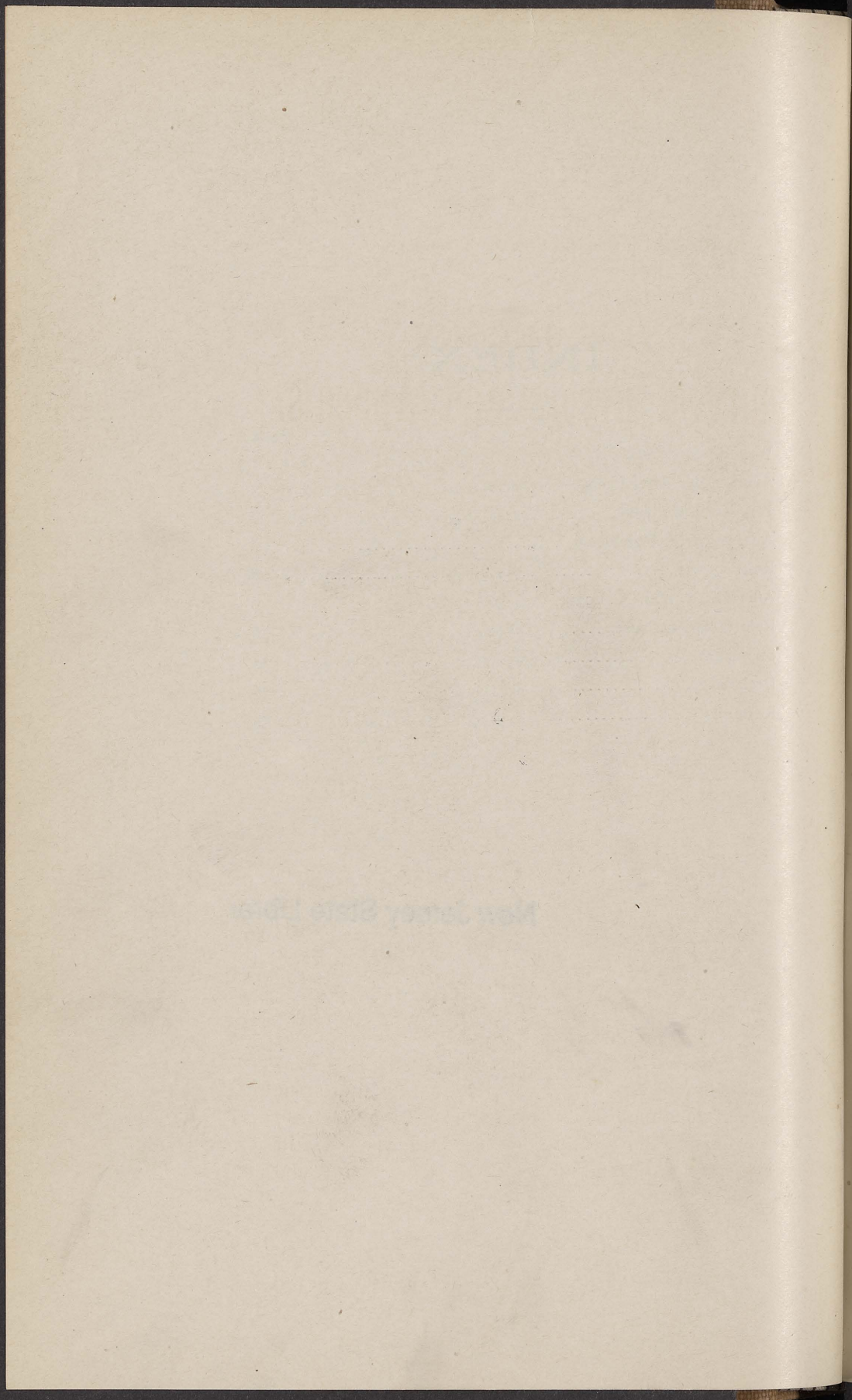


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New Jersey State Library



NEW JERSEY
Court of Errors and Appeals.

ALBERT M. JORDAN,
Pltff. in Error,
vs.
IRENE MOORE,
Deft. in Error. } On Certiorari.

WRIT OF CERTIORARI.

(Filed June 7, 1911.)

(Returnable forthwith.)

NEW JERSEY, ss.—The State of New Jersey, to our
Justices of our Supreme Court; **10**
[l. s.] Greeting:

We being willing, for certain reasons, to be certified of a certain judgment of the New Jersey Supreme Court, rendered at the February term of the said New Jersey Supreme Court, in the year of our Lord one thousand nine hundred and eleven, whereby a judgment in the suit of Albert M. Jordan, Plaintiff, and Plaintiff in error, against Irene Moore, et als., Defendants, and

Defendants in error, was rendered, and upon return of said writ of error to this court, it appears that there is a diminution of the record of the Supreme Court:

Therefore, we do command you, that a transcript of the judgment of record in said cause, together with all the files and proceedings of the said Supreme Court be sent by said New Jersey Supreme Court to our court, together with all things touching and concerning the same, as fully and entirely before you they remain, to
 10 our Justices of said Court of Errors and Appeals, on this twenty-third day of April, nineteen hundred and eleven, you certify and send together with this writ that therein may be done, what of right, should be done.

Witness, our Chancellor and President Judge of said Court of Errors and Appeals, at Trenton aforesaid, the twenty-third day of April, nineteen hundred and eleven.

J. J. CRANDALL,

of Counsel.

S. D. DICKINSON,

Clerk.

20 I do herewith send to the Court of Errors and Appeals the proceedings as within commanded under the seal of the Supreme Court of the State of New Jersey and my hand.

[L. s.]

WM. RIKER, JR.,

Ck.

NEW JERSEY SUPREME COURT.

ALBERT M. JORDAN, v. IRENE MOORE, EPHEL W. MOORE AND ISAAC W. MOORE, DE- VISEES OF I. WHELDEN MOORE, DEC'D.	}	Affidavit for Attachment.
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AFFIDAVIT FOR ATTACHMENT.

(Filed June 3, 1910.)

STATE OF NEW JERSEY, }
 COUNTY OF ATLANTIC, } ss.

10

John J. Crandall, of lawful age, and being by me duly sworn, on his oath says, that he is the agent and attorney of Albert M. Jordan in this behalf, and further deposes and says that one I. Whelden Moore in his life time and on or about the seventeenth day of February, nineteen hundred and four, became and was indebted to said Albert M. Jordan in the sum of eighty-two hundred dollars, and afterward and on the fourth day of April, nineteen hundred and five, said I. Whelden Moore executed and published his last will and testament and therein created H. Philip Reed his executor thereof, and that in and by his said last will and testament such testator devised all his property, real, personal and mixed, to his wife, Irene Moore, and his two children, Ephel W. Moore and Isaac W. Moore, and that afterward said debtor and testator departed this life without in anywise paying and satisfying the aforesaid debt to said Albert M. Jordan, and that said Irene Moore, Ephel W. Moore and Isaac W. Moore, his children in and by said testator's last will and testament, have received and become invested with divers and large amounts of lands, tenements, goods and chattels, rights and credits by devise of said testator, and that as such

20

30

devises they are indebted to said Jordan in the sum of eighty-two hundred dollars, besides four hundred and ninety-two dollars interest thereon, and that said Irene W. Moore and Ephel W. Moore and Isaac W. Moore are neither of them to deponent's knowledge and belief, residents of this State at this time, and that they are respectively residents of the State of Pennsylvania.

JOHN J. CRANDALL.

Sworn to and subscribed before me, this second day
10 of June, nineteen hundred and ten.

JENNIE F. YOUNG,
Notary Public.

[L. S.]

NEW JERSEY SUPREME COURT.

ALBERT W. JORDAN	}	Writ of Attachment.
<i>vs.</i>		
IRENE MOORE ET ALS., DE- VISEES, ETC.		

WRIT OF ATTACHMENT.

(Filed June 22, 1910.)

20

(Returnable June 9, 1910.)

STATE OF NEW JERSEY, *ss.*—The State of New Jersey to our Sheriff of the County of Cumberland,
[L. S.] Greeting:

We command you that you attach the rights and credits, moneys and effects, goods and chattels, lands and tenements of Irene Moore, Ephel W. Moore and Isaac W. Moore, Devises of I. Whilden Moore, de-

ceased, as were devised to them in and by the last will and testament of I. Whilden Moore, deceased, where-soever they may be found in your county, so that they be and appear before our Justices of our Supreme Court to be holden at Trenton in and for said State on the ninth day of this June, nineteen hundred and ten, to answer Albert W. Jordan in a plea of an action upon contract as devisees of the late I. Whilden Moore, deceased, to his damage seventeen thousand three hundred eighty-four dollars, as is said.

10

And in what manner you shall execute this our writ, make it to us appear at the day and place aforesaid, and have you then and there this writ.

Witness, William S. Gummere, Esquire, Chief Justice of said Supreme Court at Trenton aforesaid, the third day of June, nineteen hundred and ten.

JOHN J. CRANDALL,

WM. RIKER, JR.,

*Attorney.**Clerk.*

Affidavit for eight thousand six hundred ninety-two dollars filed before issuing writ. June 3, 1910.

20

WM. RIKER, JR.,

Clerk.

I return the within writ with the certification that I found no goods, chattels, rights and credits, lands and tenements of the within named defendants to take as I am commanded.

Dated June 10, 1910.

GEORGE W. PAYNE,

Sheriff.

Shff. fees, 12c.

30

NEW JERSEY SUPREME COURT.

ALBERT W. JORDAN, <i>vs.</i> IRENE MOORE ET ALS., DEVISEES, ETC.,	}	Alias Writ of Attachment.
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*(Filed June 30th, 1910.)**(Returnable July 1st, 1910.)*

STATE OF NEW JERSEY, *ss.*—The State of New Jersey to our Sheriff of the County of Cumberland, Greeting:

10 [L. S.]

We command, as we have before commanded you, that you attach the rights and credits, moneys and effects, goods and chattels, lands and tenements of Irene Moore, Ephel W. Moore and Isaac W. Moore, Devisees of I. Whilden Moore, deceased, as were devised to them in and by the last will and testament of I. Whilden Moore, deceased, wheresoever they may be found in your county, so that they be and appear before our

20 Justice of our Supreme Court, to be holden at Trenton in and for said State, on the first day of this July, nineteen hundred and ten, to answer Albert W. Jordan in a plea of an action upon contract as devisees of the late I. Whilden Moore, deceased, to his damage seventeen thousand three hundred eighty-four dollars, as is said.

And in what manner you shall execute this our writ make it to us appear at the day and place aforesaid, and have you then and there this writ.

30 Witness, William S. Gummere, Esquire, Chief Justice of said Supreme Court at Trenton aforesaid, the twenty-fourth day of June, nineteen hundred and ten.

J. J. CRANDALL,

Attorney.

WM. RIKER, JR.,

Clerk.

SCHEDULE.

By virtue of the writ of attachment hereto annexed, on Monday, the twenty-seventh day of June, A. D. 1910, at 3:25 o'clock in the afternoon of that day, in the presence of J. Ellsworth Long, a creditable person, I, George W. Payne, Sheriff of the County of Cumberland, executed the said writ of attachment by personally delivering to William A. Logue, Substituted Administrator and Trustee of the Estate of I. Whilden Moore, deceased, a true copy or counterpart of said writ, and then and there, in the presence of the said J. Ellsworth Long, declared that I attached the rights and credits, moneys and effects, goods and chattels, lands and tenements of Irene Moore, Ephel W. Moore and Isaac W. Moore, devisees of I. Whilden Moore, deceased, the defendants, at the suit of Albert W. Jordan, plaintiff, whereupon the said William A. Logue replied, "I have no property of those three defendants in my hands at this time."

GEORGE W. PAYNE, 20
Sheriff.

Affidavit for eight thousand six hundred ninety-two dollars filed before issuing writ, June twenty-fourth, 1910.

WM. RIKER, JR.,
Clerk.

I executed this writ on Monday, the 27th day of June, 1910, at 3:25 o'clock in the afternoon of that day, as appears in the schedule hereto annexed.

GEORGE W. PAYNE, 30
Sheriff.

Fees, \$2.62.

NEW JERSEY SUPREME COURT.

ALBERT M. JORDAN,	}	
<i>vs.</i>		
IRENE MOORE, EPHEL W. MOORE		
AND ISAAC W. MOORE, DE-		
VISEES UNDER THE WILL OF I.		In Attachment.
WHILDEN MOORE, DECEASED,		On Contract.
<i>Defendants,</i>		
AND		
IO WILLIAM A. LOGUE,		
<i>Garnishee.</i>		

RULE.

(Filed August 5, 1910.)

The writ of attachment in this cause having been returned served by the Sheriff of the County of Cumberland to the present term duly executed, and no appearance having been entered by defendants,

It is on this second day of August, in the year one thousand nine hundred and ten, on motion of John J. Crandall, attorney of plaintiff, ordered, that a notice of the issuing of said attachment, at whose suit, against whose estate, for what sum and when returned, shall be published in the New Jersey Patriot, a newspaper printed in the County of Cumberland, once a week for four successive weeks, and it is further ordered, that Joseph B. Perskie be appointed auditor to adjust and ascertain the amount due plaintiff and each of the applying creditors.

Rule actually entered August second, one thousand nine hundred and ten.

O. G. GARRISON,
Justice of Supreme Court.

On motion of
J. J. CRANDALL,
Attorney for Plaintiff.

NEW JERSEY SUPREME COURT.

ALBERT M. JORDAN, <i>Plaintiff,</i>	} In Attachment.
<i>vs.</i>	
IRENE MOORE AND OTHERS, DEVISEES, ETC., <i>Defendants.</i>	

AFFIDAVIT.

(Filed September 7, 1910.)

STATE OF NEW JERSEY, COUNTY OF CUMBERLAND,	} ss.	

William A. Logue, being first duly sworn according to law, upon his oath says that he is the substituted administrator with the will annexed of the estate of I. Whilden Moore, deceased; that the legal title to the real estate of which said Moore died seized is in deponent as administrator and trustee; that the correct name of said deceased is I. Whilden Moore; that the correct name of the executor named in his will is H. Phelps Reed; that the correct name of the two children of deceased is Ethel M. Wadley (nee Moore) and 20 Isaac W. Moore, and that both the said Ethel M. Wadley and Isaac W. Moore are infants under the age of twenty-one years.

Deponent further says that at the time of the death of the said I. Whilden Moore he was a resident of Bridgeton in the State of New Jersey, and had been continuously for a period of at least four years before his death.

Deponent further says that during the month of October or November, eighteen hundred and ninety- 30 six, plaintiff herein instituted a suit in this court on contract against the said I. Whilden Moore, upon which issue was joined during his lifetime, and that he is advised and believes that the claim which is the

basis of the writ of attachment in the above entitled cause is the same as in the suit brought during the lifetime of the said I. Whilden Moore.

WM. A. LOGUE.

Sworn and subscribed to before me this 30th day of August, A. D. 1910.

ROSCOE C. WARD,
Master in Chancery of N. J.

NEW JERSEY SUPREME COURT.

<p>10 ALBERT M. JORDAN, <i>Plaintiff,</i></p> <p style="text-align: center;"><i>vs.</i></p> <p>IRENE MOORE AND OTHERS, DEVISEES, ETC., <i>Defendants.</i></p>	}	In Attachment.
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RULE TO SHOW CAUSE.

(Filed September 7, 1910.)

Upon reading and filing the affidavit of William A. Logue,

20 It is on this third day of September, nineteen hundred and ten, on motion of Thompson and Cole, attorneys for defendants, ordered that the plaintiff show cause before the Supreme Court at the opening day of the November Term next why the writ in the above entitled cause should not be quashed and set aside, and that in the meanwhile and until the further order of the court, all further proceedings in the cause be stayed.

30 It is further ordered that either side have leave to take testimony before a Supreme Court Commissioner on notice as required, and that a copy of said affidavit

and of this rule (both of which may be uncertified) be served upon the plaintiff or his attorney within five days from the date hereof.

THOMAS W. TRENCHARD,
J. S. C.

NEW JERSEY SUPREME COURT.

<p>ALBERT M. JORDAN, <i>Plaintiff,</i></p> <p style="text-align: center;">vs.</p> <p>IRENE MOORE AND OTHERS, <i>Defendants.</i></p>	}	<p>In Attachment. On Rule to Show Cause.</p>	10
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STIPULATION.

(Filed October 6, 1910.)

For the purpose of the argument upon the rule to show cause in this cause, it is stipulated as follows:

1. That the annexed is a true copy of the will of I. Whilden Moore, deceased, and may be considered on the argument as far as relevant as though a certified copy thereof had been duly offered in evidence.
2. That at the time of the death of I. Whilden Moore, and for at least five years continuously prior to his death, he was a legal resident of Bridgeton, in the State of New Jersey.
3. That during the lifetime of the said I. Whilden Moore plaintiff instituted a suit in the Supreme Court of this State against the said I. Whilden Moore to recover on the same claim referred to in the affidavit awarding the attachment in this cause; that issue was joined and the cause tried before a jury at Mays Landing and judgment rendered for the plaintiff, which was reversed on writ of error by the Court of Errors and Appeals, and which action was pending at the time of the death of the said I. Whilden Moore.

4. That the correct name of the two children of I. Whilden Moore, deceased, is Ethel M. Waddey (nee Moore) and Isaac W. Moore, both of whom are infants under the age of twenty-one years.

5. That the plaintiff has never filed his claim with the legal representative of the said I. Whilden Moore.

6. That William A. Logue is the substituted administrator with the will annexed, and that the estate of the said I. Whilden Moore has not yet been settled by
10 the Orphans' Court of Cumberland county, where his will was admitted to probate, and that it is not yet certain that any estate will be left for the benefit of any of the legatees or devisees named in the will after the payment of debts and expenses of administration.

7. That on petition of the said William A. Logue, substituted administrator, an order was made by the Orphans' Court of the county of Cumberland, before the issuance of the attachment, granting leave to sell the real estate of the said I. Whilden Moore for the
20 payment of debts, and that said order has not been acted on.

8. That it has been judicially determined by the decree of the Court of Chancery of New Jersey that the legal title to the real estate of I. Whilden Moore, deceased, upon his death became vested in the trustee appointed in his will for the lifetime of Irene Moore, one of the defendants, and that William A. Logue, a resident of the State of New Jersey, is trustee thereunder; and that if it be deemed relevant the record
30 may be inspected by the Court.

9. That Jennie Ritter, a sister of I. Whilden Moore, is living and is a non-resident of the State of New Jersey, and that the children of Stratton Moore are living, none of whom are parties to the suit.

J. J. CRANDALL,
Attorney for Plaintiff.
THOMPSON & COLE,
Attorneys for Defendants.

NEW JERSEY SUPREME COURT.

ALBERT M. JORDAN, <i>Plaintiff,</i> <i>vs.</i> IRENE MOORE, EPHEL MOORE AND ISAAC MOORE, <i>Defendants.</i>	}	On Contract. Attachment.
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DECLARATION.

(Filed August 5, 1910.)

ATLANTIC COUNTY, ss.—Irene Moore, Ephemel W. 10
 Moore and Isaac W. Moore are attached of the
 rights and credits, moneys and effects, goods and
 chattels, lands and tenements which they have as
 legatees and devisees of the late I. Whelden Moore,
 deceased, to answer plaintiff, Albert M. Jordan,
 in a plea of an action upon contract of their
 testator in his life time to plaintiff's damages nine
 thousand dollars, and now comes plaintiff by his at-
 torney, John J. Crandall, and for cause of action avers,

That on or about the eighth day of February, nine- 20
 teen hundred and four, the North Side Land Company,
 a corporation of this State, was the owner of and
 seized in its demesne as of fee of the following described
 lands situate in the county of Atlantic and State of
 New Jersey, to wit:

Lots Nos. 1 to 32, inclusive; Block 12. Lots Nos. 1
 to 32, inclusive, Block 21. Lots Nos 1 to 32, Block
 22. Lots Nos. 1 to 32, inclusive, Block 23. Lots Nos.
 1 to 16, inclusive, Block No. 29, on a plan of lots of 30
 North Side Land Company, of record in the office of
 the county clerk of Atlantic county.

Which land constituted then and there the whole of
 the property of the said corporation, and plaintiff
 further avers that I. Whelden Moore, in his lifetime,
 then and there and while he was the owner of a large

number of shares of such corporation made a proposition to said corporation that he would pay the the debts of said corporation if the corporation would transfer to him, I. Whelden Moore, John Myers, Charles Myers and Robert Moore the property of said corporation, consisting of the lands aforesaid, which proposition was then and there accepted by the said corporation, and in pursuance of such contract, the corporation did, on the seventeenth day of said
10 February, then and there transfer by deed of bargain and sale the lands to them to fully execute its understanding accordingly, and said Moore then and there accepted the same accordingly, and plaintiff further avers that said corporation, North Side Land Company, was then and there indebted to the La Charge Dredging Company, a corporation of this State, in two sums of moneys, to wit, the sum of two thousand dollars, payable on or about the twelfth day of November, nineteen hundred and three, and the sum of six thousand
20 dollars, payable on or about the twelfth day of June, nineteen hundred and four, and plaintiff further avers that these said indebtedness are parcels of the debts that said I. Whelden Moore undertook to pay for said North Side Land Company as a part of the consideration aforesaid, for its transfer of its property to said I. Whelden Moore, John Myers, Charles Myers and Robert Moore as aforesaid; and plaintiff further avers that at the request and by and with the demand of said I. Whelden Moore, then and there in his lifetime, said La Charge Dredging Company, to satisfy
30 and liquidate the said two thousand dollars and said six thousand dollars, which said La Charge Dredging Company then and there owed this plaintiff, it then and there transferred its said credits and claims and demands aforesaid against said North Side Land Company to him whereby and by means of the promises aforesaid I. Whelden Moore, then and there in his lifetime, undertook and promised to pay plaintiff the aforesaid indebtedness of North Side Land Company

of two thousand dollars and six thousand dollars with interest, respectively, from the said twelfth day of February, nineteen hundred and four, and which indebtedness deceased in his lifetime refused and neglected to pay and in any wise satisfy, and defendants have refused and neglected in any wise to pay and satisfy.

Plaintiff further avers that said I. Whelden Moore died testate and seized of a large amount of rights and credits, moneys and effects, goods and chattels, and lands and tenements in this State, and by his last will and testament he devised to these defendants his said properties as legatees and devisees, wherefore an action has accrued to plaintiff to recover said indebtedness from defendants as such devisees, wherefore he brings his suit.

J. J. CRANDALL,
Attorney.

NEW JERSEY SUPREME COURT.

ALBERT M. JORDAN, <i>Plaintiff,</i>	}	In Attachment.	20
<i>vs.</i>		On Rule to	
IRENE MOORE AND OTHERS, <i>Defendants.</i>		Show Cause.	

REASONS.

(Filed September 2, 1910.)

Defendants, Irene Moore and others named as defendants in the writ of attachment in this cause, and William A. Logue, substituted administrator with the will annexed of I. Whilden Moore, deceased, come now 30 and assign the following reasons why the writ should be quashed:

1. Because at the time of the death of I. Whilden Moore, and for at least five years continuously prior to his death, he was a legal resident of Bridgeton in the State of New Jersey.

2. Because at the time of the death of I. Whilden Moore there was pending in the Supreme Court of this State an action on contract in favor of plaintiff against the said I. Whelden Moore to recover on the same claim and debt which is the basis of the attachment in this
10 cause.

3. Because the legal title to the property of which I. Whilden Moore died seized is, by virtue of the decree of the Court of Chancery of the State of New Jersey, in William A. Logue, trustee, and not in any of the defendants named in the attachment.

4. Because Jennie Ritter, a sister of I. Whilden Moore, a non-resident of the State of New Jersey, and also the children of Stratton Moore, non-residents of the State of New Jersey, are interested under the will
20 of I. Whilden Moore and are not parties to the attachment.

5. Because the children of I. Whilden Moore are incorrectly named and are infants under the age of twenty-one years.

6. Because the administration of the estate of I. Whilden Moore is in the hands of the Orphans' Court of Cumberland county, this State, unsettled, and that the plaintiff has failed to file his claim with the representative of said estate; that before the issuance of the
30 attachment in this cause the Orphan's Court of the county of Cumberland on the petition of William A. Logue, substituted administrator, made an order granting leave to sell the real estate of I. Whilden Moore for the payment of debts.

THOMPSON & COLE,
Attorneys for Defendants.

New Jersey Court of Errors and Appeals

ALBERT M. JORDAN,

Plt'ff and Plt'ff-in-Error,

vs.

IRENE MOORE, et als.,

Def'ts and Def'ts-in-Error.

ATTACHMENT.

Error to Supreme Court.

SUPPLEMENTAL BRIEF.

We have prepared the briefs and argued the case under the erroneous impression that the judgment of the Supreme Court had to be sustained, if at all, upon the single ground mentioned in the opinion of the Supreme Court, hence this supplemental brief by consent of Mr. Crandall. 10

It appears by the affidavit (page 3) that I. Whilden Moore, in his lifetime, and on or about the seventeenth day of February, nineteen hundred and four, was indebted to the plaintiff in the sum of eighty-two hundred dollars.

By the stipulation, page 11, it appears that in the lifetime of Moore, who, for at least five years continuously prior to his death, was a resident of the State of New Jersey, plaintiff instituted a suit in the Supreme Court of this State to recover on the same claim re- 20

ferred to in the affidavit for attachment, and that such proceedings were had that plaintiff recovered a judgment, which was set aside by the Court of Errors, and which action was pending at the time of the death of I. Whilden Moore.

The first point made by defendants is that the writ will not lie.

Section 5 of the attachment act (Pamphlet Laws 1901 page 159) provides:

“Attachments may issue for the debt of a deceased debtor against his executor, administrator, trustee, heir or devisee in all cases in which the writ might have issued against such debtor immediately prior to his decease and all real estate descended from or devised by him to the heir or devisee may be attached.” 10

The question for solution is, might a writ of attachment have issued in favor of the plaintiff against I. Whilden Moore immediately prior to his decease? Our contention is that a writ will not issue against a non-resident executor, administrator, trustee, heir or devisee except in those cases where the debtor was a non-resident or absconding debtor at the time of his death. In short, the purpose of the statute is to give to the creditor the same rights against non-resident executors, etc., as he would have against the non-resident or absconding debtor. Such is the plain meaning of the language of the act and it seems no other interpretation can be properly put upon this language without seriously distorting it. 20

As I. Whilden Moore was a resident of the State at the time of his decease, certainly immediately prior thereto a writ of attachment could not legally have issued against him in favor of the plaintiff. 30

If the Legislature had intended to give the right to issue the writ against a non-resident executor, etc., irrespective of whether the debtor was a non-resident or

absconding debtor during his lifetime, it was wholly unnecessary to insert the words "In all cases in which the writ might have issued against such debtor immediately prior to his decease."

The quoted language is wholly superfluous and meaningless unless the creditor's right to issue the writ is limited to those cases where it might have issued against the debtor in his lifetime.

Moreover, the first section of the act supports this construction, because it says that the writ may issue only in those cases where the debtor is absconding or a non-resident. 10

In this case an anomaly is presented. The substituted administrator and trustee is resident and his appointment was by the Orphans Court of Cumberland County, this State, and yet a writ issues because some of the heirs of I. Whilden Moore happen to reside out of the State. Under the terms of the will, as we shall presently discuss, the trustee is a necessary party and yet he is not a party, and, as we think, could not legally be, being resident in the State. 20

The construction for which we contend seems to have been in the mind of this court in *Connelly* against *Lerche*, 56 Law, 95. While the precise question was not raised and was not decided, the dictum of the case is with us. At page 106 this court, through Justice Abbott, said:

"This suit is an application by a creditor for a writ of foreign attachment under section 8 of the attachment act against the devisee for the debt of his devisor and not for any debt of his own. The object of this section is undoubtedly to enable a creditor to appropriate lands of which the non-resident devisor died seized." 30

Moreover, Mr. I. Whilden Moore was actually sued in his lifetime and the case was pending against him by

the plaintiff for the very cause of action now involved at the time of his, Moore's decease.

Again, plaintiff had a legal right to file his claim with the administrator and have it allowed by the Orphans' Court of Cumberland County.

10 In view of these facts, it seems manifest that the plaintiff is not within the terms of the attachment act and that the present proceeding is in the face of, if not an abuse of the provisions of that act.

20 Again, it appeared by the stipulation that the Court of Chancery of this State has judicially determined that the legal title to the real estate of I. Whilden Moore, deceased, is now vested in William A. Logue, trustee, a resident of the State of New Jersey. The attachment act plainly intends to require the writ to issue against the one holding the legal title. Otherwise, why provide that the writ may issue against "executor, administrator, trustee, etc." The trustee is no party to this writ and, at best, those who are made defendants have only an equitable interest which we submit is not the subject matter of levy under the writ. As the trustee holds the legal title, it cannot be said that any of the defendants named are heirs, or devisees within the meaning of the attachment act.

It also appears by the stipulation that there are interests under the will who are not parties to the attachment and, in consequence, their interest cannot be passed upon.

30 It further appears that two of the children of I. Whilden Moore, who are parties to the writ, are under the age of twenty-one years.

That it was not intended to permit an attachment against non-resident heirs and devisees where the writ would not lie in the lifetime of the debtor is suggested,

at least, in the heirs and devisees act. That act permits a suit against the heirs and devisees and makes them liable to the extent of the interest taken by the heir or devisee from the ancestor or testator and expressly provides a method of bringing them into court where they are non-resident. That method is by an order of court and publication.

It further appears that the very property attached is in the hands of the Trustee and Administrator for settlement in the Orphans' Court and it is not certain that there will be enough to pay the claims of creditors who have filed their claims under the Orphans' Court Act. The effect of the levy in this case is to tie up the estate and make the proper administration in the Orphans' Court somewhat doubtful. Plaintiff should be required to proceed to file his claim in the usual course and not be allowed to resort to attachment, as he has done. 10

For these reasons we respectfully submit that the action of the Supreme Court in quashing the writ was proper and that its judgment should be affirmed.

THOMPSON & SMATHERS, 20

Attorneys for Defendants.

at least in the latter and former cases. This was a matter
of fact against the bills and debts as well as against the
title to the extent of the interest taken by the party
debtor from the assets of the insolvent and creditor
under a finding of bankruptcy there was some authority
and under what. The result is by an order of court
and publication.

It further appears that the same property attached
to in the hands of the Insolvency and Administrator for
the estate in the Ordinance Court and it is not certain
that there will be an order to pay the claims at auction
who have filed their claims under the Ordinance Court
led. The effect of the law in this case is to require
order and make the party administrator in the Or
dinance Court responsible. Payment should be
required in respect to the balance in the insolvency and
not be allowed to resort to attachment as he has done.

For these reasons we respectfully submit that the
action of the Supreme Court in quashing the writ was
proper and that its judgment should be affirmed.

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THOMPSON & SMITH

Attorneys for Debtors

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NEW JERSEY
Court of Errors and Appeals.

ALBERT M. JORDAN,
Pl'tff and Pl'tff in Error, } Attachment.
vs. } Error to
IRENE MOORE ET AL., } Supreme
Def't and Def't in Error. } Court.

Brief of Defendant in Error.

There are two assignments of error in this cause:
First: That the debt disclosed by the affidavit of the creditor, plaintiff in error, is a personal obligation by operation of law of the defendant devisees.

Second: That the circumstances that deceased debtor was resident in this State at the time of his decease gives these defendants, his devisees, no immunity from the process of attachment in cases wherein the debtor devisees are non-residents at the time of the sealing of the writ and service thereof.

It appears that, in the early periods of the common law, the heir of a deceased person was bound, to the extent of the inheritance which descended to him, to pay such of the debts of his ancestor as the goods and chattels of the ancestor were not sufficient to satisfy.

(Williams, Real Prop. (5th Ed.) 79.)

But the spirit of feudalism, which attained to such a height in the reign of Edward I, appears to have infringed on this ancient doctrine; for it is laid down by Britton, who wrote in that reign, that no one should be held to pay the debt of his ancestor, whose heir he was, to any other person than the king, unless he were by the deed of his ancestor specially bound to do so. On this footing the law of England long continued. It allowed any person, by any deed or writing under seal (called a special contract or specialty), to bind or charge his heirs, as well as himself, with the payment of any debt, or the fulfillment of any contract; in such a case the heir was liable, on the decease of his ancestor, to pay the debt or fulfill the contract, to the value of the lands which had descended to him from the ancestor, but no further. If, however, the heir was not expressly named in such bond or contract, he was under no liability. When the power of the testamentary alienation was granted, a debtor, who had thus bound his heirs, became enabled to defeat his creditor, by devising his estate by his will to some person other than his heir; and in this case neither heir nor devisee was under any liability to the creditor.

(*Williams, supra* 80.)

It appears from the above that the liability of the devisee must rest upon statute.

On March the seventh, A. D. seventeen hundred and ninety-seven, the legislature of this State passed "An Act for the Relief of Creditors against Heirs and Devisees," which has remained in force without change or amendment until the present day. (*Gen. Statutes, 1679.*)

In an opinion by Beasley, C. J., in *New Jersey Insurance Company v. Meeker*, 37 N. J. L. 382—1875, there is a dictum, which is not alone, that under this act the debt is personal to the devisee. But the law is not to be built up from dicta.

The form for an execution against heirs, referred to in *St. Mary's Church v. Wallace*, 10 N. J. L. 317, re-

quires a levy to be made "on the lands of the ancestor" in the hands of his heirs. In the same case, same page, the court said: "Therefore it is said, in Boc. Ab., title Heir, letter G, that they are sued *as if it* was their own debt; not that it *is* their debt or contract, or that they are at all liable otherwise, than in respect of the lands descended to them from the ancestor. It is, therefore, no personal contract, nor anything more than a *lien* on lands descended to them from an ancestor for his debt."

It is to be noted that section two of our act uses the exact phrase, "as if the same were his, her or their own proper debt."

In the case of *Muldoon v. Moore*, 55 N. J. L. 410—1893, it was held that under the same act a creditor of a deceased debtor may recover in an action against his heir or devisee either—

(1) If defendant pleads properly, a special judgment requiring the debt to be made only out of lands descended or devised, and which have not been *bona fide* aliened before the commencement of the action; or

(2) If defendant fails to plead, or pleads falsely or improperly, a general judgment as if for the debt of defendant; or

(3) If it is made to appear in a manner prescribed that such lands have been so aliened before action brought, a like general judgment, but only for the value of the lands.

It is suggested that, under the act, the mere devise does not make a debt of the devisor a personal debt of the devisee. Because title has passed to the devisee, he is a necessary party to a suit to reach the specific property, but the judgment against him is not personal unless he has failed to plead properly or has aliened the property devised before suit brought. His own act of alienating makes the claim, which before that time was against a particular piece of property, a personal debt which can be enforced by a personal judgment and execution generally.

The judgments permitted by the act have been enforced by the processes of execution in use at the time of its passage. *Muldon v. Moore*, 55 N. J. L., 410—1893.

A proceeding to recover a debt by attaching the property of the debtor was no part of the common law. It had its origin in the custom of London, and was adopted and modified by statute. Being a statutory proceeding in derogation of the common law, we must resort to the statute itself to ascertain its nature and effect. *Goldmark v. Magnolia Company*, 65 N. J. L., 343—1900.

In New York, it was held, in a case which arose at an early period, that the statute of that State respecting absent debtors did not warrant proceedings against heirs, executors, trustees or others claiming merely by right of representation. Subsequently this doctrine was recognized and affirmed, under another statute, which the court said was much more explicit than that which was the subject of the former construction. Under this second statute an attachment might be obtained by a creditor "having a demand against the debtor personally." The same views have been expressed in Rhode Island, Connecticut, New Jersey, Pennsylvania, South Carolina, Georgia, Alabama, Louisiana and the District of Columbia.

Drake Attach. (7th Ed.) pgh. 81, citing, *inter alia*,

Peacock v. Wildes, 3 Halstead 179.

A number of early cases in this State held an attachment to be a proceeding in rem, and obviously inconsistent with our law of administration of estates.

Haight v. Bergh, 15 N. J. L., 183—1835.

Thompson v. Eastburn, 16 N. J. L., 100.

In *Hotel Registry Corporation v. Stafford*, 76 N. J. L., 528—1904, Pitney, J., at page 533, said: "The act of March the seventh, A. D. seventeen hundred and ninety-seven, 'for the relief of creditors against heirs and devisees' (Gen. Stat., p. 1679) authorized an action

to be maintained against the heirs and devisees of a deceased debtor, whether upon simple contract or specialty, and whether the heirs be mentioned therein or not." The "attachment act" of 1798 contained no express authorization of procedure against the property of absconding or non-resident heirs or devisees, and in *Peacock v. Wildes*, 3 *Holst.* 179, decided by this court in the year eighteen hundred and twenty-five, it was held that a writ of attachment could not issue against them. Thereupon, in the revision of eighteen hundred and forty-six, it was provided (*R. S.* 1847, p. 59, pgh. 44) that the writ might be issued against the heir or devisee of any deceased debtor in all cases where it might lawfully have been issued against the debtor in his lifetime. * * * The section as thus amended, with some further modifications, was carried into the revised attachment act of nineteen hundred and one, as section 5, P. L. 1901, p. 159.

It would appear clear from the above that authority for an attachment against devisees must rest on some express statute.

The only section expressly covering the point is section five of the attachment act, P. L. 1901, page 159, which enacts that attachments may issue for the debt of a deceased debtor against his devisee "in all cases in which the writ might have issued against such debtor immediately prior to his decease, and all real estate descended from or devised by him to the heir or devisee may be attached."

A non-technical reader would have no hesitation in stating the meaning of the above to be that if a situation existed which warranted an attachment, and the debtor died, the creditors' rights and remedies are to be preserved, neither lessened nor increased, against the devisees.

Let us see what authority, if any, exists for taking a forced construction. In the brief of plaintiff there appears a quotation from *Edwards v. M'Clave*, 1 *N. J. L. J.* 16. In the reported case a Circuit Court Judge,

after using the language quoted, goes on to say: "I am not able to reach the conclusion that the writ in this case was improperly issued, and even if I were, I would be compelled to deny the motion as the defendants have entered an appearance. That admits in this case the validity of the writ." The last sentence expresses the only point really decided in the case. The rest is dictum.

The learned judge in the case above creates an erroneous dictum to avoid answering a perfectly answerable objection. He says: "Under the construction contended for by defendants, the property of resident heirs of a non-resident deceased debtor would be subject to attachment." Admitted. But, why should the property which was liable to attachment when in the hands of the deceased, be held to be freed from liability to that particular remedy by his death coupled with the circumstances that his heirs or devisees are resident? Why should the rights and remedies of the creditors be held to be affected by acts of others and circumstances beyond his control? If the deceased, at the moment immediately preceding his death, was guilty of fraud warranting an attachment, or was absconding, why should death be permitted to purge him and deprive the creditor of his remedy? Is it any answer to say that he has another? Why should he not be allowed to retain, if he so desires, that particular one?

The same judge repeated the same dictum in another dictum in *Goldmark v. Magnolia Metal Company*, 65 N. J. L. 341—1900. This last case was not against an heir or a devisee, but against a foreign corporation.

Both dicta were erroneous. The wording of the act then was "The writ of attachment may be issued against the heirs or devisees of any deceased debtor, in all cases in which the writ might lawfully have been issued against such debtor in his lifetime."

The natural meaning is: "in all cases in which" an attachment "might lawfully have been issued against" a "debtor in his lifetime" the same remedy shall be pre-

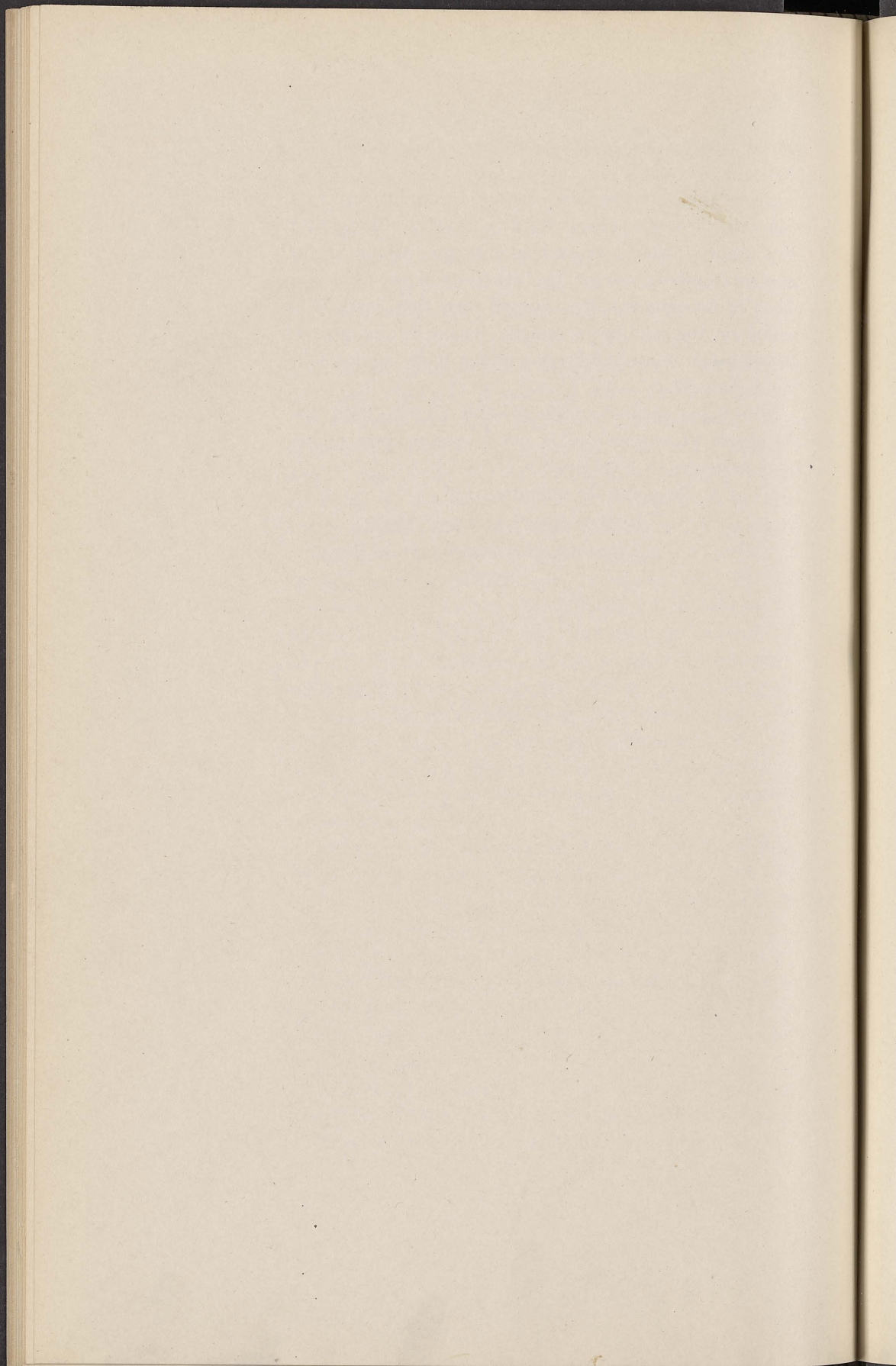
served after his death and "may be issued against" his "heirs or devisees."

Under this interpretation we are forced neither to a view which would permit death to deprive the creditor of a remedy which existed against the debtor at the moment thereof; nor on the other hand are we compelled to take the equally unsound view that death is to confer on the creditor a remedy which he did not, at the moment immediately preceding, have against the debtor himself.

Does it not seem the most sensible view to hold that the object of section five is not to create, but to preserve remedies in statu quo?

Respectfully submitted,

THOMPSON & SMATHERS,
Attorneys for Defendant in Error.



NEW JERSEY
Court of Errors and Appeals.

Supplement to Case No. 32.

NOVEMBER TERM.

NEW JERSEY, ss.—The State of New Jersey to the
[SEAL.] Justices of our Supreme Court, Greeting:

Because in the record and proceedings, and also in giving judgment upon a certain writ of certiorari and return which was in our said Supreme Court, before you between Albert M. Jordan, plaintiff, and Irene Moore, defendant, in a plea of attachment, manifest error hath intervened, to the great damage of said Albert M. Jordan as it is said.

We being willing, in this behalf, to correct the error in due manner, if any there shall be, and that speedy justice be done to him, said Albert M. Jordan, command you that if judgment be thereon given, then you distinctly and openly send, under your seal, the record and proceedings aforesaid, with all things touching the same, to our Court of Errors and Appeals in the last resort in all causes to be holden at Capitol, Trenton, on the eighteenth day of March next, and this writ, that the records and proceedings aforesaid being inspected, we may further cause to be done thereupon, for correcting that error, what of right and according to the laws and customs of New Jersey ought to be done.

Witness, Hon. Mahlon Pitney, Chancellor at Trenton, this second day of March, A. D., 1911.

S. D. DICKINSON,
Clerk.

JOHN J. CRANDALL, *Attorney.*

The answer of the Justices of the Supreme Court of the State of New Jersey within named. The record and proceedings whereof mention is within made, with all things touching and concerning the same, we do certify to the Court of Errors and Appeals of said State, in a certain schedule to this writ annexed, as within we are commanded.

WM. S. GUMMERE, *C. J.* (SEAL)

N. B.—Writ of Attachment (page 6, of Case), Rule to show cause why attachment should not be set aside (p. 10), Judgment (p. 19).

J. J. CRANDALL,
For Plaintiff.

South

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