# NEW JERSEY
# COURT OF ERRORS AND APPEALS

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| GUSTAVE KEIN,<br>Plaintiff-Respondent,<br><br>vs.<br><br>NATHAN KATZ,<br>Defendant-Appellant. | On Appeal. |

## BRIEF FOR GUSTAVE KEIN.

The above action was founded upon a promissory note and resulted in a judgment entered in the Union Circuit on the 13th of February, 1918, for $848.06 (C. p. 25). The defendant appeals from this judgment (C. p. 1), and specifies four grounds of appeal (C. p. 2).

It will be noticed that this cause was tried before a jury and the sole evidence consisted of a promissory note upon which the suit was founded. The note being offered in evidence and no defense being offered the jury retired and found a verdict in favor of the plaintiff. Upon that verdict the judgment was entered. (C. pages 25, 26 and 27.)

## POINT I.

**There is nothing before this Court for review.**

At the trial there was no objection or exception to the admission or rejection of the evidence or to any ruling by the court. There does not appear anywhere in the state of the case any objection or exception to any ruling by the court on a point of law.

Two orders were entered in this cause—one on February 2nd and the other on February 11th (C. P. 21 and 24). An inspection of those orders shows that there was no objection entered against the same.

Therefore the judgment below should be affirmed. *Sulzberger & Sons Co.* v. *Miller,* 87 N. J. L. 720; *Blanchard Bros.* v. *Beveridge,* 86 N. J. L. 561; *Webster* v. *Freeholders of Hudson,* 86 N. J. L. 256.

## POINT II.

**Grounds of Appeal Are Insufficient.**

At the top of page 3 of appellant's brief, counsel says: "The appeal is prosecuted for the purpose of reviewing the order of the Trial Court denying the motion to strike out the complaint and discharge the defendant's bail" and cites the order on page 21.

It will be noticed that the grounds of appeal specified on page 2 do not contain any mention of that order. The grounds of appeal relate to several other matters which in my opinion are not now reviewable. ~~The first of these is~~

(A) That the affidavit is not defective and insufficient.

In the brief counsel says that the affidavit is defective because it is improperly entitled and cites *Potter* v. *Cook,* N. J. L. 206.

An inspection of the case shows that the affidavit is not entitled in the cause, but commences with the venue and concludes with the jurat. (C. pg. 3 to 7). On page 8 is endorsement designating the title of the cause in which the affidavit is to be filed and in which the affidavit was filed. This is not improper and is a proper means of identifying the affidavit for its proper filing with the order to hold to bail.

(B) The Supreme Court Commissioner's order is sufficient.

The Commissioner adjudged and decided that by the affidavit of said Gustave Kein it was sufficiently proven that the debt was founded upon contract, the particulars of which were specified in the affidavit of Kein and that it was established to said Commissioner's satisfaction that the said Nathan Katz fraudulently incurred said obligation and that Katz obtained possession of ten cows belonging to Kein by reason of statements made by said Katz to Kein which were wholly untrue and false. Said Commissioner further referred to the facts in the affidavit of Kein as proof before him that the debt due from Katz to Kein was fraudulently incurred.

It is elementary that the obtaining from a person of property by untrue and false statements is a fraud.

This order contains an adjudication and decision of the Commissioner founded upon legal evidence and does not bring the case at bar within the decisions cited by the appellant.

(C) The Capias is sufficient.

The capias issued in this case is in the ordinary form and upon its face is sufficient.

(D) There were no irregularities in the service of the process.

It is complained that the defendant would not have known when to file his answer because the capias and complaint were not served at the same time. The record before the court shows that the capias was served on January 5th, 1918, by Thomas L. Carey, a deputy of the Sheriff of Union County (C. pg. 10); the record also shows that the same officer on the same day served the complaint (C. pg. 17). There is nothing in the record to show whether or not the complaint was annexed to the capias at the time of service.

> "On an appeal every intendment is in favor of the correctness of the judgment below and doubt will not lead to a reversal."
>
> *Phillips* v. *Longport*, 90 N. J. L. 212.

(E) The defendant waived his objections.

It is contended by the defendant that he entered a special appearance and therefore is now entitled to raise all of his objections to the invalidity of the proceedings upon the issuance of the capias and arrest of the defendant.

It will be noticed that in this case the defendant not only filed his answer to the suit but further submitted himself to the jurisdiction of the court by filing a recoupment and counterclaim. (C. pg. 23). That this was an absolute submission to the jurisdiction of the court has been held by the United States Supreme Court in Merchants' Heat & Light Company vs. Clow, 204 U. S. 286. See also Logan vs. Lawshe, 62 N. J. L. 567.

## CONCLUSION.

On page 19 of the printed case appears the affidavit of one John D. Pierson and this is the only matter which in any way was before the court below to contest the validity of plaintiff's proceedings. The affidavit is based upon conclusions and hearsay evidence and therefore there was nothing before the court below upon which it should have disturbed plaintiff's proceedings.

The record shows that the defendant had a full and fair opportunity to present any defense he had and he stated to the court that there was no defense. (C. pg. 27, line 20).

The Practice Act provides:

> "No judgment shall be reversed, or new trial granted on the ground of misdirection, or the improper admission or exclusion of evidence, or for error as to matter of pleading or procedure, unless, after examination of the whole case, it shall appear that the error injuriously affected the substantial rights of a party." (1912 P. L. 382, section 27).

It is respectfully submitted that no proper grounds of appeal are specified and that the record does not disclose any objection or exception in the court below which is a proper subject of review in this court, and therefore the judgment below should be affirmed with costs.

STAMLER & STAMLER,
Of Counsel for Gustave Kein.

# INDEX

# Union County Circuit Court.

## NOTICE OF APPEAL.

Filed March 1st, 1918.

| | |
|---|---|
| GUSTAVE KEIN,<br>*Plaintiff-Respondent,*<br><br>*vs.*<br><br>NATHAN KATZ,<br>*Defendant Appellant.* | *Action at Law.* |

*To Stamler & Stamler, Esqs., Attorneys of Plaintiff:*

Take notice: that the appellant, Nathan Katz, appeals to the Court of Errors and Appeals of the State of New Jersey, from the whole of the judgment entered in the above entitled cause.

DANIEL D. LOEB,
Attorney of Defendant-Appellant.

Dated February 27, 1918.

(Service acknowledged).

## GROUNDS OF APPEAL.

Filed March 13, 1918.

The appellant states the following grounds of appeal in this cause:

1. Because the affidavit upon which was based the order for bail is defective and insufficient.

2. Because the complaint was not properly served.

3. Because the proceedings are irregular in that the complaint was not annexed to the capias ad respondendum and returned therewith in accordance with the practice in such case made and provided.

4. Because the Trial Court refused to grant the defendant's motion to strike out the complaint and dismiss the capias ad respondendum.

Dated March 12, 1918.

DANIEL D. LOEB,
Attorney for Defendant-Appellant.

(Service acknowledged).

JUDGMENT RECORD and AFFIDAVIT FOR BAIL

IN THE UNION COUNTY CIRCUIT COURT.

GUSTAVE KEIN,
*Plaintiff,*
*vs.*
NATHAN KATZ,
*Defendant.*
} *Action at Law.*

## JUDGMENT RECORD.

Nathan Katz, the defendant in this cause, was taken on capias ad respondendum to answer unto Gustave Kein, the plaintiff therein, in an action at law, in the manner following:

## AFFIDAVIT FOR BAIL.

Filed January 5, 1918.

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

GUSTAVE KEIN, of full age, being duly sworn according to law, on his oath says that Nathan Katz is justly and truly indebted to him in the sum of seven hundred and fifty dollars ($750) as evidenced by a promissory note of which the following is a true copy:

"$750.00 Union, N. J., Dec. 3, 1917.
Thirty (30) days after date I promise to pay to the order of Gus. Kein
Seven hundred and fifty..... Dollars
at his residence, Union, N. J.
Value received.
No..... Due Jan. 3, 1918. Nathan Katz."

That the consideration for the note was as fol-

lows: That on the third day of December, nineteen hundred and seventeen, the said Nathan Katz came to deponent and desired to buy and requested the defendant to sell to him, the said Nathan Katz, ten (10) cows; that the said Nathan Katz urgently requested deponent to sell the same to him; that thereupon deponent told the said Nathan Katz that he would not sell said cows only for cash and would sell them for the sum of twelve hundred dollars ($1,200); that thereupon the said Nathan Katz informed deponent that he had recently purchased from one Morris H. Bob for cash forty-four (44) cows; one (1) heifer; three (3) horses and the entire business of said Morris H. Bob, located at No. 116 Hillside avenue, Lyons Farms, New Jersey, for six thousand dollars ($6,000) all of which he had paid in cash to the said Morris H. Bob and that he was the owner of the aforesaid mentioned chattels, and that said goods and chattels were free and clear of all liens, and that he had only four hundred and fifty dollars ($450) in cash which he would pay to the plaintiff on account of said cows, and that the balance he would pay in thirty (30) days and would give his note to deponent for said sum of money payable in thirty days.

That the plaintiff thereupon told the said Nathan Katz that he knew nothing of his circumstances or his ability to pay the said money within thirty days and that he did not know whether or not he had actually purchased from the said Morris H. Bob the goods and chattels above mentioned for the sum of six thousand ($6,000) dollars in cash, but if that is a fact that he had invested six thousand ($6,000) dollars in said business and was the owner of the goods and chattels above mentioned, and that relying upon said representations he would be willing to accept the note for the balance of the payment of said cattle and upon being re-assured by the said Nathan Katz that he did acquire and purchase the forty-four (44) cows; one (1) heifer; three (3) horses, wagons and the business of the said Morris H. Bob and paid six thousand ($6,000) dollars in cash, therefore, deponent consented to accept four hundred and fifty ($450) dollars in part payment of said sale of the ten (10) cows aforesaid and accept his, Nathan Katz's, note for the balance of seven hundred and fifty ($750) dollars, payable in thirty (30) days from December 3rd, 1917. That deponent relying upon the aforesaid statement and assurances of the said Nathan Katz then and there accepted the said note allowed the said Nathan Katz to take away said cows.

That on the 3rd day of January, 1918, deponent called at the place of business of the said Nathan Katz and presented the note of seven hundred and fifty ($750) dollars for payment, and payment thereof was refused, and that thereupon the said Nathan Katz stated that he could not pay said note, and deponent thereupon stated to the said Nathan Katz that he would bring an action against him at once if he did not pay said note, that thereupon, Nathan

Katz stated to deponent that he did not care whether a suit was commenced against him because a judgment would be valueless as he was not the owner of the cattle and business located at No. 116 Hillside avenue, Lyons Farms, N. J., but that his son Abraham Katz was such owner; that there were several chattel mortgages of record covering all of the goods including the cattle purchased from deponent and that a judgment against the said Nathan Katz would be of no value.

That thereupon deponent caused the records of the County of Union to be searched and found that Abraham Katz did actually purchase all of the cattle mentioned in the foregoing paragraphs, and that the said Nathan Katz was not the owner of the said cattle as he claimed on the 3rd day of December, 1917, and that the said Abraham Katz did on the 28th day of November, 1917, execute a mortgage to one Samuel Taub for the sum of six hundred dollars ($600) covering all of the goods and chattels located at No. 116 Hillside avenue, Lyons Farms, N. J., which mortgage was recorded in Book 97 of chattel mortgages at page 442; that said Abraham Katz also by a chattle mortgage dated the 24th day of November, 1917, and recorded on the 30th day of November, 1917, execute a chattel mortgage for $3,000 to Harry Goldberg, which mortgage was recorded in Book 97 of chattel mortgages, at page 447, and that also the said Abraham Katz executed another mortgage to one Samuel Taub for $600 covering the goods and chattels mentioned in this affidavit, which was recorded on the 7th day of December, 1917, recorded in Book 97 of chattel mortgages, at page 485, and that also on the 11th day of December, 1917, the said Abraham Katz executed another mortgage to one Morris H. Bob for $3,500,

covering the goods and chattels described in this affidavit, which mortgage was recorded in Book 97 of chattel mortgages for Union County, on page 504.

Deponent therefore states that it is a fact that the said Nathan Katz was not on the third day of December, 1917, the owner of the goods and chattels mentioned in this affidavit, and that he did not pay six thousand ($6,000) dollars in cash for the business and merchandise located at No. 116 Hillside avenue, Lyons Farms, N. J., and that the said statements and representations made by the said Nathan Katz on the 3rd day of December, 1917, were wholly untrue and false, were and are a fraud and deception practiced upon this deponent, and that deponent would not have allowed the said Nathan Katz to take away the said ten (10) cows out of his, deponent's, possession had not he, the said Nathan Katz, made the statements and representations aforesaid.

Deponent further states that the said defendant, Nathan Katz, fraudulently contracted the debt and fraudulently incurred the obligation upon which this suit is brought.

GUS KEIN.

Sworn and subscribed to before me this 5th day of January, 1918.

VALERIA HUSBANDS,
Commissioner of Deeds of N. J.

ORDER TO HOLD TO COMMON BAIL

[Endorsement.]

UNION COUNTY CIRCUIT COURT.

GUSTAVE KEIN,
*Plaintiff*,
*vs.*
NATHAN KATZ,
*Defendant*.
*Action at Law.*

AFFIDAVIT FOR BAIL.

STAMLER & STAMLER, Attorneys of Plaintiff, 207 Broad Street, Elizabeth, N. J.

Filed January 5, 1918.

WILLIAM D. WOLFSKEIL,
Supreme Court Commissioner.

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## ORDER TO HOLD TO COMMON BAIL.

(Filed January 5th, 1918.)

I, WILLIAM D. WOLFSKEIL, a Supreme Court Commissioner of the State of New Jersey, having read the affidavit of Gustave Kein and having duly considered the same do adjudge and decide that by the said affidavit, it is sufficiently proved before me, that there is due to the said Gustave Kein from the said Nathan Katz, his demand founded on contract, amounting on this date to the sum of seven hundred and fifty dollars ($750.00) for the price and value of goods, wares and merchandise heretofore sold and delivered to the said Nathan Katz, the nature and particulars thereof being set out and described in

said affidavit, and that by the affidavit aforesaid, it is established to my satisfaction that the said Nathan Katz fraudulently incurred the obligation aforesaid and that the said Nathan Katz obtained the possession of the ten cows belonging to the said Gustave Kein and mentioned in said affidavit on statements made by the said Nathan Katz to the said Gustave Kein, which were and are wholly untrue and false and were and are a fraud and deception practiced upon the said Gustave Kein, and that the said Nathan Katz fraudulently contracted said debt and fraudulently incurred the obligation respecting which this suit is brought.

I do, therefore, order that the said Nathan Katz be held in bail in the sum of seven hundred and fifty dollars to answer unto the said Gustave Kein of a plea of an action at law, upon contract.

Dated January 5th, 1918.

WILLIAM D. WOLFSKEIL,
Supreme Court Commissioner.

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## CAPIAS AD RESPONDENDUM.

(Filed January 8th, 1918).

NEW JERSEY, SS.

The State of New Jersey to the Sheriff
[SEAL] of the County of Union.

GREETING:

We command you that you take Nathan Katz, if in your County he may be found and him safely keep so that you may have his body before the Union County Circuit Court of the State of New Jersey, to be held at the City of Elizabeth, in and

for the State of New Jersey, on the first Tuesday of May next, to answer unto Gustave Kein in an action at law, upon contract, wherein the plaintiff demands the sum of fifteen hundred dollars, and have you then and there this writ.

Witness, GEORGE S. SILZER, Judge of our Union County Circuit Court, at Elizabeth, this fifth day of January, nineteen hundred and eighteen.

WILLIAM B. MARTIN,
Clerk.

STAMLER & STAMLER,
Attorneys

Let the defendant be held in bail in the sum of seven hundred and fifty dollars ($750).

WM. D. WOLFSKEIL,
Supreme Court Commissioner,

Received Union County Sheriff's office, Jan. 5th, 10.34 A. M., 1918, Elizabeth, N. J.

JAMES E. WARNER,
Sheriff.

I hereby deputize and appoint Thomas L. Carey, a special deputy to serve the within writ.

Witness my hand and seal this 5th day of January, A. D. 1918.

JAMES E. WARNER,
Sheriff.

Executed this 5th day of January, 1918, by taking the body of Nathan Katz into custody and he having given the required surety he was upon order of William D. Wolfskeil, Supreme Court Commissioner, discharged from custody this 5th day of January, A. D. 1917, also served the defend-

ant with copy of the capias at his residence Hillside Road, Hillside, N. J.

JAMES E. WARNER,
Sheriff.

By THOMAS L. CAREY,
Special Deputy Sheriff.

Fees $4.56.

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## RECOGNIZANCE OF BAIL.

(Filed January 7th, 1918.)

UNION COUNTY CIRCUIT COURT.

| | |
|---|---|
| GUSTAVE KEIN,<br>*vs.*<br>NATHAN KATZ. | *On Contract.* |

*New Jersey, Union County, to wit:*

Be it remembered, that on this fifth day of January, nineteen hundred and eighteen, Nathan Katz of the County of Union, New Jersey, and National Surety Company of New York, authorized to do business in New Jersey, represented by Robert M. Nugent, Resident Vice President, personally appeared before me, William D. Wolfskeil, one of the Supreme Court Commissioners of the State of New Jersey, and severally acknowledged themselves to owe unto Gustave Kein the sum of fifteen hundred dollars each, to be levied upon their several goods and lands upon condition that if the defendant, Nathan Katz shall be condemned in this action at the suit of Gustave Kein, the plaintiff, he shall pay the costs and condemnation of the Court or render himself unto the custody of the Sheriff of the said County for the same, or if he fails so to do, that the

said National Surety Company of New York will pay the costs and condemnation for him or render him unto the custody of the Sheriff of the said County.

NATHAN KATZ, [L. S.]

NATIONAL SURETY COMPANY,
By ROBERT M. NUGENT,
Resident Vice President.
[SEAL]

Taken and acknowledged the day and year first above written, before me

WILLIAM D. WOLFSKEIL,
Supreme Court Commissioner.

For use in New York State and other States which do not require published figures to conform to statement furnished the department of such State after audit by them.

NATIONAL SURETY COMPANY OF NEW YORK.

Financial Statement, December 30th, 1916.

WM. B. JOYCE, Pres. HUBERT J. HEWITT, Secy.

ASSETS.

| | |
|---|---|
| Cash in banks and offices | $2,475,272.31 |
| Government, municipal and other bonds and stocks | 8,734,216.18 |
| Real estate, mortgages and collateral loans | 264,157.99 |
| Unpaid premiums excluding premiums 90 days over due. | 962,208.57 |
| Accrued interest and accounts receivable. | 505,057.52 |
| Total | $12,940,912.57 |

RECOGNIZANCE OF BAIL

LIABILITIES.

| | |
|---|---|
| Unearned premium reserve ..... | $2,780,723.87 |
| Contingent claim and expense reserve (less reinsurance)..... | 1,079,726.62 |
| Reserve for taxes and unpaid commissions (not due)..... | 287,026.46 |
| Accounts payable and expenses incurred (not due)..... | 157,339.87 |
| Dividends declared (payable Jan. 2, 1917) ..... | 90,000.00 |
| Capital stock. ..... | 4,000,000.00 |
| Surplus ... ..... | 4,546,095.75 |
| Total..... | $12,940,912.57 |

STATE OF NEW YORK,
COUNTY OF NEW YORK, } ss.

E. M. MCCARTHY, being duly sworn, says: That he is Resident Assistant Secretary of the National Surety Company; that said company is a corporation duly organized, existing, and engaged in business as a Surety by virtue of the Laws of the State of New York, and has duly complied with all the quirements of the laws of said State and of the laws of the State of New York applicable to said company, and is duly qualified to act as Surety under such laws; that said company has also complied with and is duly qualified to act as Surety under the act of August 13th, 1894, entitled, "An Act Relative to Recognizances, Stipulations, Bonds and Undertakings, and to allow certain corporations to be accepted as surety thereon," as amended by the Act of Congress of March 23, 1910. That the foregoing is a full, true and correct statement of the financial

condition of said company on the 30th day of December, 1916.

E. M. McCARTHY,
Resident Assistant Secretary.
[SEAL]

Sworn to before me this 5th day of January, 1918.

F. E. FIELDS,
Commissioner of Deeds, City of New York.
New York County Clerk's No. 188,
New York County Reg. No. 18 124,
Bronx County Clerk's No. 40,
Bronx County Reg. No. 8031,
Queen's County Clerk's No. 8000,
King's County Clerk's No. 264–A,
King's County Register No. 8089.

My commission expires September 12th, 1918.

NATIONAL SURETY COMPANY.

CERTIFICATE OF APPOINTMENT OF RESIDENT VICE-PRESIDENT.

Know all men by these presents, that Robert M. Nugent has been and is hereby appointed Resident Vice-President of the National Surety Company, at New York, N. Y., and as such Resident Vice-President has full power and authority to sign and execute on behalf of the company any and all bail bonds, and all bail bonds signed by him, when sealed, shall be as valid and binding upon the company as if said bonds had been signed by the President and duly sealed and attested.

Said appointment is made under and by authority of the following By-Law adopted by the Board of Directors of the National Surety Company at a meeting duly called and held on the second day of February, 1909:

"ARTICLE XII. RESIDENT OFFICERS AND ATTORNEY-IN FACT.

"Section 1. The President, First Vice-President or any other Vice-President may from time to time appoint Resident Vice Presidents, Resident Assistant Secretary's and Attorney in-Fact to represent and act for and on behalf of the company, and either the President, First Vice-President or any other Vice-President, the Board of Directors or the Executive Committee may at any time remove any such Resident Vice-President, Resident Assistant Secretary or Attorney-in-Fact and revoke the power and authority given him.

"Sec. 2 RESIDENT VICE-PRESIDENTS.—Resident Vice Presidents, shall have the power and authority to sign and execute on behalf of the company any and all bonds, recognizances, contracts of indemnity and other writings obligatory in the nature thereof, and to bind the company thereby as fully and to the same extent as the President could bind it."

IN WITNESS WHEREOF, the National Surety Company has caused these presents to be signed by its Vice-President and its corporate seal to be hereto affixed, duly attested by its Assistant Secretary, this 31st day of December, A. D. 1915.

NATIONAL SURETY COMPANY,

[CORPORATE SEAL] By J. R. WELLS,
Vice-President.

ATTEST:

WM. I. HAWKS,
Assistant Secretary.

STATE OF NEW YORK, }
COUNTY OF NEW YORK, } SS.

On this 31st day of December, A. D. 1915, be-

fore me personally came J. R. Wells to me known, who being by me duly sworn did depose and say, that he resides in the city of New York; that he is theVice-President of the National Surety Company, the corporation described in and which executed the above instrument; that he knows the seal of said corporation; that the seal affixed to the said instrument is such corporate seal; that it was so affixed by order of the Board of Directors of said corporation and that he signed his name thereto by like order.

WM. M. WEAVER,

[NOTARIAL SEAL] Notary Public.

STATE OF NEW YORK, }
COUNTY OF NEW YORK, } ss.

I, STUART JOHNSTON, Assistant Secretary of the National Surety Company, do hereby certify that the above and foregoing is a true and correct copy of an instrument executed by said National Surety Company which is still in full force and effect.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said company, at the City of New York, this 5th day of January.

STUART JOHNSTON,

[SEAL] Assistant Secretary.

A. D. 1918.

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

THOMAS L. CAREY, being duly sworn according to law, deposes and says that on Saturday, the 5th day of January, 1918, he personally served upon the defendant Nathan Katz, a true copy of the within complaint by delivering to him a true copy thereof at his residence in Hillside, N. J.

THOMAS L. CAREY.

Sworn and subscribed to before me, this 9th day of January, 1918.

VALERIA HUSBANDS,
Commissioner of Deeds of N. J.

## COMPLAINT.

Filed January 10th, 1918.

The defendant having been apprehended in pursuance to a capias ad respondendum issued out of this Court on the fifth day of January, nineteen hundred and eighteen, and the plaintiff residing in the Township of Union, County of Union and State of New Jersey, complains:

1. That on the 3rd day of December, 1917, the defendant became indebted to the plaintiff in the sum of seven hundred and fifty dollars ($750) as evidenced by a promissory note, the following being a true copy:

"$750.00 Union, N. J., Dec. 3, 1917.
Thirty (30) days after date I promise to pay to the order of Gus Kein
seven hundred and fifty. .....dollars
at his residence, Union, N. J.
Value received.
No .....Due Jan 3rd, 1918. Nathan Katz."

2. That on Jan. 3rd, 1918, when the note became due, the defendant did not pay the same although the same was duly presented for payment at the place stated in said note.

3. That the plaintiff is the owner of said note.

4. That the full amount of said note is still due and owing, to wit, the sum of seven hundred and fifty dollars ($750) and interest from January 3rd, 1918.

Judgment will be demanded for seven hundred and fifty dollars ($750) and interest from January 3rd, 1918.

STAMLER & STAMLER,
Attorneys for Plaintiff.

ORDER GRANTING DEFENDANT ADDITIONAL TIME TO PLEAD

*Notice to the within named defendant.*

In case the within summons and complaint are served upon you personally, then take notice that if you intend to make a defense to this action, you must file an Affidavit of Merits within ten days from the date of service hereof upon you, and must file your answer within twenty days from the date of such service, and in default of the filing of such affidavit and answer, judgment will be entered against you.

STAMLER & STAMLER,
Per JOHN J. STAMLER,
Attorneys for Plaintiff.

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## ORDER GRANTING DEFENDANT ADDITIONAL TIME TO PLEAD.

Filed Jan. 26, 1918.

Upon reading the annexed affidavit, it is, on this 25th day of January, 1918, ordered that the defendant, Nathan Katz, have five additional days from the date hereof within which to file an answer to the complaint heretofore filed in the above entitled cause; it is further ordered that this order shall not prevent the said defendant from moving to strike out the said complaint because not properly served, or from moving to dismiss the capias served in this cause upon any grounds, or for an order of non pros.

GEORGE S. SILZER,
Judge.

## AFFIDAVIT.

Filed Jan. 26, 1918.

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

JOHN D. PIERSON, of full age, being duly sworn according to law on his oath, says that he is an attorney and counselor at law of this State; that he has examined the warrant, or capias ad respondendum served in this cause, the order for arrest, and the affidavit upon which said order was based, and that he has made inquiry about other proceedings had in connection therewith; that said suit was commenced by a capias; that the complaint filed in this cause was not annexed to the capias ad respondendum and returned therewith, and that a copy thereof was not served with the said capias; and defendant has informed deponent that the said complaint was served about two or three days later than the said capias, not personally, but by being left at the abode of Charles Katz, a son of the defendant, in the said County of Union; that from statements made to deponent by the said defendant it appears that the said defendant never resided in the said County of Union or elsewhere in the State of New Jersey, and that Pierson & Schroeder, a firm of lawyers, of which deponent is a member, is about to appear specially in this cause for the purpose of moving to strike out the said complaint because it was not properly served, because the proceedings are irregular, because the said complaint was not properly served with the capias; and to dismiss the said capias and for an order of non pros upon the same grounds; that the said motion cannot be brought on at any regular motion day known to deponent before February 2nd, 1918, and before the time required to answer has expired pursuant to

the notice endorsed on said complaint as so served as follows:

"*Notice to the within named defendant:*

In case the within summons and complaint are served upon you personally, then take notice that if you intend to make a defense to this action, you must file an affidavit of merits within ten days from the date of service hereof upon you, and must file your answer within twenty days from the date of such service, and in default of the filing of such affidavit and answer, judgment will be entered against you.

STAMLER & STAMLER per
John J. Stamler,
Attorneys for Plaintiff."

And that if defendant fails to obey said notice, judgment by default may be entered against him which will stand until set aside or vacated; that from statements made to deponent by defendant it appears that the said defendant has a good defense because of partial failure of consideration of the note on which the action is based, and deponent believes that if an answer is filed to said declaration it would preclude the defendant from presenting said motion. Defendant also denies the allegations of fraud alleged in the affidavit on which said capias was based.

Deponent's said firm therefore appear specially for the purpose of moving to strike out the said complaint and for the other relief above set forth, and prays that the plaintiff may have twenty days additional time within to file his answer.

JOHN D. PIERSON.

Subscribed and sworn to before me
this 25th day of January, 1918.
HENRY J. CAMBY,
Attorney-at-law of New Jersey.

## ORDER DENYING MOTION TO STRIKE OUT COMPLAINT, &c.

(Filed February 2nd, 1918).

Application having been made to the Court by Messrs. Pierson & Schroeder, attorneys of the defendant, Nathan Katz, upon due notice to the plaintiff for an order to take proofs concerning the truth of the affidavit of the complainant upon which the order for the issuance of the capias was made, and also for an order striking out the complaint filed in this cause, and also for an order discharging the defendant's bail, and for an order for non pros, and all of said matters coming on to be heard in the presence of Pierson & Schroeder, attorneys of the defendant, and of Stamler & Stamler, attorneys of the plaintiff, and the Court having considered the same,

It is, on this 1st day of February, 1918, ordered that said several applications of the defendant be and the same are hereby denied, with costs.

It is further ordered, that notwithstanding the entry of judgment in this cause, the defendant have leave on or before February 5th, 1918, to file an answer to complaint and in the event of the filing of said answer, said judgment shall be opened for the purpose of trying said cause and to stand as security for any judgment which may be eventually entered. In the event of the defendant failing to file the answer within the time herein limited, the judgment heretofore entered shall stand in full force and effect.

This order for leave to file said answer is made upon condition that the defendant accept short notice of trial for a day within the January term, 1918, to wit, February 11, 1918, and that said cause be placed on the day calendar of said day for trial.

And it is further ordered, that within one day a true copy of this order, which need not be certified, shall be mailed to Messrs. Pierson & Schroeder, the attorneys of the defendant, at their office address, No. 95 River street, Hoboken, New Jersey, and such mailing of said order shall be sufficient service of the same.

GEO. S. SILZER,

Judge.

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## ANSWER.

(Filed February 6, 1918).

Defendant, residing at No. 495 Sutter avenue, in the Borough of Brooklyn, City of New York, in the County of Kings, State of New York, says that:

1. He denies the truth of the matters contained in paragraph numbered one, except that he admits the making and delivery of the note set forth in said paragraph.

2. He admits paragraph numbered two.

3. He admits paragraph numbered three.

4. He denys the truth of the matters contained in paragraph No. 4.

Pursuant to the provisions of the Practice Act, Section 166, P. L. 1903, page 581; 3 Compiled Statutes, 4104, this defendant will demand on the trial of this action that the Court inquire into the question of fraud upon which allegations had been made in the inception of this suit and upon which application for a capias ad respondendum had been made

ANSWER

*By way of recoupment and counter-claim*:

1. He denies the truth of the matters contained in the complaint, except so far as admitted in the following statement.

Defendant admits the making of the promissory note set forth in said complaint and says that said note was delivered to the plaintiff in payment of the balance due on the purchase price of ten cows at $120 a piece, making a total of $1, 200 upon which $450 was paid in cash; that said cash was paid and note delivered to said plaintiff upon the false and fraudulent representation that seven of said cows were springers and that three of said cows were fresh, the plaintiff well knowing that the defendant was a dairyman and that said cows were to be used by defendant in his dairy business; that all of said cows were purchased as of equal value; that said three cows so represented as aforesaid were in truth not fresh but on the contrary were dry; that by reason of the foregoing defendant has suffered damages in the sum of $1,000

Defendant will ask for judgment against the plaintiff for $1,000 together with interest thereon from December 3rd, 1917, and defendant's costs of suit.

PIERSON & SCHROEDER,

Attorneys for Defendant.

## ORDER DENYING MOTION TO DISCHARGE DEFENDANT.

(Filed February 11th, 1918.)

A second application having been made to discharge the defendant in the above cause from arrest because the capias heretofore issued was void, and the order to hold to bail being illegal, having been granted upon the filing of a defective affidavit, and after hearing Isidor H. Brand, of counsel in support of said motion and John Stamler, Esq., in opposition thereto, it is, on this 11th day of February, 1918, after due deliberation having been had, on motion of Stamler & Stamler, Esqs., attorneys for plaintiff,

Ordered, that the said motion be and the same is in all respects denied with costs.

GEO. S. SILZER,
Judge.

Rule actually entered
this 11th day of
February, A.D. 1918,
by Pierson & Schroeder,
Attorneys for Defendant.

## JUDGMENT.

This action was tried before Judge George S. Silzer, with a jury at the Union County Circuit, on February eleventh, nineteen hundred and eighteen.

This cause having been heard and submitted to the jury, they rendered their verdict as follows: That they find in favor of the plaintiff and against the defendant, and assess the plaintiff's damages at the sum of seven hundred and fifty-seven dollars and eighty cents ($757.80).

Whereupon it is adjudged that the plaintiff, Gustave Kein, recover of the defendant, Nathan Katz, the sum of seven hundred and fifty-seven dollars and eighty cents ($757.80), and his costs which are taxed at the sum of ninety dollars and twenty-six cents ($90.26), making in the whole the sum of eight hundred and forty-eight dollars and six cents ($848.06).

Judgment entered February 13th, 1918, at 2.10 P. M.

GEORGE S. SILZER,
Judge.

On motion of
STAMLER & STAMLER,
Attorneys of Plaintiff.

TRANSCRIPT OF STENOGRAPHER'S NOTES

CIRCUIT COURT OF NEW JERSEY,
UNION COUNTY CIRCUIT.

January Term, 1918.

| | |
|---|---|
| GUSTAVE KEIN,<br>*vs.*<br>NATHAN KATZ. | *No. 87 in the List.* |

Transcript of stenographer's notes, taken in the above entitled matter, before Hon. George S. Silzer, Circuit Court Judge and a jury, in the Union County Court House, City of Elizabeth, New Jersey, on the eleventh day of February, A. D. 1918, at 9.50 A. M.

APPEARANCES:

JOHN J. STAMLER, Esq., representing the plaintiff.

PIERSON & SCHROEDER, Mr. Schroeder present, representing the defendant.

A jury being impanelled and found satisfactory, they were sworn.

Mr. STAMLER—This suit is on a promissory note. One Gustave Kein, who resides at Union, New Jersey, is a wholesale cattle dealer, and on the 3rd of December, 1917, Nathan Katz, the defendant, purchased from him ten cows. He agreed to pay him twelve hundred dollars for them. He paid him four hundred and fifty dollars in cash and gave him his promissory note for seven hundred and fifty dollars, which became due on January third, 1918, and which he has not paid. If I prove these facts

to you, I will ask for a judgment for seven hundred and fifty dollars together with interest amounting to seven dollars and eighty cents, making $757.80.

Mr. STAMLER—I offer the note.

THE COURT—Make proof of it.

Mr STAMLER—Under the statute I don't have to because it is admitted in the pleadings, and under the statute I don't have to. I offer in evidence a note dated December third, 1917, which is fully set forth in the complaint.

(Note entered in evidence and marked Exhibit P No. 1.)

THE COURT—Is there any defense, Mr. Brandt?

Mr. BRANDT—No, sir.

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## EXHIBIT P 1.

$750.00 Union, N. J., Dec. 3, 1917.
Thirty (30) days after date I promise to pay to the order of Gus Kein
seven hundred and fifty.....dollars
at his residence, Union, N. J.
Value received.
No .....Due Jan. 3, 1918. Nathan Katz.

NEW JERSEY

# Court of Errors and Appeals.

| | |
|---|---|
| GUSTAVE KEIN,<br>*Plaintiff-Respondent,*<br><br>*vs.*<br><br>NATHAN KATZ,<br>*Defendant-Appellant.* | *Action at Law. Appeal from Union County Circuit Court.* |

## Brief for Appellant.

### STATEMENT OF THE CASE.

The plaintiff in the above case brought suit against the defendant to recover the sum of $750.00 which was due on a certain promissory note made by the defendant to the plaintiff herein and which promissory note represented the balance of the purchase price on certain cows purchased by the defendant from the plaintiff in December, 1917.

Suit was commenced by issuing a capias ad respondendum in accordance with the provisions of the Practice Act (1903) which provides for the issuing of a capias ad respondendum where the debt is fraudulently contracted. The plaintiff alleged in his affidavit for bail (p. 3) that the defendant had made certain false presentations to him at the time of the purchase of the above cows, respecting certain property which the defendant alleged he was the owner of, which property consisted of certain horses and cows and farm located at 116 Hillside avenue, Lyons Farms, New Jersey.

The capias ad respondendum was not annexed to the complaint and returned therewith in pursuance to Rule 54 (Pr. Act, 1912).

The Sheriff's return on the capias ad respondendum (p. 10) shows that defendant in this case was arrested on the 5th day of January, 1918. The affidavit annexed to the complaint (p. 17) shows that after defendant's arrest, a copy of the complaint was served by leaving a true copy thereof at the defendant's residence at Hillside, New Jersey.

Defendant,on the same day that he was arrested, entefed into a recognizance of bail (p. 11); thereafter, on January 26th, 1918, he entered a special appearance for the purpose of moving to strike out the complaint because it was not properly served, because the proceedings were irregular and because the said complaint was not properly served with the capias, to dismiss the capias and for an order of non pros (affidavit, p. 19).

Thereafter, on the 10th day of February, 1918, upon due notice to attorneys for the plaintiff and after argument in open Court, an order was entered, whereby the defendant's applications to strike out the complaint, to discharge the defendant's bail, etc., were denied (p. 21).

After the entering of the foregoing order, defendant filed an answer and counterclaim to the action (p. 22); on February 11th, 1918, a second application was made to discharge the defendant from arrest (p. 24).

The above action was brought on for trial before the Court and jury, and defendant having failed to put in a defense, judgment was rendered for the plaintiff for the full amount of the note together with interest and costs (p. 26).

Defendant below, who is the appellant in this

Court, prosecutes this appeal for the purpose of reviewing the order of the Trial Court denying the motion to strike out the complaint and discharge the defendant's bail, etc. (p. 21).

## Specifications of Grounds of Appeal.

1. Because the affidavit upon which was based the order for bail is defective and insufficient.

2. Because the complaint was not properly served.

3. Because the proceedings are irregular in that the complaint was not annexed to the capias ad respondendum and returned therewith in accordance with the Practice Act in such case made and provided.

4. Because the Trial Court refused to grant the defendant's motion to strike out the complaint and dismiss the capias ad respondendum, etc.

## POINTS.

1. The affidavit for bail is defective because it is improperly entitled.

2. The Supreme Court Commissioner who made the order to hold to bail did not set forth in his order the facts which were held by him to constitute fraud.

3. The capias ad respondendum is not sufficient.

4. The proceedings in this case are irregular in that the complaint was not annexed to the capias ad respondendum and returned therewith in accordance with the Practice Act in such case made and provided.

5. Defendant, having entered a special appearance, he did not waive his objections to the jurisdiction of the Court, by subsequently filing an answer and counterclaim, and contesting the case on the merits.

## I.

### The affidavit for bail is defective because it is improperly entitled.

The affidavit for bail in this case was improperly entitled (Endorsement, p. 8); that an affidavit for bail that is so entitled is fatal, has been held in the following cases:

> Potter vs. Cook, 30 N. J. L. J., 206; Milliken vs. Selye, 4 Denio, 54; Bronson vs. Mitchell, 12 Johnson, 400; Humphrey vs. Conde, 2 Cowen, 509.

In Milliken vs. Selye, supra, the Court said on page 56, "The affidavit should not have been entitled because when it was made there was no suit pending in Court. As the affidavit purported to be made in a suit when there was none, the party could not be convicted of perjury for false swearing. In such cases, the affidavit cannot be used—it is a nullity. The rule has been too long settled to be now shaken (citing, The King vs. Pierson, Andrew, 313; Rex vs. Jones, 1 Str. 704; Haight vs. Turner, 2 John, 371; The People vs. Tioga, C. P. 1 Wend., 291; Hollis vs. Brandon, 1 Bos. & Pul., 36; The King vs. Cole, 6 T. R , 640)." In the same case, at page 57, the Court said:

"There are many cases where false swearing will be perjury although no suit was pending at the time. It is so where the oath is lawful; and the oath is lawful when it is a preparatory step to legal proceedings, as on issuing out a writ of replevin, or when a motion is to be made for a mandamus, quo warranto, attachment, or the like. But the difficulty here is, that the affidavit purports to have been made in a suit between Samuel Milliken, Jr., plaintiff, and Louis Kenyon, defendant, when in

fact there was no such suit; as there was no such suit, the affidavit was not lawful but an extra-judicial oath. On this ground, such affidavits have been held to be nullities."

The Court will notice that the affidavit for bail (p. 5, l. 5), reads: "that the *plaintiff* thereupon told the said Nathan Katz, etc.,"

And the affidavit for bail (p. 7, line 23) reads: "Deponent further states that the said *defendant*, Nathan Katz, fraudulently contracted the debt, etc."

The affidavit for bail speaks of a *plaintiff* and of a *defendant* as existing, whereas as a matter of fact, at the time the said affidavit was executed, there was no *plaintiff* and there was no *defendant* and the entitling of the affidavit for bail, as if the plaintiff and defendant did exist at the time of the execution of the affidavit for bail in a suit then pending, when there was no such suit pending, makes the affidavit for bail in this case an extra-judicial oath, upon which a conviction of perjury could not be sustained.

## II.

**The Supreme Court Commissioner who made the order to hold to bail did not set forth in his order the facts which were held by him to constitute fraud.**

The order made by the Justice or Commissioner, must show, upon its face, that he has considered and decided upon the evidence of fraud submitted to him and that the proof was to his satisfaction.

Hill vs. Hunt, 20 N. J. L., 476; Bowne vs. Titus, 30 N. J. L., 340.

In the order for bail (p. 9), the Supreme Court Commissioner in this case decided that "it is estab-

lished to my satisfaction that the said Nathan Katz *fraudulently* incurred the obligation aforesaid" (line 5). And the Commissioner in the same order for bail decides "And that the said Nathan Katz obtained the possesssion of the ten cows belonging to the said Gustave Kein and mentioned in said affidavit on statements made by the said Nathan Katz to the said Gustave Kein, which were and are wholly untrue and false and were and are a fraud and deception practiced upon the said Gustave Kein and that the said Nathan Katz *fraudulently contracted* said debt and *fraudulently incurred* the obligation respecting which this suit is brought" (line 8).

The Supreme Court Commissioner does not state in his order *what "the fraudulent statements were."* To say that a man *fraudulently incurred* an obligation and "*fraudulently contracted* said debt" is simply stating a legal conclusion.

## III.

### The capias ad respondendum is not sufficient.

The capias issued by the plaintiff (p. 9) fails to give notice to the defendant, that the defendant must file his answer, within twenty days after service of the capias and the complaint.

The forms annexed to the Practice Act (1912) Schedule B, show that a writ of summons, writ of replevin and summons in ejectment, should contain a notice that the answer be filed within twenty days after service of the writ and the annexed complaint. It is submitted that a capias ad respondendum should contain a similar notice.

## IV.

**The proceedings in this case are irregular in that the complaint was not annexed to the capias ad respondendum and returned therewith in accordance with the Practice Act in such case made and provided.**

The Sheriff's return endorsed on the capias (p. 10) and the affidavit of service annexed to the complaint (p. 17) show that the capias was not annexed to the complaint and returned therewith, although both were served the same day.

The Practice Act (1912), Rule 54, S. C. R., 1913, Rule 75, provides:

"The complaint shall be annexed to the summons or capias ad respondendum and returned therewith and a copy thereof shall be served with the summons or capias."

The answer or counterclaim shall be filed within twenty (20) days after service of the summons (or capias) and complaint. If further pleadings be necessary, they shall be filed within twenty (20) days, each after the other.

Practice Act, 1912, Rule 55; S. C. R. 1914, Rule 76.

Judgment of non-suit or by default, may be entered against plaintiff or defendant respectively or failure to plead according to the rules.

Pr. Act, 1912, Section 14.

It will be noticed that the provisions requiring the answer to be filed within 20 days after the service of the summons and complaint, are conjunctive.

If the summons (or capias) are served separately when is the answer to be filed, within 20 days after the service of the summons or capias or after the service of the complaint? The rules, contemplate but one occasion, not a split occasion. Twenty days after the service of both the summons or capias and complaint, is the occasion contemplated. If the summons or capias is not served *together*, with the complaint, then the answer never has to be filed. If the answer never has to be filed, it is manifest that the service of the summons or capias were nullities and should have been dismissed.

If the complaint may be served after the service of a summons or capias, in one instance, and the defendant be required to plead within 20 days after the service of the summons or capias, this could be done in every case. In other words, the provision of the statute which requires the service of the complaint with the summons or capias would be done away with, and it will be possible to go back to the former practice of filing a summons or capias and then filing the complaint and requiring the defendant to plead.

If the complaint need not be served with the summons or capias, when may it be served or is there no time limit? If the period of time intervening the the service of the capias and complaint is one hour, what is there to prevent the service of the complaint being made a day, a week, or a year thereafter?

## V.

**Defendant having entered a special appearance, he did not waive his objections to the jurisdiction of the Court, by subsequently filing an answer and counterclaim and contesting the case on the merits.**

The defendant, in the first instance, filed a special appearance objecting to the jurisdiction of the Court over his person for various reasons (affidavit, p. 19). The act of the defendant in entering into recognizance of bail (p. 11), did not constitute a general appearance as Section 61 of the Practice Act (1903) provides:

"Any justice of the Supreme Court or judge of the Court out of which a capias ad respondendum shall issue may on notice to the plaintiff determine upon the legality of orders for bail and discharge persons illegally arrested in civil actions whether bail has been given or not; and upon such application the justice or judge shall consider and determine the sufficiency, in fact as well as in law, of the proof upon which the order for bail was founded; if an order for bail is set aside, the action shall not abate but the defendant shall be discharged from arrest and his bail discharged and the action shall proceed as if commenced by summons, unless otherwise ordered by the Court or a judge." (P. L. 1903, p. 553; 3 C.S. 4071; Rev., Secs. 62, 63; 1853, p. 406; 1855, sec. 83).

Hisorn vs. Vandiver, 82 Atl., 526; 82 N. J. L., 203; 85 Atl., 181, 83 N. J. L., 433.

The defendant's objections to the jurisdiction of the Court over his person, being overruled, he filed an answer. The question to be determined by this Court, is whether the filing of an answer amounted to a waiver of the defendant's special appearance and the objections raised thereon. There is a strong conflict among the various courts on this point.

The cases on both sides of this question are collected in a footnote in 16 L. R. A. (N. S.) 177.

"There are many cases which hold that, if a defendant appears specially for the sole purpose of objecting to the jurisdiction of the Court over his person, and the objection is overruled, he does not waive the question of jurisdiction by taking steps thereafter to contest the case upon the merits, provided, of course, that he properly excepts to the overruling of his objection. The principle underlying these decisions seems to be that the defendant, having done all that he could in objecting to the jurisdiction of the Trial Court over his person, should not be compelled to submit to judgment of default as the condition of having the jurisdiction of the Trial Court tested on appeal. His further appearance, or other acts in the case, are not strictly voluntary, but are in a sense compulsory and should not be deemed a waiver of his objections." (Citing cases) 16 L. R. A., (N. S. 178).

The United States Supreme Court has adopted the rule that the filing of an answer and contesting the case on the merits after the entering of a special appearance, does not amount to a waiver of the objections raised on the special appearance. In Harkness vs. Hyde, 98 U. S., page 476, a motion was made to quash the service of a summons and after the motion was denied, the defendant contested upon the merits. The Court said in this case, at page 479:

"The right of the defendant to insist upon the objection to the illegality of the service was not waived by the special appearance of counsel for him to move the dismissal of the action on that ground, or what we consider as intended, that the service be set aside; nor, when that motion was overruled by their answering for him to the merits of the action. Illegality in a proceeding by which jurisdiction is to be obtained is in no case waived by the

appearance of the defendant for the purpose of calling the attention of the Court to such irregularity; nor is the objection waived when being urged, it is overruled, and the defendant is thereby compelled to answer. He is not considered as abandoning his objection because he does not submit to further proceedings without contestation. It is only when he pleads to the merits in the first instance, without insisting upon the illegality, that the objection is deemed to be waived."

The rule adopted by the United States Supreme Court and which rule the appellant in this case respectfully urges should be adopted by this Court, was only recently followed by the Supreme Court of Errors of Connecticut in the case of Coyne vs. Blume, 90 Conn., 293, 97 Atl., 337; L. R. A., 1916E, page 1082.

In Mulhern vs. the Press Publishing Co., 53 N. J. L., 150, 20 Atl., 760, the Court held that moving for an extension of time to plead in order to prevent a judgment by default did not amount to a waiver of objections to the jurisdiction of the Court, raised on a rule to show cause why service of a summons should not be set aside.

## CONCLUSION.

The defendant in this case entered a special appearance for the purpose of contesting the jurisdiction of the Court because of certain defects and irregularities in the affidavit for bail, in the order for bail, and in the process by virtue of which he was arrested. The Trial Court overruled the defendant's objections and entered an order denying the defendant's applications to dismiss the complaint, to discharge the bail, etc. It is the action of the Trial Court in granting this order which the appellant respectfully submits was erroneous. The

Trial Court should have set aside the order for bail and discharged the defendant from arrest and the action should then have proceeded as if commenced by a summons, in accordance with Section 61 of the Practice Act (1903). The defendant has not lost the benefit of his objections raised on the special appearance, by filing an answer and contesting the case on the merits, and therefore, the action of the Trial Court below in granting the order aforesaid, may be properly reviewed by this Court.

It is respectfully submitted that judgment should be reversed.

DANIEL D. LOEB,
Attorney for Defendant-Appellant.

SAUL NEMSER,
Of Counsel.

NEW JERSEY

# COURT OF ERRORS AND APPEALS.

**GUSTAVE KEIN,**
**Plaintiff-Respondent,**

**vs.**

**NATHAN KATZ,**
**Defendant-Appellant.**

*Action at Law.*
*Appeal from Union County Circuit Court.*

# State of Case.

DANIEL D. LOEB,
Attorney for Defendant-Appellant.

SAUL NEMSER,
Of Counsel.

STAMLER & STAMLER,
Attorneys for Plaintiff-Respondent.

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