.

(Filed April 1, 1929.)

**Continuance of Motion of Garnishee.**

NEW JERSEY SUPREME COURT.

---

GLADYS T. CLEVELAND,  
Plaintiff,

VS.

GUY C. CLEVELAND,  
Defendant.

---

10

IT IS HEREBY CONSENTED AND AGREED by and between the attorneys for the respective parties hereto that the motion made to quash the writ of attachment granted in this suit, which was noticed for March 30th, 1929, at the Court House in Newark on said date, at 10.00 o'clock in the forenoon, be and the same is hereby adjourned by consent to Saturday, April 6th, 1929, at the same hour and place.

20

Dated, March 26th, 1929.

STETSON & MAPLETOFT,  
Attorneys for the Plaintiff.

J. HARRY HULL,  
Attorney for the United States  
Trust Company of New York, as  
trustee under the Last Will and  
Testament of George Cleveland,  
deceased, appearing specially for  
the purpose of this motion and  
for none other.

30

(Filed July 8, 1929.)

(NOTE—This motion was continued by consent of the parties to May 4, 1929, and argued that day before the Chief Justice.)

40

**Affidavit of Plaintiff in Opposition to Motion  
of Garnishee.**

NEW JERSEY SUPREME COURT,

ESSEX COUNTY.

10

GLADYS T. CLEVELAND,  
Plaintiff,

vs.

GUY C. CLEVELAND,  
Defendant.

} On Motion.  
} Affidavit.

20

STATE OF CALIFORNIA, }  
COUNTY OF LOS ANGELES, } ss.:

GLADYS T. CLEVELAND, of full age, being duly sworn according to law, on her oath deposes and says:

30

That she is the plaintiff in the above stated cause and that there is now due her from the defendant, Guy C. Cleveland, the sum of Two Thousand and Seventy (\$2070) Dollars, which sum was also due at the time of the commencement of this suit. This amount is due from the defendant to this plaintiff under and by virtue of an interlocutory judgment of divorce and a final judgment of divorce and an order denying the change of custody of the children and increasing the allowance to plaintiff, all of which were entered in a suit pending in the Superior Court of the State of California in and for the County of Los Angeles, wherein this defendant, Guy C. Cleveland, was plaintiff and cross-defendant, against this plaintiff, Gladys T. Cleveland, as defendant and cross-complainant, said in-

40

*Affidavit of Plaintiff.*

---

terlocutory judgment being dated October 3, 1924; said final judgment being dated October 15, 1925, and said order being dated June 28, 1928. Exemplified copies of said judgments and order will be submitted on this motion and photostat copies of the same are hereto attached.

10

The amount on which this plaintiff brings suit is made up as follows:

Alimony from November 15 to December 15, 1928; from December 15, 1928, to January 15, 1929; and from January 15, 1929, to February 15, 1929, at the rate of Three Hundred (\$300) Dollars per month, making a total of Nine Hundred (\$900) Dollars; the sum of Two Hundred (\$200) Dollars directed to be paid as an allowance for the support of the children of plaintiff and defendant, who are in the custody of deponent. Said Two Hundred (\$200) Dollars having become due on January 15, 1929, and which remains unpaid; the sum of Ninety (\$90) Dollars a month which was allowed to deponent as an additional allowance for the support of the children. This sum became due on the 15th day of December, 1928, and on the 15th day of January and February, 1929, making a total of Two Hundred and Seventy (\$270) Dollars. There is further due the sum of Seven Hundred (\$700) Dollars, which sum defendant was directed to pay for dental and surgical work for the children of the marriage of plaintiff and defendant, all of which is more particularly set forth in said order of June 28, 1928.

20

30

All of the above sums had accrued and were due and payable to plaintiff prior to the commencement of this suit and said sums of money are now justly due and owing from the defendant to the plaintiff.

40

*Affidavit of Plaintiff.*

The said judgments and order in the suit in the Superior Court of the State of California, in and for the County of Los Angeles, as stated herein, have not been altered or modified in any way whatsoever except as stated therein and plaintiff is advised that under the law and practice of the State of California, said judgments and order are final and conclusive in all respects as to all monies which became due and payable before any modification of said judgments and order.

GLADYS T. CLEVELAND.

Sworn and subscribed to this  
17th day of April, 1929, before me,

FLORENCE P. BOWMAN,  
Notary Public in and for the County of Los Angeles, State of California.  
My commission expires March 13, 1932.  
(Seal)

CERTIFICATE OF FOREIGN ACKNOWLEDGMENT.

STATE OF CALIFORNIA, }  
COUNTY OF LOS ANGELES, } ss. :

I, L. E. LAMPTON, Clerk of the County of Los Angeles, and Clerk of the Superior Court in and for said County, do hereby certify that the said Court is a Court of Record; that Florence P. Bowman, whose name is subscribed to the certificate or proof of acknowledgment of the annexed instrument, was at the time of taking the same a Notary Public in and for said County and State, duly commissioned and sworn, and qualified to act as such;

*Affidavit of Plaintiff.*

that as such Notary Public he was at the time of taking such acknowledgments duly authorized by the laws of the State of California to take the acknowledgments and proof of deeds or conveyances for land, tenements or hereditaments in said State of California; that I am well acquainted with the handwriting of said Florence P. Bowman and verily believe his signature to the same is genuine. 10

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Court at Los Angeles, in said County of Los Angeles, this 18th day of April, 1929.

L. E. LAMPTON,  
Clerk. 20

(Seal)

30

40

**Interlocutory Decree of Divorce.**

IN THE

SUPERIOR COURT OF THE STATE OF  
CALIFORNIA,

IN AND FOR THE COUNTY OF LOS ANGELES.

10

---

GUY C. CLEVELAND,  
Plaintiff and  
Cross-Defendant,

vs.

GLADYS T. CLEVELAND,  
Defendant and  
Cross-Complainant.

---

No. D-22099.  
Dept. 21.

20

30

This cause coming on regularly to be heard on the 6th day of June, 1924, in Department 21 of said Court, Honorable Walton J. Wood, one of the Judges of said Court, presiding, the plaintiff appearing in person and by his attorney, Jerome H. Kann, Esq., and the defendant appearing in person and by her attorney, Denis Evarts Bowman, Esq., then and thereafter evidence both oral and documentary was offered and considered by the Court; and said cause having been submitted to the Court for its consideration and decision, and the respective parties having waived the making and filing of findings of fact by consent in writing filed with the Clerk, and the Court being fully advised in the premises makes its decisions as follows:

40

IT IS ORDERED, ADJUDGED AND DECREED that the plaintiff, Guy C. Cleveland, is not entitled to a decree of divorce from the defendant, Gladys T.

*Interlocutory Decree of Divorce.*

---

Cleveland, on his complaint herein; that said defendant is entitled on her cross-complaint herein to a decree of divorce from said plaintiff on the ground of extreme cruelty, and that when a year shall have expired after the entry of this interlocutory judgment a final decree dissolving the marriage between plaintiff and defendant be entered. 10

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the defendant, Gladys T. Cleveland, have the care and custody of the minor children of plaintiff and defendant, George Cleveland and Townsend Cleveland, and that said children are not to be taken out of the State of California except upon order of this Court, and that the plaintiff, Guy C. Cleveland, have the right without hindrance to visit and take the children out on Sunday afternoons. 20

IT IS FURTHER ORDERED that the plaintiff, Guy C. Cleveland, pay to defendant, Gladys T. Cleveland, the sum of Three Hundred (\$300.00) Dollars per month for her support and maintenance, and the sum of One Hundred (\$100.00) Dollars per month for the support and maintenance of each of said minor children, amounting to the sum of Five Hundred (\$500.00) Dollars per month in all, beginning with the month of September, 1924, and payable thereafter on the 15th day of each calendar month, and it is further ordered that the foregoing provision for support and maintenance of said defendant and said minor children is conditioned upon said defendant and said minor children being and remaining within the jurisdiction of this Court. In the event of defendant taking said children out of California without permission of Court, allowance for support of defendant and said children shall cease. 30 40

*Interlocutory Decree of Divorce.*

---

IT IS FURTHER ORDERED that the plaintiff, Guy C. Cleveland, pay to defendant, Gladys T. Cleveland, for her attorney fees the sum of Five Thousand (\$5,000.00) Dollars; for costs and expenses of suit the sum of Two Hundred and Fifty (\$250.00) Dollars, and that said plaintiff further pay the sum of Thirteen Hundred and Fifty (\$1,350.00) Dollars to said defendant on account of alimony during the pendency of this action, in addition to what has already been paid.

Done in open court this 3 day of October, 1924.

WALTON J. WOOD,  
Judge.

20 Compared  
J. B. LIKES Book  
PAUL KIPF Document.

Satisfied in full by Sheriff Jan. 3, 1925.

L. E. LAMPTON,  
County Clerk.  
By J. B. LIKES,  
Deputy.

30 An additional sum of \$810 per yr. payable in monthly installments of \$90.00 in the months of September to May, inclusive, on the 15th of ea. month. Modified by order of Court 6/28/28. Entered Book 691 Page 96.

L. E. LAMPTON,  
County Clerk.  
By CORA SMITH,  
Deputy.

40

**Final Judgment of Divorce.**

IN THE  
SUPERIOR COURT OF THE STATE OF  
CALIFORNIA,

IN AND FOR THE COUNTY OF LOS ANGELES.

GUY C. CLEVELAND,  
Plaintiff and  
Cross-Defendant,

vs.

GLADYS T. CLEVELAND,  
Defendant and  
Cross-Complainant.

10

No. D-22099.

20

In this cause an interlocutory judgment was entered on the 4th day of October, 1924, adjudging that the plaintiff, Guy C. Cleveland, was not entitled to a decree of divorce from the defendant, Gladys T. Cleveland, on his complaint herein; that said defendant was entitled on her cross-complaint herein to a decree of divorce from said plaintiff on the ground of extreme cruelty, and that when one year should have expired after the entry of said interlocutory judgment a final judgment dissolving the marriage between plaintiff and defendant should be entered; and no appeal having been taken from said judgment, and no motion for a new trial having been made, and the action not having been dismissed;

30

Now, on motion of defendant and cross-complainant, Gladys T. Cleveland, it is adjudged that said defendant and cross-complainant, Gladys T. Cleveland, be and is granted a final judgment of divorce from the plaintiff and cross-defendant, Guy C.

40

*Final Judgment of Divorce.*

---

Cleveland, and that the bonds of matrimony between said Gladys T. Cleveland and said Guy C. Cleveland be and the same are dissolved.

10 IT IS FURTHER ORDERED, ADJUDGED AND DECREED that said Gladys T. Cleveland have the care and custody of the minor children of said parties, George Cleveland and Townsend Cleveland, and that said children are not to be taken out of the State of California except upon order of this Court, and that said Guy C. Cleveland have the right without hindrance to visit and take said children out on Sunday afternoons.

20 IT IS FURTHER ORDERED that said Guy C. Cleveland pay to said Gladys T. Cleveland the sum of Three Hundred (\$300.00) Dollars per month for her support and maintenance, and the sum of One Hundred (\$100.00) Dollars per month for the support and maintenance of each of said minor children, amounting to the sum of Five Hundred (\$500.00) Dollars per month in all, payable on the 15th day of each calendar month; and it is further ordered that the foregoing provision for support and maintenance of said Gladys T. Cleveland and said minor children is conditioned upon said Gladys  
30 T. Cleveland and said children being and remaining within the jurisdiction of this Court. In the event of said Gladys T. Cleveland taking said children out of California without permission of Court, allowance for support of herself and said children shall cease.

Done in open Court this 15th day of October, 1925.

ELLIOT CRAIG,  
Judge.

40

Compared  
S. V. WHITE Book  
I. KELLEY Document

**Order Denying Change of Custody of Children,  
and Order for Increase of Allowance  
and for Attorney's Fees, etc.**

IN THE

SUPERIOR COURT OF THE STATE OF  
CALIFORNIA,

10

IN AND FOR THE COUNTY OF LOS ANGELES.

GUY C. CLEVELAND,  
Plaintiff and  
Cross-Defendant,

vs.

GLADYS T. CLEVELAND,  
Defendant and  
Cross-Complainant.

No. D-22099.  
Dept. 51.

20

In this case an order to show cause upon appli-  
cation of plaintiff and cross-defendant for change  
of custody of minor children, and an order to show  
cause upon application of defendant and cross-  
complainant for an increase of allowance for sup-  
port and maintenance of said children having come  
on regularly for hearing in said court in Depart-  
ment 51 thereof before Hon. Elias V. Rosenkranz,  
Judge in said Department; and both parties to the  
above entitled action having appeared before said  
Court in person and by counsel, Messrs. Rollinson,  
McGann, Becker and Nelson appearing as attorneys  
for plaintiff and cross-defendant, Guy C. Cleveland,  
and Denis Evarts Bowman, Esq., appearing as at-  
torney for defendant and cross-complainant, Gladys  
T. Cleveland; and evidence having been submitted  
to the Court and the Court being fully advised in

30

40

*Order re Custody of Children.*

---

the premises now makes his decision and order, to-wit:

10 IT IS ORDERED, ADJUDGED AND DECREED that the decision of this Court heretofore rendered granting the custody of the minor children of said parties, namely, George Cleveland and Townsend Cleveland, to the defendant and cross-complainant, Gladys T. Cleveland, and requiring the plaintiff and cross-defendant to pay to the defendant and cross-complainant the sum of \$200.00 per month for support and maintenance of said children, remains unmodified and remains in full force and effect, except in the following particulars, to-wit:

20 1. That the said allowance of \$200.00 a month be and the same is increased by the additional amount of \$810.00 per year; that the same is payable and to be paid in monthly installments of \$90.00 each month in the months of September to May, inclusive, and to be paid on the 15th day of each of said months.

30 2. That the allowance for dental and surgical bills made by order of this Court in Department 40 thereof on the 10th day of February, 1928, be and the same is modified to read as follows: That on or before Monday, the second day of July, 1928, said Guy C. Cleveland pay to the Trustee of this Court the sum of \$700.00; that bills not exceeding that amount, contracted by the defendant and cross-complainant for dental work for George Cleveland and surgical work for Townsend Cleveland, be presented to the Trustee of said Court and by said Trustee paid out of said deposit; provided said 40 dental work and said surgical work must be begun within 30 days from the date hereof, and evidence of such beginning satisfactory to the Trustee shall

*Order re Custody of Children.*

---

be supplied to the Trustee within said 30 days; otherwise said deposit shall be returned to said Guy C. Cleveland. Any overplus remaining unused for the purposes specified shall be returned to Guy C. Cleveland.

10

3. That said Guy C. Cleveland shall have the right without hindrance to visit and take said children out on Sunday forenoons as well as on Sunday afternoons, as heretofore allowed, and shall have the right to keep said children all day Sundays during the daylight hours thereof; but in the event that he intends to avail himself of the privilege to take said children any Sunday forenoon or Sunday afternoon he shall, by not later than 10 o'clock A. M. of such Sunday, notify said Gladys T. Cleveland of his intention.

20

IT IS FURTHER ORDERED, upon the application of defendant and cross-complainant for attorney's fees and expense money, continued by stipulation of parties for determination at the end of said hearing, that the sum of \$500.00 is allowed for attorney's fees and the sum of \$10.00 for expense money, and that said Guy C. Cleveland pay said sums to said Gladys T. Cleveland or her attorney herein on or before July 2, 1928.

30

Dated this 28<sup>th</sup> day of June, 1928.

ELIAS V. ROSENKRANZ,  
Judge.

Compared

W. REED Book

B. M. HASSELL Document

(Filed Aug. 23, 1929.)

40

*Certification of Orders*

D. 22099

STATE OF CALIFORNIA, }  
 COUNTY OF LOS ANGELES, } ss. :

10 I, L. E. LAMPTON, County Clerk of the County of  
 Los Angeles, State of California, and ex-officio  
 Clerk of the Superior Court of Los Angeles County,  
 State of California, do hereby certify and attest the  
 foregoing to be a full, true and correct copy of the  
 original Interlocutory and Final Judgments of Di-  
 vorce and Order Denying Change of Custody of  
 Children, and Order for Increase of Allowance and  
 for Attorney's Fees, etc., in the action of Guy C.  
 Cleveland vs. Gladys T. Cleveland, and that I have  
 20 carefully compared the same with the original.

IN WITNESS WHEREOF, I have hereunto set  
 my hand and annexed the Seal of the  
 [SEAL] Superior Court of Los Angeles County,  
 State of California, this 4th day of Febru-  
 ary, 1929.

30 L. E. LAMPTON,  
 County Clerk of the County of Los  
 Angeles, State of California, and  
 ex-officio Clerk of the Superior  
 Court of Los Angeles County,  
 State of California.

*Certification of Orders*

---

STATE OF CALIFORNIA, }  
 COUNTY OF LOS ANGELES, } ss. :

I, EDWIN F. HAHN, Judge of the Superior Court of Los Angeles County, State of California, do hereby certify that L. E. LAMPTON is County Clerk of the County of Los Angeles, State of California, and ex-officio Clerk of the Superior Court of Los Angeles County, State of California (which Court is a Court of Record, having a seal); that the signature to the foregoing certificate and attestation is the genuine signature of the said L. E. LAMPTON as such officer; that the seal annexed thereto is the seal of said Superior Court; that said L. E. LAMPTON, as such Clerk, is the proper officer to execute the said certificate and attestation, and that such attestation is in due form according to the laws of the State of California.

IN WITNESS WHEREOF, I have hereunto set my hand in my official character as such Judge, at the City of Los Angeles, County and State aforesaid, this 4th day of February, A. D. 1929.

EDWIN F. HAHN,  
 Judge of the Superior Court of Los Angeles County, State of California.

*Certification of Orders*

---

STATE OF CALIFORNIA, }  
 COUNTY OF LOS ANGELES, } ss. :

I, L. E. LAMPTON, County Clerk of the County  
 of Los Angeles, State of California, and ex-officio  
 10 Clerk of the Superior Court of Los Angeles County,  
 State of California (which Court is a Court of  
 Record, having a seal, which is annexed hereto),  
 do hereby certify that EDWIN F. HAHN, whose name  
 is subscribed to the foregoing certificate of due at-  
 testation was, at the time of signing the same,  
 Judge of the Superior Court aforesaid, and was  
 duly commissioned, qualified and authorized by  
 law to execute said certificate. And I do further  
 certify that the signature of the Judge above named  
 20 to the said certificate of due attestation is genuine.

IN WITNESS WHEREOF, I have hereunto set  
 my hand and annexed the Seal of the  
 [SEAL] Superior Court, at my office in said Coun-  
 ty, this 4th day of February, A. D. 1929.

L. E. LAMPTON,  
 County Clerk of the County of Los  
 Angeles, State of California, and  
 ex-officio Clerk of the Superior  
 Court of Los Angeles County,  
 State of California.

30

**Affidavit on Behalf of Plaintiff in Opposition  
to Motion of Garnishee.**

NEW JERSEY SUPREME COURT.

---

GLADYS T. CLEVELAND,  
Plaintiff,

vs.

GUY C. CLEVELAND,  
Defendant.

---

} On Motion.  
} Affidavit.

10

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

WILLIAM J. McCORMACK, being duly sworn, according to law, upon his oath deposes and says that he is a practicing attorney of the State of New Jersey, associated with the offices of Horace & Henry T. Stetson; that on March 1st, 1928, a Writ of Attachment was issued out of the New Jersey Supreme Court at the suit of the plaintiff and that a levy was made by the Sheriff of Essex County on E. Garfield Gifford, Surrogate of the County of Essex, as agent for the United States Trust Company of New York, as executor and trustee of the Last Will and Testament of George Cleveland. No previous action has been instituted in this Court by the plaintiff against the defendant; a prior Writ of Attachment was issued in the Essex County Circuit Court to recover Twenty-one Hundred (2100) Dollars in attachment. The Writ issued in said suit was for moneys accrued under Decrees of the Superior Court of Los Angeles County, California, to the date of the issuance of the said Writ. The present action was instituted to recover moneys accrued under said decrees subsequent to

20

30

40

*Affidavit of William J. McCormack.*

---

the date of the issuance of the Writ in the Essex County Circuit Court action, which moneys were due at the date of the issuance of the Writ in the present case, and, also to recover the sum of Seven Hundred (700) Dollars directed to be paid to the  
10 Trustee of the Superior Court of Los Angeles, California, under the decree dated June 28th, 1928, which sum was not allowed in the action issued out of the Essex County Circuit Court, because at that time plaintiff did not furnish sufficient proof that said moneys were to be paid to her.

Deponent has requested Denis Evarts Bowman, a member of the California Bar, to advise him as to the law of California covering alimony which  
20 has accrued under a decree of the Courts of that State. Mr. Bowman has advised deponent that Section 139 of the Civil Code of California governs the situation and that this section reads as follows:

30 "Support of wife and children on divorce or separation granted to wife. Where a divorce is granted for an offense of the husband, the court may compel him to provide for the maintenance of the children of the marriage, and to make such suitable allowance to the wife, for her support, during her life, or for a shorter period, as the court may deem just, having regard to the circumstances of the parties respectively; and the Court may, from time to time, modify its orders in these respects."

Mr. Bowman further advised deponent that the case of Parker v. Parker, 266 Pacific Reporter, 283, a decision of the Supreme Court of California, is  
40 the latest pronouncement of that Court as to accrued alimony; that opinion concludes as follows:

*Affidavit of William J. McCormack.*

---

“Likewise, the order modifying the judgment from which the plaintiff has taken an appeal should be reversed, for the reason that it was beyond the power of the court to modify said judgment so as to make said modification operative on payments already accrued under the judgment. It is so ordered.” 10

The defendant is a beneficiary under the Last Will and Testament of George Cleveland, deceased, and the United States Trust Company of New York is executor and trustee under said Will. The defendant is entitled to quarterly payments of income, which cannot be assigned or anticipated under and by virtue of the provisions of said Will.

The said United States Trust Company of New York had moneys of the defendant in its possession of the date on which the levy was made. 20

WILLIAM J. McCORMACK.

Sworn to and subscribed before me on  
this 10th day of May, A. D., 1929.

WM. C. GORMLEY,  
An Attorney at Law  
of New Jersey. 30

(Filed Aug. 23, 1929.)

**Affidavit on Behalf of Plaintiff in Opposition  
to Motion of Garnishee.**

NEW JERSEY SUPREME COURT.

10	<p style="text-align: center;">GLADYS T. CLEVELAND, Plaintiff,</p> <p style="text-align: center;">vs.</p> <p style="text-align: center;">GUY C. CLEVELAND, Defendant.</p>	<p>On Motion of Garnishee to Vacate Levy.  Affidavit.</p>
----	---	---

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

20 HENRY T. STETSON, being duly sworn, according to law, upon his oath deposes and says:

30 That he is a practicing attorney of the State of New Jersey, and is a member of the firm of Horace & Henry T. Stetson, attorneys for the plaintiff herein; that the defendant, Guy C. Cleveland, is a beneficiary under the will of his father, George Cleveland, who died a resident of Essex County, New Jersey, on February 28, 1913; that under the will of the deceased, the defendant is entitled to approximately Twenty Thousand (\$20,000.00) Dollars annually during his life, and paragraph Fourth of the second codicil of the will of the deceased, dated September 9, 1909, provides as follows:

“I direct that no interest of a beneficiary under any of the trusts established by said will or by either of the codicils thereto shall be assigned or anticipated by such beneficiary.”

40 The United States Trust Company of New York (herein referred to as the “Trust Co.”) was one of

*Affidavit of Henry T. Stetson.*

the executors of said will and trustee of the trusts created therein, including the trust for the benefit of the defendant herein, and is a banking corporation organized under the laws of the State of New York, when it applied to probate the will of the deceased, filed with the Surrogate of Essex County in accordance with Chapter 213 of the Laws of 1912, on March 11, 1913, a power of attorney, a copy of which is hereto annexed and marked "Exhibit A." Said power of attorney is still in full force and effect. 10

HENRY T. STETSON.

Sworn and subscribed before me  
this 15th day of May, 1929. 20

WILLIAM J. McCORMACK,  
Master in Chancery of New Jersey.

30

40

## Exhibit A.

## ESSEX COUNTY SURROGATE'S COURT.

10	<p style="text-align: center;">IN THE MATTER</p> <p style="text-align: center;">OF</p> <p style="text-align: center;">the Estate of GEORGE CLEVELAND, Deceased.</p>	}	Power of Attorney.
----	---	---	-----------------------

KNOW ALL MEN BY THESE PRESENTS, That I, EDWARD W. SHELDON, President of the United States Trust Company, a corporation of the State of New York, residing at No. Wall Street, in the City of New York, in the County of New York, and State of New York, pursuant to the provisions of an Act entitled "A supplement to an Act, entitled 'An Act respecting the Orphans' Court and relating to the powers and duties of the Ordinary and the Orphans' Court and Surrogates (Revision of 1898), approved June 14th, 1898,'" which Act was approved April 1st, 1912, being Chapter 213 of the Laws of 1912, do hereby make, constitute and appoint Isaac Shoenthal, Surrogate of the County of Essex, in the State of New Jersey, and his successors in office, my true and lawful attorney upon whom may be served all original process in any action at law, or in equity, against the aforesaid estate of George Cleveland, Deceased, whereof I have been duly appointed one of the executors.

And it does further agree that any original process against the aforesaid estate of George Cleveland, Deceased, shall be of the same force and effect as if duly served upon me within this State.

40 IN WITNESS WHEREOF, I have hereunto set my hand and seal, this 11th day of March, in the year

*Exhibit A.*

of our Lord, one thousand nine hundred and thirteen.

EDWARD W. SHELDON (L. S.),  
 President United States  
 Trust Company of New York.

10

Signed, sealed and delivered  
 in the presence of

CHARLES B. STORRS.

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

20

BE IT REMEMBERED, That on this 11th day of March, 1913, before me, the subscriber, a Master in Chancery of New Jersey, personally appeared Edward W. Sheldon, who I am satisfied is the person in the foregoing power of attorney named, and I having first made known to him the contents thereof, he did thereupon acknowledge that he signed, sealed, and delivered the aforesaid power of attorney as his voluntary act and deed for the uses and purposes therein expressed.

30

CHARLES B. STORRS,  
 M. C. C. of N. J.

(Filed Aug. 23, 1929.)

40

### Opinion of Chief Justice on Motion.

Newark, N. J., June 27, 1929.

MESSRS. HORACE & HENRY T. STETSON, attorneys for plaintiff, and J. HARRY HULL, Esq., attorney for U. S. Trust Co.

10 *Gentlemen:*

I have reached the following conclusions in the case of Gladys T. Cleveland v. Guy C. Cleveland, upon the motion to vacate the writ of attachment. The second, third and fourth grounds upon which the motion is rested set out matters in which the U. S. Trust Co., as garnishee, has no interest whatever—that is, matters which relate solely to the rights and obligations of Gladys Cleveland and Guy  
20 Cleveland, the parties to this suit, as between themselves. This being so, the garnishee is not entitled to a rule vacating the attachment upon either of these grounds.

The validity of the first ground upon which the motion is rested—namely, that the Surrogate of Essex County was not the legally authorized agent of the U. S. Trust Co., upon whom a writ of attachment could be served in a suit by the present  
30 plaintiff against one of the beneficiaries under the will of George Cleveland—depends upon the scope of the powers conferred upon the Surrogate by the letter of attorney given to him by the U. S. Trust Co., executor under that will. The pertinent language is as follows: “do hereby make, constitute and appoint Isaac Shoenthal, Surrogate of the County of Essex, in the State of New Jersey, and his successors in office, my true and lawful attorney upon whom may be served all original process  
40 in any action at law, or in equity, against the aforesaid estate of George Cleveland, deceased.” This language, as I read it, clearly limits the power of

*Opinion of Chief Justice.*

---

the Surrogate to represent the executor to actions brought against the estate of the decedent—i. e., against the executor thereof—and does not include a right to represent the executor in a suit brought, not against the decedent's estate, but against one of the beneficiaries named in the will of the decedent. This question was apparently not involved in any of the cases cited in the briefs submitted to me. My consideration of it leads me to the conclusion that the theory upon which the so-called levy under the writ of attachment was based is unsound, for the reason that I have indicated; that the levy was absolutely null and void; and that the alleged garnishee is entitled to be relieved from any apparent obligation arising out of the service of the writ upon the Surrogate. 10  
20

For the reasons stated, the motion to vacate the writ will be granted. 20

I have left the papers which each of you have submitted to me with Mr. Gmeiner, the deputy clerk, subject to your call.

Very truly yours,

WM. S. GUMMERE,  
*Chief Justice.* 30

(Filed July 8, 1929.)

**Certificate of Clerk of Supreme Court.**

I, FRED L. BLOODGOOD, Clerk of the Supreme Court of the State of New Jersey, do certify that the foregoing is a true copy of the entire proceedings in the above stated cause as the same remain on file and of record in my office.

10           IN TESTIMONY WHEREOF, I have set my hand  
                  and the seal of said Court at Trenton, this  
[SEAL] Twenty-sixth day of September, A. D.  
                  nineteen hundred and twenty-nine.

FRED L. BLOODGOOD,  
Clerk.

20

30

40

135  
134

To be argued by

HENRY T. STETSON.

**NEW JERSEY**

**Court of Errors and Appeals**

GLADYS T. CLEVELAND,  
Plaintiff-Appellant,

vs.

GUY C. CLEVELAND,  
Defendant,

and

UNITED STATES TRUST COMPANY  
OF NEW YORK, Executor and  
Trustee of the Last Will and  
Testament of George Cleve-  
land,

Garnishee-Respondent.

**BRIEF OF PLAINTIFF-APPELLANT.**

This is an appeal from an order made by the Chief Justice of the Supreme Court vacating a writ of attachment issued out of the Supreme Court by the plaintiff-appellant against the defendant, Guy C. Cleveland (the order is set forth at p. 6, State of Case).

The question involved is the proper interpretation of Chapter 313 of the Laws of 1912 (P. L. 1912, p. 505; Com. Supp. 2 C. S. 2635). The law is printed in full as Appendix A to this brief.

### Facts.

The essential facts are as follows: A writ of attachment was issued by the plaintiff against the defendant, under the Attachment Act of 1901 (P. L. 1901, p. 158, and Amendments thereto; C. S. 152), on an affidavit alleging that the defendant owed the plaintiff \$2,070, and that the defendant was a non-resident of the State of New Jersey (Case pp. 8 and 9). The affidavits disclose that the purpose of the suit is to collect alimony for the support of the plaintiff and her children, by virtue of final judgments of the Superior Court of the County of Los Angeles, State of California, in a suit wherein this defendant was plaintiff and cross-defendant and this plaintiff-appellant, Gladys T. Cleveland, was defendant and cross-plaintiff, all of which sums had accrued under said judgment prior to the commencement of this suit (Case pp. 22 to 36 inc.). The writ of attachment was executed by the Sheriff of Essex County by attaching

“The rights and credits, moneys, effects, goods, chattel, lands and tenements of the said defendant, and particularly all his right, title and interest of, in and to the hereafter described:

Everything due and to come due to the defendant under the Will of George Cleveland. Writ served upon E. Garfield Gifford, Surrogate of Essex County, N. J., as Agent of the United States Trust Company of New York, Executor and Trustee of the Last Will and Testament of George Cleveland.”

The United States Trust Company of New York (hereinafter called the “garnishee”) is the Trustee under the Last Will and Testament of George Cleveland, father of the defendant (Case p. 15, fol.

10). George Cleveland died a resident of Essex County on February 28, 1913, and in his will appointed garnishee as one of his executors and trustee of the trusts created therein, including a trust for the benefit of his son, the defendant herein from which he receives approximately \$20,000 annual income during his life (Case pp. 39, 40 and 41). The garnishee is a banking corporation organized under the laws of the State of New York, and at the time of the probate of the will, filed with the Surrogate of Essex County, in accordance with Chapter 313 of the Laws of 1912, a power of attorney in the form required by the statute appointing the said Surrogate its

“true and lawful attorney upon whom may be served all original process in any action at law, or in equity, against the aforesaid estate of George Cleveland, Deceased, whereof I have been duly appointed one of the executors.”

The power of attorney is set forth in full on page 42 of the case.

The writ of attachment is the only process issued herein, and as the defendant is a non-resident, no process has been served on him, nor has he appeared in this suit.

In accordance with Section 2 of Chapter 313 of the Laws of 1912, the Surrogate of Essex County mailed to the garnishee a copy of the writ of attachment with a letter which is printed in full as Appendix B to this brief. (The writ is printed on page 9 of case.)

After the writ was executed, the garnishee appeared specially and moved to quash the writ on four grounds stated in its notice of motion (Case pp. 12 and 13). The Chief Justice in his opinion denied the motion as to the second, third and fourth grounds (and the garnishee has not appealed from this decision) but granted a motion to vacate the

same on the first ground. For the sake of convenience the first ground is printed here:

"1. That the United States Trust Company of New York, as trustee, was not within the State of New Jersey, at the time the attachment was levied and the powers conferred upon the Surrogate of Essex County by the power of attorney executed by Edward W. Sheldon, president of the United States Trust Company of New York, running to the Surrogate of the County of Essex, are not broad enough to sustain the levy upon the rights of the defendant under the said Last Will and Testament by making the statutory declaration of attachment and levy in the Surrogate's presence as the representative of the trustee."

The sole question for this Court to determine is the meaning of Section 1 of Chapter 313 of the Laws of 1912, this being raised in grounds C, D, E and F of the grounds of appeal (Case pp. 2, 3, 4 and 5).

#### POINT I.

**The levy by the Sheriff on the Surrogate of Essex County, as agent of the garnishee under the power of attorney, is original process in an action at law against the estate of George Cleveland, and within the meaning of Chapter 313 of the Laws of 1912.**

Section 7 of the Attachment Act provides the manner of execution of the writ when a chose in action is to be attached (C. S. 137), and the return of the Sheriff complied with this section (Case pp. 10 and 11).

Section 29 of the Attachment Act (C. S. 146) provides that the plaintiff may sue the garnishee if he is indebted to the defendant, before final judgment is entered against the defendant, and Section 32 provides the procedure against the garnishee after the entry of judgment against the defendant. This provokes inquiry as to the effect of the service of the writ of attachment and levy thereunder upon the garnishee.

As stated by Dixon, J., in *Cord v. Newlin*, 71 N. J. L. 438, page 441 :

“Such process warns the corporation (upon whom the writ of attachment was served) not to perfect any transfer (of its stock) without the permission of the court, and thus subjects that matter, to the jurisdiction of the Court.”

The service of the writ of attachment thereby makes the garnishee, as well as the defendant Cleveland, a party to the suit of the plaintiff.

The following citations support this principle :

12 Ruling Case Law, Title of “Garnishment,” page 777 :

“Though in the nature of a proceeding in rem, garnishment is in effect an action by the defendant in the plaintiff’s name against the garnishee, the purpose and result of which are to subrogate the plaintiff to the right of the defendant against the garnishee.

When the jurisdiction of the court is based upon the attachment of property, such as a debt, and not on the appearance of the parties proceeded against, the action is essentially a proceeding in rem.”

Shinn on Attachment and Garnishment, Section 469, states:

“While garnishment cannot be classed as a suit in the sense that ordinary actions are suits, yet it is a suit in that it must have a plaintiff and defendant who have their day in court.”

Section 470 states:

“When garnishment process is issued immediately after the commencement of the principal suit, or before the termination thereof, and as auxiliary thereto, then three parties are necessary to the garnishment proceedings. These are the plaintiff, the defendant and the garnishee. The plaintiff must prove his debt, the defendant must have due notice of the process against him, and the garnishee must be indebted to the defendant or be in actual possession of his property.”

Section 471 states:

“The garnishee is in most states considered to be ‘a defendant in the action.’ He is a party to the action adverse to the plaintiff. And a judgment charging or discharging him has the same force and effect as other judgments: That is to say it is conclusive upon the parties as to the matter adjudicated.

The garnishee, however, has no such active interest in the determination of the suit as a defendant has in ordinary suits. He has often been pronounced to be only a stakeholder or custodian of the funds or property in his hands, for the one or the other of the litigants as the case may be determined. He has no pecuniary interest in the matter, no costs to pay and none to save. His business is to let the law have its course between the litigants, and he is not per-

mitted to do anything to change his position toward either. He is only bound to disclose the truth as to them. He is not permitted to interfere between the plaintiff and defendant, and the only question to be determined as to him is whether he is indebted and can safely pay. He is at most a qualified defendant. It is a matter of no concern to the garnishee which party shall succeed or to whom he shall pay the money due from him to the defendant. It is his business to stand aloof from the contesting parties and to bind himself to the separate interest of neither. He is entirely indifferent as between them and can properly do nothing to aid either party in the litigation. He must act solely for his own protection. And he is restrained from paying over the money either to his individual creditor—the defendant—or to the attaching creditor, until the attachment is disposed of and then he must pay only according to the result of that proceeding.”

If the plaintiff is successful in entering a judgment against the defendant, it may then proceed to enforce the judgment against the garnishee, and unless the defendant is served with process or voluntarily appears in this suit, the judgment is one *in rem* against the property attached, and can only be enforced against the same. This raises the question whether the writ of attachment is “original process” against the garnishee. If it is, it may be served upon the Surrogate in accordance with the statute. If it is not, it may not be served.

“Process” is defined in Cyc., Vol. 32, Title Process, page 419, as

“the writ, notice, or other formal writing issued by authority of law for the purpose of bringing defendant into a court of law to answer plaintiff’s demands in a civil action.”

Chancellor Walker, in *In re Martin*, 86 N. J. Eq. 265, at page 273, says:

“Process need not necessarily be a subpoena or other writ. An order of the court of chancery directing a receiver to take possession and convert the goods of a corporation into money has been held to be process. (*Wood v. McCardell & Co.*, 49 N. J. Eq. 433. See also, *Weinstein v. Herman*, 81 N. J. Eq. 236.) And the proceedings may be summary.”

\* \* \* \* \*

“Process is the means of compelling the defendant to appear in court. 3 Bl. Com. 279. In 2 Bouv. L. Dic. (Rawles' rev.) 766, one of the definitions of process is ‘a writ, warrant, subpoena or other formal writing issued by authority of law.’”

Again in *Gondas v. Gondas*, 93 N. J. Eq. 473, at page 478, referring to *In re Martin*:

“it need not necessarily be a subpoena or other writ, it may be an order or notice.”

These cases are cited with approval in *Sheldon v. Sheldon*, 100 N. J. Eq. 24, at page 26.

*Boyd v. Chesapeake & Ohio Canal Co.*, 17 Md. 195 (1860), holds that

“‘Process’ when used in an act relating to corporations is sufficiently comprehensive to apply to service of a writ of attachment on a corporation as garnishee, and a corporation when served is a defendant in an action.”

Original process is the process which originates the proceeding against the person on whom it is served.

*Oglesby v. Attrill*, 12 Fed. 227, at page 230.

*Franklyn v. Taylor Hydraulic &c. Co.*, 68 N. J. L. 113 at p. 117, holds that the word "process" is very broad and cannot be considered as only synonymous with the word "summons." At page 118, in the opinion, the following appears:

"The word 'process' is very broad, and, as used in the act, it cannot be considered as only synonymous with the word 'summons.' A summons is, of course, a process, but many kinds of process are not a summons, and the word in the Attachment act means any kind of legal writ to which a corporation under our laws may at any time and in any way be subject, and among these is the liability to become a garnishee by the proper service of a 'process' of attachment in a suit between other parties, although it is neither the plaintiff nor defendant in the original suit.

"Our Attachment act gives no greater immunity to an artificial person than to a natural one in this respect."

The notice of garnishment served on the garnishee had for its object the bringing of the garnishee into court, and as a party to this suit, as regards everything it owed the defendant, and which was covered by levy of the Sheriff, even though the plaintiff cannot recover from the garnishee anything attached until the Court decides that the defendant is indebted to the plaintiff. The garnishee must hold the property attached, subject to the order of the Court. When the judgment is entered herein against the defendant, the plaintiff may then proceed to enforce the judgment against the garnishee as to anything that has been attached, and which (to quote again from Dixon, J., in *Cord v. Newlin* [cited above]) has been subjected to the jurisdiction of the Court.

The writ of attachment is certainly original process against the garnishee, because no claim

can be made against it for anything that has not been attached. Neither can the garnishee be sued by this plaintiff if the writ of attachment has not been served upon it; nor can it be sued for anything more than is levied upon in its hands by the Sheriff. This notice limits the liability of the garnishee, and the jurisdiction of the Court over it, to the property attached in its hands, or under its control.

## POINT II.

**Chapter 313 of the Laws of 1912 is a remedial statute, and should be liberally construed.**

*Blackstone, Chase's 4th Ed.*, at page 51, states:

“Remedial statutes are those which are made to supply such defects, and abridge such superfluities, in the common law, as arise either from the general imperfection of all human laws, from change of time and circumstances, from the mistakes and unadvised determinations of unlearned (or even learned) judges, or from any other cause whatsoever.”

And at page 52:

“There are three points to be considered in the construction of all remedial statutes; the old law, the mischief, and the remedy; that is, how the common law stood at the making of the act; what the mischief was, for which the common law did not provide; and what remedy the parliament hath provided to cure this mischief.”

What was the law? Before the statute in question was enacted a non-resident or a foreign corporation could qualify as executor, or trustee (if

named in a will) in the State of New Jersey, and unless he or it could be served with process within the State of New Jersey, was immune from suit in the courts of this State. These persons and corporations came to New Jersey and invoked the aid of our courts for the assertion and protection of their rights and might sue in our courts, but could not be sued here, unless by chance they were found in the State, so that the process could be served upon them.

What was the mischief? This resulted in hardships to the citizens of New Jersey, by forcing a suitor to go to another forum if he desired to bring suit against the executors of the estate, the decedent of which died a resident of this State, and whose affairs were being settled here.

The remedy is Chapter 313 of the Laws of 1912; the intent of the Legislature being to put foreign executors and trustees on the same footing, as regards the service of process against them as domestic executors and trustees, and to aid suitors to obtain jurisdiction over them, when suing the estate. If the garnishee was a New Jersey banking corporation, there is no doubt whatever that the writ of attachment herein could be served upon it and be absolutely binding upon it, and recourse could be had to the courts of this State to compel it to comply with the same in accordance with the Attachment Act.

A remedial statute is to be construed liberally.

See:

*Camden v. Amboy R. R. v. Briggs*, 22  
N. J. L. 623.

*Hoguet v. Wallace*, 28 N. J. L. 523.

In *State v. Alderman*, 81 N. J. L. 529, at page 551, in the opinion of this Court by former Justice

Minturn, where a section of the Criminal Procedure Act was under consideration, he says:

“Statutes relating to remedies and procedure are to be liberally construed with a view to the effective administration of justice; and this is especially true of statutes designed to render the methods of procedure more simple and convenient. (*Hoguet v. Wallace*, 4 Dutcher 523; *Black. Interp. L.* 310; 36 Cyc. 1188, and cases.)”

This statute does not interfere with any vested rights of the garnishee, but is purely a statute of procedure. The statute does not limit in any way the character of the process. It simply says “original process.” Neither does it state who must make a claim against the estate, but simply that there shall be “an action at law or in equity against the estate.” The writ of attachment when served on the garnishee is original process in an action at law against the estate represented by the garnishee, who is present in Essex County by reason of the statute and the power of attorney executed by it.

### POINT III.

**The decision of the Supreme Court is in conflict with prior decisions of that court as to the meaning of Chapter 313 of the Laws of 1912.**

The statute has received judicial construction in the case of *Tiffany & Co. v. d'Erlanger*, 1 N. J. Misc. 146. In this case an attachment was issued by the plaintiff against the defendant under the 1901 Act, and the Sheriff of Passaic County levied upon

“all moneys that may be due to defendant in trust fund created by will of Mr. Peter

Cooper Hewitt, in possession of Frederic Beggs, surrogate of Passaic county, as agent of Farmers' Loan and Trust Company."

The trust company was executor of the will of Mr. Hewitt, and was a New York corporation, and filed a written power of attorney with the Surrogate in accordance with Chapter 313 of the Laws of 1912. The defendant (not the garnishee as in this case) moved to set aside the levy on the ground that the executor, as garnishee, was not within the State of New Jersey, and also that the rights levied upon were exempt from attachment. These facts are all set forth in the opinion of the late Judge Newman, wherein he states:

"Defendant contends that the powers thus conferred upon the surrogate are not sufficiently broad, so that a levy upon rights of the defendant under said will or upon a debt due her from the estate can be legally made, by making the statutory declaration of attachment and levy in his presence, as the representative of the executor.

I am of the opinion that the levies should not be set aside on that ground."

The case was removed by certiorari to the Supreme Court and argued before former Justice Minturn, sitting alone. The briefs of the learned counsel for both the plaintiff and defendant, which were submitted to the Justice, each argued the question as to whether the statute was broad enough to cover the service of the writ of attachment on the Surrogate, the plaintiff holding that it was and the defendant holding that it was not. That part of each brief bearing on the subject is printed as Appendix C to this brief.

Justice Minturn stated, in 1 Misc. 340, as follows:

“My examination of the record and my consideration of the arguments and briefs of counsel have led me to concur in the views expressed by Judge Newman in this opinion filed in this case in the Circuit. The judgment under review will thereupon be affirmed.”

This case is looked upon as judicially establishing the propriety and legality of serving a writ of attachment on a foreign executor who has filed the statutory power of attorney by delivering the same to the Surrogate as his or its agent, and there is no decision in conflict with it, except the decision of the Supreme Court in this case.

### CONCLUSION.

We have pointed out that the writ of attachment and the service of the same constitutes original process in an action at law against the garnishee, even though a judgment must be obtained against another defendant before resort can be had against the garnishee. Therefore, by reason of the statute and the power of attorney, the service of the writ of attachment on the Surrogate was valid, and the order appealed from is erroneous, and should be reversed and the writ reinstated with costs.

Respectfully submitted,

HORACE & HENRY T. STETSON,  
Attorneys for Plaintiff-Appellant.

WILLIAM H. OSBORNE,  
HENRY T. STETSON,  
WILLIAM J. McCORMACK,  
of Counsel.

## APPENDIX A.

**Chapter 313 of Laws of New Jersey of 1912.**

A Supplement to an act entitled "An Act respecting the Orphans' Court and relating to the powers and duties of the ordinary, and the Orphans' Court and surrogates" (Revision of 1898), approved June fourteenth, one thousand eight hundred and ninety-eight.

BE IT ENACTED by the Senate and General Assembly of the State of New Jersey:

1. Every executor, administrator, trustee or guardian not a resident within this State shall file with the surrogate of the county, or with the register, or clerk of the court, of this State, from which he, she or it has received or may hereafter receive letters testamentary or of administration, or such letters and power and authority as have been or may hereafter be granted, a duly executed instrument in writing constituting the said surrogate, register or clerk, and his successors in office, his, her or its true and lawful attorney upon whom all original process in any action at law or in equity against the estate which he, she or it may represent and therein shall set forth the post-office address, street and number, and shall agree that any original process against the estate shall be of the same force and effect as if duly served on such executors, administrators, trustees or guardians within this State.

2. Service of such process shall be made by leaving a copy of the same with the surrogate or deputy surrogate, register or clerk, or with any

clerk employed in the office of such surrogate, register or clerk, together with a fee of two dollars to be taxed in the plaintiff's costs of suit.

The surrogate or deputy surrogate, register or clerk shall forthwith notify the executor, administrator, trustee or guardian of such service by mailing a letter with a copy of the process served enclosed, with full postage thereon prepaid, directed to such executor, administrator, trustee or guardian at the post-office address given in the said power of attorney.

3. If the power of attorney is not executed and filed as aforesaid, within ten days after notice served upon said executor, administrator, trustee or guardian, either in person or by mail as may be directed; or if at any time said power of attorney is revoked by such executor, administrator, trustee or guardian, any letters testamentary, or of administration, or any authority whatsoever of any kind which may have been granted by such surrogate, or by any court of this State or by any judge of any court of this State, shall forthwith and immediately be and become null, void and revoked, and any person or persons or any competent and duly authorized corporation of this State, upon giving notice of such application as may be directed, may then petition the surrogate or court or whomsoever may have the power and authority, for letters of substitution in the place and stead of those revoked as aforesaid which may then be granted.

4. This act shall take effect immediately.

Approved April 1, 1912.

**APPENDIX B.**

E. GARFIELD GIFFORD  
Surrogate of the County of Essex  
Newark, New Jersey

March 5, 1929.

United States Trust Company,  
45 Wall Street,  
New York City.

Gentlemen :

We enclose herewith Writ of Attachment issued out of the New Jersey Supreme Court in a certain matter therein pending wherein Gladys T. Cleveland is plaintiff and you, as one of the Executors of the last Will and Testament of George Cleveland, deceased, are defendant.

This Writ of Attachment was served upon me pursuant to the power of attorney which you gave at the time this will was admitted to probate, and under the statute of the State, the mailing of these papers to you is as full and complete a service thereof upon you as though it were served upon you personally.

Yours very truly,

E. GARFIELD GIFFORD,  
Surrogate.

SFJ/DED  
Inc.

## APPENDIX C.

## NEW JERSEY SUPREME COURT.

<p style="text-align: center;">TIFFANY &amp; COMPANY, a body corporate, Plaintiff,</p> <p style="text-align: center;">vs.</p> <p style="text-align: center;">MARYON ANDREWS D'ERLANGER, formerly known as Mrs. Peter Cooper Hewitt, Defendant.</p>	}	In Certiorari.
--	---	----------------

## BRIEF FOR DEFENDANT.

(Copy of that part of the brief of the defendant in the above case relating to the issues presented in the appeal of *Cleveland v. Cleveland* and referred to on page 13 of this brief.)

In this case, the writ of attachment was served only upon Frederic Beggs, Surrogate of Passaic County. The plaintiff contends that pursuant to the power of attorney (Case, 21) that is as if the attachment was served upon the executor personally. A reading of the power of attorney and of the statute (P. L. 1912, 551, C. S. Supplement 1915, 1159) will show that this is not so. The power of attorney conforms strictly to the phraseology of the statute, and makes the Surrogate the executor's attorney, "upon whom all original process in any action at law, or in equity, against the estate of Peter Cooper Hewitt may be served." This is a very narrow representation. Conceivably, the Act

of 1912 might have required, and the foreign executor might have given a power of attorney making the Surrogate its attorney-in-fact, for the service of any legal process affecting the executor, and notice of garnishment might have been expressly included. Furthermore, the Act of 1912 might have required the power of attorney, as did the Insurance Act of 1902 (C. S. 2855, Section 59) require the appointment of a resident attorney "upon whom all original process in any action or legal proceeding against it may be served." This was not done, however. The Legislature did not see fit to establish the sweeping representation established, for example, by the statutes of Pennsylvania as to foreign insurance companies (Laws of Pennsylvania of 1873, page 20), or even to the extent of the above quoted section of the Insurance Act of 1902. The representation is limited under the Act of 1912, and under the power of attorney in this case, to original process in any action at law, or in equity, against the estate of Peter Cooper Hewitt. The writ of attachment in this case may be original process, but it is original process against the defendant, and is not original process against the estate of Peter Cooper Hewitt, and it is only to process against the estate of Peter Cooper Hewitt that the authority extends. Should the foreign executor convert or mismanage the funds of the estate so as to make itself personally liable, process in an action against it individually could not be served on the Surrogate under this power of attorney.

Counsel may argue that the court must extend by construction the meaning of the Act of 1912, because, otherwise, it would be impossible to attach in New Jersey rights and credits held by a non-

resident executor, and that such cannot have been the intention of the Legislature. The fallacy of this argument is two-fold. In the first place, it may be that notice of garnishment served upon one of the persons named in Section 88 of the Corporation Act of 1896, or in P. L. 1916, 410, as being persons upon whom process against a corporation can be served, would effectually attach the rights and credits held by such foreign executor. I doubt even that, however. It must be borne in mind that non-residence has never been a ground for refusing letters testamentary to an executor. *Ackers Case*, 70 N. J. Eq. 669 (1905). The Attachment Act has been in existence since the eighteenth century, and it was not until 1912 that non-resident executors, whether individual or corporate, were required to appoint a local attorney-in-fact. Until the passage of the Act of 1912, a non-resident executor could not possibly have been served with notice of garnishment by the service upon him of an attachment out of the New Jersey courts against a creditor of the estate, unless the Sheriff happened to find him on a visit to New Jersey. For all those years, therefore, it cannot have been the policy of the state that rights and credits held by a non-resident executor of a New Jersey decedent must necessarily have been subject to attachment. The change in the policy of the state, as evidenced by the passage of the Act of 1912, is very limited. In the first place, by Section 3 of that Act, the right to revoke the power of attorney is left in the non-resident executor. It is true, the result of such revocation is that the non-resident executor would have his own letters revoked. Still, it is left in his power to withdraw the representation by the Surrogate. The appointment is not irrevocable as is the case under the statutes of some of the other states of

local representatives of foreign corporations. Furthermore, as we have seen, the representation is limited to original process in any action at law, or in equity, against the estate. It is not as it might well have been any legal process, rule, order, notice or proceeding affecting the executor in either his individual or representative capacity. While Section 33 of the Attachment Act provides that it shall be construed liberally for the advancement of justice and the benefit of creditors, and it has been so construed pursuant to that command, nevertheless, it is a statutory proceeding, and the courts cannot, and do not, extend it. How strictly the courts hold proceedings under the Attachment Act to the scope of that Act, and refuse to extend that scope or apply thereto and in aid thereof other statutes or provisions of law, is evidenced by the recent decision of the Court of Errors and Appeals in *Brink v. Flannagan*, 87 N. J. Eq. 630. In conclusion on this point, rights and credits can be effectively attached only by serving the writ of attachment upon the person holding the rights and credits. Service upon another person who can notify the real garnishee is not sufficient. Nothing in the Act of 1912 so identifies the Surrogate of Passaic with the executor as to make service of the attachment on him service upon the executor. It followed, therefore, that both the levy under the original writ, and under the alias writ, are invalid, and must be set aside.

## APPENDIX D.

## NEW JERSEY SUPREME COURT.

<p style="text-align: center;">TIFFANY &amp; COMPANY, a body corporate, Plaintiff, Defendant in Certiorari,</p> <p style="text-align: center;">vs.</p> <p style="text-align: center;">MARYON ANDREWS D'ERLANGER (formerly known as Mrs. Peter Cooper Hewitt), Defendant, Prosecutor in Certiorari.</p>	}	On Certiorari.
--	---	----------------

## BRIEF FOR TIFFANY &amp; COMPANY.

(Copy of that part of the brief of the plaintiff in the above case relating to the issues presented in the appeal of *Cleveland v. Cleveland*, and referred to on page 13 of this brief.)

## POINT I.

## BOTH LEVIES ARE GOOD.

Chapter 313, Laws of 1912, page 551, provides that every non-resident executor shall file with the Surrogate of the county from which it receives letters, a power of attorney constituting the Surrogate its lawful attorney on whom process against the estate it represents may be served.

The law further provides that the non-resident executor shall agree that any original process

against the estate shall be of the same force and effect as if duly served on the executor within this state. It is a necessary step in the qualification of the executor. If it is not filed or if it is revoked, the letters testamentary forthwith become void and any competent and duly authorized corporation of this state may apply on notice for letters of substitution which may then be granted.

Section 2 of the act provides the method of service. This method was followed in the present case. The executor gave the power of attorney to Surrogate Beggs and made the agreement required by the statute. The power of attorney and the agreement are set forth in the stipulation. Admittedly they are in the statutory form.

The policy of this law is plain on its face. It is in aid of creditors' rights and is designed to place foreign executors on an equality with domestic executors. If the foreign executor does not comply, a competent domestic corporation may be substituted.

But defendant says that the statute is very narrow; that the words "against the estate" limit it so as not to include a claim of a creditor of this kind.

Conceivably, defendant says, the law might have required a power of attorney covering legal process affecting the executor; but the interest of the defendant is in the estate.

Plaintiff asks no remedy against the executor as such. Plaintiff asserts no fault or omission on the part of the executor. The executor is a representative of the estate and as such representative has agreed that process served upon it by delivery to Surrogate Beggs shall have the same force as if served on it within this estate.

Counsel says if the foreign executor should mismanage the fund so as to be personally liable, process in such an action against it individually could not be served. This observation has to do with questions outside the frontier of the present discussion; but an obvious answer is that the statute is not necessary for any such purpose. The Orphans' Court was not powerless before 1912 to deal with erring executors.

Defendant further says that attachment is a statutory proceeding and the courts cannot extend it. This observation will of course not apply to the statute of 1912 which is an amendment to the Orphans' Court Act and applies to all actions at law or in equity.

However, when we are speaking of extending the Attachment Act, we mean extension beyond its own limits. What are its limits? Section 33 says it shall be liberally construed for the advancement of justice and the benefit of creditors. Beyond such limits it cannot extend.

The case of *Brink v. Flannagan*, 87 N. J. Eq. 630, held that under the Attachment Act of 1901 a judgment is not a lien against land conveyed by bona fide unrecorded deed *delivered prior* to the issue of the writ of attachment. The fact that anyone could claim that such a writ was a lien on land which had already been conveyed before its issue, gives one the impression not of limitation but the reverse.

In *Thompson v. Eastburn*, 16 N. J. Law 100-101, Hornblower, C.J., in dealing with the Act of 1798, says:

“But the argument of plaintiff's counsel  
“is based upon a mistaken assumption. He  
“supposes because this is a statute remedy,

“it is to be governed by the same rigid rules  
 “that are applied to the execution of special  
 “delegated and extra-judicial authorities.  
 “This is a mistake.”

And on page 102:

“This is a remedial statute and as well  
 “upon legal principles as by its own express  
 “enactment in the 32nd section, is to be liber-  
 “ally construed for the benefit of creditors.”

Defendant cites *Tomlinson v. Stiles*, 29 N. J. Law 426, but the quotation underscored in his brief shows that all that is necessary to attach rights and credits is to go to the person who controls the right. Who else controlled the right than the executor of the will, and by the statute and the power of attorney and the agreement included in it, the Farmers Loan & Trust Company was constructively present in Passaic County in the person of Surrogate Beggs for service of process against the estate of Hewitt.

Counsel further says that rights and credits can be effectively attached only by serving the writ upon the person holding the rights and credits, and that service upon another person who can notify the real garnishee is not sufficient.

The last paragraph of *Cord v. Newlin*, 71 N. J. Law 438, is directly to the contrary.

It was held in this case that the provisions of the act as to the mode of service were only directory; that substantial compliance was sufficient and the officers' return was amendable in accordance with the facts, quoting an earlier case.

Notice was a matter about which the Farmers Loan could agree or waive if it so desired. Such a matter differs materially from a question like

liquidated damages, for example. There the defendant could move to quash and succeed and no act of the garnishee could in any way affect the matter. Notice is knowledge and an opportunity to defend. It would seem to be an indefensible position that the executor could be content with the knowledge of the suit and the opportunity for defense and be in fact ready to waive additional formalities of notice, and that the defendant, without bringing the executor in, could change the status.

132  
134

To be Argued by  
MR. HULL.

## New Jersey Court of Errors and Appeals

GLADYS T. CLEVELAND,  
*Plaintiff-Appellant,*

vs.

GUY C. CLEVELAND,  
*Defendant,*  
and

UNITED STATES TRUST COMPANY  
OF NEW YORK, Executor and  
Trustee of the Last Will and  
Testament of George Cleveland,  
*Garnishee-Respondent.*

### Brief on Behalf of Garnishee-Respondent.

This is an appeal from an order made by the Chief Justice of the Supreme Court, setting aside a writ of attachment issued out of the Supreme Court by the plaintiff-appellant against the defendant, Guy C. Cleveland.

The action was brought by the plaintiff against the defendant in the Supreme Court to recover moneys due and to become due under three interlocutory decrees of the Superior Court of Los Angeles County, California (State of Case, pp. 26-36). These decrees awarded a divorce to the plaintiff in this case against the defendant, Guy C. Cleveland, and awarded alimony. The interlocutory decree was dated October 3rd, 1924 and the final decree, October 15th, 1925. These two

decrees, in addition to granting the plaintiff herein a divorce, awarded to her, inter alia, the sum of \$300.00 a month for herself and \$100.00 a month for each of the two children of the marriage. The third decree, dated June 28th, 1928, and nearly three years later than the final decree, modified the previous and final decree by awarding to the plaintiff the sum of \$800.00 additional, payable at the rate of \$90.00 a month, and also awarded to the plaintiff additional sums of money for other purposes, which were recited in the decree.

Both the plaintiff and the defendant are non-residents of the State of New Jersey.

On February 13th, 1913, the plaintiff's father, George Cleveland, died, leaving a Last Will and Testament, which was duly probated in the office of the Surrogate of Essex County, of which county the said George Cleveland was a resident. Under this will, the United States Trust Company of New York was appointed one of the executors of said will and duly qualified. On or about the date of the probate of the will, the United States Trust Company of New York executed a power of attorney to the Surrogate of the County of Essex (S. C., p. 42). On March 5th, 1929, the plaintiff levied an attachment upon the funds in the hands of the United States Trust Company of New York, as trustee, by making the statutory declaration in the presence of E. Garfield Gifford, Surrogate of Essex County, as agent of said company, the executor and trustee of the Last Will and Testament of George Cleveland. Service was made upon the Surrogate, by virtue of the power of attorney given by the garnishee to the Surrogate of Essex County (S. C., p. 42).

The attachment was obtained upon the ground that the defendant, Guy C. Cleveland, was not a

resident of the State of New Jersey and owed the plaintiff the sum of \$2,070.00 (S. C., p. 8). The trust company, appearing specially, moved to set aside the attachment upon four grounds (S. C., pp. 12 and 13). The Chief Justice vacated the attachment (see Opinion, S. C., p. 44-45).

### POINT I.

**The language of the power of attorney given to the Surrogate of Essex County limited the Surrogate to represent the executor and trustee to actions brought against the estate of the decedent and not against one of the beneficiaries named in the will.**

The opinion appealed from held that the language of the power of attorney given by the garnishee herein to the Surrogate of Essex County limited the powers of the Surrogate to represent the executor in actions brought against the estate of the decedent, that is against the executor or trustee and does not include a right to represent the executor in a suit brought not against the decedent's estate but against one of the beneficiaries named in the will of the decedent.

The brief of the plaintiff-appellant begs the question. Her entire argument, as set forth in Point I, pages 4 to 9, inclusive, of her brief, does not answer the opinion of the Chief Justice at all. This suit is not against the garnishee. It is not a suit directed against the United States Trust Company of New York in its capacity as executor or trustee. It is a suit by one person, the plaintiff, against the defendant, her former husband, to recover moneys she claims are due her under the decrees of the Superior Court of Los Angeles County,

California. The appellant states on page 5 of her brief:

“The service of the writ of attachment thereby makes the garnishee as well as the defendant, Cleveland, a party to the suit of the plaintiff.”

This is a non-sequiter. The citations on pages 5, 6 and 7 do not bear out the argument of the plaintiff. Under the law relating to attachment, the garnishee is not made a party defendant until a writ of scire facias is entered against it. Then, after that writ has been served, judgment may be entered against the garnishee, either after it files its answer and a trial has been had, or after it has defaulted. It is as perfectly clear as language can be that this power of attorney only authorizes the Surrogate to receive process in a suit brought against the executor or trustee. Nothing in the language of the power of attorney or in the statute, Laws of 1912, Ch. 313, which it rather strictly follows, can be found which authorizes the Surrogate to accept service in any proceeding brought against anyone who may be interested in this state. The intent of the power of attorney is that the Surrogate can represent the trustee as far as the acceptance of process is concerned when an action is brought against the trustee in relation to the acts or defaults of such corporation in relation to the estate which it is administering. The whole point in this matter is the insufficiency of the language of the power of attorney. The Chief Justice put his finger on the weakness of the power and no reasoning on the part of counsel is necessary to sustain him. It is clear, unequivocal and not open to question.

All through the plaintiff's argument runs the contention that the word "process" is synonymous with the word "summons". She contends that from the similarity of the two words, the service of a writ of attachment on the Surrogate is equivalent to the service of a summons on the garnishee. What of it? That does not meet the vice in this power of attorney at all.

According to the Chief Justice opinion, the service of a summons or any process on the Surrogate would not bind the trust company, unless that summons or process was issued in a suit against the estate itself, i. e., the trustee. That's the milk in this cocoanut. Any other argument is beside the point.

## POINT II.

**The power of attorney is not to be extended by implication, but is to be strictly construed.**

31 Cyc., pages 1407-8, Principal and Agent;

Wood v. Goodridge, 6 Cushing (Mass.), 117;

Kislak, Inc. v. Muller, 100 E., 110, at 116;

Fletcher v. Inter-State Chemical Co., 94 L., 332, at 334.

Bleimeyer v. Public Service M. C. Ins. Corp., 250 N. Y., at page 264.

The plaintiff asks that the attachment act be liberally construed. The question before this court would seem to be the construction of the power of attorney and not a liberal construction of the attachment act; and further, whether the language of the power of attorney can be extended by im-

plication, to include the right to accept process not against the garnishee herein but against a beneficiary under a trust held by the trustee.

In 31 Cyc., page 1407, it is said:

“A power of attorney is a formal instrument and must be construed according to the natural import of its language and is not subject to that liberal interpretation which is given to less formal instruments.”

In *Wood v. Goodridge*, supra, at page 123, Judge Fletcher says this:

“In accordance with the well settled principles of law, the power of attorney to Levi must be so interpreted as not to extend the authority given to him beyond that which is given in terms or which is necessary or proper for carrying out the authority expressly given; into effect.”

At page 1408, 31 Cyc., it is said:

“In the case of a power of attorney as with other instruments, when the meaning of the language used is obvious, such meaning is not by implication to be enlarged or restrained beyond what is expressed or indicated by the natural or ordinary meaning of the language used.”

The language of this power of attorney is obvious. It authorizes the agent to accept service in an action or legal proceeding against the trustee as executor or trustee. Its language is plain, simple and easily understood. It needs no refinement or explanation. The attempt is here made to extend the agent's authority to accept service in

a suit not brought against the trustee but in a suit brought against a third person, one who receives an income from a trust fund in the hands of the trust company, the garnishee herein. It is an effort to extend by implication, the authority which is plainly limited by the language of the power of attorney itself.

In *Kislak, Inc. v. Muller*, supra, at page 116, Vice-Chancellor Griffin says:

“It is the rule that where a contract is ambiguous it should be construed most strongly against the party preparing it, or employing the words concerning which doubt arises. *Fletcher v. Inter-State Chemical Co.*, 94 N. J. Law, 332; affirmed, 95 N. J. Law, 543.”

Judge Trenchard, in *Fletcher v. Inter-State Chemical Co.*, supra, at page 334, lays down the same principle, when he says:

“And this view is strengthened by the fact that the ambiguous words in question were the words of the defendant, and the rule is, that where a contract is ambiguous, it will be construed most strongly against the party preparing it or employing the words concerning which doubt arises (*American Lithographic Co. v. Commercial Casualty Insurance Co.*, 81 N. J. L., 271).”

Cardozo, Ch. J., in *Bleimeyer v. Public Service M. C. Ins. Corp.*, 250 N. Y., page 264, in referring to the ambiguity of an insurance policy, says:

“The language of the policy is obscure. We read it against the insurer when the choice is nicely balanced.”

The Chief Judge of the Court of Appeals of New York does not go as far as the courts of our State. He says in the language just quoted that when the choice is evenly balanced, the instrument is to be resolved against the person preparing it, but the rule in our state seems to be that where a contract is ambiguous, quoting Judge Trenchard:

“It will be construed most strongly against the party preparing it or employing the words concerning which doubt arises.”

Counsel contends that the choice between the two constructions cannot be considered to be nicely balanced in this case because the language, according to counsel's contention, seems to be clear and unequivocal.

### POINT III.

- a. Attachment is not original process.
- b. The attachment being in derogation of the common law, is to be construed strictly even in states where the preceding is statutory.

Corpus Juris, 6, pages 29 and 36, Attachment.

Shinn on Attachment, Volume I, page 3, Edition of 1896.

An attachment is not the beginning of a suit. It is a supplementary or secondary preceding. It is begun after the issuance of a summons and a return of not found, or it may be issued simultaneously with the issuance of the summons. The attachment is issued against the defendant's property to compel his appearance but that cannot be said to be an action against the trustee. This is

clearly shown by a reference to *Corpus Juris*, Volume 6, page 29, where it is said:

“That this writ, attachment, was issued out of the Court of Common Pleas and was grounded on the failure of the defendant to appear.”

It has been extended by statute when it is evident that the defendant cannot be reached. At common law, it was never an original process, so as to be considered the beginning of a suit.

In *Corpus Juris*, Volume 6, under Attachment, at page 31, it is stated that some states have made attachment an original process for the beginning of a suit. The only states, according to this authority, that have done this, are those of Indiana, New Mexico and Pennsylvania; these three and these only. New Jersey is not given by this authority as one of those states where an attachment is the beginning of a suit. A reading of the attachment act and the authorities, as far as counsel can discover, show no contradiction of this statement.

In *Shinn on Attachment*, Volume I, page 3, Edition of 1896, it is said that:

“It is an ancillary or provisional remedy— an attachment is not considered to be an independent proceeding but one merely in aid of an action commenced, concurrent with or before the proceedings in attachment.”

Again quoting from *Corpus Juris* under Attachment, on page 36, it is said:

“Attachment being an extraordinary and summary remedy in derogation of the common law, the courts will usually, in the absence of

any statutory requirement to the contrary, construe the statute strictly in favor of those against whom the proceeding is employed, both as to the subject matter of the attachment and the method of enforcing the remedy."

And again:

"The proceeding as it exists in the United States today is deemed to be a summary or extraordinary remedy in derogation of the common law and has been said to owe its existence entirely to statutory enactment and it follows that no legal right or title can be acquired by its exercise unless there has been a strict compliance with the provision of the statute, or a substantial compliance in those estates where it is provided that attachment statutes should be liberally construed."

The appellant argues that this attachment act should be liberally construed. On pages 10 and 11 of her brief, she argues that the attachment act should be liberally construed by reason of the mischief that might be caused by narrow construction placed upon the power of attorney by the Chief Justice. The further argument is, of course, that the creditor will have no remedy if the decision of the Chief Justice is upheld.

The attachment act has probably been in existence for nearly a century and a half. It was only in 1912 that the act was passed which required non-resident executors, either individuals or corporations, to appoint an attorney in fact, and this act is very limited, as can be seen by an inspection of it. It would have been very simple for the legislature in enacting this statute, to state that process attempting to reach interests in an estate held by

a non-resident trustee, could be served upon the executor or trustee in a suit against a defendant who was interested in the estate. The limited authority therefore given by the power of attorney should not be extended.

Not should it be extended simply because it might be impossible to reach property of a non-resident debtor in such a situation as this. Chief Justice Hornblower in *Pullinger v. Van Emburgh*, 16 L., 456, answered that argument. It was urged before him that an insolvent debtor might acquire property after his discharge from an attachment. He said at page 460:

“So be it. The proceeding by attachment is altogether a statutory remedy and if it fails to reach the case of such an insolvent debtor, we cannot extend it to him by construction.”

If the power of attorney conferred upon the Surrogate of Essex County is not broad enough to meet this situation, let the legislature amend the act. It should not be enlarged by judicial construction to reach this particular case.

#### POINT IV.

**The respondent may urge in this Court any ground to support the decision of the court below.**

- McCrorry Stores Corp. v. Braunstein*, 99 L., 166, at 169;
- Levintan v. Donaldson*, 102 L., 144;
- Meisel v. Merchants National Bank*, 85 L., 253;
- McMichael v. Horay*, 90 L., 142;
- McCarthy v. West Hoboken*, 93 L., 247.

These cases all hold that the question to be determined upon review in an appellate court, is always as to the propriety of the judicial action of the court below, and not the soundness of the reasons which prompted it.

On page 3 of the appellant's brief, referring to the grounds of the motion made to vacate the attachment, it is said:

“The Chief Justice, in his opinion, denied the motion as to the second, third and fourth grounds (and the garnishee has not appealed therefrom), but granted the motion to vacate the same on the first ground.”

Attention is called to the parenthesis, namely, “and the garnishee has not appealed from this decision”. The garnishee could hardly appeal from a decision in its favor. It can, however, in view of the authorities just cited, support the decision of the Chief Justice upon the grounds urged in the court below. The Appellate Court might hold that the first ground of the motion upon which the court based its decision, was error. It might also hold, in order to support the decision of the court below, that the second, third and fourth grounds were good. Consequently the following grounds urged in the court below follow.

## POINT V.

**A judgment of the Superior Court of Los Angeles County, California, in so far as it awards alimony, is not such a final judgment as is entitled to full faith and credit under the Federal Constitution.**

- Lynde v. Lynde, 181 U. S., 183;  
 Sistare v. Sistare, 218 U. S., 1;  
 Kerr's Cyclopedic Code of California,  
 Civil Code, Part One, Second Edition,  
 1920, Paragraph 139;  
 Ex Parte Spencer, 83 Calif., 460;  
 Ex Parte Cottrell, 59 id., 417;  
 Gaston v. Gaston, 114 id., 542;  
 Tremper v. Tremper, 177 Pac., 868;  
 Cohen v. Cohen, 150 Calif., 103;

Lynde v. Lynde, *supra*, was an appeal from a judgment of the Supreme Court of the State of New York. The New York court awarded a judgment for alimony based upon the decree of the Court of Chancery of New Jersey. The lower court of New York allowed judgment for alimony due at the date of the New Jersey decree. This amounted to \$8840.00. In addition, it allowed the alimony that had accrued from the date of the entry of the New Jersey decree to the date of the beginning of the action in New York State. This was reversed upon an appeal to the Appellate Division. The upper court allowed only the alimony due at the date of the New Jersey decree and disallowed the amount that accrued after that date. The Supreme Court of the United States affirmed this latter decision, saying:

“The provision for the payment of alimony in the future was subject to the discretion of

the Court of Chancery of New Jersey, which might at any time alter it and it was not a final judgment for a fixed sum."

*Sistare v. Sistare*, supra, was a case taken to the Supreme Court of the United States by a writ of error from the Connecticut Court of Errors. The Connecticut court held that a decree of alimony granted by the Supreme Court of the State of New York, was not such a judgment as was entitled to full faith and credit under the Federal Constitution. The Connecticut Court of Errors construed the sections of the New York Code of Civil Procedure, numbers 1762, 1763, 1766, 1767 and 1769, and the opinions of the courts of New York, construing that section, and held that under these sections, the New York court had the power to modify or annul the provisions for alimony, not only as to alimony to become due but as to alimony that had already accrued, saying:

"The right of modification or annulment which is thus reserved to the court, is one which extends to overdue and unsatisfied payments, as well as those that may accrue in the future."

The Supreme Court of the United States differed in its construction of the New York Code Sections regarding alimony, stating that the code sections just referred to gave to the judgments for past due alimony a finality which the Connecticut Court did not give to it, and held, reversing the Connecticut Court of Errors, that it was such a judgment as was entitled to full faith and credit under the Federal Constitution; so it was apparent from the decision of the Supreme Court and also of the

Court of Errors of Connecticut, that if a judgment for past due alimony could be modified by the court in which that judgment was entered, then that judgment was not such a one as entitled it to full faith and credit under the Federal Constitution.

Section 139 of the Civil Code of California, referred to above, is as follows:

“Where a divorce is granted for an offense of the husband, the court may compel him (1) to provide for the maintenance of the children of the marriage, and (2) to make such suitable allowance to the wife for her support (a) during her lifetime or (b) for a shorter period as the court may deem just, having regard to the circumstances of the parties respectively; *and the court may from time to time modify its orders in these respects.*”

In *ex parte Spencer*, supra, permanent alimony was reduced from \$50.00 to \$25.00 a month.

In *Gaston v. Gaston*, supra, it was held that no writ for the issuance of an execution for a monthly allowance of alimony could be issued, till the monthly allowance became due.

In *Tremper v. Tremper*, supra, the court, in referring to a lump sum of alimony which had been awarded in that case, stated:

“It is better practice to make monthly allowances to the end that the court can from time to time modify its orders in these respects.”

Sections 137 and 138 are also sections regarding the allowances upon judgments for maintenance of the wife in an action for permanent support and

for the support of children in an action between the parents. The last sentence of Section 137 is as follows:

“The final judgment in such action may be enforced by the court by such order or orders as in its discretion it may from time to time deem necessary, and such order or orders may be varied, altered, or revoked at the discretion of the court.”

In none of these cases just cited did the court modify or decrease alimony that had already accrued and that was unpaid, but in the Cohen case, supra, the court vacated and set aside alimony that had accrued and was unpaid from October 4th, 1898 to January 15th, 1902. The facts were as follows:

On January 4th, 1898, the plaintiff divorced the defendant and the court awarded her \$10.00 a week alimony under the decree of divorce. The decree was obtained by default and the wife told her husband that she would make no application for alimony. After several years elapsed, the plaintiff assigned her overdue alimony for a valuable consideration to one White. The assignee made a motion for leave to issue execution upon the unpaid alimony returnable January 15th, 1902. The defendant also made a motion at the same time to vacate the alimony that had accrued subsequent to the date of the remarriage of the plaintiff. The court below vacated the alimony that accrued subsequent to January 15th, 1902, which was the return day of the motion, but refused to vacate or set aside the unpaid alimony from the date of the remarriage and

ordered the issuance of an execution for the alimony which accrued between October 4th, 1898 and January 15th, 1902. The Supreme Court, on appeal, reversed the decision of the Superior Court and set aside the alimony which had accrued since the date of the plaintiff's remarriage in spite of the fact that this accrued alimony had been assigned to one who claimed that it was given for a valuable consideration. This was done under the authority of Section 139 of the Civil Code of California. It clearly shows that Section 139 means exactly what it says when it states that the court may modify, vacate or set aside such decrees whenever in its discretion, it may deem advisable.

In the affidavit of Mr. McCormack (S. C., p. 38) he states that the case of *Parker v. Parker*, 266 Pac. Rep., 283, is the latest pronouncement of the Court of California as to accrued alimony and he cites an extract from the opinion. Particular attention is called to the opinion of the Supreme Court of California in the *Parker* case, which states that the *Cohen* case has never been reversed or modified. At page 103 of the opinion in the case of *Cohen v. Cohen*, 150 Calif., 99, is this statement:

"The code expressly gives the court the power to modify from time to time its orders respecting permanent alimony (Civ. Code Sec. 139). The judgment in the first instance, might have been made for a gross sum or for periodical payments, either for a stated period or as in effect, was done during the life of the plaintiff (Civ. Code Sec. 139). To change this judgment so as to require the payments for a

stated period would not be an annulment of the original judgment, but only a modification thereof. Therefore, such modification would be within the power of the court, even if it were conceded that the power to modify did not give authority to vacate such order in its entirety."

Bearing in mind that the Supreme Court of California in *Parker v. Parker*, states specifically that the *Cohen* case has never been reversed or modified, how can it be said that the quotation in the affidavit of Mr. McCormack's, just referred to, is the latest pronouncement of the Court of California? It can thus be seen from the *Cohen* case that Section 139 of the Civil Code of California gives to the courts of that state the widest discretion to vary or modify judgments for alimony. Counsel contends and thinks that a reading of the California case will show that this applies to alimony accrued and unpaid as well as to future alimony. Counsel further contends that it is within the province of this court to determine from a reading of the cases in California and an inspection of the Civil Code and particularly Sections 137, 138 and 139 regarding alimony, the power to determine for the purpose of this case what the law of the State of California is regarding the modification of judgment for alimony.

In the *Sistare* case, just cited, the Connecticut Court of Errors determined, from an inspection of the Statutes of the State of New York, that a judgment for alimony could be modified. It further held that the judgment in that case was not such a judgment which would be entitled to full faith and credit under the Federal Constitution. The Supreme Court of the United States differed from

the conclusion reached by the Court of Errors of Connecticut and reversed the decision of that court and held that under the statutes and decisions of New York that a judgment for permanent alimony could not be modified and so was within this clause of the Federal Constitution.

The Lynde and Sistare cases, just referred to, are discussed in *Tehsman v. Tehsman*, 93 Eq., 76, and the Lynde case in 101 Eq., 523. Vice-Chancellor Griffin states that:

“Under the statutes of New York then existing, a decree of alimony was a final decree, and as each installment matured, it automatically became a debt of record to which full faith and credit should be given in a suit thereon in a sister state, because, as to such accrued installments, there was no power in the courts of New York to annul, alter or modify.”

From this, it is apparent that had the New York courts the power to modify a decree as to alimony accrued, then the judgment was not such a one as would be entitled to full faith and credit.

In *Reik v. Reik*, 101 Eq., 523, the syllabus states that:

“A decree for future maintenance of a wife subject to a subsequent modification is not a final judgment within the full faith and credit clause of the Federal Constitution.”

So it can be seen that the courts of this state are committed to the proposition that if a decree for alimony could be modified, either as to alimony due or alimony to become due, then such decree was not entitled to full faith and credit under the Federal Constitution.

## POINT VI.

The *res*, the subject matter of the seizure, namely, the income from the trust fund, was never within the State of New Jersey, as neither the debtor, the trustee, nor the defendant were domiciled in this state, jurisdiction, therefore, did not attach.

The Sheriff's return (S. C., p. 10) says that he did

“attach the rights and credits, moneys, effects, goods, chattels, lands and tenements of the said defendant, and particularly all his right, title and interest of, in and to the hereafter described:

Everything due and to become due the defendant under the Will of George Cleveland. Writ served upon E. Garfield Gifford, Surrogate of Essex County, N. J., as Agent of the United States Trust Company of New York, Executor and Trustee of the Last Will and Testament of George Cleveland.

No other rights or credits, moneys or effects, goods and chattels, lands or tenements of the said defendant being found in my county.”

The *res* attempted to be attached was income payable from a New York corporation which had possession of the corpus from which the income was derived and was to be paid to a non-resident of New Jersey, the defendant being a resident of the State of California.

As to the question of jurisdiction sought to be obtained by this levy, counsel has only been able to find in the State of New Jersey, the following cases bearing upon this subject:

National Fire Insurance Co. v. Chambers,  
53 Eq., 468;  
Tiffany v. d'Erlanger, 1 Misc., 146, Aff'd  
1 Misc., 340.

These cases, in so far as the question of *situs* of the *res* is concerned, were decided apparently adverse to the garnishee's contention that the *res*, namely, the subject of seizure, was not physically within the State of New Jersey and therefore the attachment was void.

Vice-Chancellor Pitney, in the National Fire Insurance Co. v. Chambers case, goes into the question whether the debt, namely, the *res* cannot be said to be in a jurisdiction, where neither debtor nor creditor are domiciled and almost the entire opinion, from pages 476 of the report down to 495, is devoted to this question. He quotes the cases, both for and against the proposition raised by the garnishee defendant in that case. He distinguishes those cases which support the view that the debt attached cannot be held to be in a jurisdiction where the creditor and debtor are non-residents, among the cases being Bowen v. Pope, 125 Ill., 28 (see p. 485 of the opinion), Plimpton v. Bigelow, 29 Hun, 362; 93 N. Y., 592, Strauss & Terry v. Chicago Glycerine, 46 Hun, 216, aff'd 108 N. Y., 654, and Douglass v. Phoenix Insurance Co., 138 N. Y., 209.

An attempt by the attorney for the garnishee to distinguish the cases for and against his proposition, would be almost a hopeless task, in view of the lengthy opinion of Vice-Chancellor Pitney, but it will be remembered that the decision of Vice-Chancellor Pitney construed a statute of the State of Pennsylvania. The action was brought in his court to restrain the prosecution of a suit and this involved the question as to whether an attachment

levied in the State of Pennsylvania was good, the claim being that the debt, the subject of seizure, was not within the jurisdiction of that court.

It is apparent from a reading of the return that the *res* was not within the County of Essex and was never in the possession of E. Garfield Gifford or under his control. As stated before, it was income in the hands of a foreign corporation, with its office on Wall Street, in the City of New York (S. C., p. 42). The action should have been brought in the County of New York where the proceeds in the hands of the trustee could be effectively dealt with.

Justice Swayze, in discussing the situs of causes of action, in *Amparo Mining Company v. Fidelity Trust Company*, 75 Eq., 555, says at page 558:

“The principle which should guide in such a case is said by Professor Dicey, in his book on ‘Conflict of Law’, to be that choses in action should be held to be situate at the place where they can be effectively dealt with, from which it follows that debts, choses in action and claims of any kind must be held situate where the debtor or other person against whom a claim exists resides; or in other words, debts or choses in action are generally to be looked upon as situate in the country where they are properly recoverable or can be enforced.”

If such be the case, is not the State of New York where the debtor, if it be a debtor, the United States Trust Company of New York, has its principal place of business, and where the corpus of the estate actually is, the state in which the action should be brought.

Judge Clark, in *Redzina v. Provident Institution*, 96 Eq., 346, at page 352, says, regarding the *situs* of a debt:

“Upon this question many and widely divergent opinions have been expressed.”

In the Tiffany case, 1 Misc., 146, aff'd 1 Mis., 340, the question was decided adversely to respondents contention. It is cited by the appellant, on page 12 of her brief, as authority for her contention. Her point is that the decision of the Chief Justice is in conflict with the decisions of the Supreme Court of the State of New Jersey. The Supreme Court has only decided this question once, and that was in the Tiffany case, where former Justice Minturn affirmed the opinion of Circuit Court Judge Newman. On the motion to vacate, before the Chief Justice, the Tiffany case was cited as an authority. The Chief Justice's reply was “I have the greatest respect for Justice Minturn's opinion, but I do not agree with him”. He showed his disagreement in the decision appealed from.

#### POINT VII.

For the reasons herein before set out, the order appealed from should be affirmed.

J. HARRY HULL,  
Attorney for Garnishee-Respondent.

J. HARRY HULL,  
of Counsel.

