DAVISON & CO., PRINTERS, 27 Montgomery Street, Jersey City.

N. J. Court of Errors and Appeals.

WILLIAM BAGNALL. *vs.* SARAH J. POINEER.	*In Ejectment.*

DEFENDANT'S BRIEF.

On Sept. 21, 1872, William Bagnall, who then owned the premises in question, confessed judgment in favor of Frank E. Noble before Thomas Aldridge, a Justice of the Peace of Hudson County, for $86.28 debt, and $2.05 costs.

Execution was issued on Sept. 24, 1872, and returned by the constable endorsed as follows:

"I return the within execution this 25th day of September, 1872, unsatisfied, no goods or chattels found within my county belonging to the defendant to make any part of the debt and costs on this execution, except that which is exempt by law."

On Sept. 28, 1872, said judgment was docketed in the office of the Clerk of the Court of Common Pleas

of Hudson County, and execution was issued thereon the same day, was duly recorded and delivered to the Sheriff, who levied on the premises in question and sold them to Thomas Atcheson. The Sheriff's deed is dated Oct. 2, 1873, and recorded Oct. 17, 1873.

Atcheson and wife conveyed them to the defendant, Sarah J. Poineer, by deed dated Dec. 1, 1873, and recorded Dec. 2, 1873, for $2,300, subject to a mortgage for $1,500 given by Bagnall (the plaintiff) to Jacob Van Wagenen, dated April 8, 1872, which she assumed and the amount due thereon was deducted from the purchase money.

Mrs. Poineer took possession of the premises on Dec. 1, 1873, and has continued in possession thereof to the present time.

She continued to pay interest on the mortgage until June, 1876, when she paid off the principal and the mortgage was cancelled of record.

It is now claimed by Bagnall that the docketing of the judgment against him was void:

1st.—On the ground that the return of the constable was not sufficient.

2nd.—On the ground that the original state of demand and the original return of the constable on the execution were filed with the Clerk of the Court of Common Pleas, instead of certified copies as required by the statute.

I.

As to the return of the Constable.

The statutory requirement is that the execution be returned by the constable "endorsed *to the effect* (1) that he could not find any personal property of the party against whom the execution has issued on which to levy, or (2) that he levied and sold goods and chattels and made thereof part of said judgment and that

the same was not fully satisfied and stating the balance still unsatisfied."

1.—The Legislature did not prescribe any particular form for the constable's return. It had in view any form of return which the courts at the time of the passage of the act would have construed as of *the effect* that the officer could not find any personal property of the defendant whereon to levy.

At the time of the passage of this act (1848) and from time immemorial sheriffs and other officers to whom mesne and final process had been issued were accustomed to make their returns in abbreviated forms which had a well recognized meaning and *effect* in the courts.

Burrill's Practice, ed. of 1840, vol. 1, p. 100, under the head of "CAPIAS, HOW RETURNED," says:

"If the sheriff has *not been able to find* the defendant, his return is endorsed 'not found' (*non est inventus*). *Note.* The sheriff's return is now generally endorsed in this abbreviated form. It was formerly; and still may be, expressed at length as in the forms referred to."

And on page 304, under the head of "FIERI FACIAS, HOW RETURNED," says:

"The return is made in the same manner as to a capias, by endorsing a short certificate on the back of the writ according to the fact. * * * * If the sheriff has been *unable to find* property of the defendant in his bailiwick in whole or in part, his return will be *nulla bona*, or in the language usually adopted "no goods or chattels, lands or tenements."

See Burrill's Appendix, ed. 1840, p. 400, sec. 571, for forms of the return of *nulla bona*, both at length and abbreviated.

Freeman on Executions, Sec. 356.
Herman on Executions, Sec. 340, p. 386.

The return under consideration contains the words "no goods or chattels found within my county belonging to the defendant to make any part of the debt and costs on this execution."

Under the law as it existed at the time of the passage of this act, there can be no doubt that this return would have been construed by the courts as of the same *effect* as if he had said that he "could not find any personal property of the party against whom the execution was issued on which to levy."

2.—Irrespective of the effect given by the courts to the returns of officers made in abbreviated forms—the Court, by adopting the usual rules of construction, will construe the return under consideration as of the effect mentioned in the statute.

"In construing official returns the courts have usually exercised great liberality toward the officer and others interested in maintaining the sufficiency and the legality of the returns—no severity of criticism will be allowed. Every favorable inference that can fairly arise will be indulged. Nothing beyond reasonable certainty will be exacted—and that construction will be adopted which most accords with the hypothesis that the officer performed his whole duty."

Freeman on Executions, Sec. 362.
See also Sec. 384.
Herman on Executions, Sec. 238, p. 385.
" " " " 237, " 381.
Bissell v. Nooney, 33 Conn., 418.
Brace v. Catlin, 7 " 361, note.
Backus v. Danforth, 10 " 297.
Peck v. Wallace, 9, " 453.
Johnson v. Huntington 13 Conn. 52.
Corbett v. M. & U. Bank, 53 Maine 542.

The Constable's return is endorsed upon the Execution and is his answer to the command contained in the writ.

In construing the return, resort may be had if necessary to the writ itself—at least the Court will recogize the fact that it is the constable's answer to the command of the writ.

The essential part of the return in this case is an independant participial phrase, viz :

" No goods or chattels found within my county belonging to the defendant to make any part of the debt and costs on this execution, except that which is exempt by law."

It is not a complete sentence. But if the Court can, beyond any reasonable doubt, discover its meaning, it will supply the necessary subject and predicate in order to make a complete grammatical sentence out of it.

Can there be any doubt in the mind of the court as to what the officer meant by his return ?

Worcester defines the word *find*—" to meet, reach or obtain by searching or by accident."

" To obtain by searching" is therefore synonymous with " to find".

" Seek and you shall find." *Seek* is the command, and *find* is the successful result of the act done in obedience to the command.

The affirmative or successful answer to the command to search would invariably be " found" or " I have found"—It would not be, " I have been able to find,' or ' I could find."

The negative answer might be either " I have not found"—which would be a direct answer to the command, or " I could not find"—which would not be a direct answer to the command. Both answers mean ordinarily the unsuccessful result of the effort to find.

In construing the return in this case we must remember that it is the constable's answer to the command of the writ, or his statement of the result of his effort to obey that command. That being so, can there be any doubt that when he said " no goods or chattels found within my county belonging to the defendant" &c., he meant precisely the same thing as if

he had said " I could not find any personal property of the defendant" &c. ?

3.—But it is contended that it was intended by the legislature, that the words " could not" or their equivalent should appear in the return itself, so that it might appear in the return itself, at least by inference, that the officer had made a search for property on which to levy.

To support this contention the plaintiff relies upon the case of Matthews vs. Miller, 18 Vroom, 414.

In that case the return was " I return this execution in Court with no property found whereon to levy" and it was held that that return could have been truthfully made without any inquiry or search on the part of the officer.

But that would involve a presumption that the officer had failed to obey the command of the execution. Surely the Court will not presume that the officer did not perform his duty. If any presumption is to be indulged in, it is that the officer performed his duty, and if any liberality of construction is exercised it will be in favor of maintaining the sufficiency and legality of the return.

While it is true that no presumption of regularity, &c. will be applied to give Jurisdiction to persons exercising a special statutory authority—yet we claim that this rule applies particularly to the *acts of the officer exercising the special statutory authority*, (in this case the clerk of the Court of Common Pleas) and does not prevent the maxim, " *Omnia praesumuntur rite esse, acta*" from being applied in this case to the acts of the Justice and constable, prior to the proceedings of docketing the Judgment.

Hartwell v. Root, 19 Johns. 345.
Jackson s. Shafer, 11 " 517.
Den. v. Hillman, 2 Halst. Law. 188.
Newark v. Batten, 3 Vroom, 453.

The Statute permits the judgment to be docketed in two cases (1) where the officer could not find any personal property &c., and (2) where he had levied and sold goods and chattels and made thereof part of the judgment, and that the same was not fully satisfied, and stating the balance still unsatisfied.

Now if the word "could" or its equivalant was intended to be an essential part of the return in the first case in order that it might appear by the return itself, (by inference) that the officer had performed his duty, it would also have been required in the second case and would have required the officer to state in his returns that he had levied and sold *all* the goods *that he could find.*

The reason given for the use of the word in the one case applies with equal force to the other.

The fact that it is not required in the latter case proves that it was not intended to be an essential part of the return in the former case.

But the assumption in the case of *Matthews vs. Miller*, that the words "I could not find" &c. necessarily involved inquiry and search is not correct. For if the officer had lost his sight, or been in prison, or was suffering from some other physical disability, he might have truthfully said "I could not find" &c. without having made any inquiry or search.

But the return in the present case is much more full and specific than the return in the case of *Matthews vs. Miller.*

It contains the expressions, "within my county," "belonging to the defendant," "to make any part of the debt any costs," and "except that which is exempt by law," which are not contained in the other return.

All these expressions, taken together, indicate beyond any doubt that the officer made complete search and inquiry.

The cases relied upon by the plaintiff as requiring a strict compliance with the statute all apply to the acts of docketing, or to a total failure of some condi-

tion precedent.

The cases of Bailey vs. Ward, 27 Cal., 369, and Jewett vs. Bennett, 3 Mich., 198, concerned defects in the transcripts, or certification of the transcripts.

In the cases of Edmiston vs. Edmiston, 2 Ohio, 251, Francis Lessee vs. Washburn, 5 Haywood, 293, Thatcher vs. Powell, 6 Wheaton, 121, there was no return whatever.

In Monayhan vs. McKirnine, 32 Mich., 40, there was no affidavit.

In Peck vs. Colwell, 16 Mich., the return was entirely void, being made on Sunday. Also the transcript was not certified, and no affidavit was filed.

In Tasto vs. Klopping, 14 Vroom., 448, and Freichnect vs Meyer. 12 Stewart, 551, the returns were in effect that the constable could not find *enough* goods to pay the *entire amount* of the execution, and not that he could not find *any* goods, &c.

In Tasto vs. Klopping the Court construes "*not finding*" to be in effect that the officer "*could not find*"

4.—The words, "to the effect that he could not find any personal property of the party, &c., on which to levy," as used in the statute, have, from the time of the passage of the act in 1848 down to and after the year 1873 (when the premises in question were sold by the sheriff), had a practical construction in this State, so as to embrace any return to which the courts would have given that effect prior to the passage of the act. (See testimony, schedule D 1, page 9 of case.)

This practical construction has been so general and unquestioned that more than three-fourths of all the judgments docketed from 1848 to 1873 are void, unless this practical construction is upheld by the courts.

Scarcely one-fourth of the returns of constables, as recorded in the records of docketed judgments during that period, contain the word "could" or any equivalent word. The most usual form is about as follows: "no goods or chattels found belonging to the defend-

ant whereon to levy."

In nearly all the returns containing the word "could" or its equivalent, there is a complete sentence, such as "I could not find any goods or chattels of the defendant whereon to levy," whilst in mostly all the returns which do not contain the word "could" or its equivalent there is no subject or predicate, but simply a participial phrase.

There is no doubt whatever that in both classes of returns the officers meant precisely the same thing, viz.: that they could not find, &c.

The omission of the word "could" or its equivalent from the returns, which consist of simply a participial phrase, is to be attributed to the form of the phrase, and not because any different meaning was intended.

Where a subject and predicate, making a complete sentence, are used, it would be quite natural to use the word "could," and say "I could not find," &c., or "no goods, &c., could be found." But in a participial phrase it would be extremely awkward to use the word "could" or its equivalent. An expert grammarian might possibly be able to do it, but I am satisfied that very few constables could do it.

This form of making returns by using a participial phrase is very common among sheriffs and constables, and is recognized by the courts as sufficient.

These returns having been made in this way for so many years without having been questioned, and having been made and acted upon by officers whose duty it was to make them, or act upon them, and very many land titles being dependent thereon, it would be unpardonable now to disturb this practical construction by a critical examination of the words of the act.

McKean vs. Delancy, 5 Crauch, 22; 1 Serg. and Rawle, 106.

Troup vs. Haight, Hopk. (N. Y. Ch.), 239.

Bank of Utica vs. Mersereau, 3 Barb. Ch., 530-577.

Meriam vs. Harson, 2 Barb. Ch., 232.

Jackson vs. Gumaer, 2 Cowen, 552.
State vs. Kelsey, 15 Vroom, 22.
Den. vs. Geiger, 4 Halst. Law, 228.

II.

As to the filing of certified copies of the State of demand and return of the constable.

1.—The clerk certifies in his docket " I have also filed as aforesaid certified copies of the State of demand, return of constable" &c.

(See printed case, page 13)

This is sufficient proof that certified copies were filed.

Graham v. Whitley, 2 Dutch, 262.
Voorhees etal. v. Jackson 10 Peters, 449, 469.
Dyckman v. New York, 5. N. Y. 434.
Van Steinburgh v. Bigelow, 3 Wend. 42.
Steelman v. Steelman 1. Harr. 66.
Weaver v. Lienan, 52. Md. 720.
Kennedy v. Doyle 10 Allen, 161.
Blackburn v. Crawford 3 Wall. 175.
Woodruff, v. Woodruff 1 South. 375.
Den v. Gaston, 1 Dutch. 615. 620.
Browning vs. Flanagin, 2 Zab. 567, 572.

2.—The original state of demand and the original execution with the constable's return are annexed to the transcript on file.

The originals are at least as good as certified copies.

Britton v. Miller' 54 Ind. 535.
Folsom v. Cressy, 73 Maine, 270.

3.—The constables return is set forth in the transcript, which is duly certified.

The copy set forth in the transcript is therefore a certified copy.

4.—The defendant in the suit before the Justice appeared on the return day of the Summons and confessed Judgment.

(See printed case, pages 14 and 21.)

No state of demand was therefore necessary.

Hunt v. Shivers, 1 South. 89.
Branson v. Eayre 7, Halst. 127.
Ferguson v. Earl. 2 Green 124.

The absence of a certified copy would therefore be immaterial.

III.

The defendant, Sarah J. Poineer, if not the owner of the premises in fee simple, is a mortgagee in possession.

Bagnall had given a mortgage to Jacob Van Wagenen on April 8, 1872, for $1500, on the premises.

Atcheson and wife conveyed the premises to Mrs. Poinier by deed with full covenants of title and warranty, subject to this mortgage which was assumed by her as part of the consideration.

Supposing that she had acquired the title to the premises, she paid the interest on this mortgage regularly, and on May 20, 1876, paid the principal, and Van Wagenen receipted the mortgage and Mrs. Poinier had it cancelled of record.

Of course it is self evident that this payment was made under a mistake, and under the case of Friechnecht v. Meyer, 12 Stew. 551, it is immaterial whether the mistake was one of fact or law. Pomeroy Eq. Jur., Sec. 849 and note.

Since that time the only parties concerned, viz: Mrs. Poineer and the mortgagee have rehabilitated this mortgage, and the mortgagee has assigned it to Mrs.

Poinier.

Under well established rules a payment by a volunteer is no payment; and if Mrs. Poinier had no title she was a mere volunteer—There being no payment, the tearing of the seals and cancellation of the instrument were nugatory. In equity the transaction should be treated as an assignment—and the parties by their written instrument have made it an assignment at law, and Mrs. Poinier can maintain her possession under it.

The plaintiff claims that the minute of cancellation made on the registry of the mortgage under the 23d section of the mortgage act (Rev. p. 707) renders it impossible for the parties to the transaction which resulted in that minute, to undo their work.

He relies on the last clause of the section—" which minute shall be a full and absolute bar to and discharge of the said entry, registry and *mortgage.*"

No doubt such cancellation, so long as it remains in force, operates as such discharge ; but it does not prevent the mortgage from being revived. A court of equity can, by its decree, restore a mortgage cancelled of record through fraud, accident or mistake, even as against innocent third parties. Surely those who alone were parties to, and are affected by the cancellation, can make such restoration by their agreement—Under Freichnecht v. Meyer, (*Supra*) the cancellation in this case was by a mistake against which a Court of equity would relieve, and what the Court would do, the parties could do.

Even if there was no mistake the parties in interest could restore the mortgage—It is only as against third parties who have acquired rights, that such restoration would not be permitted either by decree or agreement.

The plaintiff in the case before the Court acquired no rights by the cancellation, was not affected by it, and can claim no benefit from it.

J. GARRICK.

Atty. for and of Counsel with Defendant.

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PLAINTIFF'S BRIEF.

FACTS.

The plaintiffs *prima facie* case was not questioned at the trial, inasmuch as the defendant claimed under the plaintiff by a sheriff's deed on an alleged docketed judgment. To maintain the said judgment, the defendant offered in evidence the book of docketed judgments and a bundle of papers filed with clerk of Hudson County.

The plaintiff objected to said docketed judgment(1), that the return endorsed on the justice's *fi fa*(2) that the defendant did not prove in anyway the filing with the Clerk of any "certified copy of the State of demand. Roller v. Roller, 17 Vr., 413. No such certified copy was among the filed papers, and the only

evidence of the filing of any was the "formula" which the Clerk used in making the entry of the docketed judgment (See p. 13 of record). The said "formula" (so called by Mr. Fisher, the Deputy Clerk) is an entry neither authorized nor required, and therefore the plaintiff claims that it is not competent evidence, (*even prima facie*) of any fact. No witness to its truth was called, nor was the handwriting of it proven. Mr. Fisher clearly shows its likelihood of being false. (P. 27 of record.)

I.

The return is not such as the Statute requires. See Rev. Tit., "Justices' Courts," sec. 71. It is as follows :

"I return the within execution this 28th day of September, 1872, unsatisfied, no goods or chattels found within my county belonging to the defendant to make any part of the debt and costs on this execution except that which is exempt cy law.

Henry E. Kline,
Constable."

Klopping v. Tasto 14 Vr., 448 holds a return containing a negative pregnant bad, so also Freiknecht v. Meyer 12 Stew. 551

In Matthews v. Miller, 18 Vroom, 414 the following return was held bad :

"I return this execution in Court with no property found whereon to levy. April 17, 1867."

Unless the Court overrule the Matthews' case, they must hold the present return bad. All the arguments which defendant used in this case have been repeatedly urged in the Courts of this State and overruled. The Matthews' case was decided by four judges who decided the Klopping and Freiknecht cases, and unless we

do them great injustice, we must conclusively infer that they were familiar with every argument which could be made in favor of the return which in that case they held invalid. The Court will in the present argument observe that every point which is now urged has been urged before. To overrule a decision like the Matthews' case which must be the result of most mature thought, would be a judicial stultification which no precedent either in fact or principle can support.

The learned trial judge in upholding the present docketed judgment, has overruled a clear and unanimous decision, unless it can be shown the latter words of the return make it a valid one—The portion of the return before the comma certainly is not distinguishable from the return in the Matthews' case. Do the subsequent words aid the weakness of those proceedings ? Admitting that those words indicate a finding of exempt property, will not help the defendant's case, for then the return being paraphrased might be construed thus ; " I did find exempt property, but did not find other property." This is manifestly insufficient, " *I did not*," is not to the effect that I could not, either in law, logic or common sense.

The return will not be aided by any presumption of performance of official duty ; and this for at least two reasons(1) The return itself and not the truth of the fact stated in it, is the jurisdictional requirement. No one can say that a valid docketed judgment could be vacated by proof, that the return was false in stating that the defendent has no personal property. (2).—It is an universal rule that special statutory proceedings are never supported by any presumption of due performance of official duty. This is so well known a rule that authority for it is hardly necessary, but we subjoin a few of the many authorities that might be cited. If the proceeding be a judicial one, the record must affirmatively show the existence of all facts on which jurisdiction depends—If the statute empowering the proceeding calls for no exercise of judicial power, no reason can be shown why the proceed-

ing can not be proven by *aliunde* evidence—(See 3 Ph. Ev. 1019, 1106).

The return will not be aided by any presumption of due performance of official duty.

The return in the Klöpping case stated that *a search had been made*, and was yet held bad.

It is an universal rule for which multitudes of cases might be cited, that no presumptions will be applied ta give jurisdiction to persons or courts exercising a mere special statutory authority.

Best on Presumptions, p. 81.
Inp. Co., vs. Munson, 14 Wall, p. 151.
Rex. vs. Croke, Cowper—
Hilgers vs. Quincy; 51 Wisc. 62.
Parker, v. Rules Lessee, 5 Wheat, 116.
Fowler vs. City of St. Jo., 37 Mo, 238.
Morton vs., Reed, 6 Mo. 64.
Potters Dw. on St., 750 ; Tyler Eject, 533.

If this is the rule in special proceedings involving judicial functions, *a fortiori* is it the rule where there is no exercise of judicial power, as in the present case.

The uttter fallacy of any argument based on presumptions will appear when it is considered that the *return* and not the truth of the facts set forth in it, is the jurisdictional requirement.

Cases of returns which may be cited by the defendant, and which depend on common law principles are then not in point ; in all of them an intendment or presumption was made of due performance of official duty, whichf in a statutory proceeding, is irrelevant. Where the fact of the defendant's property is not in issue, no presumption can be relevant.

There are several cases in the various state reports in which the validity of docketed judgments has been questioned because of lack of conformity with the statute.

In Peck v. Caldwell, 16 Mich, 1, (1867), a return ap-

pearing to be made on Sunday, the docketing was held void.

In Jewett v. Bennett, 3 Mich. 198 the docketing was avoided because the Justice certified " the above is a true copy of the above judgment and the subsequent proceedings thereon," whereas the statute required a certificate " of the proceedings so far as they appear on the docket"

Monoghan vs. McKimmie, 32 Mich. 40, held a docketing void because no affidavit of the amount due was shown

In Edmiston vs. Edmiston, 2 Ohio 251 (1826) it was held that if the transcript from the Justice did not show a return unsatisfied, and a suggestion that defendant had land as the act required the docketing was void.

In Bailey vs. Ward, 27 Cal. 369, a certificate of " a true and correct copy of the "*judgment docket*" was held not to comply with the act which required a certified transcript of the *judgment.*

In Eason vs. Cummings, 11 Humph. 210 and State vs. Bettick, 1 Baxter (Tenn.) it was held that a certificate that the Justice was at the time of the *fi. fa.* an acting Justice did not satisfy a statute which required a certificate that the magistrate was " at the time of the judgment and execution an acting justice."

To the same points, or similar ones we cite also Massey vs. Gardenhire, 12 Ark. 638 ; Dearborn vs. Patton, 4 Oregon, p. 58 ; Brandling vs. Plumer, 3 Jurist (N. S.) 401 ; Braithwaite vs. Wales, Tyr. 293.

If a presumption of due performance of official care be used to support special statutory proceedings why was such a presumption applied to support the proceedings in Lawrence, vs. Frich 2 C. E. G. 240 ; and the affidavit of the surveyor in State vs. Dairs 1 J. S. Gr. 10 ; and to the justice's certificate in Jewett vs. Bennett, 3 Mich. 198 ; and to the certificate in Bailey vs. Ward, 27 Cal. 369 ; and to affidavit in attachment in Jeffrey vs. Wooley, 5 Halst. 123 ; and to the certifi-

cate in Eason vs. Cummings, 11 Humph. 210 ; and to support "$" in Coombs vs. O'Neal 1 Mc Arthur 405.

The well settled proposition that statutory proceedings must *affirmatively* appear to be in *strict* conformity to the statute, carries with it the necessary corrolary that compliance with the statute cannot be eked out by presumption, for a fact which appears only by presumption certainly cannot be said to appear affirmatively.

II.

The "Formula" is mere hearsay evidence.

the "formula" s. 13 of case)

It is quite manifest, that if the said formula is evidence at all of the filing of the certified copy of the state of demand, it must be so because of its being either (1.) a record, and therefore importing absolute verity or (2) an entry or certificate of an officer, and therefore evidence of the facts certified, or (3) within some of the other exceptions to the rule against hearsay evidence.

The plaintiff denies any evidential effect, even *prima facie*, to said " formula" because the clerk has no judicial power to determine whether any paper is a "certified copy" and because the "formula" is entirely extra-official and not within any of the exceptions to the rule against hearsay evidence.

1. The said FORMULA is not evidence on the ground of its being a record. In considering this point tion, the plaintiff wishes the Court to consider that proceedings by which a person may be legally deprived of his property, may be divided into four classes.

(*a*) Judgment of superior Courts of general jurisdiction; in these the record (properly so called) imports absolue verity, and in N. J. it has been decided that a Supreme Court Judgment cannot be impeached by proof of non-service of the summons.

The mere judgment is evidence of jurisdiction, regularity and legality Miller v. Dungan, 6 Vr. 389.

(*b*) Special Statutory proceedings of a judical nature in such courts. In these the record must show affirmatively that all jurisdictional requirements of the statute have been fulfilled. Recitals in such records are adjudications, (3 Phil, Ev. 1016, citing English, N. Y. and other cases) and as such are evidence sometimes *prima facie* and sometimes irrebutable of the facts recited. An examination of the authorities last cited will show that such recitals are evidence *solely* because of their being judicial decisions, and because every *judicial* proceeding is by a rule of common law, required to be in writing (3 Ph. Ev. 1012.)

(*c*) Special limited statutory proceedings of a *judicial* nature by tribunals erected by statute for special purposes. These proceedings, like those of the last class, must show affirmatively the existence of all facts on which jurisdiction depends, (3 Ph. Ev. 946).

(*d*) Limited and statutory proceedings involving *no* judicial function, but which rely solely on mere *ministerial* powers. In these it is manifest that an adjudication of jurisdiction being made by one having no judicial power, cannot be of *any effect* as evidence, if it relies solely on the fact of being an adjudication.

The docketing of a judgment under our law, (Just Ct., Act §70,) has been several times decided to be the exercise of a mere ministerial power.

The principles of this classification are elementary, but many decisions recognizing their correctness may be found.

Thus in Sutton vs., Uxbridge, 2 Pick. 436, (cited 3 Ph. Ev. 1106,)it appears that a Mass. Statute made 12 months residence of a pauper in a town a settlement there, unless a " warrant of caution" were served on him and returned to the Clerk of the Sessions and filed. A question of settlement having arisen, and no

such warrant being found on the files of the Sessions, it was sought to disprove the settlement by a statement of record written by the Clerk that such a warrant had been served and filed. But the Court held such evidence incompetent by reason of the non-judicial character of the proceeding, the clerk having no power but to file the warrant.

In Annesley v, Dixon, Rep. Tenn. Q. Anne, 104, (3 Ph. Ev. 1019) where it appeared that Irish commissioners were authorized by statute to sell forfeited estates of King James, but were not authorized to determine what estates were forfeited, it was decided that their adjudication that certain estates were such, was no evidence of forfeiture.

The principles of the last two cases are so elementary, that decisions exemplifying them *explicitly* are rare, while the principles themselves are relied on *implicitly* in many cases.

Taylor Ev. 1397 and cases,
" " 1403—4

It is well known law that recitals in sheriff's deeds and deeds by tax collectors do not furnish even *prima facie* evidence of the facts recited, in the absence of statutes making such recitals evidence. Such is the law in New Jersey ; and also in the following cases :

William vs. Peyton's Lessee, 4 Wheat. 77.
Parker vs. Rule's " 9 Cr. 64.
Stead's Executors vs. Course, 4 Cr. 403.
Jackson vs. Shephard, 7 Cowen, 88.
Hopper vs. Malleson, 1 C. E. G. 382,

In such cases the recitals, in absence of statute, are considered mere hearsay evidence, although the officer making the deed was also required to set up the advertisements recited.

Taylor on Ev. p. 1397, recognizes the well-known rule that a judicial decision by a ministerial officer is of no force—Thus where a Justice of the Peace was

given power to issue a distress warrant for ~~higher~~ highway rates, but had no power to adjudicate the validity of the rates, he was held to be a mere trespasser for issuing the warrant on a void rate.

Moulds vs. Williams, 303, 476 per Lord Denman.
Weaver vs. Price, 3 B. & Ad. 409 ; Morrell vs. Martin, 2 M. and Gr. 593 ; Amherst vs. Summers, 3 T. R. 372.
Nickolls vs. Walker, Cro. Car. 394.

2. **The formula is not evidence as being an entry of a clerk or officer.** The entry of it was a mere non-official, or extra-official act of the clerk and therefore can have no evidential force.

Among the exceptions to the rule against hearsay evidence, *Stephen on Evidence* article 36 classes certain entries in public records, " made in proper time by any person in the discharge of a *duty imposed* on him, by the law of the place in which such book register or record is kept." If the officer is not required to keep a register or record and yet keeps one, his entries therein are not, *as such*, of any evidential weight, or if he is required to make entries of certain facts and makes others, they are not evidence.

Taylor on Evidence, p. 1478, citing many English decisions.

Thus in England where statutes require clergymen of the national church to keep registers of marriages, showing names, dates and witnesses, the entries thereof are evidence of the facts entered, (1 Stark, Ev. 205). The reason why such entries are not mere heresay, is said to be in the fact that they are required to be made by officers, who are obliged under criminal penalties to make truthful entries (Taylor Ev. 1326) (See also 3 Ph. Ev. 1106). And to make the entry of any effect as evidence it must be (1) made by an officer

whose duty it was to make it, and (2) one that he was authorized to make. Thus while a register of marriages and baptisms by a minister of the established church is evidence of the marriages and baptisms therein entered. (Stark evidence Ev. 205-6.) May vs. May, Strange 1073 ; Lee vs. Meecock, 5 Esp. C. 177) yet such a registry in a dissenting chapel is not admissible to prove the facts entered (Starkie loc. cit.) because the former is one required to be kept, and the latter not. So also while entries of the former class are admissible evidence of the facts entered, they are not evidence of other facts entered but not required to be entered. Thus if the daybook used in making up the register of baptisms contain the letters " B. B." (*base born*) they are no evidence of illegitimacy, and for the reason above given. (May vs. May, supra,) Taylor on evidence, p. 1478, intimates that official books are evidence only of facts required to be entered. (See also Whittuck vs. Waters, 4. C & P. 375 ; Newham & Raithby 1 Phillim, 315 ; *Exparte* Taylor 1 Jac. & W. 1183.) Thus in Rex vs. Clapham, 4 C. & P., 26, Lord Tenterden held an entry of baptism to be evidence only of the baptism, but not of the child's birth, although its date was entered. S. P. Wihen vs. Law, 3 Stark, C. 63 ; Doe. vs. Bray, 8 B. & C. 8-13. And in D'Aglie, vs. Freyer, 13 L. J. N. S. Chy, an entry of baptism at an ambassador's chaplaincy was denied any evidential force, as being unrequired. Similar principles to those we insist on may be found in notes to Lord Torrington's case, 1 Sm. L. C. (last Ed.) 566. Many American cases are also in point. An unrequired entry in the register of deeds, although made by an officer in line of his duty, was held to be of no effect as evidence in Newell vs. Mc.Larney, 49 Mich. 232.

In Howe vs. Taylor, 9 Oreg. 288, where an official bond had been copied into a book, neither authorized nor required, the entry was held not to be evidence without other proof. For a similar reason in Massachusetts, the minutes of a board of selectmen were

held incompetent. Commonwealth, vs. McGarry, 135 Mass. 553. So in Georgia the letter " C" (" colored") on a voting list was denied any evidential effects, as being an entry not required ; White vs. Clements, 39 Ga. 232.

Many authorities establish that returns although generally admissible in an officer's favor, yet when not required by law, are no evidence in favor of the officer making them—(3 Phillips, Ev. 1046-1083, Hathaway & Goodrich, 5 Vt. 65) And even a return on returnable process has often been decided to be no evidence of any statement which the officer is not authorized to make in the return, e. g. a statement excusing the officer on ground of illness, Bruce vs. Dyall 5 Monroe 125–6, (3 Ph. Ev. 1084 citing several cases which are based upon the principle which governs the cases(*supra*) of an entry not *required* to be made. In Chambers vs. Bernasconi, 1 Tyr. 342, 4 Tyr. 531 in error, cited 1, Sm. L. C. 565, a return stating the place of an arrest was held no evidence, as being extra official.

So books of a notary, unless he be sworn, are inadmissible in the absence of a statute making them competent. Nicholls, vs. Webb, 8 Wheaton 326.

Following similar rules, Penn. Court held the memorandum book of a sheriff inadmissible to prove the facts therein entered Salmon vs. Rance, 3 Serg. & R. 314.

So a record by a parish Clerk of an oath not required to be recorded is no evidence—Colburn vs.Ellis, 5 Mass. 427 ; Wells vs. Battelle, 11 Id. 477.

The principles of the cases cited by us apply as well to entries by Clerks of Courts as to other officers, and many decisions show that an entry by such a clerk of a fact not required to be entered or recorded, must as evidence stand or fall by the rules which govern similar entries made by private persons.

Sutton vs. Uxbridge, (*ante*) ;
Wolf vs. Washburne, (*ante*) ;

in both of which entries, not required by law, were denied any evidential effect. The entry in the present case is doubly objectionable by reason of its being both *unauthorized*, and in its nature *judicial*, while the clerk was absolutely devoid of any judicial right to determine what is a *certified* copy.

In Perry v. Block 1 Mo. 484, it was held that a docket of a justice was no evidence of any fact except those which he was required to record.

In South Carolina where magistrates are not required to keep dockets, if they do keep one their entries therein are not evidence.

2 Hill, (S. C.) 420.

In 1 Greenleaf Ev. § 483 it is said to be necessarys to the official character of entries in a register or book that they be made by a person whose duty it was to make them and *in the mode prescribed* by law, if any—

The Statute regulating docketed judgments authorises only one entry (the transcript) and impliedly forbids others—which if made can have no force as evidence.

The last cited authority at §493 speaking of register entries and books says that they are "not evidence of any facts not required to be recorded in them," citing several English cases in the notes.

4. The "formula" is not within any of the exceptions to the rule excluding hearsay evidence.

The leading cases on the admissibility of book entries made by persons not parties are Price v. Lord Torrington, Vol. 1, Pt. 1, Sm. L. C. 563, and Higham v. Ridgeway Vol. 2, Pt. 1, Sm. L. C. 363. The former case decided that entries in books made by persons *since deceased*, and in the ordinary course of business, are evidence of the facts entered on proof of the handwriting of the person making the entry. The latter case decides that entries *against interest* by persons *since deceased* are evidence, on *proof of handwriting*, of the person making the entry.

The American notes to Lord Torrington's case 1 Sm. L. C. (last Ed.) p. 512 and 581, contain the principal authorities as to the admissibility of entries made in the ordinary course of business. It is there said that such entries *after proof of the death* of the maker of them and of his handwriting are evidence of the truth of the facts entered; but of course only if not otherwise objectionable as being too general, or setting out a special contract, etc. (p. 595 of last cited authority). Page 572 denies any admissibility to such entries if the maker is still alive, for they are mere secondary evidence (p. 601).

And in the notes to Higham v. Ridgeway, 2 Sm. L. C. (last Ed.) p. 384, the American editors cite a learned opinion of Judge Dillon in Mahaska v. Ingolls, 16 Iowa, 81, as to the principle of Higham v. Ridgeway. Even if the entry be one against the interest of the maker of it, it is inadmissible *unless his death be shown* and handwriting proven; and of course it may be objectionable on other grounds, as being too general, or a conclusion of law, etc.

In the present case there is no evidence either of the handwriting of the person making the entry or of his decease. Although John Kennedy was county clerk at the time of the alleged docketing, no evidence appears that he is dead. In the absence of such evidence he should have been produced, unless the entry is of such a nature as those of the marriages and baptisms spoken of ante p 458, which the enteror was required to make. It is quite manifest that they are not of such a nature. Inslee vs. Prall, 4 Zab. 458, following Lord Torrington's case, is the leading authority in New Jersey as to the evidential effect of book entries; it decides that such entries are not evidence of money lent, nor of unliquidated damages; nor of a settlement or a balance due on a settlement; Prest v. Mersereau, 4 Hal. 268; nor of the *contents of a bond, note, receipt or special agreement entered therein*; Wilson v. Wilson, 1 Halst. 95, nor of a sum due upon contract, Dauser v. Boyle, 1

Har. 395; nor is a charge wanting in particularity, such as "to sundries" admissible, Penn., 827, 603, 550, 976; 3 Hals. 130.

From analogy then it seems perfectly clear that the mere statement in the *formula*, "I have also filed a *certified copy* of the state of demand" can be of no more effect as evidence than an entry in books of account that a defendant was indebted to the plaintiff "*on bond*" or "contract." If a document were produced at a jury trial as a "certified copy" the question whether it was such certainly would be one of law to be determined by a *judge*. To allow the mere entry "certified copy" in the "formula," without showing the document itself, to be evidence that the document (if any) referred to was such, would be contrary to elementary law. The entry is one of a mere conclusion as to the legal effect of a document; and, if the clerk himself were produced as a witness in the cause to prove the filing of a certified copy of the demand he could not give such evidence verbally, but would be obliged to show the paper, that he might swear was filed by him in order that the court might determine whether in law it was "a certified copy of the state of demand."

There is nothing in the exceptions to show whether the document on file (Schedule D. 2d.) is the original state of demand; but, if the original were sent up by the Justice, the statute requiring as it does the filing of a "certified copy" would not be complied with. *Ita lex est scripta*, and no court can assume to legislate against the statute.

Nor does the mere fact that the judgment in the Justice's court was by confession render unnecessary the filing of certified copy of the state of demand in the clerk's office. A state of demand *was filed* with Justice see schedule, D.2 a, and it is not now necessary to determine whether the statute will authorize a docketing of a judgment by confession in a case where no demand was filed with the Justice.

III.

The mortgage (p. 5 of record) having been paid (p. 22 of record) and cancelled of record (IV exception p. 6 of record) can furnish no defence of this action.

The statute (Rev. "Mortgages," § 23, passed 1831) makes the *minute* of cancellation of record "an absolute bar to and discharge of the said entry registry and mortgage."

If there were no decisions interpreting this section, its words would be enough to maintain the present point. For a mortgage could certainly not be set up as a defence if its cancellation of record were a *full and absolute bar* to it.

But decisions are not wanting. In Garwood vs. Eldridge, 1 Gr. Ch. 145, Chancellor Pennington said that one who cancelled a mortgage of record, was clearly without remedy at law.

Miller vs. Wack, Sax. 204, decides that the mere cancellation was a bar.

Trenton Banking Co. vs. Woodruff, 1 Gr. Ch. 117, followed the last case, but an issue was directed to determine where the cancellation had not been made by mistake of fact.

In Frazee vs. Inslee, 1 Gr., ch. 239, a mortgagee, after obtaining a deed for the mortgaged premises, cancelled his mortgage of record. The Chancellor refused to restore it, as such a restoration would destroy the value of a public record.

In the following cases, also, the relief by restoration was refused *in equity*: Wilson vs. Brown, 2 McC., 279; Bentley vs. Whittemore, 3 C. E. G., 356; Hampton vs. Nicholson, 8 C. E. G., 423. *A fortiori* would it be refused at at law. Garwood vs. Eldridge is followed in 16 Cal., 195.

In Bacon vs. Van Schoonhoven, 19 Hun., a satisfaction of record, under a statute not so comprehensive as ours, was held equivolent to a reconveyance to the mortgagor.

Shields vs. Lozear, 5 Vroom, 496-507, holds that a

payment to a mortgagee *post diem*, without a cancellation, if accepted, revests the legal estate in the mortgagee.

The written agreement (p. 23 of record), being *res inter alios*, certainly cannot revive a dead mortgage. No authority is necessary for this proposition, the contrary of which is a manifest absurdity.

IV.

Mr. Garrick's evidence (p. 9), as to an alleged custom, should have no effect on the present controversy.

Of the seven counties in which he has searched the returns, he testifies to but six counties, and one county he finds in which four-fifths of the returns are good; one in which about one-fourth of them are good; one in which one-tenth are good; two in which one-third are good.

Can any general custom be inferred from such meagre evidence?

No authority can be shown by the defendant where the judicial construction of a statute has been changed by *evidence* of custom. Neither *Sedgwick nor Potter's Dwarris* mention any rule to maintain such evidence, which is only admissible (1) when the meaning of the act is doubtful, and (2) where there are no judicial interpretations of it.

As to the bearing of *custom* or *usage* on statutory construction, the following rules bearing on the present case are thoroughly established.

(1.) Where the words of an act are of doubtful meaning, general usage not opposed to the act and in absence of judicial interpretation may be looked at in construing the act.

(2.) The usage must be general—

(3.) The meaning of a general law can not be governed by local usage, even for the locality where the usage exists.

Clarks Browns Us., & Cust. 181 n. 8.
Rex. v. Saltren Cald. 441.
Maxwell on Statute 275.

(4.) After a judicial decision as to the meaning of a statute usage will not be consulted to obtain a different meaning.

Sedgwick on Statutes 215.
Wilberforce on Statutes 142–8.
Williams v. Newton.

(5.) Mere evidence of a vulger and common acceptation of the words of an act does not prove such a usage as can give any meaning to them.

Shepherd v. Gosnold, Vaughan's R. 170.

The judgment below should be reversed.

D. W. McCREA,
Atty. of Plaintiff.

W. B. GILLMORE,
Of Counsel.

Clerk's Table
No 31

DAVISON & CO., PRINTERS, 27 Montgomery Street, Jersey City.

N. J. Court of Errors and Appeals.

ON WRIT OF ERROR TO HUDSON CO. CIRCUIT COURT.

WILLIAM BAGNALL,
Plaintiff in Error

vs.

SARAH J. POINIER.
Defendant in Error.

Pleadings.

HUDSON COUNTY, *ss.:*

Sarah J. Poinier, the defendant in this action was summoned to answer unto William Bagnall, the plaintiff in a plea of ejectment; and thereupon the said plaintiff, by William B. Gillmore, his attorney, demands of the said Sarah J. Poinier, the possession of all that certain lot, piece or parcel of land and premises with the appurtences, situate, lying and being in the city of Jersey City, in the county of Hudson and state of New Jersey, and described as follows, etc.:

(DESCRIPTION OF PREMISES.)

And the plaintiff says that his right to the possession of the same accrued on the sixth day of July, A. D. 1871, and that the defendant wrongfully deprives

him of the possession thereof to his damage one thousand dollars.

And the said defendant, by John Garrick, her attorney, appears and defends this action, and says she is not guilty of the injury, whereof the said William Bagnall has complained in his declaration, nor of any part thereof, and of this she puts herself upon the country and the said William Bagnall doth the like.

(The above cause was tried by the Court, a jury being waived, and judgment was rendered for the defendant, July 19, 1886, as appears of record.)

HUDSON COUNTY CIRCUIT COURT.

WILLIAM BAGNALL,

vs.

SARAH J. POINIER.

In Ejectment.
Bill of Exceptions

1. Be it remembered, that at the April Term of the above named Court, A. D. 1886, the above cause came on for trial before the Court, a jury being waived by the plaintiff and defendant; and the defendant admitted, that on the twenty-eighth day of September, A. D. 1872, the plaintiff was seized in fee simple of the premises in question herein, and was then in possession thereof; and the plaintiff for further evidence in his behalf offered in evidence the bill of particulars of the defendant's title, duly served on the plaintiff, according to the usual practice, and of which a true copy is hereto annexed, in a schedule marked Schedule P. 1.; and the plaintiff having rested, the defendant pro-

duced as a witness in her behalf, John Garrick, all of whose evidence is hereto annexed in a schedule marked D. 1., to which, and all of which evidence of said defendant, the plaintiff duly objected as immaterial and incompetent, and requested the Court to rule it out, and refuse to consider it. To which the Court ruled to admit the evidence, and the plaintiff duly prayed an exception, and it is duly sealed accordingly.

M. M. KNAPP, [L. S.] 10
J. S. C.

II. And the defendant further produced and offered in evidence (for the purpose of establishing the docketed judgment set up in her bill of particulars) the following:

(a) Pages 376-7 of Liber 3 of Docketed Judgments of Hudson County, on which appears a statement or entry of which a true copy is hereto annexed in a Schedule marked D. 2 a. 20

(b) A number of papers fastened together with a brass fastening, and which were———

(1) An affidavit of Charles L. Corbin, of which Schedule D. 2 b is a true copy. 30

(2) A paper writing of which Schedule D. 2 c hereto annexed is a true copy.

(3) A paper writing of which Schedule D. 2 d hereto annexed is a true copy.

(4) A paper writing of which Schedule D. 2 e hereto annexed is a true copy.

(5) A transcript signed and sealed by Thomas Aldridge, Justice of the 40

Peace, and of which D. 2 f is a true copy.

The said bundle was endorsed as follows :

940—Fol. 215.

Court for the trial of small causes before Thomas Aldridge, Justice.

FRANK E. NOBLE,
Plaintiff,
vs.
WILLIAM BAGNALL,
Defendant.

Dated Sept. 27, 1872.
Debt, 86.28.
Costs, 2.05.
Docketing, 2.10.

Filed in the Clerk's office of the County of Hudson, N. J., on the 28th day of September, A. D. 1872, and recorded in Liber 3 of docketed judgments for such County, page 376.

JOHN KENNEDY,
Clerk.

And all the foregoing last five papers in the aforesaid bundle were filed in the office of the Clerk of the Court of Common Pleas, of Hudson County, on September 28, 1872.

(g) The original execution in due form, (issued on said alleged docketed judgment,) and which was first duly recorded in Liber 1, of Hudson Co. Ex'ns on Docketed Judgments; also

the Sheriff's levy and deed under said execufion in due form of law the statement of sale, and the Sheriff's return—

The foregoing evidence, together with that mentioned in Exception I. (ante) and Exception IV. (post) was all of the evidence in this cause relating or relevant to the docketing of any judgment, and upon the said evidence in this, and in said exceptions mentioned the said plaintiff requested and moved the Court to find as a matter of law that no docketed judgment had been established or proven by the defendant, which the Court refused to find, and found and decided that the defendant had in point of law established a valid docketed Justice's Court Judgment, to which ruling the plaintiff duly prayed an exception, and it is sealed accordingly.

M. M. KNAPP, [L. S.]
J. S. C.

III. And the said defendant was sworn in her own behalf, and testified as in Schedule D. 3, hereto annexed, which contains all her testimony. To which, and to all of which testimony of said defendant the plaintiff duly objected as irrelevant and illegal, and the Court overruled the plaintiff's objection,sto which ruling the plaintiff duly prayed an exception, and it is sealed accordingly.

M. M. KNAPP, [L. S.]
J. S. C.

IV. The defendant further offered in evidence a mortgage on the premises in question made by the plaintiff to Jacob Van Wagonen, dated and duly proved, and recorded in Liber 97 of mortgages for Hudson County, p. 46; and the defendant further offered in evidence an instrument in writing duly proved, and of

which a true copy is hereto annexed in a schedule marked Schedule D. 4.

The plaintiff then in rebuttal produced the deposition of John G. Fisher, which had been taken *de bene esse*, and was used as evidence by consent, and of which a true copy is hereto annexed in a schedule marked Schedule P. 2, and also produced and offered in evidence, Liber. 5, Clerk's Register, Hudson County, page 450, case 940, which shows the entry of which a copy appears in Schedule P. 2 hereto annexed; and the plaintiff also produced and offered in evidence the aforesaid Liber. 97 of mortgages, and it appearing, that on the margin of the record of said mortgage, the Register of Hudson County had written the following minute:

"The original mortgage having been presented to "me, this June 27, 1872, by Sarah J. Poinier, receipted in full by Jacob Van Wagonen, the mortgagee, and the seals torn off, I hereby cancel it of record."

J. B. CLEVELAND,
Register.

And the name J. B. Cleveland was signed thereto by the said J. B. Cleveland, then Register of said County, and the plaintiff then declared his case closed. This exception together with the three foregoing exceptions state all the evidence produced by the said defendant, and thereupon the plaintiff moved the Court to find as a matter of law that the plaintiff was, as against the defendant, entitled to the possession of the said premises, and moved the Court to give judgment in favor of the plaintiff, and against the defendant for the possession of the said premises, which the Court refused to do, and gave judgment in favor of the defendant; to the ruling of the Court in which regard the plaintiff duly prayed an exception, and it is sealed accordingly.

M. M. KNAPP, [L. S.]
J. S. C.

SCHEDULE P. 1.

HUDSON COUNTY CIRCUIT COURT.

SARAH J. POINIER,

adsm.

WILLIAM BAGNALL.

In Ejectmeut.
Defendant's Bill of Particulars.

To DAVID W. MCCREA, ESQ.,
Attorney for Plaintiff.

Take notice that the following is a bill of particulars of the claim or title of the defendant, to the lands and premises in question in the above stated cause.

I. A transcript of a judgment recovered by Frank E. Noble, against the plaintiff, William Bagnall, in the Court for trial of small causes, before Thomas Aldridge, Esquire, a Justice of the Peace, of the County of Hudson, on the twenty-first day of September, eighteen hundred and seventy-two, for eighty-six dollars and twenty-eight cents debt, and two dollars and five cents costs, filed in the office of the Clerk of the Court of Common Pleas of said county, on the twenty-eighth day of September, eighteen hundred and seventy-two, together with a certified copy of the state of demand in said action, and a certified copy of the return of the Constable, to whom execution was delivered by said Justice of the Peace on said judgment, and an affidavit of Charles L. Corbin, attorney for said Frank E, Noble, all filed with said transcript at the same time.

II. Book 3, of docketed judgments for said County of Hudson, page 376, &c., containing the record of the

docketing of said judgment by the Clerk of the Court of Common Pleas of said County.

III. An execution issued upon said docketed judgment, to the Sheriff of said county, dated September 28, 1872, now on file in the office of the Clerk of said Court of Common Pleas, and the levy and return thereto annexed.

IV. Book 1, p. 72 of executions of docketed judgments for said county, containing the record of said last mentioned execution.

V. A deed from John Reinhardt, Sheriff of Hudson County, to Thomas Atcheson, dated October 2, 1873, proved and acknowledged, October 17, 1873, before Garrick M. Olmstead, Master in Chancery, and recorded November 18, 1873, in the Clerk's, (now Register's) office of said county, in book 259 of deeds, page 528. &c., which deed recites the said last mentioned execution and levy thereunder upon the premises in question in this suit, advertisement, publication and sale, and conveys said premises in fee to said Thomas Atcheson.

VI. A deed from Thomas Atcheson and Margaret, his wife, to the defendant, Sarah J. Poinier, dated December 1, 1873, acknowledged same day before John Garrick, Master in Chancery, and recorded December 2, 1873, in the Clerk's (now Register's) office of said county, in book 265 of deeds, page 328, &c., which conveys the premises in question in this cause to said Sarah J. Poineer in fee.

VII. A mortgage made by the plaintiff, William Bagnall to Jacob Van Wagonen, upon the premises in question in this cause, dated April 8, 1872, acknowledged July 20, 1872, before M. T. Newbold, Master in Chancery, and recorded July 26, 1872, in the

Clerk's (now Register's) office of said County of Hudson, in book 97 of mortgages, page 46, &c., now held by the said defendant, Sarah J. Poinier.

Yours respectfully,
J. GARRICK,
Attorney for Defendant.

Dated February 20, 1886.

10

SCHEDULE D. 1

JOHN GARRICK, being duly sworn, testifies as follows:

I examined the title when Mrs. Poinier purchased and attended to the transfer of the title for her. Out of the $800. which she paid the taxes for 1872, which were a lien on the premises were paid, amounting to about $47.71, and (Mr. Gillmore objects to this evidence, and prays exception if it be admitted.) also the 20 taxes for the year 1873—$33.20.

Mr. Atchison paid them out of the $800., and redeemed a tax sale for the arrears of taxes of 1871—$9.92.

The property had been sold for taxes of 1871, and Atchison paid $9.92 to redeem that sale. I have the receipts for those two payments; they were taxes against the property; these taxes all accrued before Mr. Atchison became owner of the property; the tax sale took place Sept. 26, 1873, which was, I believe 30 prior to the date of Atchison's deed.

THE COURT:

Q. Who became the purchaser at the tax sale?

A. The city of Jersey City, and no transfer of the city's right had been made.

I found that there were several judgments against Wm. Bagnall, all a lien upon these premises. One was a judgment in the Court of Common Pleas, on bond, and warrant, and confession in favor of Thomas 40

Atchison against Wm. Bagnall for $102. Another was a judgment in the Hudson Circuit Court, recovered by Henry Albers against Wm. Bagnall, April 6, 1872 for $126.73 damages, and $30.09 costs. Another was a judgment in the Hudson Circuit Court in favor of Henry Blohm against William Bagnall and others for $112, and costs $25.05. Another was a judgment in the Hudson Circuit Court in favor of Norman W.Dodge,and another against Wm.Bagnall, entered Dec. 20,1872,for $222.43 damages, and costs, $30. 68. Another was a judgment in the Hudson Court in favor of Peter H. Treadwell against Wm. Bagnall, recovered Dec. 20, 1872, for $78.34, and $29.05 costs.

All these judgments and the taxes were paid by Mr. Atchison out of the $800. purchase money paid by Mrs. Poinier, about the time of the sale to Mrs. Poinier. I understood that Atchison was Bagnall's agent.

I hadn't proof of that, except what Atchison himself told me ; Atchison died a year ago. I have examined the records of docketed judgments in the counties of Hudson, Bergen, Passaic, Morris, Essex, Union and Mommouth, commencing from the year 1848, and extending down to about 1872 or 1873, just prior to and about the time of the docketing of this judgment.

In the county of Bergen, I do not find a single docketed judgment where the return of the Constable has the word could or its equivalent, or any equivalent word in the return from the year 1848 to 1873. In the county of Hudson, I have not made a complete examination, but I have examined the records from the year 1848 to 1857, and examined every return between those dates.

(Mr. Gillmore. I don't see the materiality of this.)

I want to show what the custom has been, and how the act has been practically construed from the time of its passage down to the year 1873 throughout the state, from 1857 down to 1873. I have examined sev-

eral returns, but not all; I find in Hudson County, between 1848 and 1857 that about three quarters of the returns or a little more have not the word could or any equivalent word in the return of the Constable. I find that about one quarter of the returns between those dates in Hudson Co. had the word could or some equivalent word, such as able.

In Union County, I have examined every return between the years 1848 and 1873, and I find that nine-tenths of the returns have not the word could or any equivalent word in the return of the Constable.

In the remaining one-tenth, the word could or an equivalent appears

In the county of Morris, I did not examine the first hundred pages, and then I examined the first ten pages of every subsequent hundred from 1848 to 1873, and I find that the proportion of the returns which have not the word could or its equivalent was about two-thirds of the proportion that have it.

I made a similiar examination in Monmouth County, under the same arbitrary system, that is to say, I examined the first hundred pages of returns, and then I examined the first ten pages of each subsequent hundred to the year 1873, and found the proportion to be the same as in Morris Co., that is to say, two-thirds of the returns did not have the word could, and about one-third did.

In the county of Essex, I examined the returns in the same arbitrary way, and I find there that the proportion of the returns that had the word could or able was about four out of every five, and that is the only county of six which I examined where the majority of the returns did have the word could or its equivalent.

I also notice, that, as a rule, the returns that had the word could or its equivalent, made a complete sentence with the subject and predicate, and that the returns which did not have the word could or its equivalent did not make a complete sentence, but was simply a participial phrase,without a subject or predicate So far as my experience goes, the custom in the major-

ity of cases has been to treat a return which was not a complete sentence, and which was simply a participial phrase, as meaning that the officer could not find.

By The Court :

Q. Treated where?

A. Treated by the Bar generally as a sufficient compliance with the Act on the ground that it was equivalent to a return of nulla bona, which means the same thing.

Cross-examination by Mr. Gillmore :

Q. Before 1873, do you know of any case in which there has been any controversy, as to what was a valid return under the Act in dispute?

A. No, sir.

Q. Did you search to see whether any Sheriff's sales had been made on any of the returns, or on any of the returns you searched for?

A. No.

Mr. Gillmore desires it to be entered, that he objects to all testimony already given as to the payment of the judgments, taxes, or any other liens upon the premises, as to the redemption of the alleged sale for taxes, as to any transactions or conversations with Atchison, as to the alleged custom as to the returns. These objections cover all the testimony that has been given.

The Court :

There is a record in the City Hall of sales for taxes.

Mr. Garrick:

There is. When the City buys in at a sale, it simply records the sale. I do not think there is any formal declaration of sale where the city buys ; they simply record the sale.

Adjourned to June 5, 1886.

SCHEDULE D. 2 a.

HUDSON COUNTY COMMON PLEAS.

FRANK E. NOBLE,	Debt, $86.28.
	Costs, 2.05.
vs.	Docketing, 2.10.
	$90.43.
WILLIAM BAGNALL.	

Be it remembered, that on this twenty-eight day of September, A. D. eighteen hundred and seventy-two, I, John Kennedy, Clerk of the Court of Common Pleas, holden in, and for the county of Hudson, at the request of Frank E. Noble, the plaintiff above named, have filed in my office a transcript of the judgment and proceeding in a certain cause lately tried before Thomas Aldridge, a Justice of the Peace, in and for said county, wherein Frank E. Noble was the plaintiff, and William Bagnall, the defendant, and wherein judgment was entered on the twenty-first day of September, A. D. eighteen hundred and seventy-two, in favor of the plaintiff, and against the defendant, for the sum of eighty-six dollars and twenty-eight cents debt, and two dollars and five cents costs.

I have also filed, as aforesaid, certified copies of the state of demand, return of Constable, and affidavit of Charles L. Corbin, attorney for the above named plaintiff, stating that at the time of filing said transcript, there was still due and owing said plaintff, the sum of eighty-nine dollars and thirty-three cents, the whole amount of the said judgment with interest from Sept. 21st, 1872, and that he verily believes said defendant is not possessed of sufficient goods and chattels to satisfy the amount so due which said transcript now here written, and in words and figures is as follows:

September 13, 1872.

	FRANK E. NOBLE,	
	vs.	*In Debt*, $90.
10	WILLIAM BAGNALL.	

Issued a summons in the above stated case, returnable before me on the twenty-first day of September instant, at 10 o'clock in the forenoon. Constable Henry E. Kline returned said summons endorsed as follows:

The said William Bagnall, not being found, I served
20 the within summons on him, this 14th day day of September,1872, by leaving a copy at his house in the presence of a member of his family, a free person of age of fourteen years,who was informed by me of the contents thereof.

HENRY E. KLINE.

Both parties appeared. Plaintiff filed his state of demand, defendant confessed judgment for eighty-six dollars and twenty-eight cents debt, and two dollars
30 and five cents costs of suit. Counsel for plaintiff ordered an execution, which issued and directed to Henry H. Kline, Constable, who returned said execution indorsed as follows :

I return the within execution this 28th day of September, 1872, unsatisfied no goods or c attels found within my county belonging to the defendant, to make any part of the debt and costs on this execution, except that which is exempt by law.

HENKY E. KLINE,
40 Constable.

I hereby certify the foregoing to be a true copy of the proceedings in the above stated cause, as the same is reeorded in my docket.

In witness thereof, I have set my hand and seal this twenty-seventh day of September, in the year of our Lord one thousand eight hundred and seventy two.

Signed, THOMAS ALDRIDGE, [L. s.]
Justice of the Peace.

Received and docketed, Sept. 28, 1872.

JOHN KENNEDY,
Clerk.

SCHEDULE D. 2 b.

HUDSON COUNTY COMMON PLEAS.

FRANK E. NOBLE,
vs.
WILLIAM BAGNALL.
In Debt.

HUDSON COUNTY, *ss.:*

Charles L. Corbin, attorney for the above named plaintiff, being duly sworn on his oath says :

That at the time of filing the foregoing transcript of proceedings and judgment, the whole amount thereof together with the subsequent costs and charges, amounting to the whole to the sum of eighty-nine dollars and thirty-three cents, with interest from September 21st, A. D. 1872, is still due from the aforesaid de-

fendant, and that he believes said defendant is not possessed of goods and chattels sufficient to satisfy the amount due.

CHARLES L. CORBIN.

Sworn to a subscribed at Jersey City, this 28th day of September, A. D. 1872.

M. T. NEWBOLD,
Master in Chancery of New Jersey.

SCHEDULE D. 2 c.

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

To HENRY H. KLINE,
Constable.

Whereas judgment was given by me, on the twenty-first day of September, 1872, against William Bagnall, at the suit of Frank E. Noble, for the sum of eighty-six dollars and twenty-eight cents debt, and one dollar and ninty-five cents costs.

You are, therefore, agreeably to law to levy upon his goods and chattels, and sell as much as to pay the debt and all legal costs, and make return of your proceedings within thirty days, according to law.

Given under my hand and seal, this twenty-fourth day of September, 1872.

THOMAS ALDRIDGE,
Justice of the Peace.

Endorsement.

EXECUTION,

vs.

WILLIAM BAGNALL.

Jndgment, $86.28.
Costs, $1,95.
Execution, $1.25.

I return the within execution, this 25th day of September, 1872, unsatisfied—no goods or chattels found within my county belonging to the defendant, to make any part of the debt or costs on this execution, except that which is exempt by law.

HENRY H. KLINE,
Constable.

SCHEDULE D. 2 d.

HUDSON COUNTY, *ss.:*

Court for the trial of small causes before Justice Thomas Aldridge.

FRANK E. NOBLE,
Plaintiff,

vs.

WILLIAM BAGNALL,
Defendant.

In Debt.
State of Demand

The plaintiff demands from the defendant, the sum of ninety dollars, for professional services in medical

advice, and attendance at Jersey City, between the twenty-fourth day of May and the twenty-first day of November, A. D. 1869, together with interest, as showing by the following account:

Jersey City, Sept. 13, 1872.

William Bagnall To Frank E. Noble, M. D., Dr.

1869.				
May	25,	To office advice for wife	$ 1.00	
"	29,	" visit "	1.25	
July	1,	" "	1.25	
"	20,	" " forself	1.25	
Sept.	2,	" office advice for wife	1.00	
"	4, 5, 7, 9, 11, 13, 14, 15, 16, 17, 18, 19, 20, 22, visits for wife,		18.75	
"	24, 26, 28, 30		5.00	
Oct.	1, 2, 3, 5, 8, 11, 12, 13, 14, 23, 23, 24, 26, 28, 29, (2) 30, 31		21.25	
Nov.	1, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 15, 16, 17, 18, 19, 20		21.25	$72,00
			——	18.00
				$90.00
				72.00
		Interest at 7 per cent. to date of judgment		18.00
		Amount claimed		$90.00

FRANK E. NOBLE,
Plaintiff.

SCHEDULE D. 2 e.

SUMMONS.

STATE OF NEW JERSEY, } ss:
HUDSON COUNTY, }

To any Constable in said county; summon William Bagnall to appear before me, at my office, Newark ave., in the city of Jersey City, on the twenty-first day of September, at ten o'clock in the forenoon, to answer Frank E. Noble, in a plea of debt, demand ninety dollars—$90.00. Hereof fail not.

Given under my hand and seal, this thirteenth day of September, 1872.

THOMAS ALDRIDGE,
Justice of the Peace.

Endorsement.

Summons in Debt.

FRANK E. NOBLE,

vs,

WILLIAM BAGNALL.

Demand, $90.
Cost, 1.70.

The said William Bagnall, not being found, I served the within summons on him this 14th day of Septem-

ber, 1872, by leaving a copy thereof at his house in presence of a member of his family, a free person of the age of fourteen years, who was informed by me of the contents thereof.

HENRY H. KLINE,
Constable.

SCHEDULE D. 2 f.

September 13, 1872.

FRANK E. NOBLE,		
	vs.	*In Debt*, $90.
WILLIAM BAGNALL,		

Issued a summons in the above stated case, returnable before me on the twenty-first day of September instant, at ten o'clock in the forenoon. Constable Henry E. Kline returned said summons endorsed as follows :

The said William Bagnall, not being found, I served the within summons on him, this 14th day of September, 1872, by leaving a copy at his house in the presence of a member of his family, a free person of the age of fourteen years, who was informed by me of the contents thereof.

HENRY E. KLINE.

Both parties appeared. Plaintiff filed his state of demand, defendant confessed judgment for eighty-six dollars and twenty-eight cents debt, and two dollars and five cents costs of the suit. Counsel for plaintiff ordered an execution, which issued and directed to Henry H. Kline, Constable, who returned said execution indorsed as follows :

I return the within execution this 28th day of September, 1872, unsatisfied no goods or chattels found within my county belonging to the defendant to make any part of the debt and costs on this execution, except that which is exempt by law.

HENRY E. KLINE,
Constable.

I hereby certify the foregoing to be a true copy of the proceedings in the above stated cause, as the same is recorded in my docket.

In witness thereof, I have set my hand and seal, this twenty-seventh day of September, in the year of our Lord one thousand eight hundred and seventy-two.

Signed, THOMAS ALDRIDGE, [L. S.]
Justice of the Peace.

Received and docketed, Sept. 28, 1872.

JOHN KENNEDY.
Clerk.

SCHEDULE D. 3.

SARAH J. POINIER, testifies for the defense as follows:

I am the defendant; I have been in possession of the premises since 1872, I think, or 1873: I don't know which; I purchased the premises from Thomas Atchison; the purchase price was $2,300; there was a mortgage of $1,500 on the property, and I bought

subject to that; the price included the mortgage; I paid $800. which went to pay Mr. Bagnall's debts, taxes or something; I paid that $800. to Mr. Atchinson, but it was used to pay Mr. Bagnall's debts, taxes and so on. I paid the $1,500 to Mr. Van Wagonen, on May 20, 1876, but in the meantime I had paid interest to Mr. Van Wagonen, the interest was regularly paid.

(Mr. Gillmore objects to all this line of evidence.)

(The Court will take the testimony subject to objections and exceptions, if it is finally allowed to stand in evidence.)

Q. After you went into possession of the premises you never heard of Mr. Bagnall?

A. No, sir; I knew nothing about him.

Q. You then supposed you owned this property?

(It is understood that this whole line of evidence is objected to).

A. Of course, I supposed I did.

Q. How did you come to pay this money to Mr. Van Wagonen?

A. He held a mortgage on the property, and I supposed I had to to pay it to him.

Q. You didn't know that Mr. Bagnall had any claim against it?

A. I never knew anything about Mr. Bagnall, until after I went there; then I heard that he had built those two houses.

Q. When did you ever hear of any claim of Mr. Bagnall on this property?

A. I never knew he had any claim until the summon was sent to me to vacate in this case. That was

the first intimation I had that anybody else had any claim against this property.

THE COURT:

No bill has ever been filed to restore this mortgage?

MR. GILLMORE:

A. No, sir.

MR. GARRICK:

The parties themselves have restored it as far as they can.

SCHEDULE D. 4.

Whereas, William Bagnall did on the eighth day of April, eighteen hundred and seventy-two, execute and deliver unto Jacob Van Wagonen, a bond and mortgage on a lot of land and premises, situated on the westerly side of Wallis street, in Jersey City, Hudson County, New Jersey, to secure the payment of fifteen hundred dollars, on the eighth day of April, eighteen hundred and seventy-five, with interest thereon at the rate of seven per cent. per annum, which mortgage was recorded on the twenty-sixth day of July, eighteen hundred and seventy-two, in the Clerk's office of said county of Hudson, in book 97 of mortgages, page 46, &c.

And whereas, the premises described in said mortgage were sold and conveyed by John Reinhardt, Sheriff of said county, to Thomas Atchinson, by deed dated October second, eighteen hundred and seventy-three, and recorded November eighteenth, eighteen hundred and seventy-three, in book 259 of deeds for said county of Hudson, page 528, &c, upon an execution issued out of the Court of Common Pleas of the county of Hudson, upon a judgment recovered in the Court for the trial of small causes before Thomas Aldridge, Jus-

tice of the Peace, in and for said county, in favor of Frank E. Noble, plaintiff, against the said William Bagnall, defendant, and docketed in said Court of Common Pleas.

And whereas, the said Thomas Atchison and his wife, did sell and convey said mortgaged premises to Sarah J. Poinier, by deed dated December first, eighteen hundred and seventy-three, and recorded December second, eighteen hundred and seventy-three, in the Clerk's office of said county, in Book 265 of deeds, page 328, &c.

And whereas the said Thomas Atchison did on the first day of December, eighteen hundred and seventy-three, pay to the said Jacob Van Wagonen, the sum of one hundred and twenty dollars and thirteen cents, being the amount of interest accrued on said bond to that time, and the said Sarah J. Poinier did between the first day of September, eighteen hundred and seventy-three, and the twentieth day of May, eighteen hundred and seventy-six, pay to the said Jacob Van Wagonen the sum of two hundred and sixty-two dollars and fifty cents, being the amount of interest accrued on said bond, between those dates, and on the day and year last aforesaid did pay to the said Jacob Van Wagonen, the sum of fifteen hundred dollars, the amount of the principal of said bond.

And whereas, said Sarah J. Poinier, on the day and year last aforesaid, did procure the said Jacob Van Wagonen to sign a receipt on said bond and on said mortgage, and a request on said mortgage to the Register of Hudson County to cancel the same of record; and the said Sarah J. Poinier did thereupon tear off the seal from said mortgage, and on the twenty-eighth day of June, eighteen hundred and seventy-six, did cause said mortgage to be cancelled of record.

And whereas, it is now claimed by said William Bagnall, that the docketing of said judgment in said Court of Common Pleas was defective and void, and that said Thomas Atchison and Sarah J. Poinier acquired no title to said mortgaged premises under the

said deeds from John Reinhardt, Sheriff to said Thomas Atchison, and from said Thomas Atchison and wife to said Sarah J. Poinier.

And whereas said payments of interest and principal were not made on behalf of said William Bagnall, but only on behalf of said Thomas Atchison and Sarah J. Poinier respectfully, and it was not intended by the receipts on said bond, or the cancellation of said mortgage to discharge the lien and incumbrance thereof upon the said mortgaged premises as against any estate or interest, which the said William Bagnall might have or claim in said mortgaged premises, but only as against such estate or interest as the said Sarah J. Poinier had therein.

Now, therefore the said Jacob Van Wagenen, and the said Sarah J. Poinier in consideration of the premises, do hereby agree that the said receipts be, and the same are hereby vacated, and that the said cancellation of the said mortgage and tearing off the seal thereof be, and the same are hereby vacated, and do further agree that the lien and incumbrance of the said mortgage upon the said mortgaged premises be, and the same are hereby restored as fully as the same existed before the said receipts and cancellation were made.

And the said Jacob Van Wagenen in consideration of the said payments above mentioned, and the further sum of one dollar to him in hand paid by the said Sarah J. Poinier, has granted, bargained, sold, assigned, transferred and set over, and by these presents do grant, bargain, sell, assign, transfer and set over unto the said Sarah J. Poinier, the said Indenture of mortgage above mentioned, together with the lands therein described, and the covenants and stipulations therein contained, and the bond or obligation therein recited, and the money due and to grow due thereon with the interest. To have and to hold the same unto the said Sarah J. Poinier, her heirs, executors, administrators or assigns forever. Subject only to the proviso in the said Indenture of mortgage mentioned.

And the said Jacob Van Wagenen, doth hereby make, constitute and appoint the said Sarah J. Poinier, his true and lawful attorney, irrevocable in his name or otherwise, but at her proper costs and charges to have, use and take all lawful ways and means for the recovery of the said money and interest, and in case of payment to discharge the same as fully as the said Jacob Van Wagenen could do if these presents were not made.

In witness whereof, the said parties have hereunto set there hands and seals, this fifth day of July, A. D. eighteen hundred and seventy-six.

JACOB VAN WAGENEN, [L. S.]
SARAH J. POINIER, [L. S.]

Signed, sealed and delivered in the presence of

WM. G. BUMSTED.

J. GARRICK as to Sarah J. Poinier.

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

Be it remembered, that on the eighth day of May, in the year one thousand eight hundred and eighty-six, before me the subscriber, one of the Masters of the Court of Chancery of New Jersey, personally appeared Jacob Van Wagenen, who I am satisfied is the assignor named in, and who executed the within assignment; and I having first made known to him the contents thereof, he did thereupon acknowledge that he signed, sealed and delivered the same as his voluntary act and deed.

WM. G. BUMSTED,
Master in Chancery of New Jersey.

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

Be it remembered, that on this eighth day of May, eighteen hundred and eighty-six, before me, John Garrick a Master in Chancery of New Jersey, personally appeared Sarah J. Poinier, who I am satisfied is the assignee named in, and who executed the within assignment; and I having first made known to her the contents thereof she did acknowledge that she signed, sealed and delivered the same as her voluntary act and deed.

J. GARRICK,
Master in Chancery of N. J.

Endorsement.

Received in the office of the Register of the County of Hudson, N. J., at 9:15 o'clock, May 11, 1886, A. M., and recorded in book 43 of Assn. of M'tges for said county, on page 483, &c.

GEO. B. FIELDER,
Register.

J. GARRICK.

Stipulation.

SCHEDULE P. 2.

HUDSON CIRCUIT COURT.

WILLIAM BAGNALL, vs. SARAH J. POINIER.	*In Ejectment. Evidence for Plaintiff in rebuttal taken by consent for use on trial.*

JOHN G. FISHER, a witness produced on the part of

the plaintiff, and sworn by the defendant's attorney, as Master in Chancery by consent:

I am Deputy County Clerk. I first entered upon duties in this office in 1870. Since then I have been familiar with all the records kept in this office. In 1872, I was engaged in searching and Court work. I was familiar at that time with the records of docketed judgments. In 1872, the practice and method of docketing Justice Court judgments was by filing the papers brought here on request of the parties bringing them.

Q. What would be the first entry on any record in this office of the docketing of such a judgment in 1872?

A. They would first be indexed in the blotter index of docketed judgments. The next proceeding would be to record the judgment in the book of docketed judgments. The transcript would be recorded at length and ahead of that are the record. The formula that precedes the transcript would be written in the docket. This formula is one that has always been used by the Clerk.

Q. I refer you to Liber 3 of docketed judgment, page 376, showing the docketed judgment of Frank E. Noble against William Bagnall, does that show the formula to which you refer?

A. Yes; that was the formula that was used by the Clerk all along. That formula was not a part of the papers that were brought to the office as coming from the Justice.

Q. During 1872, and since, has it not been the practice when papers from the Justice of the Peace were filed for the purpose of docketing a judgment to use such a formula as that you have looked at for the entering of the docketed judgment of record.

A. Yes; besides this docket the filing of the papers would appear in the Clerk's register. The Clerk's register is a short memorandum of the parties to judgment, the date of the filing of the papers, and issuing of the fi. fa., and returns if any.

All the filed papers in docketed judgments are put away together, each case being in a separate envelope with a number endorsed corresponding with the number in the Clerk's register.

The filing of these papers would not appear in any other book, unless the fees were charged to an attorney or entered in the cash book; that cash book belonged to the Clerk for the time being, and is not here now.

Q. Can you tell me by examining the docket and Clerk's register just what papers have been filed in this case?

A. I can't tell from that entry in the docket just what papers have been filed in the case.

Q. Are not the bundle of papers marked "transcript" the papers referred to in Liber 3 of docketed judgments, page 376 in the formula to which you have referred?

A. That formula refers to that package of papers marked transcript. But I don't mean to say that that paper marked " transcript " that you refer to contains all that the formula mentions. The formula is one that appears to have been gotten up to comply with the statute. The papers themselves might not strictly conform to the formula. Such a thing is possible, as that original papers only might be filed, and not certified copies and the formula would be the same.

And being *cross-examined* by defendant's counsel, witness says:

This book commences May 1st, 1869, about a year before I entered the office, and it ends Feb'y.3, 1873. There is none of my handwriting in this book, except some cancellations on the margins of some of the judgments. During that time I had no personal supervision of the entry of docketed judgments in that book.

Q. If a person should apply to you to look at the papers in this case you would let him have the envelope, and examine them.

A. I would.

Q. Would you watch him during the time he would have the papers ?

A. If the parties were attorneys, or their clerks, we would not watch them with the same vigilance as if they were out-siders or strangers.

Q. If an attorney or attorney's clerk were disposed to take away any papers filed in the case could he do so without your knowledge ?

A. He could if he were so disposed.

John Kennedy was County Clerk from April 9, 1870 to April 9, 1875. I can't tell in whose handwriting this judgment of Noble vs. Bagnall was entered.

Q. Who was the party who had the supervision of the entering of judgments in Mr. Kennedy's time.

A. I think Robert Wilson or Andrew J. Tuttle. The latter is dead. I don't know where Wilson lives.

Q. When did you first have supervision over the entry of docketed judgments ?

A. I think in the neighborhood of 1878, when Tuttle died. Prior to that time I had no special knowledge, but I had a general knowledge of how such judgments were entered. I was employed here in the office, and I had a general knowledge of the working of the office. I don't see from the books that any of these matters were given into my hands.

Re-direct.

Q. In point of fact have any papers in the docketed judgment of *Noble vs, Bagnall* been missed from the office ?

A. I don't know that they have ; I have not had my attention called to it to the fact of any being missed. If they had been missing we would not have known of it, unless our attention had been specially called to the fact.

Q. During the past 3 or 4 months you have several times procured from the file the papers in the case for the use of the attorneys in this cause.

A. Yes; neither in doing so, nor any other time have I missed any of the papers in that case. In so doing, we did not examine the papers before or after the attorneys looked at them.

JOHN G. FISHER,
Deputy Clerk.

Sworn and subscribed before me at Jersey City, this 2d day of June, A. D. 1886.

J. GARRICK,
Master in Chancery of N. J.

SCHEDULE P. 3.

940. 1872.

HUDSON COMMON PLEAS.

FRANK E. NOBLE,
vs.
WILLIAM BAGNALL.

September 28, judgment docketed; debt, $86.28; costs, $2.05; docketing, $2.50; total, $90.43.

1873. Jan. 22, fi fa recorded and returnable Mar. 4, 1873.

1874. Jan. 20, fi fa return and statement annexed.

N. J. COURT OF ERRORS AND APPEALS.

In the last resort in all cases.

WILLIAM BAGNALL,

vs.

SARAH J. POINIER.

Assignment of Errors.

Afterwards, that is to say, on the 30th day of September, in the year of our Lord one thousand eight hundred and eighty-six, in the Court of Errors and Appeals, in the last resort of all cases, of the state of New Jersey, comes the said William Bagnall, by David W. McCrea, his attorney, and says that in the record and proceedings aforesaid, and also in the matters recited and contained in the bill of exceptions herein, and also in giving the judgment of the Court below herein, there is manifest error in this to wit:

First.—That the said, the Circuit Court of Hudson County, on the trial of said cause, admitted in evidence against the plaintiff's objection the evidence of John Garrick, stated and referred to in the first of said exceptions.

Second.—That the said, the Circuit Court of Hudson County, on the trial of said cause admitted in evidence against the plaintiff's objection the evidence of the defendant, Sarah J. Poinier.

Third.—That on the trial of said cause the said the Circuit Court of Hudson County, (against the plaintiff's request) refused, to find that no valid docketed judgment had been established or proven by the said defendant.

Fourth.—That the said, the Circuit Court of Hudson County on the trial of said cause, although duly requested by the said plaintiff, refused to find as matter

of law, that the said defendant had established no title to the possession of said premises, and also refused to give judgment in favor of the plaintiff, and against the defendant, but found and determined as matter of law that the said defendant had established a title to said premises, and gave judgment in her favor.

Therefore, the said William Bagnall, pray that the judgment aforesaid by reason of the aforesaid errors, and of other errors in said record and proceedings aforesaid may be reversed, annulled and held for nothing, and that the said William Bagnall may be restored to all things which he has lost by occasion of the said judgment, and that the defendant, Sarah J. Poinier may rejoin to said errors, etc.

D. W. McCREA,
Att'y for Pl'tff.

WM. B. GILLMORE,
Of Counsel with plaintiff.

Due service of an assignment of errors of which within is a copy is hereby admitted Oct. 5, 1886.

J. GARRICK,
Att'y for def. in Error.

(Joinder in Error in due form.)