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Notice of Appeal.

New Jersey Supreme Court.

Filed December 12, 1916.

LIMPERT BROS. INC., *Prosecutor-Appellant, vs.* R. M. FRENCH & SON AND THE SMALL CAUSE COURT IN THE COUNTY OF UNION, HOLDEN BY EDWIN R. COLLINS, ESQUIRE, JUSTICE OF THE PEACE, *Respondents-Appellees.*	*On Certiorari.* *In Attachment.* *Notice of Appeal.*

To A. C. Nash,

Attorney for Respondents.

Take notice that the prosecutor appeals to the Court of Errors and Appeals in the last resort in all causes in New Jersey from the whole of the judgment entered in this cause.

E. A. MERRILL,
Attorney of Appellant.

JAMES O. CLARK,
Of Counsel.

Westfield, N. J., Dec. 12, 1916.

SUPREME COURT OF NEW JERSEY.

LIMPERT BROS. INC., *Prosecutor-Appellant, vs.* R. M. FRENCH & SON AND THE SMALL CAUSE COURT IN THE COUNTY OF UNION, HOLDEN BY EDWIN R. COLLINS, ESQUIRE, JUSTICE OF THE PEACE, *Respondents-Appellees.*	*On Certiorari.* *In Attachment.* *Notice of Appeal.*

Due service of the within Notice of Appeal hereby acknowledged.

AUGUSTUS C. NASH,
Attorney for Respondents.

December 12th, 1916.
Filed December 12, 1916.

WM. C. GEBHARDT,
Clerk.

E. A. MERRILL,
Attorney at Law,
Westfield, N. J.

Grounds of Appeal.

New Jersey Court of Errors and Appeals

Filed January 10, 1917.

LIMPERT BROS. INC., *Prosecutor-Appellant, vs.* R. M. FRENCH & SON AND THE SMALL CAUSE COURT IN THE COUNTY OF UNION, HOLDEN BY EDWIN R. COLLINS, ESQUIRE, JUSTICE OF THE PEACE, *Respondents-Appellees.*	*On Certiorari.* *In Attachment.* *Grounds of Appeal.*

The appellant states the following grounds of appeal:

1. If a Court has jurisdiction over the subject matter, statutory authority giving jurisdiction over the parties is not necessary, as, in such case, it is a rule of law that jurisdiction over parties may be acquired by consent.

2. The decision seems to hold that because an interest in the *res* involved in a suit *in rem* is held by a stranger to the record, such stranger cannot intervene by motion to protect such interest from injury.

3. The prosecutor-appellant has a fundamental right, independent of statute, and independent of consent, to intervene in an illegal proceeding which inflicts an injury upon a property right of the prosecutor-appellant touching the *res* involved in such illegal proceeding.

4. The decision places a limitation upon the power of the Small Cause Court to control its own

process, which, the prosecutor-appellant contends, is not warranted in law.

5. The decision lays down a rule for the Small Cause Court, concerning conflicting rights of creditors, which is at variance with the rule laid down in other courts, and which is injurious to the interests which the prosecutor-appellant has in the *res* involved in the litigation in the Small Cause Court.

6. The decision virtually sanctions a taking of property without due process of law, in that the denial of a status in the Small Cause Court is tantamount to a refusal to hear before condemnation, to proceed upon inquiry, and to render judgment only after trial.

E. A. MERRILL,

Attorney for Limpert Bros. Inc.,
Prosecutor-Appellant.

Westfield, N. J., January 8th, 1917.

Grounds of Appeal.

Endorsed:

NEW JERSEY COURT OF ERRORS AND APPEALS.

LIMPERT BROS. INC., *Prosecutor-Appellant, vs.* R. M. FRENCH & SON, *et al, Respondents-Appellees.*	*On Certiorari. In Attachment.* *Grounds of Appeal.*

Filed January 10, 1917.

THOMAS F. MARTIN,
Clerk.

Due service of the within Grounds of Appeal, acknowledged this 8th day of January, 1917.

AUGUSTUS C. NASH,
Attorney for R. M. French & Son, Respondents-Appellees.

Writ of Certiorari.

NEW JERSEY SUPREME COURT.

Filed October 16, 1915.

LIMPERT BROS. INC., *Prosecutor,* *vs.* R. M. FRENCH & SON AND THE SMALL CAUSE COURT IN THE COUNTY OF UNION, HOLDEN BY EDWIN R. COLLINS, ESQUIRE, JUSTICE OF THE PEACE, *Respondents.*	*Writ of Certiorari.*

The State of New Jersey to R. M. French & Son and the Small Cause (SEAL) Court in the County of Union holden by Edwin R. Collins, Esquire, Justice of the Peace, GREETING:

We being willing, for certain reasons, to be certified of the judgment, order and proceedings given or made in the Small Cause Court, in the County of Union, holden before you, Edwin R. Collins, Justice of the Peace, in a certain action in attachment brought by the said R. M. French & Son against "Clay and Tokis, partners trading and doing business as Diana," and in the proceedings upon a motion made on behalf of the said Limpert Bros., Inc., to quash the writ of attachment issued in the said action, in which it appears that judgment on the motion was rendered against the said Limpert Bros. Inc., on the eighth day of October, 1915;

We do command that the judgment, order, and all proceedings in the aforesaid action brought in the Small Cause Court holden before you, the said

Edwin R. Collins against the said "Clay and Tokis, partners trading and doing business as Diana," by the said R. M. French & Son, and on motion of the said Limpert Bros., Inc., appertaining thereto, together with all papers and things touching and concerning the same, as fully and entirely before you they remain, to our Justices of our Supreme Court of Judicature at Trenton, on October 16, 1915, you certify and send, together with this writ, that therein may be done what of right and according to the laws of this State should be done.

Witness, William S. Gummere, Esquire, Chief Justice of our Supreme Court at Trenton, this 13th day of October, 1915.

WM. C. GEBHARDT,
Clerk.

E. A. MERRILL,
Attorney for Prosecutor.

I do hereby send to the New Jersey Supreme Court the present judgment and proceedings as within I am commanded, as by the transcript under my hand and seal, hereto certified and annexed more fully appears.

(SEAL) EDWIN R. COLLINS,
Justice of the Peace.

Writ of Certiorari.

Endorsed:

NEW JERSEY SUPREME COURT.

LIMPERT BROS. INC.,
Prosecutor,
vs.
R. M. FRENCH & SON AND THE SMALL CAUSE COURT IN UNION COUNTY,
Respondents.

In Attachment.

Writ of *Certiorari.*

Issued October , 1915.
Returnable October , 1915.

E. A. MERRILL,
Attorney for Prosecutor,
121 Prospect St.,
Westfield, N. J.

This Writ is allowed. Let it be sealed October 11, 1915, on terms that cause be argued before one Justice on five days' notice.

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

Let the writ be made returnable October 16th, 1915.

C. W. P.

Due service of the within writ is hereby acknowledged.

AUGUSTUS C. NASH,
Attorney for
R. M. FRENCH & SON, *Respondent.*

Received October 14, 1915. 10.20 A. M.

EDWIN R. COLLINS,
Justice of the Peace.

Allocatur.

This Writ is allowed. Let it be sealed October 11, 1915, on terms that cause be argued before one Justice on five days' notice.

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

Let the writ be made returnable October 16th, 1915.

C. W. P.

Admission of Service.

Due service of the within writ is hereby acknowledged.

AUGUSTUS C. NASH,
Attorney for
R. M. FRENCH & SON, *Respondent.*

Received October 14, 1915. 10.20 A. M.

EDWIN R. COLLINS,
Justice of the Peace.

Stipulation.

NEW JERSEY SUPREME COURT.

LIMPERT BROS. INC., *Prosecutor,* *vs.* R. M. FRENCH & SON AND THE SMALL CAUSE COURT IN THE COUNTY OF UNION, HOLDEN BY EDWIN R. COLLINS, ESQUIRE, JUSTICE OF THE PEACE, *Respondents.*	*On Certiorari.* *Stipulations.*

It is hereby stipulated and agreed that the argument in the above cause shall be had at Trenton, before three judges, on Wednesday, November 3rd, 1915, in accordance with the suggestion made by Justice Parker.

E. A. MERRILL,
Attorney for Limpert Bros. Inc.

AUGUSTUS C. NASH,
Attorney for R. M. French & Son.

October 21st, 1915.

Affidavit to Secure Attachment.

Filed September 20, 1915.

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

R. Warren French, one of the partners of the firm of R. M. French & Son, of the Town of Westfield, in the County of Union, being duly sworn according to law upon his oath, saith: That Clay and Tokis, partners, trading and doing business as Diana, is indebted to him upon contract in the sum of *sixty-six, fifty cents dollars,* as nearly as he can ascertain, and he verily believes that the said Clay & Tokis absconds from their creditors; and that they *is* not, to the knowledge and belief of the said R. Warren French, resident in this State at this time.

R. WARREN FRENCH.

Sworn and subscribed before me,
this twentieth day of September, 1915.

EDWIN R. COLLINS,
Justice of the Peace.

Endorsement.

Endorsed:

COURT FOR THE TRIAL OF SMALL CAUSES.

Before

EDWIN R. COLLINS, ESQ.,

Justice of the Peace.

Westfield, N. J.

R. M. FRENCH & SON, *Partners,*

vs.

CLAY & TOKIS, *Partners.*

On Contract.

Plaintiff's Affidavit in Attachment.

Filed September 20, 1915. 3.40 P. M.

EDWIN R. COLLINS,

Justice.

Writ of Attachment.

Filed September 20, 1915.

THE SMALL CAUSE COURT.

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

(SEAL) The State of New Jersey, To any Constable of the County of Union, You are hereby commanded to attach the goods and chattels, moneys, rights and credits of Clay & Tokis, partners, trading and doing business as Diana in the County of Union, to the value of eighty dollars, in whose hands soever found, to answer the demand of R. M. French & Son, partners, in an action on contract, and make return of such attachment to me, immediately after the same, that such further proceedings may be had as law and justice may require.

Witness my hand and seal this twentieth day of September, 1915.

EDWIN R. COLLINS,
Justice of the Peace.

Endorsement.

Endorsed:

THE SMALL CAUSE COURT.

Before

EDWIN R. COLLINS, ESQ.,

Justice of the Peace,

Westfield, N. J.

R. M. FRENCH & SON, *Partners,*

vs.

CLAY & TOKIS, partners trading and doing business as DIANA.

In Attachment.

Writ of Attachment.

Issued September 20, 1915.

For Amount of..... $80.00
Costs of Writ and Service..... 1.35

Filed September 20, 1915.

EDWIN R. COLLINS,

Justice of the Peace.

Return to Writ of Attachment.

Filed September 20, 1915.

By virtue of the within writ, I did on the twentieth day of September, in the presence of John Goltra, a credible person, attach the property of and estate of the defendant in the annexed inventory mentioned and described.

Witness my hand, this twentieth day of September, A. D. 1915.

WM. H. STITT.

Levy Schedule.

R. M. French & Son.

Westfield, New Jersey, September 20, 1915.

Levy made, Five fifteen (5.15) P. M.

1 awning and fixtures	$15.00
36 chairs	36.00
9 tables	18.00
12 stools	8.00
Linoleum on floor	80.00
1 show case and contents	30.00
1 soda fountain marble	1,000.00
Electric fan	5.00
Back bar and mirrors and glassware on same	50.00
3 dozen glass holdres	6.00
Contents of 2 show windows	10.00
1 small enameled table	1.00
7 gas fixtures	25.00
4 shelves and contents	2.00
2 cash registers	200.00
1 counter scale	2.00
2 dozen frappe cups, silver	3.00

4 dozen glass frappe cups		$2.00
All soda glasses		3.00
1 charging machine	Cellar	50.00
1 candy table and slab	Cellar	10.00
1 stove	Cellar	3.00
1 long table	Cellar	2.00
1 ice chopper	Cellar	25.00
1 ice box	Cellar	2.00
11 ice cream freezers and cases		3.00
2 shades and fixtures		10.00

BACK ROOM.

1 barrel glasses	$5.00
1 platform scales	5.00
1 table	.50
4 chairs	.40
1 step ladder	.10
1 lot of empty boxes	.25
1 cross cut saw	.25
2 large copper boilers	2.00
1 meat chopper	.50
2 large ice choppers	.50
8 boxes of straws	.25
1 box of twine	.15
1 copper gallon measure	.25
1 marble slab	.25
1 lot of ribbon	.25
22 large boxes of small boxes	1.50
2 small glass slabs	.25
1 lot of tin ware	1.00
1 peanut roaster	1.00
2 large knives	.25
1 barrel of gluecose	8.00
30 lbs. of candy	5.00
1 box of shelled English walnuts	2.00
1 gallon of slab oil	.50
1 half jar raspberry	.25

Levy Schedule.

1 part can of gelatine		$ .25
10 cans crushed pineapple		1.00
25 lb. case powered cocoa		2.50
½ box shelled peanuts		.50
1 ½ gallon vanilla extract		1.00
15 gallons *malassas*		3.00
2 bags of salt	Cellar	1.00
2 charging tanks	Cellar	10.00
½ jar strawberry flavoring		.25
1 box of raisins		1.00
½ box of almonds		1.00
1 box of dates		2.00
¼ cocoanut		1.00
1 box of sugar color		.50
15 lbs. candy		1.50
20 large jars fruit syrup		4.00
17 small bottles grape juice		1.70
7 large bottles grape juice		.70

and contents of entire store not enumerated.

JOHN GOLTRA,
Freeholder.

WM. H. STITT,
Constable.

State of Demand.

Filed October 8, 1915.

SMALL CAUSE COURT.

Before

EDWIN R. COLINS, ESQ.,

Justice of the Peace.

ROBERT M. FRENCH and R. WARREN FRENCH, partners, trading and doing business under the firm name and style of R. M. FRENCH & SON,

Plaintiffs,

vs.

CLAY and TOKIS, partners trading and doing business under the firm name and style of the DIANA,

Defendants.

In Attachment.

State of Demand.

The plaintiff demands of the defendants the sum of $100 on contract on a book account of which the following is a true copy:

Aug. 23.	59 yds. Granite linoleum @ $1.00.	$59.00
	Furnishing 2 green store shades and fixtures	7.50
		$66.50

Judgment will be claimed for the sum of $66.50 together with the lawful interest and costs of suit.

AUGUSTUS C. NASH,

Attorney of Plaintiffs.

Endorsement.

Endorsed:

SMALL CAUSE COURT.

Before

EDWIN R. COLLINS, ESQ.,

Justice of the Peace.

ROBERT M. FRENCH and R. WARREN FRENCH, partners, trading and doing business under the firm name and style of R. M. FRENCH & SON,

Plaintiff,

vs.

CLAY and TOKIS, partners, trading and doing business under the firm name and style of the DIANA,

Defendants.

In Attachment.

State of Demand.

AUGUSTUS C. NASH,

Attorney of Plaintiff,

9 Elm Street,

Westfield, N. J.

Filed October 8, 1915.

EDWIN R. COLLINS,

Justice of the Peace.

Affidavit of Interest of Limpert Bros., Inc.

Filed October 8, 1915.

IN THE SMALL CAUSE COURT.

R. M. FRENCH & SON, *vs.* CLAY and TOKIS, trading as DIANA.	*In Attachment.*

Affidavit of interest on behalf of Limpert Bros., Inc.

Earle A. Merrill, being duly sworn, deposes and says: that he is attorney for Limpert Bros., Inc., an attaching creditor of Charles Clay, Thomas Takis and Harry Rally, trading as "Diana Sweets"; that property attached by and under the writ issued to said Limpert Bros., Inc., is also attached by and under a writ issued September 20th, 1915, out of the Small Cause Court, in the County of Union, by Judge Edwin R. Collins, Justice of the Peace; that the writ issued to the said R. M. French & Son is issued against property of "Clay and Tokis, Trading as Diana"; that the levy under the writ so issued to the said R. M. French & Son is prior to the levy made under the writ issued to the said Limpert Bros., Inc.

Wherefore in view of the premises, the said Limpert Bros., Inc., have such interest in the said attachment by the said R. M. French & Son as entitle the said Limpert Bros., Inc., to intervene in the said attachment proceedings.

EARLE A. MERRILL,

Sworn and subscribed before me
this 6th day of October, 1915.
(SEAL) SALTER S. CLARK, JR.,
Notary Public.

Endorsement.

Endorsed:

IN THE SMALL CAUSE COURT.

R. M. FRENCH & SON,
vs.
CLAY *and* TOKIS, trading as
DIANA.

In Attachment.

Affidavit of Interest on behalf of Limpert Bros., Inc.

E. A. MERRILL,
Attorney,
121 Prospect St.,
Westfield, N. J.

Filed October 8, 1915.

EDWIN R. COLLINS.
Justice of the Peace.

Reasons for Motion to Quash Attachment.

Filed October 8, 1915.

IN THE SMALL CAUSE COURT.

R. M. FRENCH & SON, *vs.* CLAY and TOKIS, trading as DIANA.	*In Attachment.*

The motion to quash the writ issued in the above entitled cause is made for the following reasons:

First. Because the Christian names of the defendants are not set forth in the affidavit, or in the Writ of Attachment, as required by law.

Second. Because the correct trade name, under which the owners of the property attached, or attempted to be attached, were doing business, is not set forth in the affidavit, or in the Writ of Attachment.

Third. Because the names of all the individuals owning the property attached, or attempted to be attached, and trading under a fictitious name, are not set forth in the affidavit, or in the Writ of Attachment.

Fourth. Because the property attached, or attempted to be attached, under the said writ, is attached under a writ of attachment subsequently issued out of the Union County Circuit Court against Charles Clay, Thomas Takis, and Harry Rally, trading as "Diana Sweets," at the instance of the said Limpert Bros., Inc., whose rights will be prejudiced if the said writ issued to the said R. M. French & Son be not set aside and for nothing holden.

E. A. MERRILL,
Attorney for
LIMPERT BROS., INC.

Westfield, N. J.
October 7, 1915.

Endorsement.

Endorsed:

IN THE SMALL CAUSE COURT.

R. M. FRENCH & SON,
vs.
CLAY and TOKIS, trading as DIANA.

In Attachment.

Reasons for Motion to Quash Attachments.

E. A. MERRILL,
Attorney,
121 Prospect St.,
Westfield, N. J.

Filed October 8, 1915.

E. R. COLLINS,
Justice of the Peace

Certificate of True Name.

Filed in this Cause on behalf of Limpert Bros., October 8, 1915.

This is to certify, that we, Charles Clay, Thomas Takis, and Harry Rally, all of Westfield, Union County, New Jersey, are the persons about to engage in the Candy, Ice Cream and Confectionary business at 140 East Broad Street, Westfield, Union County, New Jersey, and said business is to be conducted or transacted under the name of "DIANA SWEETS" and the true or real full names of the persons conducting or transacting or about to conduct or transact said Candy, Ice Cream and Confectionery business, with his or their post office address, are or is:

Charles Clay, Westfield, Union County, New Jersey.

Thomas Takis, Westfield, Union County, New Jersey.

Harry Rally, Westfield, Union County, New Jersey.

Signed this twenty-sixth day of August, nineteen hundred and fifteeen.

CHAS. CLAY, Westfield, N. J.
THOMAS TAKIS, Westfield, N. J.
HARRY RALLY, Westfield, N. J.

Signed in the presence of:

L. E. HART. (Rev. 10c. stamp.)

Certificate of True Name.

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

Charles Clay, Thomas Takis and Harry Rally being duly sworn deposes and says, that they are the persons who are about to carry on or transact a candy, ice cream and confectionery business at 140 East Broad street, Westfield, New Jersey under the name of "Diana Sweets" and who signed the above certificate, and that the matters stated therein are true.

CHAS. CLAY,
THOMAS TAKIS,
HARRY RALLY.

Sworn to before me this 26th
day of August, 1915.
L. E. HART,
Master in Chancery of New Jersey.
(SEAL.)

Endorsed:

No. 888.

"DIANA SWEETS."

Names and post office address of the person's about to do business under said name of "Diana Sweets" at Westfield, New Jersey.

Filed September 8, 1915.

L. E. HART,
Attorney and Counselor at Law,
Westfield, N. J.

Certificate of True Name.

STATE OF NEW JERSEY,
COUNTY OF UNION. } *ss.*

I, James C. Calvert, Clerk of the County of Union, do hereby certify the foregoing to be a true and correct copy of a certain certificate of True Name No. 888, as the same remains on file in my office, under date of September 8, 1915.

In witness whereof, I have hereunto set my hand and affixed the seal of said county, this fourth day of October, A. D., 1915.

JAMES C. CALVERT,
Clerk.

(SEAL.)

(10c. rev. stamp—cancelled.)

Endorsed:

Certificate of True Name.

CHARLES CLAY
THOMAS TAKIS
HARRY RALLY.

Trading as "Diana Sweets."

In Attachment.

Filed in the cause of

R. M. FRENCH & SON,
vs.
CLAY & TAKIS.

EDWIN R. COLLINS,
Justice of the Peace.

E. A. MERRILL,
Attorney at Law,
Westfield, N. J.

Docket Entries.

THE SMALL CAUSE COURT.

Union County.

Before Edwin R. Collins, Justice of the Peace.

Transcript of Docket.

ROBERT M. FRENCH *and* R. WARREN FRENCH, doing business as R. M. FRENCH & SON, partners, *vs.* CLAY & TOKIS, partners doing business as Diana.	*In Attachment. Demand $66.50.*

September 20, 1915.

R. Warren French having made and filed with me an affidavit setting fourth that Clay and Tokis, partners doing business as Diana, is indebted to R. M. French & Son, partners in the sum of sixty-six dollars and fifty cents, and that the said Clay and Tokis absconds from their creditors and are not resident in this state at this time, to the best of his knowledge and belief, affidavit approved and filed September 20, 1915.

I issued my writ of attachment under date of September 20, 1915, directed to any constable of the County of Union, directing that the goods and chattels of Clay & Tokis trading as Diana be attached to the value of eighty dollars, and to make return of such attachment immediately.

Constable William H. Stitt returned the writ of attachment endorsed as follows: "By virtue of the within writ, I did on the 20th day of Septem-

ber in the presence of John Goltra a credible person attach the property of and estate of the defendant in the annexed inventory mentioned and described. Witness my hand this 20th day of September, 1915. Wm. H. Stitt, Constable.

With inventory of goods and chattels attached, writ and inventory filed September 20, 1915.

I do set Monday, October eleventh as the date for trial of the aforesaid cause and ten o'clock a. m. as the hour.

October 5, 1915, Earl A. Merrill, attorney for Lampert Bros. Inc., a corporation, made application for a date to argue on motion to quash the writ of attachment in this cause. I set Friday, October 8, 1915, as the date and 2 p. m. as the hour for hearing on motion to quash the writ.

Earl A. Merrill, attorney for Limpert Bros., Inc., a corporation, appeared and A. W. Nash, attorney for R. M. French & Son appeared opposing the motion.

Augustus W. Nash filed the State of Demand of the plaintiffs in the action.

Earl A. Merrill filed affidavit of interest on behalf of Limpert Bros., Inc., also.

Reasons for motion to quash attachment, also Certificate of True Name, issued by James C. Calvert, County Clerk of Union County, under seal.

Mr. Merrill argued his motion setting fourth reasons in brief as follows:

One. Because the Christian names of the defendants were not set forth in the affidavit.

Second. Because the correct trade name under which the owners of the property attached, or attempted to be attached, were doing business, is not set forth in the affidavit or writ.

Third. Because all of the names of the individuals owning the property attached, or attempted

to be attached, and trading under a fictitious name are not set forth in the affidavit or writ.

Fourth. Because the property attached or attempted to be attached, under the writ is attached under a writ of attachment subsequently issued out of the Union County Circuit Court against Charles Clay, Thomas Takis and Harry Rally, trading as "Diana Sweets" at the instance of Lampert Bros., Inc., whose rights will be prejudiced if the said writ be not set aside.

Mr. Nash argued against granting the motion and produced R. Warren French, who being sworn, testified that he is the son in the firm of R. M. French & Son, partners, dealing in furniture; that he made the sale of certain linoleum to two men who he understood to say were in partnership and they told him their names were Clay and Tokis; that he gave them the goods; extended them credit and that he saw the goods so sold in the possession of the two men who told him their names were Clay and Tokis, in the store in Broad street run by them under the name of "The Diana" and that the goods sold by him to the defendants are included in the goods and chattels seized by the constable by virtue of the writ of attachment.

It appears that the names as used in the affidavit and writ, were as given to the plaintiffs at the time of the transaction and they had every reason to believe that they were proper. It is not incumbent upon a vendor at the time of an off hand sale, to search records before making the sale, to verify the statements of the vendee.

This court has no knowledge except the statements of the attorney that a writ has been issued out of the Union County Circuit Court. If a writ affecting these proceedings has been issued, superseding or affecting this jurisdiction, this court has not been officially so informed. This court can see

no reason for vacating these proceedings in the fact that the rights of another creditor might be prejudiced in the event of this action standing.

The motion is therefore denied.

October 11, 1915.

A. W. Nash, attorney for plaintiff appeared and asked for an adjournment to Thursday, October 14, at 10 a. m.

October 14, 1915, A. W. Nash appeared for the plaintiff. No appearance for the defendant.

R. Warren French duly sworn on behalf of the plaintiff produced original book of entry of the account, testified that the sum of sixty-six dollars and fifty cents is just and owning to R. M. French & Son. That no part has been paid.

I do therefore give judgment that R. M. French & Son, Robert M. French and R. Warren French, partners, recover from the said Clay & Tokis partners, trading as Diana, the sum of sixty-six and 50/100 dollars debt on contract and the sum of two dollars and eighty cents of costs taxed in judgment.

October 14, 1915.

A writ of *certiorari* out of the Supreme Court by Limpert Bros. Inc., serven on this court October 14, 1915, subsequent to the above proceedings.

I hereby certify and make statement that the foregoing is a just and true copy of my docket of the proceedings had before me in the foregoing cause.

Witness my hand and seal this fourteenth day of October, A. D. 1915.

(SEAL) EDWIN R. COLLINS,

Justice of the Peace.

Docket Entries.

THE SMALL CAUSE COURT.
UNION COUNTY.
Before
EDWIN R. COLLINS,
Justice of the Peace.

ROBERT M. FRENCH and R. WARREN FRENCH, doing business *a*-R. M. FRENCH & SON, partners, *vs.* CLAY & TOKIS, partners, doing business as Diana.	*In Attachment.*

Costs Taxed.

	Justice	Constable
Entering Suit	.20	
Plaintiff's Affidavit	.25	
Filing Affidavit	.10	
Writ and Recording Return	.35	
Filing Writ	.10	
Constable and Serving Writ		.60
Freeholder	.50	
Filing State of Demand	.10	
Hearing Cause	.20	
Swearing one Witness	.10	
Entering Judgment	.20	
Entering Particulars of cost	.15	
	$1.75	.50 .60

On Motion to Vacate.

Hearing	.75
Filing Affidavit of Interest	.10
Filing Reasons for Motion	.10

Filing County Clerk's Certificate..... .10
Swearing *i* Witness ..... .10

$1.15

On *Certiorari.*

Transcript of Docket 12 folios..... $1.80
Drawing, Signing and Sealing Return to *Certiorari* 1.00

$2.80

I hereby certify that the above are the costs taxed by me in the above cause.

Witness my hand and seal this fourteenth day of October, A. D., 1915.

EDWIN R. COLLINS,
Justice of the Peace.

(SEAL.)

Return to Writ of Certiorari.

Filed October 16, 1915.

THE SMALL CAUSE COURT.

Union County.

ROBERT M. FRENCH and R. WARREN FRENCH, doing business as R. M. FRENCH & SON, partners, *vs.* CLAY & TOKIS, partners doing business as Diana.	*In Attachment.*

Before Edwin R. Collins, Justice of the Peace.

On *certiorari.*

I do herewith transmit to the New Jersey Supreme Court, the plaintiff's affidavit, writ of attachment with schedule attached, plaintiffs' state of demand, affidavit of interest on behalf of Limpert Bros., Inc., reasons for motion to quash attachments, certificate of true name, together with the writ of *certiorari,* as therein I am commanded, as by the transcript, under my hand and seal, hereto certified, and annexed, more fully appears.

Witness my hand and seal this fourteenth day of October, A. D., 1915.

EDWIN R. COLLINS,

(SEAL.) *Justice of the Peace.*

Stipulation.

IN THE SMALL CAUSE COURT OF UNION COUNTY, HELD AT WESTFIELD.

IN THE MATTER
OF
THE ATTACHMENT CLAIMS
AGAINST CLAY AND TAKIS.

Stipulation.

Whereas several attachments have been issued against the goods and chattels of Clay & Takis, and whereas E. A. Merrill, attorney for Limpert Bros., Inc., attaching creditor, intends to move to quash one or more of said attachments within six days from date, and it appears that the same point in dispute arises in all the attachments as made, except Limpert Bros., Inc. It is stipulated and agreed that no further legal action be taken on any of the attachments so issued until the final disposition of said motion.

And it is agreed that E. A. Merrill, Atty., shall make such application to quash one of the attachments represented by A. C. Nash, for the purpose of establishing the validity of said attachments, provided the writ issued to Harry N. Taylor is set aside or is not defended if carried up on *certiorari*.

Westfield, N. J.

October 2, 1915. E. A. MERRILL,
Attorney for Limpert Bros., Inc.

LLOYD THOMPSON,
Attorney for George Cummings.

A. C. NASH,
Attorney for Welch Bros., Inc.,
John C. Tobin,
R. M. French & Son,
Jaburg Bros.

Discontinuance Suit of Harry N. Taylor.

Certified Copy of Docket.

HARRY N. TAYLOR,
Plaintiff,

vs.

CLAY & TAKIS, partners trading as Diana,
Defendants.

Attachment.

1915. COSTS.

September twenty-first instant Harry N. Taylor having filed with me an affidavit that Clay & Takos, partners trading as Diana was indebted to him in the sum of sixty-four dollars and forty-nine cents on book account and that the said Clay & Tokis, partners, was not a residence of the State of New Jersey to the knowledge and belief of the said Harry N. Taylor.

September twenty-first instant I issued a writ of attachment and gave to William H. Stitt, constable, who returned it into Justice Court with the following endorsement:

I executed the within writ the twenty-first day of September, 1915, at five o'clock in the afternoon, in the presence of Charles E. Cox a creditable person, and at the same time made a just and true inventory and appraisement with the assistance of Charles E. Cox, a discreet freeholder the levy and appraisment hereto annexed.

WM. H. STITT,
Constable.

Inventory and Appraisement.

	Awning and Fixtures	$ 15.00
	36 Chairs	36.00
	9 Tables	15.00
	12 Stools	18.00
	Linoleum on floor	80.00
	1 Show case and contents	30.00
	Soda Fountain, Marble	1,000.00
	Electric Fan	5.00
	Back Bar and Mirrors and Glassware on same	50.00
	3 Doz. Glass holders	6.00
	Contents of two windows	10.00
	Small enamel table	1.00
	7 Gas fixtures	35.00
	4 Shelves and contents	2.00
	2 Cash registers	200.00
	Counter scales	1.00
	2 Dozen Frappe Cups	3.00
	4 Dozen Frappe Cups, glass	2.00
	11 Soda Glasses	3.00
	Charging Machine	50.00
	Candy table and slab	10.00
	1 Stove	3.00
	Long Table	2.00
	Ice Chopper	25.00
	Ice Box	2.00
	11 Ice Cream Freezers and Case	3.00
	2 Bags of Salt	1.00
	2 Charging Tanks	10.00
	1 Bbl. of Glasses	5.00
	Platform Scales	5.00
	1 Table	.50
	4 Chairs	.40
	Step Ladder	.10
	Empty Boxes	.25
	Cross-Cut Saw	.25

2 Copper Boilers	$2.00
Meat Chopper	.50
2 Large Ice Choppers	.50
8 Boxes Straws	.25
Box Twine	.15
Copper Gal. Measure	.25
Marble Slab	.25
Lot of Ribbon	.25
22 Large boxes of small boxes	1.50
2 Small Glass Slabs	.25
Lot of tinware	1.00
Peanut Roaster	1.00
2 Large Knives	.25
Barrel of Molasses	3.00
50 Lbs. Candy	5.00
Box Shelled Walnuts	2.00
1 Gal. Slab Oil	.50
½ Jar Raspberry	.25
Part Can Gelatine	.25
10 Cans Pineapple	1.00
22 Lbs. Powdered Cocoa	2.50
½ Box Shelled Peanuts	.50
1½ Gal. Vanilla Extract	1.00
½ Jar Strawberry Syrup	.25
½ Box Raisins	1.00
½ Box Almonds	1.00
1 Box Dates	2.00
½ Box Cocoanut	1.00
Box Sugar Color	.50
15 Lbs. Candy	1.50
20 Jars Fruit Syrup	4.00
17 Small Bottles Grape Juice	1.70
7 Large Bottles Grape Juice	.70

And contents of entire store not enumerated.

CHARLES E. COX,
Freeholder.

WILLIAM H. STITT,
Constable.

I fixed Wednesday, the thirteenth day of October, A. D., 1915, at two o'clock in the afternoon, at 175 East Broad street (my office), for a hearing in the above cause.

W. B. TOUCEY,
Justice.

October 1st, A. D., 1915. E. A. Merrill attorney for Limpert Bros., Inc., filed with me the following notice:

Motion to Quash Writ.

IN THE SMALL CAUSE COURT.

HARRY N. TAYLOR, *vs.* CLAY and TAKIS, trading as "Diana."	*In Attachment. Notice of motion to quash writ.*

Honorable Walter B. Toucey, Justice of the Peace:

Sir: On behalf of Limpert Bros., Inc., an attaching creditor of Charles Clay, Thomas Takis and Harry Rally, trading as "Diana Sweets" I have notified Harry N. Taylor an attaching creditor of Clay and Takis trading as "Diana" that at your office at 10 A. M., October 6th, 1915, I shall argue a motion to set aside the writ issued at his instance against the said Clay and Takis, trading as Diana.

Yours truly,

E. A. MERRILL,

Attorney for Limpert Bros., Inc.

October 6th, 1915. Harry N. Taylor the attaching creditor appeared and stated he had settled the case and wished to have it discontinued, I therefore discontinued it.

W. B. TOUCEY,

Justice of the Peace.

I hereby certify and make oath that the above is a true copy of my docket.

Given under my hand and seal this sixth day of January, nineteen hundred and seventeen.

(SEAL.) W. B. TOUCEY,

Justice of the Peace.

Reasons.

Filed October 16th, 1915.

NEW JERSEY SUPREME COURT.

LIMPERT BROS. INC., *Prosecutor,* *vs.* R. M. FRENCH & SON AND THE SMALL CAUSE COURT IN THE COUNTY OF UNION, HOLDEN BY EDWIN R. COLLINS, ESQUIRE, JUSTICE OF THE PEACE, *Respondents.*	*Reasons for Application for writ of Certiorari.*

The Prosecutor asks for a Writ of *Certiorari* to review the proceedings in the case of *R. M. French & Son* vs. "*Clay and Tokis* partners trading and doing business as Diana" for the following reasons:

1st. Because the Christian names of the defendants are not set forth in the affidavit, or in the Writ of Attachment, as required by law.

See *McGrew* vs. *Steiner,* 77 N. J. L., 377 (1909).

On *certiorari* to review proceedings in District Court in Attachment.

Affidavit filed in District Court gave name "L. Williams," at page 379. "Upon the face of the affidavit in question it was apparent that no defendant was named in a legal sense, as initials cannot be used for the Christian names of parties to actions except where some statute authorizes it. * * * The failure to give the defendant's Christian name in the affidavit as originally filed was therefore a fatal defect and not amendable; and if the defendant or any other party interested and entitled to be heard had applied for such re-

lief, it would have been the duty of the District Court to quash the attachment." Cites with approval:

Elberson vs. *Richards,* 13 Vr., 69.
Dittmar Powder Co. vs. *Leon,* 13 Vr., 540.

2nd. Because the correct trade name, under which the owners of the property attached, or attempted to be attached, were doing business, is not set forth in the affidavit, or in the Writ of Attachment. Prior to the filing of the affidavit by the plaintiff R. M. French & Son the true name, and the full names of the partners, had been filed in the office of the County Clerk in accordance with the Statute. Certified copy of this "Certificate of True Name" was filed with the Small Cause Court by the prosecutor herein upon the argument to quash the Writ.

3rd. Because the names of all the individuals owning the property attached, or attempted to be attached and trading under a fictitious name, are not set forth in the affidavit, or in the writ of attachment.

The affidavit and writ set forth the surnames of two partners only; the "certificate of true name" gives the full names of three partners.

4th. Because the property attached, or attempted to be attached under the said writ, is attached under a Writ of Attachment, subsequently issued out of the Union County Circuit Court against Charles Clay, Thomas Takis and Harry Rally trading as "Diana Sweets," at the instance of the said Limpert Bros., Inc., whose rights will be prejudiced if the said writ issued to R. M. French & Son be not set aside and for nothing holden.

Respectfully submitted,

E. A. MERRILL,

Attorney for Limpert Bros. Inc.

Union County Circuit Court
Affidavit for Attachment.

UNION COUNTY CIRCUIT COURT.

LIMPERT BROS., INC., *vs.* CHARLES CLAY, THOMAS TAKIS AND HARRY RALLY, trading as "Diana Sweets."	*In Attachment.* *Affidavit.*

STATE OF NEW JERSEY, COUNTY OF UNION. } *ss.*

Earle A. Merrill being duly sworn on his oath, says that he is the Attorney for Limpert Bros., Inc., and that Charles Clay, Thomas Takis and Harry Rally, trading as "Diana Sweets" at 140 East Broad street, Westfield, Union County, New Jersey, are justly indebted to the said Limpert Bros., Inc., in the sum of $1,489.15 and that he verily believes that the said Charles Clay, Thomas Takis and Harry Rally abscond from their creditors and are not to deponent's knowledge and belief resident in this state at the present time.

The said deponent is credibly informed that the said Charles Clay is variously known as Charles Clay and Charles Calamaras and Peter Calamaras.

EARLE A. MERRILL.

Subscribed and sworn to before me this 23d day of September, 1915.

CHAS. E. ALLEN,
(SEAL.) *Notary Public.*

Union County Circuit Court
Writ of Attachment.

Endorsement:

UNION COUNTY CIRCUIT COURT.

LIMPERT BROS. INC., *vs.* CHARLES CLAY, THOMAS TAKIS AND HARRY RALLY, trading as "Diana Sweets."	*In Attachment.* *Affidavit.*

Filed Sept. 23, 1915.
2:15 P. M.

UNION COUNTY, *ss.*

The State of New Jersey, To the (SEAL.) Sheriff of the County of Union aforesaid, GREETING:

You are hereby commanded to attach the rights and credits, moneys and effect, goods and chattels, lands and tenements of Charles Clay, Thomas Takis and Harry Rally, trading as "Diana Sweets" at 140 Broad street, Westfield, Union County, N. J., wheresoever, in your county, the same may be found, so that the said Charles Clay, Thomas Takis and Harry Rally be and appear before our Circuit Court, to be holden at Elizabeth in and for the said County of Union on the 20th day of October next, to answer unto Limpert Brothers, Inc., in an action at law on contract to their damage, twenty-five hundred ($2,500) dollars as is said: And have you then there this writ.

Witness, James J. Bergen, Esquire, a Judge of our said Circuit Court, at Elizabeth aforesaid, the 23d day of September in the year one thousand nine hundred and fifteen.

JAMES C. CALVERT,
Clerk.

E. A. MERRILL,
Attorney,
Westfield, N. J.

Union County Circuit Court
Return to Writ of Attachment.

NEW JERSEY,
UNION COUNTY. } *ss.*

This is to certify that I do hereby nominate, appoint and depute Alexander D. Ayres, a citizen of said county, to be my Special Deputy Sheriff, to execute the hereunto annexed writ.

Witness my hand this 23d day of September, 1915.

GEORGE C. OTTO,
Sheriff.

By virtue of the annexed writ of attachment to me directed, I did, on the 23rd day of September A. D.,1915, at 4 o'clock P. M., of said day in the 140 Broad street, Westfield, N. J., County of Union, State of New Jersey, and in the presence of A. C. Fitch, a discreet person of said county, go upon the premises herein described, and attach for the plaintiff in said writ named, all the goods and chattels, rights and credits, moneys and effects, lands and tenements of the defendant in said writ named, viz.: at 140 Broad street, Westfield, N. J.

STORE.

One 20 ft. mirror and frame rear of fountain; 1 marble fountain complete and apparatus—motor in cellar; 14 high stools for fountain; 36 silver glass holders; 36 soda glasses; 48 small ice cream spoons (silver); 24 large ice cream spoons (silver); 2 glass spoon holders; 2 glass straw holders; 2 glass silver trimmed syrup dishes; 4 ice cream ladles; 20 ice cream dishes; 24 ice cream porcelain dishes; 21 ice cream glass dishes; 5 glass goblets; 1 syrup bottle; 2 glass decanters; 14 ice cream dishes; 12 glasses; 1 nickel shaker; 2 National cash registers; 12 iron enamel ice cream tables; 4 dozen chairs; 1 electric fan; 1—20 ft. counter and show case (mahogany); 1 mahogany partition with mirrors

and door; 1 pair scales; 3 scoops (nickel); 1 paper rack; 3 glass candy jars; 31 nickel pans, assorted sizes; 10 lbs. assorted chocolates in pans in case; 5 pounds assorted candies; 24 nickel pans; 1 lot paper bags; 81 fancy candy boxes, empty; 15—2 quart jars fruit syrup; 18 bottles grape juice; 7 cans pineapple; 3 silver glass holders; 1 piece linoleum (15 x 40); 1 spring roll awning; 4 sliding windows.

CELLAR.

Twelve ice cream cans; 4 ice cream tubs; 1 ice cream crusher and motor freezer; 8 ice cream frames galvanized iron; 1 long table; 1 table; 1 stove.

STORE ROOM IN REAR.

15—5 pound boxes candy; 2—5 pound boxes almonds; 2—5 pound boxes blue banner chocolates; 13 candy nickel rolls; 1 box candy tongs; 12 dozen packages; 40 opal ice cream dishes; 2 dozen soda glasses; 25,000 paper bags in boxes; 1 box empty candy boxes; 1 barrel thin blowed glasses; 1 barrel glucose; 2 copper kettles; 1 platform scale; 2 ice chisels; 1 bottle ginger extract 8 ounces; 1 bottle oil peppermint extract 8 ounces; 1 bottle sarsaparilla extract, 10 ounces; 1 tin box malted milk, 3 pounds; 3 silver syrup ladles; 1 gallon jar slab oil; 1 dozen ½ gallon glass jars; 1 gallon burnt sugar; 1 pair tailor shears; 1 confectionery thermometer; 1 cream beater; 5 pounds granulated gelatine; 10—½ gallon cans crushed pineapple; 1 large rolling pin; 10 pounds gelatine powder in bag; 2 ladles and scoops; 1 tin strainer; 1 candy pulling hook; 2 tin window ornaments; 1 tin cream brick mould; 6 plate glasses for window; ½ gallon imitation vanilla extract; 1 gallon vanilla extract; 1 food grinder; 1 candy mould machine; 8 quarts shelled peanuts; 6 ice cream cans; 25 pounds chocolate

powder; 1 peanut roaster; 4 rolls paper; 25 pounds shelled walnuts; 1 copper gallon measure; 15 gallons molasses; 22 packages small candy boxes; 1 bundle cord; 8 boxes straws; 1 strip ladder; 1 saw; 2 syrup bottles; 1 pellet knife, 12 inches; 1 caramel knife; 3 wooden paddles; 1 box fancy bon-bon chocolate holders; 1 lot wax paper.

GEORGE C. OTTO,
Sheriff.

By ALEXANDER D. AYRES,
Special Deputy.

Witness, A. C. Fitch.

We, George C. Otto, Sheriff, and Charles E. Allen, a discreet and impartial freeholder of said county, do hereby appraise the property described in the above inventory at the sum of eighteen hundred dollars $1,800.00/100.

GEORGE C. OTTO,
Sheriff.

CHAS. E. ALLEN,
Freeholder.

Union County Circuit Court
Return to Writ of Attachment.

Endorsement:

UNION COUNTY CIRCUIT COURT.

LIMPERT BROS., INC., *vs.* CHARLES CLAY, THOMAS TAKIS AND HARRY RALLY, trading as "Diana Sweets."	*Writ of Attachment.*

Rt'ble October 20th, 1915.

E. A. MERRILL, *Att'y,*
Westfield, N. J.
Affidavit for one thousand,
four hundred and eighty-nine
dollars and fifteen cents,
filed before issuing this writ.

JAMES C. CALVERT,
Clerk.

Executed
September 23d, 1915, at
4 o'clock P. M. Appraised at
$1800.00—full return annexed.

GEORGE C. OTTO,
Sheriff.

Sh'ff's fees $6.50.
Filed Oct. 5, 1915.
Received
Union County Sheriff's
Office, Elizabeth, N. J.
2:12 P. M.
Sept. 23, 1915.

GEORGE C. OTTO,
Sheriff.

Union County Circuit Court
Order for Auditor.

UNION COUNTY CIRCUIT COURT.

LIMPERT BROS., INC., *vs.* CHARLES CLAY, THOMAS TAKIS AND HARRY RALLY, trading as "Diana Sweets."	*In Attachment. Order for Advertising and Appointing Auditor.*

It appearing that a certain writ of attachment has been duly issued out of the Circuit Court in and for the County of Union in the above stated action directed to the sheriff of the County of Union, tested September 23rd, 1915, returnable on the 20th day of October, 1915, and that in pursuance thereof a certain attachment and levy has been made upon certain rights and credits, consisting of stock and furnishings in the confectionery store of the said defendant, Charles Clay, Thomas Takis, and Harry Rally, trading as Diana Sweets, situate in the Town of Westfield, County of Union, and State of New Jersey; and application being now made for an order of publication and the appointment of an auditor to adjust and ascertain the amount due to the plaintiff and each of the applying creditors, if any, under "An Act for the relief of creditors against absent, fraudulent and absconding debtors (Revision of 1901)"; and it appearing that the sheriff has made a return of the said writ to this Court, and no appearance having been entered in the cause by the defendant:

It is, therefore, on the 13th day of October, 1915, ordered that a notice of the issuing of the attachment be published in the manner prescribed by the statute once a week for four successive weeks in Union County Standard published at Westfield in

this State, and that a copy of said notice be mailed to the defendant at the last known address; and it is further ordered that Paul Q. Oliver, Esquire, of Westfield, Union County, New Jersey, be and is hereby appointed auditor to adjust and ascertain the amounts due to the plaintiff, and each of the applying creditors, if any.

On motion of E. A. Merrill, attorney for Limbert Bros., Inc., the plaintiff.

Let the above rule be entered on the minutes.

GEO. S. SILZER,
Judge.

STATE OF NEW JERSEY, }
COUNTY OF UNION. } *ss.*

I, James C. Calvert, Clerk of the Circuit Court in and for the County of Union, do hereby certify that the foregoing is a true and correct copy of a certain Writ of Attachment with the endorsements thereon and the inventory attached, and of the affidavit and the order for advertising and appointing auditor in the above entitled cause, as the same remain on file in my office.

In witness whereof, I have hereunto set my hand and affixed my official seal, this nineteenth day of October, A. D., 1915.

JAMES C. CALVERT,
Clerk.

(SEAL.)

Consent was thereafter given by Judge Silzer for the substitution of William Howell Orr as auditor.

UNION COUNTY CIRCUIT COURT.

Filed January 29, 1917.

LIMPERT BROS., INC., a corporation, *Plaintiff,* vs. CHARLES CLAY, THOMAS TAKIS AND HARRY RALLY, trading as Diana Sweets, *Defendants.*	*In Attachment.* *First Report of Auditor.*

I, William Howell Orr, the subscriber, auditor appointed in the above stated cause to adjust and ascertain the amounts due to the plaintiff and each of the applying creditors, do make the following report of the debts due the persons hereinafter named; the debts and interest due thereon being calculated to the 26th day of January, 1916.

To Limpert Bros., Inc., the plaintiff corporation, as proved by affidavit of John H. Limpert, secretary and treasurer of said corporation, balance due on contract $1,489.15

Interest at 6% from August 2nd, 1915, to January 26th, 1916..... 43.19

Amount adjudged to be due..... $1,532.34

And I do further certify that no other creditor has applied to me or to the Court to have his account audited before the making of this, my report.

WILLIAM HOWELL ORR,
Auditor.

Dated January 26th, 1916.

Union County Circuit Court Approval of Auditors' Report and Order for Judgment.

UNION COUNTY CIRCUIT COURT.

LIMPERT BROS., INC., a corporation, *Plaintiff,* *vs.* CHARLES CLAY, THOMAS TAKIS and HARRY RALLY trading as Diana Sweets. *Defendant.*	*In Attachment. Approval of Auditor's Report and Order by Court for Judgment.*

It appearing that William Howell Orr, the auditor appointed in the above stated cause, has made his report under his hand, dated the 26th day of January, 1916, and reports that he has adjusted and ascertained the amounts due to the plaintiff and that he finds there is due to the plaintiff, the sum of $1,532.34, and no other creditor having applied; and that such report has been on file ten days or more; and it further appearing, to the satisfaction of the Court, that the order of the Court, made on the 13th day of October last past, directing publication of notice of the attachment in certain designated newspapers of this State has been fully complied with, as by affidavit of B. M. Prugh, herewith ordered to be filed, fully appears, and no appearance having been entered to plaintiff's action, and no exceptions having been filed to said report, said report is herewith approved, and it is ordered that the said report be made absolute and do stand in all things confirmed, and that final judgment be forthwith entered for the plaintiff named in the said report against the defendant for the sum therein specified.

And I do further fix and allow the sum of fifteen dollars as compensation to the auditor for his services and also the further sum of fifteen dollars as a reasonable special fee to E. A. Merrill, the plaintiff's attorney, said allowances to be taxed in the costs and satisfied out of the defendant's estate.

GEO. S. SILZER,
Judge.

On motion of

E. A. MERRILL,
Attorney for Plaintiff.

Rule entered February 23, 1916, at 12.30 P. M.

Per Curiam.

NEW JERSEY SUPREME COURT.

Novemeber Term, 1915.

Filed July 26, 1916.

LIMPERT BROS., INC., *Prosecutors,* *vs.* R. M. FRENCH & SON, *et al,* *Respondents.*	*On Certiorari.*

Before Justices Parker, Minturn and Kalisch.

For the prosecutor, E. A. Merrill and James C. Clark.

For the respondents, A. C. Nash and W. S. Angleman.

Per Curiam:

R. Warren French, a member of the respondent firm made and filed an affidavit, on the 20th day of September, 1915, in a court for the trial of small causes, that he is a member of the firm of R. M. French & Son, and that Clay and Tokis, partners, trading and doing business as "Diana" is indebted to him upon contract in the sum of $66.50, as nearly as he can ascertain, etc.

On this affidavit the justice of the peace holding that court, issued a writ of attachment, and property of Clay and Tokis, was attached under the writ.

Subsequent to this proceeding, on the 23rd day of September, 1915, the prosecutor caused a writ of attachment to be issued, out of the Union County Circuit Court, against the same property of the de-

dendant in attachment, attached under the respondent's writ.

On the 8th day of October, 1915, the prosecutor herein and plaintiff in the attachment suit instituted in the Circuit Court, filed an affidavit in the Court for the Trial of Small Causes where the respondent's attachment suit was pending, setting out that the prosecutor had attached the same property of the defendant under a writ issued out of the Circuit Court as had been attached theretofore, by virtue of a writ of attachment issued out of the Court for the Trial of Small Causes, at the suit of the respondent, R. M. French & Son, and that the prosecutor had such interest in the prior attachment as to entitle it to intervene in that proceeding.

Upon filing the affidavit, the prosecutor moved to quash the writ of attachment issued at the instance of R. M. French & Son, the respondent, for various reasons, the soundness of which we need not consider, since we have reached the conclusion that the case must be disposed of on a fundamental ground, which is, that the prosecutor had no legal status in the Court for the Trial of Small Causes, and therefore the motion to quash the writ was properly refused.

It must be borne in mind that the Court for the Trial of Small Causes is purely statutory. It can exercise no judicial power not expressly given it. There is nothing in the act relating to the powers conferred upon the Court, or in the attachment act, which authorizes a stranger to the record in that Court, to intervene, by filing an affidavit of interest in the subject matter of the litigation.

The writ will be dismissed, with costs.

Rule for Judgment.

NEW JERSEY SUPREME COURT.

LIMPERT BROTHERS, INC., *Prosecutors,* *vs.* ROBERT M. FRENCH AND R. WARREN FRENCH, partners trading as R. M. French & Son, and the Small Cause Court in the County of Union holden by Edwin R. Collins, Esq., Justice of the Peace, *Respondents.*	*In Attachment.* *On Certiorari.* *Rule Confirming Judgment.*

The Court having inspected the transcript and proceedings of the Justice, returned with the *certiorari* in this cause, the reasons for reversing the judgment below, and heard the arguments of counsel therein, and having duly considered the same, do order that the writ of *certiorari* issued in the above entitled cause be and the same is hereby dismissed with costs.

On motion of

AUGUSTUS C. NASH,
Attorney of Respondents.

Dated November 3rd, 1916.

INDEX.

SUPPLEMENT TO MEET THE OBJECTIONS OF THE RESPONDENTS-APPELLEES TO THE STATE OF CASE.

Under date of February 6th, 1917, the following objections to the State of Case were served upon the attorney for the prosecutor-appellant by the attorney for the respondents-appellees.

Objections to State of Case.

New Jersey Court of Errors and Appeals

LIMPERT BROS., INC., *Prosecutor-Appellant,* *vs.* R. M. FRENCH & SON, *et al,* *Respondents-Appellees.*	*On Certiorari.* *In Appeal.* *Objections to State of Case.*

Take notice that the respondents-appellees object to the State of the Case as served on Monday, January 29, 1917, in the following particulars:

1. The following has been included in the State of the Case and should not have been so included:

(a) Paper entitled "Stipulation" on page 34.

(b) Papers in a suit of Harry N. Taylor *vs.* Clay & Takis in the Small Cause Court before W. B. Toucey, Justice of the Peace, on pages 35 to 39 inclusive.

(c) Papers in a suit of Limpert Bros., Inc., *vs.* Charles Clay, *et als,* in the Union County Circuit Court on pages 42 to 52, inclusive.

2. The following has not been included in the State of the Case and should be included:

(a) Petition of prosecutor-appellant for re-argument of this case in the Supreme Court.

(b) Opinion of the Supreme Court on the petition for re-argument of this case in the Supreme Court.

(c) Notice of the application of prosecutor-appellant in the Supreme Court for stay of execution pending appeal in this case.

(d) Decision of Mr. Justice Parker on the application on the prosecutor-appellant in the Supreme Court for stay of execution pending appeal in this case.

Dated February 6, 1917.

Respectfully,

AUGUSTUS C. NASH,

Attorney for Respondent-Appellees.

Reply to Objections.

Reply to Objection 1.

(a) The "Stipulation" is a part of the record, having been filed with the Supreme Court. The stipulation was also incorporated in the brief of the prosecutor in that Court.

(b) The papers in the suit of Harry N. Taylor *vs.* Clay & Takis are referred to in the stipulation, and in the brief of the prosecutor-appellant, and are a part of the condition imposed upon the prosecutor-appellant by the said stipulation.

(c) The papers in the suit of Limpert Bros., Inc., *vs.* Charles Clay, *et al,* suggest the basis of the stipulation, and of the status and interest of the prosecutor-appellant. With the exception of the auditor's report and the judgment they were annexed to the brief of the prosecutor in the Supreme Court.

Furthermore, under Rule 19 of the Rules of the Court of Errors and Appeals, the State of Case may include "documents proper to be considered in this court," and the prosecutor-appellant deems the papers in question to be such documents, for the reasons stated above.

Reply to Objection 2.

Copies of the papers mentioned in this objection are hereinbelow set forth.

With respect to (a) and (b) of this objection, however, it should be noted that the prosecutor did not petition for a re-argument, but for leave to argue a *motion* for a re-hearing.

Papers called for under Objection 2.

Petition re Motion.

NEW JERSEY SUPREME COURT.

LIMPERT BROS., INC., *Prosecutor,* *vs.* R. M. FRENCH & SON, AND THE SMALL CAUSE COURT IN THE COUNTY OF UNION, HOLDEN BY EDWIN R. COLLINS, ESQUIRE, JUSTICE OF THE PEACE, *Respondents.*	*On Certiorari.* *In Attachment.* *The Petition of the Prosecutor for Permission to Argue a Motion for a re-hearing.*

The petitioner respectfully shows that:

The above cause, submitted on briefs at the November term, 1915, was referred to Justices Parker, Minturn and Kalisch, whose decision was filed July 26th, 1916.

By this decision the writ of *certiorari* was dismissed on the ground "that the prosecutor had no legal status in the court for the trial of small causes, and therefore the motion to quash the writ was properly refused," with the further statement that "it must be borne in mind that the court for the trial of small causes is purely statutory. It can exercise no judicial power not expressly given it. There is nothing in the act relating to the powers conferred upon the court, or in the attachment act, which authorizes a stranger to the record in that court, to intervene, by filing an affidavit of interest in the subject matter of the litigation."

The prosecutor in the above entitled cause now petitions the Supreme Court that permission to move for a re-hearing be granted, to the end that

a decision may be rendered on the merits of the action, on the following grounds:

1. Neither at the hearing in the small cause court upon the motion, made by the prosecutor herein, to quash the writ issued out of that court at the instance of R. M. French & Son, nor at the hearing in this court upon the application for the writ of *certiorari,* was any question raised, or intimated, with respect to the fundamental right of intervention.

At the hearing on the application for the writ, it was suggested that the sufficiency of the *interest* of the prosecutor might be questioned. At the hearing on the motion in the small cause court no question of right to intervene, or interest, was raised, and the first intimation given the prosecutor that even the issue of *interest* would be raised was found in the brief of the respondents.

The prosecutor believes that inasmuch as this court did not raise the question of the right of intervention at the hearing, upon the application for the writ, and now raises the question of its own motion, opportunity should be given the prosecutor to argue that point.

2. The decision leaves in doubt the real basis upon which the issue of the right of intervention was decided.

Under the wording of the decision any one of at least four reasons may be adduced:

a. Because there is no statutory provision for intervention in the small cause court by any third party, under any circumstances.

b. Because there is no statutory provision for intervention by any one not a party in proceedings in the small cause court affecting the same property.

c. Because the prosecutor is merely an attaching creditor, and not a judgment creditor.

d. Because an affidavit of interest is not sufficient proof of interest to give the prosecutor standing in court, although made by an attorney, who is, because an attorney, an officer of the court.

A further hearing may so far clarify the situation as to permit a decision upon the merits; but should a re-hearing be denied, or the effect of the decision be not modified upon re-hearing, it is, nevertheless, submitted that in justice to the prosecutor the reason, or reasons, for the decision should be indicated upon the record sufficiently to enable the prosecutor to limit his arguments upon appeal to the specific reason or reasons upon which the decision is based; and this may be accomplished in the argument of a motion for a re-hearing.

Respectfully submitted,

E. A. MERRILL,
Attorney for Prosecutor.

JAMES O. CLARK,
Of Counsel.

Westfield, New Jersey
October 18th, 1916.

Petition for Re-argument.

NEW JERSEY SUPREME COURT.

November Term, 1915.

LIMPERT BROS., INC., *Prosecutor,* *vs.* R. M. FRENCH & SON, AND THE SMALL CAUSE COURT, &C., *Respondents.*	*On Certiorari and petition for re-argument.*

Per Curiam:

The *certiorari* allowed in this cause was dismissed; and counsel for prosecutors instead of taking an appeal, applies for a re-hearing, by petition.

The petition does not intimate that there is error in the decision, but states these two grounds:

First, that the question of the right of the prosecutors to intervene in an attachment brought by other parties in the small cause court, was not raised until suggested in the brief of respondents. This is an error of fact, as it was raised on the application for the writ in this cause, and by the justice that allowed the same; the allocatur being signed because he conceived that there was a fair doubt on the subject.

Second, that the *per curiam* previously filed herein does not state the ground of decision with sufficient definiteness to enable counsel "to limit their argument on appeal to the specific reason or reasons upon which the decision is based." To this, the answer is that counsel who limit their arguments in the appellate court to the reasons assigned by the court below for its decision do so at their peril, for the appellate court is not confined to such reasons, but may adopt any reason warranting affirmance of the judgment. *Specht* vs. *Central Passenger Rwy. Co.,* 76 N. J. L., 631; *Meisel* vs. *Merchants' National Bank,* 85 N. J. L., 253.

The application for re-hearing is denied.

Notice of Motion.

NEW JERSEY SUPREME COURT.

LIMPERT BROS., INC., *Prosecutor,* *vs.* R. M. FRENCH & SON, AND THE SMALL CAUSE COURT IN THE COUNTY OF UNION, HOLDEN BY EDWIN R. COLLINS, ESQUIRE, JUSTICE OF THE PEACE, *Respondents.*	*On Certiorari.* *On Appeal.* *Notice of Motion to Grant Stay of Execution.*

To A. C. Nash, Attorney for Respondent-Appellees:

Take notice that on December 23, 1916, I shall apply to Justice Parker, at the Hudson County Court House, Jersey City, N. J., for a Stay of Execution in the case of *R. M. French & Son* vs. *Clay & Tokis,* pending the judgment of the Court of Errors and Appeals upon the appeal in the case of *Limpert Bros., Inc.,* vs. *R. M. French & Son, et al,* on *certiorari.*

E. A. MERRILL,
Attorney for Limpert Bros., Inc.,
Prosecutor.

Westfield, N. J.
December 22, 1916.

On Application for Stay.

NEW JERSEY SUPREME COURT.

November Term, 1915.

LIMPERT BROS., INC., *Prosecutors,* *vs.* R. M. FRENCH & SON, *et al,* *Defendants.*	*On application for stay or supersedeas, pending appeal.*

Heard by Parker, *J.*, at Chambers.

For the prosecutors, James O. Clark.

Parker, *J.*

The application is fundamentally to preserve or revive the legal effect of a writ of *certiorari* as a stay of the proceedings brought up, after a judgment dismissing the writ, in view of an appeal from such judgment.

Prosecutors-appellants claim to have sued out a Circuit Court attachment and to have had it executed on certain chattels which had previously been attached in a justice court proceeding.

Prosecutors, claiming that the attachment in the justice court was not lawfully made, attempted to review it and to that end obtained a writ of *certiorari* removing the justices' court proceedings at the suit of another creditor into this court for review; and after consideration this court held that the prosecutors had no status to question the validity of the proceedings in the justices' court, and dismissed the writ of *certiorari.* After some interval there was an application for a re-argument which was denied; and thereupon an appeal from the judgment of dismissal was taken. The present

application is made to me at chambers in aid of the appeal and obviously for the purpose of preserving the *status quo* pending appeal and determination thereof.

I doubt the propriety of such an application to a single justice in any case, but assuming that it is proper, still think the application must be denied.

That the appeal itself does not operate as a stay was held by this court in *Lantz* vs. *Hightstown,* 46 N. J. L., 102, 104. The point was passed by the Court of Errors and Appeals in *Clark* vs. *Board of Education,* 76 N. J. Eq., 326, at p. 330.

Assuming that an appeal under the present practice, corresponding to a writ of error, removes the record to the Court of Errors and Appeals in cases of a dismissal of the *certiorari* upon final hearing (See *Woglom* vs. *Perth Amboy,* 80 N. J. L., 469), is an application for a *supersedeas* proper in order to preserve the status, and if so, to what tribunal should it be made?

In *Peoples Traction Co.* vs. *General Pass. Rwy. Co.,* first reported in 71 N. J. L., 134, such an application was made to the Supreme Court after affirmance in *certiorari;* and in the refusal of that court to award a *supersedeas* because of doubt of its jurisdiction in the premises, coupled with the impracticability of making an application to the appellate court, led Vice-Chancellor Grey to interfere by injunction. S. C. 67 N. J. Eq., 370, foot of 371 and top of p. 372.

A similar course was pursued on similar grounds in *Clark* vs. *Board of Education, supra* (see top of page 327 of 76 N. J. Eq.), but the Court of Errors and Appeals held that chancery had no jurisdiction and overruled the Peoples Traction Co. case.

It is stated in the head note, though I do not find it in the text, that an application for a stay is a mere step in procedure to be applied in the exer-

cise of an equitable discretion by the court having control of the law action and by that court only. I share in the doubt expressed by the Supreme Court in the Traction Co. case; indeed I think the record being removed into the Court of Errors, the Supreme Court is without interlocutory jurisdiction to award a *supersedeas*. Section 246 of the Practice Act and Rule 142 of this court, invoked by prosecutors, are to my mind plainly inapplicable because the conditions do not exist.

The motion is therefore denied but without prejudice to an application to the Court of Errors and Appeals on one of its conference days under the settled practice, or at any time satisfactory to that court.

New Jersey Court of Errors and Appeals

LIMPERT BROS., Inc.,
Prosecutor-Appellant,
vs.
ROBERT M. FRENCH and R. WARREN FRENCH, trading as R. M. French & Son, and the Small Cause Court in the County of Union, Holden by Edwin R. Collins, Esquire, Justice of the Peace,
Respondents-Appellees.

IN ATTACHMENT.
ON CERTIORARI.
ON APPEAL.

BRIEF OF RESPONDENTS-APPELLEES.

This is an appeal from a judgment of the Supreme Court dismissing a writ of certiorari granted to review a refusal to quash an attachment taken out before the Small Cause Court.

The reasons set forth in the prosecutor's application for the writ of certiorari, and which were the only reasons argued before the Supreme Court, involved but the one question, Was the justice correct in refusing to quash the writ of attachment upon application of the prosecutor. This question has been entirely lost sight of on this appeal, and the prosecutor-appellant has in his brief here gone into a twenty-seven page academic discussion of the Supreme Court opinion, not judgment, in the case, and discusses that opinion under six grounds of appeal, which bear about as much resemblance to the grounds on which the writ was granted and which were argued in the Supreme Court as night to day.

FACTS.

The statement of facts set forth in the prosecutor's brief is not justified by the record returned, which may be the reason why no reference is made to the pages in the State of the Case where the facts may be found.

On September 20, 1915, R. M. French & Son, respondents, filed an affidavit in the Small Cause Court to obtain a writ of attachment against Clay & Tokis, partners, trading under the name of "The Diana."

Affidavit to Secure Attachment, Case, pp. 11 & 12.

Docket Entries, Case, page 27.

The writ was granted and immediately executed and returned with levy attached.

Writ of Attachment, Case, pp. 13 and 14.

Return to Writ, Case, pages 15 to 17.

Docket Entries, Case, pages 27 and 28.

The State of Demand was Filed October 8, 1915.

State of Demand, Case, pages 18 and 19.

Docket Entries, Case, page 28.

The Court set October 11, 1915, as the date for trial.

Docket Entries, Case, page 28.

Attorney for Limpert Bros., Inc., prosecutor, applied to the Court for a date to argue a motion to quash and October 8, 1915, was set by the Court for that purpose, and the prosecutor filed an affidavit of interest.

Docket Entries, Case, page 28.

Affidavit of Interest, Case, pages 20 and 21.

At the hearing of the motion to quash, no testimony was offered by the prosecutor but a certified copy of the business name of Charles Clay, Thomas Takis, and Harry Rally, trading as Diana Sweets.

Docket Entries, Case, pages 28 to 30.

Certificate of True Name, Case, pages 24 to 26.

The respondents produced testimony that they had sold goods to two men who said that their names were Clay and Tokis and that they were doing business under the name of "The Diana."

Docket Entries, Case, page 29.

The Court denied the motion to quash.

Docket Entries, Case, pages 29 and 30.

The case was heard on October 14, 1915, and judgment rendered for respondents.

Docket Entries, Case, page 30.

The prosecutor obtained a writ of certiorari from Mr. Justice Parker on October 11, 1915, but failed to serve it on the Justice until just after the case was heard and judgment rendered.

Writ of Certiorari, Case, page 8.

Allocatur, Case, page 9.

Docket Entries, Case, page 30, lines 24 to 27.

The Supreme Court dismissed the writ of certiorari after argument.

Per Curiam, Case, pp. 53 and 54.

Rule for Judgment, Case, p. 55.

Subsequently, the prosecutor applied by petition for a re-hearing, which application was denied.

Petition for Re-Hearing, Supplemental Case, pp. 4 to 6.

Per Curiam on Petition, Supplemental Case, p. 7,

After the denial of the application for a re-hearing the prosecutor applied for a stay pending appeal, which was also denied.

Notice, Supplemental Case, p. 8.

Opinion of Parker, J., Supplemental Case, pp. 9 to 11.

It will be noted that the prosecutor having failed to prove any interest in the subject matter on his motion to quash, the justice was necessarily obliged to refuse the motion and that the prosecutor could not have any better standing in the Supreme Court than possessed before the Justice in the Small Cause Court, and can not have any better standing here than before the Justice in the Small Cause Court and in the Supreme Court.

It will further be noted that having made an application for a re-hearing without reservation of the right of appeal, and the re-hearing having been denied,

the prosecutor has no standing on this appeal.

POINTS.

1.

Right to Appeal Lost by Application for a Re-Hearing.

Having applied for a re-hearing in the Supreme Court without reserving the right of appeal, the prosecutor-appellant has no standing in this Court on appeal. The prosecutor's position is analogous to that of a party applying for a rule to show cause why a new trial should not be granted without reservation of objections. The **per curiam** opinion of the Supreme Court denying the re-hearing expressly says:

"* * * counsel for prosecutors instead of taking an appeal applies for a re-hearing."

2.

An objection not considered in the trial court nor in the Supreme Court will not be considered in the Court of Errors and Appeals.

None of the grounds for reversal presented in this Court were presented to the trial court nor on the application for the writ nor on the argument of the writ in the Supreme Court. None of the grounds for reversal will therefore be considered in this Court.

In Tappscott vs. McVey, 83 N. J. L. (54 Vr.) 747, 748, 749 (Errors and Appeals, 1914, Minturn, J.), in considering an objection raised for the first time in the Court of Errors and Appeals, Justice Minturn, in speaking for that Court, said:

"This objection does not seem to have been urged in the trial court and was not considered in the Supreme Court, and we are therefore not called upon to deal with it here."

3.

Attachments may issue against joint debtors, either by their names or the names of the partnership, or by whatsoever name they may be generally distinguished.

The Justice was correct in denying the application, advanced by the prosecutor, in that the statutes expressly provide that

"attachments may issue against the separate and joint estate and joint debtors, or any of them, either by their names or the names of the partnership, or by whatsoever name they may be generally distinguished, or against the heirs, executors, or administrators of them, or any of them; and the estate so attached, whether separate or joint, may be sold or assigned for the payment of the joint debt."

Compiled Statutes Attachment Act, Vol. 1, Section 3, Page 135.

This court has passed upon this point in the case of **Curtis vs. Hollingshead, 14 New Jersey Law (2 Gr.) 402, 406 (Supreme Court, 1834, Hornblower, C. J.)**

In that case this Court said:

"But it is often difficult, in the case of non-residents and especially of foreign partnership, to ascertain, with precision, the names and number of the individuals composing the firm. Therefore, to remove these doubts and difficulties, and to make the remedy more complete and beneficial, the legislature proceeded by the twenty-seventh section, to enact that the writ of attachment (authorized by the preceding section) may be issued against the separate or joint estate, or both, of such non-resident debtors, or partners; or against the joint or separate, property of any of them. Not only so, but it may issue against them 'by their proper name or names, or by the name or style of the partnership or by whatsoever other name, or names, such joint debtors shall be generally known and distinguished in this State,' and still further, the writ may not only so issue against such non-resident, joint, debtors, or partners of the survivors of them, but if they are dead, and their heirs, executors, or administrators, reside abroad, then against such absent, or non-resident, 'heirs, executors, or administrators or any of them;' 'and the estate so attached, whether it be separate or joint, shall be liable to be sold, or assigned, for the pay-

ment of such joint debt.' Thus the twenty-seventh section carries out and completes the remedy given by the twenty-sixth section, and removes the doubts and difficulties that might hang around a proceeding by attachment against joint debtors, or partners, under the general terms of that section.''

4.

The correct trade name is correctly set forth and is the same name under which the defendants conducted their business and solicited credit.

The only testimony before the Justice as to the names of the persons owing the plaintiffs in attachment and the name under which they were doing business showed that the writ of attachment correctly set forth the names and the trade name used by them.

Case, Page 29, lines 14-27.

There was no connection shown or attempted to be shown between the two persons running ''The Diana'' and the three persons claimed to be running ''Diana Sweets,'' nor was any connection shown between the two places.

5.

There was no proof offered before the Justice that the defendants mentioned in the Prosecutor's affidavit as to his attachment issued out of the Union County Circuit Court, as Charles Clay, Thomas Takis, and Harry Rally, trading as Diana Sweets, are the same defendants as attached by the respondents as Clay and Tokis, trading as The Diana.

The two partners doing business as The Diana are alleged in the respondents' affidavit to obtain the attachment, to have absconded. There is no claim to non-residency: and as there was no proof whatsoever offered as to their being other partners in the concern the respondent's affidavit fulfilled the requirements of the statute.

Case, page 11.

6.

The attachment act does not lay down any right

in a subsequent creditor to attack the attachment of any other creditor either as to validity or amount, but distinctly places this right in the power of the defendant or the party attached.

The attachment act says:

"In all cases of an attachment hereafter issued by the Justice of the Peace, when an affidavit shall be filed by or in behalf of the defendant, setting forth facts which would render said attachment illegal or void, it shall be the duty of said Justice, upon a motion to quash the writ of attachment, to try said facts, without requiring the defendant to file a bond according to the requisition of this act, and to give judgment on said motion."

Compiled Statutes, Attachment Act, Vol I., Section 43, page 150.

In the case of **Stewart v. Walters 38 New Jersey Law (9 Vr.) 274, 277 (Supreme Court, 1876, Scudder, J.)** the court said:

"But if this judgment is defective, it is still questionable whether the creditors under the attachment are in a position to have it set aside. It is true that creditors whose rights are affected by a confessed judgment may contest its validity, and may show that it is irregularly entered or fraudulent. **Clapp vs. Ely, 3 Dutcher 555.** This is done in cases of junior judgments, when prior judgments are claimed to be liens upon property or funds of the defendant, and endanger or defeat a recovery under the later liens. It may be affected by direct proceedings in the court when the judgment is entered; but it is doubtful whether those creditors in attachment have any standing in this court to make such motion, for the reason that they are not yet judgment creditors," citing cases.

CONTROLLING CASES.

The decision of this court in the case of **Morris vs. Quick, 45 New Jersey Law (16 Vr.) 308, 309, 310 (Supreme Court, 1883, Magie, J.)** fits this case. In that

case proceedings in attachment in a justice's court were brought up by certiorari, and the case shows that the defendant filed affidavits and moved to quash the writ, but produced no witnesses and relied on the affidavits. This court said:

> "Upon filing such affidavits a motion to quash is to be made in behalf of the defendant in attachment, and a trial of the facts—that is of the facts shown in the affidavits—is then to take place. Upon such trial, the party moving to quash must sustain the burden of proof and establish, by legal evidence, that the writ was illegal and void and ought to be quashed. In this view it is quite apparent that the proceeding is designed to test the legality of the issuing of the writ; in a summary way, by witnesses and proof, which in the higher courts, would require to be done by a rule to show cause and affidavits taken thereunder. In such case legal evidence must be produced. But the affidavits filed cannot be considered to be evidence on this trial of facts. They have been taken **Ex Parte** and without opportunity of cross-examination. They are like affidavits made to obtain a rule to show cause, which, it is well settled, cannot be used on the hearing of the rule. **Baldwin vs. Flagg, 14 Vroom 495.**"

In the case of **Bisbee vs. Bowden, 55 New Jersey Law (26 Vr.) 69-70 (Supreme Court, 1892, Magie, J.)** this court said:

> "By section 69 of the Attachment Act, provision for a similar inquiry and determination in respect to writs of attachment issued by justices of the peace has been made. In lieu of a rule to show cause the justice is required to try the facts alleged by the defendant's affidavit to render the attachment illegal or void, upon a motion to quash the writ and to give judgment upon the motion."

Judged by these two cases the prosecutor-appellant failed to substantiate the affidavit which he filed with the justice, as the only testimony he produced was a

certificate of trade name which was not shown to have any bearing or connection with the matter; and, therefore, the respondents-appellees are entitled to an affirmance of the Supreme Court judgment dismissing the writ.

The large amount of extraneous matter introduced into the State of the Case, and to which objection was made, can of course not be considered as having any bearing on the case as it comes before this Court.

Dated, March 3, 1917.

Respectfully submitted,

AUGUSTUS C. NASH,

Attorney of Respondents-Appellees.

W. S. ANGLEMAN,

Of Counsel with Respondents-Appellees.

New Jersey Court of Errors and Appeals

LIMPERT BROS., INC., *Prosecutor-Appellant,* *vs.* R. M. FRENCH & SON, AND THE SMALL CAUSE COURT IN THE COUNTY OF UNION, HOLDEN BY EDWIN R. COLLINS, ESQUIRE, JUSTICE OF THE PEACE, *Respondents-Appellees.*	*On Certiorari.* *On Appeal.*

Memorandum of Reply to Brief of Respondents—Appellees.

The brief submitted in this cause, on behalf of the respondents-appellees, fails to meet in any particular the points raised in the brief of the prosecutor-appellant, and discloses a complete misapprehension of the purpose and effect of this appeal.

This is an appeal from a judgment of the Supreme Court dismissing a writ of *certiorari,* granted to review the proceedings of a small cause court for the purpose of determining the legality or illegality of a writ of attachment issuing out of that court.

It appears, from the opinion of the Supreme Court dismissing the writ of *certiorari,* that the court did not give judgment upon, or consider the merits of, the question of the legality of the proceedings in the small cause court complained of by the prosecutor, but dismissed the writ on the "fundamental ground that the prosecutor had no legal status in the Court for the trial of small causes" (State of Case page 54, line 17 et seq.)

This decision, if correct, deprived the Supreme Court of any authority to determine the issue raised by the Prosecutor.

This appeal, therefore, is from the judgment of the Supreme Court dismissing the writ of *certiorari* for want of jurisdiction in the small cause court, and is not concerned with the legality of the proceedings in that court, inasmuch as no judgment upon those proceedings has been given or appealed. The purpose of this appeal is to obtain a reversal of the judgment of the Supreme Court, thus establishing the jurisdiction of the small cause court, so that the Supreme Court may then consider and render judgment upon the issue raised by the prosecutor in the writ of *certiorari*.

Therefore points 2 to 6, both inclusive, in the brief of the respondents-appellees, go by the board, as they are based upon the erroneous assumption that original jurisdiction to try the issue of the legality of the small cause court proceeding in attachment may be conferred upon this court by the simple expedient of interpolating the argument had in the Supreme Court upon that, as yet, undetermined issue, in the argument in this court upon the sole question decided in the Supreme Court and appealed here—the question of jurisdiction.

This leaves to be considered only Point 1, and the objection therein raised has no merit.

The reservation of a right to appeal is a portion of Rule 83 in the Practice Act of 1912, and is Supreme Court Rule 129. The rule is as follows: "Granting to a party a rule to show cause why a new trial shall not be granted shall be a bar against him to taking or prosecuting an appeal, except on points expressly reserved in said rule."

It is submitted that the term "trial" contemplates an action between parties upon an issue raised as provided

for by the Practice Act, and does not contemplate an argument in the Supreme Court upon a point of law, in which there was no "trial" in any proper sense.

But, admitting that the rule might be extended to include such a proceeding, the objection fails because the rule applies only when the rule to show cause is *granted*, and in this case the petition of the prosecutor-appellant was *denied*.

Furthermore, it is to be observed that the prosecutor-appellant petitioned the Supreme Court for leave to argue a motion for a re-hearing, and did not petition for a re-hearing (Supplement to State of Case, p. 4); and it would have been a manifest impropriety to have brought before that court, in a petition for leave to argue a motion, matters proper only to be brought up in the argument on the motion, if leave to argue were granted, and if it can be assumed, which may well be doubted, that such argument for a re-hearing on a point of law is the equivalent of a rule to show cause why a new trial should not be granted.

Respectfully submitted,

JAMES O. CLARK,

Of Counsel for Prosecutor-Appellant.

March Term, 1917.

E. A. MERRILL,

Attorney for Prosecutor-Appellant.

List of Authorities Cited in this Brief.

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Archbold's Practice, 1st Amer. Ed., Vol. 2, page 201.

Athletic Association vs. *New Brunswick,* 26 Vr., 279.

Branson vs. *Shinn,* 1 Green, 250.

Caldwell, et al, vs. *Fifield and Matthews,* 4 Zab., 150.

Clark vs. *Board of Education,* 76 Eq., 326.

Clapp vs. *Ely,* 3 Dutcher, 555.

Coleman vs. *Martin,* 6 Blatchford, 119.

Comp. Stat., Vol. 3, p. 2981, Sec. 1.

Cooley on Const. Lim., 7th Ed., p. 505.

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Deering & Co. vs. *Warren,* 44 N. W., 1068.

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Fischer vs. *Langbein,* 103 N. Y., 84.

Hess vs. *Cole,* 3 Zab., 116.

Hoyt vs. *Hoyt,* 1 Harr., 138.

Kennedy vs. *Chumar,* 2 Dutcher, 305.

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Matthews vs. *Warne,* 6 Hal., 295.

McQueen vs. *Middletown Mfg. Co.,* 16 John., 5.

McGrew vs. *Steiner,* 77 N. J. L., 377.

McLaughlin vs. *Cross,* 39 Vr., 599.

Mercantile Bank vs. *Pequonnock National Bank,* 29 Vr., 300.

Morgan vs. *Avery,* 7 Barb., 656.

National Papeterie Co. vs. *Kinsey,* 25 Vr., 29.
Obert vs. *Hammel,* 3 Harr., 73.
Reed vs. *Bainbridge,* 1 South., 351.
Russell vs. *Work,* 6 Vr., 316.
Sterling vs. *Van Cleve,* 7 Hal., 285.
Tidd's Practice, Farrand's Ed., Vol. 1, p. 435.
Waples on Attachment, 2nd Ed.
Woodward vs. *Lishman,* 80 N. J. L., 586.

New Jersey Court of Errors and Appeals

LIMPERT BROS., INC.,
Prosecutor-Appellant,
vs.
R. M. FRENCH & SON, AND THE SMALL CAUSE COURT IN THE COUNTY OF UNION, HOLDEN BY EDWIN R. COLLINS, ESQUIRE, JUSTICE OF THE PEACE,
Respondents-Appellees.

On Certiorari.
On Appeal.

Brief of Prosecutor-Appellant.

This is an appeal from a judgment of the Supreme Court, dismissing a writ of certiorari which brought up for review certain proceedings in attachment in the Small Cause Court in Union County.

STATEMENT.

R. Warren French, a member of the respondent firm, R. M. French & Son, made and filed an affidavit on the 20th day of September, 1915, in a Court for the Trial of Small Causes, that Clay and Tokis, partners, trading and doing business as "Diana," is indebted to him upon contract in the sum of $66.50 as nearly as he can ascertain, etc.

On this affidavit the justice of the peace holding that court issued its writ of attachment, and certain property was attached under the writ to answer the demand of R. M. French & Son.

Subsequent to this proceeding, and on the twenty-third day of September, 1915, the prosecutor-appellant caused a writ of attachment to be issued out of the Union Circuit Court, and the

sheriff attached the same property attached under the small cause court writ of the respondents-appellees.

The constable levying under the small cause court writ declined to deliver the property attached into the custody of the sheriff attaching under the Circuit Court writ, although an examination of the affidavit made in the small cause court proceeding, and of the writ issued thereon, showed the same to be illegal on their face.

This writ was one of several similar writs, and the attorneys for the several attaching creditors, desiring to settle the controversy over the alleged illegal writs with as little delay and expense as possible, agreed that a test case should be made of one of the writs in question; in order to carry out that agreement, they entered into a stipulation, hereinafter set forth, that the prosecutor-appellant should move, in the small cause court, the quashing of the above mentioned writ, which was selected for that purpose.

Thereupon the plaintiff in the Circuit Court proceeding applied to the small cause court where the respondents-appellees' attachment suit was pending, for leave to argue a motion to quash said illegal writ, which leave was granted, and notice of the argument of such motion was served upon the respondents-appellees.

On the 8th day of October, 1915, the prosecutor-appellant herein, being the plaintiff in the attachment suit instituted in the Circuit Court, filed an affidavit in the said court for the trial of small causes, to the effect that the prosecutor-appellant had attached the same property under a writ issued out of the Circuit Court, as had been attached theretofore, under the writ of attachment issued out of the court for the trial of small causes, and therefore had such interest in the property at-

tached as to entitle it to intervene in the small cause court proceeding, for the purpose of moving the quashing of the small cause court writ.

Upon filing the affidavit the prosecutor-appellant moved to quash the illegal writ of attachment issued at the instance of R. Warren French individually, but intended to be for the benefit of R. M. French & Son, the respondents-appellees. The respondents-appellees appeared by their attorney, and argued against the motion, which was thereupon denied by the Court without comment.

Thereafter the prosecutor-appellant sued out a writ of *certiorari*, allowed by Mr. Justice Parker, to review the proceedings had in the small cause court.

This *certiorari*, submitted on briefs at the November term, 1915, was referred to Justices Parker, Minturn and Kalisch, and their decision dismissing the writ was filed July 26th, 1916.

By their decision, the writ of *certiorari* was dismissed on the ground "that the prosecutor had no legal status in the court for the trial of small causes, and therefore the motion to quash the writ was properly refused," with the further statement that "it must be borne in mind that the court for the trial of small causes is purely statutory. It can exercise no judicial power not expressly given it. There is nothing in the act relating to the powers conferred upon the Court, or in the attachment act, which authorizes a stranger to the record in that Court, to intervene, by filing an affidavit of interest in the subject matter of the litigation."

From that decision the prosecutor-appellant now appeals.

The point of law involved in this appeal has not been heretofore directly passed upon by any of the Courts of this state.

In *Woodward* vs. *Lishman,* 80 N. J. L., 586, it was held that a Circuit Court writ of attachment does not act as a *supersedeas* to a small cause court writ of attachment against the same property, and that the party making the prior levy has the right to the possession and control of the property seized.

The substantial question now raised is this, to wit: Has a subsequent attaching creditor in the Circuit Court, to obtain its rightful possession and control of the property attached, the right to appear in a small cause court to move the quashing of a prior writ of attachment, illegally issued out of that court against the same property.

The decision of the Supreme Court is somewhat generic in character, making it necessary to so shape the Grounds of Appeal as to meet the several issues which that decision may be presumed to raise.

These issues are stated at length in the Grounds of Appeal, but may be epitomized, for the convenience of the court, as follows:

1. Statutory and acquired jurisdiction,

2. Interest of an intervenor,

3. Right of intervention,

4. Control and supervision of process,

5. Rules for determining conflicting rights of creditors,

6. Deprivation of property without due process of law,

and the Grounds of Appeal are arranged in that order.

FIRST GROUND OF APPEAL.

IF A COURT HAS JURISDICTION OVER THE SUBJECT-MATTER, STATUTORY AUTHORITY GIVING JURISDICTION OVER THE PARTIES IS NOT NECESSARY, AS, IN SUCH CASE, IT IS A RULE OF LAW THAT JURISDICTION OVER PARTIES MAY BE ACQUIRED BY CONSENT.

POINT I.

The Small Cause Court had jurisdiction over the subject-matter.

The proceeding in the small cause court to quash the illegal writ of attachment issued therefrom is, essentially, a new proceeding, and the subject-matter of such new proceeding is not the claim of either of the parties herein against the absconding debtor; nor were those claims involved in the *certiorari;* nor are they raised upon this appeal.

The subject-matter of the proceeding to quash the said writ of attachment is its illegality, and the right to the possession and control of the property attached thereunder; and the proper forum for such proceeding is the court out of which issued the writ attacked, and within the jurisdiction of which the property attached still remains.

POINT II.

The Small Cause Court had jurisdiction over the Res.

In a carefully considered opinion by Mr. Justice Trenchard it was held in *Woodward* vs. *Lishman,* 80 N. J. L., 586, at page 589, that "the Act of 1901 (The Attachment Act) not providing for a *pro rata* distribution among the attaching creditors, being silent as to the priority of writs of attach-

ment, and containing no provision for supersedeas of small court writs, we are of the opinion that such writs issued out of small cause courts, if first executed according to law, are liens upon the attached property prior to the lien of an attachment subsequently issued out of the Circuit Court." And at page 590 it was held that "where the subsequent levy is made by another officer, the possession of the first officer is not to be disturbed (4 *Cyc.*, 604). The first levy not only gives priority to lien, but it entitles the officer making the first seizure to the possession and control of the property."

Such was the common law rule. "It (the court issuing the writ of attachment) has such jurisdiction over the property as to prevent any other court's interference. Lord Ellenborough said: 'It appears to me not to be contradictory to any cases or principles of law, and to be mainly conducive to public convenience and to the prevention of fraud and vexatious delay in matters, to hold that when there are several authorities equally competent to bind the goods of a party, the first court attaching rules.' In other words, one court cannot disturb the lawful possession of another court which has had property attached."

Waples on Attachment, 2nd Ed., p. 420.

POINT III.

Jurisdiction of parties may be acquired by consent.

"Where the court has jurisdiction over the subject-matter, it (the rule that the parties cannot by consent confer jurisdiction where the law gives none) may, the parties being legally competent, be waived by express consent or stipulation, or by some act equivalent thereto."

11 *Cyc.*, 676 C.

"Consent cannot give a court jurisdiction of the subject-matter of an action, but it may of the parties."

Andrews' Stephen's Pleading, 2nd Ed., p. 179. Note 2.

POINT IV.

Consent by the parties was given.

Not only did the respondents-appellees appear generally in the small cause court and argue the motion to quash the writ—which general appearance was a consent—but prior thereto the parties executed the following stipulation and agreement, which was drawn by the attorney for the respondents-appellees.

IN THE SMALL CAUSE COURT OF UNION COUNTY, HELD AT WESTFIELD.

In THE MATTER *of* THE ATTACHMENT CLAIMS AGAINST CLAY AND TAKIS.	*Stipulation.*

Whereas several attachments have been issued against the goods and chattels of Clay and Takis, and whereas E. A. Merrill attorney for Limpert Bros., Inc., attaching creditor, intends to move to quash one or more of said attachments within six days from date, and it appears that the same point in dispute arises in all the attachments as made, except Limpert Bros., Inc. It is stipulated and agreed that no further legal action be taken on any of the attachments so issued until the final disposition of said motion.

And it is agreed that E. A. Merrill, Atty., shall make such application to quash one of the attachments represented by A. C. Nash, for the purpose of establishing the validity of such attachments, provided the writ issued to Harry N. Taylor is set aside or is not defended if carried up on *certiorari*.

Westfield, N. J., October 2, 1915.

E. A. MERRILL,
Attorney for Limpert Bros., Inc.

LLOYD THOMPSON,
Attorney for George Cummings.

A. C. NASH,
Attorney for Welch Bros., Inc.
John C. Tobin,
R. M. French & Son,
Jaburg Bros.

The above stipulation is more than a mere consent. By its terms (the suit of Harry N. Taylor having been discontinued State of Case, p. 35), the prosecutor-appellant was *required* to move the quashing of the writ in question.

SECOND GROUND OF APPEAL.

THE DECISION SEEMS TO HOLD THAT BECAUSE AN INTEREST IN THE RES INVOLVED IN A SUIT IN REM IS HELD BY A STRANGER TO THE RECORD, SUCH STRANGER CANNOT INTERVENE BY MOTION TO PROTECT SUCH INTEREST FROM INJURY.

POINT I.

Intervention to protect a right must be distinguished from intervention to be made a party.

An intervention for the purpose of being made a party to a suit is sometimes spoken of as an intervention; but such use of the term should be distinguished from its use where the purpose of the intervention is, in a direct proceeding, to have set aside the illegal act of a court, which illegal act adversely affects a property right of the intervenor, as in this case.

POINT II.

This intervention is not an interference.

This intervention is not intended to, and does not interfere with any orderly and lawful proceeding of the respondents-appellees for the satisfaction of their claim.

Nor does it interpose the claim of the prosecutor-appellant in such manner as to prejudice any law-

fully acquired rights, priorities, or liens of the respondents-appellees.

This intervention is simply an appearance in the small cause court, by a party having an interest in property seized under the illegal process of that court, for the purpose of moving said court to quash said illegal process, in order that the rights, priorities and liens of all the parties interested in the property thus seized shall have their proper and lawful sequence.

POINT III.

The Prosecutor-Appellant has an interest to protect.

"In a suit *in rem,* where the court has the jurisdiction over the *res,* and its decree affects the interests in the *res* of all persons who have any interest in the *res,* a person who has a claim or lien upon, or other interest in, the *res,* is allowed to intervene, and be heard for his own interest in the *res.* The theory of this is that the person, by his interest in the *res,* has an interest in a legal sense, in the subject-matter of the controversy."

Coleman vs. *Martin,* 6 Blatchford (U. S. Circuit Court), 119.

The writ out of the small cause court having been illegally issued, the creditor attaching under the Circuit Court writ was entitled, under the decision in *Woodward* vs. *Lishman,* 80 N. J. L., 586, to "the possession and control of the property," and such right is a sufficient interest to entitle such creditor to intervene for its protection.

The stipulation, set forth above under Point IV of the First Ground of Appeal, is not only (1) an admission of interest in the prosecutor-appellant, but (2) it is a waiver of further proof of such interest, and (3) it is an estoppel which prevents the respondents-appellees from raising the question of interest, or of jurisdiction, inasmuch as the prose-

cutor appellant relied upon the stipulation. It is to be observed that, by its terms, the stipulation required the prosecutor-appellant to make the motion to quash the writ in question, and stayed all further legal action on the several attachments until the final disposition of that motion.

THIRD GROUND OF APPEAL.

THE PROSECUTOR-APPELLANT HAS A FUNDAMENTAL RIGHT, INDEPENDENT OF STATUTE, AND INDEPENDENT OF CONSENT, TO INTERVENE IN AN ILLEGAL PROCEEDING WHICH INFLICTS AN INJURY UPON A PROPERTY RIGHT OF THE PROSECUTOR-APPELLANT TOUCHING THE RES INVOLVED IN SUCH ILLEGAL PROCEEDING.

POINT I.

Intervention a Right, Not a Power.

"I take it to be a clear rule, founded on the immutable principles of justice, that he whose interest is to be affected by the acts of a court, has in every such court, a just right to be heard."

Reed vs. *Bainbridge*, 4 N. J. L. (1 South.), 351, p. 354.

"Any person not originally a party to the action in attachment who claims an interest, either general or special, in the property attached, may intervene to have his rights adjudicated by the court in which the attachment suit is pending."

3 Amer. & Eng. Encyc. of Law, 2nd Ed., 214-IX.

"Creditors of the defendant who have, subsequent to the attachment, acquired liens upon the attached property, as by judgment or *attachment*, may move to dissolve the prior attachment."

3 Encyc. Pl. and Pr., 69-C.

"There are many circumstances under which the rights and interests of third persons are better protected and enforced by interpleas in an attachment suit. If one has a legal interest in defeating the claim of the attaching creditor, he may properly intervene; for instance, he may plead prescription or any other defense if the defendant is insolvent. Intervention was held the proper remedy for judgment creditors of the attachment defendant who sought relief against an attachment which they averred to be a fraud upon their rights. And on the ground that an attachment was improperly and fraudulently levied, junior attachers have been received as intervenors in the proceeding under the first attachment to have it quashed; they alleging that they have an interest thus to appear, because the first attachment, if prosecuted to judgment and execution, would leave no property of the defendant out of which the juniors could make their money."

Waples on Attachment, p. 543, sec. 798.

"In New York, prior to the enactment of the provision of the Code of Civil Procedure authorizing a subsequent attacher to move to set aside a previous attachment, that right existed as to jurisdictional defects in the prior attachment; and that provision was held not to confer any new right, but to be simply declaratory of existing law."

Drake on Attachment, 7th Ed., p. 265, sec. 275.

"As a general rule, one attaching creditor cannot intervene in the suit of another to defeat it for irregularities in the proceedings, but may for illegality or fraud."

Waples on Attachment, p. 540., sec. 792.

"The right of intervention is not affected by the existence of another remedy." 17 Amer. & Eng. Encyc. of Law, 185-2

FOURTH GROUND OF APPEAL.

THE DECISION PLACES A LIMITATION UPON THE POWER OF THE SMALL CAUSE COURT TO CONTROL ITS OWN PROCESS, WHICH, THE PROSECUTOR-APPELLANT CONTENDS, IS NOT WARRANTED IN LAW.

POINT I.

The decision places a limitation upon the power of the Small Cause Court not warranted by the statute.

The small cause court existed prior to the Revolution and was one of the "inferior" courts recognized by the Constitution, but in *Russell* vs. *Work,* 35 N. J. L. (6 Vr.), 316, in an opinion by Chief Justice Beasley, it was held that the small cause court is not an inferior court in the sense in which the term "inferior" was known to the common law; but that the court is one of limited, rather than inferior, or special jurisdiction, and therefore an attachment suit in such court cannot be collaterally attacked, but must be impeached in a direct proceeding. At page 318 the Court say: "It (the justices' or small cause court) is made by the statute a court of record. Its jurisdiction is limited to certain classes of cases, but so is the jurisdiction of most of the other State courts. It has been repeatedly adjudged by this court, that its records import absolute verity, and that they cannot be drawn in question, except in a direct proceeding for that purpose. Its process and modes of practice are founded on the models of the higher courts. That these are the characteristics of the court for the trial of small causes is manifested everywhere in our reports."

That the powers of the small cause court were not intended to be limited to such powers as are specifically set forth in the statute is proved by

the very words of the statute itself (3 Comp. Stat., 2981, sec. 1), reciting that the court shall be vested "with all such power as is usual in courts of record of this state."

While the jurisdiction exercised by a statutory court of limited jurisdiction is limited by the express terms of the statute, nevertheless, within the limits of its jurisdiction its jurisdiction is general, and it may exercise a revisory and amendatory power over its proceedings. To this effect is *Obert* vs. *Hammel,* 18 N. J. L. (3 Harr.), 73, p. 78, and *Hess* vs. *Cole,* 23 N. J. L. (3 Zab.), 116, p. 121.

Primarily, the *"legal status" of a party* to initiate, or appear in, a proceeding depends upon the jurisdiction of the court over the subject-matter of the proceeding; if the court be a statutory court, its *jurisdiction* is limited by the statute. Secondarily, the "legal status" of a party depends upon the interest of the party in the subject-matter; such interest is a question of fact to be determined upon the principles underlying the maxim—*"ubi jus ibi remedium."* But the *"judicial power" of a court* to hear a party (jurisdiction over the subject-matter and interest of the party being admitted), is inherent in the court, unless *limited* by statute.

POINT II.

It is within the power, and it is the duty, of a court to control its process.

"In New Jersey, the power and duty of the court to inquire into the misuse and abuse of this process, was declared to rest on the most ancient and established principles, and to be as applicable to writs of attachment as to any other process."

Drake on Att. 7th Ed., p. 352, sec. 402.

"The power and duty of the court to inquire into the misuse and abuse of its process, rest on the

most ancient and established principles, and are as applicable to writs of attachment as any other process."

Branson vs. *Shinn*, 13 N. J. L. (1 Gr.), 250, p. 252.

"So far as the attachment is concerned, it is process, and over its process the court has necessarily a control lest it be abused or perverted to purposes of oppression. That control is exercised according to the course and practice of the court, by special motion. It required no provision of the code to confer this power and mode of redress. They are inherent in the court, and unless taken away by statute, must of necessity be resorted to, and rendered available."

Morgan vs. *Avery*, 7 Barb., 656, p. 659.

"The control of a court over its own process is not questioned."

Clark vs. *Board of Education*, 76 Eq., 326, p. 328.

"Since a court which has authorizedly granted an attachment has the inherent power of controlling its own process, it is competent to entertain a motion to quash it."

Waples on Attachment, 2nd Ed., p. 465.

"The judge, though necessarily disinterested in the issue of the suit, may quash an attachment *without motion* when there are causes affecting his jurisdiction, as when there is no affidavit at all, or one radically, incurably, and fatally defective on its face, or like reason; or he may do so on motion by an *amicus curiae*."

Waples on Attachment, 2nd Ed., p. 469.

The failure of the small cause court to quash the illegal writ, after its attention had been called to the fatal defects in the affidavit and writ, constituted a gross misuse and abuse of its discretion and

power. That the affidavit and writ were illegal cannot be doubted, in view of the law as expounded in the opinion written by Mr. Justice Parker in the case of *McGrew* vs. *Steiner*, 77 N. J. L., 377.

POINT III.

The Supreme Court cannot be deprived of its inherent superintending authority over an inferior court.

"The power of the court to issue a supersedeas, if they adjudge the attachment to have issued improvidently, was settled in the case of *Lenox* vs. *Howland* (3 Caines, 257), on the universally conceded superintending authority which this court has ever possessed over inferior jurisdictions to restrain their proceedings when they are illegal or unwarranted; and unless it did enjoy and exercise this salutary power there would, in many cases, be a defect of justice."

McQueen vs. *The Middletown Mfg. Co.*, 16 John (N. Y.), 5, p. 7.

POINT IV.

It was incumbent upon the Small Cause Court, under the circumstances attending this case, to pass upon the merits of the question at issue, irrespective of any interest in the prosecutor-appellant.

The general appearance of the respondents-appellees, the argument of the motion, and the stipulation hereinabove set forth, were each an admission of an interest in the prosecutor-appellant, a waiver of further proof of interest, and an estoppel which effectively barred raising the question of interest as an issue.

But, irrespective of interest, the question of the legality of the writ having been stipulated by the

respondents-appellees to be argued before the small cause court, it was the duty of that court to try the issue upon its merits, and to quash the writ if, upon examination, the court should find its jurisdiction over the *res* had never attached, owing to illegality in affidavit or writ. Its failure to do so is properly subject to review in the Supreme Court on *certiorari,* under the superintending power of that court over inferior courts, to control their process and proceedings.

And we may go still further. Irrespective of any interest in, and irrespective of any appearance by, the prosecutor-appellant, the small cause court was bound, upon the appearance and argument of the respondents-appellees alone, to examine the affidavit and writ assailed; and the prosecutor-appellant, having shown in the Supreme Court an interest sufficient to entitle it to the writ of *certiorari,* that court had jurisdiction to review the said small cause court proceedings. "The allowance of the writ is an adjudication that the prosecutor is entitled to seek relief by the use of such writ, and such adjudication will not be reversed unless it clearly appears to be erroneous." *Athletic Association* vs. *New Brunswick,* 55 N. J. L. (26 Vr.), 279, p. 280.

It is not lightly to be admitted that an inferior court, in its discretion, may set at naught the superintending authority of a superior court, and may, by denying a status to an aggrieved party or by declining to examine and correct its own process, deprive that party of a remedy at law, either in a direct proceeding or by appeal.

To deny a status to a party aggrieved by the process of an inferior court to appear in that court to assert his right, is to admit that the rights of parties do not depend upon the law, but may rest in fraud or collusion, or upon the whim, caprice, or ignorance of such court.

FIFTH GROUND OF APPEAL.

The decision lays down a rule for the Small Cause Court, concerning conflicting rights of creditors, which is at variance with the rule laid down in other courts, and which is injurious to the interest which the prosecutor-appellant has in the Res involved in the litigation in the Small Cause Court.

POINT I.

The same rules should be applied in all courts to settle conflicting rights of creditors.

This decision is directly opposed to the decision in *National Papeterie Co.* vs. *Kinsey*, 54 N. J. L. (25 Vr.), 29, where the Court, in an opinion by Van Syckle, *J.*, say, page 31:

> "The claim of the attaching creditor cannot be upheld without admitting that the rights of suitors do not depend upon the conformity of their proceedings to statutory requirements and essential legal formalities, but upon the will of the debtor. Upon principle, it seems that the conflicting rights of creditors must depend upon and be settled by the law which is certain and stable, and not upon the election of the debtor, which is variable and uncertain.
>
> "The judgment creditors acquired the right of the judgment debtor in the property levied on, and had a right to rescue it for the satisfaction of their claims from anyone who could not assert a superior title in the law to it. It is not perceived how the efficacy of the proceedings under the judgments can be impaired, or how validity can be imparted to attachment proceedings unauthorized by law, by the mere volition of the debtor as against the judgment creditors.
>
> "The debtor may waive his own rights, but

he cannot surrender the rights of his judgment creditor. The right of a subsequent judgment creditor to contest the validity of a prior judgment by confession, and show that it has been entered in violation of the statute, is established. Clapp *vs.* Ely, 3 Dutcher, 555.

"In the case cited, Chief Justice Green shows that the courts were in constant practice of examining the validity of judgments at the instance of creditors for twenty years prior to 1836, and that the contrary view which prevailed for a number of years was due to a misapprehension of what the decisions were. *If the validity of a prior judgment may be challenged at the instance of a creditor, no good reason appears why an attachment issued in contravention of the statute should be shielded from a like assault.* In either case the judgment creditor is obstructed in his effort to enforce the lien which the law gives him upon the debtor's property by a proceeding under color of, but in direct contravention of, the law of the land."

It would be a strange anomaly to hold that a Circuit Court judgment creditor may intervene to have set aside an illegal Circuit Court attachment, but that a Circuit Court attaching creditor may not intervene to have set aside an illegal small cause court attachment which stands in the way of the legal right of the attaching creditor, *as such,* to the possession and control of the attached property, merely on the ground that no statutory authority exists for intervention in the small cause court, in the face of the fact that the statute creating the small cause court gives it "all such power as is usual in courts of record," and that without statutory authority, other courts of record have constantly permitted intervention as a right.

It must also be borne in mind that the small cause court acts in a summary way, while the Circuit Court is far slower in its procedure. If a creditor attaching in the Circuit Court could not intervene in the small cause court, the property attached under the small cause court writ might be sold and the proceeds dissipated long before the Circuit Court creditor could secure his judgment.

The Court of Common Pleas is an inferior court of limited jurisdiction, but in *Caldwell, et al.* vs. *Fifield and Matthews,* 24 N. J. L. (4 Zab.), 150, three execution creditors in common pleas contested the priority of their respective writs, and no question of jurisdiction was raised.

So in the case of *Matthews* vs. *Warne,* 11 N. J. L. (6 Hal.), 295, one Matthews, an execution creditor in common pleas, obtained, in the Supreme Court, a rule to show cause why a prior execution out of that court, to another plaintiff, should not be set aside. No question was raised of the right of the plaintiff in common pleas to intervene in the suit of another in the Supreme Court.

In *Sterling* vs. *Van Cleve,* 12 N. J. L. (7 Hal.), 285, plaintiff in execution in common pleas obtained, in the Supreme Court, a rule to show cause why a prior execution out of that court should not be postponed. No question of right to intervene was raised.

POINT II.

Attaching creditors are in the same relative position as judgment creditors.

The judgment of the Court of Errors and Appeals in *Clapp* vs. *Ely,* 27 N. J. L. (3 Dutcher), 555, and the language used at pages 569, *et seq.* in commenting on, and overruling dicta in, *Evans* vs. *Adams,* 15 N. J. L. (3 Green), 373, and *Hoyt* vs. *Hoyt,* 16 N. J. L. (1 Harr.), 138, seems to definitely establish

the right of a judgment creditor to intervene in an action by another plaintiff, in another court, but against the same debtor, where his rights are prejudiced by an illegal, rather than a merely irregular, judgment; and it is submitted that one attaching creditor is in the same position with respect to another attaching creditor, where the question of the possession and control of the property attached under an illegal writ is the issue, as are two judgment creditors.

"If the validity of a prior judgment may be challenged at the instance of a creditor, no good reason appears why an attachment issued in contravention of the statute should be shielded from a like assault. In either case the judgment creditor is obstructed in his effort to enforce the lien which the law gives him upon the debtor's property by a proceeding under the color of, but in direct contravention of, the law of the land."

National Papeterie Co. vs. *Kinsey,* 54 N. J. L. (25 Vr.), 29, p. 31.

"4. *a.* General Rule—The general rule is that an application to open a judgment or decree can be made only by a party to the record who has been in some way prejudicially affected by such judgment or decree, and that a stranger to the record cannot make such an application.

"*b.* Limitation of the Rule—This rule is, however, subject to the limitation that a person not a party may apply for the opening or vacation of the judgment where his rights are injuriously affected thereby. Thus, an application to set aside a judgment by confession may be made by subsequent or junior judgment creditors of the defendant, or purchasers or mortgagees of land to which the lien of

such judgment attaches." 17 Amer. & Eng. Encyc. of Law, 2nd Ed., 839.

"It is settled in this court that a judgment creditor of a defendant in an attachment may intervene and set aside the attachment if it was improvidently issued." *Mercantile Bank* vs. *Pequonnock National Bank*, 58 N. J. L. (29 Vr.), 300.

"This court, in a very early case, set aside a judgment of its own, when shown to be voidable, on the motion of a grantee of the judgment debtor. *Reed* vs. *Bainbridge*, 1 South., 351. This principle of decision was afterward doubted when sought to be applied in favor of creditors of the judgment debtor, but later was upheld (*Clapp* vs. *Ely*, 3 Dutcher, 555, P. 569), and has recently been recognized as warranting an application by execution creditors, to set aside an attachment improvidently issued against the debtor. *National Papeterie Co.* vs. *Kinsey*, 25 Vroom, 29. The practice is quite general to afford relief against void judgments to any person interested." *McLaughlin* vs. *Cross*, 68 N. J. L. (39 Vr.), 599, page 602.

"The courts of the state, for a long period after the passage of the act, were in the constant practice of examining the validity of judgments by confession, at the instance of creditors, on the ground that the affidavit was defective, or, that the judgment was otherwise invalid. It was the familiar and unquestioned exercise of power." *Clapp* vs. *Ely*, 27 N. J. L. (3 Dutcher), 555, p. 569.

An attaching creditor, as such, has a legal right to the present possession and control of the property attached, and "is obstructed in his effort to enforce the lien which the law gives him upon the debtor's property by a proceeding under the color of, but in direct contravention of, the law of the land," if such custody and control is prevented by an illegal attachment.

POINT III.

The illegal writ of the Small Cause Court is ipso facto fraudulent and void.

The judgment in the case of *Clapp* vs. *Ely,* 27 N. J. L. (3 Dutcher), 555, at page 577, is quite as applicable to the issuing of the writ of attachment, as to the entry of judgment. The court there say:

> "It must be held * * * That the affidavit required by the statute is a prerequisite to the entry of the judgment, and essential to its validity.
>
> "That if no affidavit be made, or if the affidavit * * * in any other respect be not a substantial compliance with the requirement of the statute, the judgment is *ipso facto* fraudulent and inoperative against creditors.
>
> "The creditors whose rights are affected may contest the validity of the judgment, and to this end may show that the judgment has been entered in violation of the statute.
>
> "Upon this issue, it is immaterial whether the judgment be or be not fraudulent in fact. The simple inquiry is, do the facts exist which alone authorize the entry of the judgment. Have the requirements of the statute been substantially complied with?"

> "But this is a peculiar writ (attachment), given only by the statute; and if illegal, either in its issue or service we think it should be held for nothing."

Kennedy vs. *Chumar,* 26 N. J. L. (2 Dutcher), 305, p. 308.

> "Void process is such as the court has no power to award, or has not acquired jurisdiction to issue in the particular case, *or which does not in some material respect comply in*

form with the legal requisites of such process, or which loses its vitality in consequence of non-compliance with a condition subsequent, obedience to which is considered essential."

Fischer vs. *Langbein,* 103 N. Y., 84, p. 90.

"There is no more right to issue it (writ of attachment), without the prescribed affidavit than to issue an execution without judgment. Whatever related to the affidavit is fundamental, and is the foundation for the jurisdiction of the court in attachment proceedings. It is the affidavit which brings the power of the court into action, and it is always the defendant's right, *and it may become that of others,* to question the proper exercise of jurisdiction in the particular case through attachment, because of the want of the legal foundation for issuing the writ."

Deering & Co. vs. *Warren,* 44 N. W., 1068, p. 1069.

See also *Drake on Attachment,* 7th Ed., p. 71, sec. 87.

POINT IV.

A debtor cannot waive rights of his creditors. Therefore the failure of the debtor to act cannot prejudice the right of the creditor to move for his own protection, independently of the debtor.

"There are some distinctions, however, deserving notice between a mere irregularity, and a complete defect in the proceedings; the former may be waived by the adverse party, but not the latter."

Tidd's Practice, Farrand's Edition, Vol. 1, p. 435.

"What has here been said, however, must be understood only of proceedings which are

merely irregular; for if a proceeding be defective and void, the defect is not waived by any subsequent proceeding of the defendant."

Archbold's Practice. First Amer. Ed., Vol. 2, p.201.

SIXTH GROUND OF APPEAL.

THE DECISION VIRTUALLY SANCTIONS A TAKING OF PROPERTY WITHOUT DUE PROCESS OF LAW, IN THAT THE DENIAL OF A STATUS IN THE SMALL CAUSE COURT IS TANTAMOUNT TO A REFUSAL TO HEAR BEFORE CONDEMNATION, TO PROCEED UPON INQUIRY, AND TO RENDER JUDGMENT ONLY AFTER TRIAL.

POINT I.

The Prosecutor-Appellant has been deprived of property without due process of law.

"I take it to be a clear rule, founded on the immutable principles of justice, that he whose interest is to be affected by the acts of a court, has in every such court, a just right to be heard."

Reed vs. *Bainbridge,* 4 N. J. L. (1 South.), 351, p. 354.

Due process of law is:

"An orderly proceeding adapted to the nature of the case, in which the citizen has an opportunity to be heard, and to defend, enforce and protect his rights."

8 *Cyc.,* 1082.

"The weight of authority holds that private corporations are 'persons' within the fourteenth amendment, prohibiting the state from depriving any 'person' of property without due process of law."

8 *Cyc.,* 1085.

"The taking by a state of the private prop-

erty of one person or corporation, without the owner's consent, for the private use of another, is not due process of law, and is in violation of the fourteenth amendment of the Constitution of the United States."

8 *Cyc.,* 1127.

"The Constitutional provisions that no person shall be deprived of life, liberty or property without due process of law extend to every governmental proceeding which may interfere with personal or property rights, whether the proceedings be legislative, judicial, administrative, or executive, and relate to that class of rights the protection of which is peculiarly within the province of the judicial branch of the government."

8 *Cyc.,* 1083.

"When the government through its established agencies interferes with the title to one's property, or with his independent enjoyment of it, and its action is called in question as not in accordance with the law of the land, we are to test its validity by those principles of civil liberty and constitutional protection which have become established in our system of laws, and not generally by rules that pertain to forms of procedure merely. In judicial proceedings the law of the land requires a hearing before condemnation, and judgment before dispossession."

Cooley on Constitutional Limitations, 7th Ed., p. 505.

When a superior court, in this case the Circuit Court, by its writ of attachment adjudges that the present possession and control of property is, in the absence of prior legal liens, properly in the prosecutor-appellant, and such prosecutor-appellant finds the taking of such possession and control is

prevented only by a seizure of the property under an illegal writ out of an inferior court, and the inferior court, which issued the said illegal writ and holds the property, refuses to hear before it condemns, to proceed upon inquiry, to render judgment only after trial of the merits, and to exercise a proper and salutary control over its own process, and bars a remedy by denying that the prosecutor-appellant has any status in said court, notwithstanding the subject-matter, the *res*, and the parties are within the jurisdiction of the said court, such, the prosecutor-appellant submits, constitutes a taking of property without due process of law within the constitutional inhibition.

And the prosecutor-appellant further submits that the failure of the Supreme Court to exercise "the universally conceded superintending authority which this court has ever possessed over inferior jurisdictions to restrain their proceedings, when they are illegal or unwarranted," without which exercise of a "salutary power there would, in many cases, be a defect of justice," is itself tantamount to a deprivation of property without due process of law, and therefore without warrant in law.

Respectfully submitted,

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