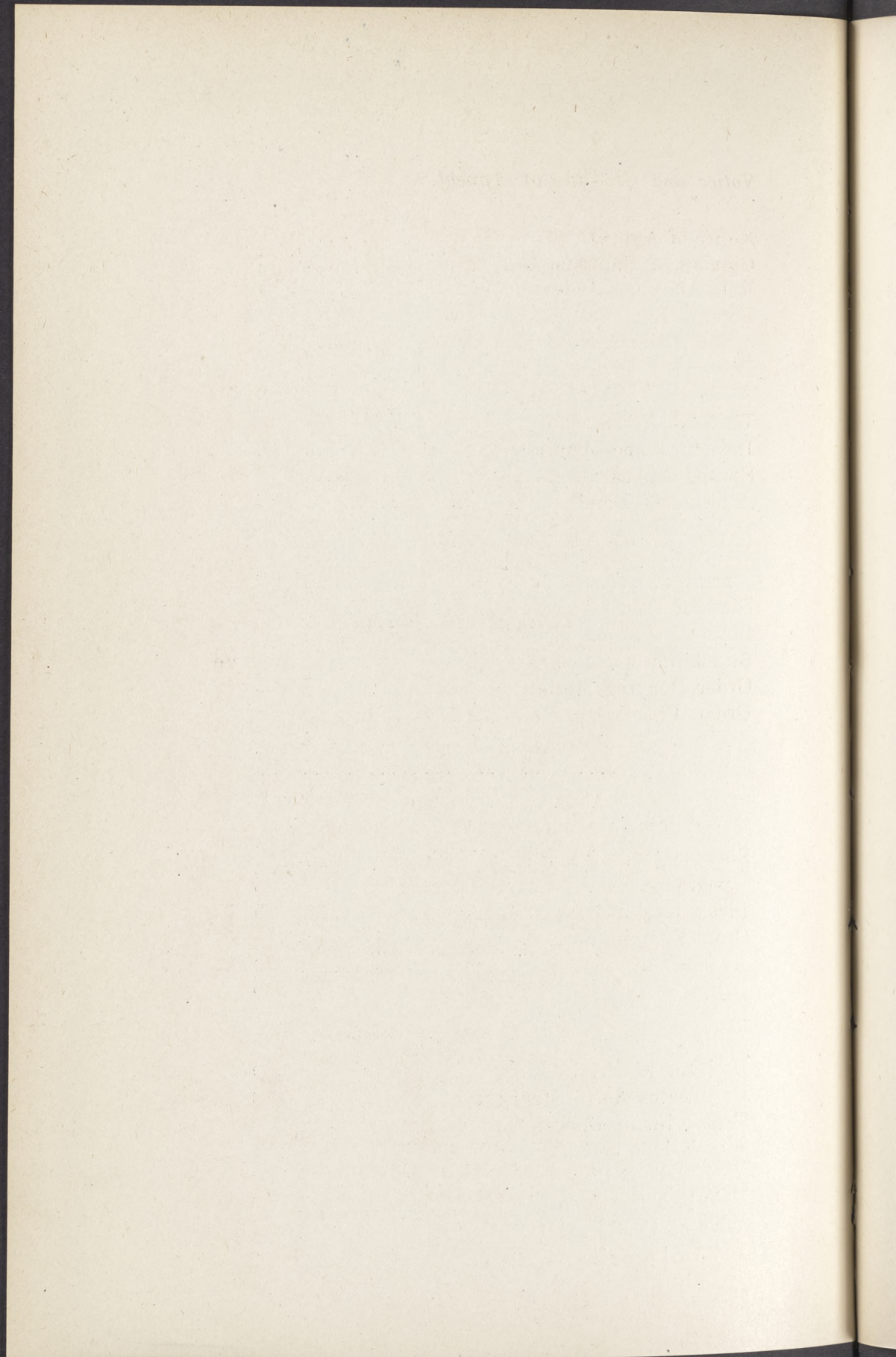


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*Notice and Grounds of Appeal.*

**Notice of Appeal.**

Filed Court of Errors and Appeals, January 21,  
1918.

NEW JERSEY SUPREME COURT.

ANTHONY LAURA,  <i>Prosecutor,</i>	}	<i>Action at Law.</i>	10
<i>vs.</i>		<i>In Attach- ment.</i>	
LOUIS PUNCERELLI and the DIS- TRICT COURT OF THE FIRST JUDICIAL DISTRICT OF HUD- SON Co.,  <i>Respondents.</i>	}	<i>On Certiorari. Notice of Appeal.</i>	

Sirs:

Take notice that Anthony Laura, prosecutor, appeals to the Court of Errors and Appeals from the judgment of the Supreme Court in certiorari affirming the judgment rendered against him in the attachment proceedings had in the respondent District Court of the First Judicial District of Hudson County.

The grounds of the appeal are: 20

(1) That the process on which the judgment purports to be founded, was improvidently issued. 30

(2) Because the writ of attachment was issued by the clerk based on an affidavit alleging a debt of \$475 when, in fact, there was no debt or contract.

(3) Because if there was a contract the same was not of such a character to warrant the issuance of the writ of attachment. 40

*Notice and Grounds of Appeal.*

(4) That the proof adduced at the hearing did not correspond to the cause of action alleged in the complaint and affidavit on which the writ is based.

10 (5) That the respondent District Court of the First Judicial District of Hudson County had no jurisdiction and acquired none of either the person or the property of the prosecutor, Anthony Laura.

(6) That the evidence properly adduced at the hearing was insufficient to warrant the entry of the judgment against the prosecutor.

DE GRAW & MURRAY,  
*Attorneys of the Prosecutor.*

Dated, January 3, 1918.

20

## Endorsement:

Due and legal service of within notice of appeal is hereby acknowledged this fourth day of January, 1918.

JOHN N. PLATOFF,  
*Attorney of Respondent, Louis Puncerelli.*

30 F. H. McCAULEY,  
*Judge of the District Court of the First  
Judicial District of Hudson County.*

40

*Opinion of Supreme Court.*

**Reasons of Supreme Court for Affirming  
Judgment of Lower Court.**

Filed December 10, 1917.

NEW JERSEY SUPREME COURT.

---

ANTHONY LAURA

*vs.*

LOUIS PUNCERELLI, *et als.*

---

10

OPINION.

Certiorari before Justice Swayze by consent  
under the statute.

DeGraw & Murray for the prosecutor. 20

John N. Platoff for respondent.

SWAYZE, *J.*:

An attachment was issued in favor of Anthony Laura against Louis Puncerelli under the District Court Act. The defendant entered a special appearance, reserving the right to except to the jurisdiction of the Court and gave bond in accordance with the statute, not waiving his right to have the writ quashed. He now moves to have it quashed because the state of demand claims damages for negligence in driving an automobile and also claims a specific sum which it is said the defendant agreed to pay in full settlement of the plaintiff's claim. Part of this demand is for unliquidated damages and part is for liquidated damages. Obviously under our decisions the writ of attachment cannot be quashed. *Moore v. Richardson*, 65 N. J. Law, 531; *Sullivan v. Moffatt*, 68 N. J. Law, 40

30

40

*Opinion of Supreme Court.*

211. It is said, however, that the testimony fails to show any agreement for liquidated damages and that this claim in the state of demand is a mere subterfuge to justify the awarding the attachment. An examination, however, of the evidence shows that there was some  
10 evidence from which the Court might infer that the defendant in order to avoid publicity in the Police Court, agreed to see that it was "fixed all right," which, it might well be inferred, was an agreement to pay the expense of repairs, and while the amount was not definitely fixed it was an amount that would readily be ascertained when the repairs were made.

I think, therefore, that the attachment could not properly be quashed. It is also to be said  
20 that the defendant took part in the trial of the case to the extent of cross examining a witness as to the merits. This I think was equivalent to a general appearance. 4 *Corpus Juris*, 1320, citing *Rahn v. Greer*, 37 Iowa, 627. The proceedings, therefore, will be affirmed with costs.

30

40



*Stipulation.*

**Consent to Argument Before Single Justice  
at Chambers.**

Filed October 6, 1917.

NEW JERSEY SUPREME COURT.

10	ANTHONY LAURA, <div style="text-align: right;"><i>Prosecutor,</i></div>	}	<i>On</i>
	<i>vs.</i>		<i>Certiorari.</i>
	LOUIS PUNCERELLI and the DIS- TRICT COURT OF THE FIRST JUDICIAL DISTRICT OF HUD- SON COUNTY, <div style="text-align: right;"><i>Respondents.</i></div>		<i>Stipulation.</i>

20     The state of the case to be used on the argu-  
 ment on the return of the Writ of Certiorari in  
 the above entitled matter and returnable and  
 returned June 26, 1917, having been duly served  
 upon the respondent, Louis Puncerelli, and the  
 parties desiring that the argument on the return  
 of such writ be brought on before the Justice  
 of the Supreme Court sitting at Chambers, in  
 and for Hudson County, instead of bringing the  
 same on before the Supreme Court in Trenton,

30     It is hereby STIPULATED by and between An-  
 thony Laura, prosecutor, and Louis Puncerelli,  
 respondent, that the argument on the return of  
 said writ of certiorari, be held before the  
 Supreme Court Justice sitting in Chambers,  
 in and for Hudson County, on the 27th day of  
 October, 1917.

Dated, September 19, 1917.

DE GRAW & MURRAY,  
*Attorneys of Prosecutor, Anthony Laura.*

40     JOHN N. PLATOFF,  
*Attorney for Respondent, Louis Puncerelli.*

*Reasons.*

The District Court of the First Judicial District of Hudson County, respondent in the above entitled matter, hereby consents to the provisions of the foregoing stipulation.

F. H. McCAULEY,  
*District Court of the First Judicial  
 District of Hudson County.* 10

**Reasons.**

Filed April 30, 1917.

## NEW JERSEY SUPREME COURT.

ANTHONY LAURA,

*Prosecutor,*

*vs.*

LOUIS PUNCERELLI and the DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF HUDSON COUNTY,

*Respondents.*

*On  
 Certiorari.  
 Reasons.*

20

The prosecutor, by Messrs. DeGraw & Murray, comes and prays that the judgment entered against him on the 18th day of April, 1917, in the District Court of the First Judicial District of Hudson County, by said Louis Puncerelli, may be set aside and for nothing holden, for the reasons following:

1. That the process on which the judgment purports to be founded, was improvidently issued.

30

40

*Affidavit for Attachment.*

(a) Because the writ was issued by the clerk, based on an affidavit alleging a debt of \$475.00, when in fact there was no debt or contract.

(b) Because if there was a contract, the same was not of such a character as warranted the issuance of the writ of attachment.

10       2. That the proof adduced at the hearing did not correspond to the cause of action alleged in the complaint, and affidavit on which the writ was based.

3. That the Court had no jurisdiction and acquired none over either the person or the property of the defendant.

20       4. That the evidence properly adduced at the hearing was insufficient to warrant the entry of the judgment against the defendant.

DE GRAW & MURRAY,  
*Attorneys of Prosecutor.*

**Affidavit for Attachment.**

Filed December 1, 1916.

30       DISTRICT COURT OF THE FIRST  
JUDICIAL DISTRICT OF THE COUNTY  
OF HUDSON.

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

Before Francis H. McCauley, Esquire, Judge.  
Louis Puncerelli, being duly sworn according to law, on his oath says that Anthony Laura is not to the knowledge or belief of the deponent, resident in this State of New Jersey at the present time, and that the said Anthony Laura

40

*Writ of Attachment.*

owes deponent, the sum of four hundred and seventy-five dollars and . . . cents, as nearly as this deponent can specify.

LOUIS PUNCERELLI.

Sworn and subscribed to before  
me this 1st day of December, A. D.  
1916.

10

HENRY BENDER,  
*Notary Public.*

**Writ of Attachment.**

Filed December 1, 1916.

DISTRICT COURT OF THE FIRST  
JUDICIAL DISTRICT OF THE COUNTY  
OF HUDSON; ATTACHMENT.

20

HUDSON COUNTY, ss:

THE STATE OF NEW JERSEY,  
SEAL OF COURT. To any constable or sergeant-  
at-arms of said county: You  
are hereby commanded to attach the goods and  
chattels, rights and credits, moneys and effects  
of Anthony Laura, in the County of Hudson, to  
the value of four hundred and seventy-five dol-  
lars, in whose hands soever found, to answer  
the demands of Louis Puncerelli, and make re-  
turn of such attachment to the District Court of  
the First Judicial District of the County of  
Hudson, immediately after making the same,  
that therein may be further done what laws  
and justice shall require.

30

WITNESS, FRANCIS H. McCAULEY, Esq., Judge  
of said Court of Hudson County aforesaid, the

40

*Writ of Attachment.*

1st day of December, in the year One thousand  
nine hundred sixteen.

HENRY BENDER, *Clerk.*

10 By virtue of the within writ, I did on the  
first day of December, in the presence of a  
creditable person, attach the property and  
estate of the defendant, in the annexed inventory  
mentioned and described.

WITNESS my hand, this first day of December,  
A. D. 1916.

WILLIAM F. HARNEY, *Constable.*

20

Endorsement:

No. 9,272.

DISTRICT COURT OF THE  
FIRST JUDICIAL DISTRICT OF THE  
COUNTY OF HUDSON.

Before Francis H. McCauley, Judge.

30

LOUIS PUNCERELLI

*vs.*

ANTHONY LAURA.

WRIT OF ATTACHMENT.

40

Claim, \$475.00.

Costs, 3.45.

*Inventory and Appraisement.***Inventory and Appraisement.**

Filed December 1, 1916.

DISTRICT COURT OF THE  
FIRST JUDICIAL DISTRICT OF THE  
COUNTY OF HUDSON.

10

---

 LOUIS PUNCERELLI
*vs.*

ANTHONY LAURA.

} *Attachment.*

Inventory and appraisement of the rights and credits, moneys and effects, goods and chattels, lands and tenements of the defendant made by virtue of the above stated writ on the 1st day of December, 1916, by William F. Harney, a constable of Hudson County, and The Siersema Garage, a discreet and impartial freeholder of said county, to-wit: 20

One Buick automobile, license 76,848 New York; numbers on engine, 18,721 and 81,845; number on pipe, 11,629.

Notices posted at the following places—on automobile in garage, on pole at corner of Hudson avenue and 6th street, and in the Town Hall, Union Hill. 30

SIERSEMA GARAGE,  
Hudson Ave., 16th & 17th., W. N. Y.  
76,848.

40

*Special Appearance.*

**Special Appearance.**

Filed December 22, 1916.

DISTRICT COURT OF THE FIRST  
JUDICIAL DISTRICT OF HUDSON  
COUNTY.

10

LOUIS PUNCERELLI,

*Plaintiff,*

*vs.*

ANTHONY LAURA,

*Defendant.*

*Action at  
Law in  
Attachment.*

*Special  
Appearance.*

20

The above named defendant, by his attorneys,  
Messrs. DeGraw & Murray, hereby enters his  
special appearance, reserving, however, the right  
to take exception to the jurisdiction of said  
Court and any irregularity of process, and here-  
with files his bond in accordance with the statute  
in such case made and provided, not waiving,  
however, his rights to have quashed the writ  
issued in the above entitled cause.

30

DE GRAW & MURRAY,  
*Attorneys of Defendant.*

**Bond.**

Filed December 22, 1916.

40

KNOW ALL MEN BY THESE PRESENTS, that we,  
Anthony Laura, of the City of New York, State  
of New York, as principal, and The Aetna  
Accident and Liability Company, a corporation  
organized and existing under the laws of the  
State of Connecticut, and authorized to do busi-

*Bond.*

ness in the State of New Jersey, as surety, are held and firmly bound unto Louis Puncerelli, in the sum of Nine hundred and fifty (\$950.00) dollars, lawful money of the United States of America, to be paid to the said Louis Puncerelli, his executors, administrators or assigns, to which payment well and truly to be made the said Anthony Laura binds himself, his heirs, executors and administrators and the said The Aetna Accident and Liability Company binds itself and its successors jointly and severally firmly by these presents. 10

Sealed with our seals and dated this 21st day of December, One thousand nine hundred and sixteen.

WHEREAS, a certain writ of attachment lately issued out of the District Court of the First Judicial District of Hudson County, at the suit of Louis Puncerelli against the said Anthony Laura, by virtue whereof William S. Harney, a constable of the said Hudson County, seized and attached certain personal property of the said Anthony Laura, to-wit: one Buick automobile, license No. New York 76,848, and the said Anthony Laura having entered his special appearance at the suit of said plaintiff and given notice to his attorney of such appearance, 20 30

Now THEREFORE, if the said Anthony Laura, his successors or assigns, shall pay such moneys as may be adjudged to be due to the said Louis Puncerelli in case judgment shall be rendered in said action for the said Louis Puncerelli, then this obligation to be void, otherwise to remain in full force and virtue.

ANTHONY LAURA. (SEAL)

*Bond.*

Signed, seal and delivered  
in the presence of:

The Aetna Accident and  
Liability Company, (SEAL)

10 By William N. Heard,  
*Resident Vice-President.*

Attest: E. M. Sunderland,  
*Resident Assistant Secretary.*

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

20 On this twenty-first day of December, 1916,  
before me, personally came E. M. Sunderland,  
to me known, who, being by me duly sworn, did  
depose and say that he resides in the City of  
West Hoboken, New Jersey, that he is resident  
assistant secretary of The Aetna Accident and  
Liability Company, the corporation described  
in and which executed the within instrument;  
that he knows the seal of said corporation;  
that the seal affixed to said instrument is such  
corporate seal, that it was so affixed by order  
of the board of directors of said company; that  
he signed his name thereto by like order, that  
30 he is acquainted with William N. Heard, that  
he knows him to be the resident vice-president  
of said company, that the signature of said  
William N. Heard subscribed to said instru-  
ment is in the genuine handwriting of said  
William N. Heard and was thereto subscribed  
by like order of said board of directors, and  
in the presence of him, the said E. M. Sunder-  
land.

40

CHARLES M. DAY,  
*Commissioner of Deeds of N. J.*

*Bond.*

Endorsement:

In the matter of

---

LOUIS PUNCERELLI

*vs.*

ANTHONY LAURA.

---

10

IN ATTACHMENT.

The within bond is hereby approved as to form and sufficiency.

F. H. McCAULEY, *Judge.*

Dec. 22, 1916.

20

At a regular meeting of the board of directors of The Aetna Accident and Liability Company, duly called and held on the 28th day of December, A. D. 1911, the following by-law was adopted:

Article 8. Resident Officers, Attorneys in Fact and Agents.

Section 1. The president, any vice-president or the secretary may from time to time appoint resident vice-presidents, resident assistant secretaries, attorneys in fact and agents to represent and act for and on behalf of the company and either the president, any vice-president, the secretary or the board of directors may at any time remove any such resident vice-president, resident assistant secretary, attorney in fact or agent and revoke the power and authority given him.

30

Section 2. Resident vice-presidents may, subject to the provisions and limits named in their

40

*Bond.*

certificate of authority, sign and execute on behalf of the company any and all bonds and undertakings and other writings obligatory in the nature of a bond and may bind the company thereby as fully and to the same extent as the president or any other officer could bind it, such bonds and undertakings, however, to be attested in every instance by a duly appointed resident assistant secretary.

Section 3. Resident assistant secretaries may, subject to the provisions and limits named in their certificate of authority, affix the seal of the company to and attest on behalf of the company any and all bonds and undertakings and other writings obligatory in the nature of a bond and may bind the company thereby as fully and to the same extent as the secretary or any other officer could bind it; such bonds and undertakings, however, to be signed and executed in every instance by a duly appointed resident vice-president.

Section 4. Attorneys in fact may, subject to the provisions and limits named in their certificate of authority, execute and deliver and attach the seal of the company to any and all bonds and undertakings and other writings obligatory in the nature of a bond on behalf of the company, and any such instrument executed by any such attorney in fact when attested by any other attorney in fact shall be as binding upon the company as if signed, sealed and attested by any officer of the company.

*Order Releasing Attached Property.*

STATE OF CONNECTICUT, }  
 COUNTY OF HUDSON. } ss:

I, D. G. Stone, of The Aetna Accident and Liability Company, have compared the foregoing by-law with the original thereof as recorded in the Minute Book of said company, and do hereby certify that the same is a true and correct transcript therefrom and of the whole of said original by-law. 10

Given under my hand and the seal of the company, at Hartford, Conn., this 26th day of September, 1916.

D. G. STONE, (SEAL)  
*Secretary.*

**Order Releasing Attached Property.**

20

Filed December 22, 1916.

DISTRICT COURT  
 OF THE FIRST JUDICIAL DISTRICT OF  
 HUDSON COUNTY.

LOUIS PUNCERELLI,

*Plaintiff,*

*vs.*

ANTHONY LAURA,

*Defendant.*

*Action at  
 Law.*

*In Attach-  
 ment.*

*Order  
 releasing  
 attached  
 property.*

30

A good and sufficient bond having been filed with the clerk of this Court by Anthony Laura, the defendant in the above stated cause, conditional for the payment of such moneys as may be adjudged due to Louis Puncerelli,

40

*Notice of Motion.*

It is therefore on this 22nd day of December,  
 Ordered, that the lien of the attachment of the  
 rights and credits, moneys and effects of goods  
 and chattels of the said Anthony Laura at the  
 suit of the said Louis Puncerelli be released,  
 and that all property attached under and by  
 10 virtue of said writ issued be and the same  
 hereby is released and discharged therefrom.

F. H. McCAULEY, *Judge.*

**Notice of Motion.**

Filed January 5, 1917.

20 DISTRICT COURT  
 OF THE FIRST JUDICIAL DISTRICT OF  
 HUDSON COUNTY.

LOUIS PUNCERELLI,  <i>vs.</i>  ANTHONY LAURA,	<i>Plaintiff,</i>   <i>Defendant.</i>	}	<i>Action at          Law.</i>  <i>In Attach-          ment.</i>  <i>Notice of          Motion.</i>
---	--	---	---

30

Sir:

As attorneys of defendant in the above stated  
 cause, and appearing specially for the purpose  
 of making the motion hereinafter referred to,  
 we hereby notify you that on Wednesday,  
 January 10th, 1917, at 10 o'clock A. M., we  
 will move that the writ of attachment issued  
 in the above entitled cause, and the levy made  
 thereunder, be quashed on the following  
 40 grounds:

*Notice of Motion.*

1. That the alleged cause of action is founded on a tort.

2. That the affidavit on which the writ of attachment was issued is insufficient in substance and form, in that it fails to set forth a cause of action, and likewise fails to show any special circumstance which authorized the issuance of said writ of attachment. 10

3. That the writ was issued without the order of the Judge of said Court.

4. That there was no adjudication by the Judge of said Court on the sufficiency of the affidavit, on which the writ of attachment was founded.

5. That the proceedings failed to show that there was an adjudication by the Judge of the said Court on the sufficiency of the affidavit, on which the writ of attachment was founded. 20

6. That the clerk of said Court was without power to issue said writ of attachment.

7. That the levy made under said writ of attachment was not made in accordance with the statute in such case made and provided.

8. That the return of said writ of attachment fails to show levy made in accordance with the statute in such case made and provided. 30

9. In serving this notice and making the motion herein provided for, the defendant reserves to himself the right to make a similar motion at the same or a later date for any reason not apparent on the face of the papers and proceedings now on file, and which may on

*State of Demand.*

further proceeding in the above entitled cause,  
appear.

DE GRAW & MURRAY,  
*Attorneys of Defendant.*

To John N. Platoff, Esq.,  
10           168 B'line Ave.,  
                  Union, Hudson Co., N. J.

**State of Demand.**

Filed January 9, 1917.

DISTRICT COURT  
OF THE FIRST JUDICIAL DISTRICT OF  
HUDSON COUNTY.

20

LOUIS PUNCERELLI,	}	<i>Plaintiff,</i>	<i>Action at Law.</i>
<i>vs.</i>			<i>In Attach- ment.</i>
ANTHONY LAURA,		<i>Defendant.</i>	<i>State of Demand.</i>

30   Plaintiff demands of the defendant the sum  
of \$500 for that on November 30th, 1916, at  
Palisade avenue at Sixth street, in the town  
of West New York, in the County of Hudson,  
and State of New Jersey, the defendant negli-  
gently drove an automobile owned and operated  
by him into and struck an automobile owned  
and operated by the plaintiff and greatly dam-  
aged plaintiff's automobile.

40   2. At said time and place, defendant agreed  
to pay plaintiff the sum of \$475.00 in full settle-

*State of Case on Motion to Quash Writ.*

ment of all the plaintiff's claims against defendant by reason of said collision and plaintiff agreed to accept the same.

3. Defendant has not paid the said sum of \$475.00; and thereupon plaintiff brings this suit.

JOHN N. PLATOFF,  
*Attorney of Plaintiff.* 10

Judgment will be claimed for the sum of \$475.00, together with interest thereon from November 30th, 1916, and costs of suit.

**State of the Case in Respect to Proceedings  
Had on Hearing Granted on Motion  
to Quash Writ.**

Although at the hearing on the motion hereinafter referred to, a stenographer was duly designated and sworn to take the testimony therein, the transcript of such testimony as submitted by him, was so inaccurate as to be useless, and I, therefore, submit the following as and for a state of the case in respect to such hearing and the proceedings had thereon, in lieu of submitting the transcript of such testimony. 20

Notice of motion to dismiss writ having been served January 5, 1917, returnable January 10, 1917, and the return day thereof having been postponed until January 17, 1917, the parties appeared, the defendant, Anthony Laura, appearing specially. The defendant asked that a hearing be granted by me for the purpose of showing that this Court was without jurisdiction, and also asked for leave to take testimony for that purpose, which request I granted. 30 40

*State of Case on Motion to Quash Writ.*

The defendant was then sworn, and testified that he was a non-resident of New Jersey, that he had had an automobile collision with the plaintiff, but that the defendant owed the plaintiff no money and made him no promise to pay him any money, and that he had had no business dealings with him of any kind.

10

Being of the opinion that the defendant was not entitled to try what amounted to the merits of the case, on a preliminary motion, I denied the defendant's motion to quash, and entered an order to that effect on January 17, 1917, copy of which order is made a part of the return of the foregoing writ of certiorari.

20

A rule to show cause why a writ of certiorari should not be granted was issued out of and made returnable in the Supreme Court, which rule was subsequently discharged, as appears by an order to that effect, which is hereby made a part of my return to the present writ of certiorari.

F. H. McCAULEY,

*Judge of the District Court of the First*

*Judicial District of Hudson County.*

30

We hereby consent to the use of the above as a true and correct state of the case in so far as it relates to the proceedings had in the respondent District Court on January 17, 1917.

DE GRAW & MURRAY,

*Attorneys of Prosecutor.*

JOHN N. PLATOFF,

*Attorney of Respondent, Louis Puncerelli.*

40

*State of Case on Motion to Quash Writ.*

## NEW JERSEY SUPREME COURT.

---

 ANTHONY LAURA,
*Prosecutor,**vs.*


---

 LOUIS PUNCERELLI and DISTRICT  
 COURT OF THE FIRST JUDICIAL  
 DISTRICT OF HUDSON COUNTY,  
*Respondents.*


---

*On**Certiorari.*

10

*Stipulation.*

The testimony and proceedings had on the final hearing of the cause sought to be reviewed by the above entitled proceeding having been taken and transcribed by a stenographer in accordance with the statute in such case made and provided and the same having been filed in the respondent District Court,

20

It is hereby stipulated by and between the prosecutor and the respondents, Louis Puncerelli, that the same be certified as filed, as a true and correct statement of the testimony taken and proceedings had in said District Court on April 18, 1917.

Dated May 19, 1917.

30

DE GRAW &amp; MURRAY,

*Attorneys of Prosecutor.*

JOHN N. PLATOFF,

*Attorney of Respondent, Louis Puncerelli.*

40

*Order Denying Motion to Quash.*

**Order Denying Motion to Quash.**

Filed January 17, 1917.

DISTRICT COURT OF THE FIRST  
JUDICIAL DISTRICT OF THE COUNTY  
OF HUDSON.

10

---

LOUIS PUNCERELLI,

*Plaintiff,*

*vs.*

ANTHONY LAURA,

*Defendant.*

---

*In*

*Attachment.*

*Order.*

20

This matter coming on to be heard in the presence of Norbury C. Murray, of Messrs. DeGraw & Murray, attorneys for defendant, and John N. Platoff, attorney for plaintiff, on motion to quash the writ of attachment heretofore issued in the above cause, due notice thereof having been served,

30

It is, on application of John N. Platoff, attorney for plaintiff, ORDERED that the motion to quash said attachment be and the same is hereby denied.

Dated, January 17th, 1917.

FRANCIS H. McCAULEY,  
*Judge.*

40

*Order Dismissing Rule to Show Cause.*

Copy filed in Respondent District Court April  
18, 1917.

## NEW JERSEY SUPREME COURT.

ANTHONY LAURA,	}	<i>Prosecutor,</i>	<i>On</i>	10
			<i>Certiorari.</i>	
<i>vs.</i>				
LOUIS PUNCERELLI and DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF HUDSON COUNTY,	}	<i>Respondents.</i>	<i>Rule to</i>	
				<i>Show Cause.</i>
			<i>Order</i>	
			<i>Dismissing.</i>	

A rule to show cause having been entered in this cause on January 27th, 1917, directing the respondents to show cause before this court on the third Tuesday of February then next, why a writ of certiorari should not issue unto this Court to review all writs issued, proceedings had and orders made in a certain cause pending in the District Court of the First Judicial District of Hudson County, entitled Louis Puncerelli, plaintiff, vs. Anthony Laura, defendant; and the cause having been argued by DeGraw & Murray, counsel for the prosecutor, and John N. Platoff, counsel for the respondent, Louis Puncerelli, and the Court having considered the same and finding no cause for making the rule absolute,

It is, thereupon, on this 26th day of March, 1917, on motion of John N. Platoff, ORDERED that the said Rule to Show Cause be and the same is hereby dismissed with costs.

By the Court,

F. J. SWAYZE, J. 40

*Record of Hearing in Trial Court.*

**Stenographic Record of Hearing in  
Trial Court.**

FIRST JUDICIAL DISTRICT OF HUDSON  
COUNTY.

10	LOUIS PUNCERELLI,  <div style="text-align: right;"><i>Plaintiff,</i></div>	}
	<i>vs.</i>	
	ANTHONY LAURA,  <div style="text-align: right;"><i>Defendant.</i></div>	

20 Transcript of shorthand notes of testimony taken in the above stated cause before Hon. Francis H. McCauley, Judge in said Court, at Union Hill, New Jersey, on Wednesday, April 18th, 1917, at 1:00 P. M.

APPEARANCES:

John N. Platoff, Esq., for the plaintiff.

DeGraw & Murray, for the defendant.

E. Irene Thompson, sworn as stenographer.

30 *Mr. Murray.* I hereby enter a special appearance for the sole purpose of meeting the issues presented by the State of Demand as now filed and this only for the purpose of showing that this court is without jurisdiction and that the writ of attachment was improvidently issued. I expressly state that I am not entering such an appearance as will give this court jurisdiction of the defendant's person or property. This will hold good all through the proceeding unless I state expressly to the contrary.

40 *Mr. Platoff.* I ask that the defense, whether general or special, be suppressed until the taxed

*Record of Hearing in Trial Court.*

costs of the Supreme Court in the certiorari proceeding by the same parties in this same action, a copy of which was served upon Mr. Murray on the 29th of March, 1917, are paid. I desire to offer the taxed costs, with acknowledgment of service by Mr. Murray.

*The Court.* What about these costs, Mr. Murray? 10

*Mr. Murray.* This court has absolutely no jurisdiction to adjust any costs of any kind in another court. The only authority which this court has over costs is where there has been costs in this court, incurred or taxed in a proceeding here, then this court has a right to restrain a party from entering another proceeding, in this court, before the costs are paid, but this court has absolutely no power to say to this defendant that he shall have a judgment against him unless he pays another judgment in another court. That would be absolutely improper—there is no statutory authority or other kind of authority for such a proposition as that. 20

*The Court.* What section of the act do you refer to, Mr. Platoff?

*Mr. Platoff.* I refer to the Supreme Court rules until costs are paid by any party against whom costs are taxed he has no right to proceed. I might also add that the defendant here is a non-resident. I didn't take the time to look up the statute for I believe it to be so well settled that it didn't require any special preparation, but I can get the authorities for the court. It has been my unhappy experience to be met with this very same situation in another case. These costs were taxed in this same proceeding— 30 40

*Record of Hearing in Trial Court.*

*Mr. Murray.* They were taxed in an entirely different proceeding in a different court. I quite agree with Mr. Platoff that I cannot bring another certiorari proceeding until I have paid the costs in the last, I entirely agree with that proposition, but that is a different matter.

10 *The Court.* These are costs in the Supreme Court?

*Mr. Platoff.* They are costs in a certiorari attacking the jurisdiction of this court in a suit between the same parties.

*Mr. Murray.* And this court has nothing whatever to do with the judgment in the Supreme Court.

*The Court.* Was there a rule entered in the Supreme Court?

20 *Mr. Platoff.* Yes, sir. Here is a copy of the rule dismissing the application with costs.

*The Court.* The order of the Supreme Court dismissed the rule to show cause, with costs. Isn't that order of the Supreme Court binding upon me?

*Mr. Murray.* No, sir. That is simply the judgment of the Supreme Court and it does not give you power to collect the judgment obtained in the Supreme Court.

30

*The Court.* But isn't it part of my duty to see that the order of the Supreme Court is obeyed—complied with?

*Mr. Murray.* It is not an order directed to your Honor at all, it is simply an order dismissing the rule to show cause with costs.

*The Court.* Without this order I would not have any right to hear the case at all.

*Mr. Murray.* But it is not an order to your Honor, it is simply an order to the defendant

40

*Record of Hearing in Trial Court.*

to pay costs. Supposing he did not pay the costs, does your Honor say that this defendant is to have a judgment taken against him in another suit in addition to these costs? Suppose he could not pay them?

*The Court.* The question is whether or not I am obliged to see that the terms of this order are carried out before I go any further since Mr. Platoff has raised the question. What is my duty under the circumstances is the question. 10

*Mr. Platoff.* Here is the situation—this man takes these proceedings with the result that we get this judgment for costs. It is not a personal judgment, it is a judgment against the party who starts the proceeding going. Having started the proceeding he is bound by the result and if he doesn't comply with the order of the court to which he has made application he is no longer entitled to proceed. He sought to avail himself of an order in this proceeding; the order having been against him he cannot now say "I refuse to be bound by it." We would have been bound by the order of the court if it had been made against us and in favor of the defendant. 20

*Mr. Murray.* We do not refuse to be bound by it. I merely say that this court has nothing to do with the costs in another court. I think Mr. Platoff is entirely right that I cannot institute another suit as plaintiff in the Supreme Court until I pay these costs, but when he says that I cannot even come in here and defend a suit instituted against me without paying costs he is certainly wrong. This court has no jurisdiction over that whatever. 30

40

*Record of Hearing in Trial Court.*

*The Court.* Is there not such a relationship between this and the Supreme Court that I am obliged to recognize a rule that issues out of the Supreme Court in a matter originally before me and which is now before me by reason of an order of the Supreme Court? Can I ignore  
 10 such an order when Mr. Platoff on behalf of the plaintiff raises the question and insists upon standing upon his rights?

*Mr. Murray.* That is no order as far as costs are concerned, it is a judgment, a personal judgment if anything.

*The Court.* I don't agree with you on that. The word costs is just as vital as any other part of the order.

*Mr. Murray.* Let me show your Honor where  
 20 your ruling leads to. You do one of two things—you can keep this case postponed until the costs are paid, in which case the plaintiff will never get satisfaction, assuming that he is entitled to it; or you can allow the plaintiff to proceed and prove his case and refuse to permit me to take any part in the proceeding and force me into a position where you allow a judgment to be taken by default against me, simply because I haven't paid a judgment with  
 30 costs in another case. Now that is just what such a ruling would inevitably lead to and I don't think your Honor can find anything in the District Court Act or any other act which gives this court any such power.

*Mr. Platoff.* I can very quickly find it in the Practice Act, I can refer your Honor to the rule in a moment if that act is here. The rules go even further and hold that where costs are taxed and not paid by the party himself then the at-  
 40 torney is liable for them.

*Record of Hearing in Trial Court.*

*Mr. Murray.* In that case you have your remedy.

*The Court.* Isn't this the same rule that prevails in the Circuit?

*Mr. Murray.* I don't think it applies to this court and I know of no rule in any court by which a defense can be suppressed. There is a rule that you cannot go in as plaintiff and institute proceedings until you pay the costs of the last, but there is no rule I ever heard of by which you can suppress a defense when the defendant is in court involuntarily. The rule says you shall not take advantage of this court again until you have paid the costs which you incurred the last time you did it, but it does not say if you don't pay the judgment against you in the last case you will not be allowed to defend yourself in this one.

*Mr. Platoff.* Mr. Murray seems to think this is a different proceeding—it is all the same proceeding.

*Mr. Murray.* What the plaintiff should have done was to make a motion in the Supreme Court not to proceed until the bond was put up, that is the way that matter is taken care of in the Supreme Court, put up a bond.

*Mr. Platoff.* But the mere fact that I did not request a bond does not say that I am not entitled to collect the costs.

*The Court.* I will send for the Practice Act and look at the rule.

*Mr. Murray.* Well, can't we go ahead in some other way? I will agree that if your Honor rules against me on this thing I will give your Honor my personal check, marked under protest. I don't want to take up the time over

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this. This is new to me—if Mr. Platoff had warned me in advance—

*Mr. Platoff.* I mentioned it to you over the telephone.

*Mr. Murray.* You said nothing about such a motion as this.

10 *The Court.* Well, what is the understanding, gentlemen?

*Mr. Platoff.* I would just as soon get it straightened out. If we have the book here, it can be done.

20 *Mr. Murray.* Section 94 says, if any judgment order or proceeding had or made shall, by certiorari, be affirmed by the Supreme Court, the prosecutor in certiorari shall pay the defendant all costs arising on such suit in said Supreme Court for which the parties entitled to such costs may have execution to be issued out of the Supreme Court against the body and goods and chattels of the adverse party. That is a precise statement of the way in which such a judgment is to be collected in the Supreme Court. That gives no power to suppress a defense. It is to be a judgment out of the Supreme Court and execution issued out of the Supreme Court to collect it.

30 *The Court.* That is the method of collection, there is no dispute about that. The question is whether or not the rules do not prohibit the defendant from proceeding until he has made the payment.

*Mr. Murray.* If Mr. Platoff will show me such a rule that will end it.

*The Court.* That is the rule in the Circuit.

40 *Mr. Murray.* I don't think there is any such rule as that, suppressing a defense.

*Record of Hearing in Trial Court.*

*The Court.* What is the difference between suppressing a defense and prohibit a defendant from putting in his case? The defendant cannot move in the Circuit if he does not pay costs.

*Mr. Murray.* The plaintiff cannot, that is true. If he has had a judgment against him for costs he cannot come in again and prosecute without paying the costs of the first action. That is what the rule covers. He cannot be a voluntary party plaintiff again, but that does not give the court any right to suppress a defense where the defendant is in court involuntarily. 10

*Mr. Platoff.* By a rule to show cause this matter was removed to the Supreme Court and after argument the higher court makes an order that this court has jurisdiction in the matter and directs the prosecutor to pay the costs. Now, having invoked the proceedings, having made an application for a beneficial order, the defendant under the circumstances is compelled to be bound by any order made by the court and the order is that he shall pay costs, and until these costs are paid the defendant has not obeyed the order of the court and he is not entitled to any relief. 20

*Mr. Murray.* We are not asking for relief—we are simply defending a suit brought against us. 30

*Mr. Platoff.* There is no difference between suppressing a plaintiff and suppressing a defendant.

*The Court.* I think this order dismissing the rule is binding on me. That, together with the usual rule that prevails in the Supreme Court and the Circuit, I think I am bound by. If you 40

*Record of Hearing in Trial Court.*

gentlemen cannot agree on what you are going to do I am perfectly willing to rule.

*Mr. Murray.* I would prefer to have your Honor rule on the matter.

*The Court.* Please re-state your motion, Mr. Platoff.

10 *Mr. Platoff's motion read as follows:* "I ask that the defense, whether general or special, be suppressed until the taxed costs of the Supreme Court in the certiorari proceedings by the same parties in this same action, a copy of which was served upon Mr. Murray on the 29th of March, 1917, are paid. I desire to offer the taxed costs, with acknowledgment of service by Mr. Murray."

20 *The Court.* The taxed costs will be admitted and marked Exhibit P. 1.

*The Court.* Have you both stated all you have to say on this motion? I will rule that I am bound by the decision of the Supreme Court dismissing the rule to show cause in this matter and that the defendant, until he complies with that order, is barred from defending this action in this court.

30 *Mr. Murray.* Do I understand that ruling now to mean that I, representing the defendant, can make no motion in this case at all until the costs are paid?

*The Court.* I don't see how you can.

*Mr. Murray.* May I have an exception to this ruling and note the same as a ground for appeal or review.

*The Court.* I don't know how you can have anything. If you are barred you are barred.

40 *Mr. Murray.* I ask that my exception be noted as ground for appeal or review.

*Record of Hearing in Trial Court.*

*Mr. Murray.* I herewith present to Mr. Platoff my check for \$19.00 in full satisfaction of the costs, which check is given under protest and for the purpose of permitting the defense to the above entitled action.

*Mr. Murray.* If you Honor please, I think it is quite apparent that there is going to be some contradiction of testimony in this case because the plaintiff has already testified to one thing and I think in order to support the plaintiff's case he will have to swear to the contrary. I think the court will come nearer to getting justice if the other witnesses are excluded from the room while one is testifying and that when it comes to the defense the defendant's witness will be excluded as well so that neither will have an opportunity to hear what the other says. 10  
20

*Mr. Platoff.* I will consent to that—we will call them in one at a time.

*The Court.* If you desire it that way of course the court is willing. All the witnesses will be excluded except the one who is testifying.

*Mr. Murray.* Does that mean, by the way, that I will not be able to have Mr. Laura here while the plaintiff is testifying? 30

*The Court.* Certainly, if we are going to exclude them, we will exclude them.

*Mr. Murray.* Well, then let us proceed in the usual way.

*Louis Puncerelli, direct.*

LOUIS PUNCERELLI, sworn on behalf of the plaintiff.

*Direct examination by Mr. Platoff.*

Q You are the plaintiff in this suit, are you not? A Yes, sir.

10 Q Where do you live? A 621 Center street, North Bergen.

Q Were you, on November 30th, 1916, the owner of an automobile? A Yes, sir.

Q What kind of an automobile? A Buick, four-cylinder Buick.

Q How many passengers? A Five-passenger.

Q Do you know the defendant, Anthony Laura? A I know him now, yes.

20 Q Did you see him on November 30th, 1916? A Yes, sir.

Q Where did you first see him? A After he hit my automobile, up at the corner of Sixth street and Palisade avenue.

Q What time of the day? A A few minutes to twelve.

Q Noon hour? A Yes, sir.

Q Were you alone in your automobile? A No, two of my children with me.

30 Q How old are they? A Nine and seven. In the front seat.

Q Was it a clear day? A Well, it was a clear day, but the sidewalks was wet and so was the pavements wet.

Q In which direction were you driving? A Coming from east, going west on Sixth street.

Q At the junction of Palisade avenue? A Yes, sir.

40 *Mr. Murray.* I object to this line of testimony on the ground that it is irrelevant

*Louis Puncerelli, direct.*

and immaterial except for the basis of a contract. I object to going into the question of liability for any damages by reason of negligence. If he is simply laying a foundation for the proving I will admit it for that purpose.

*The Court.* I suppose I must assume 10  
that he is proving the facts which are set forth in the state of demand.

*Mr. Murray.* I object to the question.

*The Court.* The question has been answered.

Q What was the position of the car, your car, with relation to Palisade avenue at the time the defendant's car struck you?

*Mr. Murray.* I object to the witness answering that question on the ground stated. 20

*Mr. Platoff.* I simply am proving the facts set forth in the state of demand. There has been no objection to the state of demand as filed, no motion to strike out any part of it, I am simply proving the facts.

*The Court.* That is in the state of demand, Mr. Murray. I will allow the question. 30

*Mr. Murray.* I ask that my objection be noted as the ground of appeal or review.

*The Court.* I will allow you an exception.

Question read.

A It was facing the avenue after the crash—

Q No, no, at the time. A At the time it was hit?

Q Yes. A The condition or position?

40

*Louis Puncerelli, direct.*

Q The position. A I was going along on Sixth street at Palisade avenue and I was two-thirds past the crossing. I didn't know nothing till I heard the crash and the kids started to scream. That's all I can remember till after I got out of the car.

10 Q Were you on the right hand side of the street?

*Mr. Murray.* I object on the same ground.

Overruled.

*Mr. Murray.* I ask to have my objection noted as ground for appeal or review.

A Yes, sir.

20 Q From which direction was the defendant's car coming?

*Mr. Murray.* Same objection.

*The Court.* If you desire to have a general objection running to this entire line of questions it may be noted and you need not make it each time and unless I overrule Mr. Platoff's question it will be understood that it is under your objection which is overruled and you have your exception.

30 A South going north.

Q Can you make a diagram showing the relative positions of the cars? A Yes, sir.

Q In connection with the streets? A Yes, sir.

*Mr. Murray.* Of course I make the same objection to this.

40 Q Now show the position of the cars. A My car was going this way.

*Louis Puncerelli, direct.*

Q Where were you when you were struck?

A Right there.

*The Court.* The witness draws a diagram showing Sixth street running east and west and Palisade avenue running north and south. A straight line across Palisade avenue shows direction of plaintiff's car going from east and west. 10

Q Does this represent (indicating the square between the crossings) the crossing? A Yes, sir.

Q Now, where was your car? A About right here.

Q Beyond the crossing? A Yes, sir.

Q On Sixth street? A Yes, sir.

Q From what direction was Laura coming? A South going north. 20

Q Did he turn in Sixth street? A No, he couldn't, because he crashed into my car and that's as far as he could go.

Q Where was your car? A I was in the middle, in between these two and according to the mark where—

Q In between these two what? A These two sidewalks, these two crossings for people to pass over, here and there. I was between these two, between the crossings on Sixth street, between the crossings— 30

*The Court.* I am sure that doesn't show anything on the record and the stenographer cannot put all this in. The four corners of the intersection of Sixth street and Palisade avenue are designated on the diagram by the letter "A" for the southwest corner; "B" for the northwest corner; "C" for the northeast corner; and "D" for the south- 40

*Louis Puncerelli, direct.*

east corner. "K" represents place where witness's car was when struck by defendant's car. A broken line designates the direction in which defendant's car was coming.

10 *Mr. Murray.* I want it understood that I object to the making and use of this diagram.

Objection overruled.

Exception allowed.

20 *Mr. Murray.* I object to any further questions and answers relating to the accident, how it happened or the damage caused thereby, if there was such an accident, and the description of the place where the same took place, and I reserve such objection as a ground of appeal or review in lieu of objecting to each separate question as it is asked.

Q In which direction was the defendant's car going? A South, going north.

Q Was he in the center of the street? A Now, he was on his wrong side, wrong hand side of the street.

30 Q On the left side of Palisade avenue? A More to the left than to the right, because the road is so bad on that side of the street, the right hand side, we know—

*The Court.* Tell us what happened.

A He was more on the left hand side than on the right.

40 Q What part of your car was struck? A The rear end.

*Louis Puncerelli, direct.*

Q What do you call the rear end? A The mud-guard, the rear end of the mud-guard was struck.

Q Before or behind the second door? A Well, behind the second door.

Q That is behind the rear door? A Yes, sir, behind the rear door. 10

Q Are you in the automobile business? A No, not in the automobile business.

Q What is your business? A Why, I just drive a car as a hack to make a living.

Q Ever do any repair work? A All my own and helping out other people by the hour.

Q How long have you been doing that? A About six years back.

Q Was this car that was struck a car that you were using in your hacking business? A Yes, sir, making a living with it. 20

*Mr. Murray.* I object to this line of testimony.

Q And was your car damaged?

*Mr. Murray.* I object on the ground that it is irrelevant, immaterial and incompetent, has no bearing on the issues presented by this case.

*The Court.* It is in the state of demand. 30  
I will allow the question.

*Mr. Murray.* I ask to have my objection noted as ground for appeal or review.

Exception allowed.

A Yes, sir.

Q What was the damage?

*Mr. Murray.* I object on the same ground.

Overruled. 40

*Louis Puncerelli, direct.*

*Mr. Murray.* I ask to have my objection noted as a ground for appeal or review.

Exception allowed.

10 *Mr. Murray.* I object on the further ground that he is not qualified to answer that question in any way. It is not the proper way to prove it.

*Mr. Platoff.* I think he is qualified he has been in this business for six years.

Q Did you examine the car? A Yes, sir, I did.

*Mr. Murray.* I object to this line of testimony.

20 *The Court.* I am going to allow these questions and if you want your objection to run—it doesn't make your appeal any stronger to make it to each question and all your rights are preserved on an appeal anyhow—we will have it run to all this line and any objection you make will be overruled and I will allow you an exception.

*Mr. Murray.* That is without making any more objections to this line of testimony?

30 *The Court.* Yes.

Q What was the damage to the car? A So many different things was damaged that I had another garage where they towed me into to make up a list so as to corroborate me in whatever I say as to my damages.

40 Q What did you find was the matter? A Running board, storage battery, mud-guard, two rear wheels, rear springs, tail light, pump and jack in the big tool box, the rear end had an awful gouge in it and the motor was badly out

*Louis Puncerelli, direct.*

of commission, windshield, body was all banged in at the doors—that's as much as I can remember now.

Q Did you have all these things repaired?

A Yes, sir.

Q What did it cost you to repair this car?

10

*Mr. Murray.* Same objection.

Overruled.

Exception.

A \$339.

Q After the collision what was the position of your car? A So badly crushed—

Q Where was it? A On top of the sidewalk.

Q How long did it take to make those repairs? A Took quite some time because I didn't have any money and I had to get it, borrow a little here and a little there—

20

Q How long did it take? A Up until about February 18th before she started to run and she hasn't been running good until three weeks back. She started to run good about three weeks back.

*Mr. Murray.* Same objection.

30

Overruled.

Exception.

Q Do you still follow the driving business, hacking? A That's all I make a living at.

Q With this car? A Yes, sir.

Q What are your average earnings per day?

*Mr. Murray.* Same objection.

Overruled.

Exception.

40

*Louis Puncerelli, direct.*

A Six or seven dollars. I have made as high as \$26.00.

Q What is your average? A \$5.00 and \$6.00 a day.

Q And were you unable to use this car from November 30th to February 18th? A Yes, sir.

10 Q Did you have any conversation with the defendant the day of the accident? A Yes, sir.

Q What was that conversation? A I spoke to the two of them—they started telling me what was the use of going through all this red tape, you know me, there was us three together—

Q Wait a moment now. Who were the three? A Laura and Majuri, who I didn't know was a friend of his then, but I know now—we were all there together and they said what is the use—almost pleaded with me not to have him arrested, I knew him and he would see that it was fixed all right, let the red tape alone, it couldn't do any good by getting us all up into the police court.

Q Anything else said? A No, not that I can remember.

Q Did you make a complaint against him?

30 A Yes, sir, I made a complaint against him—he was arrested for reckless driving.

Q Did he make any promises to adjust the matter with you? A Said everything would be all right, that's all the promise he made.

Q Did he promise to pay you any money?

40 *Mr. Murray.* I object, the witness has already answered that question twice. He said *said* there was nothing more than what he has already testified to and I object to the attorney leading him and trying to get

*Henry Habick, direct.*

him to say that he promised to pay a sum of money. He has said flatly twice that there was nothing else.

*The Court.* It doesn't make any difference, I am going to allow it and find out what there is to it.

Exception allowed.

10

A He promised everything would be fixed up in regard to the damages—no amount was specified.

Q He didn't agree to pay you any specified amount? A No, we didn't know the specified amount at that time.

*Mr. Murray.* No cross examination.

HENRY HABICK, sworn on behalf of the plaintiff. 20

*Direct examination* by Mr. Platoff.

Q Where do you live? A 414 Eighth street, West New York.

Q Were you present at Sixth street and Palisade avenue, West New York, on November 30th, 1916? A I was fifty feet from it, walking toward.

30

Q Did you see a collision of two automobiles at that time? A Yes, sir.

*The Court.* What street were you on?

A Palisade avenue.

Q Were you alone? A No, sir.

Q Whom were you with? A Billich and George Fitzpatrick.

Q What time of the day? A About ten minutes of twelve.

40

*Henry Habick, direct.*

Q Do you know Louis Puncerelli, the plaintiff in this case? A Yes, sir.

Q Did you see him in his automobile at that time? A Yes, sir.

Q Where was he when you saw him?

10 *Mr. Murray.* I object on the same ground as I objected to the testimony of the last witness along this line.

OVERRULED.

EXCEPTION.

Q Where was Puncerelli at the time you saw him? A Up on the sidewalk—after the accident.

20 Q Before the accident, at the time of the accident? A I seen the car crossing up Sixth street, we were coming down.

Q Referring to this diagram, where was Puncerelli? A Right here at the crossing.

Q On the right side of Palisade avenue? A He was coming across Sixth street.

Q On the right side of the street? A Yes.

Q A few feet east of the westerly side of Palisade avenue? A Yes, sir.

30 Q Did you see the collision of these two cars? A I saw the other car coming up.

Q Going north on Palisade avenue? A Yes.

Q Which side of the street? A Way over here on Palisade avenue.

Q What side? A More to the left and he had a chance to swing around. I heard somebody holler out if he had had his head turned around he would have got around. He had his head turned.

40 Q Did you see his head turned away? A I couldn't see him that distance. I was too far away.

*Henry Habick, direct.*

Q You couldn't see whether he was looking ahead or not? A No. When I come up there another party said if he had his head turned—

*The Court.* I will strike out that hearsay. Don't tell us what somebody else said or saw, just tell us what you saw.

10

Q Was there room enough for the defendant to have passed behind Puncerelli's car? A There was.

Q Was there room enough for Puncerelli to have passed behind the other car? A Behind it?

Q Yes. A Well, he was already past—he couldn't.

Q Then I understand that Puncerelli had gone past the middle of the road before he was struck? A Yes, sir.

20

Q Where was Puncerelli struck in the front or rear? A Rear.

Q Behind the rear door? A Behind the rear door.

Q And after the accident where was Puncerelli's car? A Driven right upon the curb stone, in the gutter by the crossing.

Q What side of Puncerelli's machine was struck? A Left side.

30

Q Have you any idea how fast Puncerelli was driving at the time? A I couldn't judge how fast he was going.

Q Do you drive an automobile? A Yes.

Q Was he going fast or slow? A He wasn't going fast—he was going slow.

Q How about the defendant's car? A He was coming pretty fast because when he put his brake on both wheels locked and he was sliding.

40

*Henry Habick, direct.*

Q Were the pavements wet? A Yes, they were wet.

10 *Mr. Murray.* I move to strike out the testimony of this witness on the ground that it is incompetent, irrelevant and immaterial to the issues. Of course my objections as the testimony went in were noted as the ground for appeal or review.

Objection overruled. Motion denied.

Exception allowed.

*Mr. Murray.* I would like to ask Mr. Puncerelli one question for the purpose of fixing a date—

*Mr. Platoff.* Your appearance is now general?

20 *Mr. Murray.* No, sir. I ask the Court's indulgence under my appearance to ask this one question of the witness now instead of when he was on the stand before.

30 *Mr. Platoff.* I think Mr. Murray's appearance is general. I don't suppose it will make any real difference, but because he says he is appearing specially I don't think it gives him the right to do all things he would do if it were general. I think his appearance is most general.

*Mr. Murray.* I have asked your Honor's indulgence to permit me, under the appearance I have entered, to ask this witness a question now which I really should have asked when he was on the stand the first time—it slipped my mind.

*Mr. Platoff.* There is no objection. I will consent.

40 *Mr. Murray.* Under the appearance I have entered.

*Louis Puncerelli, recalled—cross.*

*Mr. Platoff.* No.

*The Court.* I think you have gotten away from your special appearance, Mr. Murray, to be candid with you.

*Mr. Murray.* I haven't asked any questions at all yet, your Honor.

*The Court.* No, but you have objected to questions. 10

*Mr. Murray.* I have tried to confine the testimony to the state of demand. I appear only to show that this court has no jurisdiction. I have objected to questions that had no bearing on the issue.

*The Court.* This witness was on the stand and you have objected to questions which I have ruled on—now you ask leave to have the witness recalled to ask him a question. 20

*Mr. Murray.* To fix a time.

*The Court.* I will allow you to ask him whatever question you desire to, having now the same rights you would have had if you had desired to cross examine him when he was on the stand originally.

LOUIS PUNCERELLI, recalled. 30

*Cross examination by Mr. Murray.*

Q When did you have this automobile repaired? A No special day; it took a long time because I couldn't scrape up the money fast enough. Worked on it every day.

*George Fitzpatrick, direct.*

GEORGE FITZPATRICK, sworn on behalf of the plaintiff.

*Direct examination by Mr. Platoff.*

Q Where do you live? A 422 Eighteenth street, West New York.

10 Q Were you present at Sixth street and Palisade avenue on November 30th, 1916? A I was fifty feet away with Billich and Habick when the trouble occurred.

Q What time was it?

*Mr. Murray.* I object to this on the same ground as I previously objected to the testimony of the other witnesses.

Overruled.

20 *Mr. Murray.* I ask to have my objection noted as the ground for appeal or review.

Exception.

A About ten minutes to twelve.

Q Did you see the accident? A Yes, we seen the accident.

Q Not we, did you see it? A Yes, sir, I seen it.

30 Q Referring to this diagram, look at it—that is Sixth street and that is Palisade avenue—what was the position of Puncerelli's automobile at the time it was struck? A Puncerelli was going on Sixth street, west, and this here fellow came up Palisade avenue going north.

Q What side of the street was Puncerelli on? A On the right side.

Q How far over the crossing was he when the accident occurred? A He was not over—he was about to cross Palisade avenue.

40 Q Was he nearer to the west side of Palisade avenue or the east? A His car was only about three or four feet from the west side.

*Motion to dismiss attachment proceedings.*

Q What side of the street was Laura on?

A On the left side.

Q The wrong side? A Yes, sir.

Q What part of Puncerelli's car was struck?

A The rear.

Q Behind the rear door? A Yes, sir.

10

Q On the left side? A Yes, sir.

Q Was there room enough behind Puncerelli for Laura to have passed? A Yes, sir, lots of room.

Q Was there room enough for Puncerelli to have passed behind Laura's car? A Puncerelli couldn't pass behind Laura.

Q Who was driving Laura's car? A I guess it was Mr. Laura himself. There is the man.

Q Who was in the car with him, anybody?

A Two or three more people in the car besides him. I ain't sure how many.

20

Q Did you see what he was doing the moment before the accident occurred, referring to Laura?

A Well, he was turned around looking in the back of the car when he hit Puncerelli.

Q His head was turned? A His head was turned.

*Mr. Murray.* I move that the testimony of the witness be stricken out on the grounds previously denied.

30

Exception allowed.

PLAINTIFF RESTS.

*Mr. Murray.* If your Honor please, I ask that the case be dismissed, that the writ of attachment be quashed, on the ground that the cause of action, if any, disclosed by the plaintiff's proofs is not such as warrants the issuance of a writ of attachment out of this court by the

40

*Motion to dismiss attachment proceedings.*

clerk and that the clerk had no jurisdiction to issue any such attachment; that the officer had no power to make a levy and this court is entirely without jurisdiction over the property and person of the defendant. There is no liquidated amount, there is no promise to pay, on the  
 10 plaintiff's own testimony. The cases under the attachment act have held that—I quote one case—*Bank v. Meritt*—“His debt must be certain and liquidated so that the intervention of a court or judge is not necessary to determine its amount.” Now, the plaintiff has testified that at the time they did not know what the amount was, that it was a matter of repairs which he, himself made, and that they were not made until long after the writ was issued in this case and the affidavit on which it was founded was  
 20 sworn to. I say, therefore, that the writ was improvidently issued and it is now evident to the court that such was the case; the writ should be quashed and the case dismissed on the ground that the court was without jurisdiction.

*Mr. Platoff.* If the Court please, I want to be heard, not so much on the argument Mr. Murray advances, but on the question of general appearance. While there may be something in  
 30 Mr. Murray's argument that the amount isn't proved to be a liquidated amount and the attachment was improvidently entered, I think this about it that the defendant having entered a general appearance, at the most, Mr. Murray may prevail in having the property attached released from any attachment, but his appearance being general I think he is called upon to defend the suit regardless of the attachment.

*Mr. Murray.* In what does my general appearance consist?  
 40

*Motion to dismiss attachment proceedings.*

*Mr. Platoff.* Cross examination of witnesses.

*Mr. Murray.* I asked one question only.

*Mr. Platoff.* All the questions of jurisdiction were decided—they are *res adjudicata* by the judgment of the Supreme Court on certiorari. Any further appearance after that time must of necessity have been general and not special. 10

*Mr. Murray's* objections—I might refer to the application to amend the state of demand—his argument at that time was certainly not a special appearance but general; his examination of witnesses today, objections to testimony today, make his appearance a general appearance, and under those circumstances the most that could avail him on the application for dismissal is an order releasing the attached property, but still calling upon him to defend the suit. 20

*Mr. Murray.* If your Honor please, all the way through I have taken the greatest pains to enter a special appearance and the only reason for which I came here today was to show to the court that the court was without jurisdiction. The papers as they stood on file disclosed a contract action which was apparently within the attachment act. I appeared for the purpose of showing that there was no such state of facts existing as was alleged in the state of demand and all my objections were made for the purpose of confining the issue to that point and I examined only one witness—asked one witness one question only and that was for the purpose of fixing the time that those repairs were made, the purpose of which is quite evident. I submit that the plaintiff's attorney has practically admitted that on his proofs there is no ground for any such attachment, and I respectfully submit that I have not done one act inconsistent with my 40

*Motion to dismiss attachment proceedings.*

endeavor to show the court that it was without jurisdiction and that the process of this court was misused and abused. Everything I have done has been working toward that end and that end only and I have confined even my objections and my questions to that purpose.

- 10 *The Court.* The state of demand is exactly the same as the state of demand that went before the Supreme Court. There was a motion to amend the state of demand and I denied that motion. I think it makes very little difference what you say as to your special appearance, Mr. Murray, if your acts are such as to warrant a general appearance. The thing that comes to my mind in this case is the failure of the plaintiff to give us a certain and fixed sum. I think that is vital, in so far as the attachment is concerned.
- 20 On the other hand I think your participation in the proceeding here, Mr. Murray, and your actions are necessarily those of a general appearance rather than of a special appearance.

- Mr. Murray.* May I suggest this to your Honor—if your suggested ruling is correct it is possible in every case, in any kind of a case I don't care what it is, to bring a non-resident
- 30 into court under an attachment proceeding and after you get him here to change the proofs entirely and enter a judgment on a state of facts which would not have warranted the issuance of the writ in the first instance; in other words, to get the defendant into court for one purpose and enter a judgment on an entirely different proposition, a proposition that would not have warranted getting him into court in the first place. As to entering a general appearance—I have a perfect right to show the
- 40

*Motion to dismiss attachment proceedings.*

court that its process has been misused and misused for that purpose. I stated that the first time I came here—that the plaintiff had no case on contract. I took it up to the Supreme Court for the purpose of showing that; the court denied me throughout the case on the ground that it was going into the merits on a preliminary motion. I suggested to the court that this very thing might happen and he said “No, he cannot do that—he will be confined to his state of demand as filed, he cannot bring you into court on one state of facts and get a judgment against you on another.” I have not taken one step, haven’t asked one question or made an objection inconsistent with that purpose, not one thing. 10

*The Court.* Don’t you think that if a man has an automobile accident such as is disclosed by this case and the offending party promises the injured party that he will have everything made right and straighten matters out with him and compensate him that he would have a right to come into court just as the plaintiff has, subject of course to the proof which would bring out the particulars? 20

*Mr. Murray.* If he made such a promise as the attachment statute contemplates, yes. What he should have done was to have filed a specified and detailed affidavit and have the court pass upon that and have the attachment issued under the 77th section—that is all provided for in these cases where the court fixes the bond and the special bail and all the rest of it, but never in an unliquidated case is the clerk authorized to issue a writ of attachment as matter of course. Here he files an affidavit of debt and 30

*Motion to dismiss attachment proceedings*

comes in and proves a tort or anything else he likes.

*Mr. Platoff.* He proves a promise.

10 *Mr. Murray.* Well, assume that merely for the purpose of argument—there is no liquidation.

*The Court.* Isn't the real difficulty in the failure to prove a definite amount?

*Mr. Murray.* Either one is vital, as your Honor suggested.

20 *The Court.* Well, what have you to say. I am perfectly willing to rule on this matter and I don't see anything to change my original suggestion as to what my ruling would be in this case.

30 *Mr. Platoff.* First, I reiterate that I believe that Mr. Murray by his appearance, regardless of the fact that he continuously says to the court "I am doing this specially" has constituted a general appearance and under the general appearance the worst that can happen to the plaintiff's case is this one thing—the attached property might be ordered released but the defendant would still be called upon to meet the facts presented here, meet the case on its merits regardless of the technical right to retain the custody of the attached property. We have proved a promise to pay, proved the negligence, I believe, but that is merely incidental to the promise—not a promise to pay the exact amount because the exact amount was not determined at the time the promise was made and in view of the defendant's general appearance I think we are now entitled to call upon the defendant

40 to meet the case on its merits as presented here.

*Motion to dismiss attachment proceedings.*

*Mr. Murray.* The plaintiff's attorney talks about my general appearance—I wish the plaintiff would specify what acts of mine constitute the general appearance he speaks of—by what particular act and at what particular time did I enter a general appearance.

*Mr. Platoff.* The argument on the motion made by the plaintiff to amend the state of demand; the objections to questions asked by the plaintiff today and the cross examination of one of the witnesses. 10

*Mr. Murray.* As far as the last time we were here is concerned I took no stand whatever—I neither objected nor consented. I used those express words. We had a discussion informally.

*Mr. Platoff.* That was before we commenced the argument—then Mr. Murray joined me at the bar and argued with some heat. 20

*Mr. Murray.* I said that I neither objected nor consented.

*Mr. Platoff.* I might also add that there is no provision in the 77th section giving the plaintiff any relief.

*The Court.* That feature of the case does not bother me any. I don't think we need give serious attention to that. I think the failure of the plaintiff to prove a promise or an agreement between himself and the defendant whereby the defendant was to pay him a particular sum of money for the injury that he received on that day, November 30th, 1916, is vital to his action here in attachment and I think your proceedings here will have to go along a different angle and I am also going to rule that Mr. Murray's appearance in this proceeding is a general rather than a special appearance and 30 40

*Motion to dismiss attachment proceedings.*

if he wants to proceed now he may do so. I think there was a motion on his part—

*Mr. Murray.* I move that the writ be quashed and all proceedings had under it dismissed, the bond cancelled; the writ dismissed and the levy dismissed and the return of the writ dismissed.

10

*The Court.* That would naturally follow from my ruling anyhow.

*Mr. Murray.* Do I understand that the motion is denied or granted?

20

*The Court.* I have ruled that his failure to make out a specific amount that the defendant promised to pay him for the injury that he sustained on November 30th, 1916, was vital to his writ of attachment and your motion of course, then will prevail. There is nothing else to do, that I can see, under the circumstances.

*Mr. Platoff.* Does your Honor rule that Mr. Murray's appearance is general and that he is bound to meet the merits of the case, that they are still called upon to defend against the testimony presented by the plaintiff?

30

*The Court.* Yes, I am going to rule also that Mr. Murray's appearance is of a general character and they will proceed with their defense.

*Mr. Murray.* I object to the Court's ruling as to my having entered a general appearance and I ask that my objection to the same be noted as a ground for appeal or review.

Exception allowed.

40

*Mr. Murray.* I dispute the jurisdiction of this court of the defendant or his property and I don't care at this time to enter any defense, on the ground that the case made out is insufficient to warrant the entering of any judgment

*Motion to dismiss attachment proceedings.*

whatever, of any description, against this defendant or his property.

*Mr. Platoff.* The testimony is that the cost for repairs was \$339, and that the plaintiff's loss was \$5.00 a day from November 30th, 1916, to February 18th, 1917.

*The Court.* I do not think I ought to pay 10  
much attention to his loss of \$5.00 a day from  
November 30th to February 18th. There doesn't  
seem to be anything to show me that he has  
made any effort to minimize the damages or  
anything of that kind. Of course it may be very  
regretable that he was not able to get the money  
together to pay for the expense, but I don't think  
that gives me the right to take and impose that  
five or six dollars a day for that length of time  
upon the defendant by a judgment. There is 20  
nothing here to show me what would have been  
the reasonable time in which to make those  
repairs. What was the amount he testified to?

*Mr. Platoff.* \$339 he paid for the cost of repairs.

*The Court.* I will enter a judgment in favor of the plaintiff and against the defendant in the sum of \$339.

*Mr. Platoff.* I want to call the Court's at- 30  
tention to the depositions taken in New York.  
They are on file here—

*Mr. Murray.* They have never been introduced here.

*Mr. Murray.* I object to the ruling of the Court entering judgment on the ground that the Court is without jurisdiction to take such action and ask to have my objection noted.

Exception allowed.

*Motion to dismiss attachment proceedings.*

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

10 Norbury C. Murray, being duly sworn on his oath according to law, deposes and says: that he is a member of the firm of DeGraw & Murray, attorneys of Anthony Laura, named as defendant in the foregoing entitled cause; that he has personally compared the foregoing testimony with the original transcript made by E. Irene Thompson, who was duly sworn as stenographer, to take the same.

Deponent further says that the foregoing testimony is a true and exact copy of the transcript in every respect.

NORBURY C. MURRAY.

20 Sworn to and subscribed before me this 27th day of April, 1917.

WATTS C. FAIRCHILD,  
*An Attorney at Law of New Jersey.*

30 A stenographer having been duly designated and sworn to transcribe the proceedings at the hearing or trial had in the foregoing entitled cause and to take down the testimony therein, and a writ of certiorari having been allowed to review the proceedings therein, I hereby certify the foregoing transcript of said proceedings and testimony made by said stenographer, as the state of the case or part thereof, to be used in the above proceedings aforesaid.

F. H. McCAULEY,  
*Judge of the District Court of the First  
 Judicial District of Hudson County.*

40

*Transcript of Docket Entries.*

**Transcript of Docket.**

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

DISTRICT COURT OF THE FIRST  
JUDICIAL DISTRICT OF THE COUNTY  
OF HUDSON, N. J.

Before Francis H. McCauley, Judge.  
No. 9,272.

LOUIS PUNCERELLI

*vs.*

ANTHONY LAURA.

*In  
Attachment.*

John N. Platoff, plaintiff's attorney.

DeGraw & Murray, defendant's attorneys.

Cost	A1.	On December first, A. D. 1916, an
Taking Affidavit.		affidavit was filed by the plaintiff
Writ Service	1.95	alleging that Anthony Laura is not
Service & Return	1.00	to the belief of Louis Puncerelli a
		resident of the State of New Jersey
		and that said Anthony Laura owes
		to Louis Puncerelli the sum of Four
		hundred and seventy-five dollars.

Bond.		On December first, A. D. 1916, a
Taking Affidavit		writ of attachment was issued to
for Adj.		William F. Harney, constable.

*Transcript of Docket Entries.*

Filing Affidavit for Adj. Adjournment. Recognizance Venire. Swearing Jury. Summoning Jury. Serving Jury. Subpoena. Serving Subpoena. Witness Fees           .50	On December first, A. D. 1916, said constable returned said writ as follows, viz: By virtue of the within writ, I did on the first day of December, 1916, in the presence of a credible person, attach the property and estate of the defendant in the annexed inventory mentioned and described.
--	--

Witness my hand this first day of December, A. D. 1916.

WILLIAM F. HARNEY,  
*Constable.*

Papers Filed. Oath Admin'td. Jury Fees. Trial Fee               1.50 Mileage                 .10	On December 22, 1916, defendant, Anthony Laura, filed a bond, whereupon an order was made by Francis H. McCauley, Esq., Judge, to the constable for the release of the attached chattels, DeGraw & Murray appearing specially for defendant.
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Witness Fees. Attending Jury.	On January fifth, 1917, said attorneys for defendant filed notice of motion to quash writ.
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App'st. and Notice.	On January ninth, 1917, plaintiff filed state of demand.
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On January 17, 1917, the hearing on the motion was called and proceeded with as follows: H. J. Huddle was sworn as stenographer; N. C. Murray, attorney, appears for defendant, special; John N. Platoff, attorney, appears for plaintiff.

*Transcript of Docket Entries.*

Execution  
 Mileage  
 Percentage  
 Sale.

Mr. Murray moves to dismiss attachment and Anthony Laura was sworn in support of said motion. Motion is denied. Case was then adjourned to April 11, 1917. On April 11th, 1917, plaintiff moved to amend state of demand, and after argument motion was denied by the court, and then was adjourned to April 18, 1917, at 2 P. M., at which time case was called and proceeded with as follows: Miss Irene Thompson was sworn as stenographer to take testimony.

The following were sworn on behalf of plaintiff: Louis Puncerelli, Henry Habick, George Fitzpatrick.

N. C. Murray, attorney, moved for quashing of writ of attachment, of levy and for cancellation of bond. Motion granted.

Whereupon it is on this eighteenth day of April, 1917, considered and adjudged that said plaintiff, Louis Puncerelli, recover against defendant, Anthony Laura, the sum of Three hundred and thirty-nine dollars damage, and Twenty-one dollars and ninety cents costs of court.

I hereby certify that the above is a true copy of the records of this court.

In witness whereof I have hereunto affixed my hand as the clerk of said court and the seal of said court, as provided by law.

HENRY BENDER,  
*Clerk.*

SEAL.

*Stipulation.*

NEW JERSEY SUPREME COURT.

10	ANTHONY LAURA, <i>Prosecutor,</i>  <i>vs.</i> LOUIS PUNCERELLI and the DIS- TRICT COURT OF THE FIRST JUDICIAL DISTRICT OF HUDSON COUNTY,  <i>Respondents.</i>	}	<i>On          Certiorari.          Stipulation.</i>
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20       Whereas Francis H. McCauley, Judge of the District Court of the First Judicial District of Hudson County, owing to press of business, will be unable to certify the transcript of the testimony taken in the trial had in said District Court on the 18th day of April, 1917, within the time required by law,

It is hereby STIPULATED by and between the parties hereto, by their respective attorneys, that the time for certifying and filing said testimony in said Supreme Court be and the same is hereby extended to May 18th, 1917.

30                       DE GRAW & MURRAY,  
*Attorneys of Prosecutor.*

                          JOHN N. PLATOFF,  
*Attorney of Respondent, Louis Puncerelli.*

I hereby consent to the foregoing stipulation.

                          FRANCIS H. McCAULEY,  
*Judge of the District Court of the First  
 Judicial District of Hudson County.*

*Stipulation.*

## NEW JERSEY SUPREME COURT.

ANTHONY LAURA,

*Prosecutor,**vs.*

LOUIS PUNCERELLI and the DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF HUDSON COUNTY,

*Respondents.**On**Certiorari.*

10

*Stipulation.*

WHEREAS the respondent, District Court of the First Judicial District of Hudson County, has been unable to certify and file the transcript of the testimony taken in the cause sought to be reviewed by the above entitled proceeding,

20

It is hereby STIPULATED by and between the parties that the time for certifying and filing the transcript of said testimony be and the same hereby is extended to the 28th day of May, 1917.

Dated, May 18, 1917.

DE GRAW & MURRAY,  
*Attorneys of Prosecutor.*

30

JOHN N. PLATOFF,  
*Attorney of Respondent, Louis Puncerelli.*

40

*Stipulation and Order.*

DISTRICT COURT  
OF THE FIRST JUDICIAL DISTRICT OF  
HUDSON COUNTY.

By F. H. McCauley, Judge.

10                   NEW JERSEY SUPREME COURT.

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ANTHONY LAURA,

*Prosecutor,*

*vs.*

LOUIS PUNCERELLI and the DIS-  
TRICT COURT OF THE FIRST  
JUDICIAL DISTRICT OF HUDSON  
COUNTY,

*Respondents.*

---

*On  
Certiorari.*

*Stipulation  
and Order.*

20

WHEREAS the respondent, District Court of  
the First Judicial District of Hudson County,  
has been unable to make return of the proceed-  
ings had in the cause sought to be reviewed in  
the above entitled proceeding, as commanded by  
the writ of certiorari issued out of the above  
entitled court, and the parties have been unable  
30 to take the necessary testimony thereunder,

It is hereby STIPULATED by and between  
Messrs. DeGraw & Murray, attorneys of prose-  
cutor, and John N. Platoff, attorney of respond-  
ent, Louis Puncerelli, that the return day of the  
writ of certiorari and the time for taking testi-  
mony be extended to the 28th day of May, 1917.

JOHN N. PLATOFF,

*Attorney of Louis Puncerelli.*

DE GRAY & MURRAY,

*Attorneys of Prosecutor.*

40

*Stipulation and Order.*

It appearing that the respondent, District Court of the First Judicial District of Hudson County, has been unable to make return as commanded by the writ of certiorari, issued in the above entitled cause, and the parties having been unable to take the necessary testimony thereunder,

10

It is hereby on this 18th day of May, 1917, ORDERED that the return day of the writ and the time for taking testimony be and hereby is extended to the 28th day of May, 1917.

F. J. SWAYZE,  
*Supreme Court Justice.*

## NEW JERSEY SUPREME COURT.

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ANTHONY LAURA,

*Prosecutor,**vs.*

LOUIS PUNCERELLI and the DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF HUDSON COUNTY,

*Respondents.**On  
Certiorari.**Stipulation  
and Order.*

30

---

WHEREAS the respondent, District Court of the First Judicial District of Hudson County, has been unable to make return of the proceedings had in the cause sought to be reviewed in the above entitled proceedings as commanded by the writ of certiorari issued out of the above entitled court, and the parties have been unable to take the necessary testimony thereunder,

40

*Stipulation and Order.*

It is hereby STIPULATED by and between Messrs. DeGraw & Murray, attorneys of prosecutor, and John N. Platoff, attorney of respondent, Louis Puncerelli, that the return day of the writ of certiorari and the time for taking testimony be extended to the 11th day of June, 1917, and that  
 10 the time for certifying and filing the testimony taken in the cause sought to be reviewed be likewise extended.

JOHN N. PLATOFF,  
*Attorney of Louis Puncerelli.*

DE GRAW & MURRAY,  
*Attorneys of Prosecutor.*

It appearing that the respondent, District  
 20 Court of the First Judicial District of Hudson County, has been unable to make return as commanded by the writ of certiorari, issued in the above entitled cause, and the parties have been unable to take the necessary testimony thereunder,

It is hereby on this 28th day of May, 1917, ORDERED that the return day of the writ and the time for taking testimony be and hereby is extended to the 11th day of June, 1917.

30 F. J. SWAYZE,  
*Supreme Court Justice.*

*Stipulation and Order.*

## NEW JERSEY SUPREME COURT.

ANTHONY LAURA,

*Prosecutor,**vs.*

LOUIS PUNCERELLI and the DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF HUDSON COUNTY,

*Respondents.**On**Certiorari.*

10

*Stipulation  
and Order.*

WHEREAS the respondent, District Court of the First Judicial District of Hudson County, has been unable to make return of the proceedings had in the cause sought to be reviewed in the above entitled proceedings, as commanded by the writ of certiorari issued out of the above entitled court, and the parties have been unable to take the necessary testimony thereunder,

20

It is hereby STIPULATED by and between Messrs. DeGraw & Murray, attorneys of prosecutor, and John N. Platoff, attorney of respondent, Louis Puncerelli, that the return day of the writ of certiorari and the time for taking testimony be extended to the 26th day of June, 1917, and that the time for certifying and filing the testimony taken in the cause sought to be reviewed be likewise extended.

30

JOHN N. PLATOFF,

*Attorney of Louis Puncerelli.*

DE GRAW &amp; MURRAY,

*Attorneys of Prosecutor.*

40

*Rule to take Depositions.*

It appearing that the respondent, District Court of the First Judicial District of Hudson County, has been unable to make return as commanded by the writ of certiorari, issued in the above entitled cause, and the parties have been unable to take the necessary testimony thereunder,

It is hereby on this 11th day of June, 1917, ORDERED, that the return day of the writ and the time for taking testimony be and hereby is extended to the 26th day of June, 1917.

F. J. SWAYZE,  
*Supreme Court Justice.*

## NEW JERSEY SUPREME COURT.

20

ANTHONY LAURA,

*Prosecutor,**vs.*LOUIS PUNCERELLI and DISTRICT  
COURT OF THE FIRST JUDICIAL  
DISTRICT OF HUDSON COUNTY,*Respondents.**On  
Certiorari.**Rule to Take  
Depositions.*

30

Allowance of a writ of certiorari having this day been granted, it is hereby on this 28th day of April, A. D. 1917, ORDERED that either party may take depositions under the foregoing writ according to the statute and rules in such case made and provided, and to be returned with the writ of certiorari.

C. W. PARKER,  
*Supreme Court Justice.*

40

*Writ of Certiorari.*

**Writ of Certiorari.**

Filed April 30, 1917.

NEW JERSEY SUPREME COURT.

ANTHONY LAURA,

*Prosecutor,*

*vs.*

LOUIS PUNCERELLI and the DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF HUDSON COUNTY,

*Respondents.*

10

*Writ of  
Certiorari.*

NEW JERSEY, *to-wit:*

20

The State of New Jersey to  
[SEAL] Louis Puncerelli and the District  
Court of the First Judicial District  
of Hudson County—GREETING:

We, being willing for certain reasons, to be certified of the writ issued, orders made and proceedings had in a certain attachment suit in said District Court, pending, entitled Louis Puncerelli, plaintiff, vs. Anthony Laura, defendant; 30

We command you, the District Court of the First Judicial District of Hudson County, that you do send all papers, instruments, documents and orders filed in said court, in the cause therein pending, entitled Louis Puncerelli, plaintiff, vs. Anthony Laura, defendant, including the writ of attachment, the affidavit on which the same was founded, the bond given, and the special appearance entered by the defendant, 40

*Writ of Certiorari.*

the state of demand filed, notice of motion to  
quash the writ given by the defendant, the order  
made dismissing said motion, and the steno-  
graphic record or state of the case of the pro-  
ceedings had on the hearing of said motion, and  
a transcript of the docket of said court, in so  
10 far as it affects said cause, and the stenographic  
records of the proceedings before said court on  
April 18, 1917, together with all things touch-  
ing and concerning the same, as fully and en-  
tirely as before you they remain, to our Justices  
of our Supreme Court of Judicature at Trenton,  
on the eighteenth day of May, Nineteen hundred  
and seventeen, together with this writ, that  
therein may be done what of right and according  
to the laws of this state should be done.

20 And it is further commanded that no further  
proceedings be had or taken in the cause of  
Louis Puncerelli, plaintiff, vs. Anthony Laura,  
defendant, pending the further order of this  
court, in the premises.

WITNESS, WILLIAM S. GUMMERE, ESQUIRE, Chief  
Justice of our Supreme Court, at Trenton, this  
30th day of April, Nineteen hundred and seven-  
teen.

WM. C. GEBHARDT, *Clerk.*

30 DEGRW & MURRAY,  
*Attorneys of Prosecutor.*

This writ is allowed, let it be sealed.

Dated, April 28, 1917,

C. W. PARKER,  
*Justice of Supreme Court.*

*Return to Writ of Certiorari.*

**Return to Writ of Certiorari.**

Filed

NEW JERSEY SUPREME COURT.

ANTHONY LAURA,

*Prosecutor,*

*vs.*

LOUIS PUNCERELLI and the DIS-  
TRICT COURT OF THE FIRST  
JUDICIAL DISTRICT OF HUDSON  
COUNTY,

*Respondents.*

10

*On  
Certiorari.*

*Return of  
District  
Court to  
Writ.*

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

20

In obedience to the command of the attached writ, directed to Louis Puncerelli and the District Court of the First Judicial District of Hudson County, I hereby certify and file under the seal of said District Court, to the Honorable Justices of the Supreme Court of Judicature of New Jersey, the judgment, order and proceedings in said District Court of the First Judicial District of Hudson County, in a certain action, 30  
plaint or proceedings therein brought against said Anthony Laura at the suit of Louis Puncerelli, in which judgment was rendered against the said Anthony Laura on the 18th day of April, 1917, for Three hundred thirty-nine dol-  
lars and costs, together with all papers, testi-  
mony and records touching and appertaining to the same as fully and entirely as before the  
said the District Court of the First Judicial 40

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*Return to Writ of Certiorari.*

District of Hudson County, they remain, as commanded.

10 IN TESTIMONY WHEREOF, I, Francis H. McCauley, Judge of the District Court of the First Judicial District of Hudson County, have hereunto set my hand as Judge of said District Court, and caused the seal of said District Court to be affixed and attested by the clerk of said District Court, this 25th day of June, Nineteen hundred and seventeen.

F. H. McCAULEY,  
*Judge of the District Court of the First  
Judicial District of Hudson County.*

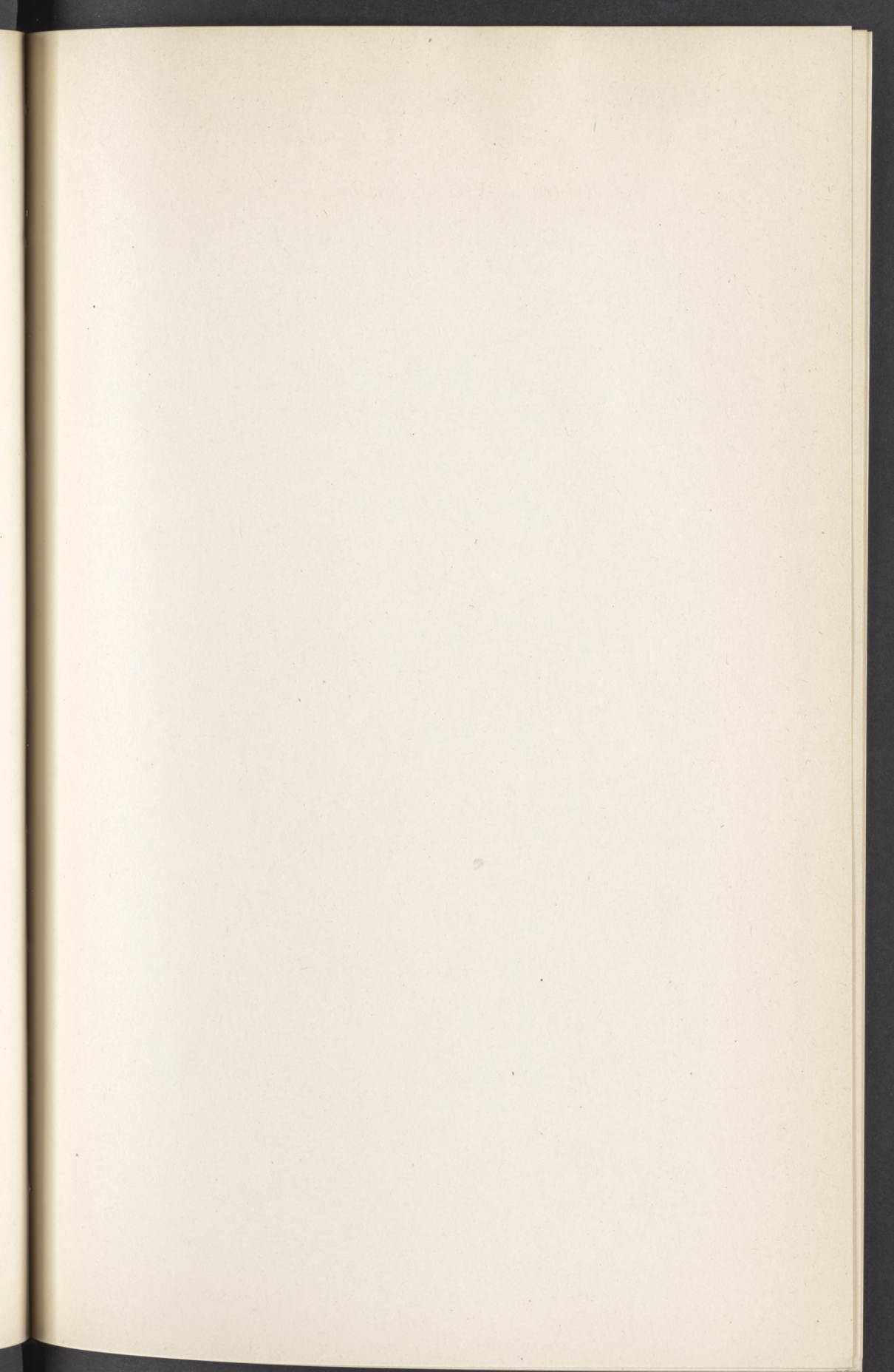
Attest:

20 HENRY BENDER,  
*Clerk.*

[SEAL]

30

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## New Jersey Court of Errors and Appeals.

ANTHONY LAURA,  
*Prosecutor-Appellant,*

vs.

LOUIS PUNCERELLI, and The  
District Court of the First  
Judicial District of Hudson  
County,  
*Respondents-Appellees.*

On Certiorari,  
On Appeal  
from  
Supreme  
Court.

Certiorari to Review Judgment rendered  
against Prosecutor and Proceedings on which it  
purports to be founded.

### BRIEF OF RESPONDENTS.

This appeal brings up for review a judgment of the Supreme Court affirming a judgment of the District Court of the First Judicial District of Hudson County in favor of the plaintiff and against the defendant (*Laura vs. Puncerelli*, 102 Atl. Rep. 433). The Respondents-Appellees respectfully submit that the judgment of the Supreme Court should be affirmed on the following grounds:

1. THERE WAS A CONTRACT THAT COULD PROPERLY BE MADE THE BASIS OF AN ATTACHMENT PROCEEDING.
2. THE STATE OF DEMAND IN THIS CAUSE WAS A PROPER ONE.

3. DEFENDANT'S APPEARANCE, ALTHOUGH CALLED BY HIM A SPECIAL APPEARANCE, WAS SUCH AN APPEARANCE AS CONSTITUTED A GENERAL APPEARANCE.

### Argument on Point I.

#### **There Was a Contract That Could Properly Be Made the Basis of an Attachment Proceeding.**

“The remedy in attachment is founded in this state upon statute, and we are therefore to recur to the statute to ascertain in what cases, or under what circumstances this remedy may be made use of and applied.” Per Ewing, C. J. in *Jeffrey vs. Wooley*, 10 N. J. L. 123, and continuing further in this learned decision. “A demand may be founded on a contract, but the amount to be recovered, so uncertain and unliquidated as to require the intervention of a jury; and as in such a case, the opinion of the plaintiff would not be the measure of damages, nor his oath suffice of itself to fix the amount of bail, so neither can he, upon such demand sue out a writ of attachment.”

In this cause in order that a writ of attachment issue under Section 69 of the District Court Act (2 Compiled Statutes 1977) two essential requisites must concur, namely: (1) non-residence and (2) a debt. Both these requisites are found here so as to bring this case within the statute.

For in the case at bar defendant after the accident stated to the plaintiff that “everything would be fixed up in regard to the damages.” (State of Case, pp. 44, 45.)

“Q. Did you have a conversation with the defendant at the time of the accident? A. Yes, sir.

“Q. What was that conversation? A. I spoke to two of them—they started telling me what was the use of going through all this red tape, you know me, there was us three together—

“Q. Wait a moment, now. Who were the three? A. Laura and Majuri, who I didn't know was a friend of his then, but I know now. We were all there together and they said what is the use—almost pleaded with me not to have him arrested, I knew him and he would see that it was fixed all right, let the red tape alone, it couldn't do any good by getting us all up into the police court.

“Q. Anything else said? A. No, not that I can remember.

“Q. Did you make a complaint against him? A. Yes, sir, I made a complaint against him—he was arrested for reckless driving.

“Q. Did he make any promises to adjust the matter with you? A. Said everything would be all right, that's all the promise he made.

“Q. Did he promise to pay you any money?

MR. MURRAY: I object, the witness has already answered that question twice. He said there was nothing more than what he has already testified to and I object to the attorney leading him and trying to get him to say that he promised to pay a sum of money. He has said flatly twice that there was nothing else.

THE COURT: It doesn't make any difference, I am going to allow it and find out what there is to it.

Exception allowed.

*A. He promised everything would be fixed up in regard to the damages—no amount was specified.*

“Q. He didn’t agree to pay you any specified amount? A. No, we didn’t know the specified amount at the time.”

The foregoing conversation constituted an acknowledgment of the debt.

“*An action in debt lies wherever the sum due is certain or ascertained in such a matter as to be readily reduced to a certainty, without regard to the manner in which the obligation was incurred or is evidenced.*” Bouviers Law Dictionary, page 787.

“The statute gives the right of attachment against absconding or absent debtors, consequently there must be a debt which is a sum of money certain, *or reducible readily to a certainty*” 1 *Chitty Pleadings* 99.

In the case of *Day vs Bennett*, 18 N. J. L. 287, the well recognized principle is laid down “that a writ of attachment lies only for debt, not for a tort; or for unliquidated damages.”

It is true that there was no fixed amount agreed between the parties in the case at bar, but is it not true that there was an agreement on part of the defendant to pay for the repairs that would have to be made, thereby incurring on part of the defendant a debt of “a certain sum” of money due and owing the plaintiff so as to bring this case within the action on contract? Even though the amount was not definitely fixed it was an amount that needed neither the intervention of a court or jury to determine same. The amount was one that could be readily ascertained and as set forth in the State of Demand (State of Case, pp. 20, 21) is a liquidated amount and by the evidence the Court might infer (State of Case, supra, pp. 44,

45) that the defendant in order to avoid publicity, etc., agreed to pay a sum certain which sum while not definitely fixed, was such an amount that would be readily ascertained when the repairs were made, per Swayze, J.; in *Laura vs Puncerelli*, 102 Atl. Rep. 433, this case does not, therefore, fall within the following cases, of *Jeffrey vs Wooley*, supra; *Day vs Bennett*, supra; *Hecksher vs Trotter*; 48 N. J. L. 119. Defendant in the case at bar by appearing specially and then by his activity in the case changing his status from that of a special appearance to that of a general one, under such circumstances the courts have held in *Hecksher vs Trotter*, supra; *Moore vs Richardson*, 65 N. J. LAW 531; *Sullivan vs Moffat*; 68 N. J. LAW 211; and *Cord vs Newlin*, 71 N. J. LAW 439, that the levy may be quashed, but the writ itself as a process to bring the defendant in court cannot be annulled, "obviously under our decisions, therefore, a writ of attachment cannot be quashed," per Swayze, J. in *Laura vs Puncerelli*, supra.

## Argument on Point II.

### The State of Demand in This Cause Was a Proper One.

In the case at bar the State of Demand (State of Case, pp. 20, 21) contains two counts, one in negligence and one in debt. Plaintiff elected to prove count two, namely, that count in debt; whereby defendant agreed to pay plaintiff for the injuries sustained to the automobile as adverted to in count one, count two being that part of plaintiff's demand for liquidated damages. Plaintiff as

part of his case proved count one, that is, the accident in order to show the agreement whereby the defendant agreed to stand the loss. This was not an action in negligence, the evidence as to the collision was rightfully introduced and admissible for the purpose of establishing that count in debt, that is the events, that lead up to the making of the agreement, the facts as proved at the trial were collateral and incidental to count two and were proper for the purpose of showing the basis upon which the action in debt was instituted.

### Argument on Point III.

#### **Defendant's Appearance Although Called by Him a Special One Was Such an Appearance As Constituted a General Appearance.**

“A defendant appearing especially to object to the jurisdiction of the court must as a general rule keep out of court for all purposes. In other words, he must limit his appearance to that particular question or he will be held to have appeared generally and to have waived the objection.” 4 Corpus Juris 1318, and further citing from the same work: “Where a defendant attacks the complaint on the merits or enters into trial, he cannot ‘in any form’ limit his appearance as a special one.” 4 Corpus Juris, p. 1320, citing *Rahn vs Green*, 37 Iowa 627; Swayze, J. in *Laura vs Puncerelli*, supra.

Defendant in this cause waived his rights to those he otherwise would have enjoyed by reason of his objection to the State of Demand in this cause, also to the numerous and many objections made during the course of the trial, (State of

Case, pp. 37, 38, 40, 41, 49, etc.) for merely stating "I am making this objection appearing specially" does not make it a special appearance. The fact that plaintiff was cross-examined by defendant (State of Case, pp. 48, 49.)

MR. MURRAY: I would like to ask Mr. Puncerelli one question for the purpose of fixing a date—

MR. PLATOFF: Your appearance is now general?

MR. MURRAY: No, sir. I ask the Court's indulgence under my appearance to ask this one question of the witness now instead of when he was on the stand before.

MR. PLATOFF: I think Mr. Murray's appearance is general. I don't suppose it will make any real difference, but because he says he is appearing specially I don't think it gives him the right to do all things he would do if it were general. I think his appearance is most general.

MR. MURRAY: I have asked your Honor's indulgence to permit me, under the appearance I have entered, to ask this witness a question now which I really should have asked him when he was on the stand the first time—it slipped my mind.

MR. PLATOFF: There is no objection. I will consent.

MR. MURRAY: Under the appearance I have entered.

MR. PLATOFF: No.

THE COURT: I think you have gotten away from your special appearance, Mr. Murray, to be candid with you.

MR. MURRAY: I have not asked any questions at all yet, your Honor.

THE COURT: No, but you have objected to questions.

MR. MURRAY: I have tried to confine the testimony to the state of demand. I appear only to show that this court has no jurisdiction. I have objected to questions that had no bearing on the issue.

THE COURT: This witness was on the stand and you have objected to questions which I have ruled on—now you ask leave to have the witness recalled to ask him a question.

MR. MURRAY: To, fix a time.

THE COURT: I will allow you to ask him whatever questions you desire to, having now the same rights you would have had if you had desired to cross-examine him when he was on the stand originally.

LOUIS PUNCERELLI, recalled.

### **Cross-Examination by Mr. Murray:**

*Q. When did you have this automobile repaired? A. No special day; it took a long time because I couldn't scrape up the money fast enough. Worked on it every day.*

The foregoing controversy plus the cross-examination conclusively shows that defendant was an active participant and one voluntarily submitting himself to the jurisdiction of the court.

Defendant's contention that his appearance was a "special" one is an unfair one for if such a position as presents itself in this case was maintained and upheld, a defendant after objecting that he was not properly in court, could go in and take his chance of a trial on the merits and if it

resulted in his favor insist on the judgment as good for his benefit, but if it resulted against him he could set it all aside on the ground that he had never been properly in court at all. If a party wishes to insist on the objection that he is not in court, he must keep out for all purposes except to make that objection.

### Conclusion.

It is respectfully submitted that the judgment of the Supreme Court rendered in favor of the plaintiff and against the defendant should be affirmed.

JOHN N. PLATOFF,  
*Attorney of Respondents.*



# New Jersey Court of Errors and Appeals

ANTHONY LAURA,  
*Prosecutor-Appellant,*

*vs.*

LOUIS PUNCERELLI AND THE  
DISTRICT COURT OF THE FIRST  
JUDICIAL DISTRICT OF HUD-  
SON COUNTY,  
*Respondents-Appellees.*

*On Certiorari.*

*On Appeal  
from  
Supreme  
Court.*

**Certiorari to Review Judgment rendered  
against Prosecutor and Proceedings on  
which it purports to be founded.**

## **Brief of Prosecutor.**

### **Summary of Facts.**

Plaintiff filed affidavit (State of Case, p. 8) under Section 69 of District Court Act (Comp. St., 1977) alleging non-residence of defendant which is admitted, and a debt of \$475 due plaintiff, which is denied. Writ issued by Clerk (State of Case, p. 9) and levy thereunder by officer upon automobile of defendant (State of Case, pp. 10, 11). Defendant entered special appearance, taking exception to jurisdiction of court, and reserving right to have writ quashed (State of Case, p. 12) and with it filed bond pursuant to Sec. 73 of District Court Act (Compl. St. 1978) in double amount claimed by plaintiff, such bond reciting the special appearance (State of Case, pp. 12, 13, 14, 15, 16) whereupon the Court ordered defendant's prop-

erty released from lien of attachment (State of Case, p. 17). Defendant served notice of motion, reciting special appearance, to quash the writ on ground that that court was without jurisdiction for several reasons therein set forth, and reserving right to make motion on any other ground not apparent on face of papers, if such ground should appear on further proceedings (State of Case, pp. 18, 19, 20). State of demand alleging contract by defendant to pay \$475 in settlement of damages was filed (State of Case, p. 13). A hearing was granted and held under defendant's special appearance, pursuant to notice of motion, at which defendant testified that he was a non-resident and that he had never made any contract with plaintiff. Court ruled that nature of plaintiff's claim could not be inquired into on a preliminary motion, and denied defendant's motion to quash (State of Case, pp. 21, 22). Defendant obtained rule to show cause why certiorari should not issue to review this ruling, which ruling was sustained by Supreme Court on argument of rule (State of Case, p. 25). Plaintiff moved to amend his state of demand (by adding thereto a count in tort) which after argument under special appearance by defendant, was denied by the Court, (State of Case, p. 63). Plaintiff then brought on the hearing (State of Case, pp. 26-59), the defendant again entering a special appearance and directly and expressly challenging the jurisdiction of the court and refusing to submit thereto (State of Case, p. 26). Plaintiff called plaintiff and several other witnesses who testified to an automobile collision between plaintiff and defendant, the damages caused, costs of repairs, etc., to all of which defendant objected except for purpose of laying foundation for

proof of contract, alleged in state of demand (State of Case, pp. 36 to 51). The only testimony as to any debt or contract was given by plaintiff as follows (State of Case, pp. 44, 45):

“Q Did you have any conversation with the defendant the day of the accident? A Yes, sir.

Q What was that conversation? A I spoke to the two of them—they started telling what was the use of going through all this red tape, you know me, there was us three together—

Q Wait a moment now. Who were the three? A Laura and Majure, who I didn't know was a friend of his then, but I know now, we were all three together and they said what is the use—almost pleaded with me not to have him arrested; I knew him and he would see that it was fixed all right, let the red tape alone, it couldn't do any good by getting us all up into the police court.

Q Anything else said? A No, not that I can remember.

Q Did he make any promise to adjust the matter with you? A Said everything would be all right, that's all the promise he made.

Q Did he promise to pay you any money?

A He promised everything would be fixed up in regard to the damages, no amount was specified.

Q He didn't agree to pay you any specific amount? A No, we didn't know the specified amount at that time.”

Plaintiff also testified over defendant's objections that his automobile was greatly dam-

aged and that it took him from November 30 to February 18 to repair it; he also testified that he had suffered loss of earnings by reason of loss of use of automobile which he used as a jitney (State of Case, pp. 41, 42, 43, 44). Defendant asked only one question on cross examination which was by defendant expressly stated to be under his special appearance (State of Case, pp. 48, 49) and that was of plaintiff and it was—

“Q When did you have the automobile repaired? A No special day. It took a long time because I couldn't scrape up the money fast enough. Worked on it every day.”

Plaintiff rested and defendant moved that writ be quashed, the bond cancelled and the whole proceeding dismissed because proofs showed that court had no jurisdiction (State of Case, pp. 51, 58) upon which motion the Court ruled as follows: “I have ruled that his failure to make out a specific amount that the defendant promised to pay him for the injury that he sustained on November 30th, 1916, was vital to his Writ of Attachment and your motion of course then will prevail. There is nothing else to do that I can see under the circumstances.

*Mr. Platoff.* Does your Honor rule that Mr. Murray's appearance is general and that he is bound to meet the merits of the case, that they are still called upon to defend against the testimony presented by the plaintiff?

*The Court.* Yes, I am going to rule also that Mr. Murray's appearance is of a general character and they will proceed with their defense.”

When defendant refused to put in a defense, the Court entered judgment against him for \$339, which was what plaintiff testified he had spent for the repairs which were made at least in part by himself and all made long after the Writ of Attachment was issued (State of Case, pp. 43, 44, 49) to which ruling and judgment defendant objected (State of Case, pp. 58 and 59).

### Points.

I. If there was a contract, it was not of such a nature that it could properly be made the basis of an attachment proceeding.

II. There was a substantial variance between the cause of action set forth in the process and state of demand and that proved at the hearing.

III. There was no general appearance and the part taken by defendant in the proceedings did not confer on the court jurisdiction to render the judgment in question.

### Argument on Point I.

If there was a contract it was not of such a nature that it could properly be made the basis of an attachment proceeding.

Attachment is a process which exists solely by virtue of Statute, and can be taken advantage of only when the facts mentioned in the Statute exist. (*Drake on Attach.* 7th Ed. Sec. 85) *Goldmark v. Magnolia Metal Co.*, 65 N. J. L. 36 Vr. 341, Sup. Ct. 1900. Depue, C. J. "Being a statutory proceeding in derogation of the com-

mon law, we must resort to the Statute itself to ascertain its nature and effect."

The existence of facts prescribed in the Statute is jurisdictional without which such process cannot legally issue, and if issued is void. *Jeffrey v. Wooley*, 10 N. J. L. 5 Halst. 123; *Drake on Attach*, 7th Ed. Section 85. *Corbit v. Corbit*, 50 N. J. L. 21 Vr. 363, Sup. Ct. 1888.

As applied to case at bar (1) non-residence and (2) a "debt" were the necessary jurisdictional facts.

"Certain sum of money," "Debt" or "Balance" as used in Section 69 of the District Court Act refer only to debt arising from contract. *Jeffrey v. Wooley, supra*. And a claim founded upon a tort does not authorize issuance of Writ of Attachment.

*Day v. Bennett*, 18 N. J. L. 287, 3 Harr. 287 (Sup. Ct. 1841). "The result of the adjudicated cases seems to be (1) that a writ of attachment lies only for a debt, not for a tort, or for unliquidated damages."

*Such debt must be liquidated or of such a nature that the intervention of a court or jury is unnecessary to determine its amount. Jeffrey v. Wooley, supra.*

*Boyd v. King*, 7 Vr. 134 (Sup. Ct. 1886), 36 N. J. L. *Schenck v. Griffin*, 38 N. J. L. 9 Vr. 462. *Heckscher v. Trotter*, 48 N. J. L. 19 Vr. 119 (Sup. Ct. 1886) in which case it held that royalties at fixed rate of \$2 a ton under a lease in which lessee agreed to pay such rate and to mine a certain number of tons a year, were subject of attachment as to ore actually mined prior to attachment, but not as to royalties on ore not mined in amount agreed upon. Also *Wynant v. Nautical Prep. School* (Sup. Ct. 1904) 27 N. J. L. J. 202, Pitney, J.

The cause of action, if any, proved by plaintiff at the hearing was not a "debt" or "balance" as used in Section 69 of the District Court Act. The claim proved consisted of what the plaintiff testified he had spent for repairs to his automobile, which were made at least in part by himself. All of such repairs were made after the issuance of the Writ of Attachment. The intervention of a jury was necessary to determine whether the amount so arrived at was the *reasonable* cost of repairs, and hence such cause of action could not, under the rule laid down in *Day v. Bennett*, and other authorities above cited, properly be the subject of a proceeding in attachment. The amount of damages was not liquidated, *nor was there any method prescribed by which the amount of damages could be ascertained by a mere arithmetical computation*, or as was said in *Hecksher v. Trotter* (*supra*) (on page 424).

*"It seems to me that neither the contract nor law prescribes any standard for measuring the damages accruing to the plaintiff on breach of this covenant sufficiently definite for their proper ascertainment without the intervention of a jury, and hence that the Writ of Attachment cannot legally be issued for their recovery."*

This was cited with approval and followed in *Moore v. Richardson*, 65 N. J. L., 531 (on page 535).

There is a clear distinction to be made between cases involving lack of the existence of the statutory, jurisdictional facts, and those involving mere irregularities of procedure. *The non-existence of such jurisdictional facts renders the proceeding absolutely void.* Irregularities of

procedure, to some extent, are susceptible of amendment, particularly where a general appearance has been entered by the defendant, or as was said in *Connelly v. Lerche*, 56 N. J. L. 95 (on page 103): "that this act shall be construed in all courts of judicature in the most liberal manner for the detection of fraud, the advancement of justice and the benefit of creditors." Rev., p. 55. *This provision was clearly not intended to give the courts, under decisions in this state, any right to uphold an attachment where there was not in fact proper ground therefor, but it was evidently meant to apply in a case where it was clear upon the affidavit and the evidence that it was a proper case for an attachment under the act. It should be construed, then, in the most liberal manner for the benefit of creditors, and under the power of the court to amend it would be proper to put the case in such shape by amendment, if the facts justified it, as would enable the creditor to obtain the benefit of the attachment, when he brought himself within the terms of the act."*

In *Moore v. Richardson* (*supra*) and *Sullivan v. Moffat*, 68 N. J. L. 211, (both cited by the Supreme Court in this case, State of Case, p. 3), *the defendants had entered a general appearance to the proceeding, and had thereby submitted themselves to the jurisdiction of the court. In the case at bar, the defendant has never entered a general appearance, and has, from the very beginning of the proceedings, contested the jurisdiction of the court on the ground that the necessary statutory, jurisdictional facts did not exist, and the court being wholly without jurisdiction, the entire proceedings are void and must be quashed.*

## Argument on Point II.

**There was a substantial variance between the cause of action set forth in the process and state of demand and that proved at the hearing.**

The affidavit and Writ of Attachment sounds in *debt*, the State of Demand as to the first count, sounds in *tort*, and the second count sounds in *debt* (See State of Case, pp. 8, 9 and 20.) Under the rule laid down in the authorities above cited, the first count, of the State of Demand namely, the count in *tort*, has no place in such a proceeding, and no evidence to support it could properly be introduced.

The defendant throughout the hearing made timely objections to any testimony under this count (State of Case, pages 36, 37, 38, 40, 41, 43, 46, 48, 50, 51).

Under the cause of action alleged in the second count, there was just one issue, namely, *Did or did not the defendant make the promise therein set forth?*

The evidence adduced at the hearing, giving it the construction most favorable to the plaintiff, proved a promise by the defendant to settle for the damages to the automobile, *i. e.*, to pay a sum to be thereafter determined by a method not fixed.

*The cause of action thus proved, involved the additional issues of nature and extent of damage, extent of repairs and reasonable cost of same, all of which involved expert testimony, etc.*

Practically the same situation obtained in *Wynant v. Nautical Prep. School* (27 N. J. L. J. 202) in which Pitney, *J.*, said in part: "Now if

the defendant's property will not be held bound for an unliquidated demand, it follows *a fortiori* that the plaintiff will not be permitted to make the defendant's appearance to a liquidated demand the basis of pursuing the defendant in person and upon demands not liquidated, and for which the writ to which the defendant appeared could not lawfully have been issued."

Even in actions commenced by summons "It is elementary law that a plaintiff cannot recover upon a cause of action other than that set out in his declaration." *Murphy v. North Jer. St. Ry. Co.*, 58 Atl. Rep. 1018, 1904, Gummere, C. J.

Such being the rule in the cause of action commenced by summons in which amendments are permitted with considerable liberality, how much more true is it in the case of actions commenced by the extraordinary statutory process of attachment.

To permit the judgment rendered in this case to stand, is to say that by attachment proceedings a judgment on any cause of action whatsoever may be rendered against the defendant, provided the affidavit on which the writ issues and the State of Demand show on their face a cause of action such as is pre-  
[a rule would be the source of continuous frauds] scribed by the attachment act. Manifestly such on parties and courts.

The Supreme Court of Minnesota, (*Hay v. Tuttle*, 69 N. W. 696) (67 Minn. 56) recognized the force of this when it said,

"But the majority of the court are of opinion that defendant having been compelled to appear in order to protect his property from attachment in an action, ostensibly for conversion, it would be a constructive fraud upon him amounting to a breach of

comity to allow plaintiff to change front, and avail himself of defendant's appearance for the purpose of an action to set aside the transfer of the stock and for its return, in which the courts of this State could never obtain jurisdiction of defendant's person except by his voluntary appearance; that courts should be very careful to prevent the enforced appearance of a non-resident on one purpose being used for some other and ulterior purpose." (Judgment reversed.)

The count in tort (first count of the State of Demand) could not properly under the attachment act, be the basis of a judgment against the defendant. The judgment actually rendered against him was based wholly upon testimony improperly admitted, and upon a cause of action which was neither within the scope of the process, nor pleaded in the State of Demand. In short, *the defendant was notified that he would be obliged to defend an action in tort and an action of debt, and at the hearing, he was actually obliged to defend an action on contract for unliquidated damages.*

That such a proceeding is wholly improper, needs no further argument.

### Argument on Point III.

**There was no general appearance and the part taken by defendant in the proceedings did not confer on the court jurisdiction to render the judgment in question.**

*The trial court recognized the weight of defendant's objection, and quashed the writ and levy and cancelled the bond. (State of Case, p.*

58) *but then ruled that the part taken by the defendant in the proceedings had made him subject to judgment on the testimony which we contend was improperly introduced.*

Unless therefore it can be said that the part taken by the defendant subjected him to the judgment in question, the judgment must be set aside.

From the fact that defendant before making any move in the proceedings, or in anywise appearing thereto, *and before the State of Demand was filed* entered a written special appearance, expressly taking exception to the jurisdiction of the court (State of Case, page 12), and filed bond reciting such special appearance (State of Case page 13); that he served notice of motion, reciting such special appearance, to quash the writ on the ground that the court was without jurisdiction, for the reason among others, that there was no debt of such a nature as to warrant the issuance of such a writ (State of Case, pages 18, 19, 20); that he made such motion, had a hearing thereon, and when overruled by the trial court, procured a writ of certiorari from the Supreme Court; that at the hearing brought on by the plaintiff on the merits, at the commencement thereof he entered a detailed special appearance, expressly excepting to the jurisdiction of the court (State of Case, page 26); that he continuously objected to the plaintiff introducing evidence except in so far as the same was necessary to prove the second count contained in the State of Demand; that he did not cross examine the plaintiff's witnesses (except one question which was for the purpose of making it clear to the court that the demand was not liquidated) which cross examination was done with the express statement of its purpose, and

that it was under his special appearance; that defendant moved for the dismissal of all the proceedings on the ground that the court was without jurisdiction; and that he refrained from putting in any defense, it is clear that defendant never *intended* to subject himself or his property to the jurisdiction of the court.

We concede the principle that a defendant cannot under a special appearance have the same liberty of action that he has under a general appearance. The question is, what may and what may not be done under a special appearance, or stated in other words, *What act on the part of a defendant changes an intended special appearance into a general appearance in fact?*

On this question the authorities in the various jurisdictions in this country are not in accord. There are two distinct rules laid down on this subject. The first (to quote from *Harkness v. Hyde*, U. S. Sup. Ct.) (1878) (98 U. S. 476) may be stated as follows: “\* \* \* Nor is the objection (objection of illegality of method of service of process) waived when, being urged, it is overruled, and the defendant is thereby compelled to answer. He is not considered as abandoning his objection, because he does not submit to further proceedings without contestation. *It is only where he pleads to the merits in the first instance, without insisting upon the illegality, that the objection is deemed to be waived.*”

This rule followed with approval in *Central Grain & Stock Exchange v. Board of Trade* (25 Federal Rep. 463) (U. S. Cir. Ct. of Appeals 1903). The same rule obtains in other jurisdictions. *Mortgage Trust Co.*, case (8 Kansas App. 699, 1898).

The other rule to quote from *Alderson v. White*, 32 Wis. 308, may be stated as follows:

“\* \* \* the party seeing to take advantage of want of jurisdiction in every such case, must object on that ground alone, and keep out of court for every other purpose. *If he goes in for any purpose incompatible with the supposition that the court had no power or jurisdiction on account of defective service of process upon him, he goes in and submits for all purposes of personal jurisdiction with respect to himself and cannot afterwards be heard to make the objection.*”

Followed *Corbett v. Physicians Casualty Co.* (16 L. R. A. N. S. 177 with elaborate notes).

The only decision in New Jersey, touching upon this question, that we have been able to find, is that in *Franklyn v. Taylor Hydraulic Air Compressing Co.*, 68 N. J. L. 113, 25 Atl. Rep. 714, N. J. Sup. Ct. 1902. In this case under an appearance entered “for the purpose of moving to quash the attachment entered in the above stated cause,” the defendant moved to quash the attachment and demanded to know the plaintiff’s residence.

In answer to the plaintiff’s contention that such act constituted a general appearance, the court said:

“After a general appearance, a motion to quash the attachment will be refused. It has been repeatedly held that *when a motion is made which can be granted only upon the assumption that the court has acquired full jurisdiction, it is a general appearance.* A motion to quash will not produce that result if its limited purpose is first declared on the record. The demand

to know the plaintiff's residence cannot be construed into a general appearance. The notice that the defendant's attorney would move to strike out the courts order invalidating the sheriff's return, having been given after the qualified appearance had been entered, and constituting one of the grounds on which the motion to quash the writ is based, cannot be construed into a general appearance of the defendant, and thus overcome the effect of the previous special appearance. The question, therefore, recurs to the merits of the motion itself."

It is apparent that the rule in New Jersey, so far as any rule has been established, leans toward the rule laid down in the Wisconsin case quoted, rather than that laid down in the United States Circuit Court case quoted. The test is, as was said in the Franklyn case. Has a motion been made "which can be granted only upon the assumption that the court has acquired full jurisdiction?"

In order, therefore, to overcome the express statement of the defendant to the effect that he was appearing specially only, *he must have done some act inconsistent with the purpose of making it clear to the court that it was without jurisdiction of his person and property.* In such a case he does not enter a general appearance when he does an act which is consistent with both an attempt to question the jurisdiction of the court, and to defend on the merits. *As long as such act is consistent with an attack on the jurisdiction of the court, it is only a special appearance when its purpose is so stated by the defendant.*

The cross examination of the plaintiff by the defendant, to the extent of one question, was for the sole purpose of making it clear to the court that the demand was not and could not be a liquidated amount. The answer brought out by that question, made it clear that the amount was not known at the time of the issuance of the writ of attachment, and did not become liquidated until the repairs were completed. *Such cross examination was therefore wholly consistent with the defendant's attack on the jurisdiction of the court, and it was for that purpose only.*

The case of *Rahn v. Greer*, 37 Iowa, 627, cited by the Supreme Court in its opinion in this case, has no application, because the facts in that case show, that the defendant had appeared and filed an answer, and had made a successful motion for a change of venue before ever raising the question of jurisdiction.

*We contend that, all of defendant's acts were necessary to and consistent with the fulfillment of his expressed desire to make it clear to the court, that it was without jurisdiction.* His written special appearance expressly challenged the jurisdiction of the court, the bond reciting the special appearance was given pursuant to Section 73 of the Act, which does not require appearance, instead of Section 7/ which does.

It was held in *Wynant v. Nautical Prep. School, supra*, that even where a general appearance is entered pursuant to such a requirement, the defendant may still object to the jurisdiction as soon as it appears, that plaintiff's claim is founded on a claim not within the statute. Even after defendant had demurred to the declaration for duplicity, the court held: "So far from constituting a waiver of the jurisdictional objection,

now urged, the demurrer amounted to an assertion of that objection. All that the Supreme Court decided was that a demurrer was not the proper mode in which to assert it."

Defendant even before state of demand was filed gave notice of motion to quash the proceedings for lack of jurisdiction, and obtained a preliminary hearing and his motion was denied because the issue thus raised touched somewhat on the merits, and the Supreme Court on certiorari, sustained the court below, adding, however, that plaintiff would be bound by his state of demand.

Defendant in successfully objecting to adding to the state of demand matter entirely outside of the scope of Section 69 was only doing what was necessary to confine the issue to the cause of action contemplated by that section.

At the hearing defendant in detail stated that he appeared for the purpose of showing that the court was without jurisdiction, and his objections to testimony were expressly stated to be for the purpose of confining the issue to that presented by the state of demand, and they were so framed. He deliberately refused to cross examine (except to the extent mentioned), and refused to put in a defense, so that he could not be accused of waiving the lack of jurisdiction.

Assuming that in a similar case a plaintiff was willing to perjure himself and testify to a cause of action which in fact did not exist, can it be said that the defendant would be compelled to sit helplessly by and see the court and himself deliberately imposed upon, unless he was willing to waive lack of jurisdiction in the court and thereby allow the plaintiff to profit

by his own fraud? If not, how could defendant expose such fraud otherwise than by pursuing the precise course pursued by the defendant in the case at bar? Clearly, any other rule than that for which we contend, would be a source of frequent and intolerable frauds on courts and defendants. That the legislature intended the defendant to have an opportunity to protect himself is shown by the fact that Section 73 gives him the right to recover his property wrongfully attached, without appearing generally.

### **Conclusion.**

On the grounds mentioned, we contend that the judgment rendered against the defendant should be set aside and the entire proceeding be declared void.

Respectfully submitted,

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*Attorneys of Prosecutor.*



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