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NOTICE AND GROUNDS OF APPEAL.

(Filed May 4, 1929.)

ATLANTIC COUNTY CIRCUIT COURT.

MARY RANK and HARRY RANK, *Plaintiffs,* v. HARRY KOLMETSKY, *Defendant.*	On Rule to Show Cause. Notice and Grounds of Appeal.

To the Within-Named Plaintiffs:

Take notice that the West Side Lumber Company, and Joseph Thompson and Walter Hanstein, practicing under the firm name of Thompson & Hanstein, attorneys for said Harry Kolmetsky, in said mechanic's lien suit, and also attorneys for said West Side Lumber Company, appeals to the New Jersey Court of Errors and Appeals, the court of last resort in all causes, from the judgment entered in this cause, upon the following grounds:

1. Because the order is not specific as to the person, or persons, who is to pay the money, and is vague, uncertain and not directory.

2. Because the Court failed to discharge the rule to show cause, in this cause.

3. Because the Court failed to order that the plaintiffs take nothing under their levy.

4. Because the Court ordered that the plaintiffs are entitled to be paid the amount due to them under their levy made by virtue of their judgment entered in this cause.

THOMPSON & HANSTEIN,
Attorneys for and of Counsel with West Side Lumber Company, and Joseph Thompson and Walter Hanstein, practicing under the firm name of Thompson & Hanstein, attorneys for Harry Kolmetsky in said mechanic's lien suit, and West Side Lumber Company.

NOTICE AND GROUNDS OF APPEAL.

(Filed May 4, 1929.)

ATLANTIC COUNTY CIRCUIT COURT.

MARY RANK and HARRY RANK, *Plaintiffs,* v. HARRY KOLMETZKY, *Defendant.*	On Rule to Show Cause. Notice and Grounds of Appeal.

To the Within-Named Plaintiffs:

Take notice that Bernard Pellicoff appeals to the New Jersey Court of Errors and Appeals, the court of last resort in all causes, from the judgment entered in this cause, upon the following grounds:

1. Because the order is not specific as to the person, or persons, who is to pay the money, and is vague, uncertain and not directory.

2. Because the Court failed to discharge the rule to show cause in this cause.

3. Because the Court failed to order that the plaintiffs take nothing under their levy.

4. Because the Court ordered that the plaintiffs

are entitled to be paid the amount due to them under their levy made by virtue of their judgment entered in this cause.

5. Because in no event is this appellant legally required to pay.

COLE & COLE,
Attorneys for and of Counsel with Bernard Pellicoff.

PETITION.

(Filed Dec. 5, 1928.)

ATLANTIC COUNTY CIRCUIT COURT.

MARY RANK and HARRY RANK, *Plaintiffs,* v. HARRY KOLMETZKY, *Defendant.*	Action at Law. Petition.

The petition of Mary Rank and Harry Rank, plaintiffs in the above entitled cause, respectfully shows that:

1. On or about September, 1926, judgment was entered herein in favor of plaintiffs and against the

defendant, Harry Kolmetzky, for the sum of three thousand forty-two dollars and thirty-nine cents ($3,042.39) damages and fifty-nine dollars and ninety-seven cents ($59.97) costs.

2. Execution was issued on said judgment on September 23, 1926, and was delivered to and received by the Sheriff of Atlantic County on that day.

3. On October 11, 1926, said Sheriff of Atlantic County, with the aid of E. Russell Truex, a discreet and impartial freeholder of said County of Atlantic, made levy upon money due or to become due the defendant, Harry Kolmetzky, in the hands of or to be in the hands of Bernard Pellicoff, arising out of a mechanic's lien suit then pending.

4. At the time said levy was made there was then pending in this court a certain action at law instituted on mechanic's lien wherein Harry Kolmetzky, the defendant in this suit, was plaintiff, and said Bernard Pellicoff was defendant. The matter in issue in said suit was tried on or about November 1st, 1926. As the result of said trial, judgment was entered in said suit on November 8, 1926, in favor of said Harry Kolmetzky and against said Bernard Pellicoff for nine thousand ($9,000.00) dollars damages and fifty-one dollars and fifty cents ($51.50) costs.

5. Said judgment of said Kolmetzky against said Pellicoff was appealed to the New Jersey Supreme Court and by order entered in said court on March 21, 1928, said judgment was affirmed. Said judgment was thereafter appealed to the Court of Errors and Appeals of this State and by order recently entered in said court, said judgment was affirmed.

6. As the result of said judgment obtained and affirmed, as aforesaid, said Bernard Pellicoff either now has or recently did have in his hands the monies sufficient in amount to fully pay and satisfy said judgment.

7. Plaintiff in this suit demanded that he be paid the amount due and owing under the levy made by virtue of the execution issued on his judgment but said Bernard Pellicoff refused to pay same and petitioners are advised that in spite of said levy made as aforesaid, he has paid to Joseph Thompson and Walter Hanstein, counsellors at law, practicing under the firm name of Thompson & Hanstein, attorneys for said Harry Kolmetzky, the full amount of the said judgment of said Kolmetzky against said Pellicoff, with the understanding, however, that said Pellicoff is to be protected against any order or judgment that the levy of petitioner herein is superior to the Kolmetzky judgment.

8. Petitioners are entitled to be paid the amount due under their said judgment from said monies now either in the hands of said Bernard Pellicoff or said Messrs. Thompson & Hanstein, or said Harry Kolmetzky.

Petitioners therefore pray:

1. That Bernard Pellicoff, Joseph Thompson and Walter Hanstein, counsellors at law, practicing under the firm name of Thompson and Hanstein, and Harry Kolmetzky, or one of them, may be required to pay to petitioners the amount so due to them on their said judgment.

And your petitioners will ever pray, etc.

WM. ELMER BROWN, JR,
Attorney for Petitioners.

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

WM. ELMER BROWN, JR., of full age, being duly sworn according to law, on his oath deposes and says:

1. I am the attorney for the petitioners named in the foregoing petition.

2. On or about September, 1926, as attorney for said petitioners, I secured a judgment in the Atlantic County Circuit Court in favor of them and against Harry Kolmetzky for the sum of three thousand forty-two dollars and thirty-nine cents ($3,042.39) damages and fifty-nine dollars and ninety-seven cents ($59.97) costs.

3. Execution was issued on said judgment on September 23, 1926, and was delivered to and received by the Sheriff of Atlantic County on that day.

4. On October 11, 1926, said sheriff made levy upon the money due or to become due the defendant, Harry Kolmetzky, in the hands of or to be in the hands of Bernard Pellicoff, arising out of mechanic's lien suit then pending.

5. At the time said levy was made there was then pending in the Atlantic County Circuit Court a certain action at law instituted on mechanic's lien wherein said Harry Kolmetzky was plaintiff and said Bernard Pellicoff was defendant. Said case was tried on or about November 1st, 1926. As the result of said trial, judgment was entered in said

suit on November 8, 1926, in favor of said Harry Kolmetzky and against said Bernard Pellicoff for nine thousand ($9,000.00) dollars damages and fifty-one dollars and fifty cents ($51.50) costs.

6. Said judgment of said Kolmetzky against said Pellicoff was appealed to the New Jersey Supreme Court and by order entered in said court on March 21, 1928, said judgment was affirmed. Said judgment was thereafter appealed to the Court of Errors and Appeals of this State and by order recently entered in said court, said judgment was affirmed.

7. Shortly after the affirmance of said judgment by said Court of Errors and Appeals I was informed that said Bernard Pellicoff was about to pay said judgment of said Kolmetzky from certain monies which were either then in his hands or available for that purpose.

8. In spite of the levy made on the judgment of petitioners herein, as aforesaid, said Bernard Pellicoff has refused to pay same and I am advised in such manner that I believe it to be true, that said Pellicoff has paid to Joseph Thompson and Walter Hanstein, counsellors at law, practicing under the firm name of Thompson and Hanstein, attorneys for said Harry Kolmetzky, the full amount of the said judgment of said Kolmetzky against said Pellicoff.

WM. ELMER BROWN, JR.

Sworn and subscribed to before me this 5th day of December, 1928.

HERBERT R. VOORHEES,
M. C. C. of N. J.

RULE TO SHOW CAUSE.

(Filed Dec. 5, 1928.)

ATLANTIC COUNTY CIRCUIT COURT.

MARY RANK and HARRY RANK, *Plaintiffs*, v. HARRY KOLMETZKY, *Defendant.*	Action at Law. Rule to Show Cause

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This matter being opened to the Court by Wm. Elmer Brown, Jr., attorney for plaintiffs, and it appearing that the Sheriff of Atlantic County did, on October 11th, 1926, levy on certain money due or to become due the defendant, Harry Kolmetzky, in the hands of or to be in the hands of Bernard Pellicoff, arising out of mechanic's lien suit then pending by virtue of a writ of execution issued here;

And it further appearing that said Bernard Pellicoff either has paid or is about to pay to said Harry Kolmetzky, or to Joseph Thompson and Walter Hanstein, counsellors at law, practicing under the firm name of Thompson and Hanstein, attorneys for said Harry Kolmetzky;

It is on this fifth day of December, 1928, ordered that said Bernard Pellicoff, Harry Kolmetzky and Joseph Thompson and Walter Hanstein, counsellors

at law, practicing under the firm name of Thompson and Hanstein, be and appear before this Court at the court room, seventh floor of the Guarantee Trust Building, Atlantic City, New Jersey, on Jan. 18th, 1929, at eleven o'clock in the forenoon to show cause, if any they have, why they should not be required to pay over to said Sheriff of Atlantic County said monies so levied upon as aforesaid.

And it is further ordered that, until the further order of this Court, the said Bernard Pellicoff, Harry Kolmetzky and Joseph Thompson and Walter Hanstein, counsellors at law, practicing under the firm name of Thompson and Hanstein, be and they hereby are restrained from paying over, paying out or otherwise disposing of the said monies in question;

And it is further ordered that a copy hereof, as well as a copy of the petition filed herein and on which this order is based, which need not be certified, be served upon said Bernard Pellicoff, Harry Kolmetzky and Joseph Thompson and Walter Hanstein, counsellors at law, practicing under the firm name of Thompson and Hanstein, within one day from the date hereof.

W. F. Sooy,
C. C. J.

On motion of:
Wm. Elmer Brown, Jr.,
Attorney for Plaintiffs.

OPINION.

(Filed April 19, 1929.)

ATLANTIC COUNTY CIRCUIT COURT.

MARY RANK and HARRY RANK, v. HARRY KOLMETSKY. — On Petition, &c. Memo.

W. ELMER BROWN, ESQ., for petitioner.
THOMPSON & HANSTEIN, for defendant and West Side Lumber Co.

SOOY, *J.*:

In the above matter two rules to show cause were signed by me, and counsel for the petitioner has consented that as to the Hudson Cement and Supply Co., the rule be dismissed.

On March 8, 1926, one Kolmetsky instituted a suit against one Pelicoff. The suit was on a mechanic's lien claim and finally resulted in judgment in favor of Kolmetsky.

Thereafter, September, 1926, Marry and Harry Rank, obtained judgment against Kolmetsky. Execution was issued against Mr. K. and on October 11, 1926, the Sheriff of Atlantic County made a levy thereunder and made the following return:

"All money due or to become due the defendant Harry Kolmetsky, in the hands of, or to be in the hands of Bernard Pelicoff, arising out of a mechanic's lien suit now pending."

On November 8, 1926, judgment was entered in Kolmetsky v. Pelicoff in favor of K. and in the sum of $9,000. This judgment was immediately (Nov. 8, 1926) assigned to the West Side Lumber Co. The Supreme Court dismissed a rule to show cause and that court and the Court of Errors and Appeals affirmed the judgment of Kolmetsky. Thereafter Mr. P. paid to Mr. K. the amount of the judgment.

On December 5, 1928, I allowed the rule to show cause on the application of counsel for the Ranks, requiring K., et als., to show cause why the moneys in the hands of the parties defendant (paid in satisfaction of the aforesaid judgment) to the extent of the Rank judgment, should not be paid over in satisfaction thereof.

The question for my determination is: Was there in the Rank case, a levy upon a debt due and owing or merely a levy on a judgment, or, in other words, was "all money due or to become due the defendant H. K., in the hands of or to be in the hands of B. P. arising out of the mechanic's lien suit now pending" a right and credit subject to levy?

There can be no doubt but that neither a *decre* in Chancery or a judgment at law, nor money due on such a decree or judgment, is subject to attachment, but, that moneys in the hands of a sheriff raised in pursuance of such a decree or judgment, or paid into court, on behalf of a party to a suit, are liable to attachment.

Edwards v. Stein, 94 Eq. 257, and cases therein cited.

The Execution Act provides, Sec. 1:

> "Rights and credits of the defendant in execution * * * may be levied upon, taken and sold or collected by virtue of said execution."

Section 2: "The term 'rights and credits' includes all rights and credits which may be attached by writ of attachment against non-resident debtors, and also includes rights and credits of an equitable nature, except such trust funds as are now exempt by law."

A reading of the Execution Act makes it quite apparent that unliquidated debts may be levied upon as "a right or credit," and Section 9 thereof, provides:

> "After levy shall have been made under this Act upon any debt due or accruing from a third person (herein called garnishee) to the judgment debtor, the Court, or a Judge thereof, may make an order upon such garnishee," &c.

Was the Rank levy merely a levy on a judgment at law? The language thereof does not so indicate, viz.: "All money due or to become due the defendant, Harry Kolmetsky, in the hands of, or to be in the hands of Bernard Pelicoff, arising out of a mechanic's lien suit now pending."

There were no moneys then in the hands of Kolmetsky but moneys did come to his hands and was in his possession at the time of the signing the rule in this case, a sum in excess of the Rank judgment, and the moneys in his hands were those arising out of the litigation against Pelicoff.

The reason for the rule that a judgment or decree or moneys due thereon may not be levied upon is that thereby control of the courts over their own process would be interfered with and the administration of justice embarrassed.

In the instant case, it so happens that all of the litigation was in the Circuit Court of Atlantic County, but irrespective of that fact, it is quite apparent that the Rank levy did not in anywise interfere with the Court's control of its process nor with the administration of justice.

The levy was not on a jusgment at law nor on money then due on a judgment at law, but on moneys "in the hands of or to be in the hands of Pelicoff" arising out of the Kolmetsky suit. That it did not embarrass the administration of justice is evidenced by the prosecution by Pelicoff of his rule to show cause in the *Supre* Court, his appeal to that court and to the Court of Errors and Appeals. The Court's control over its own process was not interfered with, with the result that the judgment was paid and by so doing made the Rank levy effective. But, it is said, that the levy as of the time of the making thereof, was not upon a debt then owing but merely a levy upon what would arise out of a pending suit, which necessarily means the "judgment."

This contention is based on the proposition that there was relationship of debtor and creditor existing between K. and P. at the time of the levy and that that relationship was created by the entry of judgment. Not so. The debt was existing but the amount was in abeyance until the entry of judgment and the judgment fixed the amount of a preexisting debt. Moneys arising by the payment of the debt were levied upon and not the judgment.

This disposes of the objection of the West Side Co., which is: "There can be no levy upon a judgment or decree" and also disposes of the objection that "there can be no levy upon a right or credit which is made the subject of an issue at law," under which reason counsel cites Elizabeth Savings Inst.

v. Gerber, 35 Eq. 158 case, it seems to me, not analagous to the present situation but which deals with a conflict of jurisdiction which is absent in the present case.

But, counsel says, that these proceedings are under the 9th Section of the Execution Act and that no levy is possible thereunder because "Pelicoff does not admit the debt as contemplated by the statute."

The Act provides: "Upon return of the order to show cause * * * and order may be made requiring the garnishee to pay the debt IF HE ADMITS IT," &c.

It is quite true that Pelicoff did not admit the debt originally but, the fact that the moneys representing the debt have been paid by him to Mr. K. is sufficient answer to his failure to admit the debt. The debt and that it was in fact owed has been established by the judgment.

Counsel also cites Marrett v. U. S. Bldg. Co., 5 Misc. Rep. 87, but all the Court did in that case was to hold that the garnishee had certain defenses which should be liquidated.

In the instant case the status of K. and P., as well as that of Rank v. K., have been determined.

The last defense of the West Side Co. is that "the attempted attachment is void as against an assignee."

If the debt of Pelicoff to K. was subject to a levy and such a levy was made prior to the assignment to the West Side, then the West Side took subject to the levy, *i. e.*, only that interest which its assignee had left in the judgment and moneys to be collected thereon. I have held that the debts was subject to levy and, therefore, will sign an order requiring the payment of the moneys necessary to

satisfy the Rank levy and discharge the rule as to the Hudson levy.

Filed April 19, 1929, at 9 A. M.

WILLIAM A. BLAIR,
Clerk.

ORDER.

(Filed April 26, 1929.)

ATLANTIC COUNTY CIRCUIT COURT.

MARY RANK and HARRY RANK, *Plaintiffs,* v. HARRY KOLMETZKY, *Defendant.*	Action at Law. On Rule to Show Cause. Order.

This matter being opened to the Court by Wm. Elmer Brown, Jr., attorney for plaintiffs, and it appearing that final judgment was entered in this cause in September, 1926; that execution was issued on said judgment and on October 11, 1926, the Sheriff of Atlantic County made a levy thereunder upon "all money due or to become due the defendant, Harry Kolmetzky, in the hands of, or to be in the hands of Bernard Pellicoff, arising out of a mechanic's lien suit now pending;" that on March 8, 1926, said Kolmetzky instituted suit in this court

against said Bernard Pellicoff which finally resulted in judgment in favor of said Kolmetzky against said Pellicoff entered November 8, 1926, in the sum of $9,000.00; that said judgment of Kolmetzky against Pellicoff was immediately, to wit: on November 8, 1926, assigned to West Side Lumber Co.; that said judgment of Kolmetzky against Pellicoff was thereafter affirmed by the Supreme Court and the Court of Errors and Appeals; that thereafter said Pellicoff paid to Joseph Thompson and Walter Hanstein, counsellors at law, practicing under the firm name of Thompson and Hanstein, attorneys for said Kolmetzky in said mechanic's lien suit and also attorneys for said West Side Lumber Company, the amount of the judgment secured by said Kolmetzky against said Pellicoff and assigned to said West Side Lumber Co. as aforesaid; that, on petition of plaintiffs filed herein, a rule to show cause was entered herein on December 5, 1928, requiring said Bernard Pellicoff, said Harry Kolmetzky and said Messrs. Thompson and Hanstein to show cause before this court on January 18, 1929, why they should not be required to pay over to said Sheriff of Atlantic County said moneys so levied upon as aforesaid and further ordered that, until the further order of this Court, the said parties named therein be restrained from paying over, paying out or otherwise disposing of the said moneys in question; that said Messrs. Thompson and Hanstein have said moneys in their hands held by them in accordance with the mandate of said rule to await the further order of this Court;

And this matter coming on to be heard, on the return of said rule to show cause, in the presence of said Wm. Elmer Brown, Jr., attorney for the plaintiffs herein, and Messrs. Thompson and Hanstein, attorneys for said Kolmetzky in said me-

chanic's lien suit, and also attorneys for said West Side Lumber Co., and after considering the allegations of said petition, the proofs and stipulations then offered and the arguments of respective counsel, this Court being of the opinion that the plaintiffs herein are entitled to be paid the amount due them under said levy made on their said judgment;

It is, thereupon, on this 26th day of April, A. D., 1929, ordered that said Bernard Pellicoff and/or said West Side Lumber Company and/or said Joseph Thompson and Walter Hanstein, counsellors at law, practicing under the firm name of Thompson and Hanstein, attorneys for said Kolmetzky in said mechanic's lien suit, and also attorneys for said West Side Lumber Co., pay unto the Sheriff of Atlantic County, the full amount due under the said levy made by virtue of the execution issued as aforesaid on the said judgment of the plaintiffs herein against the said Harry Kolmetzky.

W. F. Sooy,
C. C. J.

EXHIBIT A.

SUMMONS.

THE STATE OF NEW JERSEY,

To Bernard Pellicoff, builder and owner:

(Seal) You, Bernard Pellicoff, builder and owner, are summoned to answer the annexed complaint of Harry Kolmetsky in an action at law, in the Circuit Court of Atlantic County, in which said Harry Kolmetsky claims a building lien on certain buildings and lands of said Bernard Pellicoff, described in said complaint. And take notice that unless you file your answer to said complaint with the clerk of said court at Mays Landing, New Jersey, within twenty days after service upon you of this writ and the annexed complaint, the plaintiff may proceed in the suit and judgment may be entered against you.

Witness, THEO. W. SCHIMPF, ESQUIRE, Judge of said court at Mays Landing, this 4th day of March, A. D. 1926.

WM. A. BLAIR, *Clerk.*
By ALFRED T. GLENN, JR.,
Deputy Clerk.

THOMPSON & HANSTEIN,
Attorneys.

Filed March 9, 1926, at 9 A. M.
WM. A. BLAIR, *Clerk.*

File No. 18008.

[Endorsed]

COPY OF SUMMONS
Harry Kolmetsky,
Plaintiff,
vs.
Bernard Pellicoff, builder and owner,
Defendant.

EXHIBIT A.

COMPLAINT.

March 9, 1926.

ATLANTIC COUNTY CIRCUIT COURT.

Harry Kolmetsky,
Plaintiff,
v.
Bernard Pellicoff, owner and builder,
Defendant.
} On Mechanics' Lien. Complaint.

Plaintiff, Harry Kolmetsky, of the City and County of Atlantic, State of New Jersey, says that:

1. At the time hereafter stated the defendant, Bernard Pellicoff, was the owner of a certain lot or

curtilage of land situate in the City and County of Atlantic, State of New Jersey, bounded and described as follows:

BEGINNING in the east line of Maryland Avenue at a distance of 875 feet south of the southerly line of Pacific Avenue; thence (1) eastwardly, parallel with Pacific Avenue 130 feet to the west line of United States Avenue; thence (2) southwardly, along said line of United States Avenue 40 feet; thence (3) westwardly parallel with Pacific Avenue 130 feet to the east line of Maryland Avenue; thence (4) northwardly, along said line of Maryland Avenue 40 feet to the place of beginning.

2. That on November 4th, 1924, the said Bernard Pellicoff made a contract in writing with this plaintiff for alterations and additions of and to a certain apartment house on the land above described, and also requested this plaintiff to do certain extra work and supply certain extra material in making said alterations and additions of and to said apartment house.

3. Said contract was not filed in the office of the clerk of Atlantic County, in accordance with the statute hereinafter mentioned.

4. Between the 5th day of November, 1924, and the 5th day of November, 1925, plaintiff performed all the labor and supplied all the material for the doing of the work referred to in the contract aforesaid.

5. Between said dates the said defendant requested plaintiff to make certain other and further

alterations and additions to said premises, a list of which are attached hereto and made a part hereof and marked Schedule A *a* through his architect and agent agreed in writing that the prices for the doing of the said work would be adjusted after the building was completed, a copy of which notice is attached hereto and made a part hereof and marked Schedule B. That plaintiff completed said extra alterations and additions and completed said building but the defendant failed to adjust the prices therefor and failed and refused to refer to arbitration the value of said extra work and material, in accordance with the terms of the said contract above referred to; that Schedule A sets forth the reasonable value of said extra work and material.

6. That attached hereto and made a part hereof and marked Schedule C is a statement of the amount due from defendant to plaintiff, together with the credits to which defendant is entitled, and showing the balance justly due to said plaintiff.

7. All the material was sold and delivered and all the labor performed were used in the alterations and additions of and to said apartment house.

8. The said Bernard Pellicoff has paid $13,469.00 on account of said claim, leaving a balance of $13,557.32 justly due and owing to said plaintiff.

9. The said indebtedness is a lien upon the said lands and building by virtue of the statute entitled "An act to secure to mechanids and others payment for their labor and material in erecting any building" (Revision of 1898) and the supplements thereof and amendments thereto.

Plaintiff demands as damages the sum of $13,557.32 together with interest from November 5th, 1925, and costs of suit.

THOMPSON & HANSTEIN,
Attorneys of Plaintiff.

SCHEDULE A.

EXTRAS.

Fireproofing steps to basement under main stairs.
Installing a complete water closet on first floor, a wash basin with hot & cold water, a new stack 3 stories high, tile floor, a window, a door, and a medicine chest.
Built out a bedroom on the 1st floor complete with radiator heat and a 4-ply roof over it;
Removed partition in dining room of 1st floor and put in an iron girder to support the upper floors, then built a new plastered partition 2 feet away; also a new casement window complete.
Removed old chimney & built a new one the height of the building;
Clothes chest with cedar lining in breakfast room;
1st floor: Straightened a bay window to a square corner;
1st floor: Casement window in bedroom towards Maryland Avenue;
Tore out and put in a wooden rough floor and finished with a tile floor in rear of vestibule;
Built top and bottom railing and balusters for the rear porches & side platforms, also painting;
Built out porch on front of 3rd floor covered with canvas and finished with railing;

Built stairs from 2nd to 3rd floor with an enclosed room;
Built a bay-window in front with 2 French doors and window
Built 2 rooms at side front complete with radiator heat and basin with hot & cold water with a 4-ply tar roof on it;
Built toilet on 3rd floor complete;
1st floor—2 partitions, a door & 2 windows;
New floors on the 3rd floor of the bldg.
2nd floor—4 partitions and 1 closet complete.
2nd floor rear—1 window;
2nd floor; a ventilated skylight in bath room;
Vestibule on 2nd flor;
1st floor: Built out a cold storage closet through the wall with a roof on it, and suttoed over and a closet for brooms & carpet sweeper:
Made imitation stone blocks in the 2 front corners of the house out of stucco, the height of building;
Wash-boards out of stucco on all the porches;
Changed doors from 5 panels to 2 panels on 1st and 2nd floors;
Moving of boiler & enlarging the main;
Made 9 rooms out of 8 rooms with basins for hot and cold water in each room;
Gas outlets in each room on 3rd floor;
Glass knobs in place of plain knobs;
24 extra electric outlets;
Three hardwood floors on 1st floor;
1 brick pier to support side of building;
Scraping wall paper in all rooms thruout the house;
Plastered up all cracks and holes when papers was removed from ceiling and walls;
1st floor: put metal lath on 2 ceilings & plastered over them;
Tile blocks inserted in stucco in front of house;
Plastered boiler room and put in a new window;

Changing from white pebbles to colored pebbles in outside stucco;
Difference of price of three gas ranges;
" " " " " electric fixtures;
4 double electric bracket fixtures;
4 corner ceiling fixtures:
5 ceiling fixtures;
Relocation of windows, doors and partitions, and closing up old openings of same.

Total cost	$11,474.56
10% for supervision of extra work	1,138.76
	$12,613.32

CREDITS.

2 30 gallon boilers & 2 gas heaters	$40.00	
12 French bevelled plate glass for living room windows	12.00	
Allowance for 2 feet of flooring for the back porches, 500 square feet of lumber	35.00	87.00
Balance due		$12,526.32

SCHEDULE B.

624 Guarantee Trust Co.
Atlantic City, N. J.
February 27, 1925.

Mr. Harry Kolmetsky:
This is to authorize you to proceed with the extra work at job 172 States Avenue, Atlantic City, N. J. Prices to be adjusted after building is completed.

This notice is given in compliance with the contract made between you and Mr. B. Pellicoff, owner.

Respectfully yours,
Benjamin Brown,
Architect.

SCHEDULE C.

To performing labor and furnishing material as per agreed price in contract dated November 5th, 1924 between Bernard Pellicoff and Harry Kolmetsky.	$14,500.00
To balance due on extras	12,526.32
Total	$27,026.32

CREDIT

Amount paid by cash	13,469.00
Balance due Claimant	$13,557.32

Received Mar. 4, 1926. Sheriff.

I hereby deputize and appoint Charles Walters to serve the within writ. Witness my hand and seal this 4 day of March, 1926.

HOWARD R. CLOUD, (L.S.)
Sheriff of Atlantic Co.

Duly served within summons and complaint March 5th, 1926, on Bernard Pellicoff by leaving a

copy at his residence, 172 States Avenue, Atlantic City, Atlantic County, New Jersey, with a member of his family above the age of fourteen years, to wit, his wife.

HOWARD R. CLOUD,
Sheriff.
By CHARLES WALTERS,
Special Deputy Sheriff.

Sheriff's fees $5.22.
Filed March 9, 1926, at 9 A. M.
WILLIAM A. BLAIR,
Clerk.

EXHIBIT B.

ANSWER AND COUNTER-CLAIM.

(Filed March 31, 1926.)

ATLANTIC COUNTY CIRCUIT COURT.

HARRY KOLMETSKY, *Plaintiff,* v. BERNARD PELLICOFF, owner and builder, *Defendant.*	Action at Law. On Mechanic's Lien Claim. Answer and Counter-Claim.

Defendant, Bernard Pellicoff, of Atlantic City, Atlantic County, New Jersey, says that:

1. He admits paragraph one.

2. He admits paragraph two.

3. He admits paragraph three.

4. He admits paragraph four.

5. He admits requesting plaintiff to make certain alterations and additions not comprehended by said contract, as evidenced by the notice attached to the complaint and marked Schedule B, but denies Schedule A, attached to the complaint, sets forth a list of said extra alterations and additions, and also denies, that the price of extra alterations, and additions was not adjusted; the price and value of said extra alterations and additions having been fully paid by defendant to plaintiff. He further denies that Schedule A sets forth the reasonable value of said extra work and material.

6. He denies paragraph six.

7. He denies paragraph seven.

8. He denies that he paid but $13,469.00; the amount paid to plaintiff is $15,333.50; he further denies there is any balance due and owing to plaintiff by defendant.

9. He denies paragraph nine.

FIRST DEFENSE.

1. Said building and land are not nor is either of them, liable to said alleged debt.

SECOND DEFENSE.

1. The contract referred to in the complaint included certain work and labor and the furnishing of certain materials in and about the building erected on the lands described in the complaint and which were included in the price $14,500 for which plaintiff agreed with defendant to fully perform all that was required under the terms and provisions of said contract.

2. After the making and execution of said contract it was mutually agreed by and between plaintiff and defendant that the work and labor to be performed and the materials to be furnished in and about the alterations and additions to said basement should be omitted and a credit was then and there agreed to in the sum of $2000 by reason of said omissions and the contract price was thereupon reduced to $12,500.

3. Defendant has paid to plaintiff the whole of said $12,500.

THIRD DEFENSE.

1. Plaintiff at the request of this defendant, did certain extra work on the building mentioned and described in the complaint, the fair price and value of which is $2840 upon which defendant is entitled to a credit of $250 for the following items stipulated to be furnished by plaintiff and defendant: 2—30 gallon boilers and 2 gas heaters $100; 12 French beveled plate glass for living room windows, $50;

allowance for labor and material by reason of lessening width of back porches, 2 feet, $100; making the price and value of said extra work, $2590.

2. Defendant has paid to plaintiff the whole of said $2590. By way of counter-claiming against the plaintiff the defendant says that:

1. He repeats all the statements in the foregoing answer.

2. The contract price agreed upon between plaintiff and defendant is the sum of $12,500.

3. The fair price and value of said extra work, after the allowance to defendant the sum of $250 the value of said labor and materials omitted by consent of plaintiff and defendant is $2590.

4. The total amount of said contract price and the value of said extra work is $15,090.

5. The amount paid plaintiff by defendant is $15,333.50.

6. Defendant has overpaid plaintiff $243.50.

The defendant counter-claims $243.50 damages.

C. C. Shinn,
Attorney for Defendant.

Filed Mar. 31, 1926, at 9 A. M.
Wm. A. Blair,
Clerk.

EXHIBIT C.

RULE FOR JUDGMENT.

(Filed Nov. 8, 1926.)

ATLANTIC COUNTY CIRCUIT COURT.

HARRY KOLMETSKY,
Plaintiff,
v.
BERNARD PELLICOFF,
Defendant.

On Mechanic's Lien
Rule for Judgment.

This action was tried before Judge William H. Smathers, with a jury at the Atlantic County Circuit Court on November 2nd, 3rd and 4th, 1926.

The Court, upon motion of defendant, directed the jury to bring in a verdict of no cause of action against the defendant as owner and directed the jury to bring in a verdict of no cause of action by the defendant against the plaintiff upon the defendant's counter-claim and submitted to the jury for its determination, the question of the liability of the defendant, as builder, and the jury returned their verdict as follows: Judgment for the plaintiff and against the defendant, generally in the sum of $9000.00.

Whereupon it is adjudged that the plaintiff re-

cover of the defendant the sum of $9000.00 and his costs, which are taxed at sum of $51.50.

WM. H. SMATHERS,
Judge.

Filed and entered Nov. 8, 1926, at 9 A. M.
WM. A. BLAIR,
Clerk.

EXHIBIT D.

RULE FOR JUDGMENT BY DEFAULT.

ATLANTIC COUNTY CIRCUIT COURT.

MARY RANK and HARRY RANK, *Plaintiffs,* vs. HARRY KOLMETZKY, *Defendant.*	Action at Law. Rule for Judgment by Default.

The summons and complaint in this cause having been duly served upon the defendant, Harry Kolmetzky, on August 23, 1926, and said defendant having failed to file an answer or take any step in response to the complaint, within the time limited by the rules of court;

It is ordered that judgment interlocutory be entered against the defendant, Harry Kolmetzky, and

in favor of the plaintiffs, Mary Rank and Harry Rank.

And the damages of the plaintiff having been assessed by the clerk of this court against the defendant Harry Kolmetzky at the sum of $3042.39;

It is ordered that judgment final be entered against said defendant Harry Kolmetzky for the sum of $3042.39 with costs of suit to be taxed.

.....

On motion of

WM. ELMER, BROWN, JR.,
Attorney for Plaintiff.

Rule entered this 23rd day of September, 1926.

EXHIBIT E.

LEVY.

ATLANTIC CIRCUIT COURT.

Mary Rank & Harry Rank vs Harry Kolmetzky

By virtue of the within writ of execution, I have levied on the goods and chattels, lands and tenements, rights and credits of the defendant, as in the annexed inventory mentioned and described, subject to prior incumbrances, value one dollar.

Howard R. Cloud, Sheriff, by

.....

Special Deputy Sheriff.

Dated Mays Landing, N. J.
October 11th 1926.

The following is the inventory referred to in my indorsement and return of the annexed writ, being the goods and chattels, lands and tenements, rights

and credits of the defendant levied upon by me, Howard R. Cloud, Sheriff of Atlantic County, by Fredk. M. G. Weakley, Special Deputy Sheriff, on this Eleventh day of October, 1926, at the hour of 3:30 o'clock P. M., by virtue of a writ of execution hereto annexed, with the aid of E. Russell Truax, a discreet and impartial freeholder of said County of Atlantic, to wit:

"All money due or to become due the defendant, Harry Kolmetzky, in the hands of, or to be in the hands of Bernard Pellicoff, arising out of a Mechanic's Lien suit now pending."

Pd. Appr. fee $1.00

EXHIBIT F.

ASSIGNMENT OF JUDGMENT—Harry Kolmetzky to West Side Lumber Company of N. J.

THIS INDENTURE made the eighth day of November in the year of our Lord one thousand nine hundred and twenty six.

BETWEEN Harry Kolmetzky, party of the first part, and West Side Lumber Company, a corporation of New Jersey, party of the second part.

WHEREAS, the said party of the first part, on the eighth day of November in the year of our Lord one thousand nine hundred and twenty six recovered a judgment in the Atlantic County Circuit Court against Bernard Pellicoff for the sum of Nine thousand dollars and cents and dollars and cents cost of suit, as by the record thereof will appear.

NOW THIS INDENTURE WITNESSETH that the said party of the first part in consideration of One dollar and other good and valuable consideration to him duly paid has sold and by these presents

does assign, transfer and set over unto the said party of the second part and its assigns the said judgment and all sum or sums of money that may be had or obtained by means thereof, or on any proceedings to be had thereupon.

And, the said party of the first part does hereby constitute and appoint the said party of the second part and its assigns, *he* true and lawful attorneys, irrevocable, with power of substitution and revocation for the use and at the proper costs and charges of the said party of the second part to ask, demand and receive and to sue out executions and take all lawful ways for the recovery of the money due or to become due on the said judgment and on payment to acknowledge satisfaction or discharge the same. And attorneys, one or more, under him for the purpose aforesaid, to make and substitute and at pleasure to revoke, hereby ratifying and confirming all that his said attorney or substitute shall lawfully do in the premises.

And the said party of the first part does covenant that there is now due on the said judgment the sum of Nine thousand dollars and costs and that he will not collect or receive the same, or any part thereof, nor release or discharge the said judgment but will own and allow all lawful proceedings therein the said part of the second part saving the said party of the first part harmless of and from any costs in the premises.

IN WITNESS WHEREOF the said party of the first part has hereunto set his hand and seal the day and year first above written.

Harry Kolmetzky (seal)

Signed, sealed and delivered
in the presence of
Alice M. Lange

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

BE IT REMEMBERED that on this eighth day of November in the year of our Lord one thousand nine hundred and twenty six, before me the subscriber a Notary Public of New Jersey personally appeared Harry Kolmetzky who I am satisfied is the assignor in the within deed or assignment named and I having first made known to him the contents thereof he did acknowledge that he signed, sealed and delivered the same as his voluntary act and deed for the uses and purposes therein expressed.

ALICE M. LANGE,
Notary Public of N. J.

My commission expires 2/3/1927.

Received and recorded Nov. 8, 1926 at 10 A. M.
WILLIAM A. BLAIR, *Clerk.*
Assignment of Judgment Book No. 2, page 133.

[ENDORSED]

CERTIFIED COPY
of
ASSIGNMENT OF JUDGMENT
Harry Kolmetzky
to
West Side Lumber Co.

EXHIBIT G.

ORDER OF AFFIRMANCE.

(Filed October 15, 1928.)

NEW JERSEY COURT OF ERRORS AND APPEALS.

HARRY KOLMETSKY,
Plaintiff-Respondent,
v.
BERNARD PELLICOFF,
Defendant-Appellant.

On Appeal.
Order of Affirmance.

This matter having been presented to the Court by Thompson & Hanstein, solicitors of plaintiff-respondent, and Cole & Cole, solicitors of defendant-appellant, and the Court being of the opinion that the judgment rendered in the lower court should be affirmed;

IT IS, on this 15th day of October, 1928, ORDERED that the judgment rendered in the above entitled cause be and the same is hereby affirmed, with the costs of the plaintiff-respondent to be taxed.

A true copy.

JOSEPH B. FITZPATRICK,
Clerk.

[ENDORSED]

NEW JERSEY COURT OF ERRORS AND APPEALS.

Harry Kolmetsky,
Plaintiff-Respondent,
v.
Bernard Pellicoff,
Defendant-Appellant.

ON APPEAL.
ORDER OF AFFIRMANCE.

Endorsed: "Filed Oct. 25, 1928,
Joseph F. S. Fitzpatrick,
Clerk."

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New Jersey Court of Errors and Appeals

MARY RANK and HARRY RANK,
Plaintiffs-Respondents,
v.
HARRY KOLMETSKY,
Defendant,
and
WEST SIDE LUMBER COMPANY, THOMPSON & HANSTEIN, attorneys for HARRY KOLMETSKY and WEST SIDE LUMBER COMPANY, and BERNARD PELLICOFF,
Appellants.

ON APPEAL.

BRIEF OF APPELLANTS, WEST SIDE LUMBER COMPANY, THOMPSON & HANSTEIN, attorneys for HARRY KOLMETSKY and WEST SIDE LUMBER COMPANY, and BERNARD PELLICOFF.

This is the appeal of Bernard Pellicoff and the West Side Lumber Company, and Thompson & Hanstein, attorneys for Harry Kolmetsky and the West Side Lumber Company, from an order of Honor-

able W. Frank Sooy, Circuit Court Judge, made upon the return of a rule to show cause allowed, to determine the disposition of the moneys due under a judgment obtained in the suit of Harry Kolmetsky against Bernard Pellicoff, the opinion in which was reported by this Court in 143 Atlantic Reporter, 336.

The dates in this case, which are important, are as follows:

March 4, 1926. Suit instituted by Harry Kolmetsky v. Bernard Pellicoff on mechanic's lien claim;

March 26, 1926. Answer and counter-claim filed by Bernard Pellicoff, denying any liability and counter-claiming for damages against Harry Kolmetsky;

September 23, 1926. Judgment entered by Harry Rank and Mary Rank against Harry Kolmetsky;

October 11, 1926. Levy made under the judgment of Rank v. Kolmetsky, upon the moneys in Pellicoff's hands (hereinafter more particularly referred to);

November 8, 1926. Trial of case of Kolmetsky v. Pellicoff, resulting in a judgment for plaintiff, Kolmetsky, on that date;

November 8, 1926. Kolmetsky assigned his judgment against Pellicoff to the West Side Lumber Company, which assignment was recorded on that date;

October 15, 1928. Order of affirmance in the suit of Kolmetsky v. Pellicoff filed in the Court of Errors and Appeals;

December 5, 1928. Rule to show cause in this matter allowed.

As can be seen by the above chronology, one Harry Kolmetsky instituted a suit against Bernard Pellicoff upon a mechanic's lien claim. Pellicoff

filed an answer denying any liability, and filed a counter-claim against Kolmetsky. The pleadings in the case are set out in the State of the Case in this matter. It is important to note that the complaint in the case of Kolmetsky v. Pellicoff is for the reasonable value of extra work done under a building contract. The answer denies that the work claimed for was extra work; denies the plaintiff's allegations as to the reasonable value thereof, and counter-claims against the plaintiff. It is, therefore, obvious that Kolmetsky's suit against Pellicoff was for an unliquidated demand.

On September 23rd, 1926, six months after the joinder of issue in the case of *Kolmetsky v. Pellicoff,* the Ranks obtained a judgment against Kolmetsky, the plaintiff in the suit of *Kolmetsky v. Pellicoff,* and on October 11th, 1926, the sheriff made a levy as follows:

> "All moneys due, or to become due the defendant, Harry Kolmetsky, in the hands of, or to be in the hands of Bernard Pellicoff, arising out of a mechanic's lien suit now pending."

After that the Ranks sat by and did nothing. Kolmetsky, without any knowledge of the above levy, proceeded to move his case against Pellicoff on November 8th, 1926, and obtained a judgment against Pellicoff of $9000. This judgment was assigned on the same date to the West Side Lumber Company, and the assignment was recorded on that date, the West Side Lumber Company having no knowledge of the levy by the Ranks,

Thereafter a rule to show cause was obtained by the defense in *Kolmetsky v. Pellicoff,* and an appeal was taken to the Supreme Court, and then to the Court of Errors and Appeals, where, finally, on Oc-

tober 15th, 1928, the judgment in *Kolmetsky v. Pellicoff* was affirmed.

On December 5th, 1928, Judge Sooy, Circuit Court Judge, allowed a rule to show cause in the case of *Rank v. Kolmetsky,* ordering Bernard Pellicoff, West Side Lumber Company and Thompson & Hanstein, to show cause why they should not pay over the money arising in the suit of *Kolmetsky v. Pellicoff* to the sheriff, so that the same could be disposed of under the levy obtained by the Ranks against Pellicoff, above referred to.

In the meantime Pellicoff had paid the judgment held by the West Side Lumber Company, against him, by paying the amount due thereon to Thompson & Hanstein, the attorneys for the West Side Lumber Company, and Pellicoff received a warrant to satisfy that judgment. At the time of the service of the rule to show cause in this matter, Thompson & Hanstein, attorneys for the West Side Lumber Company, had in their hands said moneys, and have continued to hold, in their hands, sufficient money of the West Side Lumber Company to satisfy the Rank judgment, if that should be the final order of the Court.

Upon the return of the rule to show cause, Thompson & Hanstein appeared for the West Side Lumber Company. Kolmetsky, not having any interest in the matter, did not enter an appearance. Bernard Pellicoff was represented by Messrs. Cole & Cole. As a result of that hearing an order was entered by Judge Sooy, which appears in the State of the Case, the ordering part of which provides as follows:

> "It is, thereupon, on this twenty-sixth day of April, A. D. 1929, ordered that said Bernard Pellicoff and/or said West Side Lumber Company, and/or said Joseph Thompson and

> Walter Hanstein, counsellors at law, practicing under the firm name of Thompson and Hanstein, attorneys for said Kolmetsky in said mechanic's lien suit and also attorneys for said West Side Lumber Co., pay unto the Sheriff of Atlantic County the full amount due under the said levy made by virtue of the execution issued as aforesaid on the said judgment of the plaintiffs herein against the said Harry Kolmetsky."

This appeal, of course, questions the propriety of the order, we contending that it is erroneous for the following reasons.

THE LEVY WAS VOID AS AN ATTEMPT TO LEVY UPON A JUDGMENT.

Until the Execution Act of 1915 (P. L. 1915, p. 182), rights and credits could not be levied upon. By virtue of that act the right was given to levy upon rights and credits, and rights and credits are defined in that act as being "such rights and credits as could be seized under an attachment." In the Rank case the levy was made upon:

> "All money due or to become due the defendant, Harry Kolmetsky, in the hands of, or to be in the hands of Bernard Pellicoff, arising out of a mechanic's lien suit now pending."

The only possible construction of this levy is that it is a levy upon money due, or to grow due, arising out of a mechanic's lien suit now pending. The issue in the case of *Kolmetsky v. Pellicoff* having raised the question as to whether there was any debt whatever owing from Pellicoff to Kolmetsky, and if a debt, the amount thereof, it cannot be said by any

one that there was a debt due at the time of the Rank levy, and the levy clearly contemplates that it is to attach to what would arise out of the suit, to wit: the judgment. The levy being upon a judgment is void, under the case of *Edwards v. Stein,* 94 New Jersey Equity 251.

THERE CAN BE NO LEVY UPON A CLAIM FOR UNLIQUIDATED DAMAGES.

If it should not be held that the levy in question was, in effect, a levy upon a judgment, it must be said that the levy rises no higher than a levy upon Kolmetsky's unliquidated claim against Pellicoff. That a levy upon such an item is not permitted has been frequently held by our Courts.

In *Lomerson v. Huffman,* 25 New Jersey Law, 625, it was held by our Court of Errors and Appeals (at page 632), as follows:

> "The liability of the constable to Wilkes for neglect of duty, either in the shape of damages at common law, or under the statute, did not create an indebtedness, or a right or credit which was liable to be seized or taken under the attachment. Sergeant on Attachment 85.
>
> "In Crane v. Freese, 1 Harr. 309, it is held, that money actually received by the sheriff for the defendant in attachment may be attached as a right and credit of the defendant. But it has never been held that a claim against an officer for neglect to execute a writ or collect money due on execution, or to collect the proceeds of a sale under an execution, constitutes a right or credit which may be seized under an attachment, much less an indebtedness which will sustain an action for money had and received.

"The plaintiff's second contention is that the ruling made below was right, and that a claim for unliquidated damages arising out of the breach of a contract is the subject of trustee process. There is no case in this Commonwealth on the point. *But it has been decided in other jurisdictions that such a claim cannot be reached in foreign attachment.* Hugg v. Booth, 24 N. C. (2 Ired. L.) 282; Eastman v. Thayer, 60 N. H. 575; Bucklin v. Powell, 60 N. H. 119, and cases there cited; Capes v. Burgess, 135 Ill. 61, 25 N. E. 1000; Selheimer v. Elder, 98 Pa. 154, 158, and cases cited. And the textbooks lay down the same rule. 2 Shinn, Attachment & Garnishment, 483; Drake, Attachmn., 548; 2 Wade, Attachm., 447." *Wilde v. Mahaney,* 183 Mass. 455.

"While there is some authority to the contrary, *it is generally held that in the absence of specific statutory sanction a claim for unliquidated damages for breach of contract is not subject to garnishment.* But garnishment will reach such damages, resulting from breach of contract, as may be reduced to a certainty by definite standards referable to the contract itself." 28 *Corpus Juris* 136.

In the case of *Kolmetsky v. Pellicoff* it is obvious that it required the determination of a jury to fix the amount due.

THERE CAN BE NO LEVY UPON A RIGHT OR CREDIT WHICH IS MADE THE SUBJECT OF AN ISSUE AT LAW.

On this point we rely upon the case of *Elizabethtown Savings Institution v. Gerber,* 35 New Jersey

Equity, 158. While an action was pending in Chancery between one Ahern and the Esterbrook Company, in which the amount of an indebtedness due from the company to Ahern was being ascertained, the Elizabethtown Savings Institution, having obtained a judgment in New York against Ahern, procured an order in New York ordering the Esterbrook Company, or its agent, to appear and be examined concerning the said indebtedness. As the result of the examination of an agent of the company an order was made that the secretary of the Esterbrook Company should pay to the Elizabethtown Savings Institution any amount which might be due to Ahern from the Esterbrook Company up to the amount of the judgment of the Elizabethtown Institution. The amount due from the Esterbrook Company to Ahern being thereafter determined in Chancery, it was paid into Court. The Elizabethtown Institution then filed a bill to reach the fund. Held, that the Elizabethtown Institution was not entitled to the fund.

The opinion (by Beasley, C. J.) rested on a failure of the New York Court to acquire jurisdiction over the Esterbrook Company by the service which was made. As to the power of the New York Court to make the order which it did make, assuming that service on the Esterbrook Company had been sufficient, the Chief Justice, after observing that the New York Statute "was not, in its general nature, unlike our attachment act" (page 158), said:

> "And it should be also observed that, in addition to this infirmity in the appellant's case, inherent in the mode in which he has presented it, there is another difficulty which, in the nature of the transaction, was, it may be, invincible. As the case was circumstanced, it may well be

doubted whether this debt due from the pen manufacturing company was attachable by virtue of the New York process. The quality of the affair that gives rise to this question consists in the circumstances that, at the time of such attempted seizure, *the claim was in the course of judicial decision in this State.* The bill in chancery between the pen manufacturing company and Ahern was filed in 1876, and the order to appropriate these moneys embraced in that suit was made by the New York Court in 1878, so that the time for pleading in the former proceeding had expired before the foreign order came into effect. It therefore followed that, in the orderly sequence of events, the domestic and the foreign judgment would of necessity conflict and stand in direct opposition to each other; for, by the decree in chancery in this State, the pen manufacturing company would be ordered to pay these moneys to Ahern, while, by the judicial mandate of the New York judge, it would be forbidden from paying them to that person. Inasmuch as, therefore, the judicial cognizance upon the subject of litigation had attached in the Court of this State before any attempt was made to put it *sub judice* in the foreign jurisdiction, the inquiry is whether such attempt was, upon legal principles, legitimate. A negative response to this question is to be found in the case of Shinn v. Zimmerman, 3 Zab. 150. That was a case in which an attachment in this State had been levied on moneys due from a defendant in a judgment obtained in Pennsylvania, the plaintiff in such judgment being the defendant in attachment. The decision of the Court was, that, under the conditions of fact stated, such a debt

was not attachable. In explaining the reasons for this result, Chief Justice Green uses this language: 'Upon a question of conflict of jurisdiction it is clear that the Court which first acquires jurisdiction of the subject-matter of controversy is entitled to exercise it, and to enforce the execution of its own judgment. If the Court in Pennsylvania permit the attachment to supersede the execution, it would, in effect, permit the process of the Courts of this State to interfere with the execution of its own judgment. It is obvious, moreover, that if executions may thus be arrested, it would, in respect to judgments in this State, as well as elsewhere, present a ready mode of embarrassing the administration of justice and delaying the process of the Courts.'

It will be observed that if the proceedings in the Court which has acquired the right of primary jurisdiction have proceeded so far that the defendant in such action is so placed that he has no opportunity to plead the circumstance of the foreign attachment, the principle adopted in the case just cited becomes applicable for the judgments which must result in the former and the latter case necessarily will assume the form of contractories. In Thorndike v. DeWolfe, 6 Pick. 120, the Court said that: *'the trustee process shall be served before the party summoned shall be concluded by the state of the pleadings against showing in defence that the debt or property is attached in his hands.'" Elizabethtown Savings Institution v. Gerber,* 35 N. J. Equity at p. 158. See also *Shinn v. Zimmerman,* 23 N. J. Law 152, referred to in the Elizabethtown case.

At the time the Rank levy was made, issue was joined in the case of *Kolmetsky v. Pellicoff*, answer having been filed in March of 1926. There was really no debt owing at that time. The suit of *Kolmetsky v. Pellicoff* was on a *quantum meruit*. The plaintiff was suing for the reasonable value of the work which he did, and the defendant denied in his pleadings that any work had been done, and that anything was owing. It was too late, under the cases above cited, for any attachment of Kolmetsky's claim against Pellicoff. To permit an attachment of this claim would create the contradiction referred to in the case above cited, and would amount to an interference with the processes of the Courts; something which, of course, the Courts will not tolerate.

The Court below attempted to dispose of the Elizabethtown case by saying that it was determined on the question of conflict of jurisdiction. However, this does not appear to be the fact, upon a careful examination of that authority. That question was undoubtedly considered by the Court, but the case, it seems to us, clearly turns upon the question of the effect of the rights, or credit, attached being involved in a litigated matter, in which the time for pleading had expired.

The underlying theory of the case is, of course, that the control of the Courts over their own processes would be interfered with, if such attachments were permitted. In *Edwards v. Stein, supra,* where Chancellor Walker held that judgment, or decree, could not be made the subject of attachment, he also based his reason upon the ground that the control of the Courts over their own processes would be interfered with, and the administration of justice embarrassed, and he states that, as the reason for the rule, without any qualification, which would permit

an attachment of a judgment to be issued out of the same Court in which the judgment was entered, so that it seems to us that the rule in New Jersey must be considered to be established to the effect that there can be no attachment of a cause of action pending in our Courts.

This is the rule in England:

> "Debt on a bill obligatory of £31 13s. 4d. The defendant pleaded a foreign attachment in bar, made in London, by one Moulton, to whom Humphrey was indebted of £31, in his hands, after the original writ purchased, and before the return of the exigent, or appearance thereupon, and before he had any notice of the suit in the Common Pleas.—It was thereupon demurred, and adjudged to be no plea.—First, because it appeareth not, that the £31 attached was parcel of the said £31 13s. 4d. now in demand.—Secondly, because this attachment was made whilst the suit was depending in the Common Pleas; and the Queen's Court being possessed of a cause, it is insufficient, and cannot be; for, as Walmsley said, the suit depending in the Queen's Court, the said Court is interested therein; and it is against the dignity thereof to have an inferior Court meddle with it; *also whilst the suit is depending, it is quasi in custodia legis, and cannot be meddled with by another.* As the law is, where one is to be attached by his goods at the common law, if the goods be distrained and impounded, they cannot be attached.—Wherefore it was adjudged for the plaintiff." *Humphrey v. Barns*, Easter Term, 41 Eliz. Roll. 752. 78 English Reprint 927.

The logic of the rule that there can be no levy

upon an unliquidated claim, and particularly upon an unliquidated claim which is the subject of an issue at law, and particularly where a counter-claim is filed against that claim, must be clear. If that claim would be sold, as the Act provides, or, if a suit is instituted by the sheriff for the liquidation of that claim, the prosecution of that claim would be out of the plaintiff's hands. He could not control the time of the prosecution of that suit, and yet, at the time of the prosecution of that suit, the defendant would have a right to move and prove his counter-claim, which might become a judgment against the plaintiff, without the plaintiff being properly represented, or having a proper opportunity to present the defenses to that counter-claim.

Furthermore, if, as in a case such as this, the garnishment is upon only a part of the plaintiff's claim, it might very well be that the defendant would be subjected to two suits for the same cause of action, the inequities and difficulties of all of which should be convincing that such a right does not exist, and hence, the conclusion is inevitable that the levy made in this case is void.

As to Pellicoff, when the sheriff made the pretended levy Pellicoff denied that there was anything due Kolmetsky, and counter-claimed against him. After the judgment was procured the sheriff had an execution directing him to sell the property of Pellicoff, who satisfied the Kolmetsky judgment, and Pellicoff had no course open except to pay the sheriff, which he did. Thereafter the contest became warm between Rank and the West Side Lumber Company, as assignee of the Kolmetsky judgment. In this situation it was erroneous to require Pellicoff to pay under the attempted levy made on behalf of Rank.

THE PLAINTIFFS, RANK, HAVE DEFAULTED IN THE REMEDY GRANTED TO THEM.

The Rank levy was made, as above noted, on October 11th, 1926. Rank obtained the rule to show cause, which was allowed in this matter on December 5th, 1928. It is obvious that Rank sat by for two years, and almost two months, before taking any steps in this matter, although from the character of the levy made, it is perfectly obvious that Rank knew that the suit of Kolmetsky v. Pellicoff was pending, and that Kolmetsky's counsel was proceeding with the prosecution of that case. The very date upon which Rank obtained his rule to show cause clearly establishes that he even knew when the judgment in Kolmetsky v. Pellicoff was affirmed.

Under the Execution Act, under which the levy was attempted to be made, it is provided in Section 3 that sales of the rights and credits may be made by order of the Court. Section 5 of the same act provides:

> "5. In lieu of the sale of such rights or credits, the officer charged with the duty of levying said execution may, in his own name, as such officer, liquidate said rights and credits by collection or, with the assent of the plaintiff (and subject to other provisions of this act), in any other manner; and to that end, he shall, on request of the plaintiff, sue, or take any proper proceedings, at law or in equity, in his own name as such officer to obtain such recovery or relief as the defendant would be entitled to, or as any receiver of such defendant would be entitled to."

Section 6 provides as follows:

> "6. After such rights or credits shall have been levied upon, and taken, and upon application of plaintiff or defendant, a judge of the court out of which the execution shall be issued, may, in his discretion, appoint a receiver of the same." Pamphlet Laws, 1915, page 183.

It is apparent that if the levy was valid, the plaintiffs, Rank, had three remedies. First, they could have sold the rights and credits; or they could have had the sheriff liquidate the rights and credits, by instituting a suit for the collection of the same; or, by having the sheriff join in the suit with Kolmetsky; or they could have obtained a receiver for the collection of them. Instead they did nothing, and let Kolmetsky, in total ignorance of the levy, prosecute his suit, and permitted the West Side Lumber Company to accept an assignment of the judgment for a valuable consideration, and without notice.

While, it is true that the act does not specify any time within which the levying creditor must do any of those things, it is clearly the law that they must be done with reasonable diligence, and even up to this time the Ranks have not taken any of those steps provided by the Statute.

It certainly must be the law that if Rank had a levy upon Kolmetsky's unliquidated claim which was valid, he was obliged to follow the statute under which he obtained that levy, with sufficient promptness to prevent the status of that levy from being destroyed by that which he knew must inevitably happen; to wit: the conversion of that unliquidated claim into a judgment.

See *Edwards v. Stein, supra,* particularly at pages 257-8.

Under Section 9 it is provided as follows:

> "9. After levy shall have been made under this act upon any debt due or accruing from a third person (herein called the garnishee) to the judgment debtor, the Court, or a Judge thereof, may make an order upon such garnishee and the judgment debtor to show cause why the said debt (to an amount not exceeding the sum necessary to satisfy said execution), should not be paid to the officer holding the execution, or to the receiver. Upon return of the order to show cause, or at any time to which the hearing may be continued, an order may be made requiring the garnishee to pay said debt, if he admits it, to the officer holding the execution, or to the receiver, either in one payment or in installments, as the Court or a Judge shall deem just, which order may at any subsequent time, on application, be modified, as may be just." P. L. 1915, p. 183.

A rule to show cause was allowed in this cause, after the judgment in Kolmetsky v. Pellicoff had been affirmed by this Court. Under Section 9 the Court has the right to make an order requiring the garnishee (Pellicoff) to pay the *debt,* if he *admits* it, to the sheriff. Upon the return of the rule to show cause, there was standing against Pellicoff, a judgment held by the West Side Lumber Company. That judgment cannot be interfered with, or disturbed. There was only one way for Pellicoff to be relieved of that judgment, and that was to pay it to the holder thereof. It could not be interfered with by any order made in this cause.

In *Trust Company of New Jersey v. McGinness,* Vol. 7 A. R. #1, p. 1 (January 5th, 1929), Chancellor Walker said:

> "The rights of a judgment creditor are settled by his judgment, after which he may not be obstructed in the collection of his debt by anything short of a properly exercised defense thereto."

It was certainly erroneous for the Judge of the Circuit Court, in this pending suit, to direct that money due under the judgment of Kolmetsky v. Pellicoff should be interfered with. The case of *Edwards v. Stein, supra,* clearly prevented that.

If it should be said that the Circuit Court could deal with the matter of the relationship between Kolmetsky against Pellicoff, as of the date of the levy, then again his order was erroneous, because the statute provides "that the Court may, upon the return of the order, require the garnishee to pay the *debt,* if he *admits* it, to the officer holding the execution." Clearly, as of the date of the levy, Pellicoff did not admit owing the debt. There can be no levy under this section, unless the garnishee "admits" a "debt." *The Barrett Company v. United Building and Construction Company* (*Borough of Lodi, garnishee*) (135 Atlantic Reporter, 477; 5 Misc. R. 87). This case was on rule to show cause why money in the hands of the garnishee should not be paid to the assignee of the judgment. The Borough of Lodi was the garnishee, and a retained percentage of a building contract in its hands was attached. A rule to show cause was allowed and the borough showed cause, claiming that defects in the work done under the contract had developed. Justice Parker held that a case for a summary order had not been made; the garnishee did not admit the debt, and he held that the case came within Section 5 of the supplement to the

Execution Act, and that the rights and credits must be liquidated by a suit either by the sheriff, or a receiver, and the rule to show cause was discharged.

There was no debt due, within the contemplation of the statute, at the time of the levy.

> "The only other argument advanced by the plaintiff is that the damages were liquidated by the verdict. But the verdict does not convert the claim for unliquidated damages into a debt. (Thayer v. Southwick, 8 Gray, 229); it does not become a debt until it passes into judgment. See also, in this connection, Rice v. Stone, 1 Allen, 566; Bennett v. Sweet, 171 Mass. 600, 51 N. E. 183; Linton v. Hurley, 104 Mass. 353." *Wilde v. Mahaney,* 183 Mass. 455.

RANK SHOULD HAVE ADOPTED THE REMEDY AFFORDED BY THE DISCOVERY ACT.

The inquiry may present itself as to what remedy Rank should have followed, if he was without remedy under the 1915 supplement to the Execution Act.

Under the original Execution Act, 2 Compiled Statutes, Sections 23-30, and under the Chancery Act, Sections 70-75, Rank could have had his execution returned unsatisfied and then presented a petition to the Court from which he obtained his judgment or to the Chancellor showing the return, and the existence of an asset of his judgment debtor, not leviable, and could have immediately procured an injunction against Kolmetsky and Pellicoff, restraining them from doing anything to disturb the asset, which he desired to reach. A receiver should

have been appointed, who would have, under the guidance of the Court, realized on the asset, to wit: Kolmetsky's claim against Pellicoff.

In *Whitney v. Robbins,* 17 N. J. Equity, 360, at page 363, Chancellor Zabriskie, as Master, said:

> "These acts were intended to enable judgment creditors to reach things in action, debts due to the defendant, and property held in trust for him, which could not be levied on and sold by execution at common law, or by the statutes then in force."

Of the law act, he said, the act:

> "gave in the courts of law, a like remedy as was designed to be given by these acts through the more efficacious and suitable machinery of this court."

THE ORDER IS VOID AS AGAINST THE ASSIGNEE OF THE JUDGMENT.

On the date that judgment was entered it was assigned to the West Side Lumber Company, for a valuable consideration, and without any notice of the levy in the Rank case. Assuming the levy would be good, as against Kolmetsky, it is inconceivable that it should be good as against a bona fide assignee of that judgment, for value without notice. Our Recording Acts have a definite purpose. The West Side Lumber Company had a perfect right to examine the record of that judgment, and finding it to be in Kolmetsky's name, and unsatisfied, of record, to purchase it and be free and clear of any claims on the part of Rank by reason of a levy made prior to the entry of the judgment. No

search of the record that the assignee could make would have disclosed the Rank claim against the moneys due under the judgment.

As is said in 34 *Corpus Juris,* at page 649:

> "In accordance with the rule supported by the weight of authority in respect to assignments of choses in action generally, it is held in many jurisdictions that the assignee of a judgment takes it free from latent equities of third persons, not parties to the judgment, of which he has no notice at the time of the assignment."

The proposition quoted is supported in this State by the case of *Starr v. Haskins,* 26 New Jersey Equity, 414.

THE ORDER IS ON ITS FACE VOID.

If the Rank levy in this case was good, then the Court should have determined who was obliged to pay it; whether Pellicoff was obliged to pay it, in addition to the judgment, or whether the West Side Lumber Company was obliged to pay it out of the moneys collected by it under the judgment of Kolmetsky v. Pellicoff. Instead, the order provides that Bernard Pellicoff, *and/or* West Side Lumber Company, *and/or* Joseph Thompson and Walter Hanstein, practicing under the firm name of Thompson & Hanstein, attorneys for Harry Kolmetsky in the mechanic's lien suit, and also attorneys for the West Side Lumber Company, should pay the money to the Sheriff of the County of Atlantic.

It is, of course, the duty of the Court to determine against whom its orders should run, and it is not

incumbent upon the litigants to determine who is to obey the order of the Court. This order, not being conclusive in that respect, is void.

It is respectfully submitted that the judgment of the Court below should be reversed.

THOMPSON & HANSTEIN,
Attys. for and of Counsel with Appellants, West Side Lumber Company and Thompson & Hanstein.

COLE & COLE,
Attys. for and of Counsel with Appellant, Bernard Pellicoff.

NEW JERSEY COURT OF ERRORS AND APPEALS.

MARY RANK and HARRY RANK,
Plaintiffs-Respondents,
v.
HARRY KOLMETZKY,
Defendant,
and
WEST SIDE LUMBER CO., THOMPSON AND HANSTEIN, ATTYS., etc.,
Appellants.

ACTION AT LAW.

ON APPEAL.

BRIEF OF PLAINTIFFS-RESPONDENTS.

This is an appeal from an order to compel the defendants named in the petition filed herein to pay the judgment of the plaintiffs in the above-entitled cases.

Judgment in the Rank case was entered in the Atlantic County Circuit Court in September, 1926.

At the time of the entry of the Rank judgment there was also pending in said court a mechanic's lien suit instituted by Harry Kolmetzky (the above-named defendant), as plaintiff, against one Bernard Pellicoff, as defendant. This suit was instituted to recover compensation for work performed and materials furnished the defendant in connection with a certain building operation on defendant's property. Said suit resulted in a judgment for the plaintiff for $9,000.00 entered November 8, 1926.

On September 23, 1926, execution was issued on the Rank judgment and was on that day delivered to the sheriff. On October 11, 1926, said sheriff made levy by virtue of this execution upon "all money due or to become due the defendant, Harry Kolmetzky, in the hands of, or to be in the hands of Bernard Pellicoff, arising out of a mechanic's lien suit now pending."

Thereafter, and on the very day that judgment in *Kolmetzky v. Pellicoff* was entered, to wit, November 8, 1926, said judgment was assigned by Kolmetzky to West Side Lumber Company. Likewise on that day said assignment was recorded.

Said judgment of *Kolmetzky v. Pellicoff* was reviewed on rule to show cause, which rule was dismissed after hearing. Thereafter said judgment was appealed to the Supreme Court and there affirmed. Next an appeal was taken to the Court of Errors and Appeals and was affirmed there on October 15, 1928. All of said appeals were made with Kolmetzky appearing as respondent. His assignee was not made a party thereto by substitution or otherwise.

After said affirmance of said judgment demand was made upon said Pellicoff to pay the Rank judgment by reason of said levy. In spite of said levy, however, said Pellicoff paid to Joseph Thompson

and Walter Hanstein, counsellors at law, practicing under the firm name of Thompson and Hanstein, attorneys for said Kolmetzky, the full amount of the said judgment of *Kolmetzky v. Pellicoff*, with the understanding, however, that said Pellicoff was to be protected against any order or judgment that the levy of Rank was superior to the Kolmetzky judgment.

On December 5, 1928, the rule to show cause, which is now before this Court, in the Rank case, was entered and promptly served. As a result of the restraint in said rule said Messrs. Thompson and Hanstein now have in their possession sufficient of said money paid in satisfaction of the *Kolmetzky v. Pellicoff* judgment with which to pay the levy of petitioners herein which said money is retained by them by virtue of the restraint contained in said rule.

The only appearance made in answer to said rule entered in the above-entitled case was by West Side Lumber Company, as assignee of the *Kolmetzky v. Pellicoff* judgment, by its attorneys, Messrs. Thompson and Hanstein.

I.

QUERE—IS "ALL MONEY DUE OR TO BECOME DUE THE DEFENDANT, HARRY KOLMETZKY, IN THE HANDS OF OR TO BE IN THE HANDS OF BERNARD PELLICOFF, ARISING OUT OF MECHANIC'S LIEN SUIT NOW PENDING" A RIGHT AND CREDIT SUBJECT TO LEVY?

Appellants in their brief have divided their argument of the law on this question under three headings, viz:

1. The levy was void as an attempt to levy upon a judgment.

2. There can be no levy upon a claim for unliquidated damages.

3. There can be no levy upon a right or credit which is made the subject of an issue at law.

Respondents will here attempt to answer all three of these points as one.

Appellants point out in their brief that by virtue of the Execution Act of 1915 (P. L. 1915, p. 182), the right was given to levy upon rights and credits, and rights and credits are *defined* in that Act as being such rights and credits as could be seized under an attachment.

Section 1 of that Act reads:

> "Rights and credits of the defendant in execution, or if defendant be sued in a representative capacity, within his custody or control as such representative, may be levied upon, taken and sold or collected by virtue of said execution."

Section 2 of that Act reads as follows:

> "The term 'rights and credits' includes all rights and credits which may be attached by writ of attachment against non-resident debtors, and also includes rights and credits of an equitable nature, except such trust funds as are now exempt by law." etc.

Said Act gives the right to levy upon unliquidated debts as a right and credit. This appears upon reading Section 5 of said Act and it will be noted that

there the officer making the levy is empowered to liquidate said rights and credits by collection or suit in lieu of sale. This was recognized by our Supreme Court in *Sebring v. Pratt,* 91 N. J. L. 393.

In that case Mr. Justice Swayze, speaking for the Supreme Court said:

> "Saiff and Kaplan recovered a judgment against Vidoni. The sheriff levied upon the sum of $500 said to be due from Pratt to Vidoni. She denied the debt and the sheriff brought this suit under Chapter 115 of the Laws of 1915. Obviously the only issue was whether Pratt owed Vidoni, and if so, how much. This necessarily depended on what the contract was between them, whether it had been performed, what balance, if any, was due."

This case is authority for the contention that levy may be made upon an unliquidated debt as a right and credit.

See also *The Barrett Co. v. United Bldg. Construction Co.,* 5 N. J. Adv. Rep. 87.

Further provision is made in Section 6 of the Execution Act of 1915 for the appointment of a receiver. Section 7 provides that said receiver "shall be vested with the title to said rights and credits which the defendant had at the time of the levy upon the same. *It shall be his duty to liquidate the same by sale, * * * collection or otherwise; * * ** He shall apply the sums collected by him in payment of the amount due upon the execution," etc.

Section 9 of said Act is further proof of the fact that a debt is subject to judgment levy. It reads as follows:

> "After levy shall have been made under this Act upon *any debt due or accruing* from a third person (herein called the garnishee) to the

judgment debtor, the Court, or a Judge thereof, may make an order upon such garnishee and the judgment debtor to show cause why *the said debt* (to an amount not exceeding the sum necessary to satisfy said execution) should not be paid to the officer holding the execution, or to the receiver. Upon return of the order to show cause, or at any time to which the hearing may be continued, an order may be made requiring the garnishee to pay *said debt,* if he admits it," etc.

It is important to note that in the Rank case levy was made upon all money due Harry Kolmetzky (defendant in Rank judgment) in the hands of Bernard Pellicoff as well as all money to become due the defendant, Harry Kolmetzky and to be in the hands of Bernard Pellicoff arising out of a mechanic's lien suit then pending.

In the brief filed on behalf of appellants it is urged that there was no levy upon a debt then owing, but merely a levy upon what would arise out of the pending suit, which necessarily means the judgment. Such a contention is unwarranted in law. A debt is none the less a debt nor none the less owing merely because said debt is the subject of litigation. This is particularly true when the litigation results in a judgment for the plaintiff. Such a judgment is an adjudication that the debt was in existence and owing from the time claimed by plaintiff. An examination of the file in the mechanic's lien suit (*Kolmetzky v. Pellicoff*) will disclose that the money adjudicated to be due from Pellicoff to Kolmetzky had been owing from a time prior to the date of levy made on the Rank judgment.

A very careful and extensive search and examination of the authorities of this and other States has

failed to reveal any case which holds that a debt, such as here in controversy, is not a "right and credit" subject to levy merely because said debt is made the subject of an issue at law. It is urged in opponent's brief that such is the ruling in *Elizabethtown Savings Ins. v. Gerber,* 35 N. J. Eq. 158. A careful reading of that case will disclose that the decision there was based solely on the question of prior jurisdiction. In that case there was the question of conflict of jurisdiction between the Court of this State and that of the State of New York. The relief granted was merely to prevent an interference with the jurisdiction of the Court first acquiring jurisdiction.

The brief filed by appellants further points to the case of *Edwards v. Stein,* 94 N. J. Eq. 251, as authority supporting the contention that the levy made in the Rank case was not good in law. In that case it appears that the Sergeant at Arms of the Atlantic City District Court made an execution levy on a decree of the Court of Chancery and sold said decree thereunder. The decision in that case turned solely upon the fact that the levy upon the decree of Chancery was an unlawful interference with the power of that Court to carry into effect one of its own decrees. Again there was the question of conflict of jurisdiction under consideration.

The facts in *Edwards v. Stein* are not analagous to the facts here submitted for adjudication. The judgment in the case of *Rank v. Kolmetzky* was entered in the Atlantic County Circuit Court as was the judgment in *Kolmetzky v. Pellicoff.* Execution on the Rank judgment issued out of that Court and the levy was made on a debt which was the subject of litigation in that court. Said Circuit Court was in complete control of the whole subject-matter. Therefore, the question of conflicting jurisdiction does not

exist here. Neither of the opinions in *Edwards v. Stein* or *Elizabethtown Savings Ins. v. Gerber* warrant the conclusion that any one of our courts is without jurisdiction to issue its execution and make levy thereunder upon any judgment or money within its own control. Such a power would seem to be inherent for it would be a means of enforcing payment and satisfaction of its judgments.

There was no effort in the case at bar to interfere with the jurisdiction of the Court. Plaintiff, Rank, chose to await the outcome of the Pellicoff case rather than to have the sheriff litigate the debt under Section 5 of the Execution Act. He was not required to proceed under that section. Under the terms of that Act the methods of relief provided for the judgment creditor are not required to be prosecuted within any limited time. It was entirely within the discretion of Rank to permit his levy to rest and then proceed under Section 9 of the Act as was done.

The learned Judge of the Atlantic County Circuit Court, who heard this matter below, in his opinion (State of Case, p. 11) said:

> "Was the Rank levy merely on a judgment at law? The language thereof does not so indicate, viz: 'All money due or to become due the defendant, Harry Kolmetzky, in the hands of, or to be in the hands of Bernard Pellicoff, arising out of a mechanic's lien suit now pending.'
>
> There were no moneys then in the hands of Kolmetzky but moneys did come to his hands and was in his possession at the time of the signing the rule in this case, a sum in excess of the Rank judgment, and the moneys in his hands were those arising out of the litigation against Pellicoff.

The reason for the rule that a judgment or decree or moneys due thereon may not be levied upon is that thereby control of the Courts over their own process would be interfered with and the administration of justice embarrassed.

In the instant case, it so happens that all of the litigation was in the Circuit Court of Atlantic County, but irrespective of that fact, it is quite apparent that the Rank levy did not in anywise interfere with the Court's control of its process, nor with the administration of justice.

The levy was not on a judgment at law nor on money then due on a judgment at law, but on moneys 'in the hands of or to be in the hands of Pellicoff' arising out of the Kolmetzky suit. That it did not embarrass the administration of justice is evidenced by the prosecution by Pellicoff of his rule to show cause in the Supreme Court, his appeal to that Court and to the Court of Errors and Appeals. The Court's control over its own process was not interfered with, with the result that the judgment was paid and by so doing made the Rank levy effective. But, it is said, that the levy as of the time of the making thereof, was not upon a debt then owing but merely a levy upon what would arise out of a pending suit, which necessarily means the 'judgment.'

This contention is based on the proposition that there was relationship of debtor and creditor existing between K. and P. at the time of the levy and that that relationship was created by the entry of judgment. Not so. The debt was existing but the amount was in abeyance until the entry of judgment and the judgment fixed the amount of a pre-existing debt. Moneys aris-

ing by the payment of the debt were levied upon and not the judgment.

This disposes of the objection of the West Side Co., which is: 'There can be no levy upon a judgment or decree' and also disposes of the objection that 'there can be no levy upon a right or credit which is made the subject of an issue at law,' under which reason counsel cites Elizabethtown Savings Inst. v. Gerber, 35 Eq. 158, a case, it seems to me, not analagous to the present situation but which deals with a conflict of jurisdiction which is absent in the present case."

Appellants further urge that the suit of *Kolmetzky v. Pellicoff* was on a *quantum meruit;* that the plaintiff was suing for the reasonable value of the work which he did; that the defendant denied in his pleadings that any work had been done or that anything was owing; and that therefore the matter in dispute was an unliquidated debt not subject to attachment or levy.

Harris on Pleading and Practice in New Jersey, page 116, points out that "The courts are inclined to give to the term 'liquidated' a flexible meaning."

In *Boyd v. King,* 36 N. J. L. 134, 138, Chief Justice Beasley said:

> "The claim of the plaintiff is for work and labor, and it was suggested that as the amount due was not a sum fixed by positive agreement, an attachment would not lie to enforce it, on the ground that the judgment must be for unliquidated damages. But this matter has been long since settled. The test as to what claims will support an attachment was applied and adopted in the case of Jeffrey v. Wooley, 5 Halst. 123, and that test was, that such process

was proper whenever the cause of action was founded on a contract, and was of such a nature as to enable the plaintiff, as of course, to require special bail. It therefore follows, necessarily, that the plaintiff's case is not faulty in this last particular."

Mr. Justice Parker, in the case of *Max Sher v. Raymond L. Church, et al.*, 93 N. J. L. 73, 75, speaking for the Supreme Court said:

"In proceedings under the Attachment Act (Comp. Stat. p. 132), or cognate legislation, such as Sections 69, *et seq.*, of the District Court Act (Comp. Stat., p. 1977), the rule in Jeffrey v. Wooley, supra, is still in force. In that case the suit was for a breach of covenant, and it not appearing that the covenant was to pay a sum of money or was otherwise liquidated, the writ was quashed. So, where the claim was for a penalty for breach of covenant, the writ was quashed (Brown v. Hoy, 16 N. J. L. 158), and the same result was reached in a case of doubt whether the clause in the contract provided for a penalty or for liquidated damages (Cheddick v. Marsh, 21 Id. 463), though, apparently, *attachment will lie on a quantum meruit for work and labor.* Boyd v. King, 36 Id. 134, 138."

In the case of *John I. Sullivan v. Alexander Moffat, et al.*, 68 N. J. L. 211, it appeared that on November 21, 1901, a writ of attachment was issued at the suit of the plaintiff against the defendants, and on December 14th the defendants, without giving bond, entered a general appearance to the action. They then moved that the property attached be released from the lien of the writ on the ground that the plaintiff's demand, as set forth in

his declaration and bill of particular, is for unliquidated damages.

The plaintiff's claim is for the contract price of furnishing the cut marble work of a building—$6,950—less certain specific deductions, set forth as follows:

> "Amount which it would have cost plaintiff to furnish and perform so much of said marble work as remained unfinished, viz.:
>
> | | |
> |---|---|
> | 'Furnishing 175 feet of cut marble, delivered on the premises, at $3.25 | $575.00 |
> | 'Fitting | 200.00 |
> | 'Setting | 200.00 |
> | 'Contract price agreed to be paid by plaintiff to sub-contractor for all carved work | 760.00 |
> | "Cash paid by defendants to plaintiff | 500.00 |
> | "Cash expended by defendants for plaintiff | 1276.77 |
> | | $3511.77" |

which being deducted from the contract price, $6,950.00, left $3,438.23 still due the plaintiff.

> "Each item in this account is of such a nature as to be capable of supporting a writ of attachment. The price which forms the basis of the plaintiff's claim is a precise sum fixed by contract. The deductions to be made therefrom are for cash paid, and for materials to be furnished and labor to be performed at the expense of the defendants, the cost of which appears on the face of the account to be certain and presumably can be ascertained by some definite standard. *If the defendants had done this work and furnished these materials for the*

plaintiff, a debt would thereby have been created for which attachment would lie. Boyd v. King, 7 Vroom, 134, 138; Hecksher v. Trotter, 19 Id. 419; Anspach v. Spring Lake, 29 Id. 136. The allowance of these matters by the plaintiff is equivalent to the actual creation of such a debt. Consequently, as the items on both sides of the account are each sufficiently certain to support attachment, the balance derived from those items must have the same efficiency."

In *Charles F. Links v. John Mariowe,* 83 N. J. L. 389, 390, 391, it was said:

"The right of the defendant in an action in a District Court to discount or set-off any account or demand against the plaintiff (Comp. Stat. p. 1970, §60) has been denied to such accounts or demands as are for unliquidated damages (Slaytor-Jennings Co. v. Paper Box Co., 40 Vroom, 214), and the general rule is that only liquidated claims are the subject of set-off. In the case cited, it was held that by the above section of the District Court Act, no different rule arose, but that it referred to claims having such characteristics as fall within the legal meaning of the term set-off.

* * * * * * *

"Without discussing any technical objections as to the order of proof, the plaintiff contends that his claim is for unliquidated damages, and therefore could not be made the subject of set-off.

"Whether a claim is of a nature connoted by the term 'set-off,' and whether as to its liquidated or unliquidated character, capable of being the subject of set-off, is to be determined by applying the test, will an action of *indebi-*

tatus assumpsit lie thereon? If so, it is liquidated within the legal meaning of the word 'set-off.'

"This was settled by the Court of Errors and Appeals in Godkin v. Bailey, 45 Vroom, 655, wherein the old ruling in Marshall v. Hann, 2 Harr. 425, following Howlet v. Strickland, Cowp. 56, was approved and adopted. This is controlling.

"Manifestly, the plaintiff's claim may be sued in *indebitatus* assumpsit. Chitty says (1 Chit. Pl. 348):

"With respect to debts for work and labor or other personal services and for materials used in performing the work, it is a rule that if preceded by the defendant's request, then, however special the agreement was, yet if it were not under seal, and the terms of it have been performed on the plaintiff's part, and the remuneration was to be in money, it is not necessary to declare specially, and the common *indebitatus* count is sufficient."

See also

MacDowell & Co. v. Burke, Ltd., 3 N. J. Misc. Rep. 740, 741;

Grossman v. Brick, 5 N. J. Misc. Rep. 1016, 1017, 1018;

Moore v. Richardson & Baldwin, 65 N. J. L. 531, 532, 533;

The Barrett Co. v. United Bldg. Constr. Co., 5 Misc. Rep. p. 87.

Appellants also urge in their brief that the term "rights and credits" as used in the first section of the Execution Act is confined to the definition as contained in Section Two thereof. This contention

does not seem to be warranted. The latter section reads, "The term 'rights and credits' *includes,*" &c. The language there used does not give to the term a limited meaning.

But assuming that "rights and credits" are, by the Execution Act, defined to mean only such rights and credits as "may be attached by writ of attachment," a reference to the Attachment Act (P. L. 1901, Chap. 74) will disclose that debts due or accruing are included. In *Castner v. Styer,* 3 Zab. 236, the Court held that a return by the sheriff that "By virtue of the writ of attachment, he attached a certain debt due to the said 'A' in the hands of the said 'B,' etc., appraised at $500," is a valid return. Section 24 of the Attachment Act is further proof, for there it is provided that:

> "The auditor may institute suit by summons in any court of competent jurisdiction against any person who appears to him *to be indebted* to the defendant, in the name of the defendant for the use of the auditor, for the recovery *of the debt;* which suit shall proceed to trial and judgment as if the plaintiff therein was personally present, and shall not be discontinued without the consent of the auditor; provided, the defendant in such suit shall be entitled to set-offs, to the same extent as if the plaintiff was personally prosecuting the suit for his own use; and all moneys recovered shall be paid to the auditor to be disposed of according to law; and if judgment pass against the auditor he shall pay the costs and may retain the amount thereof out of any moneys that come to his hands."

Opponents urge that there was no debt owing from Pellicoff to Kolmetzky at the time levy was

made on the Rank judgment and, to sustain that point, call attention to the fact that the suit of *Kolmetzky v. Pellicoff* was on a *quantum meruit.* Even this, however, implies a contract to pay leaving only the amount to be paid in dispute. In other words, a debt existed but the amount thereof was uncertain. The judgment against Pellicoff fixed the debt due as the result of work performed by Kolmetzky prior to the levy in the Rank case and also fixed the amount due.

What is the definition of the word debt? In *N. J. Insurance Co. v. Meeker,* 37 N. J. L. 282, Chief Justice Beasley said, at page 301:

> "The words 'debt and debtor' have a similar amplitude of meaning. 'The word debt,' says Burrill, in his law dictionary, 'is of large import, including not only debts of record or judgment, and debts by specialty, but also obligations arising under simple contract, to a very wide extent, and in its popular sense includes all that is due to a man under any form of obligation or promise.' And Sir Edward Coke, in commenting on the word 'debitum' in the statute of Merton, ch. 5, says 'debitum signifieth not only debt for which an action of debt doth lie, but here in this ancient act of Parliament, it signifieth generally any duty to be yielded or paid.' "

An extensive search of authorities fails to disclose any case in this or any other jurisdiction which is on all fours with the matters here in controversy. Neither has any judicial definition of the combined term "rights and credits" been found which might be said to fit the term as used in the Executions Act of this State.

In "Words and Phrases," it is said:

> "The word 'rights' is generic and common, embracing whatever may be lawfully claimed. Lonas v. State, 50 Tenn. (3 Heisk.) 287, 306."
>
> "The term 'right' in civil society, is defined to mean that which a man is entitled to have, or to do, or to receive from others, within the limits prescribed by law. Atchison & N. C. Co. v. Baty, 6 Neb. 37, 40, 29 Am. Rep. 356."
>
> "The word 'credit' includes every demand for money, labor, or other valuable thing, whether due or to become due. Cobbey's Am. St. Neb. 1903, §10,404; State v. Georgia Co., 112 N. C. 34, 38; 17 S. E. 10, 19 L. R. A. 485; Sellars v. Barrett, 57 N. E. 422, 424, 185 Ill. 466."

The claim of Kolmetzky against Pellicoff was certainly subject to assignment even prior to the time when said claim was reduced to judgment. Assuming that Kolmetzky had assigned his claim to West Side Lumber Co. prior to judgment the latter could have prosecuted same to judgment and recovered. That which is subject of assignment is certainly subject to levy. The fact that said alleged claim was disputed by Pellicoff would surely not make it any the less assignable. In *Brown v. McGill,* 39 Atlantic, 613, it was held that property which is subject to alienation by its owner is subject to his debts.

Appellants say further in their brief (page 13):

> "Furthermore, if as in a case such as this the garnishment is upon only a part of the plaintiff's claim, it might very well be that the defendant would be subjected to two suits for the same cause of action, the inequities and difficulties of all of which should be convincing

that such a right does not exist, and hence, the conclusion is inevitable that the levy made in this case is void."

And again on page 16 of said brief appellants say:

"That judgment (meaning judgment of Kolmetzky v. Pellicoff) cannot be interfered with, or disturbed. There was only one way for Pellicoff to be relieved of that judgment, and that was to pay it to the holder thereof. It could not be interfered with by any order made in this cause."

This all may be sufficiently answered by reference to Chapter 113 of the Laws of 1916, entitled "An Act to amend an act entitled 'A supplement to an act entitled "An act respecting any execution,"' " approved, etc., and the Second Section thereof which provides as follows:

"2. *It shall be the duty of any person,* persons, agent, treasurer, or other fiduciary officer of a private or public municipal corporation, including any county and the State, *to whom said execution shall be presented,* and *who shall at such time be indebted to the judgment debtor* named in such execution, *or who shall become indebted to such judgment debtor in the future,* and while said execution shall remain a lien upon said indebtedness, *to pay over to the officer presenting the same, such amount of such indebtedness as such execution shall prescribe until said execution shall be wholly satisfied, and such payment shall be a bar to any action therefor by any such judgment debtor.* If such a person, persons, or the proper officer of the corporation, municipal, county or State, to

whom said execution shall be presented shall fail or refuse to pay over to said officer presenting said execution the percentage of said indebtedness, he shall be liable to an action therefor by the judgment creditor named in said execution, and the amount so recovered by such judgment creditor shall be applied towards the payment of said execution."

II.

RESPONDENTS WERE NOT LIMITED TO ONE COURSE OF PROCEDURE AFTER LEVY NOR TO ANY DEFINITE TIME WITHIN WHICH THE PROCEDURE FOLLOWING LEVY SHOULD BE PURSUED.

Appellants urge in their brief that "the plaintiffs, Rank, have defaulted in the remedy granted to them." They further point out that said plaintiffs had three remedies open to them, viz.: to sell the rights and credits; to have the sheriff liquidate the rights and credits, by instituting a suit for the collection of the same; by having the sheriff join in the suit with Kolmetzky; or by having obtained a receiver for the collection of them. It is assumed that appellants referred to these remedies as in addition to the one here adopted.

A careful reading of the Execution Act will disclose that there is no provision which requires the judgment creditor to pursue any prescribed course of procedure, after levy, in preference to another. Nor is there any provision which requires the judgment creditor to pursue any given course within a given time.

The Ranks were not obligated to proceed in the manner best to the liking of appellants. Nor are they to be censured or penalized for their failure to proceed as appellants would have liked. They did not default in any of their rights nor can it be said that they are estopped because of their failure to pursue some remedy other than the one here followed.

It is submitted that respondents elected to follow the reasonable course. When the levy had been made on the Rank judgment the case of *Kolmetzky v. Pellicoff* had not been tried. It was proper to await the decision in that case. After Kolmetzky secured judgment against Pellicoff same was taken to the Supreme Court on rule to show cause with the result that said rule was dismissed. Later an appeal was taken to the Supreme Court and, upon affirmance there, to the Court of Errors and Appeals. Again it is submitted that it was proper to await the final determniation of said appeals before proceeding. How could any other course of procedure have produced any different result?

The Court below in its opinion (State of the Case, p. 14) said:

> "That it did not embarrass the administration of justice is evidenced by the prosecution by Pellicoff of his rule to show cause in the Supreme Court, his appeal to that Court and to the Court of Errors and Appeals. The Court's control over its own process was not interfered with, with the result that the judgment was paid and by so doing made the Rank levy effective."

III.

PELLICOFF ADMITTED THE DEBT.

Appellants insist that the order here appealed from cannot be sustained for the reason that Pellicoff (the garnishee) did not admit the debt.

By way of answer to this it will be noted that the Rank levy was made before the Pellicoff debt was reduced to judgment. At the time the order to show cause was entered in this proceeding Pellicoff did not deny the debt. On the contrary, Pellicoff paid said judgment despite the levy which had been made. Payment admits the debt. Pellicoff did not appear in answer to the rule to show cause, and his absence was further admission of the debt.

The learned Court below, in dealing with this question said (State of the Case, p. 15):

> "But, counsel says, that these proceedings are under the 9th Section of the Execution Act and that no levy is possible thereunder because 'Pellicoff does not admit the debt as contemplated by the statute.'
>
> "The act provides: 'Upon return of the order to show cause * * * an order may be made requiring the garnishee to pay the debt if he admits it,' &c.
>
> "It is quite true that Pellicoff did not admit the debt originally, but the fact that the moneys representing the debt have been paid by him to Mr. K. is sufficient answer to his failure to admit the debt. The debt and that it was in fact owed has been established by the judgment."

IV.

THE RANK JUDGMENT LEVY IS NOT AFFECTED BY THE ASSIGNMENT OF THE PELLICOFF JUDGMENT TO THE WEST SIDE LUMBER CO.

Appellants claim that the Rank levy is void as against Kolmetzky's assignee for the reason that a purchaser of that judgment would not be obliged to do anything more before taking an assignment than to look at the record to see that the Court had jurisdiction of the parties and that the judgment had not been previously satisfied or assigned.

To approve this contention would present a dangerous precedent. It would put into the hands of an unscrupulous debtor a means of defrauding his creditor despite the latter's diligence. All that a judgment debtor would be required to do to defeat his creditor, who had secured judgment and made levy as in this case, would be to assign the judgment which is affected by the levy.

In *Hill v. Beach,* 12 N. J. Eq. 31, land held in trust was sold under a mortgage and surplus money, before it was brought into court, was attached while in the hands of the sheriff by a separate creditor. It was held that the money was attachable under the circumstances. The Court in its opinion made this significant remark, "*It is the policy of modern legislation to facilitate the creditor in reaching the property of his debtor.*"

Assuming Kolmetzky endeavored to collect his judgment against Pellicoff, no assignment thereof having been made, he certainly could not allege obstruction in such collection if a judgment creditor

of his had previously levied on the moneys due him thereunder. Kolmetzky's assignee can be in no different position.

It is interesting to note that Kolmetzky assigned his judgment against Pellicoff on the same day it was entered. Said assignment was also recorded on that day. This simultaneous action is curious and the real reason therefor does not appear in this proceeding.

It is also interesting to note that the attorneys of record for Kolmetzky in his suit against Pellicoff also appear here as attorneys for the assignee of said judgment. Said attorneys of Kolmetzky, now attorneys of said assignee, had notice of the making of the Rank judgment levy. Evidence of this is to be found in the fact that said attorneys secured the payment of said judgment by Pellicoff by assuring him that he would be saved harmless by reason of the levy by Rank.

In *Conover v. Boice,* 69 N. J. Eq. 580, it was held that the assignee of a judgment is chargeable with the knowledge of his attorney concerning litigation affecting the judgment, where his attorney negotiated the assignment.

A writ of execution, from the time of its delivery to the sheriff, binds the goods of the defendant as against himself and assigns. *Hall v. Nash,* 58 N. J. Eq. 554.

In *Losey v. Simpson,* 11 N. J. Eq. 246, it was held that an assignee of a chose in action takes subject to all defenses against it in the hands of the assignor at the time of the assignment.

Lefever v. Armstrong, 15 Pa. Super. Ct. 565, held —from the time an execution on a judgment against a lessee comes to the hands of a sheriff it becomes a lien on whatever interest, legal or equitable, the lessee has in the leasehold estate and a sale by the

sheriff conveys all of the title of the lessee as of the time of the levy and hence no subsequent act of the lessee or assignee or mortgagee claiming under the lease can enlarge or diminish the title.

In *Third Natl. Bank v. Atlantic City,* 126 Fed. 413, it was held that a levy of execution on the interest of the judgment debtor in money due from a city on a contract, under the law of New Jersey, creates a lien which takes priority of subsequent equitable assignments.

In *Lindley v. Kelley,* 42 Ind. 294, a levy was made on all the interest of a landlord in a growing crop by virtue of a contract. Said levy was made on May 13 and on the following July 25 said landlord sold his interest. It was held that said interest assigned was subject to the lien of the levy.

V.

THE ORDER APPEALED FROM IS GOOD AND VALID IN LAW.

Appellants contend that said order is void on its face because it does not determine who is obliged to pay the Rank judgment.

It is submitted that the order does just that which appellants insist it does not do.

In determining the validity and effectiveness of the order it is well to keep in mind the facts and circumstances of this issue.

If Pellicoff had not paid the Kolmetzky judgment in defiance of the levy then the order might well have provided for the payment of the Rank judgment by him. But, the judgment having been assigned by Kolmetzky to the West Side Lumber Co. and that assignment being subject to the levy, the

moneys paid in satisfaction of the judgment are in effect encumbered by the lien of the levy. Certainly the levy cannot be destroyed at the will of the one in whose hands the property is attached by assignment or transfer of the property to a third party. The West Side Lumber Co., assignee by accepting payment of its judgment, subject to the Rank levy, thereby became chargeable with the payment of the Rank judgment. The position of the West Side Lumber Co. was the same as that of Pellicoff. To say that Pellicoff is to be relieved from the liability of paying Rank would in effect place a premium on his failure to recognize the levy. To say that the West Side Lumber Co. has no liability would place a premium on its defiance of the Court's right and power to enforce its own judgments.

Kolmetzky, having assigned his judgment against Pellicoff to West Side Lumber Co., has stepped out of the picture and he, therefore, has no interest in this matter. The assignee's position, however, can rise no higher than that of the assignor. If this be true, assume, for the sake of argument, that Pellicoff had paid the judgment direct to Kolmetzky, said judgment not having been assigned. Could it then be said that the Court would be without power to require both Pellicoff and Kolmetzky to pay Rank? To so hold would be to destroy whatever effect a levy has been heretofore considered to have. With West Side Lumber Co. here standing in the shoes of Kolmetzky then it was proper for the Court to order both West Side Lumber Co. and Pellicoff to pay Rank.

As for Thompson and Hanstein, they were attorneys for Kolmetzky in his suit against Pellicoff from the time of issuance of summons until the affirmance by the Court of Errors and Appeals. At

least it does not appear when, if ever, the relationship of attorney and client ended with Kolmetzky. They also were and are now the attorneys for West Side Lumber Co. Pellicoff paid the Kolmetzky judgment by passing the money over to Thompson and Hanstein as attorneys for West Side Lumber Co. Said money was so paid with the understanding that Pellicoff would be protected against any order that the levy of Rank was superior to the Kolmetzky judgment. Said money was in the hands of said Thompson and Hanstein at the time the rule to show cause issued herein and is still in their hands by virtue of the restraint contained in said rule. Thompson and Hanstein, being the representatives of West Side Lumber Co., and their position in this matter being the same, it was proper and legal for the Court to say that they too should be responsible for the payment of the Rank judgment. To hold otherwise would be to exonerate from liability the persons who actually hold the fund.

Objection is raised to the alternative nature of the order. Under the circumstances of this case the liability of the three parties, to wit: Pellicoff, West Side Lumber Co. and Thompson and Hanstein, is joint and individual. The Court cannot excuse either of them from payment. Payment by any one or all of them, however, will satisfy the order.

Whether the order is valid can be determined by determining whether the Court has power to enforce it. As to such power, it is respectfully submitted, there can be no question. Assume, for instance, that the Rank judgment is not paid, then all three of the parties could be cited in contempt because of the defiance of its mandate.

Even if the alternative nature of the order is ob-

jectionable, it is not reason for holding the order invalid. It can only be objectionable as to form and in this respect can be corrected by this Court or remanded to the lower Court for correction.

It is respectfully submitted that the order of the lower Court should be sustained.

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