

Wear

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Zimmerman.

Order, that writ of
Mandamus heretofore
issued in this case be
superseded, and the
attachment quashed.

Filed May 4th 1865.

William N. Travis et al Court of Appeals
vs. } of Md.
L. J. Zimmerman } April Term 1865

The motions in this case to supersede the writ of mandamus and to quash the attachment heretofore issued in the case by this Court, standing ready for hearing, were argued by the Counsel of the respective parties, and the proceedings have since been read and considered by the Court: It is thereupon this 4th day of May, 1865, by the Court of Appeals of Maryland, and by the authority thereof, adjudged ordered & decreed, that the writ of mandamus heretofore issued in this case be & the same is hereby superseded & the attachment also heretofore issued in the case be and the same is hereby quashed, the appellants & appellees each to pay their own costs.

Rich. L. Davis

Geo. S. Bartol

Brian J. Goldborough

L. Morris Cochran

J. Weiser

Weaver & others

vs

Zimmerman

Mandamus,

attach^t motions &c.

B. B. G. C. W

To be Reported.

opinion

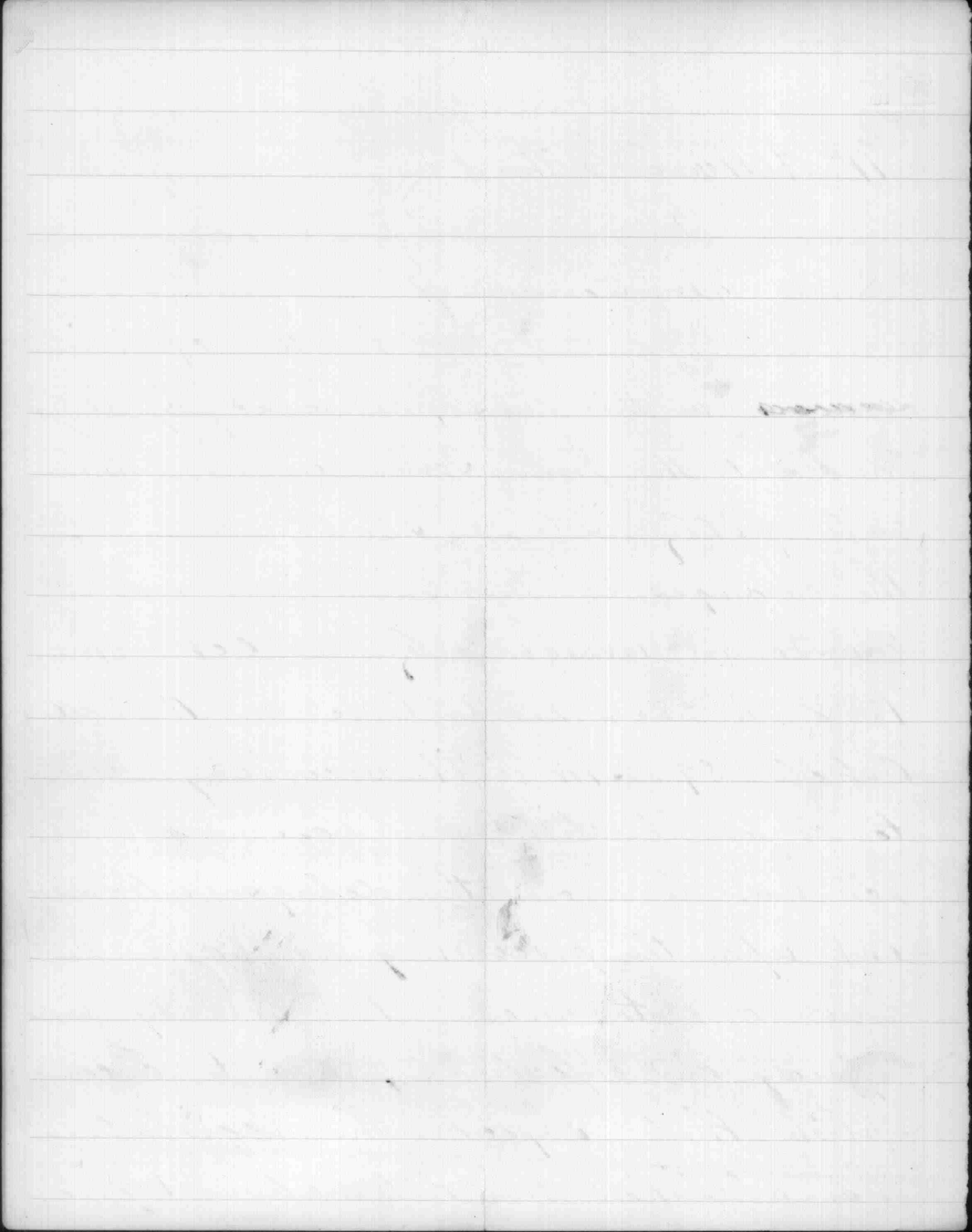
Paul J.

Filed May 4th 1865

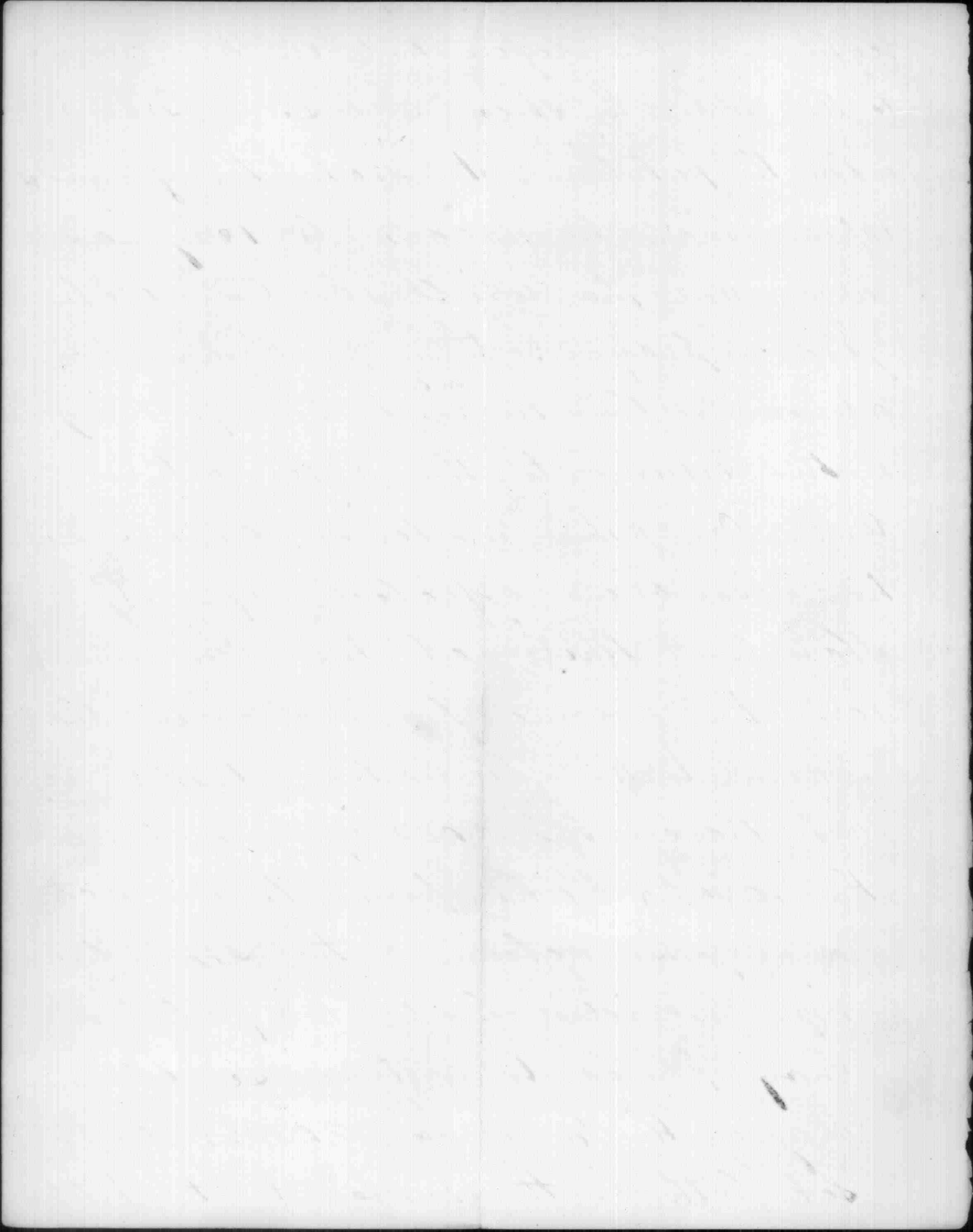
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Wm H Weaver & others,

L. J. Zimmerman

In the opinion
~~delivered~~ in this cause, delivered by this
Court at the June Term, we did not
enter fully into a statement of
the changes of the law in cases of
Mandamus, wrought by the act of
1858 Ch. 285, now embodied in the Code
Article 59; ~~nor~~ ^{nor} is it necessary now
to do so. The chief purpose of that
act was to avoid the delays attend-
-ant upon the proceeding at Common
Law, and to make the remedy more
speedy and effectual. To accom-
-plish that object, the legislature
has abolished the alternative writ,

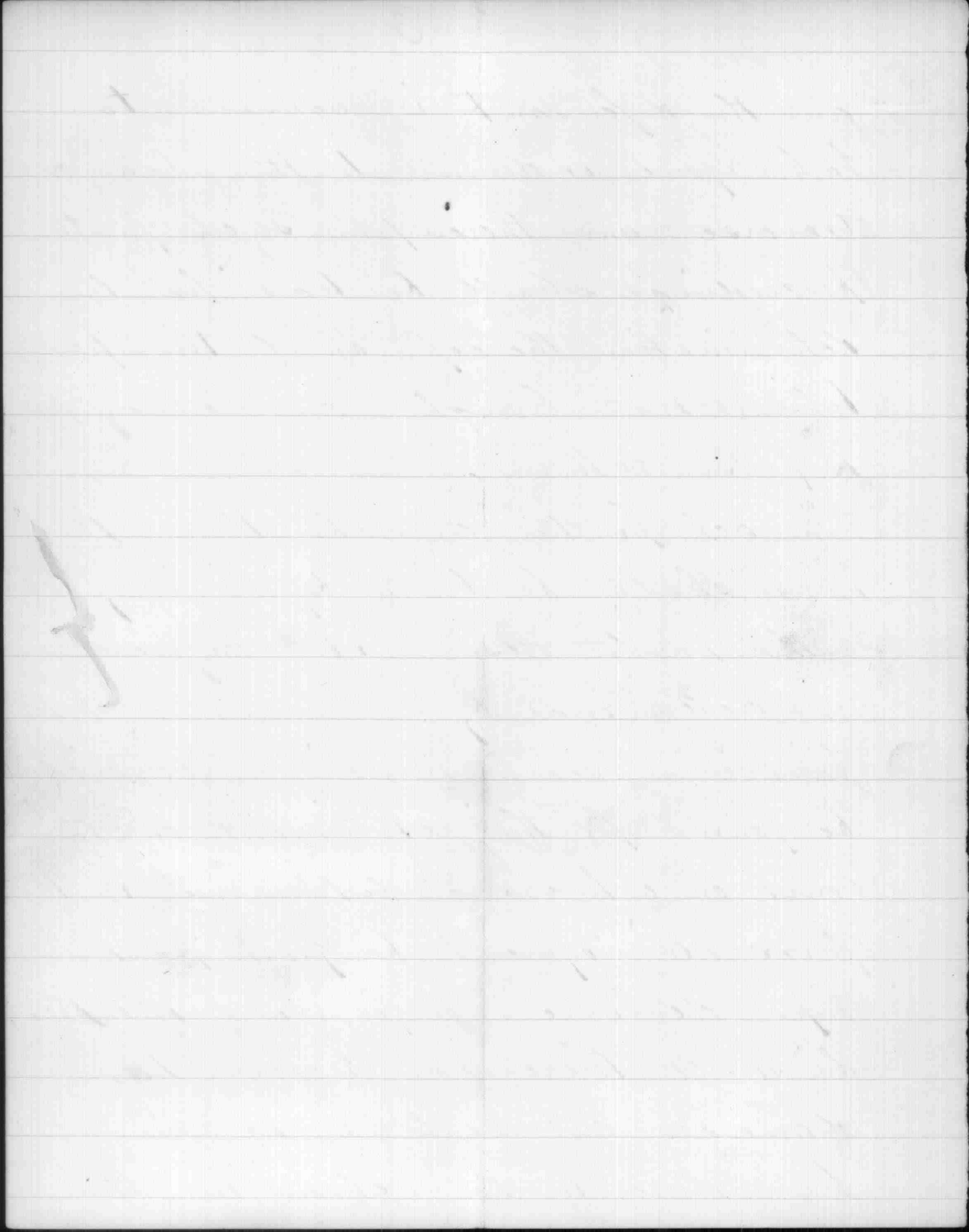


requiring the defendant in his answer to the rule to show cause issued upon the petition, to state the grounds upon which he means to rely, as causes why the writ should not issue as prayed; thus placing the answer to the rule, ^{in some respects,} on the footing of the return to the alternative writ. One other material change has also been effected by the statute, while at the common law the averments made in the return to the alternative writ were not traversable; and if not true the relator was put to his action for a false return; the statute now provides that the petitioner may plead to or traverse all and any of the material averments set forth in the answer to the petition,



and the defendant is required to take issue, or demur to the plea, or traverse; and thereupon such further proceedings shall be had for the determination thereof, as if the petitioner had brought an action for a false return.

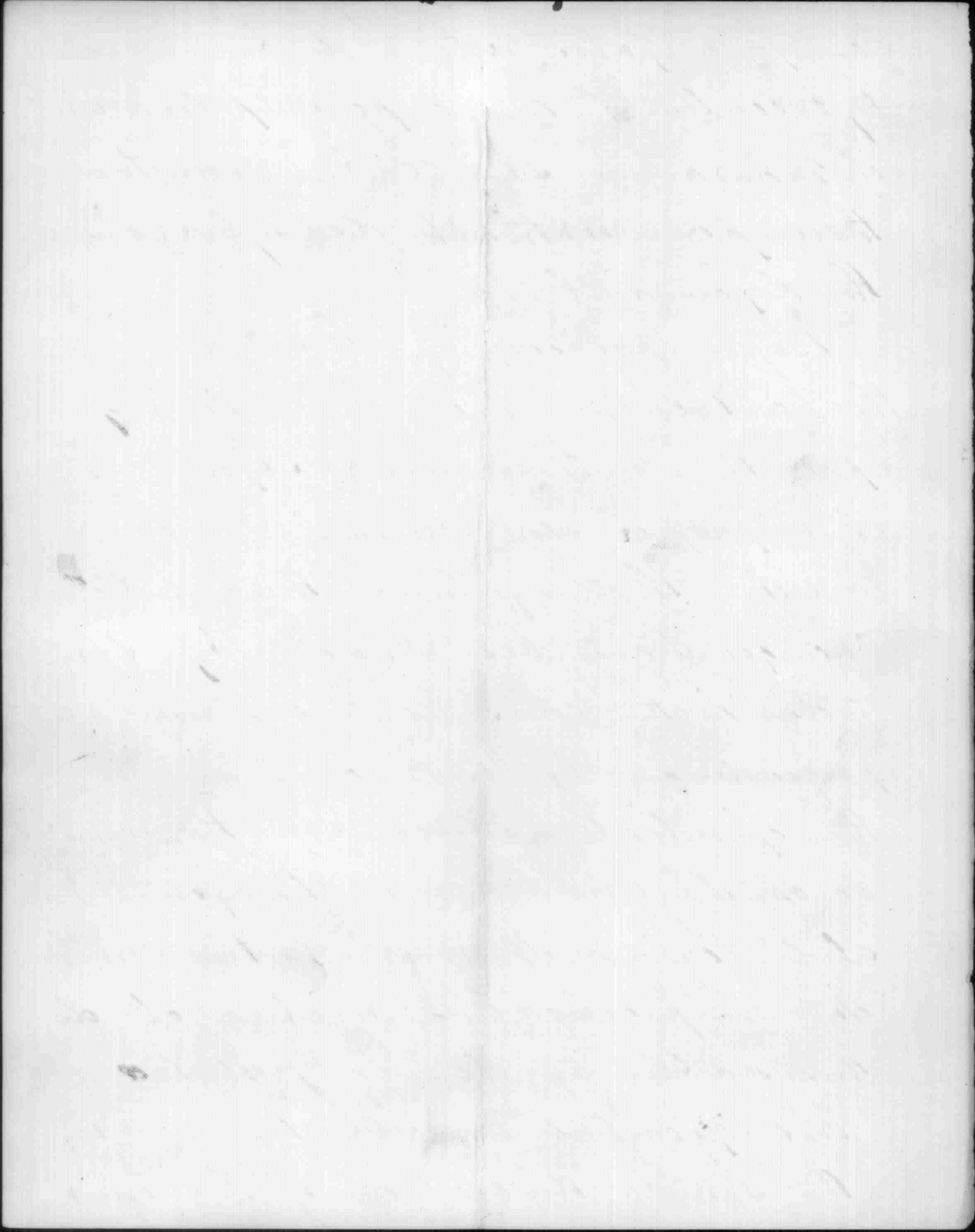
The act further directs that the issue shall be tried by a jury, if either party desire it; or heard and determined by the Court if both parties agree; - and if a verdict be found for the petitioner, or the Court on a hearing determine in his favor, or judgment be given for him upon demurrer, or for want of a plea, he shall thereupon recover his damages and costs, as he might have done in an action on the



case for a false return, ^{to} be levied
by execution; and a peremptory writ
of mandamus shall be granted
thereupon without delay against
the defendant.

Before proceeding to examine
the particular questions arising
upon the motions now before us,
it is proper to remark:

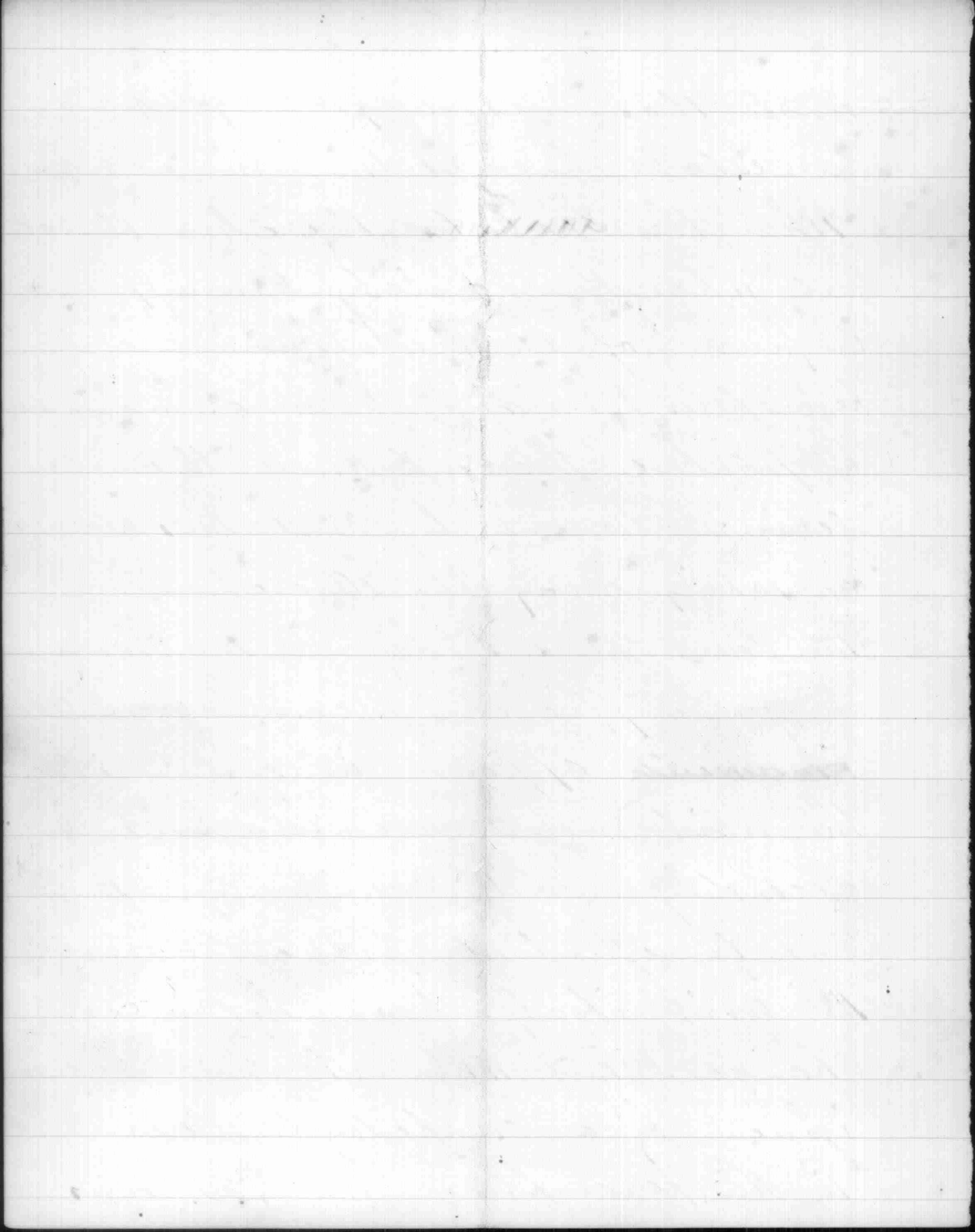
First, — That while these material
changes have been made by the
Code, in the course and manner of
proceedings in cases of this kind,
the essential nature of the remedy
or of the writ is not changed. It is
still what it was at the common
law, a prerogative writ, not *de*
mandabile ex debito justitiæ,
but granted at all times in
the sound discretion of the Court;



under the rules long recognized and established at the Common Law,

When the ~~statute~~^{code} therefore directs that upon the verdict being found in favour of the petitioner, a peremptory writ of Mandamus shall be granted thereupon without delay; it is not to be understood as taking away the discretion of the Court, still to refuse the writ if for sufficient legal cause it shall appear in its discretion the writ ought not to issue.

Secondly, In the opinion of this Court the essential properties of the writ itself have not been changed; and when it has been issued by a competent Court, in the peremptory form, it has



the same force and effect as the
peremptory writ at the Common law;
and the defendant cannot disobey it
for any cause or reason which might
have ^{been} urged in resisting the applica-
tion for the writ.

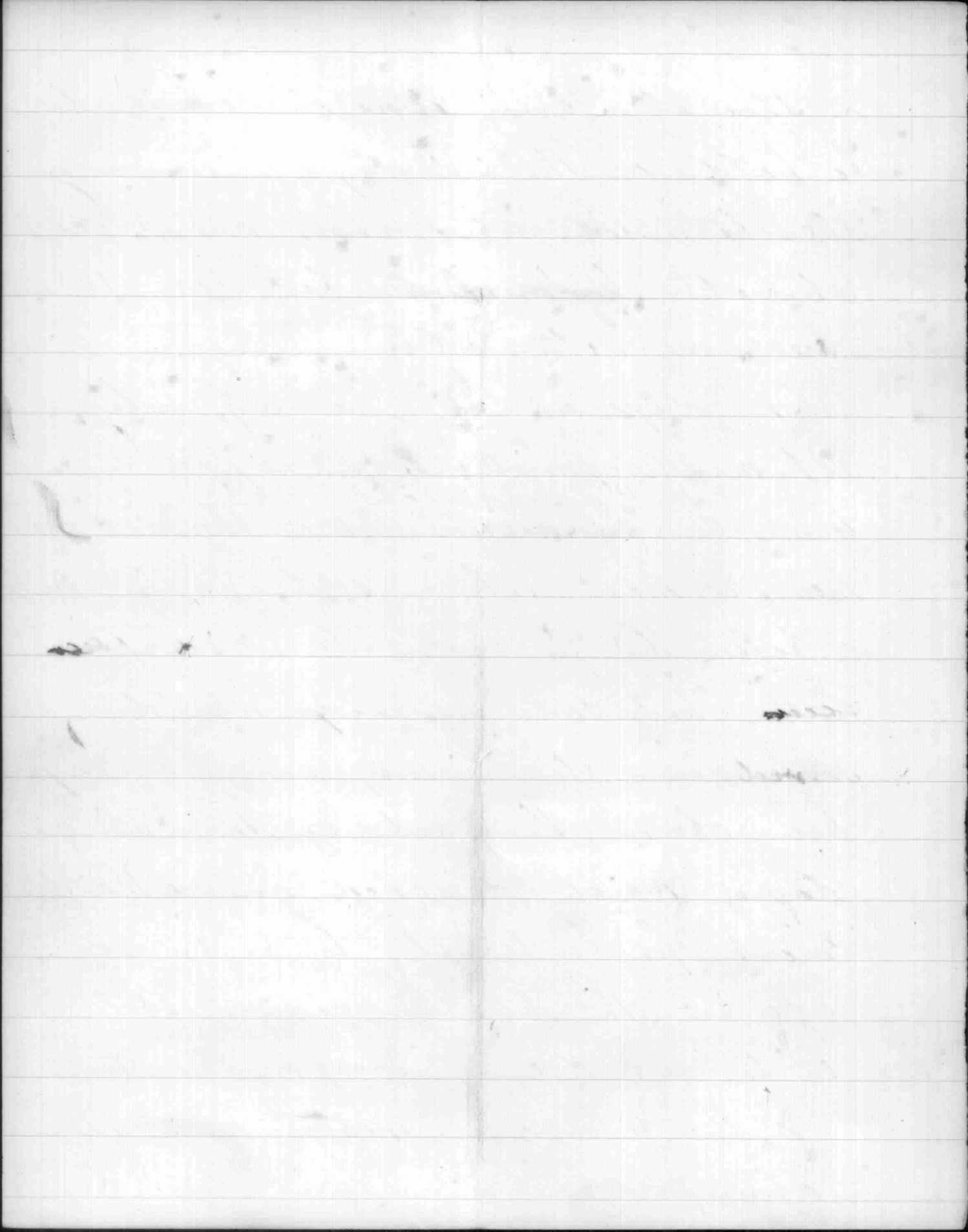
After this appeal was heard
at the June Term, this court
affirmed the ruling of the Su-
-perior Court set forth in the
bills of exceptions, and ordered
the writ to be issued. ~~from~~
~~the writ~~ in the peremptory
form. It was made returnable
to the December Term. By the
change in the Constitution, which
went into effect on the first day
of November, the December Term
was abolished; and by the act of
assembly passed at the last session

1880

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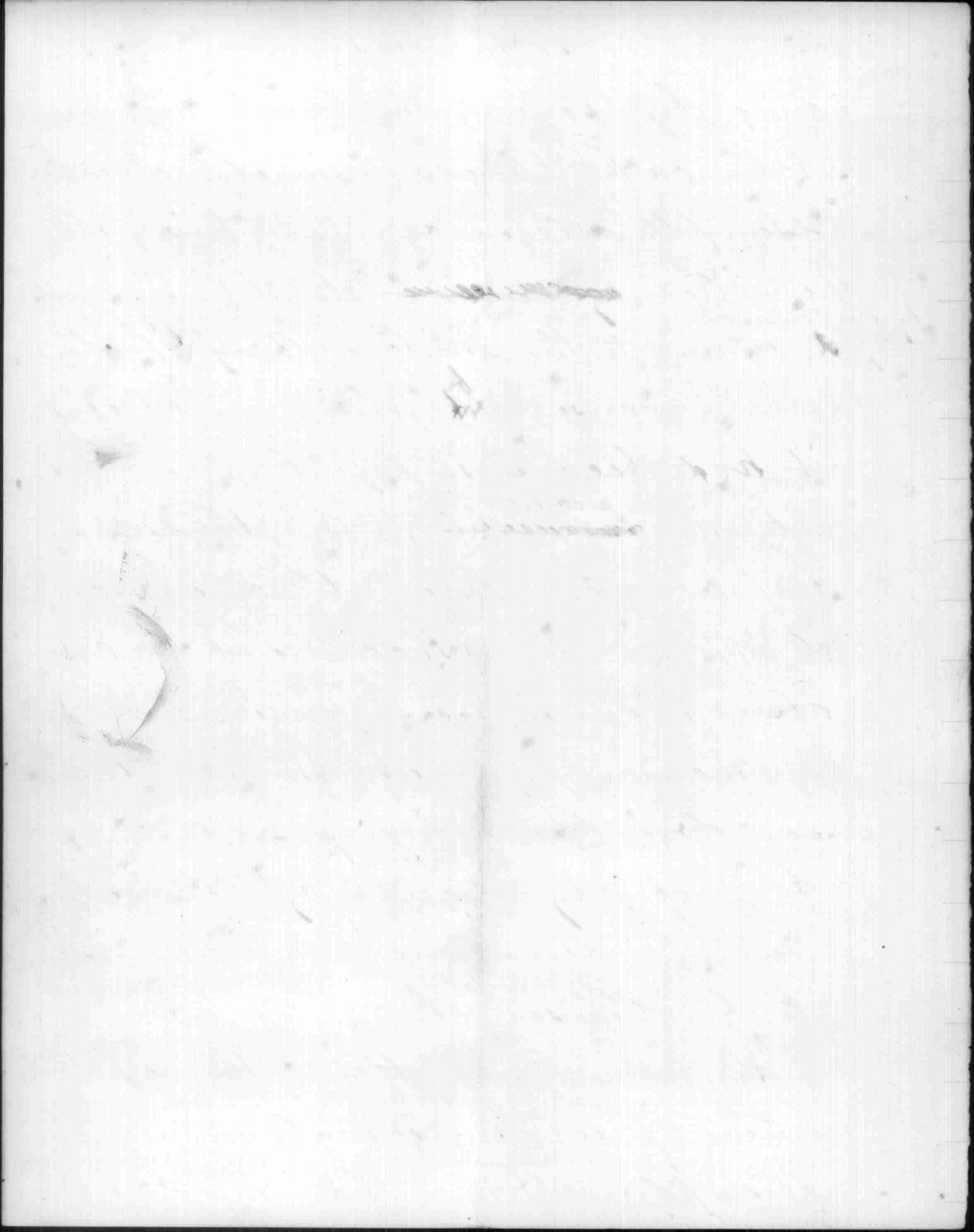
a Special Term ~~was~~ directed to be held on the 24th day of January 1865. ~~to~~ which all writs and process returnable to the December Term 1864 were made returnable.

The defendants failing to return the writ, upon application ^{on the 1st day of March} to this Court, a rule was laid upon them to make return of the same, on or before the 7th day of March. ~~and~~ ~~with~~ That rule having been duly served, and its exigency not having been obeyed, the Court on the 8th day of March directed an attachment for contempt to be issued against the parties, returnable on the 14th day of March. On that day the defendant ~~Weaver~~^{be} upon whom alone the peremptory writ had been



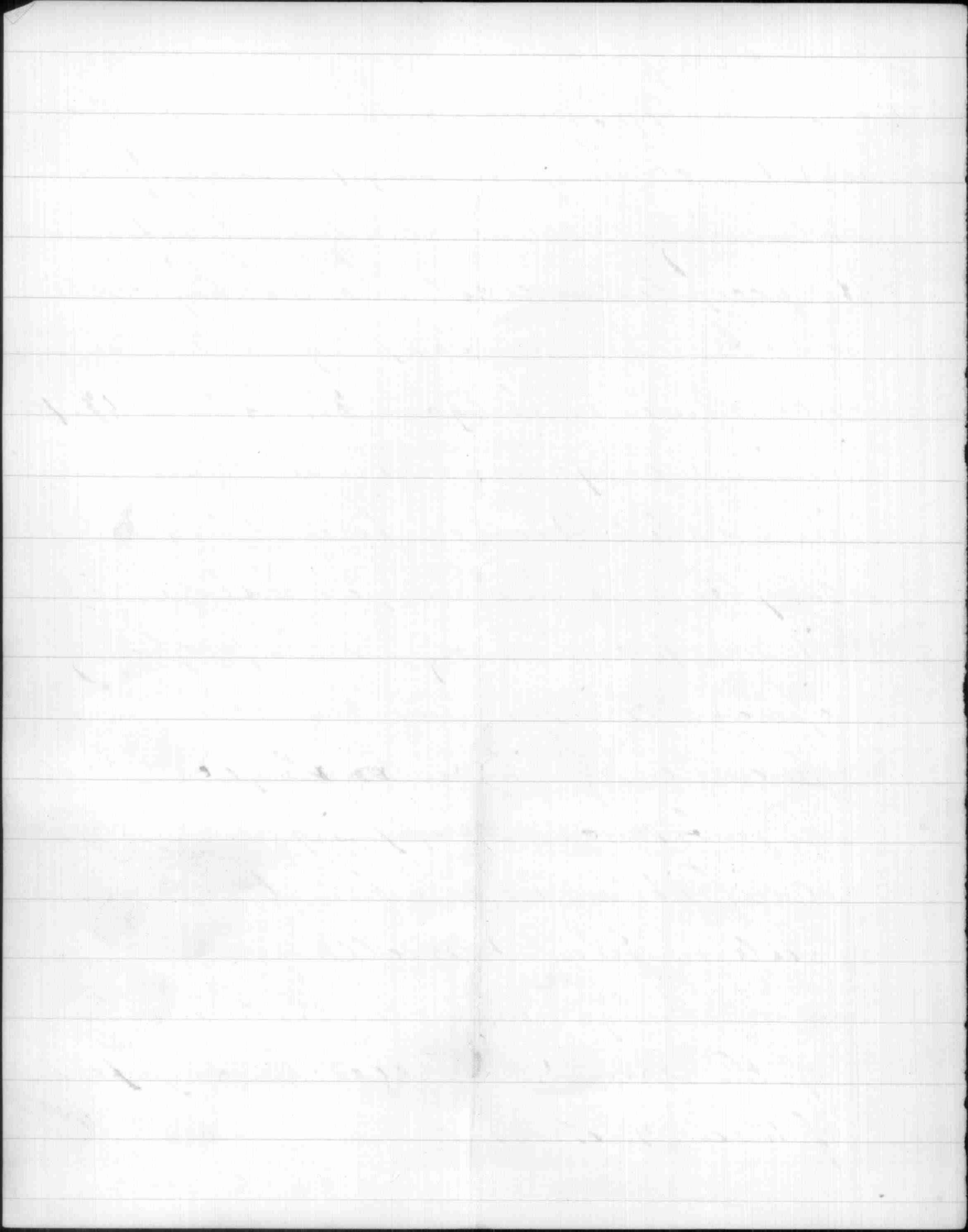
served appeared in person, and first
 having by leave of the Court upon
 solemn oath purged himself of the
 Contempt alleged against him; was
 permitted ~~by his counsel~~ to file in Court
 by his counsel, a return to the writ setting forth
 certain causes ~~at~~ which he alleged
 it had become impossible to exe-
 cute the ~~writ~~ ^{same}. And thereupon
 motions were filed to quash and
 discharge the attachment, and
 also to quash and supersede the writ
 of Mandamus. These motions were
 set down for hearing, and have
 been fully argued by counsel,
 and considered and now remain
 to be disposed of.

We have said that the writ
 when issued in Maryland in the
 peremptory form, has the same.

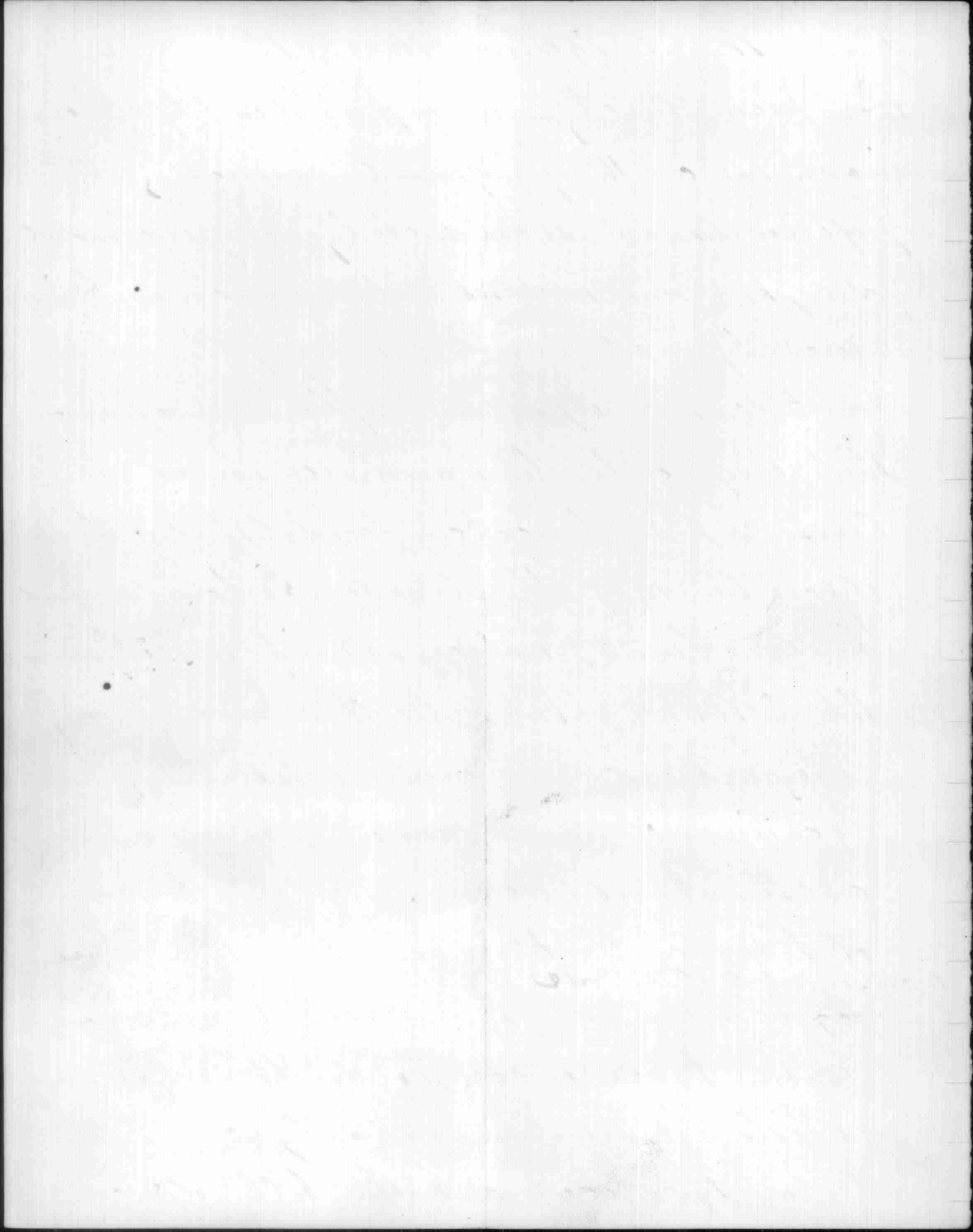


force and effect as at the Common Law,
 and the same rule applies, that
 ordinarily no return thereto will
 be accepted, except a certificate
 of obedience. Tapping on Mandamus
 408. *Queen vs Sedgwick* 41 *Eng. C. L.* 699. 700.
 This is the general rule; nevertheless
 it is settled that a peremptory writ
 4 may be quashed or set aside if
 it has prematurely or improperly
 issued, or if it has unnecessarily
 issued; or if it be ~~on its~~ face bad
 in substance. Tapping 408. 409.
 or if it be impossible ^{or illegal} to obey it
State v. Jones 1 *Dredell* 414.

This brings us to the examination
 of the grounds alleged in support
 of these motions.

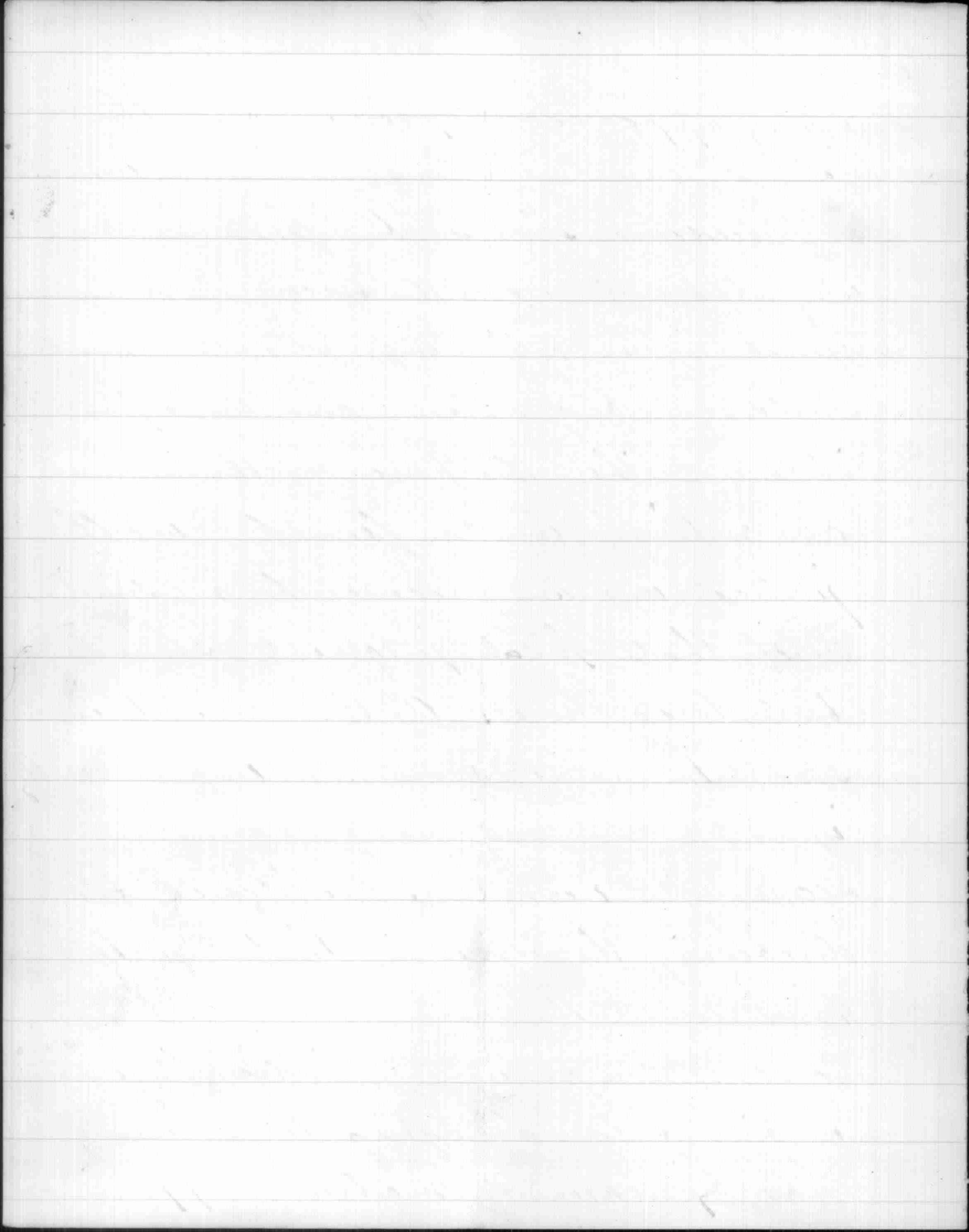


First. It is suggested ^{10.} that the writ
was prematurely or improvidently issued;
inasmuch as the judgment rendered by the
Superior Court was merely a judgment
for costs, and no writ of mandamus being
ordered by that Court; the appellate
Court ought upon the affirmance of
the judgment to have remanded the
Cause upon procedendo; so that the
discretion of the Court below might
be exercised in awarding or refusing
the writ. This matter was very
carefully considered when the
decision of the cause was made
at the June Term. Of the power
of this Court to award the writ ^{under} ~~from~~
the 16 sec. Art 5. of the Code,
~~the~~ without sending back the case
under procedendo, no doubt whatever
exists; and we are equally clear that
upon the record and the bills of exceptions

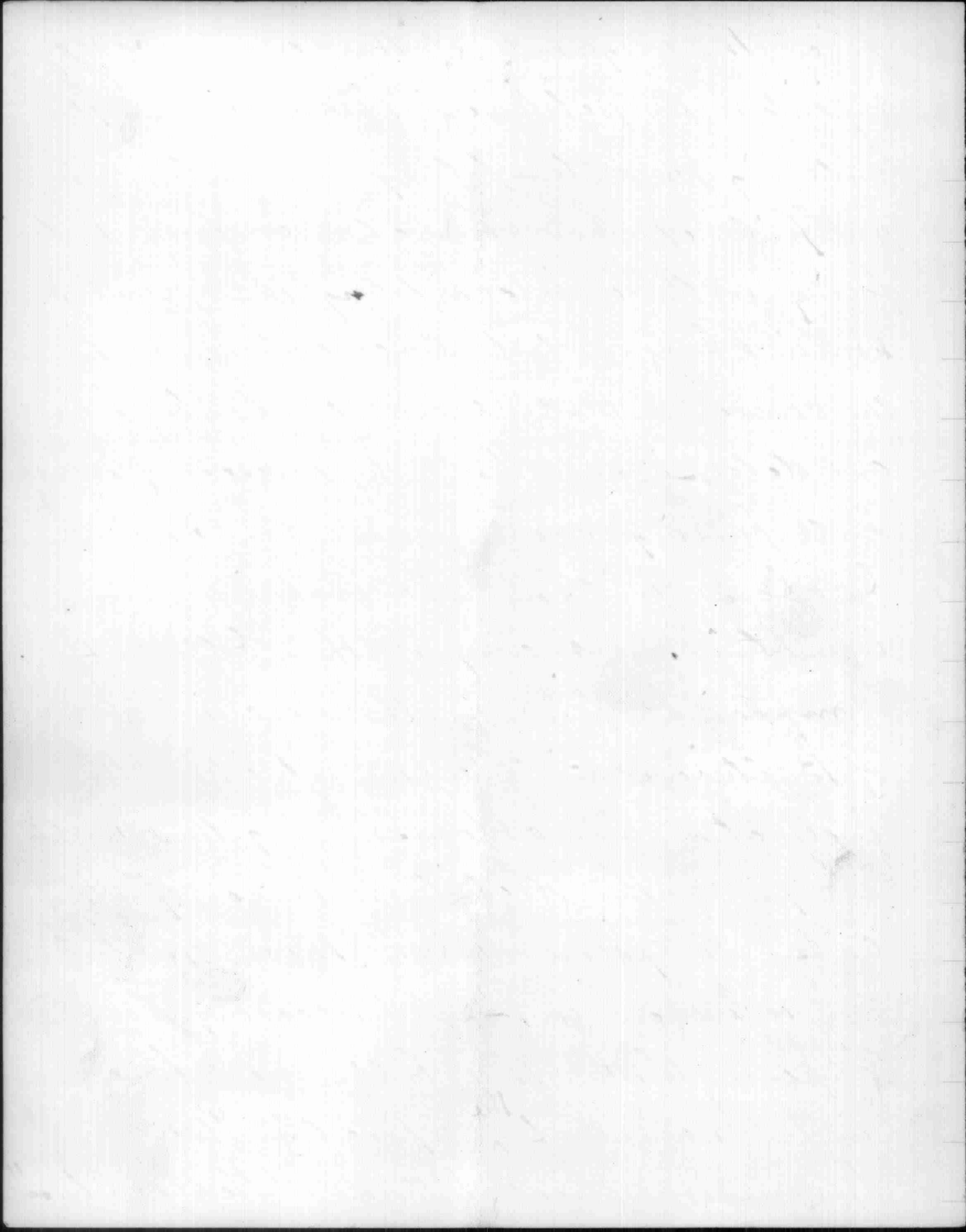


as they appeared before us at the trial, no reason whatever existed why a *procedendo* should be issued; no cause was apparent upon the record or suggested in the argument why the writ should not be granted: and therefore it was within the power of this Court, and entirely in conformity with justice and the precedents in similar cases, that final judgment should be entered here. As the case then stood the writ was not improvidently issued.

Second. The next cause assigned for disobeying the writ is that at the time when the return was made a Court of competent jurisdiction, upon a bill filed alleging the Game had by reason of matters happening

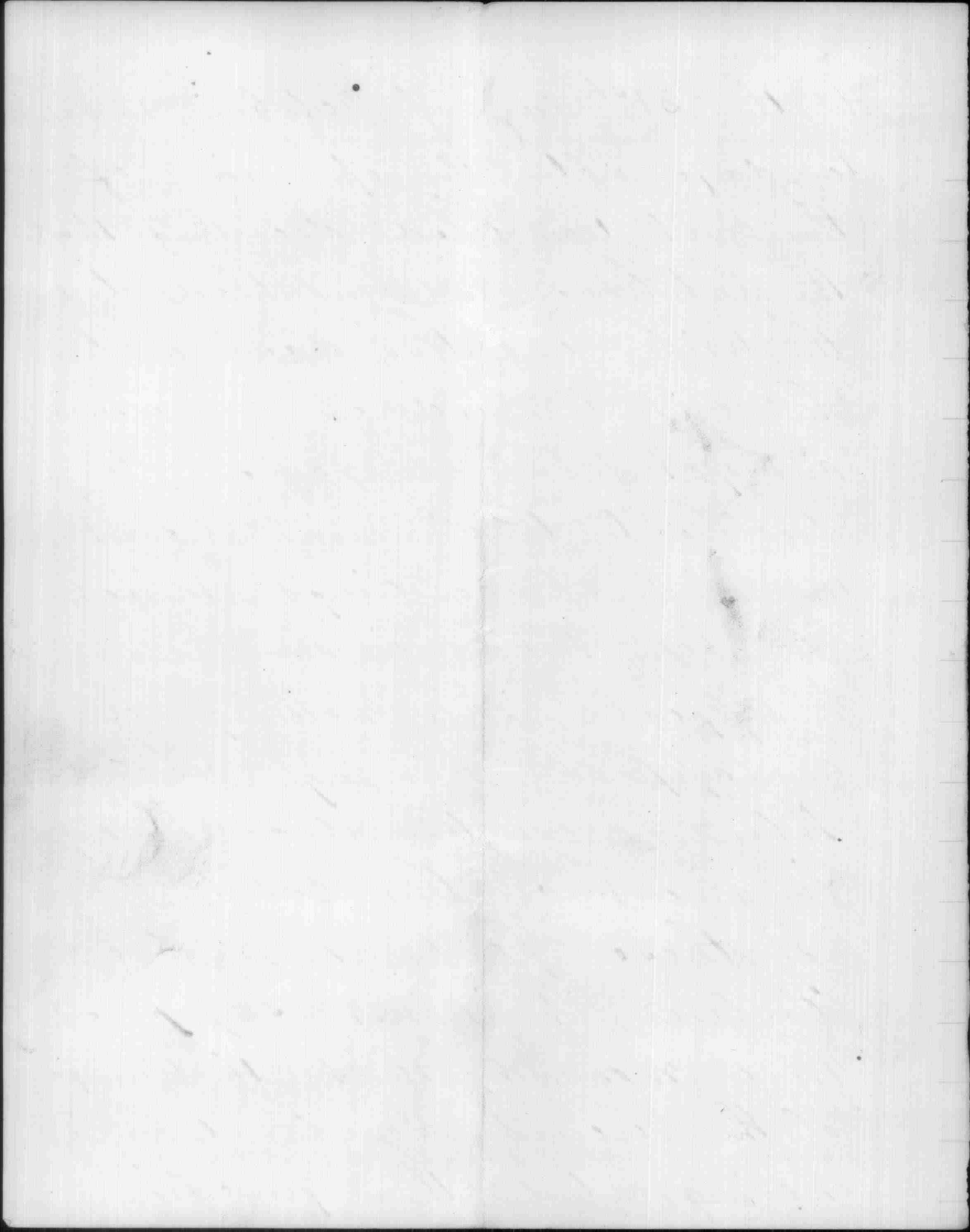


Since the judgment of the Court below enjoined the petitioner (Zimmerman) from entering or attempting to enter the pulpit of said Church; or from interfering with, or interrupting the pastor now in charge of the congregation, until the cause in that Court could be heard and determined; that the proceedings are still pending, and the writ could not be obeyed without violating the injunction. A copy of the bill of complaint filed in the Circuit Court of Baltimore City upon which the injunction was obtained, together with a copy of the docket entries of the cause, is filed with these motions. By reference to these proceedings it appears that the bill was filed in the name of ^{the} Corporation "The Germans Evangelical Lutheran St. Stephens Church".



on the 31st day of October 1864,
 ten days after the opinion of
 this court was filed, deciding that
 the petitioner was entitled to
 the writ, and two days after
 the writ was ordered and issued;
 and yet the bill failed to
 disclose to the Circuit Court
 any of the proceedings which
 had been taken in the Court
 of Appeals, says nothing of
 any appeal having been
 taken, or of the decision and
 judgment of this court.

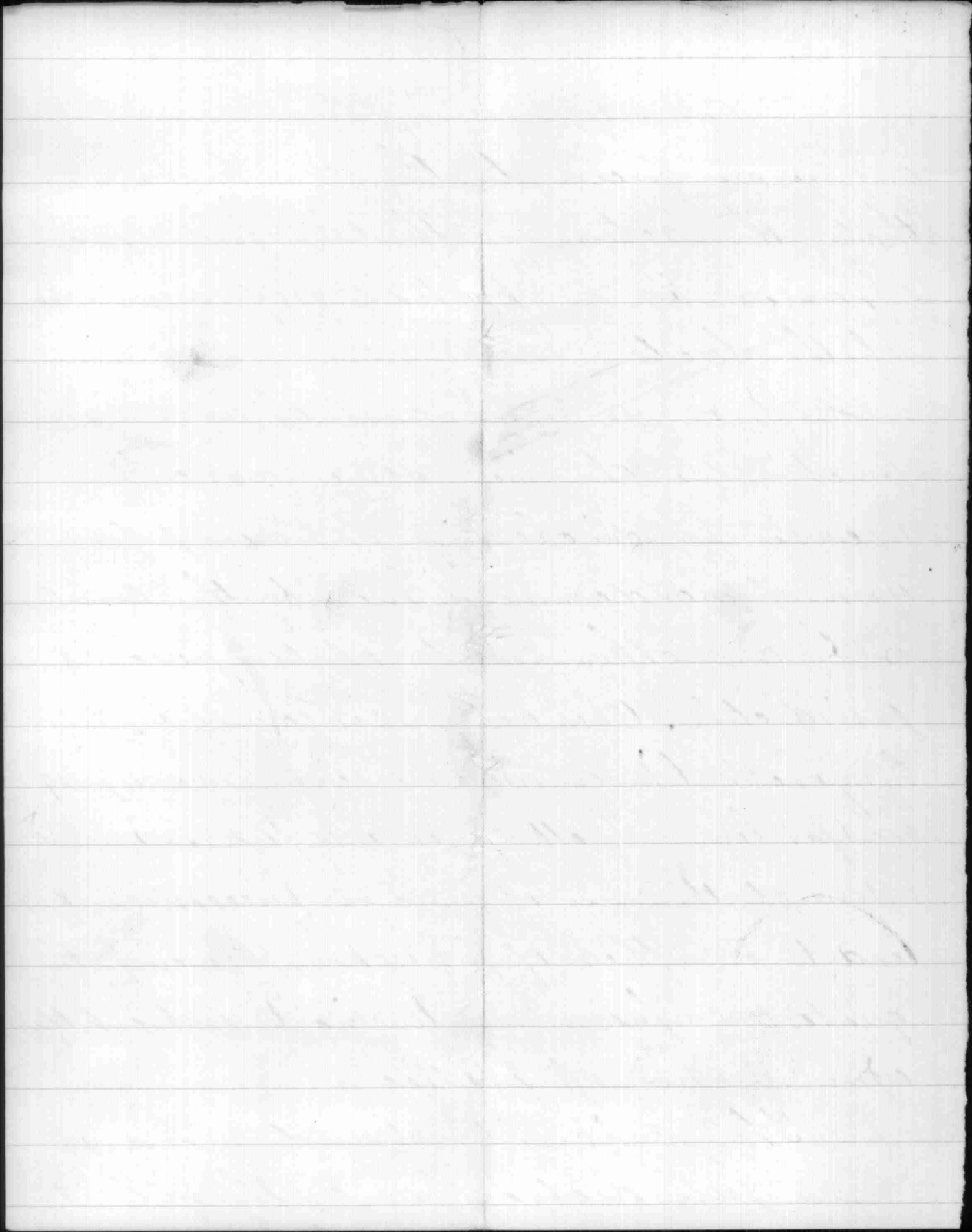
If these facts had been
 disclosed, it is not supposed
 for a moment, that the Judge
 of the Circuit Court would
 have granted the injunction;



and we are forced to the conclusion, that the action of that Court was obtained by a partial representation of the facts.

But in no event could an injunction so obtained serve as an excuse for disobeying a peremptory writ of mandamus, issued by this Court, or by any other court of competent jurisdiction, when once issued it cannot be stayed by injunction like an ordinary execution upon a judgment at law. To allow such interference would interrupt the course of judicial proceedings, and lead to a conflict of jurisdiction, producing the greatest confusion, and tending to subvert the administration of justice.

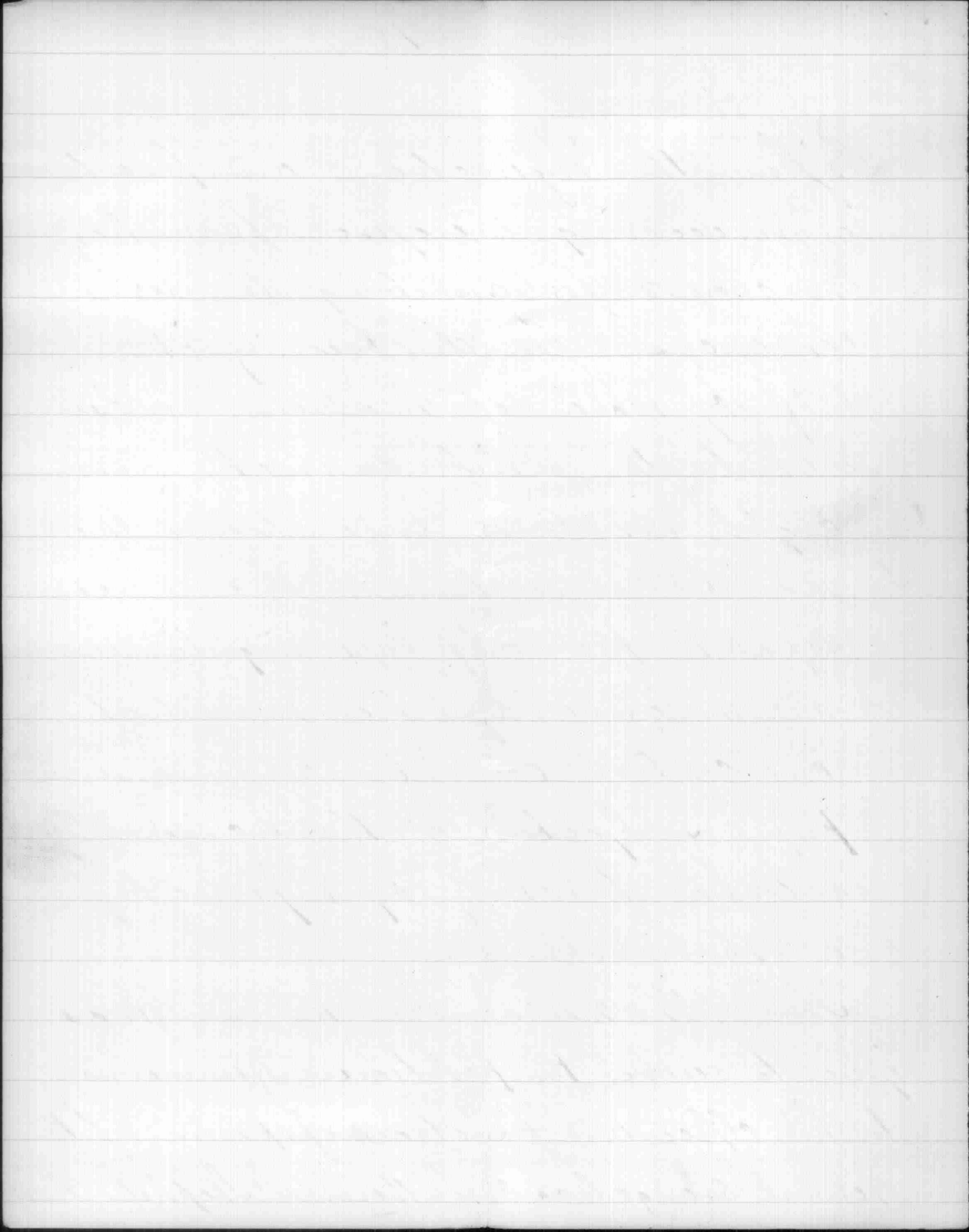
The Circuit Court had no jurisdiction, or authority to



issue the injunction, and such a proceeding therefore furnishes no ground for quashing the writ, or excuse for disobeying it.

7. If by reason of matters subsequent the writ cannot, or ought not to be executed, they may be made known, and relied upon in the Court issuing the writ, and which alone has jurisdiction, and control over it; and are not proper subjects for the action of a court of equity by injunction, or otherwise.

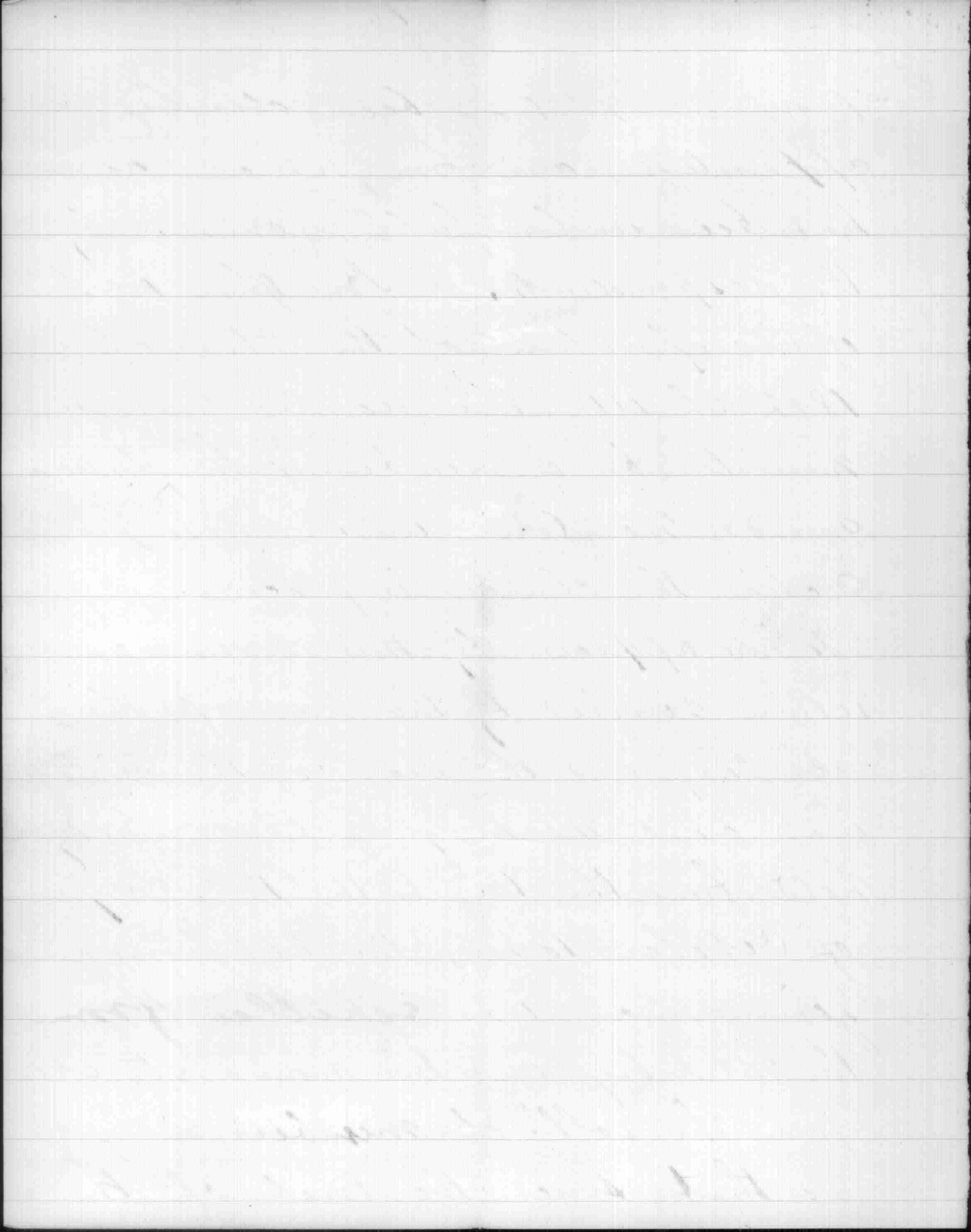
Third, The mandamus in this case was issued to restore the petitioner, Zimmerman, to his office and functions of pastor of "the German Evangelical Lutheran St. Stephens Church".



to which he had been duly appointed, and from which he had been unlawfully removed by the respondents. By the act of incorporation of the Church, 1802 ch 111, it is required that the minister, be a member of the ^{Evangelical} Lutheran Synod of Maryland, under whose jurisdiction the Church is placed.

It now appears by this motion and return verified by the hand of the secretary and the seal of the Synod; that at a meeting of that body held from the 14th to the 18th day of October 1864, the petitioner Zimmerman was "expelled from the ministry and his name stricken from the roll" of members.

So that since the trial of the

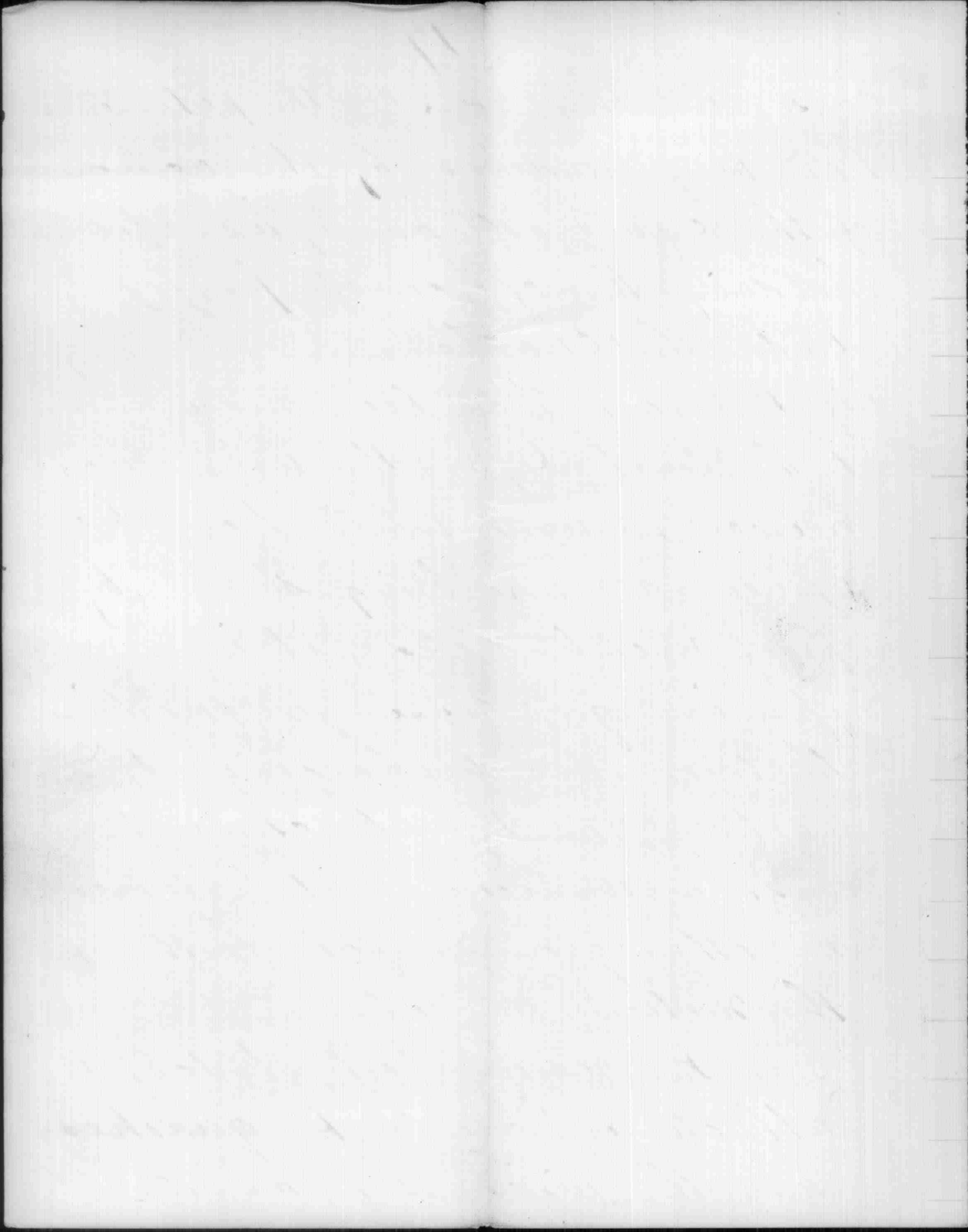


cause in this Court, the petitioner
has been rendered by the action
of the Synod, disqualified from
holding the office of pastor,
under the Charter.

If this fact had been made known
to this Court before the writ was
ordered; no writ would have been
issued; and now being shown by
proof uncontradicted, it is in our
opinion good cause for quashing
the writ, and discharging the
parties from the attachment.

— It is unnecessary to notice
the other grounds set forth in
the motion, and return.

For the reason last stated, the
attachment will be quashed,
and the writ set aside;



without prejudice however to the
right of the petitioner, to renew
in the Superior Court, his applica-
-tion for the writ, and of trying
the facts before a jury.

Writ superseded & attach^t quashed.