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NOTICE OF APPEAL.

UNION COUNTY CIRCUIT COURT.

Filed November 6, 1919.

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

NOTICE OF APPEAL.

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

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

E. A. MERRILL,
Attorney for Appellant.

To A. C. Nash,
Attorney for Defendant.

DEMAND UPON DEFENDANT.

April 13, 1918.

Mr. William H. Stitt, Constable,
Mountain Avenue,
Westfield, N. J.

Dear Sir:—

On March 19, 1918, we purchased from William H. Orr, auditor, the goods and chattels set forth in the memorandum attached hereto and made a part hereof. The said goods and chattels were attached by the Sheriff of Union County in our suit in attachment against Charles Clay, Thomas Takis, and Harry Rally, partners, trading as "Diana Sweets", but the said Sheriff was unable to take possession of the said goods and chattels because he found them in your possession, and you refused to deliver same to him upon demand. Thereafter you refused to deliver said goods and chattels to the auditor appointed in the said cause, and the auditor was, therefore, unable to deliver the possession of said goods and chattels to us upon purchase of same from said auditor.

We hereby demand that you deliver to us forthwith the said goods and chattels.

Yours very truly,
LIMPERT BROS., INC.
BY E. A. MERRILL.

ORIGINAL SUMMONS AND COMPLAINT

Served April 17, 1918.

Filed May 1, 1918.

UNION COUNTY CIRCUIT COURT.

LIMPERT BROS., INC.,
a corporation,
Plaintiff,

vs.

WILLIAM H. STITT, Constable
Defendant.

Action at Law.

WRIT OF SUMMONS

THE STATE OF NEW JERSEY

To *William H. Stitt,* Constable:

You are summoned to answer the annexed complaint of Limpert Bros., Inc., a corporation, in an action at Law in the Union County Circuit Court, and take notice that unless you file your answer to said complaint with the clerk of the Union County Circuit Court at Elizabeth within twenty days after service upon you of this writ and the annexed complaint, the plaintiff may proceed in the suit and judgment may be entered against you.

SEAL

WITNESS, *James J. Bergen,* Judge of the Union County Circuit Court, at Elizabeth, this 17th day of April, nineteen hundred and eighteen.

E. A. MERRILL,
Attorney

WM. B. MARTIN,
Clerk.

Original Complaint.

UNION COUNTY CIRCUIT COURT.

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

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

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

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

partners, trading as "Diana," and the said William H. Stitt, constable, then refused, and continued to refuse, to deliver the said goods and chattels to said sheriff.

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

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

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

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

FIRST COUNT.

1. The said certain goods and chattels were seized

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

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

SECOND COUNT.

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

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

THIRD COUNT.

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

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

FOURTH COUNT.

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

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

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

E. A. MERRILL,
Attorney for Plaintiff.

NOTICE OF MOTION TO STRIKE OUT ORIGINAL COMPLAINT.
Served May 30, 1918.
Filed May 2, 1919.
UNION COUNTY CIRCUIT COURT.

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

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

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

2. The complaint discloses no cause of action.

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

4. The action is barred by statute.

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

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

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

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

ORDER STRIKING OUT COMPLAINT.
Filed April 30, 1919.
UNION COUNTY CIRCUIT COURT.

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

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

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

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

On motion of

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

Let the above order be entered.
Dated September , 1918.

GEO. S. SILZER,
Circuit Court Judge

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

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

WRIT OF SUMMONS.

THE STATE OF NEW JERSEY

To *William H. Stitt,* ~~Constable~~:

You are summoned to answer the annexed complaint of Limpert Bros., Inc., a corporation, in an action at Law in the Union County Circuit Court, and take notice unless you file your answer to said complaint with the clerk of the Union County Circuit Court of Elizabeth within twenty days after service upon you of this writ and the annexed complaint, the plaintiff may proceed in the suit and judgment may be entered against you.

SEAL

Witness, James J. Bergen, Judge of the Union County Circuit Court, at Elizabeth, this 17th day of April nineteen hundred and nineteen.

E. A. MERRILL,
Attorney.

WM. B. MARTIN,
Clerk.

New Complaint.

UNION COUNTY CIRCUIT COURT.

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

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

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

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

3. The said William H. Stitt, on September 23, 1915, was not, nor did he thereafter become, the owner of said goods and chattels, or any part thereof, nor did he then have or thereafter acquire any interest therein, or lien thereon.

4. On February 23, 1916, Rule for Judgment in the

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

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

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

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

E. A. MERRILL,
Attorney for Plaintiff.

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

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

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

FIRST DEFENSE.

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

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

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

4. Defendant has no knowledge as to paragraph four.

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

6. Defendant admits the demand set forth in para-

graph six, and that he refused and still refuses to comply with the same, but denies that said refusal was wrongful.

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

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

SECOND DEFENSE.

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

THIRD DEFENSE.

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

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

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

PLAINTIFF'S REPLY.

Filed June 25, 1919.

UNION COUNTY CIRCUIT COURT.

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

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

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

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

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

E. A. MERRILL,
Attorney for Plaintiff.

JUDGMENT.
Filed October 21, 1919.
UNION COUNTY CIRCUIT COURT.

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

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

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

Costs to be taxed against the plaintiff.

GEO. S. SILZER,
Judge.

Judgment entered October 21, 1919.

OBJECTION AND EXCEPTION.

Objection was made by counsel for plaintiff, and the court granted an exception.

New Jersey Court of Errors and Appeals

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

APPELLANT'S BRIEF.

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

The plaintiff-appellant, after demand and refusal, brought an action (R., p. 3), for the recovery of the value of certain goods belonging to the plaintiff, but wrongfully sold by the defendant-respondent, a constable, as the goods of another. The complaint was dismissed, but the order dismissing the complaint (R., p. 9), reserved to the plaintiff the right to file and serve a "new complaint" within twenty days for the purpose of preserving to the plaintiff its right of action, which would otherwise have been barred by the Statute of Limitations.

Thereupon the plaintiff served a summons and complaint in a new action, and the defendant, after waiting until the twenty days had expired, asked for a non-suit on the ground that the plaintiff should have served merely an *amended* complaint in the original action.

The circumstances were as follows:

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

Prior to this attachment the said goods and chattels were in the possession of one William H. Stitt, the defendant-respondent herein, a constable, who refused to deliver the goods to the sheriff when attached in the attachment suit of Limpert Bros., Inc.

On April 13, 1918, the said purchaser, Limpert Bros., Inc., demanded the said goods and chattels of the said Stitt, on the ground that the said goods and chattels belonged to it, and were wrongfully detained by said Stitt (R., p. 2).

This demand being refused, Limpert Bros., Inc., served a summons and complaint upon the said Stitt on April 17, 1918 (R., p. 3), in an action at law in the Union County Circuit Court, for the recovery of the goods or their value, and damages for their detention.

An application by the defendant to strike out the complaint (R., p. 8) was argued on June 8, 1918, and an order striking out the complaint, but reserving further time to the plaintiff, was filed in the Union County Circuit Court, April 30, 1919 (R., p. 9).

This reservation was in the following terms:

> It is ORDERED that the complaint filed herein be stricken out, with costs.
>
> And it is FURTHER ORDERED that the plaintiff have twenty days from the service of a copy of this order upon the plaintiff or its

attorney, which copy need not be certified, in which to file a new complaint and to serve a copy thereof on the defendant's attorney, and that in default of the plaintiff so doing judgment may be entered against the plaintiff and for the defendant without further notice.

On motion of

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

The appellant believed, and still believes, that under the terms of the above order its only proper course was to begin a new action. Assuming that the complaint must have been either amended or dismissed, two courses were open to the court: to order the complaint *amended,* with the penalty of dismissal unless amended within the time granted, or to *dismiss* the complaint without prejudice. The court took the latter alternative and struck out the complaint. The plaintiff was now out of court, the complaint was no longer amendable, no further proceedings in that action were authorized or valid, and the bar of the statute of limitations was interposed.

At this juncture the defendant of his own motion and as he had a right to do, *waived* the bar of the statute of limitations for a period of twenty days from the date of service of the above order.

It does not appear in the record that the order of the Circuit Court was served on the plaintiff, but the court advised the plaintiff of the order by letter dated April 10, 1919, and thereupon the plaintiff, proceeding in the only way which appeared to be open under the rules of pleading, served a "new complaint" on the defendant on April 19, 1919.

The case was set down for the October term, 1919, but upon being moved the defendant moved for a

non-suit on the ground that the plaintiff should have served and filed an *amended* complaint in the original action, and that, more than two months having elapsed after demand made, the action was barred under the following statute:

STATUTE OF LIMITATIONS.

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

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

The court granted the motion and ordered a nonsuit (R., p. 16), and this appeal is brought to reverse that judgment. The chronology is as follows:

Goods purchased by the plaintiff March 19, 1918.

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

Complaint served on defendant April 17, 1918.

Motion to strike out complaint argued June 8, 1918.

Plaintiff advised by the court by letter dated April 10, 1919, of order striking out complaint and granting twenty days further time.

New Complaint served on defendant April 19, 1919.

In effect it is the contention of the defendant that he should now be allowed to repudiate his waiver in violation of the rules of pleading, and under a forced and unnatural construction of an order entered on his own motion, in order to deprive the plaintiff of property costing over $1,300 which the defendant admits belongs to the plaintiff, notwithstanding the defendant was in nowise prejudiced by the procedure adopted, and acquiesced in it until the time granted had expired.

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

The defendant may also claim that a new defendant has been substituted, in that the defendant in the original complaint was described as "William H. Stitt, constable," while in the new complaint the defendant is simply "William H. Stitt." This contention, if made, is without merit. Chitty, in

his work on Pleading, lays down the rule, based on the English cases, that if a party sues or is sued *as* executor, *as* agent, *as* constable, then the party sues or is sued in a representative capacity; but if the designation merely indicates the party as *being* executor, agent, or constable, and it appears that the party sues or is sued in his own right, then the words are descriptive only, have no more effect than would the word "carpenter," and may be treated as surplusage.

The courts in this country appear to follow the English rule as laid down by Chitty.

In this action the defendant can be only individually liable; his tortious act, being without official authority, was of an unofficial character, and this court has said, in *Jersey City* vs. *Schoppe*, 82 N. J. L., 697, that in such case the officer guilty of a tort "is liable as an individual to the party injured."

Because the descriptive word "constable" was surplusage and tended to confuse, it was properly omitted in the new complaint.

POINT I.

THE STATUTE OF LIMITATIONS WAS WAIVED.

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

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

The order granting the plaintiff further time was on the motion of the defendant's attorney, and was a waiver of the statute. The essence and purpose of the order was the preservation of a right of action in the plaintiff, and not the service of a new

complaint in a particular form. So far as the defendant was concerned it was of absolutely no consequence in what form the new complaint was served, and it was only incumbent on the plaintiff to avoid the error complained of in the original complaint. The plaintiff having acted upon the waiver in a manner to preserve its right of action, the waiver cannot now be withdrawn and the right of action destroyed.

The order is inartificially drawn and doubtless might have been expressed in clearer terms, but its purpose to preserve to the plaintiff its right of action is beyond cavil or dispute, and any ambiguity should be resolved against the defendant who drew it. As already indicated, the plaintiff is of the opinion that after dismissal the original complaint was no longer amendable, and the defendant, having waived the statute, invited a new action.

But even if it were admitted that the order contemplated an amended complaint, and that the rules of pleading would permit an amendment without a reinstatement of the original action, nevertheless the defendant's position would still be indefensible.

POINT II.

THE DEFENDANT IS ESTOPPED TO RAISE THE STATUTE OF LIMITATIONS.

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

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

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

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

POINT III.

THE DEFENDANT HAS NOT BEEN PREJUDICED.

The original complaint contained four counts. The new complaint contains but *one count* (R., p. 11), which is the *first count* in the original complaint (R., p. 5). The issue, then, has not been changed in form or substance, and the defendant has not been prejudiced in any manner or degree. It made not the slightest difference to the defendant how the "new complaint" was served.

The plaintiff does not need to urge this point, because an amended complaint may contain matter raising a new issue, but the point serves to emphasize the defendant's untenable position.

POINT IV.

THE PLAINTIFF WAS SURPRISED.

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

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

The defendant deliberately and wilfully surprised the plaintiff by waiting until the time granted had expired before calling the plaintiff's attention to an alleged defect of which the defendant was always cognizant, and for the sole purpose of depriving the plaintiff of property which, so far as this court is concerned, the defendant admits to belong to the plaintiff.

POINT V.

THE PLAINTIFF SHOULD HAVE ITS DAY IN COURT.

The issue raised in the Circuit Court goes to the ownership of certain goods and chattels. If they are the goods and chattels of the plaintiff, and the defendant's motion admits such to be the fact in this court, the plaintiff is entitled to recover, and should not lightly be debarred of its right to its property. The plaintiff should not be deprived of its right to a day in court for the trial of its claim of ownership except upon the soundest of reasons.

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

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

It is the contention of the plaintiff that the judgment of non-suit was without warrant in law and gives the defendant an *unfair advantage.* It being, in the words of Mr. Justice Depue in writing the unanimous opinion of this court in *Walker* vs. *Hills' Executors,* 22 N. J. Eq., 513, "the province of the court to so control the conduct of a cause and regulate its practice, that no unfair advantage is taken by either side in presenting the merits of the cause for decision," the judgment should be reversed.

March Term, 1920.

Respectfully submitted,

E. A. MERRILL,

Attorney for Plaintiff-Appellant.

New Jersey Court of Errors and Appeals

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

APPELLANT'S REPLY BRIEF

The appellant replies to the respondent's brief in order to correct certain inaccurate and erroneous statements in the respondent's brief which, uncorrected, might lead to wrong inferences and conclusions.

The following references are to the respondent's brief.

Respondent's statement, page 2, line 2:

"The Small Cause Court attachment had been held good by the Supreme Court and by this Court," etc.

Appellant's comment:

The same party that is this appellant, as an attaching creditor in an action only collaterally connected with this litigation, attempted to intervene in a Small Cause Court in the attachment action of another creditor against different defendants—the same property having been levied upon in both actions. The purpose of the intervenor was to have the Small Cause Court writ quashed for errors on the face of the record. The motion was denied without reference to the merits.

On *certiorari*, and disclaiming in terms passing upon the merits, the Supreme Court affirmed the denial of the motion by the Small Cause Court on the ground that the intervenor had no legal status to intervene.

Upon appeal this Court reversed the Supreme

Court on that point, and held that there was a *right* of intervention if the intervenor proved the existence of an interest to be protected. But this Court then went back to the original proceedings and affirmed the denial of the motion on the ground that the *affidavit* of interest filed in the small cause court as proof of interest was not legal proof.

Respondent's statement, referring to the present litigation, page 3, paragraph 2.

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

(a) Stenographer's minutes of what took place at the trial.

(b) Determination of facts as found by Judge Silzer."

Appellant's comment:

There was no "trial," but merely an argument. Stenographer's minutes of the argument relative to the propriety of the judgment of non-suit are omitted on the authority of this Court in *Koch* vs. *Costello,* 108 Atl. Rep., 225.

There was no "determination of facts" other than the admission of the date of demand upon the defendant, the date when the order of the Court was brought to the attention of appellant, and the dates of service of the two complaints.

Respondent's statement, page 8, under caption, "Summary of Above:"

"There have been therefore, ten decisions against this plaintiff relative to this matter."

Appellant's comments, referring to the paragraphs on page 9:

"1. Motion in Small Cause Court to quash."

This was an action of intervention based on errors alleged to appear on the face of the record. Motion denied without reference to the merits.

"2. *Certiorari* in Supreme Court."

The judgment of the Small Cause Court was

affirmed, but on the ground of lack of jurisdiction, and disclaiming in terms passing on the merits.

"3. Appeal in Court of Errors and Appeals."

The Supreme Court was reversed on the law, but the judgment of the Small Cause Court was affirmed, on another ground not going to the merits.

"1. Motion before Small Cause Court to vacate judgment."

When the judgment of the Court of Errors and Appeals was handed down all the actions had gone to judgment, and the intervenor now moved in the Small Cause Court to set aside the judgments of the Small Cause Court for errors on the face of the record. The justice refused to entertain the motion on the ground that, after judgment, he had no further jurisdiction.

"2. Application for *certiorari.*"

"3. Rule to show cause * * * why *certiorari* should not be issued."

An application for a rule to show cause why a writ of mandamus should not issue was refused, but a rule to show cause why a writ of *certiorari* should not issue was granted. The Supreme Court, however, discharged the rule on the ground that mandamus, and not *certiorari* was the proper remedy, if any, but with the intimation that mandamus would not lie because it appeared that the justice of the peace holding the court was no longer in office.

"1. Rules to show cause * * * to obtain information."

No report and no accounting was made in the Small Cause Court of the proceedings had therein, and all information concerning the result of the sale under the Small Cause Court judgments was refused the intervenor, who thereupon secured a

rule to show cause why such information should not be furnished. The rule was discharged on the ground that an order, if proper, would be unenforcible in the absence of an actual, pending, litigation.

"Rehearing."

The application for a rehearing in *certiorari* before the Supreme Court was denied, but the fact that the judgment of that court was reversed, upon the issue raised, is evidence that the application had substantial merit.

"Stay pending appeal" denied.

The question was as to whether the application for a stay should be made to the Supreme Court, or to the Court of Errors and Appeals. Mr. Justice Parker reserved decision and wrote a carefully considered opinion holding that the application should be made to the Appellate Court.

All the prior litigation, as outlined above, has been decided upon issues going to matters of law in actions of intervention, and the fact that the intervenor in those actions happens to be the same party as the plaintiff in the present litigation cannot affect the rights of this plaintiff.

The present litigation is an action at law in trespass, with different parties, and with a wholly different cause of action. The same goods were levied upon in all the attachment actions, but the defendants in the Small Cause Court attachments are different from the defendants in the Circuit Court attachment, and this appellant, being the purchaser of the goods at the auditor's sale in the Circuit Court action claims the goods as owner. In this court ownership in the appellant is admitted.

Respectfully submitted,

E. A. MERRILL,

Attorney for Plaintiff-Appellant.

New Jersey Court of Errors and Appeals

LIMPERT BROS., INC.,
Plaintiff-Appellant,

vs.

WILLIAM H. STITT,
Defendant-Respondent.

Action at Law.
On Appeal.

BRIEF FOR RESPONDENT.

The plaintiff appeals from a non suit directed by Judge Silzer at the Union Circuit.

The controlling facts in the case are few and simple, although the tentacles are many and perhaps at first somewhat confusing.

FACTS.

Summons was issued on April 17, 1919, in a suit in the Union Circuit to recover certain goods, or their value, and damages for their detention. The goods were alleged to have been attached by the Sheriff at the suit of the plaintiff on September 23, 1915, and to have been sold by the auditor to the plaintiff on March 19,1918, but which goods, on written demand being made therefor, the defendant, who had previously seized the goods under attachments in the Small Cause Court, had refused to deliver to the Sheriff at the time of the alleged attachment on September 23, 1915, and

had also refused to deliver the goods to the plaintiff on April 13, 1918, by which time the Small Cause Court attachments had been held good by the Supreme Court and by this Court as against the attack made against them by this plaintiff, and the defendant, after the decisions by the Supreme Court and by this Court, had sold, as constable, the goods to satisfy the judgments in the attachment suits in the Small Cause Court and had distributed the money to the judgment creditors.

Case, Simmons, p. 10.
Case, Complaint, pp. 11, 12.
Case, Answer, pp. 13, 14.
Case, Demand, p. 2.

On these facts appearing, Judge Silzer, in the Union Circuit, ordered a non suit on the ground that the action was barred by the statute limiting the time for bringing actions against officers.

Case, Rule for Judgment, p. 16.

3 C. S., p. 3171, Sec. 23 (Title, Limitation of Actions) (P. L. 1896, p. 358).

The appellant endeavors to get around the statute by claiming that an order entered in a previous suit striking out the complaint in that suit entitled the appellant to bring a new action, and in order to link the two actions together the appellant has included certain of the record in the previous suit in the state of the case in this suit against objection by the respondent, who insists that only the record in the suit in which the appeal is pending is properly before this Court.

OBJECTIONS TO STATE OF CASE.

The following objections to the state of the case were served by the respondent on the appellant within five days after receipt of the state of the case by the respondent, but no notice was taken of the objections made.

NEW JERSEY COURT OF ERRORS AND APPEALS.

LIMPERT BROS., INC., Plaintiff-Appellant, vs. WILLIAM H. STITT, Defendant-Respondent.	Action at Law On Appeal. Objections to State of Case.

Take notice that the defendant-respondent objects to the State of the Case as served on February 10, 1920, 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 "Original Summons and Complaint" on page 3.

(b) Paper entitled "Original Complaint" on pages 4, 5, 6, and 7.

(c) Paper entitled "Notice of Motion to Strike Out Original Complaint" on page 8.

(d) Paper entitled "Order Striking Out Complaint" on page 9.

(e) The word "constable" in the nineteenth line on page 10.

(f) The heading "Objection and Exception" on page 16 and the two lines following, "Objection was made by counsel for plaintiff, and the court granted an exception."

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

(a) Stenographer's minutes of what took place at the trial.

(b) Determination of facts as found by Judge Silzer, who presided at the trial.

(c) Determination of matters of law as found by Judge Silzer, who presided at the trial.

3. The following papers have been wrongly entitled:

(a) The summons as a "new" summons on page 10.

(b) The complaint as a "new" complaint on pages 11 and 12.

(c) The answer as an answer to a "new" complaint on page 13.

Respectfully,

AUGUSTUS C. NASH,

Attorney for Defendant-Respondent.

Dated, February 17, 1920.

Endorsed:

Service of the within notice acknowledged February 19, 1920.

E. A. MERRILL,
Att'y for Plaintiff-Appellant.

STATUTE LIMITING TIME FOR BRINGING ACTIONS AGAINST OFFICERS.

The following is the statute limiting the time for bringing actions against officers applicable to this case.

An Act entitled: "An Act limiting the time for bringing actions against sheriffs and other offiecrs and their agents."

Actions against sheriffs or other officers to enforce claims to personal property attached, etc.—Sec. 1. In all cases where any sheriff or other officer shall attach,

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

3 C. S., p. 3171, Sec. 23 (Title, Limitations of Actions) (P. L. 1896, p. 358).

APPELLANT'S ARGUMENT.

The appellant's entire argument is based on the claim that the bringing of a new action was a compliance with the order made in the previous case allowing the plaintiff to file a new complaint in that case.

Order Striking Out Complaint, p. 9.

Plaintiff's Brief, p. 3, lines 10, etc.

That the new action, so far as the application to it of the statute limiting the time for bringing actions against officers is concerned, must be governed by the date of the issuing of the summons in that new action, that action being the one in which this appeal is pending, can not admit of argument; otherwise, the discretion of the Court would be substituted for the statute, and the Court would be exercising legislative instead of judicial functions. The moment the summons was is-

sued in this action in which the appeal is pending the status of the action as to the applicability of the statute was fixed. More than two months, the time limit fixed by the statute, having intervened between the making of the demand and the issuing of the summons, this action was barred by the statute, and the non suit was proper. Prolonged argument based on what plaintiff's counsel says he thought the law was or a discussion of his five purely moot points can not change these controlling facts or make improper a proper ruling based on these controlling facts. But a reading of the two summons and the two complaints will show that the first action was against the defendant as constable and is predicated upon his actions as constable; while the second action is against the defendant individually and seeks to hold him on his actions individually. The statute properly covers both phases.

If it were proper for the appellant to include a part of the record in the immediately preceding action in this state of the case, then the appellant should have put in the entire record of every thing in the history of this litigation. If the appellant had done so, it would be seen that this appellant is not being deprived of its money by the wiles of a wicked opposition and is not being "entrapped," as the appellant's brief puts it, and that this New York corporation appellant is not the weak little lamb being led to the slaughter that the fair words and unfair insinuations of the appellant's brief would have this Court believe.

A brief outline history of the litigation of which this case is the latest feature is annexed to this brief, by which it will be seen that there have been ten decisions against this appellant relative to the matters involved, one in this Court, five in the Supreme Court, two in the Union Circuit Court, and two in the Small Cause Court.

It is respectfully submitted that the judgment of the Union Circuit should be affirmed.

AUGUSTUS C. NASH,
Attorney and Counsel for Respondent,

W. S. ANGLEMAN,
of Counsel.

OUTLINE HISTORY OF THE LITIGATION.

The history of the litigation naturally divides itself into three parts. The following is a brief outline of it:

I.

Goods were attached in Small Cause Court on Sept. 20, 1915, this defendant as constable executing writ.

On Sept. 23, 1915, attachment by this plaintiff issued out of Union County Court and same goods were attempted to be attached.

Motion to quash Small Cause Court attachment was made by this plaintiff Oct. 8, 1915, and was denied.

Judgment rendered in Small Cause Court attachment on Oct. 14, 1915.

Small Cause Court attachment taken to Supreme Court by certiorari, which was argued at Nov. Term, 1915, and decided July 26, 1916. Certiorari was dismissed.

Application for re-hearing was made and denied.

Application for stay pending appeal was made and denied.

Appeal to Court of Errors and Appeals was taken, which was argued at March Term, 1917, and judgment of Supreme Court was sustained June 18, 1817.

II.

Motion to vacate judgment in attachment made before Small Cause Court and denied July 6, 1917.

Application to review denial made before Justice Bergen and denied July 21, 1917.

Goods were then sold under attachment judgments on Aug. 20, 1917, by this defendant as constable and proceeds applied to payment of costs and disbursements and in satisfying judgments.

Rule to Show Cause why certiorari should not be granted to review denial to vacate judgment allowed Oct. 13, 1917, and argued Nov. Term, 1917, and Rule discharged March 6, 1918.

III.

Rules to Show Cause in Union Circuit Court why memorandum showing purchases at sale under attachment judgments with list of goods sold to each purchaser and amount paid to each judgment creditor from proceeds of sale should not be given to this plaintiff allowed against this defendant and others March 26, 1918, and argued and dismissed April 13, 1918.

Suit in Union Circuit Court by this plaintiff against this defendant as constable for possession of goods or their value and damages for their detention begun April 17, 1918, and complaint struck out on motion of defendant.

Present suit for same purpose but against this defendant individually and not as constable.

SUMMARY OF ABOVE

There have been, therefore, ten decisions against this plaintiff relative to this matter,—

1 by Court of Errors and Appeals.
5 by Supreme Court.
2 by Union Circuit Court.
2 by Small Cause Court.

Of these decisions, three were in actions directly aimed at the validity of the Small Cause Court attachments, namely,

1. Motion in Small Cause Court to quash.
2. Certiorari in Supreme Court to review Small Cause Court proceedings.
3. Appeal in Court of Errors and Appeals from Supreme Court.

Three decisions were in actions which attacked the Small Cause Court attachments in another way, namely,

1. Motion before Small Cause Court to vacate judgment.
2. Application to Justice Bergen for certiorari to review refusal.
3. Rule to Show Cause before Supreme Court why certiorari should not issue to review refusal.

Two decisions were in actions which sought to hold the officer executing the attachments, namely,

1. Rules to Show Cause in Union Circuit Court against officer and others to obtain information.
2. Suit in Union Circuit Court to hold officer liable for goods.

The other two decisions were in the Supreme Court for a rehearing and for a stay pending appeal under I.

Does the above look as though the statute limiting the time for bringing actions against officers had been waived, or that anything else had been waived, (Point 1 in Appellant's Brief), or that there has been any es-

toppel of any kind (Point II in Appellant's Brief), or that the defendant has not been prejudiced (Point III in Appellant's Brief), or that the plaintiff has been surprised, except at the unanimity of adverse decisions (Point IV in Appellant's Brief), or (Heaven save the mark!) that the plaintiff has not had its day, and many of them, in court (Point V in Appellant's Brief).