

NEW JERSEY COURT OF ERRORS AND APPEALS.

CONRAD LOMERSON, garnishee in attachment, plaintiff in error, }
vs. } ON SCIRE FACIAS.
PETER H. HUFFMAN and MAHLON R. RISLER, (late) partners trading under the name and firm of P. H. HUFFMAN & Co., defendants in error. } *Writ of error to Supreme Court of New Jersey.*

M. D. TREFREN, *Attorney for plaintiff in error.*

B. VANSYCKEL, *Attorney for defendants in error.*

This action was commenced in the Hunterdon Circuit Court by writ of *scire facias*, returnable on the second Tuesday of December, A. D. 1852.

The record of the said Circuit Court is in the following words, that is to say:—

HUNTERDON CIRCUIT, APRIL TERM, 1853.

PETER H. HUFFMAN and MAHLON R. RISLER, (late) partners, &c., as P. H. HUFFMAN & Co., } B. VANSYCKEL, At'y
vs. } *Judgment on verdict.*
CONRAD LOMERSON, garnishee in attachment. } *Sci. fa. in attachment, April term, 1853.*

Pleas before the Judge of the Hunterdon county Circuit Court at Flemington, in and for the county of Hunterdon, of the term of April, in the year of our Lord one thousand eight hundred and fifty-three.

EMERY, *Clerk.*

HUNTERDON COUNTY CIRCUIT COURT, of the term of December, A. D., eighteen hundred and fifty-two.

HUNTERDON COUNTY, *ss.*—Peter H. Huffman and Mahlon R. Risler, (late) partners trading under the name and firm of P. H. Huffman & Co., put in their place Bennet Vansyckel, their attorney, against Conrad Lomerson, garnishee in attachment, in *scire facias*.

HUNTERDON COUNTY, ss.—Conrad Lomerson, garnishee in the above stated attachment, puts in his place M. D. Trefren, his attorney, at the suit of Peter H. Huffman and Mahlon R. Risler, (late) partners, trading under the name and firm of P. H. Huffman & Co., of a plea of trespass on the case in attachment.

HUNTERDON, ss.—The State of New Jersey sent to the sheriff of the county of Hunterdon its writ, closed in these words, to wit:—New Jersey, Hunterdon county.—The State
 10 of New Jersey, to our sheriff of our county of Hunterdon, greeting.—Whereas, heretofore, to wit: of the term of May, in the year of our Lord one thousand eight hundred and fifty-one, Peter H. Huffman and Mahlon R. Risler, (late) partners, trading under the name and firm of P. H. Huffman & Co., sued out of our Circuit Court a certain writ of attachment to our sheriff of our county of Hunterdon directed, whereby the said sheriff was commanded to attach George Wilkes, by all and singular the rights and credits, moneys and effects, goods
 20 and chattels, lands and tenements, of him the said George Wilkes, in the said county, so that he, the said George Wilkes, might be before the judges of our Circuit Court at Flemington, on the second Tuesday of September (then) next, to answer Peter H. Huffman and Mahlon R. Risler, (late) partners, trading under the name and firm of P. H. Huffman & Co., of a plea of trespass on the case, to the damage of the said Peter H. Huffman and Mahlon R. Risler, (late) partners, &c., under the name and firm of P. H. Huffman & Co., of two hundred dollars, as is said; and whereas, the said sheriff of the said
 30 county of Hunterdon, did, on the second Tuesday of September, make return to our said judge of our Circuit Court aforesaid, that by virtue of the said writ to him directed, he had attached the said defendant, by money in the hands of Conrad Lomerson, due the said defendant, appraised in the hands of the said Conrad Lomerson at fifty dollars, as by the said writ of attachment and return thereunto made, duly filed in the office of the clerk of our Circuit Court aforesaid, may more fully and at large appear.

And whereas, on the said second Tuesday of September, in the year of our Lord one thousand eight hundred and fifty-one,
 40 agreeably to the statute in such case made and provided, auditors were, by the said Circuit Court, appointed to audit and adjust the demands of the said Peter H. Huffman and Mahlon R. Risler, (late) partners, &c., of P. H. Huffman & Co., and such other of the creditors of the said George Wilkes, as might apply for that purpose.

And whereas, the said auditors, by their report, bearing date the thirteenth day of April, A. D., eighteen hundred and fifty-two, and made to the said court in the term of April in the same year, did certify and report to the said court, that on the day of the date of their report, there was due to the said Peter H. Huffman and Mahlon R. Risler, (late) partners, &c., of P. H. Huffman & Co., the sum of twenty-seven dollars and fifteen cents; to William G. Nicholls, five hundred and sixty-nine dollars and fifty-two cents; to James Mahaffee, ninety-eight dollars and ninety-four cents; to Elijah Swarts, ten dollars and sixty cents; to Huffman, Foster & Co., twenty-six dollars and thirty-nine cents; to Abraham P. Huffman, eighteen dollars and sixty cents; to Peter M. Huffman, fifteen dollars and fifty-six cents; to Charles Conover, twenty-eight dollars and sixty-two cents; to James Hedden, ninety-three dollars and three cents; to Samuel Parry, one hundred and ninety dollars and eighty cents; to Robert J. Allen, seven dollars and twenty-eight and a half cents; to Dennis Maher, eighty-three dollars and forty-nine cents; to Patrick Farley, fifty-three dollars and sixty-five cents; to Thomas O'Brien, fifty-one dollars and fourteen cents; to James Sexton, twenty-six dollars and forty-two cents, to James O'Bryan, seventeen dollars and sixteen cents; to Dennis Bigler, eleven dollars and thirteen cents; to Timothy Dum, fourteen dollars and sixteen cents; to John Savage, twenty-seven dollars and ninety-one cents; to John Sullivan, thirteen dollars and ninety cents; to Patrick Connsidine, three dollars and ninety-five cents; to Michael Flynn, eleven dollars and eighty-one cents; to Michael Caineny, five dollars and twenty-three cents; to Patrick Neagle, five dollars and twenty-three cents; to Batt Hickey, twenty-two dollars and twelve cents; to Jerry Sullivan, thirty-one dollars and thirty-seven cents; to James Carvan, ninety-two dollars and sixty-four cents; to Michael Downey, twenty-nine dollars and fifteen cents; to John Riley, sixty dollars and twenty-five cents, and to Joshua Apgar, six dollars; and that no other creditor had applied to them to audit and adjust his demand, as by their report, duly filed, more fully appears. And whereas, such proceedings have been had upon the said writ of attachment, that judgment upon the said report hath in due form of law been entered of the term of April last, against the said George Wilkes, by default, with costs, as appears to us of record. And now on the behalf of the said Peter H. Huffman and Mahlon R. Risler, (late) partners, trading under the name and firm of P. H. Huffman & Co., we have been informed that, although judgment be thereupon given, yet execution thereof

still remains to be made, and they have humbly besought us to provide a proper remedy. In their behalf, we being willing that what is right and just should be done in the occasion, command you, that by good and lawful men of your county, you cause to be made known to the said Conrad Lomerson, that he be and appear before the said Circuit Court at Flemington, on the second Tuesday of December next, to show cause, if any thing he has, why the said Peter H. Huffman and Mahlon R. Risler, (late) partners, &c., of P. H. Huffman 10 & Co., should not have execution of the money so as aforesaid, due by the said Conrad Lomerson to the said George Wilkes and in his hands, according to the statute in such case made and provided, if he shall see fit so to do. And further, to do and receive what our said court shall then and there consider of him in this behalf: and have you there the names of those by whom you shall cause to be made known to him, and this writ. Witness—Stacy G. Potts, Esquire, judge of our said Circuit Court at Flemington aforesaid, on the second Tuesday of September, in the year of our Lord eighteen hundred and fifty-two.

WILLIAM EMERY, *Clerk.*

B. VANSYCKEL, *Attorney.*

At which time the said sheriff returned the said writ “duly served.”

And the said Conrad Lomerson, on that day, being solemnly called, comes not, and thereupon the said Peter H. Huffman and Mahlon R. Risler, (late) partners, trading under the name and firm of P. H. Huffman & Co., by their attorney, Bennet Vansyckel, pray that execution may be adjudged to them of 30 the debt and damages aforesaid, according to the force, form, and effect of the said recovery, &c.

And the said Conrad Lomerson comes and pleads and avers that neither he nor any one for him had any goods or chattels, rights or credits, moneys or effects of the defendant, George Wilkes, in his or in any one else custody or possession, either at the time of executing the said writ of attachment, or at any time since, and of this he puts himself upon the country, &c.

And the plaintiffs, as to the plea of the said Conrad Lomerson, by him above pleaded, and whereof he hath put himself upon the country, do the like.

Therefore, let a jury thereupon come before our said court at Flemington aforesaid, on the second Tuesday of December, by whom, &c., who neither, &c., to recognize, &c., because as well, &c., the same day is given to the parties aforesaid. At

the same place afterwards, the process aforesaid between the parties aforesaid, was continued before our said court at Flemington aforesaid, by *vice comes non ninsit breve*, until the second Tuesday of April, in the year of our Lord one thousand eight hundred and fifty-two, the same day is given to the parties aforesaid, then, &c., at which day, before our said court at Flemington aforesaid, come the parties aforesaid, by their attorneys aforesaid, and the jurors of that jury whereof mention is made, being summoned, also come, who, to speak the truth of the matter within contained, being chosen, tried and 10 sworn, say upon their oaths that the said Conrad Lomerson did undertake and promise, in manner and form as the said Peter H. Huffman and Mahlon R. Risler, partners, &c., hath within complained against him; and they assess the damages of the said Peter H. Huffman and Mahlon R. Risler, partners, &c., on occasion of the premises, besides their costs and charges by them in this behalf expended, to two hundred and seventy-two dollars and thirteen cents, and for those costs and charges to thirty-eight dollars and fifty-eight cents; therefore it is considered that the said P. H. Huffman and Mahlon R. 20 Risler, partners, &c., do recover against the said Conrad Lomerson their damages, by the jury in form aforesaid assessed, and also thirty-eight dollars and fifty-eight cents for their costs and charges by the court now here adjudged of increase to the said Peter H. and Mahlon R., and with his assent, which said damages, costs and charges in the whole, amount to three hundred and ten dollars and seventy-one cents. And the said Lomerson in mercy, &c.

Judgment signed this fourteenth day of April, in the year of our Lord one thousand eight hundred and fifty-three. 30

STACY G. POTTS, J.

On the trial of the said issue, before his Honor Stacy G. Potts, Associate Justice of the Supreme Court of the State of New Jersey, at a circuit court, held at Flemington, in and for the county of Hunterdon, the following bills of exception were allowed and sealed, viz :—

HUNTERDON COUNTY CIRCUIT COURT,
Of the term of April, 1853.

10	CONRAD LOMERSON, <i>ads.</i> PETER H. HUFFMAN and MAHLON R. RISLER, (late) partners, trading un- der the name and firm of P. H. HUFFMAN & COMPANY.	}	<i>Sci. fa. on judgment in attachment.</i>
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Be it remembered, that on this fourteenth day of April, in the year of our Lord, one thousand eight hundred and fifty-three, at a Circuit Court held at Flemington, in and for the said county of Hunterdon, before his Honor STACY G. POTTS, Judge of the said court, the above stated cause came on to be tried upon the pleadings and issue joined thereon, (*pro ut* the said pleadings and issue.) At which said day, before the said Judge, came, as well the said Conrad Lomerson, as the said Peter H. Huffman, and Mahlon R. Risler, (partners) aforesaid, by their respective attorneys aforesaid, and the jurors likewise came, and were sworn to try the said issue joined.— And thereupon, the said Peter H. Huffman and Mahlon R. Risler, partners as aforesaid, the plaintiffs to maintain the issue joined on their part, offered and read in evidence to the jury, the record of a judgment in attachment, recovered by the said Peter H. Huffman and Mahlon R. Risler, partners
 30 as aforesaid, against one George Wilkes, in the Circuit Court of the county of Hunterdon, at the April term of the said court, A. D., 1852, (*pro ut* the said record.)

Also the original writ of attachment in said case, together with the Sheriff's return and appraisal. Writ, tested May term, A. D., 1851, and returnable, September term, A. D., 1851. Served the twenty-sixth day of August, A. D. 1851. (*Pro ut* the said writ and return.)

David Huffman, a witness on the part of the plaintiffs, did testify as follows: (being shown a paper) said, I saw this pa-
 40 per in February, A. D., 1851. It is the vendue list and conditions of sale. It was signed by Mr. Lomerson. The charges are in my hand writing. I clerked the vendue. I

understood the sale was under several executions, besides the one named in this paper, then in Lomerson's hands. This does not contain a correct statement of sales. There were two lots of cross ties struck off to me. Before the sale, there was an agreement made between Mr. Lomerson and myself, in Mr. Trefren's office. It was this: We expected Durham and Chapman, who had taken the contract Wilkes had left, to purchase the ties. It was agreed to strike them off to me at a good price. They were struck off to me. I afterwards sold them and got ten dollars for them. The lot at the west 10 end of the section, was struck off to me at thirty dollars.— That at the east end at fifty dollars. I afterwards sold the lot for \$10. In all other particulars, the paper is a correct statement of sales. The \$10 I got for the ties, I paid to Lomerson. The property was sold as the property of George Wilkes.

And on being cross-examined said: I acted for a number of Wilkes' creditors. I acted for Dennis Mere, Thomas O'Brien, and James O'Brien. I had nothing to do with my father's claim. The sale took place on the 22d day of February, A. 20 D., 1851. The people for whom I acted had no judgments.

The plaintiff's counsel read in evidence, the conditions of sale and vendue list or statement of sales, the paper referred to by the above witness, (*pro ut* the said paper.)

Jacob H. Huffman, another witness produced and sworn on the part of the plaintiff, did testify as follows, viz: I issued the attachments in December, A. D., 1850; and the judgments upon them were rendered in January, A. D., 1851, by me. This a correct list of judgments, which were recovered before me, (referring to a list shown him,) and these 30 (referring to the executions shown him,) are the executions which were issued upon the said judgments, and placed by me in Lomerson's hands, as constable, in January, A. D., 1851. I was present at the sale made by virtue of these executions by Lomerson.

Mr. Trefren bought the cars. I bid against him. They stood at one hundred or one hundred and fifty dollars, until I commenced bidding against him. I bid to buy the cars. They were sold as Wilkes' property. I bid them up to \$125. They were struck off at \$450. Some small articles besides, 40 were sold. Some ties and picks.

The above statement and executions were admitted by counsel to be correct, and were offered in evidence and received, (*pro ut* the said statement and execution.)

The following mentioned and described executions, were read in evidence, viz : Admitted to be ten executions in the hands of Lomerson, under which the sale was made.

1st. Execution issued by Jacob H. Huffman, Esq., Justice of the Peace, January 16, 1851, in favor of George Apgar, plaintiff, against George Wilkes, defendant, on judgment rendered January 15th, 1851, for \$21 28 debt, and \$3 39 costs, (*pro ut* the said execution.)

2d. Execution issued by Jacob H. Huffman, Esqr., January 10 16th, 1851, in favor of Charles Conover *vs.* George Wilkes, on judgment rendered same day for \$27 00 debt, and \$4 29 costs, (*pro ut* the said execution.)

3d. Execution issued by Jacob H. Huffman, Esqr., January 16th, 1851, in favor of John Dalruple and Henry A. Apgar *vs.* George Wilkes, on judgment rendered the same day for \$19 25 debt, and \$4 39 costs, (*pro ut* the said execution.)

4th. Execution issued by Jacob H. Huffman, Esqr., January 16th, 1851, in favor of Abraham P. Huffman *vs.* George Wilkes, on judgment rendered same day for \$17 58 debt, and 20 \$4 39 costs, (*pro ut* the said execution.)

5th. Execution issued by Jacob H. Huffman, Esqr., January 16th, 1851, in favor of James Mahaffee *vs.* George Wilkes, on judgment rendered same day for \$27 41 debt, and \$4 39 costs, (*pro ut* the said execution.)

6th. Execution issued by Jacob H. Huffman, Esqr., January 16th, 1851, in favor of Peter C. Apgar *vs.* George Wilkes, on judgment rendered same day, for \$29 75 debt, and \$4 39 costs, (*pro ut* the said execution.)

7th. Execution issued by Jacob H. Huffman, Esqr., January 30 16th, 1851, in favor of Peter M. Huffman *vs.* George Wilkes, on judgment rendered same day, for \$14 69 debt, and \$4 39 costs, (*pro ut* the execution.)

8th. Execution issued by Jacob H. Huffman, Esqr., January 16th, 1851, in favor of Huffman, Foster & Finley *vs.* George Wilkes, on judgment entered same day, for \$25 00 debt, and \$4 39 costs, (*pro ut* the said execution.)

9th. Execution issued by Jacob H. Huffman, Esqr., January 16th, 1851, in favor of Elijah Swarts *vs.* George Wilkes on judgment rendered same day, for \$8 00 debt, and \$4 39 costs, 40 (*pro ut* the said execution.)

10th. Execution issued by Isaiah P. Large, Esqr., January 13th, 1851, in favor of Cornelius W. Van Horne *vs.* George Wilkes, on judgment entered same day, for \$15 00 debt, and \$4 07½ costs, (*pro ut* the said execution.)

The plaintiffs having rested, the defendant, by his counsel, moved that the plaintiffs be called, upon the ground that they had not established their right to recover.

And his Honor the Judge, thereupon refused to order the said plaintiffs to be called. To which said decision of his Honor the Judge, the said defendant, by his counsel, excepted, and prayed that this, his bill of exceptions, might be sealed; and it is sealed accordingly.

STACY G. POTTS, [L. s.]

The defendant's counsel having opened his defence to the 10 jury, called and examined as a witness, *Marston D. Trefren*, who being sworn, did testify as follows:

I was present at the sale of the property by Lomerson. Lomerson received nothing for the cars; they were struck off to me, as the agent of Boody, Ross & Co.; they never paid anything for them; there was no claim of property made at the sale of Boody, Ross & Co. Mr. Ransom asked witness to state the arrangement made about the cars, by Boody, Ross & Co., and the plaintiffs in execution about that sale.

Answer. The arrangement was, that the cars were to be 20 set up and sold by Lomerson, conditionally; the condition was that Boody, Ross & Co., would be the purchasers at five hundred dollars, if they proved to be the property of George Wilkes. There was a suit then pending in New York, brought by Callendar against Boody, Ross & Co., for the recovery of money due on a promissory note given by Boody, Ross & Co., to Callendar, in part consideration for the said cars, at which suit it was expected the right of property, as between Callendar and Wilkes, would be determined, and if Callendar recovered, Boody, Ross & Co., were not to be held bound for 30 their bids at the vendue; if the suit in New York was determined against Boody, Ross & Co., it was to be no bid.

Question. How was that suit between Callendar and Boody, Ross & Co., determined?

The plaintiffs, by their counsel, objected to this question being answered. And the court having delivered its opinion that it was not competent and legal for the defendant to prove how the said suit was determined, without producing a record of the said judgment, sustained the objection, and refused to let the witness answer the question. 40

To which opinion of the court the defendant, by his counsel, excepted, and prayed that this his bill of exceptions might be sealed, and it is sealed accordingly.

STACY G. POTTS, [L. s.]

Mr. Trefren proceeded :

The cars remained upon the road ; at the time of the sale, the cars were in Boody, Ross & Co.'s possession ; it is my impression that they were in their possession at the time of the attachment ; they were never taken out of their possession by the constable. On the 26th of August, 1851, the August after the constable's sale, they were in Boody, Ross & Co.'s possession ; I think Callendar brought them on the road ; they were in the possession of Wilkes six or seven weeks ;
 10 when Wilkes left, Callendar was in New York ; Callendar then sold the cars to Boody, Ross & Co., the first time he came out in November or December ; the contract was made in my office ; I think Wilkes left the seventh of November ; Callendar sold the cars to Boody, Ross & Co., about two weeks afterwards ; when Wilkes left, the contract came back to Boody, Ross & Co. ; I know of no settlement between Wilkes and Callendar ; Wilkes had the contract of Boody, Ross & Co. ; Boody, Ross & Co. had the original contract for the whole road ; Callendar took the contract for a section un-
 20 der Callendar, and afterwards gave it up, and then Wilkes took the contract of Boody, Ross & Co. ; Callendar had brought the cars on the road ; Callendar let the cars to Wilkes for \$20.00 per month.

The plaintiffs, by their counsel, moved to overrule all that part of Trefren's testimony which relates to who was the owner of the cars, except so much as relates to the agreement at the sale.

And the said court being of opinion that Boody, Ross & Co. having been present, by their agent, at the sale, and having
 30 made no claim to the property, it was not competent for the defendant in *scire facias* now to set up that the property was the property of Boody, Ross & Co., and not Wilkes, at the time of the sale, sustained the objection and overruled the said testimony, to which said opinion of the said court, the said defendant, by his counsel, excepted, and prayed that this his bill of exceptions might be sealed, and it is sealed accordingly.

STACY G. POTTS, [L. s.]

Mr. Trefren proceeded :

40 Esquire Huffman bid at the sale ; I think the honest bid was \$400 ; I am not positive ; I know Boody, Ross & Co. paid nothing to the constable at the purchase ; I know it by their own acknowledgments ; the defendant offered as evidence the record of a judgment in attachment recovered in the court by William G. Nicholls against the said George Wilkes, at the

December term, A. D. 1851, in which it appears that the plaintiffs in this suit were applying creditors; that the auditors reported in favor of these plaintiffs, and that judgment was recovered on said report in their favor, and also proposed to prove that the claim upon which they issued the attachment upon which the *scire facias* in this suit was sued out, is the same claim upon which judgment was rendered in their favor in the said suit of William G. Nicholls against George Wilkes, and insisted that consequently this second attachment was irregular. 10

To the admission of this testimony, the plaintiffs, by their counsel, objected. The court being of opinion that the proceedings in the second attachment, even if voidable, could not be avoided in this way, sustained the objection. To which said opinion of the said court, the defendant by his counsel, excepted, and prayed that this his bill of exceptions might be sealed, and it is sealed accordingly.

STACY G. POTTS, [L. s.]

The defendants having rested—

The plaintiffs called as a witness, *James N. Ramsey*, who, 20
being sworn, did testify as follows :

I was at the constable's sale; the cars were started at \$125 or \$150, as near as I recollect—under \$200; there were some four or five bids; Jacob H. Huffman and Mr. Trefren bid; no notice was given at the sale that the cars belonged to any body else but Wilkes; no claim was made by any body; it appeared to be a *bona fide* sale; some picks and handles were sold; I did not see any money paid Lomerson.

Jacob H. Huffman, another witness, produced and sworn, on the part of the plaintiffs, did testify as follows, viz.:

I never heard of any arrangement between Boody, Ross & 30
Co., about the purchase of the cars and the execution creditors; Trefren said he was about buying the cars for Boody, Ross & Co.; he mentioned no agreement; I did not hear of any until some weeks afterwards; some of the execution creditors came to my house and wanted to prosecute the constable for their money; Dillon was the acting man of the firm of Boody, Ross & Co.; Dillon was not present at the sale, nor any of the firm; I did not expect Trefren to bid over me.

Mr. Trefren was here cross-examined by plaintiffs, and testified as follows, viz.:

I made the agreement for all the creditors; those not pre-40
sent had given me no express authority; all the creditors I was concerned for, subsequently agreed to it; I was concerned for eight or nine of them; (on looking at exceptions) he was concerned for all the execution creditors.

All parties then rested.

Whereupon the court charged the jury as follows:

The question in this case is, had Lomerson, the defendant, at the time of the service of the writ of attachment in the case of Peter H. Huffman & Co., against George Wilkes, any money in his hands belonging to Wilkes, actually or constructively?

The writ was served on the 26th August, 1851, and judgment entered in April, 1852, they are in evidence. It is also
10 in evidence that several executions issued out of the court for the trial of small causes, were placed in the hands of Lomerson, the garnishee, who is the defendant here, against Wilkes, by virtue of which he levied on, and sold certain property belonging to, or alleged to have belonged to said Wilkes, as per vendue list, &c., on 26th February, 1851.

The proceeds of this sale, as per said list, was \$467.17. The amount of the executions was \$243.97, which left a balance, including interest, of about \$235.74 over and above the amount of the executions.

20 This makes out the plaintiff's case, and he is entitled to recover unless the defendant has made out a sufficient defence.

For it is not necessary to go further than to show, in the first instance, the sale by the officer, and the amount for which the property was bid off, to charge him with the money. The legal presumption being, in the absence of evidence to the contrary, that he received the money, and that it is in his hands, unless he shows a legal acquittance for it.

The defendant's plea is, that he had no money of Wilkes' in
30 his hands on the 20th August, 1851, or, in other words, that he was not indebted to Wilkes at the time, and under this plea he is entitled to show any matter of law or fact which ought to protect him. Has he done so?

He does not deny that he levied on and sold this property at the time mentioned; nor that he sold it as the property of Wilkes; nor that the excess of amount of sales over the executions in his hands, was as heretofore stated. He does not show that any legal notice of claim of property was interposed by any one before or at the time of the sale, or that he was in
40 any way obstructed in the legal execution of the writs under which he acted. He does not show that he paid the amount of the sales over to the execution creditors, or Wilkes, or to any body else. But he puts his defence upon this, that in point of fact he never did receive any, or but a very small part of the proceeds of the sale, and he accounts for this in this way: He shows that a person by the name of Callendar, in the city of

New York, had claimed to be the owner of this property, and had sold it to a firm called Boody, Ross & Co., for \$500; that this firm had paid Callendar \$200 in cash, and given him their note for \$300; and he, Callendar, had commenced a suit against them on this note, in New York, in which the question whether Callendar or Wilkes was the real owner, was to be settled; that an agent or attorney of Boody, Ross & Co., Mr. Trefren, was present at the sale, who was also the attorney of a number of the execution creditors; and that there was a private understanding between him and the defendant, that 10 Mr. Trefren was to bid off the articles of principal value, as the agent of Boody, Ross & Co. (which he did), and if Callendar should fail in his suit in New York to show that he, and not Wilkes, was the owner, then the understanding was that the bids were to be considered good, and the money paid; but if Callendar should establish his right to the goods by a recovery in that suit, then the bids were to be considered null and void, and the sale to go for nothing.

Here the defendant stopped; he had no competent evidence to show how the suit was decided, and we consequently know 20 nothing about it.

Now the question we have to decide, is not whether this defence as it stands, would be good or not in an action by any of the creditors under whose executions the sale was made. As to them, it might be only necessary for Lomerson to show that they were parties to the understanding between Mr. Trefren and the defendant, and that the contingency upon which the sale was to be avoided, actually happened, but these creditors are not here.

The plaintiffs, at the time of the constable's sale, as far as 30 appears, were creditors at large of Wilkes. They had no lien on his property. Lomerson had no claim of theirs in his hands to satisfy. It is not pretended that they had any thing to do with the understanding between Mr. Trefren and the defendant.

The executions in his, Lomerson's hands, required him to levy on and sell so much of Wilkes' property, as would be sufficient to satisfy them and no more. He was not required to raise any surplus money, out of the goods levied on, for the benefit of Wilkes' general creditors. But whatever overplus 40 the sale produced, so far as we have any evidence, was the money of Wilkes.

Whatever goods of those levied on, which might not have been sold, would have remained to Wilkes. Lomerson could have discharged himself in either case, by showing that he

paid the surplus realized, or returned the goods not sold, to Wilkes, or his order after the executions were satisfied.

The plaintiffs proceed here, upon the ground that inasmuch as the evidence shows an excess in the amount of sales, beyond the amount of the executions, on the 26th February, 1851. This excess, or surplus, was the proper subject of attachment in Lomerson's hands, in August, in 1851. This presents the single question: had Lomerson anything of Wilkes' that could be the subject of attachment, on the 26th August, 1851?

10 The writ of attachment, commands the Sheriff to attach the rights and credits, moneys and effects, good and chattels, land and tenements of the debtor, wheresoever they may be found.

Now, was this excess of the sales over the amount of executions, on 26th February, 1851, a debt due Wilkes from Lomerson, on 26th August 1851. There is evidence that in point of fact, Lomerson did not receive the money, in consequence of the understanding had with Mr. Trefren. But it is not pretended that Mr. Wilkes was a party to this under-
20 standing. He was in no way bound by it.

The sale was binding as between Lomerson and Wilkes, and as between them, Lomerson was bound, having sold this property as Wilkes', to account to Wilkes for the surplus. If he had settled this matter with Wilkes, before the plaintiffs attachment was served, he would have a good defence.

As between Lomerson and Wilkes then, he, Lomerson, was liable for this surplus. Being so liable, the plaintiffs, standing in Wilkes' place, having attached his right and credits in Lomerson's hands, are, I think, entitled to recover it, as a debt
30 due from Lomerson to Wilkes, and not paid over or accounted for.

Lomerson was in possession of this property, as an officer, by virtue of judicial writs, in his hands.

His business was to sell the property for as much as he could get for it, and if a surplus was produced by the sale, he is accountable to the creditors in attachment for it. What he sold, and what the purchasers bought, was Wilkes' right in the property sold.

He sold the property as Wilkes'. There was no legal
40 notice of any claim to the property by any body else. The constable can't set up, that the property was not Wilkes', under the evidence here. That is a question for the purchasers, Boody, Ross & Co., and they must take the risk of it.

The defendant, by his counsel, excepted to all that part of the charge of the court which ruled:

That upon the evidence of the plaintiffs in this case, they

are entitled to recover, for it is only necessary for them to show the sale by the defendant, and the amount of the sale, the presumption being that the money was received by the constable, and the surplus remains in his hands.

That between Lomerson and Wilkes, Lomerson was liable to Wilkes for the surplus money, and being so liable, Wilkes might recover it of him.

That what Lomerson sold, and what the purchasers bought, was only Wilkes' right in the property sold, and in a suit by Wilkes against Lomerson for the surplus, Lomerson could not set up that the property was not Wilkes' property.

And also to all that part of the said charge in which the court instructed the jury, that in this case, the plaintiffs were entitled to recover.

And the defendant, by his counsel, prayed that this, his bill of exceptions, might be sealed, and it is sealed accordingly.

STACY G. POTTS, [L. s.]

The defendant, by his counsel, called upon the court to charge the jury :

That upon the attachment of money, in the hands of a garnishee, the plaintiffs cannot have execution against the garnishee for a bare right or credit, or for any other chose in action.

That the presumption in law, until the contrary is proved, is, that the constable paid over the surplus money to the defendant in execution, if he had any surplus in his hands, after paying the claims of the plaintiffs in execution.

The court having declined so to charge the jury, the defendant, by his counsel, excepted to this opinion of the court, and prayed that this, his bill of exceptions, might be sealed, and it is sealed accordingly.

STACY G. POTTS, [L. s.]

The plaintiffs in error, assigned errors, as follows, viz :

Afterwards, to wit, on the first Tuesday of November, in the year of our Lord one thousand eight hundred and fifty-three, before the justices of the Supreme Court of Judicature, at Trenton, cause the said Conrad Lomerson, garnishee in attachment, by Marston D. Trefren, his attorney, and says that in the record and proceedings aforesaid, and in giving the judgment aforesaid, there is manifest error, in this, to wit : that the declaration aforesaid, and that the matters therein contained, are not sufficient in law for the said Peter H. Huffinan and Mahlon R. Risler, (late) partners, trading under

the name and firm of P. H. Huffman & Co., to have or maintain their aforesaid action thereof, against the said Conrad Lomerson, garnishee in attachment. And also, there is error in this, to wit: that upon the trial of this cause, in the Circuit Court of the county of Hunterdon, after the defendants in error, who were the plaintiffs below had rested their cause, the plaintiff in error, who was the defendant below, insisted before the said Circuit Court, that the said Peter H. Huffman and Mahlon R. Risler, (late) partners as aforesaid, had failed to make out a legal cause of action against him, and thereupon moved that the said Circuit Court of the county of Hunterdon, that the said Peter H. Huffman and Mahlon R. Risler, (late) partners as aforesaid, the plaintiffs below, should be called; but the said Circuit Court having delivered its opinion, that the said Peter H. Huffman and Mahlon R. Risler, (late) partners as aforesaid, had made out a legal cause of action against the said Conrad Lomerson, garnishee in attachment, refused to order the said Peter H. Huffman and Mahlon R. Risler (late) partners

10 aforesaid, to be called; whereas, by the law of the land, the said Peter H. Huffman and Mahlon R. Risler, (late) partners as aforesaid, did fail to make out a legal cause of action, against the said Conrad Lomerson, garnishee in attachment, and by the law of the land, ought to have been called; therefore in that, there is manifest error.

And also there is error in this, to wit: that on the trial of the said issue the said Circuit Court of the county of Hunterdon overruled competent, legal, material and important evidence in the cause, which was offered by the plaintiff in error, who

30 was the defendant below, and refused to allow the said evidence to go to the jury, whereas by the law of the land the said evidence ought to have been given to the jury, therefore in that there is manifest error; and also there is error in this, to wit: that on the trial of this cause before the Circuit Court, of the county of Hunterdon, the said court referring to the evidence of the plaintiffs below, charged the jury in the words following, that is to say: "This makes out the plaintiffs case, and he is entitled to recover unless the defendant has made out a sufficient defence, for it is not necessary to go further than

40 to show in the first instance the sale by the officer, and the amount for which the property was bid off, to charge him with the money. The legal presumption being, in the absence of evidence to the contrary, that he received the money, and that it is in his hands, unless he shows a legal acquittance for it;" whereas, by the law of the land, the evidence of the said plaintiffs below, did not make out their case, and they were

not entitled to recover, and it was necessary for the plaintiffs below to prove before they were entitled to recover, that the money was in the hands of the defendant at the time the attachment was served, or sometime afterwards, therefore in that there is manifest error; and also there is error in this, to wit: that upon the trial of the said cause before the said Circuit Court of the county of Hunterdon, the said court charged the jury in the words following, that is to say: "As between Lomerson and Wilkes, then he, Lomerson, was liable for this surplus; being so liable, the plaintiffs standing in Wilkes' place 10 having attached his rights and credits in Lomerson's hands, are, I think, entitled to recover it as a debt due from Lomerson to Wilkes, and not paid over or accounted for;" whereas, by the law of the land, as between Lomerson and Wilkes, Lomerson was not liable for this surplus, and the plaintiffs below were not entitled to recover it as a debt due from Lomerson to Wilkes, and the said Circuit Court ought to have so charged the jury, therefore in that there is manifest error. And also there is error in this, to wit: that upon the trial of the said cause before the said Circuit Court of the county of Hunterdon, the 20 said court charged the jury in the words following, that is to say: "Lomerson was in possession of this property as an officer, by virtue of judicial writs in his hands. His business was to sell the property for as much as he could get for it, and if a surplus was produced by the sale, he is accountable to the creditors in attachment for it. What he sold and what the purchasers bought, was Wilkes' right in the property sold. He sold the property as Wilkes'; there was no legal notice of any claim to the property by any body else; the constable can't set up that the property was not Wilkes' under the evi- 30 dence here; that is a question for the purchasers, Boody, Ross & Co., and they must take the risk of it," whereas, by the law of the land, Lomerson sold not the right of Wilkes only, but the property, and was bound to make the right of that property good to the purchasers, and in any suit whatever against Lomerson for the purchase money, he could set up that the property was not Wilkes' property, and the said Circuit Court ought to have so charged the jury, therefore, in that there is manifest error. And also there is error in this, to wit: that upon the trial of the said cause before the Circuit Court of 40 the county of Hunterdon, the said court charged the jury as follows, that is to say: "That in this case the plaintiffs are entitled to recover," whereas, by the law of the land, the said plaintiffs below were not entitled to recover in this case, and the said court ought to have so charged the jury, therefore in that there is manifest error. And also there is error in this,

to wit: that upon the trial of the said cause before the said Circuit Court of the county of Hunterdon, the plaintiff in error, who was defendant below, called upon the court to charge the jury in the words following, that is to say: "That upon the attachment of money in the hands of a garnishee, the plaintiffs cannot have execution against the garnishee for a bare right or credit, or for any other chose in action," but the said Circuit Court declined so to charge the jury, whereas by the law of the land the said Circuit Court ought to have

10 charged the jury, therefore in that there is manifest error. And also there is error in this, to wit: that upon the trial of the said cause before the said Circuit Court of the county of Hunterdon, the said plaintiff in error, who was the defendant below, called upon the said Circuit Court to charge the jury in the words following, that is to say: "That the presumption in law, until the contrary is proved, is, that the constable paid over the surplus money to the defendant in execution, if he had any surplus in his hands after paying the claims of the plaintiffs in execution," but the said court declined so to charge the jury,

20 whereas by the law of the land the said court ought to have so charged the jury, therefore in that there is manifest error. And also there is error in this, to wit: that the judgment aforesaid, by the record aforesaid, appears to have been given for the said Peter H. Huffman and Mahlon R. Risler, (late) partners, trading under the name and firm of P. H. Huffman & Co., against the said Conrad Lomerson, garnishee in attachment, whereas by the law of the land the said judgment ought to have been given for the said Conrad Lomerson, garnishee, as aforesaid, against the said Peter H. Huffman and Mahlon

30 R. Risler, (late) partners, as aforesaid. And also there is error in this, to wit: that the judgment aforesaid, by the record aforesaid, appears to have been given in favor of the said Peter H. Huffman and Mahlon R. Risler, (late) partners, as aforesaid, and against the said Conrad Lomerson, for damages assessed by the jury to the sum of two hundred and seventy-two dollars and thirteen cents, whereas the real claim of the said defendants in error, who were the plaintiffs below, as appears by the said record, was only the sum of twenty-seven dollars and fifteen cents,

40 therefore in that there is manifest error. And the said Conrad Lomerson, garnishee in attachment, prays the judgment aforesaid for the errors aforesaid, and for other errors in the record, process and proceedings being, may be reversed, annulled and altogether holden for naught, and that he may be restored to all things which he has lost by the occasion of the said judgment, &c.

The defendants in error have filed a joinder in error, as fol-

lows, viz:—And hereupon afterwards, to wit, on the first Tuesday of November, in the year of our Lord one thousand eight hundred and fifty-three, come the said Peter H. Huffman and Mahlon R. Risler, (late) partners, &c., by Bennet Vansyckel, their attorney, and say that there is no error in the record and proceedings aforesaid, and they pray that the said court may proceed to examine, as well the record and proceedings aforesaid, as the matters aforesaid above assigned for error, and that the said judgment aforesaid, in form aforesaid given, may be in all things affirmed, &c. 10

This action was brought in the Supreme Court of Judicature of the State of New Jersey, by writ of error to the Hunterdon county Circuit Court, returned at the November term, A. D. 1853.

On the argument of the said bills of exception before their Honors Stacy G. Potts and Daniel Haines, Associate Justices of the said Supreme Court, at a Supreme Court held at Trenton, in and for the State of New Jersey, the judgment of the said Circuit Court of the county of Hunterdon was confirmed, whereupon the said Conrad Lomerson, garnishee in attachment, prayed a writ of error to remove the said proceedings and judgment into this court, which said writ of error, directed to the Supreme Court being granted, was returned to the March term of this court, A. D. 1855.

SUPREME COURT OF NEW JERSEY.

CONRAD LOMERSON, garnishee in attachment,	}	<i>On sci. fa.</i>	30
<i>vs.</i>			
PETER H. HUFFMAN and MAHLON R. RISLER, (late) partners, trading under the name and firm of P. H. HUFFMAN & Co.	}		

PETER H. HUFFMAN and MAHLON R. RISLEY, (late) partners, &c., as P. H. HUFFMAN & Co., <i>ads.</i>	}	<i>In error.</i>	}	As yet of the term of November, in the year of our Lord one thousand eight hundred and fifty-three. 40
CONRAD LOMERSON, garnishee, &c.		<i>Judgment on affirmation.</i>		
		M. D. TREFREN, <i>Attorney.</i>		

Witness—The Honorable Henry W. Green, Esquire, Chief Justice.

WM. M. FORCE. *Clerk.*

HUNTERDON, *ss.*—Conrad Lomerson puts in his place M. D. Trefren, his attorney, to prosecute a writ of error against Peter H. Huffman and Mahlon R. Risler, late partners, &c., upon a judgment upon a plea of trespass on the case in attachment.

HUNTERDON COUNTY, *ss.*—Peter H. Huffman and Mahlon R. Risley, late partners, &c., put in their place Bennet Vansyckel, their attorney, at the suit of Conrad Lomerson, garnishee, &c., in the said writ of error, in the plea aforesaid.

- 10 NEW JERSEY, *ss.*—The State of New Jersey to the Judge of the Hunterdon county Circuit Court, greeting:—
 [L. s.] Because in the record and process and proceedings, and also in the rendering of judgment in a certain plaint which was before the said Circuit Court, between Peter H. Huffman and Mahlon R. Risler, late partners, trading under the name, style and firm of P. H. Huffman & Co., plaintiffs, and Conrad Lomerson, garnishee in attachment, defendant, in a plea of *scire facias*, as is said, manifest error hath intervened, to the great damage of the said Conrad Lomerson, defendant, as by his complaint we are informed. We being, 20 therefore, willing that the error, if any, should in due manner be corrected, and the parties aforesaid have full and speedy justice done in this behalf, do command you, that if the judgment thereof be given, then the record, process and proceedings aforesaid, with all and singular the matters relating thereunto, under your seal, distinctly and openly you send, and this writ, so that you have the same before our Justices of our Supreme Court at Trenton, on the first Tuesday of November next, that the record, process, and proceedings aforesaid being 30 inspected, we may further do in that behalf for correcting the same errors, what of right, and according to the law and Constitution of this State, ought to be done. Witnes—His Honor Henry W. Green, Chief Justice of our said Supreme Court at Trenton aforesaid, the first Tuesday of June, in the year of our Lord, one thousand eight hundred and fifty-three.

WM. M. FORCE, *Clerk.*

M. D. TREFREN, *Attorney.*

Presented in open court, and return ordered, September term, 1853.

HENRY W. GREEN, *Cir. Judge.*

- 40 The answer of Henry W. Green, Esquire, the Judge within named:—The record and process, and proceedings whereof

mention is within made, with all things touching the same, I humbly certify to our Justices of our Supreme Court, in a certain schedule to this writ annexed, as within I am commanded. Witness my hand and seal, this fourteenth day of September, A. D. 1853.

HENRY W. GREEN.

PETER H. HUFFMAN and MAHLON R. RISLEY, late partners, &c., as P. H. HUFFMAN & Co.,

vs.

CONRAD LOMERSON, garnishee in attachment.

Pleas before the Judge of the Hunterdon county Circuit Court at Flemington, in and for the county of Hunterdon, of the term of April, in the year of our Lord one thousand eight hundred and fifty-three.

EMERY, Clerk.

HUNTERDON COUNTY CIRCUIT COURT,
*Of the term of December, A. D.,
eighteen hundred and fifty-two.*

HUNTERDON, ss.—Peter H. Huffman and Mahlon R. Risley, (late) partners, trading under the name and firm of P. H. Huffman & Co., put in their place Bennet Vansyckel, their attorney, against Conrad Lomerson, garnishee in attachment, on *scira facias*.

HUNTERDON COUNTY, ss.—Conrad Lomerson, garnishee in the above stated attachment, puts in his place M. D. Trefren, his attorney, at the suit of the said Peter H. Huffman and Mahlon R. Risler, (late) partners, trading under the name and firm of P. H. Huffman & Co., of a plea of trespass on the case in attachment.

HUNTERDON, to wit.—The State of New Jersey sent to the sheriff of the county of Hunterdon, its writ, closed in these words, to wit: New Jersey, Hunterdon county—The State of New Jersey, to our sheriff of our county of Hunterdon, greeting: whereas, heretofore to wit, of the term of May, in the year of our Lord one thousand eight hundred and fifty-one, Peter H. Huffman and Malon R. Risler, (late) partners, trading under the name and firm of P. H. Huffman & Co., sued out of our Circuit Court, a certain writ of attachment to our sheriff of our county of Hunterdon directed, whereby the said sheriff was commanded to attach George Wilkes, by all and singular the rights and credits, moneys and effects,

goods and chattles, lands and tenements, of him, the said George Wilkes, in the said county, so that he, the said George Wilkes might be before the judges of our Circuit Court, at Flemington, on the second Tuesday of September (then) next, to answer Peter H. Huffman and Mahlon R. Risley, (late) partners, trading under the name and firm of P. H. Huffman & Co., of a plea of trespass on the case to the damage of the said Peter H. Huffman and Mahlon R. Risley, (late) partners, &c., under the name and firm of P. H. Huffman & Co., of two hundred dollars, as it is said: and whereas the said sheriff of the said county of Hunterdon did, on the second day of September, make return to our said judge of our Circuit Court aforesaid, that by virtue of the said writ to him directed, he had attached the said defendant, by money, in the hands of Conrad Lomerson, due the said defendant, appraised in the hands of the said Conrad Lomerson, at fifty dollars, as by the said writ of attachment, and return thereunto made, duly filed in the office of the clerk of our Circuit Court aforesaid, may more fully and at large appear; and whereas, on the said second Tuesday of September, in the year of our Lord one thousand eight hundred and fifty-one, agreeably to the statute in such case made and provided, auditors were by the said Circuit Court appointed to audit and adjust the demands of the Peter H. Huffman and Malon R. Risler, (late) partners of P. H. Huffman & Co., and such other of the creditors of the said George Wilkes as might apply for that purpose; and whereas the said auditors, by their report bearing date the thirteenth day of April, A. D. eighteen hundred and fifty-two, and made to the said court in the term of April, in the same year, did certify and report to the said court that on the day of the date of their report, there was due to the said Peter H. Huffman and Malon R. Risler, (late) partners, &c., of P. H. Huffman & Co., the sum of twenty-seven dollars and fifteen cents; to William G. Nicholls, five hundred and sixty-nine dollars and fifty-two cents; to James Mahaffee, ninety-eight dollars and ninety-four cents; to Elijah Swarts, ten dollars and sixty cents; to Huffman, Foster & Co., twenty-six dollars and thirty-nine cents; to Abraham P. Huffman, eighteen dollars and sixty cents; to Peter M. Huffman, fifteen dollars and fifty-six cents; to Charles Conover, twenty-eight dollars and sixty-two cents; to James Hedden, ninety-three dollars and three cents; to Samuel Parry, one hundred and ninety dollars and eighty cents; to Robert J. Allen, seven dollars and twenty-eight and a-half cents; to Dennis Mahar, eighty-three dollars and forty-nine cents; to Patrick Farley, fifty-three dollars and sixty-five cents; to Thomas O'Brien, fifty-one dollars and four-

teen cents; to James Sexton, twenty-six dollars and forty-two cents; to James O'Bryan, seventeen dollars and sixteen cents; to Dennis Bigler, eleven dollars and thirteen cents; to Timothy Dunn, fourteen dollars and sixteen cents; to John Savage, twenty-seven dollars and ninety-one cents; to John Sullivan, thirteen dollars and ninety cents; to Patrick Counsidine, three dollars and ninety-five cents; to Michael Flynn, eleven dollars and eighty-one cents; to Michael Caineny, five dollars and twenty-three cents; to Patrick Neagle, five dollars and twenty-three cents; to Batt Hickey, twenty-two dollars and twelve cents; to Jerry Sullivan, thirty-one dollars and thirty-seven cents; to James Carvan, ninety-two dollars and sixty-four cents; to Michael Downey, twenty nine dollars and fifteen cents; to John Riley, sixty dollars and twenty-five cents; and to Joshua Apgar, six dollars, and that no other creditor had applied to them to audit and adjust his demands, as by their report duly filed more fully appears; and whereas such proceedings have been had upon the said writ of attachment that judgment upon the said report hath in due form of law been entered, of the term of April last, against the said George 20 Wilkes, by default, with costs, as appears to us of record, and now on the behalf of the said Peter H. Huffman and Mahlon R. Risler, (late) partners, trading under the name and firm of P. H. Huffman & Co., we have been informed that although judgment be thereupon given, yet execution thereof still remain to be made, and they have humbly besought us to provide a proper remedy in their behalf, we being willing that what is right and just should be done in this occasion, command you, that by good, lawful men of your county, you cause to be made known to the said Conrad Lomerson, that he 30 be and appear before the said Circuit Court at Flemington, on the second Tuesday of December next, to show cause, if any thing he has, why the said Peter H. Huffman and Mahlon R. Risler, (late) partners, &c., of P. H. Huffman & Co., should not have execution of the money, so as aforesaid, due by the said Conrad Lomerson, to the said George Wilkes, and in his hands, according to the statutes in such cases made and provided, if he shall see fit so to do; and further, to do and receive what our said court shall then and there consider of him in this behalf, and have you there the names of those by whom 49 you shall cause to be made known to him and this writ. Witness—Stacy G. Potts, Esquire, Judge of our said Circuit Court at Flemington aforesaid, on the second Tuesday of September, in the year of our Lord eighteen hundred and fifty-two.

WILLIAM EMERY, *Clerk.*

B. VANSYCKEL, *Attorney.*

At which time the said sheriff returned the said writ "duly served," and the said Conrad Lomerson, on that day, being solemnly called, comes not, and thereupon the said Peter H. Huffman and Mahlon R. Risler, (late) partners, trading under the name and firm of P. H. Huffman & Co., by their attorney, Bennet Vansyckel, pray that execution may be adjudged to them of the debt and damages aforesaid, according to the force, form, and effect of the said recovery, &c. And the said Conrad Lomerson comes and pleads and avers

10) that neither he nor any one for him had any goods or chattels, rights or credits, moneys or effects of the defendant, George Wilkes, in his or in any one else custody or possession, either at the time of executing the said writ of attachment, or at any time since, and of this he puts himself upon the country, &c. And the said plaintiffs, as to the plea of the said Conrad Lomerson, by him above pleaded, and whereof he hath put himself upon the country, do the like. Therefore, let a jury thereupon come before our said court at Flemington aforesaid, on the second Tuesday of December, by

20 whom, &c., who neither, &c., to recognize, &c., because as well, &c., the same day is given to the parties aforesaid. At the same place afterwards, the process aforesaid between the parties aforesaid, was continued before our said court at Flemington aforesaid, by *vice comes non ninsit breve*, until the second Tuesday of April, in the year of our Lord one thousand eight hundred and fifty-two, the same day is given to the parties aforesaid, there, &c., at which day, before our said court at Flemington aforesaid, come the parties aforesaid, by their attorneys aforesaid, and the jurors of the jury whereof mention

30 is above made, being summoned, also come, who, to speak the truth of the matter within contained, being chosen, tried and sworn, say upon their oaths that the said Conrad Lomerson did undertake and promise, in manner and form as the said Peter H. Huffman and Mahlon R. Risler, partners, &c., hath within complained against him; and they assess the damages of the said Peter H. Huffman and Mahlon R. Risler, partners, &c., on occasion of the premises, besides his costs and charges by him in this behalf expended, to two hundred and seventy-two *degrees* and thirteen cents, and for those costs and

40 charges to thirty-eight dollars and fifty-eight cents; therefore it is considered that the said P. H. Huffman and Mahlon R. Risler, partners, &c., do recover against the said Conrad Lomerson their damages, by the jury in form aforesaid assessed, and also thirty-eight dollars and fifty-eight cents for their costs and charges by the court now here adjudged of increase to the said Peter H. and Mahlon R., and with *his*

assent, which said damages, costs and charges in the whole, amount to three hundred and ten dollars and seventy-one cents. And the said Lomerson in mercy, &c. Judgment signed this fourteenth day of April, in the year of our Lord one thousand eight hundred and fifty-three.

STACY G. POTTS, J.

Afterwards, to wit, on the first Tuesday of November, in the year of our Lord one thousand eight hundred and fifty-three, before the justices of the Supreme Court of Judicature, 10 at Trenton, come the said Conrad Lomerson, garnishee in attachment, by Marston D. Trefren, his attorney, and says that in the record and proceedings aforesaid, and in giving the judgment aforesaid, there is manifest error, in this, to wit: that the declaration aforesaid, and that the matters therein contained, are not sufficient in law for the said Peter H. Huffman and Mahlon R. Risler, (late) partners, trading under the name and firm of P. H. Huffman & Co., to have or maintain their aforesaid action thereof, against the said Conrad Lomerson, garnishee in attachment. And also, there is error 20 in this, to wit: that upon the trial of this cause, in the Circuit Court of the county of Hunterdon, after the defendants in error, who were the plaintiffs below, had rested their cause, the plaintiff in error, who was the defendant below, insisted before the said Circuit Court, that the said Peter H. Huffman and Mahlon R. Risler, (late) partners as aforesaid, had failed to make out a legal cause of action against him, and did thereupon move the said Circuit Court of the county of Hunterdon, that the said Peter H. Huffman and Mahlon R. Risler, (late) partners as aforesaid, 30 the plaintiffs below, should be called; but the said Circuit Court having delivered its opinion, that the said Peter H. Huffman and Mahlon R. Risler, (late) partners as aforesaid, had made out a legal cause of action against the said Conrad Lomerson, garnishee in attachment, refused to order the said Peter H. Huffman and Mahlon R. Risler (late) partners as aforesaid, to be called; whereas, by the law of the land, the said Peter H. Huffman and Mahlon R. Risler, (late) partners as aforesaid, did fail to make out a legal cause of action, against the said Conrad Lomerson, garnishee in attachment, 40 and by the law of the land, ought to have been called; therefore in that, there is manifest error.

And also there is error in this, to wit: that on the trial of the said issue the said Circuit Court of the county of Hunterdon overruled competent, legal, material and important evidence in the cause, which was offered by the plaintiff in error, who

was the defendant below, and refused to allow the said evidence to go to the jury, whereas by the law of the land the said evidence ought to have been given to the jury, therefore in that there is manifest error; and also there is error in this, to wit: that on the trial of this cause before the said Circuit Court, of the county of Hunterdon, the said court referring to the evidence of the plaintiffs below, charged the jury in the words following, that is to say: "This makes out the plaintiff's case, and he is entitled to recover unless the defendant has made out

10 a sufficient defence, for it is not necessary to go further than to show in the first instance the sale by the officer, and the amount for which the property was bid off, to charge him with the money. The legal presumption being, in the absence of evidence to the contrary, that he received the money, and that it is in his hands, unless he shows a legal acquittance for it;" whereas, by the law of the land, the evidence of the said plaintiffs below, did not make out their case, and they were not entitled to recover, and it was necessary for the plaintiffs

20 below to prove before they were entitled to recover, that the money was in the hands of the said defendant below at the time the attachment was served, or at some time afterwards, therefore in that there is manifest error; and also there is error in this, to wit: that upon the trial of the said cause before the said Circuit Court of the county of Hunterdon, the said court charged the jury in the words following, that is to say: "As between Lomerson and Wilkes, then he, Lomerson, was liable for this surplus; being so liable, the plaintiffs standing in Wilkes' place having attached his rights and credits in Lomerson's hands, are, I think, entitled to recover it as a debt due from Lomerson

30 to Wilkes, and not paid over or accounted for;" whereas, by the law of the land, as between Lomerson and Wilkes, Lomerson was not liable for this surplus, and the plaintiffs below were not entitled to recover it as a debt due from Lomerson to Wilkes, and the said Circuit Court ought to have so charged the jury, therefore in that there is manifest error. And also there is error in this, to wit: that upon the trial of the said cause before the said Circuit Court of the county of Hunterdon, the said court charged the jury in the words following, that is to say: "Lomerson was in possession of this property as an officer,

40 by virtue of judicial writs in his hands. His business was to sell the property for as much as he could get for it, and if a surplus was produced by the sale, he is accountable to the creditors in attachment for it. What he sold and what the purchasers bought, was Wilkes' right in the property sold. He sold the property as Wilkes'; there was no legal notice of any claim to the property by any body else; the constable

can't set up that the property was not Wilkes' under the evidence here; that is a question for the purchasers, Boody, Ross & Co., and they must take the risk of it," whereas, by the law of the land, Lomerson sold not the right of Wilkes only, but the property, and was bound to make the right to the property good to the purchasers, and in any suit whatever against Lomerson for the purchase money, he could set up that the property was not Wilkes' property, and the said Circuit Court ought to have so charged the jury, therefore, in that there is manifest error. And also there is error in this, to wit: that 10 upon the trial of the said cause before the Circuit Court of the county of Hunterdon, the said court charged the jury as follows, that is to say: "That in this case the plaintiffs are entitled to recover," whereas, by the law of the land, the said plaintiffs below were not entitled to recover in this case, and the said court ought to have so charged the jury, therefore in that there is manifest error. And also there is error in this, to wit: that upon the trial of the said cause before the said Circuit Court of the county of Hunterdon, the plaintiff in error, who was defendant below, called upon the court to 20 charge the jury in the words following, that is to say: "That upon the attachment of money in the hands of a garnishee, the plaintiff cannot have execution against the garnishee for a bare right or credit, or for any other chose in action," but the said Circuit Court declined so to charge the jury, whereas by the law of the land the said Circuit Court ought to have so charged the jury, therefore in that there is manifest error. And also there is error in this, to wit: that upon the trial of the said cause before the said Circuit Court of the county of Hunterdon, the said plaintiff in error, who was the defendant be- 30 low, called upon the said Circuit Court to charge the jury in the words following, that is to say: "That the presumption in law, until the contrary is proved, is, that the constable paid over the surplus money to the defendant in execution, if he had any surplus in his hands after paying the claims of the plaintiffs in execution," but the said Circuit Court declined so to charge the jury, whereas by the law of the land the said Circuit Court ought to have so charged the jury, therefore in that there is manifest error. And also there is error in this, to wit: that the judgment aforesaid, by the record aforesaid, appears to have been given 40 for the said Peter H. Huffman and Mahlon R. Risler, (late) partners, trading under the name and firm of P. H. Huffman & Co., against the said Conrad Lomerson, garnishee in attachment, whereas by the law of the land the said judgment ought to have been given for the said Conrad Lomerson, garnishee, as aforesaid, against the said Peter H. Huffman and Mahlon

R. Risler, (late) partners, as aforesaid. And also there is error in this, to wit: that the judgment aforesaid, by the record aforesaid, appears to have been given in favor of the said Peter H. Huffman and Mahlon R. Risler, (late) partners, as aforesaid, and against the said Conrad Lomerson, for damages assessed by the said jury to the sum of two hundred and seventy-two dollars and thirteen cents, whereas the real claim of the said defendants in error, who were the plaintiffs below, as appears by the said record,

10 was only the sum of twenty-seven dollars and fifteen cents, therefore in that there is manifest error. And the said Conrad Lomerson, garnishee in attachment, prays the judgment aforesaid for the errors aforesaid, and for other errors in the record, process and proceedings being, may be reversed, annulled and altogether holden for naught, and that he may be restored to all things which he has lost by occasion of the said judgment, &c. And hereupon afterwards, to wit, on the first Tuesday of November, in the year of our Lord one thousand eight hundred and fifty-three, comes the said Peter H. Huffman and Mahlon R. Risler, (late) partners, &c., by Bennet

20 Vansyckel, their attorney, and say that there is no error in the record and proceedings aforesaid, and they pray that the said court may proceed to examine, as well the record and proceedings aforesaid, as the matters aforesaid above assigned for error, and that the said judgment aforesaid, in form aforesaid given, may be in all things affirmed, &c. But because our said Supreme Court, now here, are not yet advised what judgment to give of and upon the premises, a day is therefore given to the parties aforesaid, until the fourth Tuesday of February,

30 in the year of our Lord eighteen hundred and fifty-five, to hear the judgment of the said court thereupon; at which day, before our said court at Trenton, come the parties aforesaid, by their attorneys, whereupon all and singular the premises being seen, and by the court now here fully understood, and as well the record and proceedings aforesaid, and the judgment given in form aforesaid, as the matters aforesaid, by the said Conrad Lomerson, garnishee, &c., above, for error assigned, being diligently examined and inspected, and mature deliberation being thereupon had, it appears to our said court now

40 here, that there is no error either in the record and proceedings aforesaid, or in giving the judgment aforesaid; therefore it is considered that the judgment aforesaid, in form aforesaid given, be in all things affirmed, and stand in full force and effect, the said causes and matter above for error assigned in anywise notwithstanding; and it is further considered that the said Peter H. Huffman and Mahlon R. Risler, late partners,

&c., do recover against the said Conrad Lomerson, as well their damages and costs aforesaid, as also thirty-eight dollars and ninety-eight cents, for their damages, double costs and charges which they have sustained and expended by reason of the delay of execution of the judgment aforesaid, on pretence of prosecuting the said writ of error by our said Supreme Court, now here adjudged to the said Peter H. Huffman and Mahlon R. Risler, (late) partners, &c., and with their assent, according to the form of the statute in such case made and provided, and that the said Peter H. and Mahlon R. have execution thereof, &c. Judgment signed the eighth day of 10 March, in the year of our Lord one thousand eight hundred and fifty-five.

HENRY W. GREEN.

The opinion of the said Supreme Court was delivered by his Honor Daniel Haines, Associate Justice of the said Supreme Court, at the February term, A. D. 1855, in the following words, that is to say :

NEW JERSEY SUPREME COURT,
February term, 1855.

LOMERSON, garnishee, vs. PETER H. HUFFMAN & Co.	}	In error.	20
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Argued before Potts and Haines, J. J.

HAINES, J. Upon a writ of attachment issued out of the Circuit Court of the county of Hunterdon, at the suit of Peter H. Huffman and Mahlon R. Risler, the defendants in error, against one George Wilkes. The sheriff returned that he had attached the said George Wilkes, by money in the hands of Conrad Lomerson, the plaintiff in error, due to said Wilkes, and appraised at fifty dollars. Judgment in the suit 30 was afterwards entered against Wilkes, on the report of auditors in favor of Huffman & Co., for \$27 15, and also in favor of certain applying creditors, for several other sums of money. Peter H. Huffman & Co. then sued out a writ of *scire facias* against Lomerson, as the garnishee of Wilkes. A declaration and plea were filed, and on the trial of the issue so joined, a verdict and judgment were rendered in favor of the plaintiff below.

To review this judgment, Lomerson has brought a writ of error, and has assigned for error. 40

First. That the court refused to nonsuit the plaintiff below.

This motion involved every thing which it was material for the plaintiff to prove, in order to sustain their action. The plea in brief presented by the statute, the defendants neither demurred nor plead specially. But the court, under this statutory plea, requires the plaintiff to aver and prove every thing necessary for his protection, in case of a suit against him by the defendant in attachment. *Neal vs. Cook*, 5 Hal. 10 337; *Welsh vs. Black*, 2 Green 349. He may insist that it appears by the *scire facias* what property was attached, at what time, and in whose hands or custody that a judgment was duly entered, and the amount of it. But he cannot deny the debt due from the defendant in attachment, nor call in question the regularity of the proceedings. *Welsh v. Black*, 2 Green 347.

The omission, therefore, to recite in the *scire facias*, and in the declaration upon it, that the defendant was three times called in open court and made default; the manner in which 20 the writ was served, or that notice of its having been issued was duly advertised, cannot be objected to by the garnishee. Neither of those matters are essential to his protection.

It is enough for that purpose, that a judgment was duly rendered, by a court of competent jurisdiction. Such judgment remaining unreversed, is conclusive as between him and the debtor. It affords the garnishee a complete shield against the claim of his creditor for money, or goods attached in his hands. And it precludes the garnishee from denying the plaintiffs' right to the money or effects of the defendant so 30 attached in his hands. *McDaniel vs. Hughes*, 3 East. 367.

Nor is it a valid objection, that the *scire facias* was not issued to the next term after the judgment. The statute in that respect is not imperative but only directory. The delay of a term could in no wise prejudice the garnishee.

Again, it is objected that there is a variance between the declaration and the *scire facias*, the latter requiring the garnishee to show cause why the plaintiffs should not have execution for the money, so as aforesaid due from him to Wilkes, and in his hands, according to the statute in such case made and provided; the prayer of the declaration being that 40 execution may be adjudged to the plaintiffs, of the debt and damages aforesaid, according to the force, form and effect of the said recovery.

The objection is, that here is a prayer for execution, according to a recovery, when in fact there was no recovery against the garnishee.

But I can see no reason why this objection should prevail.

1. The offensive words, "according to the force, form and effect of the said recovery," may be rejected as surplussage. They are not necessary to constitute the cause of complaint, (1 *Chit. Pl.* 216,) nor an essential part of the declaration.

2. If not surplussage, the declaration in this particular is amendable, even after error brought. *Stork vs. Coffin, Ex. of Coffin*, 5 *Burr R.* 27, 30; *Tillotson vs. Chetan*, 3 *Johns. R.* 95; *Teneyck vs. Del. and Rar. Canal Co.*, 4 *Harr.* 92-99, and the cases there referred to. And the court may consider the 10 amendment as made, by overlooking the exception (2.) 3 *Arch. Practice*, 233; 3 *Black.* 407.

It may well be questioned, whether such an exception can be taken under the plea in this case. If it may be, it is because the statute directs a particular plea, and by construction excludes a special plea or demurrer. If under that statutory plea, the defendant may raise like questions, as if he had demurred, the court will extend to the plaintiff the same advantages, that he could have had on a demurrer, and in such case, direct an amendment, if necessary, to effect justice. 20

It is further insisted, that the plaintiffs should have been called, because it is said they have failed to prove money in the hands of the garnishee.

Such proof was clearly necessary, to maintain the issue. That was, indeed, the issue itself; and without proof of it, the plaintiffs must have failed in their action. But it was shown and admitted, that Lomerson was acting as a constable, and had in his hands to be executed, several writs of execution, issued out of a court for the trial of small causes, to the amount of \$243 42, that by virtue thereof, he had sold property which 30 he had levied upon as the property of Wilkes', to the sum of \$530, leaving a surplus of \$272 15, and the court rightly held that in presumption of law, the constable received the whole amount of the sales, and held the surplus for the use of Wilkes, and that this was *prima facie* evidence of his having money of Wilkes' in his hands.

He sold all the interest of Wilkes in the property, and it brought more money than was due on the executions. For the surplus he was accountable to Wilkes, and if Wilkes had sued him for the money it would in such suit have been no de- 40 fence, to show that the purchase money had not in fact been paid, unless it also appeared that it remained unpaid by the consent of Wilkes.

It is further assigned for error, that the court cannot overrule material and competent evidence offered on the part of the garnishee.

The evidence overruled was, first, parol evidence of a judgment rendered in the State of New York, and it is insisted that such evidence is competent, because it was intended to prove the result of the judgment, and not the proceedings, by which it was obtained.

But how could the result or effect of a judgment be shown without the production of the record or an exemplification of it? and when was it ever held that parol testimony could be given of a judgment?

10 Upon the first and most simple rule of evidence, that the best which the nature of the case admits of, must be produced, the court was clearly right in rejecting the parol evidence offered.

Again, it was attempted to prove that Wilkes did not own the property sold, by showing that Boody, Ross & Co., at the time of the sale, agreed with the execution creditors that they would bid upon and purchase the property at the price of five hundred dollars, and if it proved to be the property of Wilkes, it should be no sale, and they should not be required to pay
20 for it, and that the right to the property was to be determined by a suit then pending in the State of New York.

This testimony was irrelevant, and ought to have been overruled.

Boody, Ross & Co. had, by their agent, appeared at the sale. They made no claim to the property, but treated it as that of Wilkes, by bidding upon and purchasing it. To the agreement under which it is said they purchased, Wilkes was not a party, and by it he was in no wise bound. It did not charge his right to the surplus money in the hands of Lo-
30 merson.

And Boody, Ross & Co., having treated the property as Wilkes', had no right, through the garnishee, to set up a prior claim to it on this trial. Nor had the garnishee any right to deny before the court, what by his own levy, made under his official oath, and by his sale, he had elsewhere openly avowed. He had declared the property to belong to Wilkes, and it did not lie in his mouth to deny it, and thereby defeat Wilkes or his creditors in the recovery of the surplus money in his hands.

40 The garnishee further offered to prove that a prior attachment had been issued against Wilkes at the suit of one Nicholls, under which the plaintiffs below in this suit were applying creditors, for the same debt.

This evidence was properly overruled. The pendency of a prior attachment would have been a good ground for a motion

to set aside the second one, under which these proceedings were had, but no such motion appears to have been made.

The second attachment was not set aside, but proceeded in to judgment. It was voidable, but never avoided, and it could not be declared void in this collateral way. It was not competent for the garnishee to set that upon this issue.

It is further objected, that the verdict was for more than the amount due to the plaintiffs below; but it must be remembered that the plaintiffs represent not only their own claim, but those of all the applying creditors. The proceedings against the 10 garnishee are necessarily in their name, but for the use of all those creditors. The verdict did not exceed the amount due to them, and therefore is not wrong.

Other errors are assigned upon the charge delivered by the court; and on his refusal to charge as requested by the counsel of the garnishee; but the questions thereby raised are substantially, if not literally, the same as those that have been considered.

Not being able to see any error in the proceedings below, I am of the opinion that the judgment should be affirmed with 20 costs.

Which said opinion was concurred in by his Honor Stacy G. Potts, Judge.

The plaintiffs in error assigned errors as follows, viz:

Afterwards, that is to say, on the second Tuesday of March, in the year of our Lord one thousand eight hundred and fifty-30 five, before our chancellor, justices and judges, in this present court at Trenton, in the county of Mercer, assembled, comes the said Conrad Lomerson, garnishee in attachment, by Marston D. Trefren, his attorney, and says that in affirming the judgment of the Circuit Court of the county of Hunterdon, there is manifest error in this: that the said judgment was affirmed in the Supreme Court of the State of New Jersey, whereas by the law of the land the said judgment ought to have been reversed, therefore in that there is manifest error. And the said Conrad Lomerson, garnishee as aforesaid, prays, 40 that the said judgment of affirmance so given by the said Supreme Court of the State of New Jersey as aforesaid, may be reversed, annulled, and altogether holden for naught, and that the judgment of the said Circuit Court of the county of Hunterdon, before the court aforesaid, may in all things be re-

versed, and that he may be restored to all things which he has lost by occasion of the affirmance.

MARSTON D. TREFREN,
Attorney for, and of counsel with
the plaintiff in error.

To which assignment of errors the defendants in error have filed the common joinder in error.

APPENDIX.

NEW JERSEY COURT OF ERRORS AND APPEALS.

CONRAD LOMERSON, garnishee in attachment, plaintiff in error,

vs.

PETER H. HUFFMAN and MAHLON R. RISLER, (late) partners trading under the name and firm of P. H. HUFFMAN & Co., defendants in error.

} Exhibits.

Plaintiff's Exhibits.

1. *Exhibit.* The record of a judgment in attachment recovered by the said Peter H. Huffman and Mahlon R. Risler, partners, trading under the name and firm of P. H. Huffman & Co., against George Wilkes, in the Circuit Court of the county of Hunterdon, at the April term of said court, A. D. 1852.

2. *Exhibit.* The original writ of attachment in said case, together with the sheriff's return and appraisal. Writ tested May term, A. D. 1851, and returnable September term, A. D. 1851; served the 26th day of August, A. D. 1851. 10

3. *Exhibit.* A paper containing the conditions of the sale and the vendue list of articles sold by Conrad Lomerson, constable, by virtue of several executions issued out of the court for the trial of small causes.

4. *Exhibit.* A paper containing a list of judgments in the docket of Jacob H. Huffman, Esquire, Justice of the Peace, against George Wilkes.

5. *Exhibit.* Execution issued by Jacob H. Huffman, Esq., Jan. 16th, 1851, in favor of George Apgar, against George 20 Wilkes.

6. *Exhibit.* Execution issued by Jacob H. Huffman, Esq., Jan. 16th, 1851, in favor of Charles Conover, against George Wilkes.

7. *Exhibit.* Execution issued by Jacob H. Huffman, Esq., Jan. 16th, 1851, in favor of John Dalrimple and Henry A. Apgar, against George Wilkes.

8. *Exhibit.* Execution issued by Jacob H. Huffman, Esq., Jan. 16th, 1851, in favor of Abraham P. Huffman, against George Wilkes.

10 9. *Exhibit.* Execution issued by Jacob H. Huffman, Esq., Jan. 16th, 1851, in favor of James Mahaffee, against George Wilkes.

10. *Exhibit.* Execution issued by Jacob H. Huffman, Esq., Jan. 16th, in favor of Peter C. Apgar, against George Wilkes.

11. *Exhibit.* Execution issued by Jacob H. Huffman, Esq., Jan. 16th, 1851, in favor of Peter M. Huffman, against George Wilkes.

12. *Exhibit.* Execution issued by Jacob H. Huffman, Esq., Jan. 16th, 1851, in favor of Huffman, Foster and Finley, 20 against George Wilkes.

13. *Exhibit.* Execution issued by Jacob H. Huffman, Esq., Jan. 16th, 1851, in favor of Elijah Swarts, against George Wilkes.

14. *Exhibit.* Execution issued by Isaiah P. Large, Esq., Jan. 13th, 1851, in favor of Cornelius W. Van Horn, against George Wilkes.

Defendants' Exhibit.

30 1. *Exhibit.* The record of a judgment in attachment recovered in the Hunterdon county Circuit Court, by William G. Nicholls, against George Wilkes, at the December term of said court, A. D. 1851.

NEW JERSEY COURT OF ERRORS AND APPEALS.

CONRAD LOMERSON, garnishee in attachment, plaintiff in error,	}	<i>Points for plaintiff in error.</i>
<i>vs.</i>		
PETER H. HUFFMAN and MAHLON R. RISLER, (late) partners, trading under the name and firm of P. H. HUFFMAN & Co., defendants in error.	}	

I. The writ of *scire facias*, as set forth in the declaration, does not recite all the previous proceedings, which it is necessary it should do.

II. The writ of *scire facias* does not show that on the return of the writ of attachment, the clerk advertised the attachment according to law.

III. The judgment against Wilkes, in the original attachment, was entered on the report of auditors, at the April term, A. D., 1852, of the Circuit Court of the county of Hunterdon, that being the third term after the return of the original writ of attachment, as appears by the said writ of *scire facias*, while it is not alleged in said writ of *scire facias*, that the said George Wilkes had been thrice called in each of the successive terms and made default.

IV. The *scire facias* against the defendant, garnishee, is for him to appear at the second term after judgment in the original attachment, while the statute does not authorize the issuing of such a writ.

V. The sheriff has not returned the manner in which he served the said writ of *scire facias*, as by law he ought to have done.

VI. The defendant is declared against, as being in default after his appearance had been entered.

VII. The prayer for execution in the declaration, is variant from that in the writ of *scire facias*, and is erroneous and contrary to law, it being for the debt and damages aforesaid, while the prayer for execution in *scire facias* is for the money due from Lomerson to Wilkes.

VIII. The plaintiffs failed to prove that the defendant, garnishee, had any money in his hands belonging to Wilkes, at

the time the attachment was served on him, or at any time after; therefore, they were not entitled to recover against the said garnishee, and ought to have been nonsuited by the court.

IX. On the trial of the cause the court overruled legal and competent evidence offered by the defendant.

X. It was competent and legal for defendant to prove by parol how the suit between Boody, Ross & Co., and Callender, was determined.

XI. It was competent and legal for the defendant to prove that the property attached by him as the property of Wilkes, was so attached and taken by mistake, Wilkes never having had any title to it; that it really belonged to Boody, Ross & Co., and that the defendant, garnishee, never received any money for it.

XII. If the property was the property of Wilkes, the constable was not liable to Wilkes for the surplus, and neither Wilkes nor his creditors could legally recover the same of the constable.

XIII. The constable sold not the right of Wilkes merely in the property, but the property itself, absolutely, and the purchasers got a good title to the property.

XIV. Boody, Ross & Co. had a perfect and legal right to consent to such sale, and did not thereby loose their right to the purchase money under the agreement which they made, if the property was really theirs.

XV. A second attachment cannot be legally issued against the same defendant and in favor of the same parties, while the property attached by virtue of the second writ is within the jurisdiction of the court, out of which the first attachment issued.

XVI. The court misdirected the jury in charging them that the plaintiffs were entitled to recover.

XVII. Upon an attachment of money in the hands of a garnishee, the plaintiffs cannot have execution of a bare right or credit, or for any other chose in action.

XVIII. The presumption of law, until the contrary is shown, is, that if the constable had any surplus after satisfying the claims in his hands, he paid it over to Wilkes as required by the statute.

XIX. In an action of this kind, if the money attached is more than the plaintiff's claim, they can have execution only for the amount of their claim.

XX. There is a variance between the issue and the verdict, the issue being whether or not the defendant had any money of Wilkes' in his hands at the time of the service of the attachment, or at any time after, while the verdict is that the

said Conrad Lomerson did undertake and promise in manner and form as complained against.

XXI. The judgment is irregular, illegal and defective, not being the judgment prayed for in the declaration.

XXII. If Lomerson had any surplus in his hands after paying the plaintiffs in attachment, he had it as a wrong doer. The writs commanded him to make the money due the plaintiffs, and neither required nor authorized him to do more.

XXIII. Surplus money so in the hands of a judicial officer is not subject to attachment.

XXIV. The verdict and the judgment are against both the law and the evidence.

M. D. TREFREN,

Atty. for, and of Counsel with Pltff. in Error.

and Edward Johnson did not take any promise of immunity
and form is considered against.

XII. The defendant's lawyer, legal and detective, had
been the witness, and he is in the position.

XIII. If Johnson had any suspicion in his hands after the
the trial, and the statement, he had it as a witness, but
The witness intended him to make the answer, and the plain-
tiff and the witness, and the witness, and the witness.

XIV. The witness, and the witness, and the witness, and
is not subject to attack.

XV. The witness, and the witness, and the witness, and
law and the evidence.

M. D. Tamm

My friend of course with this in favor