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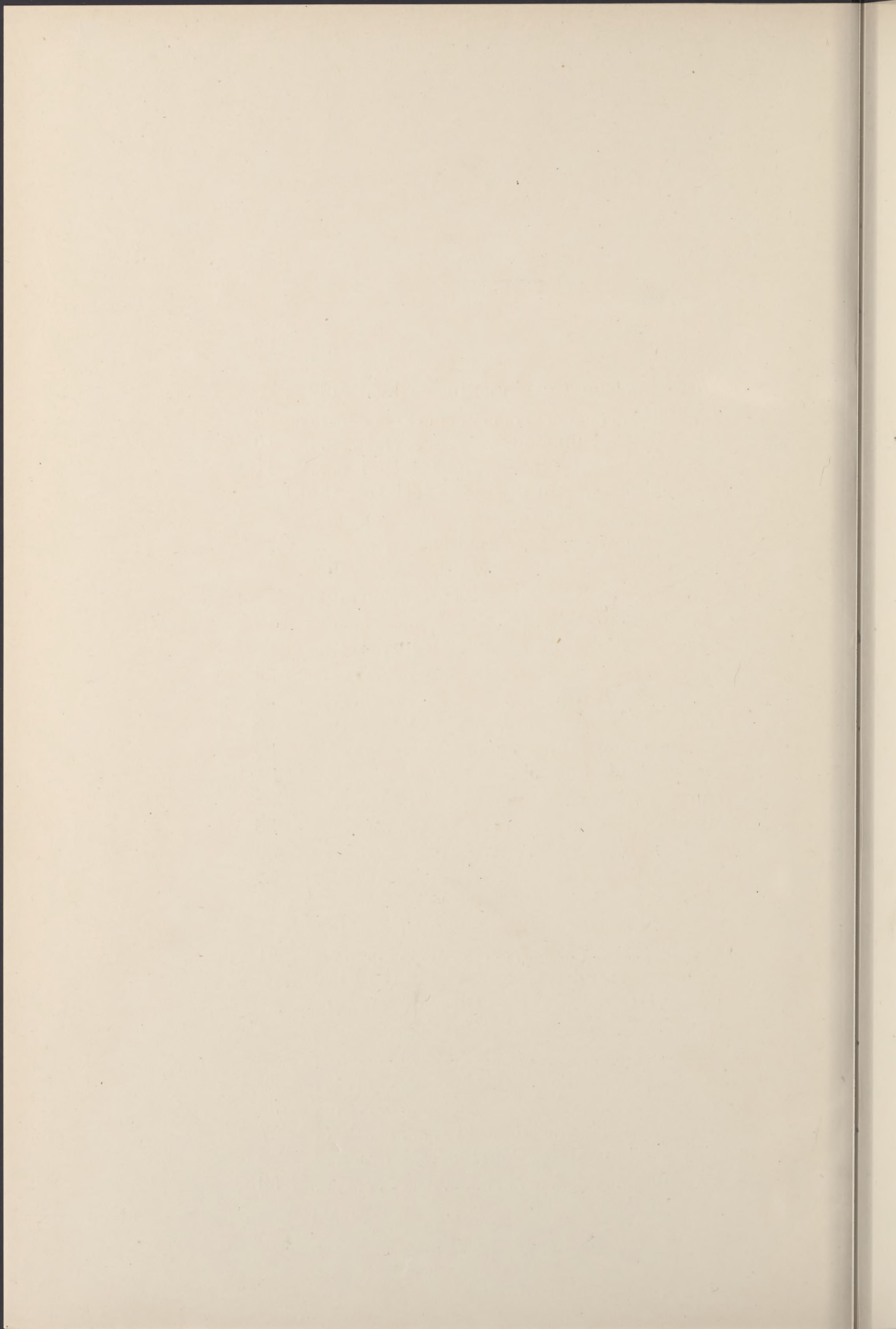

New Jersey Supreme Court

Writ of Certiorari

New Jersey, ss:
To the Judge of the First District Court of the City of Newark, Greetings:

(L. S.) We being willing for certain reasons to be certified of the judgment order and proceedings had before the First District Court of the City of Newark in a certain action entitled an action at law brought against Thomas S. Morley and Henry J. Morley in the suit of George McDonald on the 3d day of September 1920, in the District Court for the First Judicial District of Essex County and afterwards removed to the said First District Court of the City of Newark. 20

We hereby command that you send, under your seal, to our justices of the Supreme Court of Judicature of the State of New Jersey, at Trenton, on the second day of August 1921, the said judgment, order and all proceedings in the aforesaid action and with all things touching and concerning the same, as fully and entirely as they remain before you, by whatever names the parties may be called, therein, together with this Writ that we may further cause to be done what of right and according to law ought to be done. 30

Witness, William S. Gummere, Chief Justice 40

of our Supreme Court of New Jersey, at Trenton, this 15th day of July, 1921.

ENOCH L. JOHNSON,
Clerk.

Thomas Brunetto,
Attorney of Prosecutor.

10

A true copy.
Enoch L. Johnson.

Affidavit of Thomas Brunetto

(Filed July 14, 1921)

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NEW JERSEY SUPREME COURT

THOMAS S. MORLEY, Prosecutor, vs. GEORGE McDONALD, Respondent.	On certiorari.

State of New Jersey, County of Essex, ss:

30

Thomas Brunetto, being duly sworn according to law upon his oath deposes and says:

1. That I am the attorney of the defendant, Thomas S. Morley in a certain action entitled an action at law which was instituted in the District Court of the First Judicial District of the County of Essex on or about September 3, 1920. A

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copy of the summons which was issued in said cause is hereunto attached and marked Exhibit A.

2. That on or about the 2d day of September 1920, I was attorney for Henry Morley and I instituted suit in the First District Court of the City of Newark on behalf of the said Morley and against the said George McDonald.

3. On or about the 9th day of September 1920, a stipulation was entered between myself, as attorney of Henry J. Morley and Thomas S. Morley, and Clarence Sackett, attorney of George McDonald wherein it was agreed between us that the case which was entitled George McDonald v. Henry J. Morley and which was instituted in the District Court of the First Judicial District of the County of Essex was to be transferred and to be tried in the First District Court of the City of Newark. A copy of said stipulation is hereunto annexed and marked Exhibit B.

4. That on or about Oct. 1st, I moved for trial the case of Henry Morley vs. George McDonald separately from the case of George McDonald vs. Henry J. Morley in the First District Court of the City of Newark, at Newark, not having consented to try both cases together. After the testimony was all in both for the plaintiff and defendant, the Honorable Cecil H. McMahon, Judge of the First District Court of the City of Newark, who at the time was sitting as the Judge of the First District Court of the City of Newark, at Newark, said that he would not take any new testimony in relation to the case of George McDonald vs. Henry J. Morley with the exception as to question of damages to the McDonald car which was the case instituted in the District Court of the First Judicial District of the County of Essex.

5. On or about October 8, 1920, I received a notice from the Clerk of the First District Court of the City of Newark in which he stated that on the 8th day of October 1920, judgment had been rendered in the case of Morley vs. McDonald, judgment was in favor of defendant, and in the case of McDonald vs. Morley which was the case which was instituted in the District Court of the First Judicial District of the County of Essex, judgment was rendered in favor of the plaintiff for the sum of $265.25 and costs.

6. That on October 21st I went to the office of Clarence Sackett, who is the attorney of record in the case of McDonald v. Morley, and attempted to serve him with a notice of appeal, the said notice stating that the defendant, Thomas S. Morley, appealed from the judgment of the First District Court in the case of George McDonald vs. Thomas S. Morley *et al.* I was then informed by the said Clarence Sackett that there was no judgment in existence, and that the only judgment which was on record under the above name was a judgment which had been rendered in the District Court of the First Judicial District of the County of Essex and that he had secured from the Clerk of the said Court a certificate for the purpose of docketing said judgment, and that said judgment had been docketed in the Essex County Court of Common Pleas.

7. That on or about the 5th day of November 1920, as attorney for Thomas S. Morley I applied to the Supreme Court at State House, Trenton, N. J., for a Writ of *Certiorari* to remove the judgment which had been entered in the District

Court of the First Judicial District of the County of Essex and later docketed in the Essex County Court of Common Pleas, in the case of George McDonald vs. Thomas S. Morley *et al.*, which Writ was granted in open Court on the 5th day of November 1920, and returnable on the 24th day of November 1920; the said Writ being directed to the Judges of the District Court of the First Judicial District of the County of Essex, the judge of the First District Court of the City of Newark, and to the Judges of the Court of Common Pleas of Essex County to certify the judgment order and proceedings had before the District Court of the First Jurdicial District of the County of Essex, the First District Court of the City of Newark and the Essex County Court of Common Pleas, in an action entitled, "An Action at law brought against Thomas S. Morley and Henry J. Morley in the suit of George McDonald on the 9th day of September 1920."

8. That in response to said Writ each of the Judges of the Courts before mentioned made a return to said Writ which is now on file in this Court.

9. That the said cause was argued at the November term of this Court and a decision in said cause was rendered on June 7, 1920.

10. That on or about the 11th day of June, 1921 this Court ordered that the judgment of the District Court of the First Judicial District of the County of Essex, in the case of George McDonald v. Thomas S. Morley which judgment was later docketed in the Essex County Court of Common Pleas be reversed, set aside, made void and for

nothing holden, and that the prosecutor in *certiorari* be restored in all things wherein he had lost by reason of said judgment or judgments with costs to the prosecutor to be taxed, which rule was entered in the minutes of said Court on June 13, 1921.

11. That on or about the 23d day of June, 1921 the respondent in said cause applied to the Supreme Court for a rule to vacate rules which had been entered in said cause on February 17, 1921 and June 13, 1921. The said application was denied by the Court with the exception that the word "reversed" or "reversing" was to be stricken out from the rule ordered on June 11th and entered on June 13th. Annexed hereto is a certificate of the Clerk of the Supreme Court stating the rules entered, and also copy of return to *certiorari* by First District Court of Newark in Morley vs. McDonald, marked Exhibit "C."

12. That on or about June 22d, 1921, I caused to be served upon Clarence Sackett, attorney for the respondent, a copy of the taxed bill of costs which had been awarded to the prosecutor by the rule which was entered in said cause on February 13, 1921, and on June 13, 1921, and that up to this date I have not as yet received payment from the said respondent of the costs awarded by this Court to the prosecutor and which amounts to the total of $82.85.

13. That on or about July 1, 1921 a notice entitled "Notice of motions of the First District Court of the City of Newark" herein in McDonald vs. Morley was served upon me by Clarence Sackett, attorney of Plaintiff George McDonald,

828 Broad St., Newark, N. J., in which application was to be made on or about July 7, 1921, to the First District Court of the City of Newark for an order directing the Clerk of said Court to enter upon the docket of said Court *nunc pro tunc,* as of September 1, 1920, and thereafter as the same may appear from the record filed in the District Court of the First Judicial District of the County of Essex in the case of McDonald vs. Thomas Morley etc., defendants, and at the same time and place application would be made to direct the Clerk of said Court to enter judgment in said cause in favor of the plaintiff, George McDonald and against the defendant Thomas S. Morley for $265.24. A true copy of said notice being hereunto attached and marked Exhibit "D."

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14. That on July 7, 1921 as attorney for Thomas S. Morley, I appeared in the First District Court and objected to the jurisdiction of the said court in the premises, as the First District Court of the City of Newark had no authority in law to direct the Clerk of said Court to enter in the docket of the First District Court of the City of Newark, a suit which had been instituted in the District Court of the First Judicial District of the County of Essex, and for the further reason that the defendant Thomas S. Morley would be deprived of an appeal from the First District Court to the Supreme Court as he could not serve a notice of appeal and file a bond as more than twenty days had elapsed since the judgment was rendered in said cause on October 8, 1920, as provided by Chapter 305 of the laws of 1915, page 549. At the time the attorney for

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the plaintiff did not state anything to the Court with the exception of handing a paper.

15. That prior to the beginning of the argument of said motion, as attorney for Thomas S. Morley I requested that the said motion be re-
10 ported stenographically and a stenographer was sworn for that purpose. Copy of order entered on said motion marked Exhibit "E."

16. That the said judgment entered in the First District court of the City of Newark is invalid for the following reasons:

1. That the Court had no jurisdiction to direct judgment in said cause at this time because it had no jurisdiction as the said cause had not been
20 remanded by the Supreme Court to the First District Court of the City of Newark to enter judgment.

2. That the First District Court of the City of Newark had no jurisdiction to enter a judgment on the same State of Facts on July 12, 1921 on which it had rendered a judgment on October 8, 1920.

3. That the said Court had lost jurisdiction because if it had authority in law to hear and de-
30 termine the same when it rendered its decision on October 8, 1920, it had not adjourned the cause to a definite date as required by law.

4. That the First District Court of the City of Newark determined and directed a judgment in the case of George McDonald vs. Thomas S. Morley et al, by filing a written opinion in said court
40 on October 20, 1920, therefore, if a judgment was rendered at this time in the above cause it would be invalid for two reasons,

(a) Because the defendant would be deprived of an appeal as he could not prepare for same as more than twenty days had elapsed since a determination or direction had been arrived at by said court.

(b) Because there was no evidence taken on July 7, 1920 on which the First District Court of the City of Newark could base a decision in giving judgment for plaintiff as before mentioned. 10

5. Because the respondent George McDonald has not complied with the former rules of this Court by paying to the prosecutor the taxed costs as ordered by this court.

THOMAS BRUNETTO.

Sworn and subscribed to
before me this 12th day of July, 1921. 20
Howard F. Kirk,
Master of Chancery of New Jersey.

A true copy,
Enoch L. Johnson,
Clerk.

Exhibit A

Annexed to Affidavit of Thomas Brunetto.

Essex County, The State of New Jersey, ss:
To any Constable of said County, or to the Sergeant-at-Arms of the District Court of the First Judicial District of the County of Essex.

SUMMON

Henry J. Morley and Thomas S. Morley to appear before the District Court of the First Judicial District of the County of Essex, to be held at the Council Chamber, No. 649 Bloomfield Avenue (second floor), in the Town of Montclair, on the 9th day of September, Nineteen Hundred and Twenty, at ten o'clock in the forenoon, to answer unto George MacDonald in an action in Tort to the damage of the Plaintiff.

Five hundred dollars.

Hereof fail not.

Witness, Harry N. Reeves, Esq., Judge of said Court at Montclair, as aforesaid, the 3rd day of September in the year One Thousand Nine Hundred and Twenty.

JOSEPH F. MURPHY,
Clerk.

A true copy,
Enoch L. Johnson,
Clerk.

Exhibit B

Annexed to Affidavit of Thomas Brunetto.

DISTRICT COURT FOR THE FIRST JUDICIAL DISTRICT OF ESSEX COUNTY

10

GEORGE McDONALD, Plaintiff, vs. HENRY J. MORLEY, et al., Defendants.	In Tort Stipulation and Consent.

The defendant Henry J. Morley having instituted a suit in the First District Court of Newark against the plaintiff herein, George MacDonald, 20 for damage to his, defendant's automobile, growing out of the same collision that caused the damage to plaintiff's automobile, for the recovery of which this action was brought, and the parties being desirous of having both causes tried and disposed of at the same time, it is on this 9th day of Sept. 1920, stipulated and agreed between the parties, by their respective attorneys, the judge of the Montclair District Court consenting, that this action be and the same is hereby removed to 30 the First District Court of Newark.

CLARENCE SACKETT
Attorney of Plaintiff Geo. MacDonald.
THOMAS BRUNETTO
Attorney of defendants, Henry J. Morley and Thomas Morley.

40

Affidavit of Thomas Brunetto—Exhibit C

I hereby consent to the removal of this cause to the First District Court of Newark.

HARRY N. REEVES,
Judge District Court for First
Judicial District of Essex County.

10 A true copy,
Enoch L. Johnson,
Clerk.

Exhibit C

Annexed to Affidavit of Thomas Brunetto.

20 NEW JERSEY SUPREME COURT

THOMAS S. MORLEY, Prosecutor, vs. GEORGE McDONALD, Respondent.	On Certiorari Certificate of Clerk of the Supreme Court

I, ENOCH L. JOHNSON, do hereby certify that an-
30 nexed hereto is a true copy which is on file in my office of the following papers in the above entitled cause.

The return by the First District Court of the City of Newark to Certiorari, also the Rule for Reversing Judgment in the District Court of the First Judicial District of Essex County, and the Essex County Court of Common Pleas which
40 was entered June 13, 1921, also Rule Denying

Motion to Vacate Rules entered therein, which was entered on June 23, 1921, and I further certify that there is no other Order or Rule on file in my office in which the case of George McDonald vs. Thomas S. Morley was remitted to the First District Court of the City of Newark. 10

ENOCH L. JOHNSON,
(SEAL) Clerk of the Supreme Court.

Dated July 11, 1921.

A true copy,
Enoch L. Johnson,
Clerk.

NEW JERSEY SUPREME COURT 20

THOMAS S. MORLEY, Prosecutor, vs. GEORGE MCDONALD, Respondent.	On Certiorari Return by the First District Court to Certiorari.

TO THE HONORABLE, the justices of the Supreme Court of Judicature of New Jersey; in obedience 30 to the command of this Writ, directed to the Judge of the District Court of the First Judicial District of County of Essex and to the Judge of the First District Court of the City of Newark, and to the Judges of the Court of Common Pleas for the County of Essex, I hereby certify and send under the seal of the First District Court 40 of the City of Newark, to the Honorable Justices

of the Supreme Court of Judicature of New Jersey, the judgment, order and proceedings in the First District Court of the City of Newark, in a certain action, plaint or proceedings brought against Thomas S. Morley and Henry J. Morley at the suit of George McDonald instituted in District Court of the First Judicial District of the County of Essex, in which judgment was rendered against the said Thomas S. Morley on the 8th day of October, 1920, for $265.25 damages and $20.76 costs, together with all papers touching and pertaining to the same, as fully and entirely as before said First District Court of the City of Newark they remain as is commanded.

In Testimony whereof, I, Cecil H. MacMahon, Judge of the First District Court of the City of Newark have hereunto set my hand as Judge of said First District Court of City of Newark, and caused the seal of the said First District Court of the City of Newark to be affixed and attested by the Clerk of the said First District Court of the City of Newark this 12th day of November, 1920.

CECIL H. MAC MAHON,
Judge of the First District Court of the City of Newark.
Charles R. Baldwin,
Clerk.

A true copy,
Enoch L. Johnson,
Clerk.

FIRST DISTRICT COURT OF THE CITY OF NEWARK

MORLEY VS. MCDONALD }
MCDONALD VS. MORLEY }

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OPINION

These two cases involve the same accident. I find the fact to be that Thomas Morley, who was driving the Morley car, was proceeding west on Bloomfield Ave. at such a rate of speed that he did not have his car under proper control. That Mr. McDonald who was coming down Bloomfield Ave. in an easterly direction stopped his car to allow a trolley car passing in the same direction to get out of his way, as he intended to turn to his left into Willard Ave., that Mr. McDonald had observed the Morley car coming west on Bloomfield Ave., and knew that Morley would pass the opening into Willard Ave. before he could safely enter Willard Ave., that McDonald turned his car to the left, after the trolley car had passed, and came to a full stop before crossing the double trolley tracks on Bloomfield Ave. leaving ample room for the Morley car to continue on its way west. That Morley was guilty of negligence in operating his car at an excessive rate of speed so that he was unable to control it when he suddenly observed McDonald's car in the rear of the trolley car, and not having time to observe that McDonald had come to a standstill, turned to his left in an effort to pass behind the McDonald car, but his plain duty was to continue west in safety. There is no proof of any negligence on the part of McDonald. On the contrary he exercised the care that could have been asked of a reasonable man,

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in the way of observation of Morley's approach, and kept his car out of the path of the Morley car by coming to a full stop.

In the case of Morley vs. McDonald there will be a judgment for the defendant.

10 In the case of McDonald v. Morley there will be a judgment for the defendant, Henry J. Morley, who was not in the car at the time of the accident, and who was not in any way liable for the conduct of Morley who was driving the car. In this last case there will be a judgment against Thomas Morley for the sum of $265.25.

A true copy,
Enoch L. Johnson,
Clerk.

20

NEW JERSEY SUPREME COURT

THOMAS S. MORLEY, Prosecutor,	On Certiorari Rule for Reversing Judgment in the District Court of the First Judicial District of the County of Essex, and the Essex County Court of Common Pleas.
30	
GEORGE McDONALD, Respondent.	

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The court having inspected the transcript and proceedings of the District Court of the First

Judicial District of the County of Essex, of the Essex County Court of Common Pleas and of the First District Court of the City of Newark, which were returned with the certiorari in this cause, and the reasons for reversing the judgment below, and heard the argument of counsel therein, and having duly considered the same; 10

It is on this 11th day of June, 1921, ORDERED, that the judgment of the District Court of the First Judicial District of the County of Essex in the case of George McDonald vs. Thomas S. Morley, which judgment was later docketed in the Essex County Court of Common Pleas be set aside, made void and for nothing holden, and that the prosecutor in certiorari be restored in all things wherein he has lost by reason of said judgment or judgments, with costs to the prosecutor, to be taxed. 20

Let this rule be entered in the minutes.

F. J. SWAYZE,
J.

Entered June 13, 1921
On motion of Thomas Brunetto,
attorney of Prosecutor.

A true copy,
Enoch L. Johnson,
Clerk. 30

Exhibit D

Annexed to Affidavit of Thomas Brunetto.

re McDonald v. Morley

10 To Thomas S. Morley
Thomas Brunetto, Esq., Attorney.

Take Notice, that I will on Thursday July 7, 1921 at 10 o'clock in the forenoon or as soon thereafter as counsel can be heard, move in the First District Court of the City of Newark, in the City Hall in said city, for an order directing the clerk of said court to enter upon the docket of said court, nunc pro tunc as of September 1, 1920, and 20 thereafter as the same may appear, the record filed in the District Court for the First Judicial District of Essex County in the case of George McDonald, plaintiff, against Henry J. Morley and Thomas S. Morley, defendants, which record was, by stipulation between the parties, consented to by the judge of said District Court for the First Judicial District of Essex County for the purpose expressly stated in said stipulation removed to the First District Court of the City of 30 Newark; together with the proceedings and trial had in last mentioned court upon said record, pursuant to said stipulation.

And further Take Notice that I shall at the same time and place move the said First District Court of the City of Newark to direct the clerk of said court to enter judgment in said court in favor of the plaintiff, George McDonald, and 40 against the defendant Thomas S. Morley for $265.25, upon said record of said District Court

for the First Judicial District of Essex County and the proceedings and trial had thereon in said First District Court of the City of Newark.

CLARENCE SACKETT,
Attorney of the plaintiff, George McDonald.

Dated Newark, N. J.
July 1, 1921.

A true copy,
Enoch L. Johnson,
Clerk.

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NEW JERSEY SUPREME COURT

THOMAS MORLEY, Prosecutor, vs. GEORGE McDONALD, Respondent.	On Writ of Certiorari Rule Denying Motion to Vacate Rules Entered Herein.

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Application being made on behalf of the respondent to set aside, vacate or strike out, modify or amend that part of the rule heretofore on the 13th day of June, 1921, entered herein ordering that the judgments therein referred to "be reversed, set aside and for nothing holden, and also to strike out or vacate" that part of said rule ordering that the prosecutor on certiorari be restored in all things wherein he has lost by reason of said judgment or judgments with the costs to the prosecutor to be taxed, and also to vacate the order made herein on the 15th day of Feb. 1921, denying the motion to dismiss the proceed-

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ings herein with $10.00 costs to the prosecutor of the Writ, and after hearing argument of Clarence Sackett appearing for the respondent and Thomas Brunetto appearing for the Prosecutor, it is on this 23rd day of June, 1921, Ordered that
10 the application to vacate rules entered herein be denied with the exception that the word "reversed or reversing" wherever it appears in the rule entered June 13, 1921 in the above entitled cause be stricken out.

Let the foregoing rule be entered in the minutes.

By the Court,
F. J. SWAYZE,
J.

20 Entered June 23, 1921
On motion of
Thomas Brunetto,
Atty. of Prosecutor.
A true copy,
Enoch L. Johnson,
Clerk.

Affidavit of Thomas Brunetto—Exhibit D

FIRST DISTRICT COURT OF THE CITY OF NEWARK

(Removed by stipulation, consented to by the judge of the District Court for the First Judicial District of the County of Essex, from said court to First District Court of Newark)

10

George McDonald, Plaintiff, vs. Henry J. Morley and Thomas S. Morley, Defendants.	Action at Law On Motion for Judgment Order.

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This matter coming on to be heard pursuant to notice, in the presence of Clarence Sackett, Esq., attorney of plaintiff, and Thomas Brunetto, Esq., attorney of Defendants, and who stated that he appeared especially to object to the jurisdiction of the Court, and the parties by their respective attorneys having been heard, and the Court having considered the matter, it is on this 12th day of July 1921, on motion of Clarence Sackett, sufficient reason therefor appearing, ORDERED that the record sent to this Court, under the stipulation signed by the attorneys of the respective parties, and consent by the District Court for the First Judicial District of the County of Essex be filed in this Court, as of September 16th, 1920.

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It is further ordered that said record, consisting of the stipulation of the parties by their re-

spective attorneys, consented to by the judge of the District Court for the First Judicial District of the County of Essex, the state of demand and other papers sent to this court under said stipulation by said court be re-entitled in this court.

10 It is further ORDERED that judgment, as of the date of this order be entered upon said record and the proceedings of this court had thereon, in accordance with the finding of this court, in favor of the plaintiff, George McDonald and against the defendant Thomas S. Morley, for two hundred and sixty-five dollars and twenty-five cents ($265.25) this suit having been heretofore discontinued as against Henry J. Morely.

CECIL M. MACMAHON,
Judge.

20 Certified a true copy of original filed in the office of the First District Court of Newark, N. J.

Charles R. Baldwin,
Clerk.

A true copy,
Enoch L. Johnson.
Clerk.

Return by the First District Court of the City of Newark to Certiorari

(Filed July 28, 1921)

NEW JERSEY SUPREME COURT

THOMAS S. MORLEY, Prosecutor, vs. GEORGE McDONALD, Respondent.	On Certiorari.

TO THE HONORABLE, the Justices of the Supreme Court of Judicature of New Jersey, in obedience to the command of this Writ, directed to the Judge of the First District Court of the City of Newark, I hereby certify and send under the seal of the First District Court of the City of Newark, to the Honorable Justices of the Supreme Court of Judicature of New Jersey, the judgment, order and proceedings in the First District court of the City of Newark in a certain action, plaint or proceedings brought against Thomas S. Morley and Henry J. Morley at the suit of George McDonald instituted in the District court of the First Judicial District of Essex County, and afterwards removed to the said First District Court of the City of Newark, in which judgment was rendered against Thomas S. Morley on the 16th day of September, 1920, for $265.25 damages and $20.76 costs, together with all papers touching and pertaining to the same, as fully and entirely as before said First District Court of the City of Newark, they remain as is commanded.

Return by the First District Court of the City of Newark to Certiorari

In Testimony whereof, I Cecil H. McMahon, Judge of the First District court of the City of Newark, have hereunto set my hand as Judge of the said First District Court of City of Newark,
10 and caused the seal of the said First District Court of the City of Newark to be affixed and attested by the Clerk of the said First District Court of the City of Newark this 21st day of July 1921.

(SEAL) CECIL H. MAC MAHON,
Judge of the First District
Court of the City of Newark.
Charles R. Baldwin,
Clerk of the First District
Court of the City of Newark.

20 A true copy,
Enoch L. Johnson,
Clerk.

Re McDonald vs. Morley

To Thomas S. Morley
Thomas Brunetto, Esq., Attorney.

30 Take notice, that I will on Thursday July 7, 1921 at 10 o'clock in the forenoon or as soon thereafter as counsel can be heard, move in the First District Court of the City of Newark, in the City Hall in said city, for an order directing the clerk of said court to enter upon the docket of said court, nunc pro tunc as of September 1, 1920, and thereafter as the same may appear, the
40 record filed in the District Court for the First Judicial District of Essex County in the case of

Return by the First District Court of the City of Newark to Certiorari

George McDonald, plaintiff, against Henry J. Morley and Thomas S. Morley, defendants, which record was, by stipulation between the parties, consented to by the judge of said District Court for the First Judicial District of Essex County, for the purpose expressly stated in said stipulation removed to the First District Court of the City of Newark together with the proceedings and trial had in last mentioned court upon said record, pursuant to said stipulation.

And further TAKE NOTICE that I shall at the same time and place move the said First District Court of the City of Newark to direct the clerk of said court to enter judgment in said court in favor of the plaintiff, George McDonald and against the defendant Thomas S. Morley for $265.25 upon said record of said District Court for the First Judicial District of Essex County and the proceedings and trial had thereon in said First District Court of the City of Newark.

CLARENCE SACKETT,
Attorney of the plaintiff George McDonald.

Dated Newark, N. J., July 1, 1921.

A true copy,
Enoch L. Johnson,
Clerk.

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Return by the First District Court of the City of Newark to Certiorari

FIRST DISTRICT COURT OF THE CITY OF NEWARK

GEORGE McDONALD,
Plaintiff,
vs.
HENRY J. MORLEY and
THOMAS S. MORLEY,
Defendants.

10

Transcript of stenographer's notes in a motion in the above entitled cause, taken before HON. CECIL H. MACMAHON, Judge, at the First District Court, City Hall, Newark, New Jersey, on the 7th day of July 1921.

20

Appearances:
Clarence Sackett, Esq., for plaintiff.
Thomas Brunetto, Esq., for defendants.

(William E. Davenport, stenographer, duly sworn)

The Court: (After attorney for plaintiff handed him a paper) Mr. Brunetto, you were present at the trial of this case in this court?

30

Mr. Brunetto: Yes, sir.

The Court: And you received a copy of the notice of this motion?

Mr. Brunetto: Notice was left at my office.

The Court: You received it?

Mr. Brunetto: Yes, sir.

40

The Court: Mr. Sackett now makes a motion to file the papers in this case which was originally

begun in the Montclair District Court, and by stipulation tried here, to now file in this Court by an order nunc pro tunc as of September 1st, 1920; and that I also order judgment to be entered on the record after its trial in this court. 10
What have you to say?

Mr. Brunetto: I understand your Honor has already ordered judgment.

The Court: I am telling you what Mr. Sackett is going to say. What have you to say about it?

Mr. Brunetto: The defendants appearing especially and for the sole purpose of objecting to the jurisdiction of this court, at this time to enter a judgment nunc pro tunc in the case of George McDonald against Thomas S. Morley, for the 20
following reasons:

The Court (interrupting): The application is not to enter a judgment nunc pro tunc. Go on now.

Mr. Brunetto: I will now direct my argument on that part of the application and which is made to direct the clerk to file the papers as of September 1st, 1920. First, there are no papers before the Court now of the Montclair District Court, and, secondly, there is no proceeding in the 30
Montclair District Court as of September 1st, 1920.

The Court: Anything further?

Mr. Brunetto: Thirdly, the powers of the Clerk of the District Court are defined by section 25 of the District court Act, and that says: "Whenever a suit is instituted in the District Court, the Clerk shall keep a docket" and so forth. 40
This Court has no jurisdiction to enter on the

docket of this Court a proceeding which was instituted in another court. Section 19, of the District Court Act says that a Judge of the District Court may call another Judge of another District
10 Court to try a case. As to that question, that part of the application in which an order is asked to order the Clerk of this Court to make up a docket or to enter into his docket, of course, I contend this Court has no jurisdiction to do that. Now, as to the other parts; As to the parts which asks for a judgment to be entered nunc pro tunc.

The Court: No, not nunc pro tunc.

Mr. Brunetto: As to that part of the notice where application is made to enter judgment at
20 this time. I contend that this Court has no jurisdiction at this time to enter judgment for the reason that the defendants in this proceeding will be deprived of an appeal.

The Court: Why?

Mr. Brunetto: Page 549 of the laws of 1915, Section 206 of the District Court Act—

The Court: I am asking you why you are deprived of an appeal?

Mr. Brunetto: Because Section 206 as amended,
30 by Chapter 305 of the laws of 1915, page 549 of the District Court Act provides that the defendant is entitled to an appeal provided he serves notice on the other side within twenty days and files a bond within twenty days after the determination and direction of the District Court. This court determined this case on October 8th, 1920.

40 The Court: We didn't enter judgment.

Mr. Brunetto: That's not our fault.

The Court: You will have, after judgment is entered in this case today, or any day later than today, you will have all your rights to appeal from the time that judgment is entered. Now, the next point. 10

Mr. Brunetto: I now call your Honor's attention to the opinion filed in this case, which is on record.

The Court: Do you mean my opinion?

Mr. Brunetto: Yes, sir.

The Court: Call it a memorandum.

Mr. Brunetto: Memorandum, you might call it a determination.

The Court: Call it anything you please except opinion. 20

Mr. Brunetto: Your Honor, here it is, opinion.

The Court: Proceed.

Mr. Brunetto: That opinion was filed October 8, 1920, and it says that judgment be entered in favor of the plaintiff in such case for two hundred and sixty five dollars and twenty-five cents, and then—

The Court: Wait one moment. Do you want judgment entered in this Court?

Mr. Brunetto: No, sir. I say in answer to your Honor's question the plaintiff is not entitled to come in at this minute and say "Here I want judgment now entered in this Court" whose fault was it that judgment was not entered in this Court? 30

The Court: Yours.

Mr. Brunetto: It was not.

The Court: You signed a stipulation transferring the case to this Court and tried it in this 40

court, and then when the judgment was entered in the Montclair District Court and docketed, you then took a writ of certiorari to the Supreme Court which resulted in their declaring there was no case in the Montclair District Court to try, and therefore there could be no judgment in the Montclair District Court. The proceeding had never been sent back to the Montclair District Court. The opinion said they did not know whether or not judgment could now be entered in this Court because the defendant might lose his appeal. I say it is your fault because you stipulated to come into this Court; you came into this Court and tried your case in this Court. Now, go on.

Mr. Brunetto: I call your attention to the docket of the Montclair District Court. The docket says this case is removed to the First District Court for trial.

The Court: All right.

Mr. Brunetto: And you cannot vary that record by oral testimony.

The Court: We are not concerned with the Clerk of the District Court just now. Anything further?

Mr. Brunetto: I have certain authority if your Honor wishes to hear me on that point.

The Court: No, give me the reference.

Mr. Brunetto: The leading case on that, your Honor, is 224 Fed. 92.

The Court: That has nothing to do with the District Court of New Jersey.

Mr. Brunetto: The case of Freeman vs. Tranah, the power of a Judge to enter judgment at a different date.

The Court: That's a Justice of the Peace case.

Mr. Brunetto: No, an English case.

The Court: I don't care anything about it. Is that all?

Mr. Brunetto: Of course, we also come in at this time under the case of Handlman vs. Harris, 107 Atlantic, 734; a supreme Court case.

I also have to say that we demanded a trial by jury in the other case, and I have the receipt of the Clerk, but which we never had. If your Honor, will look at the notes of this case, we never agreed to a trial of both cases together, until your Honor said after hearing one case, "I will consider the question of damages."

The Court: Believing that I am following a suggestion in the opinion made in the Supreme Court on the certiorari of this case, I shall make an order to file the record in this case in this Court on the theory that the parties commenced suit by stipulation, my opinion being that the stipulation and written consent entered into by the parties to this suit by their attorneys, whereby on the 9th day of September, 1920 it is stipulated and agreed between the parties by their respective attorneys, judge of the Montclair District Court, consent that this action is hereby removed to the First District Court; and that thereafter the parties appeared in this court and moved their case. The case that was tried was the Morley case. Morley was the plaintiff and McDonald was the defendant. That was the case that was tried. The case of McDonald against Morley which was brought in this court by consent of the attorneys, after testimony was taken in one

case, was allowed to be decided on the evidence taken in this particular case. No harm can come to the parties in this suit. You brought the case here by stipulation and we tried it. All witnesses were heard and the Court found the facts. I have no recollection of any jury being demanded in this case, and certainly no jury was asked for when the case was called for trial. No jury was mentioned when the case was called for trial. I will make an order that the record in this suit be filed as of some day between the signing of the stipulation and the trial. Some day between the signing of the stipulation and the trial. Be careful about that date. I will order judgment to be entered on the record which will consist of the stipulation first, state of demand and the papers sent down from the Montclair District Court and that they be re-entitled in this Court. I will then direct that judgment be entered in favor of the defendant and against the plaintiff. The case that was tried in this court was the case of Morley against McDonald. The case brought in the Montclair District Court was the case of McDonald against Morley which was transferred here. I will order judgment to be entered in this case for the plaintiff in the sum of two hundred and sixty five dollars and twenty five cents against the defendant on my findings of fact in this case, which were that one of the defendants, Thomas S. Morley was guilty of gross negligence in the case and responsible for the accident, and that judgment shall be entered as of the day the order is actually signed, today or later.

Mr. Brunetto: I pray an exception to your Honor's ruling.

The Court: You had better make your arrangement with Mr. Sackett at ten minutes to two to look over the order.

Mr. Brunetto: I would like to say that I have a matter set down before Hugh B. Reed, Special Master this morning, and I will probably be tied up all the afternoon. 10

The Court: What time does that go on?

Mr. Brunetto: Supposed to go on at ten o'clock.

Mr. Sackett: I do not think that your Honor stated that the judgment should be against the defendant, Thomas S. Morley.

The Court: Present the order to me on Tuesday morning next.

A true copy, 20
Enoch L. Johnson,
Clerk.

I hereby certify that the foregoing is a true and correct transcript of the shorthand notes taken July 7, 1921, at the First District Court in the before mentioned case.

WM. E. DAVENPORT,
Stenographer.

I hereby certify that the foregoing is a true and correct transcript of the proceedings hereinbefore mentioned, at the time, place and date hereinbefore stated. 30

CECIL H. MACMAHON,
Judge.

A true copy,
Enoch L. Johnson,
Clerk. 40

Return by the First District Court of the City of Newark to Certiorari

FIRST DISTRICT COURT OF THE CITY OF NEWARK

(Removed by stipulation, consented to by the judge of the District Court for the First Judicial District of the County of Essex, from said Court to First District Court of Newark)

10

GEORGE McDONALD, Plaintiff, vs. HENRY J. MORLEY and THOMAS S. MORLEY, Defendants.	Action at Law On Motion for Judgment Order.

20

This matter coming on to be heard pursuant to notice, in the presence of Clarence Sackett, Esquire, Attorney of Plaintiff, who stated that he appeared especially to object to the jurisdiction of the court, and Thomas Brunetto, Esquire, Attorney of the defendants, and the parties by their respective attorneys having been heard, and
30 the court having considered the matter, it is on this 12th day of July 1921, on motion of Clarence Sackett sufficient reason therefor appearing, ORDERED that the records sent to this court, under the stipulation signed by the attorneys of the respective parties, and consent by the District Court for the First Judicial District of the County of Essex be filed in this court, as of September
40 16th, 1920.

Return by the First District Court of the City of Newark to Certiorari

It is further ORDERED that said record, consisting of the stipulation of the parties by their respective attorneys, consented to by the judge of the District Court for the First Judicial District of the County of Essex, the State of demand and other papers sent to this court under said stipulation by said court be re-entitled in this court. 10

It is further ORDERED that judgment, as of the date of this order be entered upon said record and the proceedings in this court had thereon, in accordance with the findings of this court, in favor of the plaintiff, George McDonald, and against the defendant Thomas S. Morley, for two hundred and sixty five dollars and twenty five cents ($265.25) this suit having been heretofore discontinued as against Henry J. Morley. 20

CECIL H. MACMAHON,
Judge.

A true copy,
Enoch L. Johnson,
Clerk.

Essex County, ss. The State of New Jersey. 30
To any Constable of said County, or to the Sergeant-at-Arms of the District Court of the First Judicial District of the County of Essex.

SUMMON

Henry J. Morley and Thomas S. Morley to appear before the District Court of the First Ju- 40

dicial District of the County of Essex, to be held at the Council Chamber, No. 649 Bloomfield Avenue (second floor), in the Town of Montclair, on the 9th day of September, Nineteen Hundred and twenty, at ten o'clock in the forenoon, to answer unto George MacDonald in an action in Tort to the damage of the Plaintiff.

Five hundred dollars.

Hereof fail not.

Witness, Harry N. Reeves, Esq., Judge of said Court at Montclair, as aforesaid, the 3rd day of September in the year One Thousand Nine Hundred and twenty.

JOSEPH F. MURPHY,
Clerk.

A true Copy,
Enoch L. Johnson,
Clerk.

DISTRICT COURT FOR THE FIRST JUDICIAL DISTRICT OF ESSEX COUNTY

GEORGE MCDONALD, Plaintiff, vs. HENRY J. MORLEY and THOMAS S. MORLEY, Defendants.	Action at Law State of Demand.

Plaintiff, who resides at 30 Willard Avenue, Bloomfield, Essex County, New Jersey, demands

of the defendants the sum of Five Hundred dollars for that on or about the 28th day of August, 1920, plaintiff, in his automobile, was driving in a southerly direction on and along Bloomfield Avenue, in the Town of Bloomfield, Essex County, New Jersey; that when plaintiff had reached a point in said avenue opposite the intersection of said avenue with Willard Avenue, in said town, and had brought his car to a stop before reaching the north bound track of the trolley line operated on said Bloomfield Avenue, an automobile owned by the defendant Henry J. Morley and driven by the defendant Thomas S. Morley in an opposite direction on the right hand side of said avenue, was suddenly swerved to the left at the point where Plaintiff's car was standing for the purpose of letting said defendant's car pass said point North before proceeding with his, plaintiff's car, and struck plaintiff's car with great force; that the car of said defendant Henry J. Morley was recklessly, carelessly, negligently and at great speed being driven by the defendant Thomas S. Morley, and although plaintiff made every effort to avoid collision with said defendant Henry J. Morley's car, he was unable so to do; that owing to the negligence of the defendants aforesaid, plaintiff's car was greatly damaged, for the repair of which the defendant will be compelled to expend a large sum of money, to wit, the sum of five hundred dollars. Wherefore, by reason of the negligence of the defendants,

10

20

30

plaintiff has sustained damages as above demanded.

CLARENCE SACKETT,
Attorney of Plaintiff.

10 A true copy,
Enoch L. Johnson.
Clerk.

DEMAND OF JURY TRIAL

Montclair, N. J., Sept. 7th, 1920.

20 In re. George McDonald vs. Henry J. Morley et al

Mr. Joseph Murphy,
Clerk of the District Court of the First Judicial District of the County of Essex:
Dear Sir:
The defendants demand a trial by jury of the issue in the above named cause on Thursday, September 9, 1920 or any other day that said cause
30 may be adjourned to.

Yours truly,

THOMAS BRUNETTO,
Att'y for defendants.

A true copy,
Enoch L. Johnson,
40 Clerk.

Return by the First District Court of the City of Newark to Certiorari

DISTRICT COURT FOR THE FIRST JUDICIAL DISTRICT OF ESSEX COUNTY

GEORGE McDONALD, Plaintiff, vs. HENRY J. MORLEY, et al., Defendants.	In Tort Stipulation and Consent.

10

The defendant Henry J. Morley having instituted a suit in the First District Court of Newark against the plaintiff herein, George McDonald, for damage to his, defendant's automobile, growing out of the same collision that caused the damage to plaintiff's automobile, for the recovery of which this action was brought, and the parties being desirous of having both causes tried and disposed of at the same time, it is on this ninth day of September, 1920, stipulated and agreed between the parties, by their respective attorneys, the judge of the Montclair District Court consenting, that this action be and the same is hereby removed to the First District Court of Newark.

20

CLARENCE SACKETT,
Attorney of Plaintiff George McDonald.

30

THOMAS BRUNETTO,
Attorney of Defendants Henry J. Morley and Thomas Morley.

I hereby consent to the removal of this cause to the First District Court of Newark.

HARRY N. REEVES,
Judge District Court for First Judicial District of Essex County.

40

A true copy,
Enoch L. Johnson,
Clerk.

Return by the First District Court of the City of Newark to Certiorari

COPY OF DOCKET NO. 156—PAGE 72834

Clarence Sackett,
Att'y of Plaintiff.

10

FIRST DISTRICT COURT, NEWARK, N. J.

George McDonald	Plaintiff	On Contract
vs.		Plaintiff's
Henry J. Morley	Defendant.	Costs.

20

Summons	$1.50	July 16-21
Listing fee	1.50	July 16-21
Witness fee	2.50	
Order	1.00	
Att'ys fees	$13.25	

A summons in the above stated cause was issued on the .... day of ...... 192.. returnable on the .... day of ...... 192.. wherein the plaintiff demands the defendant the sum of ....
30
The plaintiff filed ...... State of demand ...... 192.. The summons was served and returned as follows:

July 14, 21 order filed by which the record sent to the court by the District court of the First Judicial District of the County of Essex be filed
40
in the court as of September 16, 1920 and the State of Demand and Stipulation and all the papers be re-entitled in the court.

The court rendered judgment Sept. 16, 1920 in favor of the plaintiff and against the defendant Thomas S. Morley in the sum of $265.25 damages with costs thereupon judgment is entered in favor of the plaintiff and against the defendant Thomas S. Morley in the sum of $265.25 damages with costs. 10

A true copy,
Enoch L. Johnson,
Clerk.

Letter to the Court from Plaintiff's Attorney

20

Clarence Sackett
Counsellor at Law
828 Broad Street
Newark, N. J.
February 16, 1921.

To the Hon. Francis J. Swayze, Charles W. Parker and Charles C. Black, JJ Supreme Court.

State House,
Trenton, N. J. 30
Dear Sirs:

Because of the question put to me yesterday in the argument in Morley v. McDonald, certiorari, No. 215, Part II, by Mr. Justice Swayze, as to how the judgment got back to the Montclair District Court from the First District Court of Newark, in view of the circumstances surrounding this case, I feel justified in writing your Honors 40 that I went to the Montclair court to satisfy my-

self, and to impart the information thus obtained to you, as to what return Judge MacMahon made, and find upon the official docket or covering for the papers filed in this case, this endorsement, apparently in the handwriting of Judge MacMahon,
10 "(Discontinued as to Henry J. Morley) C. H. McM, J" This in pencil, and directly underneath, in ink, "Recv'd. 10-8-20 J ptf. 265.25". The clerk informed me that the papers were sent by him to the Newark District Court and by the Newark District Court returned to the Montclair District Court, and that he, upon the authority of the above endorsement entered the judgment.

If the court should not adopt my construction of the stipulation and the proceedings in both
20 cases had thereunder, but should hold that the stipulation and consent absolutely took the respondent's action, and all the proceedings thereunder, out of the Montclair District Court, then, I submit the judgment is a valid judgment of the First District Court of the City of Newark, and the Supreme Court could order that the judgment of the Montclair court be vacated and the Judge of the First District Court of Newark directed to enter the judgment rendered by him in the Mont-
30 clair District court case as the judgment of his court. For there is no claim here that the respondent is not entitled to a judgment in this case, nor is there any attack upon the justness of the judgment under review. No substantial right or interest of the prosecutor could thereby be defeated or impaired. (See P. L. 1898, p 593).

On the other hand, to deprive the respondent of
40 this judgment-valid in which ever of the two courts it may rest—would enure to his great loss

and injury and defeat the ends of that justice which it is the particular function of the court to bestow; and this, through no fault of his own or of his attorney; while the prosecutor, upon a mere quibble, would benefit by his wrong, and the solemn stipulations of attorneys, in writing, would become mere "scraps of paper," a dangerous weapon, I respectfully submit, in the hands of unscrupulous lawyers, speaking impersonally. 10

Very respectfully,

Clarence

~~C. LAWRENC~~E SACKETT.

P. S. Am sending a copy of this letter to counsel for prosecutor. 20

Reasons why Judgment Entered in the First District Court of the City of Newark should be Vacated and Set Aside

(*Filed Aug. 5, 1921*)

10 NEW JERSEY SUPREME COURT

THOMAS S. MORLEY, Prosecutor, vs. GEORGE McDONALD, Respondent.	On Certiorari.

20 Thomas S. Morley, the Prosecutor by Thomas Brunetto his attorney, comes and prays that the judgment rendered against him in an action at law originally instituted in the District Court of the First Judicial District of the county of Essex, and which later was attempted to be transferred to the First District Court of the City of Newark by the parties therein in a certain action wherein the said Thomas S. Morley and Henry J. Morley, was defendants and the said George McDonald
30 was plaintiff, may be reversed, set aside and vacated for the following reasons:

1. Because the Judge of the District Court of the First Judicial District of the County of Essex had no authority in law to transfer a cause that had been commenced in said District Court to the First District of the City of Newark.

40 2. Because the First District Court of the City of Newark had no authority in law to direct the

Clerk of said Court to enter upon the docket of the First District Court of the City of Newark a proceeding or cause which had been instituted in the District Court of the First Judicial District of the County of Essex.

3. Because the First District Court of the City of Newark had no authority in law to enter in said Court the order of July 12, 1921, in the case of George McDonald vs. Thomas S. Morley and others, and which it directed the Clerk of said Court to enter judgment in said cause in the First District Court of the City of Newark, as of July 12, 1921.

4. Because the said ~~judgment~~ order which the First District Court of the City of Newark entered on July 12, 1921, in the case of George McDonald, plaintiff, vs. Thomas S. Morley and others, defendants, is void for the further reason that the said Court could not enter a judgment in a cause after nine months since the decision in said cause.

5. Because the plaintiff in said cause is guilty of laches, therefore, he was not entitled to enter a judgment on July 12, 1921, in a case which was determined on October 8, 1920.

6. Because the First District Court of the City of Newark had no jurisdiction to enter judgment on July 12, 1921 in a cause which is alleged to have been tried and decided on October 8, 1920, as of the date of September 16, 1920 as shown by the docket of said Court.

Reasons why Judgment Entered in the Frst District Court of the City of Newark Should be Vacated and Set Aside

7. That the First District Court of the City of Newark on July 7th and 12th, had no jurisdiction of the cause and to direct the entering of any orders in said cause on July 12, 1921, because the said cause was returned to the District Court of the First Judicial District of the County of Essex, on or before October 8, 1920, at which time a judgment (which has been declared null and void by this Court by opinion filed on June 7, 1921) was entered in said cause by the Clerk of the First District Court of the First Judicial District of the County of Essex.

8. Because the First District Court of the City of Newark had no jurisdiction to direct a judgment in said cause on July 12, 1921, in a case which it had decided on October 8, 1920 for the following reasons:

(a) Because the defendant would be deprived of an appeal to this Court as he could not prosecute said appeal as more than twenty days had elapsed (on July 12, 1921) since determination or direction of said District Court.

(b) Because there was no evidence taken on July 7, 1921, on which the First District Court of the City of Newark could base a decision in directing judgment to be entered for the plaintiff, George McDonald, in said cause.

9. Because the First District Court of the City of Newark had no jurisdiction on July 7, 1921, or any time thereafter to direct the entering of judgment in said cause, as the said cause was then in

Reasons why Judgment Entered in the First District Court of the City of Newark Should be Vacated and Set Aside

the Supreme Court, having been removed to said Court by a writ of certiorari, on November 5, 1920 and this Court has at no time remanded the said cause to the First District Court of the City of Newark. 10

10. The First District Court of the City of Newark on July 7, or any other day thereafter, had no authority in law to direct the entering of a judgment in said cause, because prior to that day the defendants had demanded a trial by jury in said cause.

The judgment of the First District Court of the City of Newark which has been entered in said Court is in divers other respects, illegal, unjust, void and contrary to law. 20

THOMAS BRUNETTO,
Attorney for Prosecutor in Certiorari.

A true copy,
Enoch L. Johnson.
Clerk.

New Jersey State Library

Order

NEW JERSEY SUPREME COURT

THOMAS S. MORLEY, Prosecutor, vs. GEORGE McDONALD, Respondent.	On Certiorari. On Rule to Certify.

This matter coming on to be heard in the presence of Clarence Sackett, Esq., attorney of the respondent and Thomas Brunetto, Esq., attorney of the prosecutor, and the attorney of the respondent alleging diminution of the record, it is, on this 16th day of November, 1921, ordered that the judge of the First District Court of the City of Newark certify to this Court the following facts, namely:

1. If it is the fact, as alleged, that the paragraph appearing in the docket of said Court (see p. 40 State of the case) "July 14, 21 order filed by which the record sent to the Court by the District Court of the First Judicial District of the County of Essex be filed in the Court as of September 16, 1920 and the state of demand and all the papers be re-entitled in the court" is incomplete in that said docket entry should go further and show that said order ordered that judgment as of its date, to wit, July 12, 1921, be entered upon the record sent to the First District Court of the City of Newark by the District Court of the First Judicial District of Essex County and the proceedings had in the First District Court of the City of Newark thereon, in accordance with the findings of the First District Court of the

City of Newark (see state of Case, p. 34) in favor of the plaintiff, George McDonald, and against the defendant Thomas S. Morley, for $265.25, this suit having been heretofore discontinued as against Henry J. Morley.

2. If it is the fact that the order of the Court directed that the papers from the District Court for the First Judicial District of Essex County to be filed in "*this*" Court and not in "*the*" Court as appears in the docket entry on page 40 of the state of the case herein. 10

3. If it is the fact that the last paragraph of the docket as it appears on page 41 of the state of the case, namely, that the Court rendered judgment September 16, 1920, etc., contrary to the fact, and, if so, what is the fact. 20

By the Court,
F. J. SWAYZE,
J.

Entered November 17, 1921, on motion of Clarence Sackett, Attorney.

A true copy,
Enoch L. Johnson,
Clerk.

Certificate of Judge MacMahon

(*Filed Nov. 23, 1921*)

NEW JERSEY SUPREME COURT

10

THOMAS S. MORLEY, Prosecutor, vs. GEORGE MCDONALD, Defendant.	On Certiorari.

In obedience to the order of the Supreme Court entered in the above entitled suit on November 17th, 1921, I, Cecil H. MacMahon, Judge of the
20 First District Court of the City of Newark, do hereby certify to the Supreme Court the following facts:

1. It is the fact that the paragraph appearing in the docket of said Court (p. 40, State of the Case) "July 14th, 1921, order filed by which the record sent to the Court by the District Court of the First Judicial District of the County of Essex, be filed in the Court as of September 16th, 1920, and the state of demand and all the papers
30 be re-entitled in the Court," is incomplete in that said docket entry should go further and show that said order further ordered that judgment, as of the date of said order, to wit, July 12th, 1921, be entered upon the record, sent to the First District Court of the City of Newark by the District Court of the First Judicial District of Essex County, and the proceedings had in the First District Court of the City of Newark thereon, in accordance with the findings of the First
40 District Court of the City of Newark, in favor

of the plaintiff, George McDonald and against the defendant Thomas S. Morley for $265.25, this suit having been heretofore discontinued as against Henry J. Morley.''

2. It is the fact that the order of the Court, (First District Court of the City of Newark) directed that the papers from the District Court for the First Judicial District of Essex County be filed in ''*this*'' Court and not in ''the'' Court as appears by the docket entry on page 40 of the State of the Case herein. 10

3. It is the fact that the last paragraph of the docket as it appears on page 41 of the State of the Case, namely, ''that the Court rendered judgment September 16th, 1920,'' etc., is contrary to the fact. 20

The fact is that the First District Court of the City of Newark rendered judgment on July 12th, 1921 in favor of George McDonald and against the defendant, Thomas S. Morley for $265.25.

Dated, November 21, 1921.

Respectfully submitted,

CECIL H. MACMAHON, 30
Judge of the First District
Court of the City of Newark.

A true copy,
Enoch L. Johnson,
Clerk.

Opinion

(*Filed February 21, 1922*)

NEW JERSEY SUPREME COURT

10 THOMAS S. MORLEY,
Prosecutor,
v.
GEORGE McDONALD,
Respondent.

Argued November Term 1921 before Justices Trenchard, Bergen and Minturn.

20 Thomas Brunetto, for Prosecutor.
Clarence Sackett, for Respondent.

Per Curiam:

The parties had an accident caused by a collision between their autos. Each sued the other, one suit, that by McDonald, was instituted in the first district court of Essex County, and the other, that by Morley, was brought in the first district court of Newark. The parties stipulated that the 30 *McDonald* case should be tried in the Newark District Court, if the Essex District Court should consent. The Essex Court consented and the record of that Court was sent to the Newark district court for trial, and it found for the plaintiff for $265. The record shows that, and apparently without authority, the clerk of the Newark district court after the trial returned the record to the Essex district court and, upon the memorandum entered thereon by Judge of the Newark district 40 court, entered judgment in favor of McDonald, against Morley, for the sum stated in the memor-

andum, and thereupon McDonald caused that judgment to be docketed in the Essex Common Pleas. Morley was allowed a writ of certiorari to review the docketed judgment, as well as the judgment in the Essex district Court, and the Supreme Court *vide Morley v. McDonald,* 114 Atl., 147 set aside both the docketed and the Essex district court judgments upon the ground that there had been no trial in the Essex district court and therefore there was nothing upon which to base that judgment, and consequently there was no judgment to docket. At the same time the First District Court of Newark gave a judgment in favor of the defendant McDonald in the *Morley* suit. We do not think it is necessary to consider this latter judgment because it is not in controversy here. After the Supreme Court had set aside the two judgments above mentioned, the Newark District Court, upon the application of McDonald, ordered that the original record which it once had in its possession, but which had been returned to the clerk of the Essex District Court be returned to it and filed *nunc pro tunc,* as of the date of the original trial, and when this was done he gave judgment on his original finding, as of July 12, 1921, that being the day when the record was returned. Thereupon Morley obtaining a writ of certiorari to review this latter judgment which is a matter now before this Court. We are of opinion that when the parties consented to have the record removed to the Newark District Court it amounted in substance and effect to the entering of a suit, by consent of the parties, without summons, as may be done under the district court act, and that when they went to trial the prosecutor consented to jurisdiction of the Newark court and cannot now complain of that. Nor do we think

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there was any error in recovering possession of the record, but that it was properly returned to the Newark Court even without an order to refile it as of its original date. Nor is there anything in the argument that by entering judgment July
10 12, 1921 the prosecutor lost his right to appeal, because his right began when the final judgment was entered.

The first point which the prosecutor makes is that the district Court of Essex County had no authority to transfer a cause that had been commenced in that Court. This point is disposed of above, for when the parties made the written agreement to try the cause before the Newark Court, it amounted to the institution of a new
20 cause by consent without process, as they might under the district court act.

The second point is that the Newark Court had no authority to direct its clerk to enter upon its docket a procedure which had been instituted in the district court of Essex County; that was also disposed of by the stipulation of the parties.

The next point is that the Newark Court had no authority to enter judgment on the 12th day of July 1921 because it was entered nine months after the decision. The decision had nothing to do
30 with the questions raised. The finding of the Newark Court was not its judgment, the only question is whether it had a right to defer a judgment for so long a time without continuing the cause to a particular date. While it is an established rule that in justice court cases there must be a definite adjournment or the Court loses jurisdiction, and the same rule applies to district courts, except that after the hearing the Court may reserve its decision, which amounts to its
40 judgment, for a reasonable time. We think that

under the circumstances in this case the time occupied by the litigation cannot be said to be an unreasonable time, especially as in this case, where the prosecutor removes the judgment to the Supreme Court by certiorari, and therefore we do not think the Court lost jurisdiction because there was a delay of considerable time caused by the interference of this Court. 10

The next point is that the defendant in certiorari was guilty of laches and therefore not entitled to enter judgment July 12, 1921 which was done after due notice to the prosecutor. We fail to see any laches on the part of the defendant. He was pursuing his remedy except so far as he was interfered with by the prosecutor, by litigation caused by the first writ held by him. 20

The next point is that the Newark Court lost jurisdiction because the record was returned to the Essex Court and a judgment entered thereon, but this Court has held in the case above cited that judgment was improperly entered, and of itself did not prevent the Newark Court from retaining jurisdiction.

The next point made is that the Newark Court had no authority to enter judgment on July 12, 1921 because the defendant would be deprived of an appeal as he could not proceed with his appeal because more than 20 days had elapsed since the finding, but the appeal is not from the finding but from the judgment, and from that the prosecutor had ample time after July 12, 1921 to prosecute his appeal. 30

It is also urged that there was no evidence taken by the Newark Court in support of the judgment which it entered. The answer to this is that the evidence had already been taken, and as we have said, the delay in entering judgment thereon 40

did not, under the circumstances, deprive the Newark Court of its jurisdiction.

The next point is that the Supreme Court in setting aside the judgment entered in the Essex Court did not remand the cause to the district Court. That the Supreme Court was not required to do. It was only dealing with the validity of the judgment under review which was set aside.

10

The next point made is that the Newark Court had no authority to enter the judgment because prior to that day the defendant had demanded a trial by jury. The answer to this is that the trial Court has certified that there was no demand for a trial by jury, and it is not denied that the prosecutor went to trial before the Court and without demanding a jury on the trial day.

20

We think that judgment of the Newark district Court now under review should be affirmed, and it is so ordered.

Order Confirming Judgment

NEW JERSEY SUPREME COURT

THOMAS S. MORLEY, Prosecutor, vs. GEORGE MCDONALD, Respondent.	On Certiorari. Rule Affirming Judgment of the First District Court of Newark.

10

The Court having inspected the record and proceedings of the First District Court of the City of Newark, sent up in obedience with the command of the writ of certiorari herein, and returned with said writ; and having considered the reasons assigned by the prosecutor for reversing the judgment below, and the briefs of counsel submitted herein;

20

It is, on this twenty-first day of February, 1922, Ordered that the judgment of the First District Court of the City of Newark be in all things affirmed, with costs to the respondent, to be taxed, and the record remitted to the Court below to be proceeded with according to law and practice of said Court.

30

Entered February 27, 1922. On motion of Clarence Sackett, Attorney of respondent.

A true copy,

Enoch L. Johnson,

Clerk.

Notice of Appeal to Court of Errors and Appeals

(*Filed March 9, 1922*)

NEW JERSEY SUPREME COURT

10

THOMAS S. MORLEY, Prosecutor, vs. GEORGE MCDONALD, Respondent.	On Certiorari. Notice and grounds of Appeal.

To Clarence Sackett, attorney of respondent:

PLEASE TAKE NOTICE, that the above prosecut-
20 or appeals to the New Jersey Court of Errors and Appeals from the judgment of the Supreme Court, affirming the judgment of the First District Court of the City of Newark, on the following ground:

Because the Supreme Court erred in affirming instead of reversing and setting aside the judgment of the First District Court of the City of Newark, which was under review in this proceeding.

30 Dated Mar. 6, 1922.

THOS. BRUNETTO,
Attorney of Prosecutor.

68 JUN 1 1922

New Jersey Court of Errors and Appeals

THOMAS S. MORLEY, Prosecutor-Appellant, vs. GEORGE McDONALD, Respondent-Appellee.	On Certiorari. On Appeal from Supreme Court.

BRIEF OF THOMAS BRUNETTO OF COUNSEL WITH PROSECUTOR-APPELLANT

This appeal brings up a judgment of affirmance in certiorari.

The writ of certiorari brought up to the Supreme Court for review, an order and judgment entered in the First District Court of the City of Newark, in a certain cause wherein George McDonald was plaintiff, and Thomas S. Morley and Henry J. Morley were defendants, the said action was entitled "action at law," and was brought to recover damages to an automobile owned by the plaintiff, in the District Court of the First Judicial District of the County of Essex, which action was later transferred for trial by the parties to the First District Court of the City of Newark.

2. The cause of action alleged in said proceedings instituted in the District Court of the First Judicial District of the County of Essex arose out

of a collision which happened on August 28, 1920, on Bloomfield Avenue, in the Town of Bloomfield, Essex County, New Jersey.

3. The summons in said action in the District Court of the First Judicial District of the County of Essex wherein George McDonald was plaintiff and Thomas S. Morley, *et al.*, were defendants, was issued on September 3, 1920, and was returnable on September 9, 1920.

4. On or about the same date Henry J. Morley who was the owner of the car which at the time of the collision was being driven by defendant, Thomas S. Morley, on or about September 3, 1920, instituted an action against George McDonald to recover damages to his car, in the First District Court of the City of Newark, New Jersey.

5. On or about the 9th day of September, 1920, the parties by stipulation attempted to transfer the said action to the First District Court of the City of Newark provided the Judge of the District Court of the First Judicial District of the County of Essex consented to same. See State of the Case, page 39.

6. All the papers in said action were sent to the Clerk of the First District Court of the City of Newark by the Clerk of the District Court of the First Judicial District of the County of Essex within a few days after the entering of the above stipulation.

7. On the trial day both the cases of *Henry J. Morley v. George McDonald* (which was originally instituted in the First District Court of the City of Newark), and the case of *George McDonald v. Thomas S. Morley,* which was the case which was transferred for trial by the parties in said proceedings were adjourned from time to

time until October 1st, when both cases were listed for trial in the First District Court of the City of Newark.

8. At that day the case of *Henry J. Morley v. George McDonald* was moved for trial by the plaintiff and after all the testimony had been in and before the Court had rendered a decision in said cause, the Judge of the said Court said that he would not hear the witnesses over again in the case of *George McDonald v. Thomas S. Morley, et al.*, but the only evidence he would like to hear in that case was as to the measure of damages to the plaintiff's car.

9. The Court after hearing the testimony as to the damage to the McDonald car, then reserved decision and on October 8, 1920, filed an opinion in both of said cases with the Clerk of the First District Court of the City of Newark. See State of the case, page .

10. On October 8th, judgment for the plaintiff in the case of *George McDonald, plaintiff vs. Thomas S. Morley,* was entered by the Clerk of the District Court of the First Judicial District of the County of Essex, and on the 18th day of October, 1920, the said Clerk issued a statement for docketing which judgment was later docketed in the Court of Common Pleas for the County of Essex.

11. On November 5, 1920, the prosecutor of this writ, Thomas S. Morley, sued out of this Court a writ of certiorari removing the judgments entered in the District Court of the First Judicial District of the County of Essex and the judgment founded upon a statement for docketing issued by the Clerk of said District Court of the First Judicial District of the County of Essex, which judgment was entered in the Essex County Court

of Common Pleas as aforesaid, and the proceedings which were then in the First District Court of the City of Newark.

The legality of the judgment removed by said writ of certiorari as aforesaid was argued at the February Term, 1921, of the Supreme Court and decision was rendered on June 7, 1921, in which the Supreme Court set aside both judgments, to wit, the judgment entered in the District Court of the First Judicial District of the County of Essex, and also the judgment entered in the Essex County Court of Common Pleas on the statement for docketing issued by the Clerk of said District Court of the First Judicial District of the County of Essex; nothing was said about proceedings which were had in First District Court.

12. On or about July 1, 1921, Clarence Sackett, attorney of George McDonald, respondent in this proceeding, served upon attorney of prosecutor-appellant a notice that on the 7th day of July, 1921, he would apply to the First District Court of the City of Newark for an order directing the Clerk of said Court to enter upon the docket of said Court *nunc pro tunc* as of September 1, 1920, and thereafter as the same may appear, the record filed in the District Court for the First Judicial District of the County of Essex in the case of *George McDonald, plaintiff, against Henry J. Morley and Thomas S. Morley, defendants, etc.*, the said notice also stated that the said Clarence Sackett would also at the same time and place, move the said First District Court of the City of Newark to direct the Clerk of said Court to enter judgment in said Court in favor of the plaintiff, George McDonald, and against Thomas S. Morley, defendant, for $265.25, upon said record of said District Court for the First Judicial District of

the County of Essex, and the proceedings and trial had thereon in the said First District Court of the City of Newark. State of Case, page 18.

13. On July 7, 1921, at the First District Court of the City of Newark, attorney of prosecutor appeared especially and for the sole purpose of objecting to the jurisdiction of said Court in entertaining jurisdiction in the case of *George McDonald vs. Thomas S. Morley*, at that time. Attorney for respondent (Clarence Sackett) was also present, and handed the Court a paper; see state of the case, page 26, and although the said Clarence Sackett, attorney for respondent did not utter a word in making any application to the said Court with the exception of handing the Court a paper, see state of the case, page 26, the said Court after argument with counsel of prosecutor-appellant, directed the Clerk of the First District Court of the City of Newark, that the records sent to that Court under the stipulation signed by the attorneys of the respective parties, and consented to by the District Court of the First Judicial District of the County of Essex was to be filed in that Court as of September 16, 1920.

14. The said Court also ordered that the record consisting of the stipulation of the parties by their respective attorneys, consented to by the Judge of the District Court of the First Judicial District of Essex County, the state of demand and other papers sent to that Court under said stipulation by said Court be re-entitled in the First District Court of the City of Newark, and at the same time and place order that judgment as of the date of said order to be entered upon the said record and proceedings in that Court (First District Court of the City of Newark), in accordance with the findings of said Court in favor of the plaintiff,

George McDonald, and against the defendant, Thomas S. Morley, for $265.25. The said order is found on pages 21 and 22 of the State of the Case.

15. *The judgment which was entered in the First District Court of the City of Newark, as per said order was entered as of September 16, 1920. State of the case, pages 40-41*

16. That on February 16, 1921, while the proceedings removed into this Court by the writ of certiorari sued by the present prosecutor on November 5, 1920, Clarence Sackett, attorney of respondent in that cause, and also in this proceeding, wrote a letter to the Justices of the Supreme Court who had heard the case, attempting to explain how the case of *George McDonald v. Thomas S. Morley, et al.*, had been remanded by the First District Court of the City of Newark, to the District Court of the First Judicial District of the County of Essex. A copy of said letter is set out in State of the Case, pages 41-43.

17. Reasons why order entered in the First District Court of the City of Newark on July 12, 1921, and judgment entered in the said District Court as of September 16, 1920, should be vacated and set aside.

POINT 1

Because the Judge of the District Court of the First Judicial District of the County of Essex had no authority in law to transfer a cause that had been commenced in said District Court to the First District Court of the City of Newark.

In *Bacon on Abridgement*, Vol. 2, Sec. B, under title of the Judges, and Persons exercising a jurisdiction, star pages 97 and 98, the rule is laid as follows:

> "As all the judges must derive their authority from the crown by some commission warranted by law, they must also exercise it in a legal manner, and hold their courts in their proper persons, for they cannot act by dupty nor any way transfer their power to another."

Section 19 of the District Court Act provided as follows:

> "The Judge of any District Court or any Judge of the Court of Common Pleas may preside in and conduct the business of any District Court when requested so to do by the Judge thereof, and aid in the transaction of the business of any District Court, and while so acting such judge shall have the same powers and authority as the judge appointed for said Court (P. L., 1898, p. 560)."

The above section of the District Court Act did not confer jurisdiction on the Judge of the District Court of the First Judicial District of the County of Essex to transfer the said cause to the First District Court of the City of Newark.

The only authority which the Judge of the District Court of the First Judicial District Court of Essex County had if he was unable to preside as Judge of the District Court of the First Judicial District of the County of Essex at any time was he could request another District Court Judge or a Judge of the Court of Common Pleas of Essex County to preside for him. In 15 *Corpus Juris,* page 1145, Section 605, the rule is laid down as follows:

> "As a general rule, it is within the constitutional powers conferred upon the legislature of a state to provide by statute for the removal of causes from one court to another, and such provisions are very generally made. But unless expressly authorized so to do, a court has no authority to transfer a cause from itself to another court, and thereby give the other court possession of the case to hear and determine it, although the other court would have had jurisdiction of the case if it had come to it by due process."

Also in Vol. 16, *Standard Encyc. of Procedure,* page 690, the rule is laid down as follows:

> "The power to request another judge to try a case is not an inherent power vested in the judge, but it must depend for its support upon the statute."

In *Wright vs. Boon,* 2 Green (Iowa), pages 45-8, the Court held:

> "The judge alone is endowed by law with the duties and responsibilities which pertain and belong to the court; and if these are assumed by another, or attempted to be conferred by the court or parties all

> proceedings emanating from such assumed or enforced authority will be absolute nullities, and should be declared void whenever attempted to be enforced."

In *Handelman vs. Harris,* 107 Atl., page 34, the Supreme Court held:

> "The point is made that there was an appearance and a defense on the merits, and the objection to jurisdiction was therefore waived. But waiver is not applicable in cases where the tribunal had no jurisdiction of the subject-matter."

In *Eaton v. Eaton,* 124 N. E., page 37:

> "Consent or waiver by the parties cannot confer jurisdiction over a cause which is not vested in the court by law, and it is the duty of the court to consider the point of its own motion."

In *People v. Simon,* 248 Ill., page 28, 119 N. E., 940, the Court held:

> "Every act of a court beyond its jurisdiction is void."

In *Nation vs. Green,* 63 Ind. App., 136, 116 N. E., 840, the Court held:

> "If a court is without jurisdiction anything it may hereafter do as well as things already done will be a nullity."

In *Re Humphrey v. Employer's Liability Ins. Corp.,* 226 Mass., 154, also 115 N. E., 253, was held:

> "A court which is without jurisdiction over a case cannot decide it authoritatively."

The Supreme Court, see state of the case, pages 52-56, in its opinion stated:

> "That the prosecutor went to trial and consented to the jurisdiction of the Newark Court, cannot now complain of that."

Still the matter of fact is from the stenographer's transcript certified to by the Judge of the First District Court of the City of Newark, of what to place in the First District Court of the City of Newark on July 12, 1921, see State of Case, page 26 to page 33, and particularly on page 31, beginning from line 30 and running to page 32 up to line 32, the Court said:

> "The case that was tried was the *Morley* case, Morley was plaintiff and McDonald was the defendant, *that was the case that was tried. The case of McDonald vs. Morley, which was brought in this court by consent of the attorneys, after testimony was taken in one case, was allowed to be decided on the evidence taken in this particular case.*"

Therefore, under the circumstances, prosecutor-appellant never had a trial of the issue of *McDonald vs. Morley,* in any Court.

POINT 2

Because the First District Court of the City of Newark had no authority in law to direct the Clerk of said Court to enter upon the docket of the First District Court of the City of Newark a proceeding or cause which had been instituted in the District Court of the First Judicial District of the County of Essex.

(a) Because the case of *McDonald v. Morley*, which had been removed in this Court by writ of certiorari dated November 5, 1920, had not been remanded to the First District Court of the City of Newark.

The Supreme Court by its Writ of Certiorari of November 5, 1920, directed as follows:

We being willing for certain reasons to be certified of the judgment, order and proceedings had before the District Court of the First Judicial District of the County of Essex, *in the First District Court of the City of Newark,* and in the Essex County Court of Common Pleas in a certain action entitled, an action at law brought against Thomas S. Morley and Henry J. Morley in the suit of George McDonald, on the 9th day of September, 1920.

We hereby command that you and each of you send, under your seal, to our justices of the Supreme Court of Judicature of the State of New Jersey at Trenton, on the 24th day of November, 1920, the said judgment, order and all proceedings in the aforesaid action and with all things touching and concerning the same, as fully and entirely as they remain before you, by whatever names the parties may be called therein, together with this writ that we may further cause to be done what of right and according to law ought to be done. In response to the command of said writ the First

District Court of the City of Newark on the 12th day of November, 1920, made its return to said writ in which among other things, the Court stated:

> "I hereby certify and send under the seal of the First District Court of the City of Newark, to the Honorable Justices of the Supreme Court of Judicature of New Jersey, the judgment, order and proceedings in the First District Court of the City of Newark, in a certain action, plaint or proceedings brought against Thomas S. Morley and Henry J. Morley at the suit of George McDonald, instituted in District Court of the First Judicial District of the County of Essex in which judgment was rendered against the said *Thomas Morley on the 8th day of October, 1920, for $265.25 damages and $20.76 costs, together with all papers touching and pertaining to the same, as fully and entirely as before said First District Court of the City of Newark they remain as is commanded,* which return is more fully set forth on pages 28 and 29 of State of the Case filed with the Supreme Court at the February Term of said Court, 1921."

At the June Term the Court in deciding said case which is reported in 114 Atl., page 147, said:

> "This is a three-headed certiorari addressed to the judge of the district court of the First Judicial District of the County of Essex *to the Judge of the First District Court of the City of Newark, and to the judges of* the Court of Common Pleas of the County of Essex.
>
> "Without approving this method of ad-

dressing the writ, we think we may properly treat the case as one of distinct writs to the judges of each court severally, consolidated for the purpose of argument and decision. The facts are somewhat obscure; we deal only with what appears in the state of the case. The writ directs that all things touching and concerning the judgment in question shall be certified, and the returns state that all have been certified. If anything else was needed it should have been brought here by the proper proceedings for that purpose."

Therefore, when the Supreme Court states in its opinion which was filed February 21, 1922, State of the Case, pages 52 and 56, and in particular on page 56, that the Supreme Court in setting aside the judgment entered in the Essex County Court did not remand the cause to the District Court; that the Supreme Court was not required to do, it was only dealing with the validity of the judgment under review which was set aside. The command of the writ of certiorari which was issued November 5, 1920, out of the Supreme Court among other things *directing the Judge of the First District Court to send all papers, judgments, etc., in the case of Morley vs. McDonald, removed any proceedings which were then pending in that court.* Therefore, the said proceedings in the First District Court of the City of Newark ever since November 5, 1920, have been pending in the Supreme Court.

Again assuming but not admitting that any of the lower courts had jurisdiction of said case after the decision of this court; the said cause would be pending in the District Court of the First Judicial District of the County of Essex. See letter of Mr. Sackett, attorney of respondent, to this court, on pages 41-43 of state of the case.

POINT 3

Because the First District Court of the City of Newark had no authority in law to enter in said Court the order of July 12, 1921, in the case of *George McDonald v. Thomas S. Morley* and *George McDonald v. Thomas S. Morley and others,* and which it directed the Clerk of said Court to enter judgment in said cause in the First District Court of the City of Newark, as of July 12, 1921.

And also for the same reason discussed in point two paragraph "A."

POINT 4

Because the said judgment which the First District Court of the City of Newark entered on July 12, 1921, in the case of *George McDonald, plaintiff, vs. Thomas S. Morley and others, defendants,* is void for the further reason that the said Court could not enter a judgment in a cause after nine months since the decision in said cause.

For the sake of argument assuming but not admitting that the said cause remained in the First District Court of the City of Newark after the transfer from the Montclair District Court and the trial of Oct. 1, 1920, if you may call that a trial of the issue, then after the First District Court of the City of Newark determined the issue of said cause on Oct. 8, 1920, by the filing of its opinion, State of the case pages 15-16, then the said First District Court of the City of Newark, on July 7, 1921 had lost jurisdiction of the cause, as said cause either on Oct. 1, 1920 when it was tried, or on Oct. 8, 1920 when the Judge of the First District Court of the City of Newark filed its opinion and ordered judgment without

continuing same to any particular date thereafter, the said First District Court of the City of Newark, lost jurisdiction of the cause.

In *Perth Amboy City Market vs. Baum*, 89 N. J. L., 614, 99 Atl., 333, Parker, Judge, speaking for the Court of E. & A. says on page 334:

> "The well established rule in justices' courts is that there must be a definite adjournment, or the court loses jurisdiction of the cause. *Allen v. Summit Board of Health,* 46 N. J. L., 99, and cases cited, overruling *Darlings v. Corey,* 1 N. J. L., (Coxe) 200. The same rule applies to district courts, except that after the hearing is terminated the court may reserve decision for a reasonable time."

In *Rutherford v. Fen,* 20 N. J. L., 288 on 304, this Court citing Blackstone (in 3 Com., 295) also Chase's Blackstone (4th edition page 771):

> "A discontinuance is somewhat similar to a nonsuit, for when a plaintiff leaves a chasm in the proceedings of his cause, as by not continuing the process regularly from day to day, and time to time, as he ought to do, the suit is discontinued, and the defendant is no longer bound to attend, but the plaintiff must begin again, by suing out a new original usually paying costs to his antagonist."

In addition the undisputed facts are as follows: The First District Court of the City of Newark delivered an opinion in the case of *Morley vs. McDonald* on the 8th day of October 1920, judgment was later entered in the District Court of the First Judicial District of the County of Essex, and which judgment which the respondent-appellee in this cause caused to be docketed in the

Essex County Court of Common Pleas on or about the 18th day of Oct. 1920, therefore, under the circumstances, at no time was the said cause continued or adjourned in the First District Court of the City of Newark to any particular date, therefore the said Court lost jurisdiction of the cause.

The Supreme Court explains this delay in its opinion, see state of the case pages 52-56 bottom of page 54 and continued on page 55 as follows:

> "We think that under the circumstances in this case the time occupied by the litigation cannot be said to be an unreasonable time, especially as in this case where the prosecutor removes the judgment to the Supreme Court by certiorari, and therefore we do not think the court lost jurisdiction because there was a delay of considerable time caused by the interference of this court. The respondent had from Oct. 8th to Nov. 5th, 1920 to have a proper judgment entered in the First District Court of the City of Newark."

Assuming that the First District Court of Newark did not enter the judgment in said court, therefore under the circumstances, the said First District Court of the City of Newark, on July 12, 1921 would not have jurisdiction to entertain any proceedings and direct the entering of a judgment in said cause on that day.

POINT 5

Because the plaintiff in said cause is guilty of laches, therefore he was not entitled to enter a judgment on July 12, 1921, in a case which was determined on October 8, 1920.

For the above reason the First District Court of the City of Newark erred on July 7, 1921 when it ordered the entry of the order of July 12, 1921. See state of the case pages 34-35 and also when said court entered judgment as of September 16, 1920.

In *re Finks,* 224 Fed. Rep., 92 on page 93, syl. No. 2, the court held:

> "The principle on which judgments *nunc pro tunc* are sustained is that such action is necessary in furtherance of justice, and to save a party from unjust prejudice through delay caused by the act of the court or the course of judicial procedure, and the delay in entering the judgment must either be solely the fault of the court, or at least not attributable to the laches of the party in whose favor the practice is resorted to."

Freeman on Judgments, 4th edition page 73, sec. 57 says:

> "Delay of the Court. The cases naturally resolved themselves into two classes. The first comprised a large number of actions in which no judgments had ever been rendered, but which were, so far as the suitors could make them in condition for the rendition of final judgments. The second was composed of cases, comparatively few in number, in which judgments, though formally pronounced, had from accident or

from negligence of the clerks never been put upon the records. The first class contained not only the greater number of cases, but each of the cases within it was, in all probability, more deserving of relief than any of the cases of the second class. No case could be ranked among the first class in which the delay to render or enter judgment was imputable to any negligence or even misapprehension of the parties. The rule that no judgment would be ordered entered *nunc pro tunc* except for delay of the court admitted of no exceptions in theory, and was so constantly observed in practice that one of the judges remarked that he had never known of its violation during his experience, extending at bar and bench over a period of forty years."

"The necessity for entering judgments as of some day prior to their rendition arose chiefly, if not exclusively in those cases where, after the trial and submission of a cause, one of the parties died, as no judgment could properly be entered bearing date subsequent to his death. As the suitor who brought his action on to trial, and caused it to be tried and submitted, had manifestly been guilty of no laches, the court protected him from any prejudice he might suffer by the death of his adversary after such submission, and instead of permitting the action to abate, directed the judgment to be given effect, if necessary, as far back as the day of the submission. Thus the time taken by the court for deliberation was, as far as possible, prevented from working injustice to the party who should in the end prevail in his suit. In the appellate courts, if a cause is argued

and submitted either upon the merits or upon motion to dismiss the appeal, and thereafter one of the parties dies, the final judgment of reversal or affirmance or dismissing the appeal will be entered as of some day prior to the death of the party but subsequent to the argument."

Sec. 60 page 76:

Delay, not of court. "If, however, the delay is in no wise attributable to the court, nor to the tying up of the case during the time required to dispose of such motions as we have mentioned no doubts nor difficulties, nor mistakes of law, in which one of the parties has been involved, will entitle him to this relief. If, for instance, the counsel in a case are unable to decide at once what form of judgment or decree is best, and while discussing this matter among themselves the plaintiff or defendant dies, or if a party, upon applying to have judgment signed, does not press the matter because one of the officers suggests a doubt as to whether it is not a legal holiday, and the defendant dies the same day, neither of these cases warrants the interposition of the court. The court is in no way blamable for the doubts or misapprehensions of the parties nor of their advisors, and it will not change its course of proceeding to relieve them from the consequence of any mistake of law or of a fact. That there is a surviving defendant is not a sufficient objection to the entry of judgment *nunc pro tunc,* if the other facts authorize it. The rule that judgment will not be entered *nunc pro tunc* will, unless to relieve a party from injury

attributable to a delay of the court, be enforced even where a delay has been occasioned, by the party against whom the entry is sought to be made. Thus where judgment would have been entered within two terms after the entry of the verdict but for the fact that the plaintiff's executor was delayed in proving a will on account of a caveat entered by the defendant against the probate being granted, the court, though conceding the case to be one of extreme hardship denied the application to enter judgment *nunc pro tunc,* one of the judges saying: 'I think we ought not to be induced by our desire to do substantial justice in the individual case, to depart from those general principles which are the only safe guides for the administration of the law.' "

Black on Judgments, Vol. 1, 2nd edition, page 189, sec. 129:

"If a delay in the entering of a judgment, after a verdict or submission is not attributable to the act of the court in holding the case under advisement, or the pendency of a motion or other interruption, but is caused by the laches of the party entitled to judgment, and during the interval a party dies, judgment *nunc pro tunc* will not be allowed. There is, of course, no room here for the application of the maxim above quoted, and the ends of justice do not require that the law should restore to a party an advantage which he may have lost through his own negligence or hesitation."

POINT 6

Because the First District Court of the City of Newark had no jurisdiction to enter judgment on July 12, 1921 in a cause which is alleged to have been tried and decided on October 8, 1920, as of the date of September 16, 1920, as shown by the docket of said court. See state of case, page . See cases cited under point 5.

POINT 7

That the First District Court of the City of Newark on July 7th, and 12th, had no jurisdiction of the cause and no authority to direct the entering of any orders in said cause on July 12, 1921, because the said cause was returned to the District Court of the First Judicial District of the County of Essex, on or before Oct. 8, 1920, at which time a judgment (which has been declared null and void by the Supreme Court by opinion filed on June 7, 1921), 114 Atl., page 147, was entered in said cause by the Clerk of the First Judicial District of the County of Essex.

See letter of Mr. Sackett who at the time was respondent's attorney, state of the case 41-43, and also opinion of this court rendered in the case of *McDonald vs. Morley* on July 7, 1921, reported in 114 Atl., 147.

POINT 8

Because the First District Court of the City of Newark had no jurisdiction to direct a judgment in said cause on July 12, 1921, in a case which it had decided on October 8, 1920, for the following reasons:

(a) Because the defendant would not be deprived of an appeal to this Court as he could not prosecute said appeal as more than twenty days had elapsed (on July 12, 1921) since determination or direction of said District Court.

Chapter 305, Laws of 1915, page 549 states: "That if a party is dissatisfied with the determination of said District Court he may appeal to the Supreme Court providing he serves a notice of the appeal and files a bond within twenty days from the date of such determination," if a judgment is permitted to be entered as of Sept. 16, 1920, on July 12, 1921, the prosecutor certainly is deprived of an appeal, and as the Supreme Court stated in its opinion in *Morley vs. McDonald,* 114 Atl., 147, this would be a good reason for depriving the First District Court of the City of Newark of jurisdiction to enter judgment at that time, Sept. 16, 1920.

(b) Because there was no evidence taken on July 7, 1921, on which the First District Court of the City of Newark could base a decision in directing judgment to be entered for the plaintiff, George McDonald, in said cause.

The Supreme Court in its opinion on page 55, state of the case, pages 52 and 56 states on page 55, line 30:

"The necessary point made is that the Newark court had no authority to enter judgment on July 12, 1921 because the defendant would be deprived of an appeal as he could not proceed with his appeal because more than 20 days had elapsed since the finding, by the appeal is not from the finding, but from the judgment, and from that the prosecutor had ample time after July 12, 1921 to prosecute his appeal. Under the record sent up by the First District Court of the City of Newark as directed by the Writ of Certiorari issued in this cause, the docket states, state of the case, pages 40-41:

'The court rendered judgment on Sept. 16, 1920, in favor of the plaintiff and against the defendant, Thomas S. Morley in the sum of $265.25 damages with costs. Thereupon judgment was entered in favor of the plaintiff and against the defendant in the sum of $265.25 damages with costs. The Writ of Certiorari in this cause was issued on July 15, 1921, and still respondent waits until November 17, 1921 when he applies to the Supreme Court for an order to amend the return; pages 48 and 49, but at the same time he does not apply to the court to have the judgment which has been entered in the first district Court of the City of Newark as of *Sept. 16, 1920* to be changed to conform with what actually took place, and as prosecutor, appellant had to appeal from a judgment as shown in the docket of the First District Court of the City of Newark, and the statements contained therein is the only proper record of said proceedings; therefore assuming that prosecutor appellant could appeal

from a judgment which was directed to be entered on July 12, 1921, the actual judgment which was entered was a judgment on September 16, 1920, and therefore more than 20 days had elapsed since the entering of said judgment and no appeal would lie.

POINT 9

Because the First District Court of the City of Newark had no jurisdiction on July 7, 1921, or any time thereafter to direct the entering of judgment in said cause, as the said cause was then in the Supreme Court, having been removed to said Court by a writ of certiorari, on November 5, 1920, and this Court has at no time remanded the said cause to the First District Court of the City of Newark.

In *Welsh v. Brown,* 42 N. J. L., 323, Justice Depue for this court said:

> "The plaintiff-in-error, who was plaintiff below, sued out a writ of error directed to the Morris Circuit Court to remove into this court a judgment entered in that court on the verdict against him. The writ was duly returned, and at Nov. Term 1878 was dismissed for want of prosecution. Within the three years after judgment, allowed by the statute of limitations for bringing writs of error, the plaintiff sued out of this court a 2nd writ of error, directed also to the Circuit Court to bring up the same record. Motion is now made to dismiss the latter writ as improperly issued. On dismissal of the 1st writ of error, no remittitur was entered."

A writ of error answers a two fold purpose. It is a certiorari to remove the record from the inferior court, and a commission to the superior court, to examine into the record and to affirm or reverse, according to law. If the record be properly described, the certiorari part of the writ is good, and the record is removed, and will remain in the superior court, though the writ be quashed. *Jacques v. Cesar,* 2 Saund., 100 note. In practice it is usual to send only a transcript of the record, yet, in contemplation of law upon a writ of error in the King's Bench, the record itself is removed. 2 Saund., 101, q. F. N. B., 45. The record being removed by the writ into the court to which it is certified, it remains there until a remittitur be entered, though the writ is determined by abatement or discontinuance, and until such remittitur be made the judgment is not again in the court from which it has been certified. *Howard v. Pitt*, 1 Salk., 261. The supersedeas continues until the record is sent back by a remittitur, though the judgment be affirmed or the plaintiff-in-error be nonsuit or discontinue, or the writ is abated. Com. Dig., "Pleader" 3 B-12.

The above case was cited with approval by the Court of Errors in *Citizens' Gas Light Co. vs. Alden,* 44 Law, 648 where it said "Doubtless, the first writ removed the record, and if no order remitting it had been made, it remained in legal contemplation in the court to which it was certified." From Syllabus:

> "A record removed into the Supreme Court by certiorari remains therein legal contemplation until remitted, by order of court."

In *State Glesson et al., pros. vs. Adams et al.,* 54 N. J. L., 506, also 24 Atl., 482.

Magie, J. "The attack of prosecutors should be confined to the part of the proceedings respecting the vacation of the public road in question, which has not heretofore been adjudicated upon in this court. These objections are therefore applicable to an order of the common pleas of Gloucester County made Feb. 25, 1891, which after reciting a previous order appointing surveyors to view the road in question, and that the proceedings had been removed to this court by certiorari, and which was subsequently dismissed, directed the surveyors to meet at a certain time and place, and thereon proceed according to law the previous order, and the return made by the surveyors under said order. The case shows that the original order appointing surveyors, and directing them to meet at a certain time and place for the purpose of vacating a certain public road, was removed into this court by certiorari. A writ of supersedeas was also allowed by this court, commanding the surveyors to desist from meeting at the time and place mentioned in the original order, and also from taking any other proceedings until the further order of this court. Upon consideration of the certiorari above mentioned, this court was of opinion that the order appointing the surveyors was valid. *State v. Adams*, 21 Atl. Rep., 928. A rule was there entered dismissing the Writ of Certiorari. But no remittitur was then or has since been discharged. It also appears that a writ of error has issued removing the judgment of this court to the court of errors. Upon these facts the prosecutors are entitled to relief. Where a certiorari has re-

moved the record of an inferior tribunal into this court, it remains here until remitted by order of the court. *Gas Light Co. v. Alden,* 44 N. J. L., 648, 2 Hale, P. C., 213. That a writ was dismissed does not change situation. When a writ of error which has removed a record into this court is dismissed, a second writ, directed to the court below, is nugatory, because the record is yet there. *Welsh v. Brown,* 42 N. J. L., 323. The result is that the record of the original order remains here or in the Court of errors. There was nothing in the common pleas on which to found the order of Feb. 25, 1891, and it, and the return made thereon, must be vacated and set aside with costs."

Also see *Chambers v. Phila. Pickling Co.*, 81 Atl., 573, by Gummere, C. J., Dec., Nov. 13, 1911.

See also for cases discussed under Point Two, paragraph "A."

POINT 10

The First District Court of the City of Newark, on July 7, 1921 or any other day thereafter, had no authority in law to direct the entering of a judgment in said cause, because prior to that day the defendants had demanded a trial by jury in said cause.

On Sept. 7, 1921 defendants (prosecutor in this cause) demanded a trial by jury of the issue in the case of *McDonald v. Morley* in the District Court of the First Judicial District of the County of Essex. State of the case page 38, therefore when case was transferred for trial at the First District Court of the City of Newark, said Court had no jurisdiction to try said issue without a jury.

In *Raphael v. Lane,* 56 N. J. L., 114, also 28 Atl., 423, the Supreme Court held:

> "A demand for a jury made by the defendant at the proper time deprives the Court of jurisdiction to try the cause otherwise than by a jury." Said case was cited with approval by the Court of E. & A. in *Crossly v. Wm. H. Connolly & Co.*, 90 N. J. L., 238, 100 Atl., 228.

For these reasons we respectfully contend that the judgment of the Supreme Court should be reversed and the judgment of the First District Court of the City of Newark entered as of September 16, 1920, and the order directing the entry of the same on July 12, 1921 be declared null and void and set aside.

June term 1922.

Respectfully submitted,

THOS. BRUNETTO,
Counsel for prosceutor-appellant.

68 JUN. 1, 1922

New Jersey Court of Errors and Appeals

THOMAS S. MORLEY, Prosecutor-Appellant, vs. GEORGE McDONALD, Defendant-Appellee.	ON CERTIORARI APPEAL.

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REPLY BRIEF FOR PROSECUTOR-APPELLANT.

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Respondent-appellee, on page 3 of his brief states:

"The judgment under review is that judgment, rendered July 12, 1921, the delay in entering it having been caused by the erroneous entry of judgment, by the acts of Clerks in both district courts in the Montclair District Court and the prosecution of the first certiorari by the prosecutor-appellant in the Supreme Court, which decided that said judgment was no judgment at all (114 Atl., 147). The respondent-appellee had no control over these proceedings, which he was bound to defend, and he abided by the opinion of the Supreme Court, with which he has no quarrel, but entirely agrees, and then took steps without delay to have his judgment entered in the Newark District Court, in which steps he was guid-

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ed by the reasoning of the opinion of Mr. Justice Swayze in the first certiorari (114 Atl., 147), with the result that the Supreme Court approved the action of the steps taken and sustained the order made by Judge MacMahon in accordance with his deliverance from the bench (Case, page 31, line 20) and affirmed the judgment under review (Case, page 56, line 20)."

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Again following the respondent says that prosecutor-appellant under Point 8, lays particular stress upon the docket entry of the District Court for the reason that the docket entry of the District Court states as follows:

"That the Court rendered judgment September 16, 1920, etc., citing case page 41."

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Then he complains that counsel for appellant is not fair on that point. He also recites that the docket entry was a clerical error of the Clerk of the District Court, and that he later applied to the Supreme Court for a rule upon Judge MacMahon, Judge of the First District Court, to certify certain facts mentioning the certification by Judge MacMahon both of which speak for themselves.

Then, on page 4 of his brief he states:

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"The Court will observe what a silly error the Clerk made by reference to Judge MacMahon's order of July 12, 1921,"

and stating the language of Judge MacMahon that,

"It was a fact that the last paragraph of the docket as it appears on page 41, State of the Case, namely; 'that the Court rendered judgment Sept. 16, 1920, etc., is con-

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trary to the fact,' and that, 'The fact was that the First District Court of the City of Newark rendered judgment on July 12, 1921, in favor of George McDonald and against the defendant Thomas S. Morley.' "

Again the Court's attention is called to the said statement on pages 40 and 41, State of the Case, the docket is the record of the judgment in the First District Court of the City of Newark, which the Legislature has provided as being the proper method of making up a record of the judgment (Sec. 25 of the District Court Act, Laws of 1898, page 562). C. S. 1910 Page 1961

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25. It shall be the duty of every clerk of every district court wherein any suit shall be instituted, to enter in a book to be called a docket, and to be kept for that purpose, and to remain a record of said court, the names of the plaintiff and defendant, the style and nature of the action, the sum demanded, the time of issuing process and when returnable, the return made thereto by the constable when the copy of the account or state of demand or set-off was filed by the parties or either of them, the time of taking the recognizance, or making or filing any order, plea, affidavit, complaint, pleading or other papers in the cause, the adjournment, the rule of reference and report of referees; the jury, when and by whom demanded; the venire, when issued and how returned; the time of trial, and names of the jurors and witnesses; a description of each paper offered in evidence, the verdict and judgment, and, when given, the execution or executions, when issued, the indorsement thereon, and how returned by the constable or sergeant-at-arms; the appeal, when and by whom demanded, and all the proceedings before said court touching the said

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suit; also the ~~terms~~ items of costs in each case and the amount paid by each party; and further, it shall be the duty of such clerk to grant to either party, when required, a certified copy of such proceedings; a transcript of the docket in any cases certified to be a true transcript by the clerk under the seal of the court, shall be admitted in evidence in any court of this state, and shall be of the same effect as if the docket were then and there produced.

Therefore any proceedings which the respondent-appellee in this case might have initiated in any other Court, on said judgment the only record which he could produce was a transcript of the docket as provided by Sec. 25 of the District Court Act, C. S., 1910, page 1961, supra.

The rule is laid down in 23 Cyc. 855.

That no one, whether or not a party, may impeach the record of a judgment considered as a record, and a record of a court imports absolute verity and is conclusive evidence of the facts which it recites as between the parties to the judgment, and those in privity with them, and cannot be contradicted or varied by evidence aliunde.

Respondent-appellee then dwells on the fact that he applied to the Supreme Court for an order to diminish the record as stated on page 51 of the State of Case.

Again the respondent-appellee did not follow the proper procedure.

The procedure which a party must follow to have a record modified where it does not show what it should show, would be for an application to the trial court to have the record modified to show true facts.

The procedure which a party must follow in a case where the record does not show what it should show is discussed and restated in the case of Davis vs. Township of Delaware, 41 N. J. L., 55, same case 42 N. J. L., 513, which opinion was affirmed by this Court in 45 Law 186.

Also in Hansen vs. DeVito, 76 N. J. L., 330, where Justice Reed of the Supreme Court restated the same rule, and where the same rule was again approved by this Court in Dolker vs. Board of Chosen Freeholders of Atlantic County, June 18, 1917, in 101 Atlantic Rep. 370.

Therefore it is respectfully submitted that when the Supreme Court held that the prosecutor-appellant had a right of appeal from the judgment of the First District Court, which judgment as shown by the docket entry, as of Sept. 16, 1920, the time prescribed by law in which an appeal may be taken from a judgment of the District Court to the Supreme Court had elapsed, on July 12, 1921, the only remedy available to prosecutor-appellant was to remove said judgment into the Supreme Court by certiorari and have the judgment set aside.

Therefore, prosecutor-appellant respectively submits that the Supreme Court erred in its judgment when it affirmed the judgment of the First District Court of the City of Newark, and that the said judgment of the Supreme Court should be reversed and set aside, and the judgment of the First District Court be declared a nullity.

THOS. BRUNETTO,
Attorney and of counsel with
the Prosecutor-Appellant.

Arthur W. Cross, Law Printer, 243 Market Street, Newark, N. J.

New Jersey Court of Errors and Appeals

THOMAS S. MORLEY,
Prosecutor-Appellant,
vs.
GEORGE McDONALD,
Respondent-Appellee.

On Certiorari.
Appeal.

BRIEF OF RESPONDENT-APPELLEE.

With a few observations, the respondent-appellee is content to rest the justice of his cause upon the *per curiam* opinion of the Supreme Court (State of Case, p. 52) which dealt *seriatim* with the reasons advanced by the prosecutor why the judgment under review should be set aside, and decided against him on every point.

The judgment in this case is for $265.25. The appellee has been compelled to spend a large sum of money in the way of costs and disbursements because of the blunders of others in the district courts, blunders over which he had no control, as, for instance, as set forth by the Supreme Court in its opinion in the first certiorari (114 Atl. 147) and later having to rule the Judge of the Newark District Court to certify certain facts, which he did certify, showing egregious blunders in the making of his docket by the clerk of that court (Case, pp. 48 to 51, inc.).

Counsel for appellant, in his brief, under "Point 2" quotes incorrectly the opinion of the Supreme Court. The Supreme Court did not say "That the prosecutor went to trial and consented to the jurisdiction of the Newark court, cannot now complain of that." It is submitted that the above quoted statement is not only incorrect, but misleading. What the Supreme Court said was: "We are of opinion that when the parties consented to have the

record removed to the Newark District Court it amounted in substance and effect to the entering of a suit, by consent of the parties, without summons, as may be done under the District Court Act, and that when they'' (*the parties, Thomas S. Morley and George McDonald*) ''went to trial the prosecutor consented to jurisdiction of the Newark court and cannot now complain of that'' (Case, p. 53, l. 32).

Appellant's counsel, in the very next paragraph of his brief, while correctly quoting Judge MacMahon, as far as he quotes him, stops short of this very significant language of Judge MacMahon, immediately following: ''No harm can come to the parties in this suit. *You brought the case here by stipulation and we tried it. All witnesses were heard and the court found the facts''* (Case, p. 32, l. 3).

The fact then, in spite of all these blunders of clerks and specious arguments of counsel, is that appellee, plaintiff below, in October, 1920, had a finding in his favor (Case, p. 15). This is a written finding of fact in both cases by Judge MacMahon, after a trial of *Morley* v. *McDonald* (and they were the parties to this suit, in which the same issues were involved), instituted in his court, in which he heard all the witnesses produced by both sides in both suits, having acquired jurisdiction in *McDonald* v. *Morley* by the stipulation (Case, p. 11, and p. 53, l. 30, &c.). All the issues involved in both cases were tried, the case of *McDonald* v. *Morley* on the stipulation (Case, pp. 11 to 32); and thus were both causes tried at the same time as stipulated. And in that finding of fact the court found:

1. That Morley, the appellant, was guilty of negligence (Case, p. 15, l. 30).

2. That there was no proof of negligence on the part of McDonald, the appellee, that on the contrary, he exercised the care that could have been asked of a reasonable man in the way of observation of Morley's approach, and kept his car out of

> the path of the Morley car by coming to a full stop (Case, p. 15, l. 40); concluding his finding by stating, in the case of McDonald (appellee) *v.* Thomas S. Morley (appellant), "There will be a judgment against Thomas S. Morley for the sum of $265.25."

The judgment under review is that judgment, rendered July 12, 1921, the delay in entering it having been caused by the erroneous entry of judgment, by the acts of the clerks in both district courts in the Montclair District Court and the prosecution of the first certiorari by the prosecutor-appellant in the Supreme Court, which decided that said judgment was no judgment at all (114 Atl. 147). The respondent-appellee had no control over these proceedings, which he was bound to defend, and he abided by the opinion of the Supreme Court, with which he has no quarrel, but entirely agrees, and then took steps without delay to have his judgment entered in the Newark District Court, in which steps he was guided by the reasoning of the opinion of Mr. Justice Swayze in the first certiorari (114 Atl. 147), with the result that the Supreme Court approved the action of the steps taken and sustained the order made by Judge MacMahon in accordance with his deliverance from the bench (Case, p. 31, l. 20) and affirmed the judgment under review (Case, p. 56, l. 20).

Appellant, in his brief, under the caption "Point 8" lays particular stress upon the docket entry of the District Court, that "the court rendered judgment Sept. 16, 1920," &c. (Case, p. 41). Counsel for appellant is not fair on that point. That docket entry was a clerical error of the Clerk of the District Court. Here again, the error not having been discovered by the appellee, the respondent in the Supreme Court, until the printed case in the Supreme Court was served upon him, the appellee at great expense obtained from the Supreme Court, on motion for that purpose, opposed by the appellant, a rule upon Judge MacMahon to certify certain facts, and a certification thereof by Judge MacMahon, both of which

speak for themselves (Case, pp. 48 to 52, inc.). The Court will observe what a silly error the Clerk made by reference to Judge MacMahon's order of July 12, 1921 (Case, p. 34). But appellant deemed it of sufficient importance even to go to the expense that he did go to, to clearly point it out to the Supreme Court, by Judge MacMahon's certification that:

> "It is the fact that the last paragraph of the docket as it appears on page 41 of the State of Case, namely, 'that the court rendered judgment Sept. 16th, 1920,' etc., is contrary to the fact.
>
> "The fact is that the First Distrcit Court of the City of Newark rendered judgment on July 12th, 1921, in favor of George McDonald and against the defendant, Thomas S. Morley, for $265.25" (Case, p. 51, l. 17).

Of course appellee's rights could not be injuriously affected by the erroneous docket entry of the Clerk, the Court having been apprised of the error in advance, by the record, as above.

It is suggested that if the appellant has prosecuted these writs of certiorari and this appeal (never a suggestion having been made that the judgment is not a just one) for the purpose of making the cost to appellee of getting his money finally more than the damage to his car amounted to, namely, $265.00, he has admirably succeeded.

Appellee respectfully submits that there was no error in the Supreme Court and that its judgment should, therefore, be affirmed.

CLARENCE SACKETT,
Attorney and of Counsel with Appellee.