INDEX.

Summons.

THE STATE OF NEW JERSEY, to BENJAMIN FARBER and ISIDOR KAPLAN

(L. S.)

YOU ARE SUMMONED to answer the annexed complaint of LOUIS D. GOLDBERG, in an action at law in the Essex County Circuit Court. And take notice, that unless you file your answer to said complaint with the Clerk of the Essex County Circuit Court, at Newark, within twenty days after service upon you of this writ and the annexed complaint, the plaintiffs may proceed with the suit and judgment may be entered against you.

WITNESS, WORRALL F. MOUNTAIN, Judge of the Essex County Circuit Court, at Newark, this 18th day of November, in the year One Thousand Nine Hundred and twenty-four.

JOHN H. SCOTT,
Clerk.

MAURICE J. ZUCKER,
Attorney for Plaintiff.

Complaint.

ESSEX COUNTY CIRCUIT COURT.

LOUIS D. GOLDBERG, *Plaintiff,* v. BENJAMIN FARBER and ISIDOR KAPLAN, *Defendants.*	Action at Law.

Plaintiff, residing in the City of Newark, County of Essex and State of New Jersey, complains of the defendants as follows:

1. On June 7th, 1924, at Newark, Essex County, New Jersey, the defendants and Jacob Miller and Joseph Friedman, partners trading under the name of Miller Friedman Co. by their obligation in writing dated on that day, bound themselves under their respective seals to Harry B. O'Connell, Sheriff of the County of Essex, in the penal sum of Eight Thousand Seven Hundred and Fifty-four Dollars and Sixty Cents ($8,754.60) with the condition thereunder written that if Jacob Miller and Joseph Friedman, partners trading under the name of Miller Friedman Co. their executors and administrators, shall return the goods and chattels, rights and credits, moneys and effects seized by virtue of a writ of attachment lately issued out of the Circuit Court of the County of Essex at the suit of Louis D. Goldberg *v.* Jacob Miller and Joseph Friedman, partners trading under the name of Miller Friedman Co. in case judgment should be rendered in that suit for the plaintiff in that

suit (Louis D. Goldberg) then this obligation should be void and of no effect, otherwise to remain in full force and virtue. A true copy of said above recited obligation is hereto annexed and made a part of this complaint.

2. That after the execution of said bond, the Sheriff of the County of Essex delivered all the goods and chattels, rights and credits, moneys and effects, seized by virtue of the writ of attachment above mentioned, to the said Jacob Miller and Joseph Friedman, partners trading under the name of Miller Friedman Co. and released the attachment from said goods and chattels, rights and credits, moneys and effects of the said Jacob Miller and Joseph Friedman, partners trading under the name of Miller Friedman Co.

3. On October 3rd, 1924, the plaintiff did obtain final judgment against Jacob Miller and Joseph Friedman, partners trading as Miller Friedman Co. at the said suit of Louis D. Goldberg *v.* Jacob Miller and Joseph Friedman, partners trading under the name of Miller Friedman Co. said judgment being for the sum of $4,465.02 and $49.88 costs.

4. On October 17th, 1924, the defendants herein were notified by service upon them by the Sheriff of the County of Essex, that judgment final had been rendered in the suit of Louis D. Goldberg *v.* Jacob Miller and Joseph Friedman, partners trading under the name of Miller-Friedman Co. in the attachment suit in which matter they had signed the bond set forth in this complaint, and demand was made in said notice served upon them requiring that the said goods and chattels, rights and credits, moneys and effects seized and taken

by virtue of the writ of attachment referred to in this complaint, be returned as provided in the bond set forth in this complaint, and that should the defendants herein fail or neglect to return said goods and chattels or to pay the judgment herein set forth by October 24th, 1924, the plaintiff would apply for an order directing the Sheriff of the County of Essex to assign the bond referred to herein to the plaintiff herein.

5. The said defendants herein did not return or cause to be returned, nor were any of the goods and chattels, rights and credits, moneys and effects seized by the Sheriff in the cause above referred to returned, nor was the said judgment obtained paid, and on the 10 day of November, 1924, the above Court issued an order directing the Sheriff of the County of Essex to assign the bond above referred to to the plaintiff herein, Louis D. Goldberg and to an applying creditor in said attachment cause, in accordance with the Statutes of the State of New Jersey in such case made and provided, and said bond was so assigned.

6. Plaintiff has demanded of the defendants herein the payment of the sum of $4,514.90 being the amount of the judgment obtained against Jacob Miller and Joseph Friedman, partners trading as Miller Friedman Co. together with taxed costs, but the defendants herein have refused to pay and still refuse to pay the same.

7. Plaintiff demands as damages from the said defendants the sum of $4,514.90 besides interest from the 3rd day of October, 1924, and costs of this action.

MAURICE J. ZUCKER,
Attorney for Plaintiff.

11/18/24

Bond.

KNOW ALL MEN BY THESE PRESENTS, that we, JACOB MILLER and JOSEPH FRIEDMAN, partners trading under the name of MILLER FRIEDMAN Co. of the City of New York, in the County of New York and State of New York and Benjamin Farber and Isador Kaplan are held and firmly bound unto HARRY B. O'CONNELL, Sheriff of the County of Essex in the sum of Eight thousand Seven hundred and fifty-four Dollars and 60/100 ($8754.60) to be paid to the said Harry B. O'Connell, his executors, administrators, successors and assigns, to which payment we bind ourselves, jointly and severally.

Sealed with our seals. Dated this seventh day of June, nineteen hundred and twenty-four.

WHEREAS a certain writ of attachment lately issued out of the Circuit Court of the County of Essex, at the suit of Louis D. Goldberg *v.* Jacob Miller and Joseph Friedman, partners trading under the name of Miller Friedman Co., by virtue whereof the Sheriff of said County did seize and attach certain personal property of the said Jacob Miller and Joseph Friedman, partners trading under the name of Miller Friedman Co. appearing in the schedule hereto annexed and made a part hereof;

AND WHEREAS the said Jacob Miller and Joseph Friedman, partners trading under the name of Miller Friedman Co. intend to appear to the said attachment;

NOW THEREFORE, if the said Jacob Miller and Joseph Friedman, partners trading under the name of Miller Friedman Co., their executors and ad-

ministrators shall return the goods and chattels, rights and credits, moneys and effects, seized by virtue of said writ of attachment, in case judgment should be rendered for the plaintiff, then this obligation to be void, otherwise to remain in full force and effect.

JACOB MILLER (L. S.)
JOSEPH FRIEDMAN (L. S.)
BENJ. FARBER (L. S.)
ISIDOR KAPLAN (L. S.)

Signed, Sealed and Delivered
in the presence of:

SARA SUOLENSKY
as to Jacob Miller and
Joseph Friedman

DANIEL J. FELDMAN
as to Benjamin Farber and
Isidore Kaplan

I approve of the within bond as to form and sufficiency. Let it be filed.

WORRALL F. MOUNTAIN,
Circuit Court Judge.

(Endorsed):

I. Kaplan, 45 Prince St., City
B. Farber, 128 Market St. City,
Room 613
37087
ESSEX COUNTY CIRCUIT COURT
LOUIS D. GOLDBERG,
Plaintiff,
v.
BENJAMIN FARBER and ISIDOR KAPLAN,
Defendants.

Bond.

ACTION AT LAW

SUMMONS AND COMPLAINT

I hereby appoint and depute Otto A. Lebert, to serve the within writ.

Witness my hand and seal this 20th day of November, 1924.

HARRY B. O'CONNELL
Sheriff

by CONRAD DEUCHLER,
Under Sheriff

Sheriff Fees $6.78
Seal.
Law Offices Maurice J. Zucker
Chamber of Commerce Bldg.,
24 Brandford Pl., Newark, N. J.

Served the within Summons and Complaint November 20, 1924, personally upon Benjamin Farber, and Isidor Kaplan the within named defendants by delivering to each a true copy thereof at the Essex County Court House, Newark, New Jersey.

HARRY B. O'CONNELL,
Sheriff

by OTTO A. LEBERT
Special Deputy.

Answer.

(Filed Dec. 17, 1924.)

ESSEX COUNTY CIRCUIT COURT.

LOUIS D. GOLDBERG,
Plaintiff,

v.

BENJAMIN FARBER and ISIDOR KAPLAN,
Defendants.

} Action at Law.

The defendants residing in the City of Newark, Essex County, New Jersey, in answer to the present complaint say:

1. They deny the allegation in paragraph 1 of the complaint.

2. They deny the allegation in paragraph 2 of the complaint.

3. They deny the allegations in paragraph 3 of the complaint, and refer specifically to the first separate defense hereafter.

4. They deny the allegations in paragraph 4 of the complaint.

5. They deny the allegations in paragraph 5 of the complaint.

6. They deny the allegations in paragraph 6 of the complaint.

FIRST SEPARATE DEFENSE.

The defendants allege that no judgment was entered against the said Jacob Miller and Joseph Friedman.

SECOND SEPARATE DEFENSE.

The defendants allege that if any judgment appears of record against the said Miller and Friedman, the same was entered contrary to law and contrary to the United States Bankruptcy Statute, and in defiance of and violation of an order of the United States District Court restraining the entry of such judgment.

THIRD SEPARATE DEFENSE.

In further defense the defendants say that the plaintiff refused to accept the attached chattels when the same were offered and are estopped thereby from suing herein.

FOURTH SEPARATE DEFENSE.

The defendants allege that the plaintiff failed to pursue the legal remedies available to him with respect to the attached chattels and is thereby estopped from setting up the cause of action herein.

FIFTH SEPARATE DEFENSE.

The defendants allege that the attached chattels were offered to the plaintiff after the execution of the said bond, but were refused by him.

SIXTH SEPARATE DEFENSE.

The defendants allege that the attachel chattels have always been available to the plaintiff and have been tendered to the plaintiff, but that he has refused to pursue the said chattels or accept a tender of them.

The defendants reserve the right to move to strike out the plaintiff's complaint at any time

before the trial of this action, or at the trial thereof on the following ground:

1. That the same does not set out a cause of action.

2. That the alleged judgment supposed to have been entered as of record against the said Miller and Friedman was not legally or properly entered and the said judgment is void and of no effect, and that the bond made by the defendants having been performed according to the conditions thereof, the same is void.

BRAELOW & TEPPER,
Attorneys for Defendants.

Notice to Strike Out Answer.

(Filed February 13, 1925.)

ESSEX COUNTY CIRCUIT COURT.

LOUIS D. GOLDBERG, *Plaintiff,* v. BENJAMIN FARBER and ISIDOR KAPLAN, *Defendants.*	Action at Law.

To the above named Defendants, or Braelow & Tepper, their attorneys:

PLEASE TAKE NOTICE, that on Friday, February 20th, 1925, at two o'clock in the afternoon, or as soon thereafter as counsel can be heard, the plaintiff in the above entitled cause, will apply to the Honorable Nelson Y. Dungan, Judge of the Essex

County Circuit Court at the Essex County Court House in the City of Newark, New Jersey, for an order striking out the answer filed by the defendants in the above entitled action, for the following reasons:

(1) In paragraph 1 of the answer, which is an answer to paragraph 1 in the complaint, the defendants deny the allegations contained in paragraph 1 of the complaint. This answer is made for the purpose of delay, for the purpose of embarrassing a fair trial of the issue and in fact is untrue, the defendants well knowing that all the matters set forth in paragraph 1 of the complaint are matters of record in books of the Essex County Clerk's office.

(2) In paragraph 2 of the answer, which is an answer to paragraph 2 in the complaint, the defendants deny the allegations contained in paragraph 2 of the complaint. This answer is made for the purpose of delay, for the purpose of embarrassing a fair trial of the issue and in fact is untrue, the defendants well knowing that all the matters set forth in Paragraph 2 of the complaint are matters of record in Books of the Essex County Clerk's Office.

(3) In Paragraph 3 of the answer, which is an answer to Paragraph 3 in the complaint, the defendants deny the allegations contained in Paragraph 3 of the complaint. This answer is made for the purpose of delay, for the purpose of embarrassing a fair trial of the issue and in fact is untrue, the defendants well knowing that all the matters set forth in Paragraph 3 of the complaint are matters of record in Books of the Essex County Clerk's Office.

Notice to Strike Out Answer.

(4) In Paragraph 4 of the answer, which is an answer to Paragraph 4 in the complaint, the defendants deny the allegations contained in Paragraph 4 of the complaint. This answer is made for the purpose of delay, for the purpose of embarrassing a fair trial of the issue and in fact is untrue, the defendants well knowing that all the matters set forth in Paragraph 4 of the complaint are matters of record in Books of the Essex County Clerk's Office.

(5) In Paragraph 5 of the answer, which is an answer to Paragraph 5 in the complaint, the defendants deny the allegations contained in Paragraph 5 of the complaint. This answer is made for the purpose of delay, for the purpose of embarrassing a fair trial of the issue and in fact is untrue, the defendants well knowing that all the matters set forth in Paragraph 5 of the complaint are matters of record in Books of the Essex County Clerk's Office.

(6) In Paragraph 6 of the answer, which is an answer to Paragraph 6 in the complaint, the defendants deny the allegations contained in Paragraph 6 of the complaint. This answer is made for the purpose of delay, for the purpose of embarrassing a fair trial of the issue and in fact is untrue, the defendants well knowing that all the matters set forth in Paragraph 6 of the complaint are matters of record in Books of the Essex County Clerk's Office.

(7) As to Paragraph 7 of the complaint, the defendants do not deny the allegations contained therein and therefore according to the Statute in such case made and provided, admits the statements made by the plaintiff in Paragraph 7 of the complaint.

Notice to Strike Out Answer.

(8) As to the first separate defense, in which the defendants allege that no judgment was entered against the said Jacob Miller and Joseph Friedman, the said statement is made for the purpose of delaying a fair trial of this issue and is so framed so as to embarrass the plaintiff, the defendants knowing that said statement is untrue and that by the records in the Office of the Clerk of the County of Essex there is of record such a judgment as is alleged by the plaintiff in the complaint filed in this cause.

(9) As to the second separate defense alleged by the defendants, the plaintiff says that the defendants know that the statement made therein is not true and further that the statements made in said second separate defense do not constitute a legal defense to this cause of action.

(10) As to the third separate defense alleged in the answer of the defendants in this cause, the plaintiff says that the defendants know that said statements are untrue and are made for the purpose of embarrassing the plaintiff and delaying a fair trial of the issues in this cause.

(11) As to the fourth separate defense set up by the defendants in this cause, plaintiff says that the same is untrue and does not constitute a legal defense to this action and that the said fourth separate defense is made for the purpose of embarrassing the plaintiff and delaying a fair trial of this cause.

(12) As to the fifth separate defense set up by the defendants in this cause, plaintiff says that the same is untrue and does not constitute a legal defense to this action and that the said fifth separate defense is made for the purpose of embar-

rassing the plaintiff and delaying a fair trial of this cause.

(13) As to the sixth separate defense set up by the defendants in this cause, plaintiff says that the same is untrue and does not constitute a legal defense to this action and that the said sixth separate defense is made for the purpose of embarrassing the plaintiff and delaying a fair trial of this cause.

The plaintiff will move to strike out from the answer that portion of the answer in which the defendants reserve the right to move to strike out the plaintiff's complaint at any time before the trial of this action, or at the trial, on the ground that the same does not set out a cause of action and that the alleged judgment supposed to have been entered as of record against the said Jacob Miller and Joseph Friedman was not legally or properly entered and that the said judgment is void and of no effect, that the bond made by the defendants having been performed according to the conditions thereof, the same is void, for the reason that the defendants cannot reserve said right but should have made said motion before the filing of the answer in this cause.

And furthermore, I shall apply for entry of summary judgment in this cause.

MAURICE J. ZUCKER,
Attorney of Plaintiff.

1/31/25

Endorsed:

Service of a true copy of the within instrument is hereby acknowledged this 12 day of Feb., 1925.

Filed Feb. 13, 1925.
John H. Scott, Clerk.

Order.

(Filed March 2, 1925.)

ESSEX COUNTY CIRCUIT COURT.

LOUIS D. GOLDBERG, *Plaintiff*, *v.* BENJAMIN FARBER and ISIDOR KAPLAN, *Defendants.*	Action at Law.

This matter coming on to be heard on motion to strike out the answer of the defendants filed herein, and it appearing that the defendants desire to file an amended answer and leave of court being given to file said amended answer within one week from February 27, 1925,

It is on this Second day of March, 1925, ORDERED that the defendants file their amended answer within one week from February 27, 1925, and that the argument on said motion to strike out the answer of the defendants be adjourned until March 6, 1925, and that the said argument be directed to the amended answer filed by said defendants.

NELSON Y. DUNGAN,
Circuit Court Judge.

Amended Answer.

(Filed Mar. 6th, 1925.)

ESSEX COUNTY CIRCUIT COURT.

LOUIS D. GOLDBERG,
Plaintiff,

v.

BENJAMIN FARBER and ISIDOR KAPLAN,
Defendants.

} Action at Law.

The defendant Benjamin Farber, residing in the City of Rahway, County of Union, and the defendant Isidor Kaplan, residing in the City of Newark, County of Essex, all of the State of New Jersey, in answer to the Complaint, and reserving the right to strike out all or part of the Complaint filed at the trial of the above cause by reason of the fact that the same does not set forth a legal cause of action, say:

1. They admit paragraph 1 of the Complaint filed in this cause.

2. They have not sufficient knowledge to form a belief as to the matter contained in paragraph 2 of the Complaint.

3. They deny paragraph 3 of the Complaint.

4. They admit paragraph 4 of the Complaint.

5. As to paragraph 5, the defendants admit all of paragraph 5 except the part reading "and said bond was so assigned," as to which latter portion the defendants say they have not sufficient knowledge upon which to form a belief.

6. As to paragraph 6, the defendants admit all of paragraph 6 except that portion of the same reading as follows: "being the amount of the judgment obtained against Jacob Miller and Joseph Friedman, Partners, trading as Miller-Friedman Co., together with taxed costs."

FIRST SEPARATE DEFENSE.

For a first separate defense to the Complaint filed in this cause, the defendants allege as follows: That shortly after the issuance of the Writ of Attachment against the said Jacob Miller and Joseph Friedman, in which action the bond set forth in the Complaint in this cause was entered into by the defendants, and well within four months of the issuance of the said Writ of Attachment, to wit, on or before August 11th, 1924, an involuntary Petition in Bankruptcy was filed against the said defendants Jacob Miller and Joseph Friedman, Partners, trading as Miller-Friedman Co., in the United States District Court in New York City; and that shortly thereafter, to wit, on August 27th, 1924, which time was less than four months after the commencement of the attachment suit against the said defendants Miller and Friedman, the said Miller and Friedman were adjudicated bankrupts in the said United States District Court.

SECOND SEPARATE DEFENSE.

Defendants repeat the whole of the First Separate Defense to this action and further say, that the goods and chattels, rights and credits, and moneys and effects seized by virtue of the said Writ of Attachment were thereupon taken into custody by the receiver in bankruptcy appointed by the said District Court, and were sold by the

said receiver pursuant to the United States Bankruptcy Laws, and that the plaintiff knew of these facts and took no steps whatsoever to secure the return of the said goods and chattels, rights and credits, and moneys and effects, or to prevent the sale of the same, nor did they object to the sale in any manner.

THIRD SEPARATE DEFENSE.

For a third separate defense the defendants repeat the First Separate Defense and further allege, that at the time of the commencement of the said attachment suit, which was on June 3rd, 1924, the attachment debtors Jacob Miller and Joseph Friedman, Partners, trading as Miller-Friedman Co., were actually insolvent and bankrupt, and that thereafter, and less than four months after the commencement of the attachment suit, to wit, on August 27th, 1924, the said Miller and Friedman were adjudicated bankrupts in the United States District Court in New York City.

FOURTH SEPARATE DEFENSE.

For a fourth separate defense the defendants allege that the judgment referred to in the Complaint against Jacob Miller and Joseph Friedman, Partners, trading as Miller-Friedman Co., was never entered, and that the Order entering judgment filed in that cause was never signed by any officer competent to sign the same.

FIFTH SEPARATE DEFENSE.

For a fifth separate defense the defendants allege that the bond entered in the attachment suit, which bond is the basis of the present action, is void and of no force and effect in that the Laws

of this State require such bond to be in double the appraised value of the goods and chattels, rights and credits, and moneys and effects; and that there was actually no appraisal made in the said attachment suit, in which the said bond, that is the basis of the plaintiff's suit in this action, was filed.

SIXTH SEPARATE DEFENSE.

That the said bond is void and of no force and effect in that the same was filed in the said attachment suit long prior to any entry of an appearance by the attachment debtors in that suit.

SEVENTH SEPARATE DEFENSE.

Defendants allege that the true value of the goods and chattels, rights and credits, and moneys and effects to be returned by them according to the terms of their said bond was less than $1,000.00 in value.

EIGHTH SEPARATE DEFENSE.

For an eighth separate defense the defendants allege that the attaching creditor in the attachment suit, to wit, Louis D. Goldberg, recovered judgment for the full amount claimed to be due in the affidavit filed by the said attaching creditor to procure the writ of attachment to issue and that subsequent to the issuance and return of the writ the bond which is the basis of this suit was filed in the attachment suit, and that thereafter this plaintiff was made an applying creditor in the attachment suit and that judgment in the attachment suit was rendered in full for both plaintiffs in the attachment suit.

BRAELOW & TEPPER,
Attorneys for Defendants.

Order.

(Filed March 6, 1925.)

ESSEX COUNTY CIRCUIT COURT.

LOUIS D. GOLDBERG,
Plaintiff,

v.

BENJAMIN FARBER and ISIDOR KAPLAN,
Defendants.

} Action at Law.

This matter being opened to the Court by Maurice J. Zucker, Attorney of the Plaintiff and in the presence of Braelow & Tepper, attorneys of the defendants, and due notice of a motion to strike out the answer filed by the defendants in the above cause and for the entry of summary judgment in said cause having been given to the defendants and the Court having heard argument of respective counsel in said cause and being satisfied that the answer and the amended answer filed by the defendants in said cause does not set forth a good and legal defense to the action instituted by the plaintiff, it is on this 6th day of March, 1925, on motion of Maurice J. Zucker, attorney of the plaintiff,

ORDERED that summary judgment be entered in favor of the plaintiff, Louis D. Goldberg and against the defendants, Benjamin Farber and Isidor Kaplan, in the sum of Forty-six Hundred and Twenty-seven Dollars and Ninety Cents ($4627.90).

NELSON Y. DUNGAN,
Circuit Court Judge.

Judgment.

ESSEX COUNTY CIRCUIT COURT.

37087

LOUIS D. GOLDBERG, *Plaintiff,* v. BENJAMIN FARBER and ISIDOR KAPLAN, *Defendants.*	Action at Law. On Default. Summary Judgment. Entered March 6, 1925. Damage $4,267.90 Costs 44.96 Total $4,672.86

MAURICE J. ZUCKER, Atty. of Plaintiff.

Judgment on Default in the above entitled Action was rendered on the Sixth day of March, A. D. Nineteen Hundred and Twenty-five in favor of the plaintiff Louis D. Goldberg and against the defendants Benjamin Farber and Isidor Kaplan for the sum of Four Thousand Six Hundred Twenty-seven Dollars and Ninety Cents damage and the sum of Forty-four Dollars and Ninety-six Cents costs of suit.

Judgment entered and signed March 6, 1925.

WILLIAM S. GUMMERE,
Judge.

Recorded in Book 99 Circuit Court Judgments, page 592.

Decision of Essex Circuit Court.

ESSEX COUNTY CIRCUIT COURT.

(Friday, March 6, 1925.)

LOUIS D. GOLDBERG,
Plaintiff,

v.

BENJAMIN FARBER and ISIDOR KAPLAN,
Defendants.

For the plaintiff appears Maurice J. Zucker, Esq.

For the defendants appear Messrs. Braelow & Tepper.

DUNGAN, J.:

This bond upon which the suit is predicated obliges the bondsmen, those who made the bond, to pay to the sheriff, his executors, administrators, successors and assigns, the sum of $8,754.60. It recites that the reason for giving the bond is a certain writ of attachment issued out of the Circuit Court, in the County of Essex, in the suit of Goldberg *v.* Miller and Friedman. It recites the intention of Miller and Friedman to appear, and then proceed to use a form that if the said Jacob Miller and Joseph Friedman shall return the goods and chattels, in case judgment should be rendered for the plaintiff, that this obligation be void. The obligation of the bondsmen to the defendant, or the sheriff at that time, which bond has been assigned to the plaintiff, as it might be under the

statute, is in the sum of $8,754.60, which is more than the amount for which the plaintiff obtained the judgment; so, of course, the obligation of the bondsman to the plaintiff is not for the full amount of the bond, but only such portion of it as represents the amount due to the plaintiff. There is no question but that the goods have not been returned, under the terms of the bond, and, therefore, the obligation of the bondsman attaches, unless there is something in the defenses which have been interposed on behalf of the sureties on the bond.

The first separate defense sets out an involuntary petition in bankruptcy, filed against the defendants Miller and Friedman. I think, under the decisions in New Jersey, that constitutes no defense to an action on a bond; but this is not an attack upon the judgment which was obtained against Miller and Friedman; it cannot be an attack upon that judgment, in this collateral way. To affect that judgment it must be directly attacked. So the first separate defense will be stricken out.

The second separate defense practically involves the same question, and will be stricken out.

The third separate defense alleges the insolvency and bankruptcy of Miller and Friedman at the time the bond was given, and that four months thereafter they were adjudged bankrupt. This does not constitute a defense under the decisions in this state.

The fourth separate defense is that the judgment was never signed by any officer competent to sign the same. I know that at one time it was the practice to sign judgments in the records of the County of Essex, but that has fallen into disuse, and it has been many years since a judgment has

actually been signed upon the record, the signature of the judge being presumed if, in fact, it be necessary. For fourteen years I have been here in Essex County and I have never signed a single judgment, and I doubt if any court would hold that all of those judgments were defective and void because they have not been signed.

That will be stricken out.

The fifth separate defense is that there was no appraisal made of the value of the goods and chattels, credits, moneys and effects upon which the bond was based. The persons giving the bond could have ascertained that fact, and if they chose to give a bond without that having been done, there there is no reason why that should not operate in this suit to defeat the plaintiff's action. That will be stricken out.

The sixth separate defense is that the bond was filed prior to the entry of the appearance by the attacking debtors in the suit. That constitutes no defense, and that will be stricken out.

The seventh separate defense is that the true value of the goods and chattels, rights and credits and moneys and effects to be returned by them according to terms of their said bonds was less than $1000 in value. That is no defense, and will be stricken out.

The eighth separate defense is that Goldberg, the plaintiff here, recovered judgment for the full amount claimed to be due in the affidavit filed by the said attaching creditors to procure the writ of attachment to issue, and that subsequent to the issuance and return of the writ the bond, which is the basis of this suit, was filed in the attachmen suit, and that thereafter this plaintiff was made an applying creditor in the attachment suit,

and that the judgment in the attachment suit was rendered in full for both plaintiffs. That would constitute no defense, but the records would seem to indicate, if counsel is right about it, that that is not the fact, and if the record discloses that the eighth separate defense is in error, that also will be stricken out.

The judgment in the suit of Goldberg against Miller and Friedman, being less than the amount involved, the answer will be stricken out, and judgment will be entered in favor of the plaintiff and against Farber and Kaplan for the amount of the judgment, with interest.

Defendant's counsel prays an exception to this ruling of the court.

Exception noted as ground of appeal.

Clerk's Certificate.

ESSEX COUNTY CLERK'S OFFICE.

State of New Jersey, }
County of Essex, } ss.:

I, JOHN H. SCOTT, Clerk of the County of Essex in the State of New Jersey;

DO HEREBY CERTIFY That the foregoing is a true and correct copy of all the records in the Case of Louis D. Goldberg, Plaintiff *v.* Benjamin Farber and Isidor Kaplan, Defendants, prepared for an Appeal, and the same is taken from and compared with Original copies of all the records, and as the same now remains on the files of said office.

In Testimony Whereof, I have hereunto set my hand and affixed the official seal of said County at Newark, N. J., this 8th day of March A. D., 1926.

JOHN H. SCOTT,
Clerk.

(Seal)

Notice of Appeal to Supreme Court.

(Filed March 3, 1926.)

ESSEX COUNTY CIRCUIT COURT.

LOUIS D. GOLDBERG,
Plaintiff,

v.

BENJAMIN FARBER and ISIDOR KAPLAN,
Defendants.

} Action at Law.

To

MAURICE J. ZUCKER, Esq.,
Attorney of Plaintiff.

TAKE NOTICE that the Defendants appeal to the New Jersey Supreme Court of Judicature of New Jersey, from the whole of the judgment in this case.

BRAELOW & TEPPER,
Attorneys of Appellant.

Mar. 1 '26.

Endorsed:

Service of a copy of the within notice acknowledged this First day of March 1926.

MAURICE J. ZUCKER,
Attorney of Appellee.

BRAELOW & TEPPER,
Attys of Appellant,
Counsellor at Law,
800 Broad St.,
Newark, N. J.

Filed March 3, 1926.

JOHN H. SCOTT,
Clerk.

Grounds of Appeal to Supreme Court.

NEW JERSEY SUPREME COURT.

LOUIS D. GOLDBERG, *Plaintiff-Appellee,* *v.* BENJAMIN FARBER and ISIDOR KAPLAN, *Defendants-Appellants.*	Action at Law

The following are the grounds upon which the Defendants-Appellants rely for the reversal of the whole judgment entered in the Court below in the above stated cause:

1. Because the Trial Court erroneously ordered that the amended answer filed in the above entitled cause be stricken out, although said amended answer contained eight separate defenses to the complaint filed in said cause, all of which contained just and legal defenses to said complaint.

2. Because the Court erroneously ordered the amended answer in said cause filed, to be stricken out, although said amended answer raised questions of fact which should have been submitted to the consideration of a Jury.

3. Because the said Court erroneously ordered that summary judgment be entered in favor of the Plaintiff and against the Defendants in the above entitled cause, although questions of fact, requiring a submission thereof for determination by a Jury had been raised in said case; said Court thus erroneously depriving Defendants of their day in Court.

Grounds of Appeal.

4. Because said Court in its opinion filed in the above entitled cause, did erroneously rule that the obligation of the defendants under the bond set out in said cause was a sum of money mentioned in said bond; whereas it was respectfully urged to said Court, that the true obligation of said bond, in accordance with the terms of the statute under which said bond was given, was the value of the goods for the return of which said bond was given.

BRAELOW & TEPPER,
Attorneys for Defendants-Appellants.

ENDORSED:

Service of a copy of the within grounds of appeal, hereby acknowledged this 29th day of March, 1926; and I hereby consent that same be filed.

MAURICE J. ZUCKER,
Attorney for Plaintiff-Appellee.

Rule on Affirmance.

NEW JERSEY SUPREME COURT.

October Term, 1926.

LOUIS D. GOLDBERG, *Plaintiff-Respondent,* *v.* BENJAMIN FARBER and ISIDOR KAPLAN, *Defendants-Appellants.*	On Appeal From Essex County Circuit Court.

This cause having been duly argued at the October Term, 1926, of this Court, by Maurice J. Zucker, of Zucker & Goldberg, of counsel for plaintiff-respondent, and Braelow & Tepper, by George F. Lahey, Jr., of counsel for the defendants-appellants, and the Court having considered the same and finding no error in the record or proceeding in the Essex County Circuit Court, it is thereupon

ORDERED AND ADJUDGED THAT the judgment of the Essex County Circuit Court, removed by the appeal in this cause, to the Supreme Court, be affirmed with costs, and that the record be remitted to the Essex County Circuit Court to be proceeded with in accordance with this judgment and the practice of said Court.

Entered March 3, 1928.

On motion of

ZUCKER & GOLDBERG,
Attorneys for Plaintiff-Respondent.

Opinion of Supreme Court.

(Filed Feb. 25, 1928.)

Nos. 52 and 53, October Term, 1926.

NEW JERSEY SUPREME COURT.

LOUIS D. GOLDBERG,
Plaintiff-Respondent,

v.

BENJAMIN FARBER and ISIDOR KAPLAN,
Defendants-Appellants.

NORTH JERSEY MORTGAGE CO., INC.,
Plaintiff-Respondent,

v.

BENJAMIN FARBER and ISIDOR KAPLAN,
Defendants-Appellants.

Argued October 6th, 1926; decided May term, 1927.

On appeal from judgments of the Essex County Circuit Court.

Before—Justices KALISCH, KATZENBACH and LLOYD.

For the appellants: BRAELOW & TEPPER, Esqs., and GEORGE F. LAHEY, JR., Esq.
For the respondents: ZUCKER & GOLDBERG, Esqs.

PER CURIAM.:

The above cases are two appeals from the Essex County Circuit Court. The appeals were argued

together. They present the same question, namely, the propriety of striking out an amended answer and entering summary judgment. The actions were instituted upon a bond given by the defendants in an attachment suit. One suit was by the attaching creditor; the other by an applying creditor. The facts briefly are that an attachment was issued by Louis D. Goldberg out of the Essex County Circuit Court against Jacob Miller and Joseph Friedman, partners, under which goods and chattels belonging to said partners trading as Miller Friedman Co. were attached. On June 7th, 1924 as the defendants in attachment wanted to appear, a bond was given to the Sheriff of Essex County in the sum of $8,754.60 by the defendants in attachment with Benjamin Farber and Isidor Kaplan as sureties. The condition of the bond was that if a return of the goods seized was made, if judgment should be rendered for the plaintiff, then the obligation would be void. Goldberg obtained a judgment for $4,465.02. The goods were not returned. The Sheriff assigned the bond to Goldberg who instituted suit upon it against Farber and Kaplan, the sureties. The answer as amended set up eight defenses. These were all struck out and summary judgment entered in favor of Goldberg.

The first ground of appeal is based upon the striking out of the 7th defense. As to this defense the lower court said:

> "The seventh separate defense is that the true value of the goods and chattels, rights and credits and moneys and effects to be returned by them according to terms of their said bonds was less than $1,000 in value. That is no defense, and will be stricken out."

What the appellants desire to do is to prove the true value of the goods taken and have a judgment entered against them for only such value. We see no merit in this contention. The suit is on the bond which speaks for itself. The bond is for the payment of a specific sum of money if the goods are not returned. The bond was given under Section 17, paragraph 1, of the Attachment Act. This provision is as follows:

> "A bond to the officer who attached the personal property in double the appraised value thereof, conditioned for the return of the said property in case judgment shall be rendered for the plaintiff or for any of the applying creditors; which bond, in case of breach of said condition, the said officer shall on application of the plaintiff or applying creditor, without fee, assign to such person, as the court shall direct, to be prosecuted for the benefit of the plaintiff and applying creditors."

The appellants desire further to read into this section the words of the 9th section of the Attachment Act which is as follows:

> "9. Custody of Personal Property Attached; Bond by Garnishee to Officer; Officer's Compensation.—The personal property so attached shall remain in the safekeeping of the officer to answer and abide the judgment of the Court, unless the garnishee, after inventory and appraisement thereof, shall enter into bond to the officer with two sufficient sureties, being freeholders of the county, or with a qualified surety company, in double the sum at which such property

> was appraised, with condition that the said personal property, or the full value thereof, to be estimated by such appraisement, shall be forthcoming to answer the judgment of the court; the officer shall receive reasonable compensation for the cost of storage, the wages of watchman, or other expense necessary to securely keep the property, to be fixed by the court or a judge thereof and included in the officer's fees for executing the writ, and to be taxed in the costs; such compensation shall be paid out of the first moneys arising from the sale of the property" (P. L. 1901, p. 161).

This section of the Act applies to garnishees and in our opinion cannot be read into a bond given under Section 17, paragraph 1.

The Attachment Act (Section 33) says the Act must be construed in the most liberal manner for the benefit of creditors. It would certainly not be beneficial to creditors to sanction a practice which would permit testimony to be given as to the value of the goods attached after a bond is given, approved by the court, accepted by the creditor, and the goods are discharged from the lien of the attachment. The debtor if he chose to do so could sell or secrete the goods so that a creditor could obtain no testimony as to their value.

The question appears to have been decided in the case of Hanniss *v.* Bonnell, 25 N. J. L. 159, where the court said:

> "The defendant was permitted to receive and enjoy the property during the pendency of the attachment, upon the condition that he would return it in case judgment should be rendered for any creditor. Judgment

having been rendered and he having failed to return the property, the bondsmen are amenable to the penalty."

In Vreeland *v.* Bruen, 21 N. J. L. 214, the court said, at page 229:

"The goods were first seized to compel the defendant's appearance; until that was effected, or judgment and sale, the lien continued; but when the defendant appeared and entered into special bail, the lien was discharged, and the plaintiff and the applying creditors were compelled to look to the defendant and his bail. * * * The property is given up, and no power remains with the sheriff to reclaim it, or even to hold or dispose of it, under the original lien. It must necessarily become subject to the defendant's sale or disposition, liable to any new liens that the owner or the law may create, or subject to be seized and sold under execution, without any power to prevent it. Suppose, after the bond was given, a judgment creditor should cause the property to be sold by execution, could this court if applied to, stay the sale, or order the sheriff to pay the money over for the benefit of the attachment? No, the answer would be; you must look to your bond; and * * * suppose, instead of the sheriff, the defendant himself, or since his discharge as a bankrupt, his assignee should attempt to sell the personal estate levied on, could he be restrained at the instance of the plaintiff? I think not; because his lien is divested, and other liens have arisen, leaving the party to his bond."

The second ground of appeal argued is that the court erred in holding that the obligation of the defendants was the sum mentioned in the bond rather than the value of the goods. This is in effect the same question as has just been considered. It is argued by the appellants that because no appraisement of the goods was made the situation is altered. If the defendants in attachment chose to put up a bond without an appraisement being made they waived an appraisement. Berry *v.* Wasserman, 179 Mass. 537.

The second case is that of an applying creditor who secured a judgment against the sureties on the bond. The same questions are involved in this case. The judgments of the Essex County Circuit Court are affirmed with costs.

Notice of Appeal and Grounds.

(Filed April 19, 1928.)

NEW JERSEY SUPREME COURT,

ESSEX COUNTY.

LOUIS D. GOLDBERG,
Plaintiff-Respondent,

v.

BENJAMIN FARBER and ISIDOR KAPLAN,
Defendants-Appellants.

NORTH JERSEY MORTGAGE CO., INC.,
Plaintiff-Respondent,

v.

BENJAMIN FARBER and ISIDOR KAPLAN,
Defendants-Appellants.

Action at Law.

To

ZUCKER & GOLDBERG, Esqs.,
Attorneys for Plaintiff-Respondent or
To whom it may concern:

PLEASE TAKE NOTICE, that the defendants-appellants in the above entitled cause appeal to the Court of Error and Appeals, in the last resort in all causes in New Jersey, from the whole of the judgment entered in this cause on the following ground:

The Supreme Court erred in giving judgment

for the plaintiff-respondent instead of for the defendants-appellants.

BRAELOW & TEPPER,
Attorneys for Defendants.

(Endorsed):

Service of a copy of the within Notice is hereby acknowledged this 15 day of March, 1928.

ZUCKER & GOLDBERG,
Attorneys for Plaintiffs-Respondents.

Filed April 19 1928

FRED L. BLOODGOOD,
Clerk.

Supreme Court Clerk's Certificate.

I, FRED L. BLOODGOOD, Clerk of the Supreme Court of the State of New Jersey, do certify that the foregoing is a true copy of the notice of appeal filed and also of rules entered in the minutes of the Court in the above-stated cause.

IN TESTIMONY WHEREOF I have set my hand and the seal of said Court at Trenton, this twenty-third day of April, A. D. nineteen hundred and twenty-eight.

[SEAL]

FRED L. BLOODGOOD,
Clerk.

New Jersey Court of Errors and Appeals

LOUIS D. GOLDBERG,
Plaintiff-Appellee,

v.

BENJAMIN FARBER and ISIDOR KAPLAN,
Defendants-Appellants.

NORTH JERSEY MORTGAGE CO., INC.,
a Corporation,
Plaintiff-Appellee,

v.

BENJAMIN FARBER and ISIDOR KAPLAN,
Defendants-Appellants.

BRIEF FOR PLAINTIFFS-APPELLEES.

(The North Jersey Mortgage Co., Inc., a New Jersey corporation, by leave of the Court below, became an applying creditor and recovered a judgment in the sum of $2,728.77. By agreement of counsel, because of the similarity of facts, and to save the time of the Court, the two cases are briefed and argued together in the Supreme Court and are argued together on this appeal.)

Answer to Point One.

The defendants-appellants' first ground of appeal rests upon the alleged error of the Trial Court in striking out the Seventh Separate Defense. (State

of the Case, p. 24, line 26. *Louis D. Goldberg, Plaintiff-Appellee* v. *Benjamin Farber and Isidor Kaplan, Defendants-Appellants.*)

> "The seventh separate defense is that the true value of the goods and chattels, rights and credits and moneys and effects to be returned by them according to terms of their said bonds was less than $1000. in value. That is no defense, and will be stricken out."

The contention is, that at the trial the defendants-appellants should have been permitted by the Court below, to interpose as a defense to this suit on their bond, the true value of the goods for which this bond was given. The basis of this contention is that no appraisal was made by the sheriff before the bond was given. The bond apparently was given under Section 17, Paragraph 1 of the Attachment Act (C. S., p. 141), which reads as follows:

> "A bond to the officer who attached the personal property in *double the appraised value thereof,* conditions for the return of the said property in case judgment shall be rendered for the plaintiff or for any of the applying creditors; which bond, in case of breach of said condition, the said officer shall on application of the plaintiff or applying creditor, without fee, assign to such person, as the court shall direct, to be prosecuted for the benefit of the plaintiff and applying creditors."

The defendants-appellants also mention as pertinent, Section 9 of the Attachment Act (C. S., p. 138) which reads as follows:

> "The personal property so attached shall remain in the safekeeping of the officer to answer and abide the judgment of the court, unless the garnishee, *after inventory and appraisement thereof,* shall enter into bond to the officer with two sufficient sureties, being free holders of the county or with a qualified surety

> company, in double the sum of which such property was appraised, with condition that the said personal property, *or the full value thereof, to be estimated by such appraisement,* shall be forthcoming to answer the judgment of the court."

The defendants-appellants claim that under the combined construction of these two sections together with the application of the Supreme Court case of *Caldwell* v. *West,* 21 N. J. L., page 418, the Court erred in not permitting the defendants-appellants to show what they deemed to be the true value of the goods.

The defendants-appellants' position is that a bondsman who had obtained the release of attached chattels by his voluntary proffer of a bond, can later by the introduction in evidence of the purported true value, limit his liability to a sum less than his bonded obligation.

The construction of the Attachment Act is fixed by Section 33 of the said act (C. S., p. 148) which reads as follows:

> "This act shall be construed in all courts in the *most liberal manner for the detection of fraud, the advancement of justice and benefit of creditors.*"

The case of *Hannes* v. *Smith,* 22 N. J. L., page 332 on page 342, the Court says:

> "*This act is to be construed liberally.* The bond was taken not for the security only of the plaintiff named in the writ, but of all the applying creditors. Such construction is to be adopted as will effectuate the object of the statute, if consistent with its terms."

In the case of *Thompson* v. *Taylor,* 16 N. J. L. page 100, Chief Justice HORNBLOWER states the rule to be that a substantial compliance with the statute

is sufficient, since it is a remedial statute enacted for the benefit of the creditors, and he says on page 101:

> "He supposes, because this is a statute remedy, it is to be governed by the same rigid rules that apply to the execution of special delegated and extra-judicial authorities. This is a mistake."

On page 102:

> "The return, if necessary, would have been amended, or if the Court could see by the return a substantial service of the writ they would hold on to the property attached, until the defendant, by a personal appearance to the action and a compliance with other requisites of the statute, should entitle himself to have the property delivered to him out of Court.
>
> "This is a remedial statute, and as well upon legal principles as by its own express enactment in the 32nd section, is to be liberally construed for the benefit of the creditors."

Under such construction, it is apparent that the defendants-appellants' appeal must fail.

The statute was created for the benefit of creditors and the appraisal mentioned in Paragraph 1, Section 17 of the Attachment Act is only a rule by which the debtor can compute the sum of the bond necessary to release the goods attached.

It is apparent that a creditor receiving a bond from his debtor and his sureties in double the amount of his claim as set forth in the affidavit, would not ask that an appraisal be made.

Under Section 17, Paragraph 1, it is the debtor's right to have an appraisal made and give a bond for a sum that is satisfactory to the plaintiff-appellee and approved by the Court. He cannot later after the goods have been discharged and removed from the jurisdiction of the Court, claim that the sum of the bond was too great.

In the event of the defendants-appellants' giving a bond to release the chattels attached without an appraisal, it should be considered as a waiver of the appraisal and a compliance with the statute. It is his right to ascertain the sum of the bond which he proffers to the Court by an appraisal, and, as stated by the Court below (p. 24, State of the Case, line 16, *Louis D. Goldberg, Plaintiff-Appellee* v. *Benjamin Farber and Isidor Kaplan, Defendants-Appellants*):

> "The persons giving the bond could have ascertained that fact, and if they chose to give a bond without that having been done, there is no reason why that should (not?) operate in this suit to defeat the plaintiff's action."

The plaintiffs-appellees' only remedy is against the bond, for in *Hanniss* v. *Bonnell*, 25 N. J. L. 159, on page 162, the Court says:

> "The defendant was permitted to receive and enjoy the property during the pendency of the attachment, upon the condition that he would return it in case judgment should be rendered for any creditor. Judgment having been rendered and he having failed to return the property, the bondsmen are amenable to the penalty."

And in the case of *Vreeland* v. *Bruen*, 21 N. J. L., page 214, on page 229, the Court says:

> "The goods were first seized to compel the defendant's appearance; until that was effected, or judgment and sale, the lien continued; but when the defendant appeared and entered into special bail, the lien was discharged, and the plaintiff and applying creditors were compelled to look to the defendant and his bail. * * * The property is given up, and no power remains with the sheriff to reclaim it, or even to hold or dispose of it, under the original lien. It must necessarily become subject to the de-

> fendant's sale or disposition, liable to any new liens that the owner or the law may create, or subject to be seized and sold under execution, without any power to prevent it. Suppose, after the bond was given, a judgment creditor should cause the property to be sold by execution, could this court if applied to, stay the sale, or order the sheriff to pay the money over for the benefit of the attachment? No, the answer would be; you must look to your bond; and * * * Suppose, instead of the sheriff, the defendant himself, or since *his discharge* as a *bankrupt,* his assignee should attempt to sell the personal estate levied on, could he be restrained at the instance of the plaintiff? I think not; because his lien is divested, and other liens have arisen, leaving the party to his bond."

Section 9 of the Attachment Act is not directly in point, as the person giving the bond is the garnishee and not the debtor, but the plaintiff-appellee believes that the provisions of the section are pertinent. The section provides for the giving of a bond by the garnishee *after inventory and appraisal* and

> "With condition that the said personal property or the value thereof, *to be estimated by such appraisement* shall be forthcoming to answer the judgment of the Court."

Under the construction of this act, as stated in Section 33

> "In the most liberal manner for * * * the benefit of creditors."

the garnishee can give a bond in a sum which would be satisfactory to the plaintiff-appellee and to the Court, and waive appraisal.

The question at bar has not arisen before because Section 17 gives the debtor his option of bonds. When he finds that the value of the goods

attached is greater than the sum due the creditor, he gives a bond double the amount of the claim, but if the value of his goods is less than the claim, he gives his bond in double the sum of the value of the goods.

It would be a gross fraud on creditors to permit testimony to be given as to the value of the goods attached *after a bond is given* and accepted by the creditor, approved by the Court, and the goods are discharged from the lien.

The goods may be sold and secreted beyond discovery before judgment shall be rendered when a creditor would have no opportunity to show their value. Such a course would have no other effect but to compel a creditor to refuse to take a bond in double the sum of his claim, and insist on an appraisal.

Under the true construction of the Attachment Act, *i. e.*, for the benefit of creditors and the prevention of fraud, it is evident that such was not the intent of the Legislature.

In support of the defendants-appellants' position, the case of *Caldwell* v. *West* (*supra*) is cited. After quoting the portion of the case deemed to be in point they go on to say that the above mentioned case was on a replevin bond and the rule would seem to apply with equal force to an attachment bond.

The reason for the supposed equal application of the rule in both attachment and replevin, they fail to state.

The plaintiff-appellee respectfully submits that the distinction is wide and apparent.

In the common law action of replevin, the bond is given by the *plaintiff* to the sheriff to indemnify the officer for any loss sustained by reason of the plaintiff's failure to prosecute in the replevin action or to return the goods, in the event of an adverse judgment. The bond is given before the

replevy and the taking of it by the sheriff is not mandatory, but is for his own protection.

In the Court of Errors and Appeals, case of *Caldwell* v. *West,* 23 N. J. L. on page 739, the Court says:

> "It is to be observed that the ascertainment of the value by appraisement, which in this case was made and inserted in the bond, *was only to aid the officer* in determining the amount for which the bond was to be taken, that is, what amount would be *'sufficient security'* to him for the return of the goods; and though not necessary under the 5th section of the statute, I see no objection to it, for it is calculated to secure both parties against the *improvident exercise of the discretion vested in the Sheriff."*

On page 740, the Court says:

> "*Neither party* can be presumed to have assented to the value mentioned in the bond, except for the purpose for which it is there; and the plaintiff was, therefore, entitled to show the real value of the property at the time taken."

An attachment bond is given to the sheriff by the *defendant* for the benefit and protection of creditors and is given to release goods already attached by the sheriff by virtue of his writ.

The attachment bond is a statutory one and in view of its voluntary proffer by the defendant and its acceptance by the plaintiff and the Court, the parties must be conclusively presumed to have assented to the amount.

A further distinction is pointed out in the case of *Brown* v. *Bissett,* 21 N. J. L., page 46 on page 52:

> "But there is a well settled distinction between a justification in trespass and an avow in replevin. There is a difference when one claims by virtue of an authority to establish a

> right or control over the property or person of another, and when it is used defensively, and relied on as an honest excuse. In replevin, the Sheriff, who avows, does not seek simply to excuse the trespass, but he is an actor, sets up a right, seeks to have a return, and ought to make a good title in omnibus."

The defendants-appellants say that the Court below erred in ruling that the obligation of the defendants-appellants under the bond was a sum of money mentioned in the said bond and not the value of the goods for the return of which the bond was given.

The Court states as its reason for deciding that the defendants-appellants' defense is unavailable to them, that

> "The persons giving the bond could have ascertained that facts (the value of the goods), and if they chose to give a bond without that having been done, there is no reason why that should operate in this suit to defeat the plaintiff's action" (State of Case, 24, line 16). Louis D. Goldberg, Plaintiff-Appellee *v.* Benjamin Farber and Isidor Kaplan, Defendants-Appellants."

It would seem that it was on the theory of estoppel that the Court below struck out the defense.

There are no cases in this State adjudicated upon this precise point, but authority can be found for the provision that a bondsman by giving his bond to release the goods, waives the requirement of an appraisal.

In *Corpus Juris* (Attachment 6 C. J., page 238, Section 453) :

> "Inventory and appraisal; It is very generally required that the officer making a levy shall make and return an inventory and appraisal of the property attached; but where the schedule and appraising of property taken

on attachment are for the protection and benefit of the defendant, if such schedule and appraisal are omitted by order or consent of defendant, no rights of other creditors being involved, he will not be heard to object to such omission, and where the provision requiring the inventory is considered as being for the benefit of a creditor, it can only be enforced by him. So, also, where a bond to dissolve an attachment provides for the payment of the amount recovered in the final judgment and is executed without an appraisal of the attached land, as required by statute, the *obligors waive requirements* for ascertainment of the value of the land and substitute the amount of the final judgment for the appraised value."

The principle is clearly stated by Chief Justice WRIGHT, in the case of *Woodward* v. *Adams,* 9 Iowa, page 474. He states on page 475:

"The appellees (the defendants-appellees in the case at bar) seek to uphold the decision sustaining the demurrer upon two grounds.

"SECOND.—That at all events it cannot form the basis of an action where there has been no appraisement of the property and no value agreed upon by the parties."

(On page 477):

"The bond is to be in the penalty of at least double the value of the property sought to be released and this value is to be determined by two disinterested persons, summoned and sworn by the sheriff for that purpose, unless the parties otherwise agree.

"Now if the defendant gives a bond as in this case, in a penalty sufficient to recover the plaintiff's claim, *all trouble in* relation to fixing the amount thereof is obviated, * * *"

(On page 478):

"We next inquire whether the appraisement of the property was necessary to the

validity of the bond. This appraisement is not required in the making of a levy of the attachment. And it is only provided for in order *to determine the amount of the bond.* And this is not necessary in all cases. If the parties agree upon the value of the property, no appraisement is to be made. Suppose they agree, is it necessary that the bond, the return of the sheriff, or any other paper, should show that fact in order to make valid the understanding? Or in other words, is the bond void, if this agreement is not thus shown?

"In our opinion it is not necessary for the plaintiff to aver in his petition that the property was appraised or that its value was fixed by agreement. And that which need not be averred need not be proved. The appraisement is only to be made in the event that the parties do not otherwise agree. When the bond is executed, received and returned by the sheriff, and suit brought thereon by the plaintiff, this is at least *prima facie* evidence that the statute has been complied with. Judgment reversed."

Of course, the obligors could attack the bond on the ground of fraud, collusion or the like. (See 2 R. C. L., p. 890, Section 110), but there are not such allegations in the case at bar.

The principle is again expounded in the case of *McRae, Coffman & Co.* v. *Austin,* 9 La. Ann., page 361, the Court in that case and under similar facts says:

"The appellants were condemned as sureties on the bond given to release the attachment in the suit between the same parties, just decided; the only ground of defense relied on, besides those which were considered in other cases, is that no inventory was made of the property attached, as required by Art. 275, C. P.

"We agree with the Judge of the Court below, that as the attachment was dissolved by a

> bond being substituted for the property, *this formality was waived* and neither the defendant nor his sureties could make any exceptions to the regularity of the proceedings on that ground. Judgment affirmed."

Again in the case of *Shelden* v. *Sharpless,* 2 Ohio Dec. 1, as stated in the Century Edition of the American Digest, Volume 5, Attachment Section 505 (L):

> "Section 198 provides that the sheriff attaching goods shall, with two free holders, inventory and appraise the property attached. Section 199 provides that the sheriff shall deliver the property attached to the person in whose possession it is found, on such person executing an undertaking to plaintiff in double the appraised value of the property. Section 212 provides that if the defendant in attachment proceedings, at any time before judgment, execute an undertaking to plaintiff in double the amount of the latter's claim, the attachment shall be discharged and the property restored. Held, that the attachment was complete without an appraisal so that an undertaking under the last section was not invalid because taken before any appraisal was made."

Another case directly in point, which affirms the principle above stated, is the case of *Berry* v. *Wasserman,* 179 Mass. 537.

In that case, the Court unanimously decided in favor of the judgment-creditor and Justice KNOWLTON writing the case of the Court on page 540, says:

> "The bond states that 'Frank Wasserman wishes to dissolve the attachment according to law'. * * *
>
> "The parties completed this bond and it was accepted and acted upon without having an appraisal of the attached property under the Pub. Sts. c. 161 sec. 126. What effect should this have upon the construction to be put

> upon their contract? The most natural construction, and that which in view of the first three lines of the condition would seem to carry out their meaning, is to say that by providing for the payment of the amount recovered on the final judgment, 'after said Berry shall establish his title to the land in a writ of entry, etc.' and by executing the bond without an appraisal of the land the obligors waive the requirement for an ascertainment of the value of the land, and substituted the amount of the final judgment for the appraisal value. *Perhaps the amount sued for was much less than the value of the land.*"

Other cases in point are *McGinn* v. *Ross,* 11 Abb. Pr. 20; *Smith* v. *Cooper,* 9 Iowa 376.

It is, therefore, respectfully urged to this Court, that the defendants-appellants by giving their bond for the release of the attached chattels have waived the appraisal of the said chattels and the plaintiffs-appellees respectfully urges the affirmance of the decision of the Court below.

Respectfully submitted,

ZUCKER & GOLDBERG,
Counsel with Plaintiffs-Appellees.

MAURICE J. ZUCKER,
Of Counsel.

New Jersey Court of Errors and Appeals

LOUIS D. GOLDBERG,
Plaintiff-Appellee,

v.

BENJAMIN FARBER and ISIDOR KAPLAN,
Defendants-Appellants.

NORTH JERSEY MORTGAGE CO., INC., a corporation,
Plaintiff-Appellee,

v.

BENJAMIN FARBER and ISIDOR KAPLAN,
Defendants-Appellants.

ON APPEAL FROM SUPREME COURT

BRIEF FOR DEFENDANTS-APPELLANTS.

Facts.

On June 7th, 1924, defendants-appellants entered into a bond with Harry B. O'Connell, then the Sheriff of Essex County, which bond appears on page 5, state of case. The condition of the bond was that if Jacob Miller and Joseph Friedman who were principals in the bond, with the defendant-appellants as sureties, should return certain goods and chattels which had been seized under a writ of attachment issued at the instance of the plaintiff-appellee herein, then said bond should be void; otherwise to remain in full force and effect. The

penal sum of the bond was mentioned as $8,754.60, which would appear to be double the sum claimed by the plaintiff-appellee herein at the time he issued his attachment.

On October 3rd, 1924, plaintiff-appellee secured judgment against Miller and Friedman in the sum of $4,465.02 and $49.88 costs. Thereafter the Sheriff of Essex County, pursuant to the Statute, assigned said bond to the plaintiff-appellee, who thereupon brought suit in the Essex County Circuit Court against the sureties, defendants-appellants, for the amount of the judgment against Miller and Friedman aforesaid, with interest and costs. Defendants-appellants filed an answer which was stricken out; filed an amended answer which was likewise ordered stricken and on March 6th, 1925, the Essex County Circuit Court ordered summary judgment entered in favor of the plaintiff-appellee and against the defendants-appellants in the sum of $4,672.86.

The New Jersey Mortgage Co., Inc., a New Jersey corporation, by leave of the Court, became an applying creditor, and recovered a judgment in the sum of $2,728.77. By agreement of counsel, because of the similarity of facts, and to save the time of the Court, the two cases are briefed and presented together.

It was from the decision of the Judge of the Essex County Circuit Court striking the aforesaid answers and entering the aforesaid summary judgments that defendants-appellants appealed to the Supreme Court, and it is from the decision of the Supreme Court affirming the Essex County Circuit Court that defendants-appellants appeal to this Court.

POINT I.

The Trial Court erred in striking the Seventh Separate Defense of defendants-appellants' answer, as follows:

Seventh Separate Defense.

> **"Defendants allege that the true value of the goods and chattels, rights and credits, and moneys and effects to be returned by them according to the terms of their bond was less than $1,000.00 in value."**

The Court further erred in ordering that summary judgment be entered in favor of plaintiff, whereas said Seventh Separate Defense raised a question of fact as to the true value of the goods which required a submission to a jury for its determination.

ARGUMENT.

In the decision of the Essex County Circuit Court (State of Case, p. 22) the Court said:

> "The seventh separate defense is that the true value of the goods and chattels, rights and credits, and moneys and effects to be returned by them according to the terms of their said bond was less than $1,000.00 in value. That is no defense and should be stricken out."

The bond in question does not specifically state under what section of the Attachment Act the said bond is given. Section 17 of the Attachment Act, 1 C. S. (1910) page 141 setting forth the varied kinds of bonds which may be given under the act reads as follows:

> "BOND BY DEFENDANT TO OFFICER OR TO PLAINTIFF OR OTHERS: FORM AND REQUISITES OF

BONDS; EFFECT OF GIVING BOND—The defendant, upon such appearance and notice, may give bond with one or more sufficient sureties, residents of this State, indorsed with the approval of a judge of the court in one of the forms herein provided, to wit:

"I. A bond to the officer who attached the personal property in double the appraised value thereof, conditioned for the return of the said property in case judgment shall be rendered for the plaintiff or for any of the applying creditors; which bond, in case of breach of said condition, the said officer shall, on application of the plaintiff or applying creditor, without fee, assign to such person as the court shall direct, to be prosecuted for the benefit of the plaintiff and applying creditors.

"II. A separate bond to the plaintiff and to each applying creditor in double the sums, respectively, sworn to in the affidavits to be filed by them, conditioned for the return of said property of judgment be rendered for the obligee; such bond to be filed with the clerk of the court.

"III. A bond or bonds to such person and of such form, amount and conditions as the court or a judge thereof may upon two days' notice to the plaintiff and the applying creditors determine.

"IV. A separate bond to the plaintiff and to each applying creditor in double the sums respectively sworn to in the affidavits filed by them, conditioned for the payment of such moneys as may be adjudged to be due to them severally in the action, such bond to be filed with the clerk of the court.

"Upon the giving of bond in either the first or second of the foregoing forms, the court or judge, if it appear just so to do, may make order discharging the defendant's personal property from the attachment; and upon the giving of bond in the third of the foregoing

forms may make order discharging such personal property or any part thereof from the attachment, and upon the giving of bond in the fourth of the foregoing forms may order the attachment set aside and the defendant's real and personal property discharged therefrom."

It will be apparent from the reading of these sections that the bond must have been given under Paragraph 1 of Section 17.

It is the contention of defendants-appellants that although no appraisal was made of the value of the goods at the time of the attachment their liability is the true value of the goods for the return of which their responsibility as sureties was undertaken, and they claim as a right a trial of this cause wherein evidence is to be allowed of the value of the goods and adjudication of the true value thereof.

As a convenient legal device for the integration of a security transaction a bond given under Section 17 cited above should contain within its four corners terminology showing the particular result desired for which security is given, or else just what is being secured by the bond should be gathered from the words of the statute expressly directing the manner of computing the amount of the bond and the condition of the said bond. In this case, the bond itself is ambiguous.

Under Paragraph Four of Section 17 above cited, the extent of liability is clear. For from the condition "for the payment of such moneys as may be adjudged to be due" and the method of computing the sum "a separate bond * * * in double the sums respectively sworn to in the affidavits filed" it is evident that the secured result is the payment of the adjudicated debt.

A comparison of Paragraph One of the section and Paragraph Two is significant. Both sections

make the condition of the bond "the return of the said property in case judgment shall be rendered for the plaintiff" yet Paragraph One computes the amount of the bond "in double the appraised value of the attached goods," while Paragraph Two computes the amount "in double the sums respectively sworn to in the affidavits to be filed," this distinction is material in determining the nature of the secured result. We can assume that the legislature had not intended the same legal consequences because of its differentiation in phraseology between the paragraphs. That the one bond is made payable directly to the sheriff and the other to the plaintiff is immaterial since the party in interest in both cases is the plaintiff.

Under Paragraph Two of the section just cited a breach of the condition, *i. e.*, to return the goods, would give rise to a right to recover the amount of the adjudicated debt which would correspond usually to the sum stated in the affidavit. It would seem that the plaintiff-respondent's contention that the true value of the goods is immaterial upon breach of the condition in a bond of the type worded as in this case is probably operative only in a case where the bond is given under Paragraph Two of Section 17. Since the paragraph says nothing about the valuation of the goods to be returned, and since the amount of the bond is based on the sums stated in the affidavit, the latter must be the operative factor in determining what was secured.

Under Paragraph One, however, the amount of the bond is based on double the appraised value of the goods and conditioned for the return of the goods. The result secured to the creditor under this section is not the payment of the amount recovered by him, for that result is secured under Paragraphs Two and Four, but rather it is the recovery of the true value of the goods. Paragraph

One, it is true, contemplates the recovery of the "appraised value" of the goods but an examination of what appears to be the only other section in the Attachment Act expressly providing for bonds to the attaching officer, leads to the conclusion that the true value of the attached goods, and not the appraised value thereof, is the criterion for determining the sureties' liability.

Section 9 of the Attachment Act, 1 C. S. (1910), page 138 reads as follows:

> 9. CUSTODY OF PERSONAL PROPERTY ATTACHED: BOND BY GARNISHEE TO OFFICER; OFFICER'S COMPENSATION.—The personal property so attached shall remain in the safe keeping of the officer to answer and abide the judgment of the Court, unless the garnishee, after inventory and appraisement thereof, shall enter into bond to the officer with two sufficient sureties being freeholders of the county, or with a qualified surety company, in double the sum at which such property was appraised, with condition that the said personal property, or the full value thereof, to be estimated by such appraisement, shall be forthcoming to answer the judgment of the court; the officer shall receive reasonable compensation for the cost of storage, the wages of watchman, or other expense necessary to securely keep the property, to be fixed by the court or a judge thereof and included in the officer's fees for executing the writ, and to be taxed in the costs; such compensation shall be paid out of the first moneys arising from the sale of the property.

Under Section 9 as just cited, the condition is stated "that the said personal property or the full value thereof, to be estimated by such appraisement, shall be forthcoming to answer the judgment of the Court."

Under Paragraph One of Section 17 the language is slightly different, but that paragraph states that

the bond is to be in double the appraised value of the personal property, the condition being the return of the property in case judgment shall be rendered for the plaintiff. Under Paragraph Three of Section 17, of course, the Court might order a bond to the officer but the necessary antecedent notice was not given in the case at bar.

Here would appear a clear case of legislature oversight. Had the legislature used the same language in Paragraph One of Section 17 as in Section 9 "the said personal property or the full value thereof" then the limitation of liability would be clear; otherwise the similarity of Section 9 and Section 17, Paragraph One, is most striking. Both sections provide for bonds to attaching officers; one by a garnishee and the other by a defendant. Both provide for particular sums "in double the value of the goods." Both provide for the return of the goods. Section 9 "to answer the judgment of the Court"; Section 17, Paragraph One "in case judgment should be rendered for the plaintiff or any of the applying creditors."

It is submitted that the language of Section 9 is to be construed as the true intent of Section 17, Paragraph One.

Section 7 of the Attachment Act, 1 C. S. (1910), page 137, reads as follows:

> 7. Execution of writ; inventory and appraisement.—The officer to whom a writ of attachment is directed shall execute the same by going to the house or lands of the defendant, or to the person or house of the person having custody or possession of the defendant's property and estate, and then and there declare in the presence of one credible person at the least, that he attaches the rights and credits, moneys and effects, goods and chattels, lands and tenements of the defendant, at the suit of the plaintiff; and with the assistance of

> one discreet and impartial freeholder, he shall make a just and true inventory and appraisement, signed by himself and the freeholder, of all the property and estate of the defendant so by him attached, and annex the same to and return it with the writ, indorsing on the writ the true time of executing the same and signing his name thereto; and the writ shall bind the attached rights and credits, moneys and effects, goods and chattels of the defendant from the time of executing the same; the freeholder shall be allowed one dollar a day for his assistance, to be paid by the officer and included in his fees.

Under this section a duty is placed on the attaching officer to make an appraisal of the property attached. That this provision is for the benefit of the creditor can be assumed since the attaching officer is acting for the creditor's interest at the time and the defendant has no voice in the computation of the appraisement. The failure of the attaching officer to make the appraisal as in the cases now under review and the apparent acquiescence of the creditor in such failure can only be deemed a waiver by the creditor of his correlative right to the protective duty placed on the attaching officer with the consequent assumption of the consequences of such a waiver. The debtor in no way is concerned in the appraisal and it is not made for his benefit. He has no right therein which he might waive. To impute a waiver and an assumption of the consequences of such a waiver to the debtor or to the debtor's surety, is to assume the very conclusion now in dispute—that the surety on the bond precludes himself from showing the true value of the goods if no appraisal is made.

The risk flowing from the attaching officer's failure should be borne by the creditor. The legal effect of the judgment entered in this case would

be to secure to the plaintiff-respondent the amount of money which he recovered in the attachment action, as if said bond had been given direct to him and the attachment dissolved as provided in Section 4. The bond having been given under the statute directing that said bond be given to the officer holding the goods conditioned for the return of the said goods, the surety is now asked to answer for the full amount of money adjudged to be due the plaintiff-respondent to whom he never directly gave the bond and from which he never had the benefit of having the attachment set aside as would have been done had a bond been given conditioned for the payment of whatever money should be recovered. In addition to the payments just stated the creditor also gets whatever benefits that might flow from a personal judgment in the cases under review. The favoritism shown the creditor in the attachment act should not be extended to thrust upon the surety such additional and undue liability not within the contemplation of the particular paragraph of Section 17 under which the bond was given.

The policy of the law relating to bonds as security devices is succinctly illustrated by the statutory provisions contained in 3 C. S. (1910), page 3778:

> 5. Real sum due, and not penalty, considered as the debt; judgment to be for penalty; discharge by payment of real sum unless retained as further security.—That where an action shall be brought on a bond, bill or other contract containing a penalty to secure or enforce the payment of money only, or if any bond, bill, or contract with such penalty as aforesaid, shall be set off by the defendant in any action, the sum really and in equity due on such bond, bill, or contract, and not the penalty, shall be deemed and taken to be

> the debt due; provided, that in all actions which shall be brought on any bond or obligation for the payment of money, wherein the plaintiff shall recover, judgment shall be entered for the penalty of such bond or obligation; to be discharged by the payment of the principal or sum found by the verdict, as the case may require, with interest till paid, and costs, where costs ought to be awarded, unless it be proper that such judgment shall stand as a further security to the plaintiff, his executors and administrators (Rev. 1877, p. 742).

It is evident from the nature of an attachment of personal property and the giving of a bond such as the one in the cases now under review that the sole function of this procedure is to give the attaching creditor the control of the said goods for the purpose of procuring its material worth. The setting of an arbitrary sum sufficiently large to cover the worth of the goods when attached should not be taken as controlling the sum payable for the breach of the condition. The return of the goods is the operative feature and its counter-part in legal contemplation, *i. e.*, the value of such goods when attached must be the substitute in order to give the creditor that which was contemplated in the bond. That such value may be difficult to ascertain is primarily due to the failure to appraise in the first instance. However, the determination of such valuation at the time the action on the bond is brought would be a risk assumed by both parties since as a question of fact it would depend on a jury determination. To arbitrarily assume such valuation would be to penalize the surety to an extent contrary to the function of this bond to secure the return of goods whose valuation is capable of ascertainment.

Precedent.

A careful perusal of the cases reported in New Jersey wouud seem to indicate that Section 17 Paragraph One has never been directly considered by this Court, with reference to the amount of liability attaching to the sureties in the event of failure to comply with the condition of the bond, to wit, to return the goods. The section in question was passed in 1901, and the cases hereinafter referred to were adjudicated prior thereto. However, the cases cited deal with bonds having the same operative features as the one in question.

The case of *Schuyler* v. *Sylvester* (Sup. Court 1860) 28 Law 487, is material to the point at issue. That was an action on a bond given under the then 27th section of the attachment act to the sheriff upon the appearance of defendants conditioned for the return of the goods attached in case judgment should be rendered for the plaintiff. The goods were not returned because they had in the meantime been attached. The questions raised were whether the surety was liable on the bond; and if he was liable, whether the measure of damages was the amount at which the property was appraised, or the amounts of its true value, or the amount of the judgment recovered by the plaintiff. The Court in holding the surety liable for the true value of the goods said:

> "The lien of the writ, while it remained on the property, was to that extent only; and if the property had been rendered according to the condition of the bond, that is all that the plaintiff could have made out of it. That amount, with the costs of that suit, is therefore the measure of damages—let judgment be entered for the plaintiff for the penalty of the bond, and for his damages sustained by reason of the breach of the condition, to the sum so found—"

Hanness v. *Smith* (Supreme Court 1850) 22 L. 332, was an action of debt on an attachment bond given to the sheriff conditioned on the return of the goods attached if judgment should be rendered for plaintiffs. The bond recited that the goods attached were appraised at the sum of $3,415.34 and the penalty of the bond was double that sum. The Court at page 342 held that:

> "The recovery of the damages is of course limited to the value of the goods, to secure the return of which the bond was given."

It is therefore respectfully urged to this Court that the true measure of the liability of the defendants-appellants herein, is the value of the goods at the time they were attached, and to that end judgment should be reversed and the case remitted for the determination of the true value of the said goods.

Respectfully submitted,

BRAELOW & TEPPER,
(ALEXANDER FELLER on the Brief),
Attorneys for and of counsel
with Defendants-Appellants.

INDEX.

Summons.

THE STATE OF NEW JERSEY, to BENJAMIN FARBER and ISIDOR KAPLAN:

(L. S.)

YOU ARE SUMMONED to answer the annexed complaint of NORTH JERSEY MORTGAGE CO., INC., in an action at law in the Essex County Circuit Court. And take notice, that unless you file your answer to said complaint with the Clerk of the Essex County Circuit Court, at Newark, within twenty days after service upon you of this writ and the annexed complaint, the plaintiff may proceed with suit and judgment may be entered against you.

WITNESS, WORRALL F. MOUNTAIN, Judge of the Essex County Circuit Court, at Newark, this 18th day of November, in the year One Thousand Nine Hundred and Twenty-four.

JOHN H. SCOTT,
Clerk.

MAURICE J. ZUCKER,
Attorney for Plaintiff.

Complaint.

ESSEX COUNTY CIRCUIT COURT.

NORTH JERSEY MORTGAGE CO., INC., a corporation, *Plaintiff*, *v.* BENJAMIN FARBER and ISIDOR KAPLAN, *Defendants.*	Action at Law.

The plaintiff, a corporation of the State of New Jersey, having its principal office in the City of Newark, County of Essex, complains of the defendants as follows:

1. On June 7th, 1924, at Newark, Essex County, New Jersey, the defendants and Jacob Miller and Joseph Friedman, partners trading under the name of Miller Friedman Co. by their obligation in writing dated on that day, bound themselves under their respective seals to Harry B. O'Connell, Sheriff of the County of Essex in the penal sum of Eight Thousand Seven Hundred and Fifty-four Dollars and Sixty Cents ($8,754.60) with the condition thereunder written that if Jacob Miller and Joseph Friedman, partners trading under the name of Miller Friedman Co. their executors and administrators, shall return the goods and chattels, rights and credits, moneys and effects seized by virtue of a writ of attachment lately issued out of the Circuit Court of the County of Essex at the suit of Louis D. Goldberg *v.* Jacob Miller and Joseph Friedman, partners trading under the name of

Miller Friedman Co. in case judgment should be rendered in that suit for the plaintiff in that suit (Louis D. Goldberg) then this obligation should be void and of no effect, otherwise to remain in full force and virtue. A true copy of said above recited obligation is hereto annexed and made a part of this complaint.

2. That after the execution of said bond, the Sheriff of the County of Essex delivered all the goods and chattels, rights and credits, moneys and effects, seized by virtue of the writ of attachment above mentioned, to the said Jacob Miller and Joseph Friedman, partners trading under the name of Miller Friedman Co. and released the attachment from said goods and chattels, rights and credits, moneys and effects of the said Jacob Miller and Joseph Friedman, partners trading under the name of Miller Friedman Co.

3. On June 9th, 1924, the plaintiff herein by order of the above Court, was admitted as an applying creditor in the attachment cause of the suit of Louis D. Goldberg *v.* Jacob Miller and Joseph Friedman, partners trading as Miller Friedman Co. in accordance with the Statutes of the State of New Jersey, in such case made and provided.

4. On October 3rd, 1924, the plaintiff herein, an applying creditor as above mentioned, did obtain final judgment against Jacob Miller and Joseph Friedman, partners trading under the name of Miller Friedman Co. as an applying creditor to the attachment suit of Louis D. Goldberg *v.* Jacob Miller and Joseph Friedman, partners trading under the name of Miller Friedman Co. in the sum of $2,433.71 besides costs amounting to $36.10.

5. On October 17th, 1924, the defendants herein were notified by service upon them by the Sheriff of the County of Essex that judgment final had been rendered in favor of the plaintiff herein and against Jacob Miller and Joseph Friedman, partners trading under the name of Miller Friedman Co. as an applying creditor in the attachment suit of Louis D. Goldberg *v.* Jacob Miller and Joseph Friedman, partners trading under the name of Millar Friedman Co. in which attachment suit the defendants herein had signed the bond set forth in this complaint, and demand was made in said notice served upon the defendants herein requiring that the said goods and chattels, rights and credits, moneys and effects seized and taken by virtue of the writ of attachment referred to in this complaint be returned as provided in the bond set forth in this complaint, and that should the defendants herein fail or neglect to return said goods and chattels or to pay the judgment herein set forth by October 24th, 1924, the plaintiff would apply for an order directing the Sheriff of the County of Essex to assign the bond referred to herein to the plaintiff herein in accordance with the Statutes of the State of New Jersey in such case made and provided.

6. The said defendants herein did not return or cause to be returned, nor were any of the goods and chattels, rights and credits, moneys and effects seized by the Sheriff of the County of Essex in the cause above referred to returned, nor was the said judgment paid, and on the 10th day of November, 1924, the above Court issued an order directing the Sheriff of the County of Essex to assign the bond above referred to, to Louis D. Goldberg and

to the plaintiff herein, who was an applying creditor as herein set forth, and in accordance with the Statutes of the State of New Jersey in such case made and provided, the said bond was assigned to Louis D. Goldberg and the plaintiff herein.

7. Plaintiff has demanded of the defendants herein the payment of the sum of $2,469.81, being the amount of the judgment obtained against Jacob Miller and Joseph Friedman, partners trading as Miller Friedman Co. together with the taxed costs, but the defendants herein have refused to pay and still refuse to pay the same.

Plaintiff demands as damages from said defendants the sum of $2,469.81 besides interest from the 3rd day of October, 1924, and the costs of this action.

MAURICE J. ZUCKER,
Attorney of Plaintiff.

11/18/24

Bond.

KNOW ALL MEN BY THESE PRESENTS, that we, JACOB MILLER and JOSEPH FRIEDMAN, partners trading under the name of MILLER FRIEDMAN CO. of the City of New York, in the County of New York and State of New York and BENJAMIN FARBER and ISIDOR KAPLAN are held and firmly bound unto HARRY B. O'CONNELL, Sheriff of the County of Essex in the sum of Eight thousand seven hundred and fifty-four Dollars and 60/100 ($8,754.60) to be paid to the said Harry B. O'Connell, his executors, administrators, successors and assigns, to which payment we bind ourselves, jointly and severally.

Sealed with our seals. Dated this seventh day of June, nineteen hundred and twenty-four.

Bond.

WHEREAS a certain writ of attachment lately issued out of the Circuit Court of the County of Essex, at the suit of Louis D. Goldberg *v.* Jacob Miller and Joseph Friedman, partners trading under the name of Miller Friedman Co., by virtue whereof the Sheriff of said County did seize and attach certain personal property of the said Jacob Miller and Joseph Friedman, partners trading under the name of Miller Friedman Co., appearing in the schedule hereto annexed and made a part hereof;

AND WHEREAS the said Jacob Miller and Joseph Friedman, partners trading under the name of Miller, Friedman Co. intend to appear to the said attachment;

NOW THEREFORE, if the said Jacob Miller and Joseph Friedman, partners trading under the name of Miller Friedman Co., their executors and administrators shall return the goods and chattels, rights and credits, moneys and effects, seized by virtue of said writ of attachment, in case judgment should be rendered for the plaintiff, then this obligation to be void, otherwise to remain in full force and effect.

JACOB MILLER (L. S.)
JOSEPH FRIEDMAN (L. S.)
BENJ. FARBER (L. S.)
ISIDOR KAPLAN (L. S.)

Signed, Sealad and Delivered
in the presence of:

SARAH SUOLENSKY
as to Jacob Miller and
Joseph Friedman

DANIEL J. FELDMAN
as to Benjamin Farber and
Isidore Kaplan

Bond.

I approve of the within bond as to form and sufficiency. Let it be filed.

WORRALL F. MOUNTAIN,
Circuit Court Judge.

(Endorsed):

I hereby appoint and depute Otto A. Lebert to serve the within writ.
Witness my hand and seal this 20th day of November, 1924.

HARRY B. O'CONNELL,
Sheriff

By CONRAD DEUCHLER,
Under Sheriff.

Sheriff's Fees $6.78 Seal.

Served the within Summons and Complaint November 20, 1925, personally upon Benjamin Farber and Isidore Kaplan the within named Defendants by delivering to each a true copy thereof at the Essex County Court House, Newark, N. J.

HARRY B. O'CONNELL,
Sheriff

By OTTO A. LEBERT,
Spec. Deputy.

Answer.

(Filed Jan. 14, 1925.)

ESSEX COUNTY CIRCUIT COURT.

NORTH JERSEY MORTGAGE CO., INC., a corporation, *Plaintiff*, *v.* BENJAMIN FARBER and ISIDOR KAPLAN, *Defendants.*	Action at Law.

The defendants residing in the City of Newark, Essex County, New Jersey, in answer to the present complaint say:

1. They deny the allegation in paragraph 1 of the complaint.

2. They deny the allegation in paragraph 2 of the complaint.

3. They deny the allegations in paragraph 3 of the complaint, and refer specifically to the first separate defense hereafter.

4. They deny the allegations in paragraph 4 of the complaint.

5. They deny the allegations in paragraph 5 of the complaint.

6. They deny the allegations in paragraph 6 of the complaint.

FIRST SEPARATE DEFENSE.

The defendants allege that no judgment was en-

tered against the said Jacob Miller and Joseph Friedman.

SECOND SEPARATE DEFENSE.

The defendants allege that if any judgment appears of record against the said Miller and Friedman, the same was entered contrary to law and contrary to the United States Bankruptcy Statute, and in defiance of and violation of an order of the United States District Court restraining the entry of such judgment.

THIRD SEPARATE DEFENSE.

In further defense the defendants say that the plaintiff refused to accept the attached chattels when the same were offered and are estopped thereby from suing herein.

FOURTH SEPARATE DEFENSE.

The defendants allege that the plaintiff failed to pursue the legal remedies available to him with respect to the attached chattels and is thereby estopped from setting up the cause of action herein.

FIFTH SEPARATE DEFENSE.

The defendants allege that the attached chattels were offered to the plaintiff after the execution of the said bond, but were refused by him.

SIXTH SEPARATE DEFENSE.

The defendants allege that the attached chattels have always been available to the plaintiff and have been tendered to the plaintiff, but that he has refused to pursue the said chattels or accept a tender of them.

Order to File Amended Answer.

The defendants reserve the right to move to strike out the plaintiff's complaint at any time before the trial of this action, or at the trial thereof on the following grounds:

1. That the same does not set out a cause of action.

2. That the alleged judgment supposed to have been entered as of record against the said Miller and Friedman was not legally or properly entered and the said judgment is void and of no effect, and that the bond made by the defendants having been performed according to the conditions thereof, the same is void.

BRAELOW & TEPPEER,
Attorneys for Defendants.

Order.

(Filed March 2, 1925.)

ESSEX COUNTY CIRCUIT COURT.

NORTH JERSEY MORTGAGE CO., INC., a corporation,
Plaintiff,
v.
BENJAMIN FARBER and ISIDOR KAPLAN,
Defendants.
} Action at Law.

This matter coming on to be heard on motion to strike out the answer of the defendants filed herein, and it appearing that the defendants desire to file an amended answer and leave of court being

given to file said amended answer within one week from February 27, 1925,

It is on this 2nd day of March, 1925, ORDERED that the defendants file their amended answer within one week from February 27, 1925, and that the argument on said motion to strike out the answer of the defendants be adjourned until March 6, 1925, and that the said argument be directed to the amended answer filed by said defendants.

NELSON Y. DUNGAN,
Circuit Court Judge.

Amended Answer.

(Filed March 6, 1925.)

ESSEX COUNTY CIRCUIT COURT.

NORTH JERSEY MORTGAGE CO., INC., a corporation, *Plaintiff*, *v.* BENJAMIN FARBER and ISIDOR KAPLAN, *Defendants.*	Action at Law.

The defendant Benjamin Farber, residing in the City of Rahway, County of Union, and the defendant, Isidor Kaplan, residing in the City of Newark, County of Essex, all of the State of New Jersey, in answer to the complaint, and reserving the right to strike out all or part of the complaint filed at the trial of the above cause by reason of the fact that the same does not set forth a legal cause of action, say:

Amended Answer.

1. They admit paragraph 1 of the complaint filed in this cause.

2. They have not sufficient knowledge to form a belief as to the matter contained in paragraph 2 of the complaint.

3. They admit paragraph 3 of the complaint.

4. They deny paragraph 4 of the complaint.

5. They admit paragraph 5.

6. As to paragraph 6 the defendants admit all of paragraph 6, except the part reading "and said bond was so assigned" as to which latter portion the defendants say they have not sufficient knowledge upon which to form a belief.

7. As to paragraph 7, the defendants admit all of paragraph 7 except that portion of the same reading as follows: "being the amount of the judgment obtained against Jacob Miller and Joseph Friedman, Partners, trading as Miller-Friedman Co., together with taxed costs."

FIRST SEPARATE DEFENSE.

For a first separate defense to the complaint filed in this cause, the defendants allege as follows: That shortly after the issuance of the Writ of Attachment against the said Jacob Miller and Joseph Friedman, in which action the bond set forth in the complaint in this cause was entered into by the defendants, and well within four months of the issuance of the said Writ of Attachment, to wit, on or before August 11th, 1924, an involuntary petition in bankruptcy was filed against the said defendants Jacob Miller and Joseph Friedman, Partners, trading as Miller-Friedman Co., in the United

States District Court in New York City; and that shortly thereafter, to wit, on August 27th, 1924, which time was less than four months after the commencement of the attachment suit against the said defendants Miller and Friedman, the said Miller and Friedman were adjudicated bankrupts in the said United States District Court.

SECOND SEPARATE DEFENSE.

Defendants repeat the whole of the First Separate Defense to this action and further say, that the goods and chattels, rights and credits, and moneys and effects seized by virtue of the said Writ of Attachment were thereupon taken into custody by the receiver in bankruptcy appointed by the said District Court, and were sold by the said receiver pursuant to the United States Bankruptcy Laws, and that the plaintiff knew of these facts and took no steps whatsoever to secure the return of the said goods and chattels, rights and credits, and moneys and effects, or to prevent the sale of the same, nor did they object to the sale in any manner.

THIRD SEPARATE DEFENSE.

For a third separate defense the defendants repeat the First Separate Defense and further allege, that at the time of the commencement of the said attachment suit, which was on June 3rd, 1924, the attachment debtors Jacob Miller and Joseph Friedman, Partners, trading as Miller-Friedman Co., were actually insolvent and bankrupt, and that thereafter, and less than four months after the commencement of the attachment suit, to wit, on August 27th, 1924, the said Miller and Friedman were adjudicated bankrupts in the United States District Court in New York City.

Amended Answer.

FOURTH SEPARATE DEFENSE.

For a fourth separate defense the defendants allege that the judgment referred to in the complaint against Jacob Miller and Joseph Friedman, Partners, trading as Miller-Friedman Co., was never entered, and that the order entering judgment filed in that cause was never signed by any officer competent to sign the same.

FIFTH SEPARATE DEFENSE.

For a fifth separate defense the defendants allege that the bond entered in the attachment suit, which bond is the basis of the present action, is void and of no force and effect in that the Laws of this State require such bond to be in double the appraised value of the goods and chattels, rights and credits, and moneys and effects; and that there was actually no appraisal made in the said attachment suit, in which the said bond, that is the basis of the plaintiff's suit in this action, was filed.

SIXTH SEPARATE DEFENSE.

That the said bond is void and of no force and effect in that the same was filed in the said attachment suit long prior to any entry of an appearance by the attachment debtors in that suit.

SEVENTH SEPARATE DEFENSE.

Defendants allege that the true value of the goods and chattels, rights and credits, and moneys and effects to be returned by them according to the terms of their said bond was less than $1,000.00 in value.

Amended Answer.

EIGHTH SEPARATE DEFENSE.

That the said North Jersey Mortgage Co., Inc., was an applying creditor in the said attachment suit, and became such applying creditor, and was admitted as such applying creditor after the bond which is the basis of the present suit was entered and appearance made by the attachment debtors; and that thereafter the said bond did not and could not inure to the benefit of the plaintiff in this suit.

NINTH SEPARATE DEFENSE.

That the judgment alleged to have been entered by this plaintiff was entered as applying creditor in the suit of one Louis D. Goldberg against Jacob Miller and Joseph Friedman, Partners, trading as Miller-Friedman Co., and that the said Louis D. Goldberg, in the same suit as attaching creditor, obtained a judgment in the sum of $4,500.00 together with taxed costs, and that this was for the full amount sued for by the said Louis D. Goldberg, and that the defendants by their bond and obligation were only compellable to pay the full amount sued for by the said Louis D. Goldberg and not, in addition thereto, the amount of the judgment of the present plaintiff in the same suit.

TENTH SEPARATE DEFENSE.

For a tenth separate defense the defendants allege that the attaching creditor in the attachment suit, to wit, Louis D. Goldberg, recovered judgment for the full amount claimed to be due in the affidavit filed by the said attaching creditor to procure the writ of attachment to issue and that subsequent to the issuance and return of the writ the bond which is the basis of this suit was filed in the attachment suit, and that thereafter this plain-

tiff was made an applying creditor in the attachment suit and that judgment in the attachment suit was rendered in full for both plaintiffs in the attachment suit.

ELEVENTH SEPARATE DEFENSE.

For an eleventh separate defense the defendants allege that in the attachment suit aforesaid, in which the present plaintiff was an applying creditor, the plaintiff became such applying creditor after the filing of the bond which is the basis of this suit, and that the said bond was in the penal sum of double the amount of the value of the goods and chattels, rights and credits, moneys and effects attached and that the attaching creditor in the said suit, to wit, Louis D. Goldberg, recovered judgment in the said suit in the sum of $4,465.02 and $49.88 costs, which said sum was larger than the appraised value of the attached property and that these defendants are liable on this bond primarily to the attaching creditor, and that the amount for which they are liable on the bond will not be sufficient to satisfy the claim of the attaching creditor let alone that of the applying creditor, this plaintiff.

BRAELOW & TEPPER,
Attorneys for Defendants.

Notice.

(Filed February 25, 1926.)

ESSEX COUNTY CIRCUIT COURT.

NORTH JERSEY MORTGAGE CO., INC., a corporation, *Plaintiff*, v. BENJAMIN FARBER and ISIDOR KAPLAN, *Defendants*.	Action at Law.

To

MAURICE J. ZUCKER, Esq.,
Attorney for Plaintiff.

SIR:

PLEASE TAKE NOTICE that we, the undersigned, shall apply to the Honorable Nelson Y. Dungan on Friday, April 3rd, 1925, or as soon thereafter as counsel may be heard for leave to file a supplemental answer in the above cause, and the attached is the proposed supplemental answer for which, leave to file will be asked.

BRAELOW & TEPPER,
Attorneys for Defendants.

Supplemental Answer.

(Filed February 25, 1926.)

ESSEX COUNTY CIRCUIT COURT.

NORTH JERSEY MORTGAGE CO., INC., a corporation, *Plaintiff*, *v.* BENJAMIN FARBER and ISIDOR KAPLAN, *Defendants.*	Action at Law.

The defendants by way of Supplemental Answer and in addition to the amended answer heretofore filed in the above cause and not by way of substitution of the same, and as a Twelfth Separate Defense allege the following facts in bar of the plaintiff's action:

1. That the Louis D. Goldberg mentioned in the complaint as one of the assignees of the bond upon which this suit is based, was the attaching creditor in the original attachment suit in which the said bond was given and that on or about the 18th day of November, 1924, the said Goldberg instituted suit on the aforesaid bond against these defendants and that theretofore and after the filing of the amended answer by these defendants in this cause, to wit, on the 6th day of March, 1925, the said Louis D. Goldberg recovered judgment in full in the sum of $4,465.02 and $45.88 costs against these defendants on the said bond.

2. That the bond mentioned in the complaint

and upon which this suit is based was a bond in double the value of the goods and chattels, rights and credits, moneys and effects attached, and that the obligation of these defendants on said bond was to return the said chattels or pay the value of the same and that the value of the said chattels could not, of necessity, exceed half of the amount of the bond, to wit, $4,377.30, and that the judgment of Louis D. Goldberg being that of an applying creditor in an attachment suit, he is entitled to be first compensated out of the said bond, and that such recovery by the said Louis D. Goldberg exceeds the amount of the liability of the defendants on their bond.

THIRTEENTH SEPARATE DEFENSE.

3. That the said Louis D. Goldberg mentioned in the complaint has recovered judgment against these defendants on the said bond, as attaching creditor, in the suit in which the bond was given in a sum greater than the value of the goods and chattels, rights and credits, moneys and affects which the defendants were, by their bond, obligated to return, at the time and place they should have returned the same.

FOURTEENTH SEPARATE DEFENSE.

4. That the said Louis D. Goldberg has recovered judgment on the said bond as attaching creditor in the suit in which the bond was given for a sum greater than the value of the goods and chattels, rights and credits, moneys and affects which the defendants were by their bond obligated to return at the time and place they should have returned the same, and that the present plaintiff

became an applying creditor in the said suit after the filing of the bond.

BRAELOW & TEPPER,
Attorneys for Defendants.

Notice to Strike Out Answer.

(Filed February 5, 1926.)

ESSEX COUNTY CIRCUIT COURT.

NORTH JERSEY MORTGAGE CO., INC., a corporation,
Plaintiff,
v.
BENJAMIN FARBER and ISIDOR KAPLAN,
Defendants.
} Action at Law.

It is hereby stipulated and agreed between Maurice J. Zucker, Attorney of the Plaintiff, and Braelow & Tepper, Attorneys of the Defendants, that the following are the reasons advanced by the plaintiff for striking out the answer, the amended answer and the supplemental answer filed by the defendants in the above entitled cause:

1. In Paragraph One of the answer, which is the answer to Paragraph One of the Complaint, the defendants deny the allegations contained in Paragraph One of the Complaint. This answer is made for the purpose of delay, for the purpose of embarrassing a fair trial of the issue, and in fact is untrue, the defendants well knowing that all matters set forth in Paragraph One of the Complaint are matters of record in the books of the Essex County Clerk's Office.

Notice to Strike Out Answer.

2. In Paragraph Two of the answer, which is an answer to Paragraph Two in the Complaint, the defendants deny the allegations contained in Paragraph Two of the Complaint. This answer is made for the purpose of delay, for the purpose of embarrassing the fair trial of the issue and in fact is untrue, the defendants knowing that all matters set forth in Paragraph Two of the Complaint are matters of record in Books in the Essex County Clerk's Office.

3. In Paragraph Three of the Answer, which is an answer to Paragraph Three in the Complaint, the defendants deny the allegations contained in Paragraph Three of the Complaint. This answer is made for the purpose of delay, for the purpose of embarrassing a fair trial of the issue, and in fact is untrue, the defendants well knowing that all matters set forth in Paragraph Three of the Complaint are matters of record in the books of the Essex County Clerk's Office.

4. In Paragraph Four of the Answer, which is an answer to Paragraph Four in the Complaint, defendants deny the allegations contained in Paragraph Four of the Complaint. This answer is made for the purpose of delay, for the purpose of embarrassing a fair trial of the issue, and in fact is untrue, the defendants well knowing that all matters set forth in Paragraph Four of the Complaint are matters of record in the books of the Essex County Clerk's Office.

5. In Paragraph Five of the Answer, which is an answer to Paragraph Five in the Complaint, defendants deny the allegations contained in Paragraph Five of the Complaint. This answer is

made for the purpose of delay, for the purpose of embarrassing a fair trial of the issue, and in fact is untrue, the defendants well knowing that all matters set forth in Paragraph Five of the Complaint are matters of record in books in the Essex County Clerk's Office.

6. In Paragraph Six of the Answer, which is an answer to Paragraph Six of the Complaint, the defendants deny the allegations contained in Paragraph Six of the Complaint. This answer is made for the purpose of delay, for the purpose of embarrassing a fair trial of the issue, and in fact is untrue, the defendants well knowing that all matters set forth in Paragraph Six of the Complaint are matters of record in the books of the Essex County Clerk's Office.

7. As to the first separate defense alleged in the answer, the said defendants know the same to be untrue as the records in the Essex County Clerk's Office show a judgment obtained against Jacob Miller and Joseph Friedman, and this defense is made for the purpose of delaying a fair trial of this issue and is so framed as to embarrass the plaintiff, the defendants knowing that the said statement is untrue and that by the records in the office of the Clerk of Essex County, there is of record such a judgment as is alleged by the plaintiff in the complaint filed in this cause.

8. As to the second separate defense alleged by the defendants in their answer, the plaintiff says that the defendants know that the statements made therein are not true, and further that the statements made in the said second separate defense do not constitute a legal defense to this cause of action.

Notice to Strike Out Answer.

9. As to the third separate defense alleged in the answer of the defendants in this cause, the plaintiff says that the defendants know that said statements are untrue and are made for the purpose of embarrassing the plaintiff and delaying a fair trial of the issue in this cause.

10. As to the fourth separate defense set up by the defendants in this cause, plaintiff says that the same is untrue and does not constitute a legal defense to this action and that the said fourth separate defense is made for the purpose of embarrassing the plaintiff and delaying a fair trial of this cause.

11. As to the fifth separate defense set up by the defendants in this cause, plaintiff says that the same is untrue and does not constitute a legal defense to this action and that the said fifth separate defense is made for the purpose of embarrassing the plaintiff and delaying a fair trial of this cause.

12. As to the sixth separate defense set up by the defendants in this cause, plaintiff says that the same is untrue and does not constitute a legal defense to this action and that the said sixth separate defense is made for the purpose of embarrassing the plaintiff and delaying a fair trial of this cause.

The plaintiff will move to strike out from the answer that portion of the answer in which the defendants reserve the right to move to strike out the plaintiff's complaint at any time before the trial of this action, or at the trial, on the ground that the same does not set out a cause of action and that the alleged judgment supposed to have been entered as of record against the said Jacob Miller and Joseph Friedman was not legally or

properly entered and that the said judgment is void and of no effect, that the bond made by the defendants having been performed according to the conditions thereof, the same is void, for the reason that the defendants cannot reserve said right but should have made said motion before the filing of the answer in this cause.

The plaintiff will move to strike out the amended answer for the same reasons alleged aforesaid.

That plaintiff will move to strike out the supplemental answer for the same reasons alleged aforesaid.

The plaintiff will apply for entry of summary judgment in this cause.

MAURICE J. ZUCKER,
Attorney of Plaintiff.

Filed 2/25/26

Consent of both attorneys appended.

Consented by
MAURICE J. ZUCKER,
Attorney of Plaintiff.

BRAELOW & TEPPER,
Attorneys of Defendant.

This cause having been argued before Nelson Y. Dungan, Judge of the Essex County Circuit Court, and he having rendered his opinion in open Court that summary judgment be entered as above stated and he having since become ill and unable to enter this judgment, it is hereby agreed between Maurice J. Zucker, Attorney of the Plaintiff, and Braelow & Tepper, Attorneys of the Defendants, and the defendants do hereby waive any defense to the

entry of this order by reason of the fact that Nelson Y. Dungan does not sign the same.

MAURICE J. ZUCKER,
Attorney for Plaintiff.

BRAELOW & TEPPER,
Attorneys of Defendants.

2/25/26

(Endorsed:)

Service acknowledged to this 25th day of February, 1926.

BRAELOW & TEPPER,
Attorneys of Defendants.

Filed February 26, 1926.

JOHN H. SCOTT,
Clerk.

ZUCKER & GOLDBERG,
Chamber of Commerce Building,
24 Branford, Pl.,
Newark, N. J.

Order.

ESSEX COUNTY CIRCUIT COURT.

NORTH JERSEY MORTGAGE CO., INC., a corporation, *Plaintiff,* v. BENJAMIN FARBER and ISIDOR KAPLAN, *Defendants.*	Action at Law.

This matter being opened to the Court by Maurice J. Zucker, Attorney of the Plaintiff, and in the presence of Braelow & Tepper, Attorneys of the Defendants, and due notice of a motion to strike out the answer, amended answer and supplemental answer filed by the defendants in the above cause and for entry of summary judgment in said cause having been given to the defendants, and the Court having heard argument of the respective counsel in said cause and being satisfied that the answer, amended answer and supplemental answer filed by the defendants in said cause do not set fort a good and legal defense to the action instituted by the plaintiff, it is on this 25th day of February, 1926, on motion of Maurice J. Zucker, Attorney of the Plaintiff,

ORDERED, that summary judgment be entered in favor of the plaintiff, North Jersey Mortgage Co., Inc., and against the defendants, Benjamin Farber and Isidor Kaplan, in the sum of Twenty-six hundred and seventy-eight dollars and eighty-one cents ($2,678.81).

WORRALL F. MOUNTAIN,
Judge of the Essex County
Circuit Court.

Judgment.

ESSEX COUNTY CIRCUIT COURT.

37086

NORTH JERSEY MORTGAGE CO., INC., a corporation, *Plaintiff*, v. BENJAMIN FARBER and ISIDOR KAPLAN, *Defendants.*	Action at Law. On Order of the Court. Judgment Entered February 26, 1926. Damage $2,678.81 Costs 49.96 Total $2,728.77

MAURICE J. ZUCKER, Atty. of Plaintiff.

Judgment on Order of the Court in the above entitled Action was rendered on the Twenty-sixth day of February A. D. Nineteen Hundred and Twenty-six in favor of the plaintiff North Jersey Mortgage Co., Inc., a corporation, and against the defendants Benjamin Farber and Isidor Kaplan, for the sum of Two Thousand six hundred seventy-eight dollars and eighty-one cents ($2678.81) damage and Forty-nine dollars and ninety-six cents costs of suit.

Judgment entered and signed February 26, 1926.

WILLIAM S. GUMMERE,
Judge.

Recorded in Book 101 Circuit Court Judgments, page 92.

Clerk's Certificate.

ESSEX COUNTY CLERK'S OFFICE

State of New Jersey, } ss.:
County of Essex, }

I, JOHN H. SCOTT, Clerk of the County of Essex in the State of New Jersey.

DO HEREBY CERTIFY That the foregoing is a true and correct copy of all the records in the Case of North Jersey Mortgage Co., Inc., Plaintiff *v.* Benjamin Farber and Isidor Kaplan, Defendants, prepared for an Appeal, and the same is taken from and compared with Original copies of all the records and as the same now remains on the files of said office.

In Testimony Whereof, I have hereunto set my hand and affixed the official seal of said County at Newark, N. J., this 9th day of March A. D., 1926

JOHN H. SCOTT,
Clerk.

(Seal)

Notice of Appeal to Supreme Court.

(Filed March 3, 1926.)

ESSEX COUNTY CIRCUIT COURT.

NORTH JERSEY MORTGAGE CO., INC., a corporation, *Plaintiff*, v. BENJAMIN FARBER and ISIDOR KAPLAN, *Defendants*.	Action at Law.

To

MAURICE J. ZUCKER, Esq.,
Attorney of Plaintiff.

TAKE NOTICE that the defendants appeal to the New Jersey Supreme Court of Judicature of New Jersey, from the whole of the judgment in this case.

BRAELOW & TEPPER,
Attorneys of Appellants.

Mar. 1, 1926.

Grounds of Appeal to Supreme Court.

(Filed March 29, 1926.)

NEW JERSEY SUPREME COURT.

NORTH JERSEY MORTGAGE CO., INC., a corporation, *Plaintiff-Appellee,* v. BENJAMIN FARBER and ISIDOR KAPLAN, *Defendants-Appellants.*	Action at Law.

The following are the grounds upon which the defendants-appellants rely for the reversal of the whole of the judgment entered in the Court below in the above stated cause:

1. Because the Trial Court erroneously ordered that the amended answer and supplemental answer filed in the above entitled cause be stricken out, although said amended answer contained eleven separate defenses to the complaint filed in said cause and the supplemental answer contained four additional separate defenses to the complaint filed in said cause, all of which contained just and legal defenses to said complaint.

2. Because the Court erroneously ordered the amended answer and supplemental answer in said cause filed, to be stricken out, although said amended answer and supplemental answer raised questions of fact which should have been submitted to the consideration of a jury.

3. Because the said Court erroneously ordered

that summary judgment be entered in favor of the plaintiff and against the defendants in the above entitled cause, although questions of fact, requiring a submission thereof for determination by a jury had been raised in said case; said Court thus erroneously depriving defendants of their day in Court.

4. Because said Court in its opinion filed in the above entitled cause, did erroneously rule that the obligation of the defendants under the bond set out in said cause was a sum of money mentioned in said bond; whereas, it was respectfully urged to said Court, that the true obligation of said bond, in accordance with the terms of the statute under which said bond was given, was the value of the goods for the return of which bond was given.

BRAELOW & TEPPER,
Attorneys for Defendants-Appellants.

(Endorsed:)

Service of a copy of the within grounds of appeal, hereby acknowledged this 29th day of March, 1926; and I hereby consent that same be filed.

MAURICE J. ZUCKER,
Attorney for Plaintiff-Appellee.

Rule on Affirmance.

NEW JERSEY SUPREME COURT,

OCTOBER TERM, 1926.

NORTH JERSEY MORTGAGE CO., INC., *Plaintiff-Respondent,* v. BENJAMIN FARBER and ISIDOR KAPLAN, *Defendants-Appellants.*	On Appeal From Essex County Circuit Court.

This cause having been duly argued at the October Term, 1926, of this Court, by Maurice J. Zucker, of Zucker & Goldberg, of counsel for plaintiff-respondent, and Braelow & Tepper, by George F. Lahey, Jr., of counsel for the defendants-appellants, and the Court having considered the same and finding no error in the record or proceeding in the Essex County Circuit Court, it is thereupon

ORDERED AND ADJUDGED that the judgment of the Essex County Circuit Court, removed by the appeal in this cause, to the Supreme Court, be affirmed with costs, and that the record be remitted to the Essex County Circuit Court to be proceeded with in accordance with this judgment and the practice of said Court.

Entered March 3, 1928,

On motion of

ZUCKER & GOLDBERG,
Attorneys for Plaintiff-Respondent.

Opinion of Supreme Court.

(Filed Feb. 25, 1928.)

Nos. 52 and 53, October Term, 1926.

NEW JERSEY SUPREME COURT.

LOUIS D. GOLDBERG,
Plaintiff-Respondent,

v.

BENJAMIN FARBER and ISIDOR KAPLAN,
Defendants-Appellants.

NORTH JERSEY MORTGAGE CO., INC.,
Plaintiff-Respondent,

v.

BENJAMIN FARBER and ISIDOR KAPLAN,
Defendants-Appellants.

Argued October 6th, 1926; decided May term, 1927.

On appeal from judgments of the Essex County Circuit Court.

Before—Justices KALISCH, KATZENBACH and LLOYD.

For the appellants: BRAELOW & TEPPER, Esqs., and GEORGE F. LAHEY, JR., Esq.
For the respondents: ZUCKER & GOLDBERG, Esqs.

PER CURIAM.:

The above cases are two appeals from the Essex County Circuit Court. The appeals were argued

together. They present the same question, namely, the propriety of striking out an amended answer and entering summary judgment. The actions were instituted upon a bond given by the defendants in an attachment suit. One suit was by the attaching creditor; the other by an applying creditor. The facts briefly are that an attachment was issued by Louis D. Goldberg out of the Essex County Circuit Court against Jacob Miller and Joseph Friedman, partners, under which goods and chattels belonging to said partners trading as Miller Friedman Co. were attached. On June 7th, 1924 as the defendants in attachment wanted to appear, a bond was given to the Sheriff of Essex County in the sum of $8,754.60 by the defendants in attachment with Benjamin Farber and Isidor Kaplan as sureties. The condition of the bond was that if a return of the goods seized was made, if judgment should be rendered for the plaintiff, then the obligation would be void. Goldberg obtained a judgment for $4,465.02. The goods were not returned. The Sheriff assigned the bond to Goldberg who instituted suit upon it against Farber and Kaplan, the sureties. The answer as amended set up eight defenses. These were all struck out and summary judgment entered in favor of Goldberg.

The first ground of appeal is based upon the striking out of the 7th defense. As to this defense the lower court said:

> "The seventh separate defense is that the true value of the goods and chattels, rights and credits and moneys and effects to be returned by them according to terms of their said bonds was less than $1,000 in value. That is no defense, and will be stricken out."

What the appellants desire to do is to prove the true value of the goods taken and have a judgment entered against them for only such value. We see no merit in this contention. The suit is on the bond which speaks for itself. The bond is for the payment of a specific sum of money if the goods are not returned. The bond was given under Section 17, paragraph 1, of the Attachment Act. This provision is as follows:

> "A bond to the officer who attached the personal property in double the appraised value thereof, conditioned for the return of the said property in case judgment shall be rendered for the plaintiff or for any of the applying creditors; which bond, in case of breach of said condition, the said officer shall on application of the plaintiff or applying creditor, without fee, assign to such person, as the court shall direct, to be prosecuted for the benefit of the plaintiff and applying creditors."

The appellants desire further to read into this section the words of the 9th section of the Attachment Act which is as follows:

> "9. Custody of Personal Property Attached; Bond by Garnishee to Officer; Officer's Compensation.—The personal property so attached shall remain in the safekeeping of the officer to answer and abide the judgment of the Court, unless the garnishee, after inventory and appraisement thereof, shall enter into bond to the officer with two sufficient sureties, being freeholders of the county, or with a qualified surety company, in double the sum at which such property

was appraised, with condition that the said personal property, or the full value thereof, to be estimated by such appraisement, shall be forthcoming to answer the judgment of the court; the officer shall receive reasonable compensation for the cost of storage, the wages of watchman, or other expense necessary to securely keep the property, to be fixed by the court or a judge thereof and included in the officer's fees for executing the writ, and to be taxed in the costs; such compensation shall be paid out of the first moneys arising from the sale of the property" (P. L. 1901, p. 161).

This section of the Act applies to garnishees and in our opinion cannot be read into a bond given under Section 17, paragraph 1.

The Attachment Act (Section 33) says the Act must be construed in the most liberal manner for the benefit of creditors. It would certainly not be beneficial to creditors to sanction a practice which would permit testimony to be given as to the value of the goods attached after a bond is given, approved by the court, accepted by the creditor, and the goods are discharged from the lien of the attachment. The debtor if he chose to do so could sell or secrete the goods so that a creditor could obtain no testimony as to their value.

The question appears to have been decided in the case of Hanniss *v.* Bonnell, 25 N. J. L. 159, where the court said:

"The defendant was permitted to receive and enjoy the property during the pendency of the attachment, upon the condition that he would return it in case judgment should be rendered for any creditor. Judgment

having been rendered and he having failed to return the property, the bondsmen are amenable to the penalty."

In Vreeland *v.* Bruen, 21 N. J. L. 214, the court said, at page 229:

"The goods were first seized to compel the defendant's appearance; until that was effected, or judgment and sale, the lien continued; but when the defendant appeared and entered into special bail, the lien was discharged, and the plaintiff and the applying creditors were compelled to look to the defendant and his bail. * * * The property is given up, and no power remains with the sheriff to reclaim it, or even to hold or dispose of it, under the original lien. It must necessarily become subject to the defendant's sale or disposition, liable to any new liens that the owner or the law may create, or subject to be seized and sold under execution, without any power to prevent it. Suppose, after the bond was given, a judgment creditor should cause the property to be sold by execution, could this court if applied to, stay the sale, or order the sheriff to pay the money over for the benefit of the attachment? No, the answer would be; you must look to your bond; and * * * suppose, instead of the sheriff, the defendant himself, or since his discharge as a bankrupt, his assignee should attempt to sell the personal estate levied on, could he be restrained at the instance of the plaintiff? I think not; because his lien is divested, and other liens have arisen, leaving the party to his bond."

The second ground of appeal argued is that the court erred in holding that the obligation of the defendants was the sum mentioned in the bond rather than the value of the goods. This is in effect the same question as has just been considered. It is argued by the appellants that because no appraisement of the goods was made the situation is altered. If the defendants in attachment chose to put up a bond without an appraisement being made they waived an appraisement. Berry *v.* Wasserman, 179 Mass. 537.

The second case is that of an applying creditor who secured a judgment against the sureties on the bond. The same questions are involved in this case. The judgments of the Essex County Circuit Court are affirmed with costs.

Notice of Appeal and Grounds.

(Filed April 19, 1928.)

NEW JERSEY SUPREME COURT,

ESSEX COUNTY.

LOUIS D. GOLDBERG,
Plaintiff-Respondent,

v.

BENJAMIN FARBER and ISIDOR KAPLAN,
Defendants-Appellants.

NORTH JERSEY MORTGAGE CO., INC.,
Plaintiff-Respondent,

v.

BENJAMIN FARBER and ISIDOR KAPLAN,
Defendants-Appellants.

} Action at Law

To

ZUCKER & GOLDBERG, Esqs.,
Attorneys for Plaintiff-Respondent or
To whom it may concern:

PLEASE TAKE NOTICE, that the defendants-appellants in the above entitled cause appeal to the Court of Error and Appeals, in the last resort in all causes in New Jersey, from the whole of the judgment entered in this cause on the following ground:

The Supreme Court erred in giving judgment

for the plaintiff-respondent instead of for the defendants-appellants.

BRAELOW & TEPPER,
Attorneys for Defendants.

(Endorsed):

Service of a copy of the within Notice is hereby acknowledged this 15 day of March, 1928.

ZUCKER & GOLDBERG,
Attorneys for Plaintiffs-Respondents.

Filed April 19 1928

FRED L. BLOODGOOD,
Clerk.

Supreme Court Clerk's Certificate.

I, FRED L. BLOODGOOD, Clerk of the Supreme Court of the State of New Jersey, do certify that the foregoing is a true copy of the notice of appeal filed and also of rules entered in the minutes of the Court in the above-stated cause.

IN TESTIMONY WHEREOF I have set my hand and the seal of said Court at [SEAL] Trenton, this twenty-third day of April, A. D. nineteen hundred and twenty-eight.

FRED L. BLOODGOOD,
Clerk.