

Ord 531 - 1912

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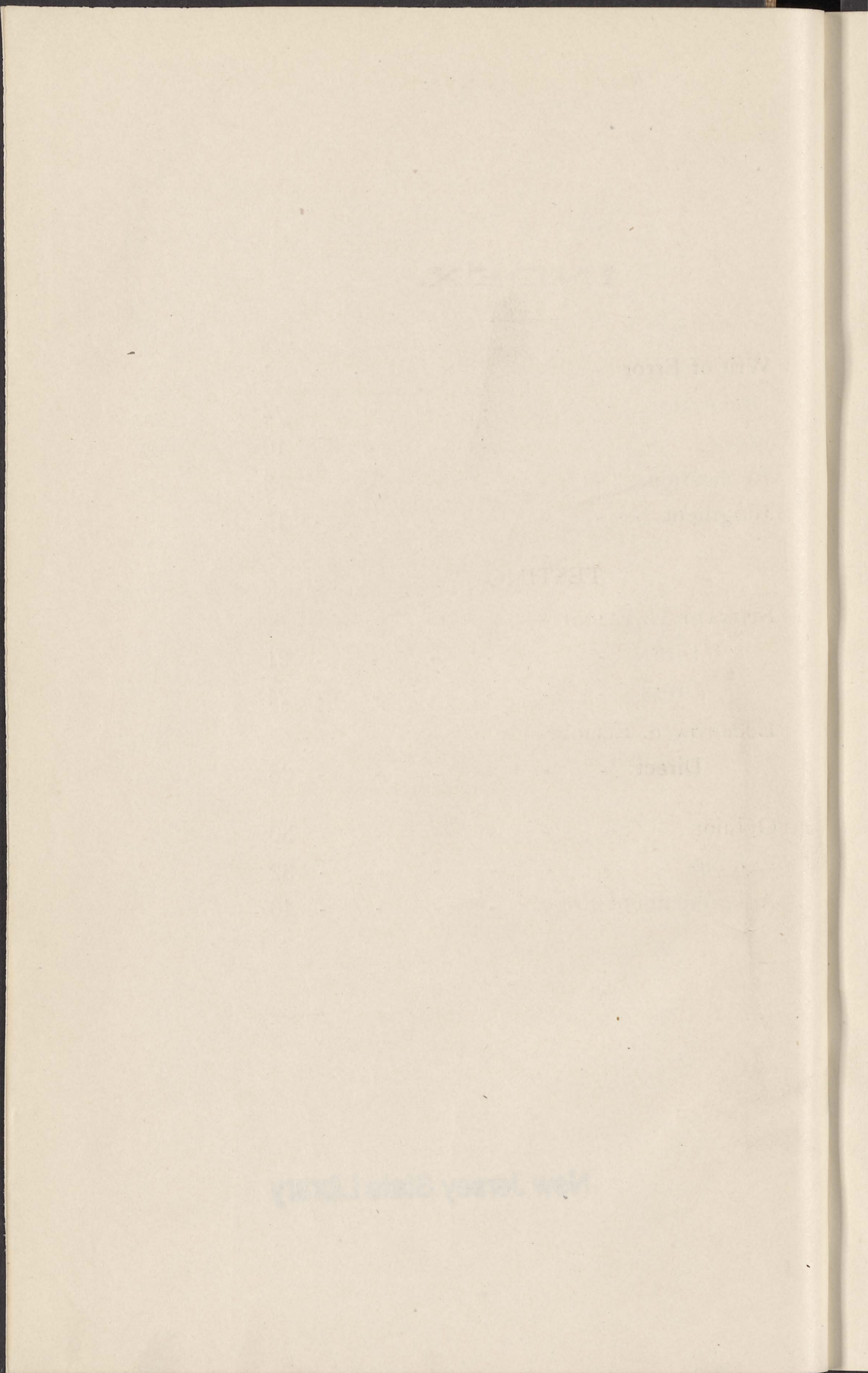
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WRIT OF ERROR

NEW JERSEY, SS:

[L. s.] The State of New Jersey to the
 Judges of our Circuit Court at
 Jersey City in and for the
 County of Hudson.

10

GREETING:

Because in the record and proceedings, and also in the giving of the judgment in a plaint which was in our said Circuit Court before you between the Mayor and Aldermen of Jersey City, a corporation, which sues for the benefit of Stewart E. Elliott, being the plaintiff, and George J. Schoppe, James J. Kinkead, and Elmer E. Hallinger, being the defendants, 20
in a plea of contract, manifest error hath intervened to the great damage of the said The Mayor and Aldermen of Jersey City, plaintiff as aforesaid, as by its complaint we are informed, we being willing that that error, if any there be, should in due manner be corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you that if judgment be thereupon given, then you send distinctly and openly under your seal, the record and proceedings and plaint aforesaid, 30
with all things touching and concerning the same, to our Court of Errors and Appeals, before the Judges thereof, on the sixteenth day of August next, together with this writ, that the record and proceedings aforesaid, being inspected, we may cause to be further done thereupon for correcting that error, what of right and according to the law 40

and customs of the State of New Jersey ought to be done.

Witness our Chancellor and President Judge of our said Court of Errors and Appeals at Trenton aforesaid, the twenty-first day of July, A. D. 1911.

PIERRE F. COOK,
Attorney.

S. D. DICKINSON,
Clerk.

The answer of Benjamin A. Vail, one of the Judges of the Circuit Court within named;

The record and proceedings of the plaint whereof mention is within made, and all things touching the same to the Court of Errors and Appeals in the last resort in all causes within specified, at the day and place within contained, I certify in a certain schedule to this writ annexed, as I am within commanded.

B. A. VAIL,
Judge.

Filed August 12, 1911.

30

Hudson County Circuit Court of
the twelfth day of November,
nineteen hundred and ten.

HUDSON COUNTY, ss.

George J. Schoppe, James J. Kinkead and Elmer E. Hallinger, the defendants in this suit, were summoned to answer unto the

Mayor and Aldermen of Jersey City, a municipal corporation of the State of New Jersey, the plaintiff therein, which sues for the benefit of Stewert H. Elliott in an action upon contract, and thereupon the said plaintiff, by Pierre F. Cook, its attorney, complains for 10
that whereas the said defendants heretofore, to wit, on the fourteenth day of December, nineteen hundred and eight, at the City of Jersey City, in the said County of Hudson, and within the jurisdiction of this Court, by their certain writing obligatory, sealed with their seals, and now shown to the Court here; the date whereof is a certain day and year therein mentioned, to wit, the day and year 20
last aforesaid, acknowledged themselves to be held and firmly bound unto "The Mayor and Aldermen of Jersey City," a municipal corporation of the State of New Jersey, in the sum of One Thousand Dollars, good and lawful money of the United States of America to be paid to the said "The Mayor and Aldermen of Jersey City," their successors or assigns, which said writing obligatory was and is subject to a certain condition thereunder written; 30
whereby, after reciting to the effect following, to wit, that whereas George J. Schoppe having been duly elected constable from the 9th Ward of Jersey City, N. J., at the election held on November 6th, 1906, and hath accepted the said office and is engaged in the discharge of the duties appertaining thereto, it was conditioned that if the said George J. Schoppe should truly and faithfully perform the duties of his said office as Constable of Jersey City, 40

then the said obligation should be void, otherwise to remain in full force and virtue; as by the said writing obligatory and the condition thereof will more fully and at large appear, a copy of which writing obligatory and the condition thereof is hereunto annexed and forms
10 a part hereof and reference to which is hereby made.

And the said plaintiff, for assigning a breach of the said condition, saith that the said George J. Schoppe, constable as aforesaid, did not truly and faithfully perform the duties of his said office as constable in that said George J. Schoppe as constable aforesaid has neglected and refused, and does still neglect
20 and refuse to pay to the Clerk of the First District Court of Jersey City, New Jersey, or to the said Stewart H. Elliott, the plaintiff herein, the sum of Two Hundred and Nineteen Dollars heretofore, to wit, on the thirteenth day of April, nineteen hundred and nine, by said plaintiff Stewart H. Elliott paid to said George J. Schoppe, constable as aforesaid, at Hoboken, to wit, at Jersey City,
30 in the County of Hudson aforesaid, as a cash deposit in lieu of a bond made in accordance with the statute in such case made and provided in a certain attachment suit then pending in said First District Court of Jersey City, wherein one Wallace H. Owen was plaintiff and said Stewart H. Elliott was defendant, pursuant to the terms of said deposit in lieu of the bond, judgment having been afterwards, to wit, on the twentieth day
40 of July, nineteen hundred and nine, rendered

in said attachment suit by said First District Court of Jersey City in favor of said Stewart H. Elliott, the defendant therein, and against said Wallace H. Owen, the plaintiff therein, the Court finding that the following facts were established: (1) The payment of the sum of two hundred and nineteen dollars by the defendant to the constable George J. Schoppe was a cash deposit in lieu of a bond and was made in accordance with the statute. (2) The contract upon which the suit was brought was not proven; as by the record and proceedings thereof still remaining in the said First District Court of Jersey City more fully and at large appears, which said judgment was by the Supreme Court of New Jersey afterwards, to wit, on the twenty-ninth day of September, nineteen hundred and ten, in all things affirmed on appeal, as by the record and proceedings of said Supreme Court still remaining in the said Court more fully and at large appears, which said judgments, and each of them, still remain in full force and effect, not in the least reversed, satisfied or made void; contrary to the tenor and effect of the condition of the said writing obligatory, to wit, at Jersey City in the County of Hudson aforesaid, whereby an action hath accrued to the said plaintiff for the use of said Stewart H. Elliott to demand and have of and from the said defendants the sum of One Thousand Dollars above demanded. Yet the said defendants, although often requested so to do, have not, nor hath either of them,

as yet paid the said sum of One Thousand Dollars or any part thereof, to the said plaintiff, or to said Stewart H. Elliott, but have hitherto wholly neglected and refused, and still do neglect and refuse so to do, to wit,
10 at Jersey City, in the County of Hudson aforesaid, to the damage of the plaintiff One Thousand Dollars, and therefore it brings its suit, etc.

PIERRE F. COOK,
Attorney of Plaintiff.

To THE DEFENDANTS:

The following is a bill of particulars of
20 the demand and a copy of the writing obligatory upon which the annexed declaration is founded:

(COPY OF WRITING OBLIGATORY)

Know all men by these presents, That we, George J. Schoppe, James J. Kinkead and Elmer E. Hallenger, all of Jersey City, Hudson County, and State of New Jersey, are
30 held and firmly bound unto "The Mayor and Aldermen of Jersey City," a municipal corporation of the State of New Jersey, in the sum of one thousand dollars good and lawful money of the United States of America, to be paid to the said, "The Mayor and Aldermen of Jersey City," their successors or assigns, which payment well and truly to
40 be made, we bind ourselves, our and each of our heirs, executors and administrators,

DECLARATION

7

jointly and severally, firmly by these presents.

Sealed with our seals, and dated this fourteenth day of December, in the year of our Lord, one thousand nine hundred and eight.

10

The condition of the above obligation is such, that whereas, George J. Schoppe having been duly elected constable from the 9th Ward of Jersey City, N. J., at the election held on November 6th, 1906, and hath accepted the said office, and is engaged in the discharge of the duties appertaining thereto.

Now, therefore, if the said George J. Schoppe shall truly and faithfully perform the duties of his said office, as Constable of Jersey City, then the above obligation to be void, otherwise to remain in full force and virtue.

20

GEORGE J. SCHOPPE, [L. S.]
 JAMES J. KINKEAD, [L. S.]
 ELMER E. HALLINGER, [L. S.]

Signed, sealed and delivered
 in the presence of

30

JOHN J. HOGAN.

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

James J. Kinkead, of full age, being by me
 duly sworn, on his oath, according to law,

40

deposes and says that he is a resident of Jersey City, Hudson County, and State of New Jersey, and a freeholder therein, and that he is worth the sum of one thousand dollars over and above all his just debts and legal liabilities and property exempt from execution.

10 JAMES J. KINKEAD.

Sworn to and subscribed before me this 14th day of December, 1908.

S. W. GARRISON,
Notary Public.

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

Elmer E. Hallinger, of full age, being by me duly sworn, on his oath, according to law, deposes and says that he is a resident of Jersey City, Hudson County, and State of New Jersey, and a freeholder therein, and that he is worth the sum of one thousand dollars, over and above all his just debts and legal liabilities and property exempt from execution.

30 ELMER E. HALLINGER,

Sworn to and subscribed before me this 14th day of December, A. D. 1908.

JOHN J. HOGAN,
Commissioner of Deeds,
New Jersey.

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DECLARATION

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(ENDORSEMENT.)

Official bond of George J. Schoppe as Constable, \$1,000.

Approved as drawn in legal form.

WARREN DIXON, 10
Corporation Counsel.

Filed December 17, 1908.

R. J. VREELAND,
Clerk.

Approved December 18, 1908.

R. J. VREELAND, 20
Clerk.

Jersey City, December 18, 1908.

Your Committee on Finance and Claims, to whom was referred December 18, 1908, the within bond of George J. Schoppe as Constable from the 9th Ward of Jersey City, respectfully report and recommend that it be received, spread at large upon the bond book and ordered filed. 30

JOHN MEHL,
GEORGE F. PERKINS,
Committee on Finance and Claims.

STATEMENT.

Amount of account, \$219.00
Interest thereon from July 20, 1909, to date of judgment. 40

Judgment will be claimed in this action for the sum of One Thousand Dollars, to be satisfied by the payment of Two Hundred and Nineteen Dollars, with interest thereon from the twentieth day of July, nineteen hundred and ten, besides costs of suit to be taxed.

10

PIERRE F. COOK,

Attorney of Plaintiff.

Filed November 10, 1910.

And the said defendant, George J. Schoppe, by Marshall Van Winkle, his attorney, comes
20 and defends the wrong and injury when, &c., and says that he did truly and faithfully perform the duties of his said office as constable of Jersey City according to the form and effect of the said writing obligatory in that behalf, made as aforesaid, to-wit, at Jersey City, in the County of Hudson, aforesaid, and of this the said defendant puts himself upon the country, &c.

30 And for a further plea in this behalf as to the said supposed breach of the said condition in the said writing obligatory, mentioned in the said declaration, the said defendant, George J. Schoppe, by leave of the Court here for this purpose first had and obtained according to the form of the statute in that case made and provided, saith that the said plaintiff ought not to have or maintain its aforesaid action thereof against him because he says that he,
40 as constable, has not neglected or refused, nor

does he still neglect and refuse to pay to the clerk of the First District Court of Jersey City, New Jersey, or to the said Stewart H. Elliott, the said sum of two hundred and nineteen dollars (\$219), and he says that the said sum was not paid to him, this defendant, as a cash deposit in lieu of a bond made in accordance with the statute, &c., in the certain attachment suit mentioned in the declaration, and of this said defendant puts himself upon the country, &c. 10

And the said defendant, James J. Kinkead, by Marshall Van Winkle, his attorney, comes and defends the wrong and injury when, &c., and says that the said defendant, George J. Schoppe, did truly and faithfully perform the duties of his said office as constable of Jersey City according to the form and effect of the said writing obligatory, in that behalf made, as aforesaid, to wit, at Jersey City, in the County of Hudson, aforesaid, and of this the said defendant puts himself upon the country, &c. 20

And for a further plea in this behalf as to the said supposed breach of the said condition in the said writing obligatory, mentioned in the said declaration, the said defendant, James J. Kinkead, by leave of the Court here for this purpose first had and obtained, according to the form of the statute in such case made and provided, saith that the said plaintiff ought not to have or maintain its aforesaid action thereof against him, because, he says, that the said George J. Schoppe, as constable, has not neglected or refused, nor does he still neglect 30 40

and refuse to pay to the clerk of the First District Court of Jersey City, New Jersey, or to the said Stewart H. Elliott the said sum of two hundred and nineteen dollars (\$219), and this defendant says that the said sum was not
10 paid to said George J. Schoppe as a cash deposit in lieu of a bond made in accordance with the statute, &c., in the certain attachment suit mentioned in the declaration; and of this said defendant, James J. Kinkead puts himself upon the country, &c.

And the said defendant, Elmer E. Hallinger, by Marshall Van Winkle, his attorney, comes and defends the wrong and injury when, &c., and says that the said defendant, George J.
20 Schoppe, did truly and faithfully perform the duties of his said office as constable of Jersey City according to the form and effect of the said writing obligatory in that behalf, made as aforesaid, to wit, at Jersey City, in the County of Hudson aforesaid, and of this the said defendant puts himself upon the country, &c.

And for a further plea in this behalf as to the said supposed breach of the said condition in the said writing obligatory, mentioned in
30 the said declaration, the said defendant, Elmer E. Hallinger, by leave of the Court here for this purpose first had and obtained according to the form of the statute in such case made and provided saith that the said plaintiff ought not to have or maintain its aforesaid action thereof against him because, he says, that the said George J. Schoppe, as constable, has not neglected or refused, nor does he still neglect
40 and refuse to pay to the clerk of the First Dis-

trict Court of Jersey City, New Jersey, or to the said Stewart H. Elliott the said sum of two hundred and nineteen dollars (\$219.), and this defendant says that the said sum was not paid to said George J. Schoppe as a cash deposit in lieu of a bond made in accordance with the statute, &c., in the certain attachment suit mentioned in the declaration; and of this said defendant, Elmer E. Hallinger puts himself upon the country, &c. 10

Filed Nov. 10, 1911

And the said plaintiff as to the plea of the said defendant, George J. Schoppe, by him first above pleaded, and whereof he hath put himself upon the country, doth the like. 20

And the said plaintiff as to the said plea of the said defendant, George J. Schoppe, by him secondly above pleaded, saith that the said plaintiff, by reason of anything by the said defendant, George J. Schoppe, in that plea alleged, ought not to be barred from having and maintaining its aforesaid action thereof against the said defendant, George J. Schoppe, because it saith that the said George J. Schoppe, as constable, has neglected and refused, and does still neglect and refuse to pay to the clerk of the First District Court of Jersey City, or to said Stewart H. Elliott, the said sum of two hundred and nineteen dollars, and that the said sum was paid to said George J. Schoppe as a cash deposit in lieu of a bond made in accordance with the statute, &c, in a certain attachment suit mentioned in the declaration. 30 40

And this the said plaintiff prays may be inquired of by the country, &c.

And the said plaintiff, as to the plea of the said defendant, James J. Kinkead, by him first above pleaded, and whereof he hath put himself upon the country, doth the like.

And the said plaintiff, as to the said plea of the said defendant, James J. Kinkead, by him secondly above pleaded saith that the said plaintiff, by reason of anything by the said defendant, James J. Kinkead, in that plea alleged, ought not to be barred from having and maintaining its aforesaid action thereof against the said defendant, James J. Kinkead, because it saith that the said George J. Schoppe, as

constable, has neglected and refused, and does still neglect and refuse to pay to the clerk of the First District Court of Jersey City, or to said Stewart H. Elliott, the said sum of two hundred and nineteen dollars, and that the said sum was paid to said George J. Schoppe as a cash deposit in lieu of a bond made in accordance with the statute, &c., in a certain attachment suit mentioned in the declaration.

And this the said plaintiff prays may be inquired of by the country, etc.

And the said plaintiff, as to the plea of the said defendant, Elmer E. Hallinger, by him first above pleaded, and whereof he hath put himself upon the country, doth the like.

And the said plaintiff, as to the said plea of the said defendant, Elmer E. Hallinger, by him secondly above pleaded, saith that the said plaintiff, by reason of anything by the said defendant, Elmer E. Hallinger, in that plea al-

leged, ought not to be barred from having and maintaining its aforesaid action thereof against the said defendant, Elmer E. Hallinger, because, it saith, that the said George J. Schoppe, as constable, has neglected and refused, and does still neglect and refuse to pay to the clerk of the First District Court of Jersey City, or to said Stewart H. Elliott, the said sum of two hundred and nineteen dollars, and that the said sum was paid to said George J. Schoppe as a cash deposit in lieu of a bond made in accordance with the statute, &c., in a certain attachment suit mentioned in the declaration. And this the said plaintiff prays may be inquired of by the country, &c.

Filed Nov. 30, 1910.

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20

Therefore, to try the issue joined let a jury come before the said Circuit Court, at Jersey City aforesaid, on the twelfth day of April, one thousand nine hundred and eleven, as yet of the term of April, in the year of our Lord one thousand nine hundred and eleven, who neither, &c., by whom and, &c., to recognize and, &c., because as well and, &c., the same day is given to parties aforesaid at which day before the said Circuit Court come the said parties, by their attorneys, aforesaid, the jurors of the jury above mentioned also come, and the said parties, with their attorneys aforesaid, having consented to try the issue above joined before the Court, without a jury the Court here so orders and the evidence of the parties

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is submitted, and the attorneys are heard thereupon.

Whereupon the premises aforesaid being seen and by the Court here fully understood and mature deliberation being thereupon had the Court finds in favor of the defendants,
 10 James J. Kinkead and Elmer E. Hallinger and against the plaintiff, and assesses the damages of the said defendants at the sum of thirty-eight dollars and twenty-nine cents for their costs and charges by the said defendants in this behalf.

Therefore it is considered that the said defendants do recover against the said plaintiff, mayor and aldermen of Jersey City for their
 20 damages aforesaid, in manner aforesaid, found, for their costs and charges by the said Court now here adjudged, and which said costs and charges, in the whole, amount to thirty-eight dollars and twenty-nine cents, and the said plaintiff, in mercy, and, &c.

Judgment entered and signed this twelfth day of April, A. D. 1911.

B. A. VAIL,
 Judge.

30 Attest,
 JOHN F. CROSBY,
 Clerk.

(Mr. Cook opened plaintiff's case to jury.)

MR. COOK: If your Honor please, Mr. Van Winkle has kindly consented that the certified
 40 copy of this bond, which is on file in the City

Hall, be offered in evidence in lieu of the original.

MR. VAN WINKLE: Your Honor will observe the condition of the bond. It is very brief.

"The condition of the above obligation is such that whereas George J. Schoppe having been duly elected constable at a certain election, and accepted office, is engaged in the discharge of the duties of the office; if he shall truly and faithfully perform the duties of the said office as constable, then this obligation to be void." 10

(Bond marked exhibit P 1.)

MR. COOK: If your Honor please, I desire next, with Mr. Van Winkle's consent, to offer the record of the attachment suit in the district court, from which it appears that that suit resulted in judgment in favor of the defendant. 20

MR. VAN WINKLE: That is objected to—not as to form, if your Honor please; I agreed that the books need not be produced here; no question about that—but I object on the ground that this judgment cannot bind or be used against these bondsmen in this proceeding. 30

MR. COOK: If your Honor please, my purpose in showing the judgment is this; if no judgment was entered for the defendant, then the cash bail never would have been forfeited, never should have been retained, but the contention of the plaintiff here is that he 40

deposited this as a bond to abide the event of the attachment suit. Now I wish to show that the event of that attachment suit was a judgment in favor of the defendant.

10 THE COURT: I will admit it for the present.

MR. COOK: That is my only purpose.

MR. VAN WINKLE: I pray an exception.

THE COURT: Well, if it is necessary. You may move to strike out the question if it is immaterial.

(Paper marked Exhibit P 2.)

20 MR. VAN WINKLE: Wouldn't it be better to put right there on the record a copy of the affidavit and the writ itself.

MR. COOK: Read that in evidence.

MR. VAN WINKLE: By consent it is agreed that an affidavit was filed in the First District Court of Jersey City on the 13th day of April, 1909, made by Wallace H Owen, which read as follows;

30

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

"Wallace H. Owen being duly sworn says that Stewart H. Elliott is indebted to him in the sum of two hundred dollars, and that deponent verily believes that the said Stewart H. Elliott absconds himself from his creditors,
40 and that he is not to the knowledge and be-

lief of the said Wallace H. Owen resident in this state at this time.

(Signed) WALLACE H. OWEN.

“Taken and subscribed before me this thirteenth day of April, A. D. 1909, at Jersey City, New Jersey. 10

JAMES N. BRADEN,
Notary Public of New Jersey,”

Endorsed: “Filed April 13, 1909. James N. Braden, Clerk.”

20

IT IS AGREED that a writ of attachment was issued on the 13th day of April, 1909, from the First District Court in words and figures following:

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

The State of New Jersey to any constable of said county: 30

You are hereby commanded to attach the effects, rights and credits of Stewart H. Elliott in the County of Hudson to the value of three hundred dollars, in whosoever hands found, to answer unto Wallace H. Owen in an action upon contract, and make return of such attachment to the First District Court of Jersey City at City Hall, corner of Grove and Montgomery streets, in said city, immediately 40

after making same, that therein may be further done what law and justice shall require.

Witness, Charles L. Carrick, Esquire, Judge of said court, at Jersey City aforesaid, the 13th day of April in the year 1909.

10

JAMES N. BRADEN,

Clerk.

HERMAN & HERMAN,

Plaintiff's Attorneys."

IT IS AGREED that on the back of the said writ is this endorsement, signed by George J. Schoppe, one of the defendants herein.

20

"I return the within writ this 13th day of April, 1909, fully satisfied. George J. Schoppe, Constable."

By consent of counsel, a juror is withdrawn, and the case will be tried before the court without a jury.

30

It is agreed that endorsed on the writ appears a receipt in words and figures as follows, which receipt is signed by Heyman & Heyman, attorneys of the plaintiff in the District Court action:

40

"Received by George J. Schoppe, \$213,-55, in full settlement of the attachment of Owen v. Elliott, April 13, 1909. Heyman & Heyman, Attorneys for Plaintiff."

IT IS AGREED that the money was paid to Mr. Schoppe, and that it was not paid into court as a cash deposit in lieu of bond, and that it was paid over to plaintiff's attorneys.

MR. COOK: I might also state the execution of the bond is admitted: 10

MR. VAN WINKLE: Yes; I think it applies to this period of office.

IT IS AGREED that the transaction occurred in April, 1909, and the bond was dated December, 1908, for a year.

STEWART HANCOCK ELLIOTT, the plaintiff, being sworn, testified as follows:

Direct Examination by Mr. Cook: 20

Q. Mr. Elliott, you are the plaintiff in this suit for whose benefit the suit upon this bond is brought, are you not? A. Yes, sir.

Q. Where do you live? A. Norwalk, Connecticut.

Q. Do you recall the 13th of April, 1909? A. Yes, sir.

Q. Where were you that day? A. April 13th I sailed for Europe. I sailed on a steamboat here at Hoboken for Europe. 30

Q. What steamboat; what line? A. It was the Hamburg - American Line—Kaiser Wilhelm Second, or something.

Q. North German Lloyd? A. Is it North German Lloyd? It may be. I forget.

Q. Anyway, you sailed from Hoboken? A. Yes, sir.

Q. What, if anything, occurred on that ship previous to the time of sailing in reference to 40

your trunks? A. Well, about half an hour—a few minutes before the boat sailed, a man came up to me and asked me if my name was Elliott and I told him it was.

Q. Who was he, did you afterwards learn?

10 A. He told me that he was a deputy sheriff from Hoboken or Jersey City.

Q. What was his name? A. George Schoppe.

Q. What did he tell you? A. He said that he had my baggage attached and that I could not sail on that boat until I had satisfied a claim of a man named Owen. I naturally was a little panic-struck at the time.

20 MR. VAN WINKLE: Don't tell us that. Tell us what you said and what you did.

A. Well, I told him I must sail on the boat, and I asked him what the best thing I could do. He said, "You can go down and see Mr. Owen," who was standing at the gang-plank, across on the dock. I spoke to Mr. Owen, who I supposed was a friend of mine, and I told him I could not understand any such action. He said, well—

30

MR. VAN WINKLE: Are you telling what you told Owen now?

THE WITNESS: Yes.

MR. VAN WINKLE: Speak louder.

A. I told him I could not understand.

MR. VAN WINKLE: You are telling Owen?

A. Yes, Owen. And Schoppe told me that
40 if I wanted to sail on the boat, if I gave him

two hundred and nineteen dollars, that that would be the only way that I could sail. So I told him I would give him the two hundred and nineteen dollars providing it was just as surety or a bond to my appearance in the court in Jersey City when the thing came to trial, so I would have a chance to fight it, and he gave me a receipt for the money which I paid him. 10

Q. What did he say as to this being paid under those circumstances? A. He told me that that money would be put in the custody of the court as a bond for my reappearance back there to satisfy the claim.

Q. Did you pay him the money? A. I paid him the money. 20

Q. Were your trunks or were they not released? A. My trunks had never been attached.

Q. And you sailed, however— A. My trunks were locked up in the room at the time. He never saw the trunks.

MR. VAN WINKLE: What's that?

A. My trunks were not attached. And he told me they were. At any rate, I believed they were. 30

Q. You sailed? A. I sailed.

Q. How long were you abroad? A. About two months.

Q. When you returned what did you do in reference to the case if anything? A. I immediately tried the case.

Q. Well? A. I notified my attorneys. 40

MR. VAN WINKLE: You employed Mr. Cook and he went ahead?

THE WITNESS: Yes.

Q. The case was tried in the First District Court of Jersey City? A. Yes.

10 Q. With what result?

MR. VAN WINKLE: I object.

MR. COOK: That is all in evidence.

Q. As a matter of fact, was that money ever paid into court?

MR. VAN WINKLE: I object.

MR. COOK: Well, that is admitted.

20

Q. Was it ever paid to you? A. No, sir.

Q. Was demand made upon Mr. Schoppe for it? A. I think so.

Q. He never paid it to you? A. Never paid it.

Q. How soon after this transaction on board the ship did you get in communication with your attorneys on shore? A. I wrote them letters before the pilot got off which were
30 mailed that same morning.

Q. You stated that Schoppe told you that he was a deputy sheriff. Did he say that or did he say that he was a constable? A. I don't recall; I can't recall that.

Cross examination by Mr. Van Winkle.

Q. You did say that he said to you that he was a deputy sheriff of Hoboken? A. Well, I
40 might have made a mistake there; whether it

was a deputy sheriff or a constable. He gave me a card and it had constable on it but it looked all the same to me.

Q. Aren't there some other mistakes in the rest of your testimony except that one?

MR COOK: I object unless you specify 10
them.

THE COURT: I think that is too broad.

Q. Where were your trunks, Mr. Elliott, at the time that Mr. Schoppe came to the pier or to the boat? A. They were in my stateroom.

Q. On the ship? A. Yes, sir.

Q. What baggage did you have there; how many trunks, how many boxes, how many 20
pieces of luggage? A. I had four pieces of baggage.

Q. All filled with your clothing and personal belongings? A. Yes, sir.

Q. Worth three, four, five hundred dollars, possibly? A. Yes, sir.

Q. Worth about five hundred dollars? A. Yes, sir; I suppose they were.

Q. Now, then, did Schoppe ever get near your trunks at all? A. Not that I know of. 30

Q. Had you locked your stateroom when you came out? A. No; the trunks were left at the dock down below where they were to be weighed, and so forth, and when I went in my trunks were put in the stateroom by the stewards, but I never saw them until after they were locked in my room; when I got the key to my room they were all in it.

Q. Did you get a key to your room before?

Schoppe came? A. No, sir. Yes; I had it in my pocket.

Q. So the trunks were in your room when he came? A. I guess so; I wasn't down in the room then. I had the key but I had not been in the room until the boat went away, but
10 I then went to my room before the boat did sail and saw that they were in there.

Q. Now, then, you say that you spoke to Mr. Owen, who you thought was a friend?
A. Yes, sir.

Q. And he was the friend who was bringing the suit against you, wasn't he? A. Yes, sir.

Q. Did not Owen tell you that you owed him two hundred dollars?

20

(Objected to; question allowed.)

A. No, sir.

Q. Didn't you ask him why he had sued out the writ? A. Why he had? No; I didn't ask him why.

Q. Now, you say, Mr. Elliott, that you wrote a letter to Mr. Cook, or to your lawyers, concerning this matter as soon as you sailed?

30 A. Yes.

Q. Do you know when the letter is dated?

MR. COOK: I do.

MR. VAN WINKLE: May I see it?

MR. COOK: Yes.

By the Court:

Q. Have you the receipt the constable gave
40 you? A. No, sir; Mr. Cook did have it.

By Mr. Van Winkle:

Q. You got the receipt from the constable, didn't you? A. Yes, sir.

Q. Where is it? A. I couldn't tell you; Mr. Cook had it the last time in court. 10

MR. COOK: That is a copy of it, Mr. Van Winkle.

THE COURT: Use the copy.

MR. COOK: I lost the original.

MR. VAN WINKLE: It is agreed, then, that the constable gave to Mr. Elliott a receipt in the words and figures as follows: 20

“Received of S. H. Elliott two hundred and nineteen dollars in suit of W. H. Owen. George J. Schoppe.”

Q. That is the receipt that you received, was it not? A. Yes.

Q. Why didn't you have the constable put on that receipt the fact that you were paying that money as a deposit and not in settlement of the suit? A. Probably I would have done such a thing if it had not been that they were—I just about had time to hand the money to him before the gangplank lifted, and otherwise I couldn't have gone to Europe; I would have lost the passage. 30

Q. That is the only receipt you got? A. That is the only receipt I had or had time to get. 40

MR. COOK: Do you call for the letter?

MR. VAN WINKLE: Is that a letter?

MR. COOK: I will offer the paper; you called for it and inspected it and I will offer it.

10 *Redirect Examination by Mr. Cook:*

Q. Look at the paper which I now show you and tell me in whose handwriting is that?

A. I wrote it.

Q. And to whom is it addressed? A. It is addressed to Reggie Brixie, of Lannon, Bailey & Brixey.

Q. He is a New York attorney? A. Yes.

Q. Signed by whom? A. Signed by me.

20 Q. In your handwriting? A. In my handwriting.

Q. Is that a letter that you sent back by the pilot? A. That is a letter I mailed before that boat got away.

Q. To Mr. Brixey?

MR. VAN WINKLE: There is no objection.

MR. COOK: I offer the letter.

30 (Mr. Cook read letter, instructing stenographer not to enter it.)

LUCRETIA S. ELLIOTT, a witness produced on behalf of the plaintiff, being sworn, testified as follows:

Direct Examination by Mr. Cook:

Q. Mrs. Elliott, you are the wife of Stewart H. Elliott, who has just testified? A. I am.

40 Q. Do you recall the 13th of April, 1909?
A. I do.

Q. You and he sailed for Europe on that day? A. Yes; we did.

Q. Were you present when this transaction occurred with Mr. Schoppe, the constable, of which your husband has just testified? A. I was present.

Q. Did you see the two hundred and nineteen dollars paid to Schoppe by your husband? A. I did.

Q. Did you hear anything said as to the conditions under which it was paid by your husband? A. My husband said to the constable, "I will pay you this money as a bond, but I appear when I get home from Europe and fight the case," and the constable accepted it.

Q. What did Schoppe say to that? A. He wrote the receipt on his card and handed it to my husband right in front of me.

Q. Did Schoppe say anything as to its being taken as a bond? A. He agreed absolutely right there. He said, "Very well," and wrote the receipt and handed it to my husband.

No cross examination.

PLAINTIFF RESTS.

(Mr. Van Winkle stated that he had expected Mr. Schoppe to appear, but he has not.)

(Counsel for respective parties then argued the case.)

(The court reserved decision until counsel shall have opportunity to present briefs.)

The finding of the court is as follows:

HUDSON COUNTY CIRCUIT COURT.

10 THE MAYOR AND ALDERMEN
OF JERSEY CITY, corpora-
tion, which sues for the
benefit of Stewart H. Elli-
ott,

Plaintiff,

vs.

20 GEORGE J. SCHOPPE, JAMES J.
KINKEAD, ELMER H. HAL-
LINGER,

Defendants.

On contract.

DECISION.

VAIL, J.

30 This case was tried by consent of counsel
without a jury. The only question involved
is as to the liability of the sureties upon a con-
stable's bond. The evidence shows that an
attachment suit was commenced in the First
District Court of Jersey City; was regularly
instituted; that a writ was directed to a con-
stable; that it was put in the hands of one
of the defendants in this case, who was a
regularly elected constable, and that he ex-
ecuted the writ by attaching property of the
plaintiff; that he received from the plaintiff
Two Hundred and Nineteen (\$219) Dollars
40 cash deposit, and thereupon released what-

ever levy he had upon the goods. Afterwards the plaintiff in this case (the defendant in the attachment suit) entered an appearance in the attachment suit, which was regularly tried and resulted in a judgment for the defendant, who is the plaintiff in this suit, and that the constable refused to repay the deposit. 10

This suit is brought against the constable and his sureties, and the plaintiff claims that by reason of the constable failing to return the money there was a forfeiture of the bond, for which not only the constable but his sureties are liable.

The District Court Act provides that after an attachment is levied, a bond may be given by the person whose property is attached or a cash deposit may be made with the clerk in lieu of the bond. In this case the cash for the amount of the claim was deposited with the constable, and the insistence of the sureties is that they are not liable, because the constable acted without authority. 20

In the case of *State vs. Conover*, 4 Dutcher, 224, it was held that where a surety had an execution against the goods and chattels of one person and levies upon and sells the goods of another, it is not a breach of his official bond, and does not make his sureties liable to the party whose property is taken. The distinction is made between acts done by virtue of office and acts done under color of office and this case held that the acts done under color of office do not render sureties liable. In the case under consideration there is no law which would 4 30

justify the constable in receiving a cash deposit from the plaintiff in this case whose goods he had attached, and his taking the money was an act not done by virtue of his office but by color of his office, and it would seem, under authority of the above cited case, that there-
 10 fore the sureties were not liable. The Conover case has been disapproved by the Supreme Court of the United States in Lammon vs. Brugier, 111 U. S., 17, 20. where it was distinctly held that the taking by a marshal of the United States upon a writ of attachment against one person of the goods of another is a breach of the condition of his official bond, for which the sureties are liable. But I feel
 20 constrained in this case to follow the law as laid down by the Supreme Court of this State rather than the law as established by the Supreme Court of the United States, and therefore I think that in this case the defendants are entitled to judgment; to which finding of the Court the plaintiff prayed exception which is allowed. Let it be sealed and it is sealed accordingly.

30

B. A. VAIL,
 Judge. [L. s.]

EXHIBIT Pt.

KNOW ALL MEN BY THESE PRESENTS, That we, George J. Schoppe, James J. Kinkead and Elmer E. Hallenger, all of Jersey City, Hudson County and State of New Jersey, are held and
 40 firmly bound unto "THE MAYOR AND ALDERMEN

OF JERSEY CITY," a municipal corporation of the State of New Jersey, in the sum of one thousand dollars, good and lawful money of the United States of America, to be paid to the said "THE MAYOR AND ALDERMEN OF JERSEY CITY," their successors or assigns, which payment well and truly to be made, we bind ourselves, our and each of our heirs, executors and administrators, jointly and severally, firmly by these presents. Sealed with our seals, and dated this 14th day of December, in the year of our Lord one thousand nine hundred and eight. 10

The condition of the above obligation is such that whereas, George J. Schoppe, having been duly elected constable from the 9th Ward of Jersey City, N. J., at the election held on November 6th, 1906, and hath accepted the said office, and is engaged in the discharge of the duties appertaining thereto, 20

Now, therefore, if the said George J. Schoppe shall truly and faithfully perform the duties of his said office as constable of Jersey City then the above obligation to be void, otherwise to remain in full force and virtue. 30

GEORGE J. SCHOPPE, [L. S.]
 JAMES J. KINKEAD, [L. S.]
 ELMER E. HALLINGER. [L. S.]

Signed, sealed and delivered }
 in the presence of }

JOHN J HOGAN,

40

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

10 JAMES J. KINKEAD, of full age, being by me
 duly sworn, on his oath, according to law, de-
 poses and says that he is a resident of Jersey
 City, Hudson County, and State of New Jer-
 sey, and a freeholder therein, and that he is
 worth the sum of one thousand dollars over
 and above all his just debts and legal liabil-
 ities and property exempt from execution.

JAMES J. KINKEAD.

20 Sworn to and subscribed before
 me this 14th day of December,
 A. D. 1908.

SAMUEL W. GARRISON,
 Notary Public.

30

40

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

ELMER E. HALLINGER, of full age, being by me duly sworn, on his oath, according to law, deposes and says that he is a resident of Jersey City, Hudson County, and State of New Jersey, and a freeholder therein, and that he is worth the sum of one thousand dollars over and above all his just debts and legal liabilities and property exempt from execution. 10

ELMER E. HALLINGER,

Sworn to and subscribed before me this 14th day of December, A. D. 1908. 20

JOHN J. HOGAN,
 Commissioner of Deeds, New Jersey.

OFFICIAL BOND OF GEORGE J. SCHOPPE AS CONSTABLE,

\$1000.00.

Approved as drawn in legal form. 30

WARREN DIXON,
 Corporation Counsel.

Filed December 17th, 1908.

R. J. VREELAND,
 Clerk.

Approved December 18th, 1908.

R. J. VREELAND,
 Clerk. 40

Jersey City, December 18, 1908.

Your Committee on Finance and Claims,
to whom was referred December 18, 1908,
the within bond of George J. Schoppe as
Constable from the Ninth Ward of Jersey
10 City, respectfully report and recommend that
it be received, spread at large upon the bond
book and ordered filed.

JOHN MEHL, Jr.
GEORGE F. PERKINS,
Committee on Finance and Claims.

20

OFFICE OF THE BOARD OF FINANCE,
Room No. 29, City Hall,

Jersey City, Aug. 17th, 1909.

This is to certify that the attached is a cor-
rect copy of the bond of George J. Schoppe,
as Constable, on file in this office.

R. J. VREELAND,
30 Clerk.

EXHIBIT P2.

FIRST DISTRICT COURT OF JERSEY
CITY.

40 Before Charles L. Carrick, Esq., Judge.

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

In Attachment, \$300.00

Heyman & Heyman, 10
 Plaintiff's Attorneys.

Pierre F. Cook,
 Defendant's Attorney.

No. 65275, WALLACE H. OWEN, plaintiff,
 vs. STEWART H. ELLIOTT, defendant.

COSTS.	CITY.	ALS.
Writ,	\$1.50	
Service and return,		\$1.85 20
Mileage,20
Trial fee,	1.50	
	<hr/>	<hr/>
	\$3.00	\$2.05

April 13, A. D. 1909, an affidavit was filed by the plaintiff, alleging that Stewart H. Elliott is indebted to deponent in the sum of two hundred dollars, and deponent verily believes that the said Stewart H. Elliott absconds from his creditors and is not to the knowledge or belief of deponent resident in this State at this time. 30

April 13, A. D. 1909, a writ of attachment was issued to George J. Schoppe, constable.

April 13, A. D. 1909, said constable returns said writ as follows, viz: I return the within writ fully satisfied.

GEORGE J. SCHOPPE,
 Constable. 40

July 15, 1909, order that the trial be fixed for July 20, 1909, filed.

Thereupon the Court appointed July 20, A. D. 1909, at 10 o'clock in the forenoon for the trial of said cause.

10 Plaintiff's state of demand was filed July 20, A. D. 1909.

July 20, A. D. 1909, this cause was called at 10 o'clock in the forenoon, the plaintiff appeared, the defendant appeared and the trial was proceeded with as follows:

On the part of the plaintiff, George J. Schoppe, Wallace H. Owen and Clifford C. Moore were sworn and testified. One receipt was offered and received in evidence.

20 On the part of the defendant, Lucretia S. Elliott, Stewart H. Elliott and W. Irving Fickling were sworn and testified, two books were offered and received in evidence.

Whereupon the Court rendered judgment in favor of Stewart H. Elliott, defendant against Wallace H. Owen, plaintiff.

July 28, 1909, defendant filed notice of appeal and deposited fifty dollars in lieu of bond.

30

CERTIFICATE OF CLERK.

I, JAMES F. BRADEN, Clerk of the First District Court of Jersey City, Charles L. Carrick, Esq., Judge, do hereby certify that the foregoing is a true copy of the Affidavit, Writ of
40 Attachment, State of Demand, Order,

Defendant's Affidavit and Record of a judgment of said Court.

IN WITNESS WHEREOF, I do hereby set my hand as clerk of said Court and affix the seal of said Court this thirteenth day of September, nineteen hundred and nine.

10

[L. S.] JAMES N. BRADEN,
Clerk.

EXHIBIT P 3.

Dear Reg:

Enclosed find attachment served on me as boat about to sail on my trunks. I paid the sheriff the money & have receipt. Answer suit and by no means let him get judgment. Appeal & wait for me to return in June. Answer me immediately c/o Am. Express Co., Paris. Have kept number, etc., of paper. Stewart.

Over.

Sheriff's name. Paid \$219.00.

to GEORGE J. SCHOPPE,
2nd Dist. Court,
586 Newark Ave.,
Jersey City.

30

40

NEW JERSEY COURT OF ERRORS AND APPEALS.

10 THE MAYOR AND ALDERMEN
OF JERSEY CITY, a corpora-
tion, which sues for the
benefit of Stewart H. El-
liott,

Plaintiff,
Plaintiff in Error,

vs.

20 GEORGE J. SCHOPPE, JAMES J.
KINKEAD and ELMER E.
HALLINGER;
Defendants,
Defendants in Error.

} Assignments of
Error.
Filed Aug. 30.
1911.

30 Afterwards, that is to say, on the sixteenth
day of August, in the year of our Lord one
thousand nine hundred and eleven, in the
Court of Errors and Appeals, in the last resort
in all causes, comes the said The Mayor and
Aldermen of Jersey City, a corporation, which
sues for the benefit of Stewart H. Elliott, by
Pierre F. Cook, its attorney, and says that in
the record and proceedings aforesaid there is
manifest error in this, to wit:

I. That by the record aforesaid it appears
that the judgment, in form as aforesaid, was
given for the said James J. Kinkead and Elmer
40 E. Hallinger, defendants, against the said The

Mayor and Aldermen of Jersey City, plaintiff, whereas, by the law of the land, judgment ought to have been given for the said The Mayor and Aldermen of Jersey City, plaintiff, and against the said James J. Kinkead and Elmer E. Hallinger, defendants. 10

II. That by the record aforesaid it appears that there was no evidence to sustain the finding of the Court in favor of the said defendants.

III. That by the record aforesaid it appears that the Circuit Court found that there was no law which would justify the constable in receiving a cash deposit from the plaintiff whose goods he had attached. 20

IV. That by the record aforesaid it appears that the said Court found that the said constable's taking the money was an act not done by virtue of his office but by color of his office.

V. That by the record aforesaid it appears that the said Court found that the sureties upon the bond in suit were not liable. 30

VI. That by the record aforesaid it appears that the said Court found that the defendants were entitled to judgment.

Therefore the said The Mayor and Aldermen of Jersey City, a corporation, which sues for the benefit of Stewart H. Elliott, prays that the judgment aforesaid, by reason of the aforesaid errors and of other errors appearing 40

42 ASSIGNMENTS OF ERROR.

on the record and proceedings aforesaid, be reversed. annulled and held for nothing, and that the said The Mayor and Aldermen of Jersey City, a corporation, which sues for the benefit of Stewart H. Elliott, be restored to all things that it has lost on occasion of the
10 said judgment aforesaid.

PIERRE F. COOK,

Attorney for and of counsel with
plaintiff in error The Mayor
and Aldermen of Jersey City,
a corporation, which sues for
the benefit of Stewart H. Elli-
ott.

20

30

40

New Jersey Court of Errors and Appeals.

MAYOR AND ALDERMEN OF
JERSEY CITY for the bene-
fit of Stewart H. Elliott,
vs.
GEORGE J. SCHOPPE, JAMES J.
KINKEAD, AND ELMER E.
HALLINGER.

On Error to
Hudson County 10
Circuit Court.

**Brief for James J. Kinkead and El-
mer E. Hallinger, Defendants
in Error.**

James J. Kinkead and Elmer E. Hallinger are²⁰
sued as sureties on the official bond of the defend-
ant, George J. Schoppe, a constable.

An affidavit, as a foundation for writ of attach-
ment, was filed in the office of the clerk of the
First District Court of Jersey City by one Wal-
lace H. Owen specifying that Stewart H. Elliott
was indebted to Owen in the sum of Two hundred
dollars.

Writ of attachment was issued from the First
District Court directed "to any constable of said³⁰
county."

The District Court Act provides that the writ
shall be directed "to a constable or a sergeant-at-
arms."

*Sec. 69, District Court Act, p. 55, Mc-
Carter's District Court Practice.*

Can the sureties be held with respect to a writ
that was not addressed to the officer?

The constable Schoppe with this writ went to⁴⁰

a steamship pier in Hoboken from which Elliott was about to sail for Europe.

There is no proof that the constable in any way "attached" the goods of Elliott. The method in which the constable should have executed the writ is pointed out in the District Court Statute.

Ibid, Sec. 69, p. 55.

10 He would need under the requirement of this section to "declare in the presence of one credible person at the least that he attaches the rights and credits, etc.," at the suit of the plaintiff named in the writ.

20 Up to the time that the constable went to the pier, assuming that the writ was properly directed to and held by him, his proceedings were regular. Even though the affidavit and attachment were defective still he would be authorized and indeed compelled to execute the writ. This would be so even though the affidavit were entirely false. The Court had jurisdiction of the subject matter and the process showed apparent jurisdiction in the particular case.

Cyc. 1626, Sheriffs and Constables.

30 The constable could not dispute the paper. He could not try out the issue of debt or no debt, absconding or not absconding, in advance of a motion to quash or in advance of the trial.

The 69th Section of the District Court Act above referred to was amended in 1909, *Laws 1909, p. 18.*

There is nothing in the District Court Act authorizing the constable to receive a settlement of the case by payment of the amount specified in the affidavit or of an arbitrary amount, or to take a cash deposit in lieu of bond.

40 The constable did either one of these two things. According to Elliott he received Two

hundred and nineteen dollars as some kind of deposit or "as a bond."

Elliott testified that he "did not think that Schoppe attached his trunks." The receipt given by Schoppe to Elliott contains no statement that the money was received as a deposit or in lieu of bond.

The District Court Act provides for several kinds of bonds that may be given by a defendant in attachment. Section 71 provides for the filing with the clerk a bond to the plaintiff in "double the value of the property attached." Section 72 provides for an appearance without bond. Section 73 provides for a bond by the defendant to the plaintiff "in double the sum sworn to on the issuing of the writ." 10

Elliott testified that his trunks were of the value of Five hundred dollars (\$500.) 20

The sum sworn to in the affidavit being Two hundred dollars (\$200.) and the value of the property being Five hundred dollars (\$500.) any bond given by Elliott would need to be in the penalty of at least Four hundred dollars (\$400.), or at least One thousand dollars (\$1,000.) depending upon the kind of bond given.

The bonds specified in Section 71 and 73 could not be taken by the constable.

Section 18 of the District Court Act provides that in all cases whereby the provisions of any section of the Act any party shall be "required to give bond or recognizance such party may deposit a sum of money equal to the amount of the penalty of such bond or recognizance, which sum shall be paid to the clerk of the Court." 30

The Two hundred and nineteen dollars (\$219.) received by Schoppe from Elliott could not have been, and cannot be treated as, a cash deposit. 40

(a) Because Section 18 did not give the constable any authority to receive a cash deposit, for the section expressly says that the deposit shall be paid to the clerk of the Court;

(b) Because the constable had not "attached" the property of Elliott and a deposit in lieu of bond could not be made by Elliott even with the clerk of the Court, until the property had been attached;

(c) Because any deposit would need to be "of a sum of money equal to the amount of the penalty of such bond or recognizance," and in this case such deposit would need to be of at least Four hundred dollars (\$400.) and,

(d) Because Elliott was not "required" to give bond; he was only permitted to do so.

I CONTEND,

20 (1) That the liability of James J. Kinkead and Elmer E. Hallinger as sureties cannot be extended by construction or doubtful implication.

(2) That Schoppe had no official right to receive the Two hundred and nineteen dollars (\$219.); his act was unauthorized.

(3) That the sureties are not responsible for the officer's misapplication or conversion of money which he had no official authority to receive.

30 (4) That the sureties on an official bond are liable only for the *official* acts of the officer, and not for his personal dealings.

The liability of a surety cannot be extended by construction or doubtful implication.

In the application of this rule it has been held that the sureties on a constable's official bond are not bound for malfeasance, as respects a third party, on a bond by which the sureties assumed to become answerable for any neglect or failure
40 of the constable to legally do acts which the due

execution of his office authorized and required him to perform. The liability of sureties is *strictissimi juris*, and they are bound by what they say in their obligation, and by nothing else.

When the officer is under no legal duty to perform the act, or acts without the scope of his authority, the sureties cannot be held liable.

If he should seize property without authority **10** of process, the sureties would not be liable.

Murfree on Sheriffs and Other Ministerial Offices. Section 1124, 1124 A.

Encyclo, 2nd. Ed. Sheriffs and Constables, p. 724.

The case of *State vs. Conover*, 28, *N. J. Law*, p. 228, holds that whether the facts stated constitute a breach of the bond for which the sureties are liable depends upon the terms of the contract, and **20** that in that case the officer acted by color of his office, and not by virtue of his office; and further, that to render sureties liable the case must be within the words and plain meaning of the Statute; and that a constable may do many things which will render himself personally liable, but for which his sureties are not responsible, and that, the sureties do not bind themselves to protect the public against every act of their principal, nor do they become his sureties to keep the peace, **30** and it is necessary to determine what acts of such a person are official and what not official. And that unofficial acts are such as are committed under color of the office, such as cannot be lawfully done and cannot be justified by the official character of the officer or by any process in his hands. And that, one acting under color of authority cannot justify the act. He is not acting officially; and that, for such unauthorized act the sureties never assumed any responsibility. **40**

The sureties are not responsible for the officer's misapplication or conversion of money which he had no official authority to receive.

Sample v. Davis 4, *Greene* 117.

Griffith v. Com., 10, *Bush* 281.

10 The sureties on a sheriff's official bond are not liable on his covenant to collect and account for fee bills of which he has acknowledged the receipt, but are only liable for money collected on writs and process which the law makes it his duty to take and collect.

Com. v. Summers, 3, *Bush*, 555.

20 As the sheriff is not authorized to receive from the purchaser of property at a judicial sale the amount of the mortgage or privileged debts which rank the claim of the seizing creditor, the sureties of the sheriff cannot be held for the amount of such debts received and not accounted for by the sheriff.

Bacas v. Hernandez, 31 *La.*

Merchants' Bank v. Peters, 2 *Rob.*, 214.

30 Where a city marshal's bond provided that, if he should faithfully execute the duties of his office, the obligation should be void, and after the marshal had levied on personal property on an execution, plaintiff therein deposited two hundred and fifty dollars with the marshal to secure him against any dangers from the levy, to be returned if suit was not commenced for the property within twenty days, and no suit was begun, and the marshal converted the money to his own use, the marshal's bondsmen were not liable for the conversion of the money, since the marshal had no official authority to receive the deposit.

40 *De Sisto v. Stimmel*, 58 *N. Y. App. Div.*, 486, 69 *N. Y. Suppl.* 431 (*affirming* 31 *Misc.*, 711, 65 *N. Y. Suppl.*, 314, *reversing* 29 *Misc.*, 769, 61 *N. Y. Suppl.*, 57.)

Blythe v. Outland, 33 N. C., 134.

Ellis v. Long, 30 N. C., 513.

Where a sheriff, making a sale on partition exceeds the authority of his office by receiving and collecting the notes, instead of having the notes made to the parties and delivering them to the parties the sureties on his bond are not liable for the money so collected. 10

Bradt v. Skillen, 2 Ohio, Dec. 727, 5 West L. Month, 72.

Heidenheimer v. Brent, 59 Tex., 533.

Where a sheriff having a writ of replevin for execution received from plaintiff in replevin a deposit of money in lieu of the bond required by statute for the diligent prosecution of the suit and subsequently embezzled the money, the sureties on his official bond were not liable for the amount.

People v. Hilton, 36 Fed., 172. 20

Where plaintiff placed in the hands of a deputy sheriff a claim for collection against a person who, in payment thereof, turned in a claim which he held against such deputy, and plaintiff thereupon sued on the sheriff's official bond to recover the amount of his claim, the sureties were entitled to set up the lack of power in the officer to receive anything in satisfaction of a claim placed in his hands for collection except money, or bank notes circulating as such. 30

Draper v. State, 1 Head, Tenn., 262.

Schoppe had no right to receive the money as a payment in full (and the plaintiff denies that it was received by Schoppe as a payment in full); or as a payment on account (and plaintiff denies that it was received by Schoppe as a payment on account); or by way of bond (which plaintiff claims and pleads it was.)

The proceeding of collection was irregular, whether viewed from the point of view taken in 40

the brief of the plaintiff in error, or from the point of view disclosed in this brief. Schoppe did something he had no official right to do. That which the plaintiff claims Schoppe did was not done by Schoppe pursuant to or as a consequence of his office. The entrusting of the money by the plaintiff with Schoppe was not an entrusting of
 10 the money with Schoppe *as constable*: for as constable, he had no right to receive it. The money was entrusted to Schoppe as the agent of the plaintiff, to pay to the clerk of the Court. If the money was not paid by Schoppe to the clerk of the Court, or if Schoppe paid the money to the attorneys of the plaintiff in the attachment, or if Schoppe embezzled the money, his actions were those of an agent and not those of a constable; and the sureties on Schoppe's official bond cannot be held.

20 If in fact the payment was made in settlement of the attachment suit (and the fact of the amount of the debt and costs, the wording of the receipt given, and the immediate payment of the money to the attorneys of the plaintiff—all seem to prove that the money *was* paid in settlement of the suit) the plaintiff cannot complain. The theory of the plaintiff's case is that the money was paid as a cash deposit in lieu of bond. It could
 30 not have been that in law, for it was not adequate in amount according to the Statute, nor did the constable have any right to receive such deposit. Can it be held to be such deposit in fact? How was the act of the officer "official?" If the act was not official, how can the sureties on the official bond be held?

See Murfree on Sheriffs. Secs. 45 and 46.

It may be that Schoppe is responsible in an ordinary action in his individual capacity, but if
 40 he is not responsible officially then the sureties

are not responsible. The case is like one where money is received by a sheriff or constable without an execution, in which case sureties cannot be held.

“When a sheriff assumes to act as a collecting agent * * * he does not thereby charge the sureties on his official bond with any responsibility for his misfeasance in any of these proceed-**10** ings.”

Murfree on Sheriffs, Sec. 967.

Schoppe had no right as constable to take a bond. *He was not exercising a lawful authority improperly, and here is the distinction.* He had no right or authority whatever authorizing the collection by him of the sum paid to him as a deposit in lieu of bond.

The case in the U. S. Supreme Court, cited by counsel for plaintiff in error (*Lammon v. Feu-***20** *sier*, 111 U. S., 17) was a case of *official misconduct*; and therefore this case is not to be decided on the authority of that case.

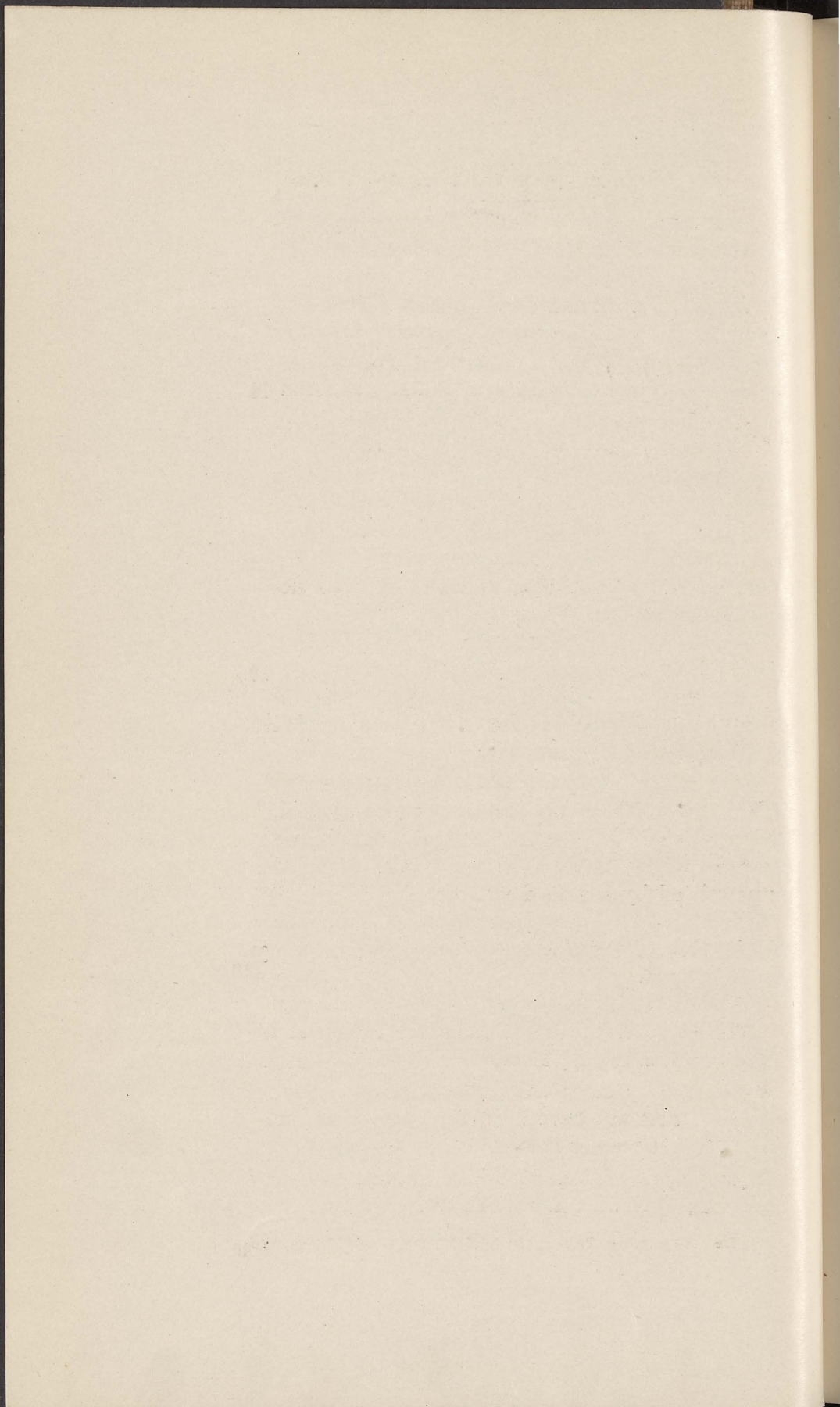
If the act of Schoppe was not within the scope of his official duties, the sureties cannot be held. The bond was only for the faithful performance of such *official* duties as Schoppe was required or permitted by law to discharge.

Sureties on an official bond are liable for the *official* acts of the officer, and not for his *per-***30** *sonal* dealings.

See cases collected in Century Digest, “Sheriffs and Constables” Vol. 43., Col. 3950, § 356.

I respectfully submit that the sureties cannot be and should not have been held, and that the judgment below was right.

MARSHALL VAN WINKLE,
Of Counsel with Kinkead and Hallinger,
Defendants in Error. **40**



New Jersey Court of Errors and Appeals

THE MAYOR AND ALDERMEN
OF JERSEY CITY which
sues for the benefit of
Stewart H. Elliott,
Plaintiff,
Plaintiff-in-Error,

vs.

GEORGE J. SCHOPPE, JAMES J.
KINKEAD and ELMER E.
HALLINGER,
Defendants,
Defendants-in-Error.

On Error to
Hudson County
Circuit
Court.

BRIEF OF PLAINTIFF-IN-ERROR.

This is a suit upon a constable's bond, brought under the statute in the name of the Mayor and Aldermen of Jersey City, for the benefit of Stewart H. Elliott, against George J. Schoppe, a constable of Jersey City and his sureties, James J. Kinkead and Elmer E. Hallinger.

The bond which was sealed and dated on December 14, 1908, contains the following condition:

“The condition of the above obligation is
“is such that whereas George J. Schoppe,

“having been duly elected constable from the
“ninth ward of Jersey City, N. J., at the
“election held on November 6th, 1906, and
“hath accepted the said office and is engaged
“in the discharge of the duties appertaining
“thereto.

“Now, therefore, if the said George J.
“Schoppe shall truly and faithfully perform
“the duties of his said office as constable of
“Jersey City then the above obligation to be
“void, otherwise to remain in full force and
“virtue.”

The constable, the principal on the bond, did not appear at the trial and the sureties upon the facts proven and admitted deny their liability.

On April 13, 1909, during the period of office covered by the bond (printed case p. 21), Mr. Elliott and his wife were about to embark upon a transatlantic liner from Hoboken. Shortly before sailing time the constable, Schoppe, came aboard and announced to Mr. Elliott that he had attached his baggage at the suit of one Wallace H. Owen (p. 22.)

After some discussion an arrangement was entered into between Mr Elliott and Schoppe whereby the sum of two hundred and nineteen dollars was paid to Schoppe as a cash deposit in lieu of bond, under sections 71 and 18 of the District Court Act and the goods were released.

Mr. Elliott entered appearance in the attachment suit, which was regularly tried and resulted in judgment for the defendant (p. 17, 18, 38.)

The money was not paid into court (p. 21) or to Mr. Elliott (p. 24) and was paid to Mr. Owen's attorneys (p. 21).

The plaintiff in error contends that under the facts proven and admitted there was a forfeiture of the bond for which not only the constable but his sureties are liable.

It is in evidence that the attachment suit in the District Court was regularly instituted, that a proper writ was directed to a bonded constable and was by him regularly executed by attaching Mr. Elliott's property, that the sum of two hundred and nineteen dollars was paid by Mr. Elliott to the officer in lieu of bond and was by him paid to the attorneys of the plaintiff in attachment and not deposited in Court, that the attachment suit was regularly set down for trial and resulted in judgment for Mr. Elliott, the defendant therein, and that Schoppe refuses to repay the deposit.

It would seem that if ever there was a wilful disregard of the duties of a public officer for which his bondsmen should be responsible, such a case is here presented. In another aspect of the case it may well be argued that the sum of Two hundred and nineteen dollars taken by the constable was the subject of the actual levy and that his failure to account for it is a violation of the condition of his official bond.

The New Jersey case nearest in point is *State v. Conover*, 4 Dutcher 224, holding that where a Sheriff having an execution against the goods and chattels of one person levies upon and sells the goods of another it is

not a breach of the condition of his official bond and does not make his sureties liable to the party whose property is taken. The distinction is made between the acts *colore officii* and *virtute officii*, holding that the former do not render his sureties answerable.

The case in hand can readily be distinguished from the Conover case in that there was no irregularity in Schoppe's levy or in the proceedings leading up to it, which would render it merely by color of office. The regularity of the proceedings leading up to the levy is shown by the evidence as above quoted; the regularity of the levy is shown by the testimony of Mr. Elliott and his wife that Schoppe, the constable, declared in their presence that he had attached the goods (p. 22, 29), this being a literal compliance with the terms of Section 69 of the District Court Act prescribing the method of attachment.

The Conover case has been disapproved by the Supreme Court of the United States in *Lammon v. Feusier and Brugier*, 111 U. S. 17, 20, it there being distinctly held that the taking by a marshal of the United States upon a writ of attachment on mesne process against one person of the goods of another is a breach of the condition of his official bond for which the sureties are liable.

“But the remedy of a person whose property
“is wrongfully taken by the marshal in offic-
“ally executing his writ is not limited to an
“action against him personally. His official
“bond is not made to the person in whose be-

“half the writ is issued nor to any other individual, but to the government for the indemnity of all persons injured by the official misconduct of himself or his deputies; and his bond may be put in suit by and for the benefit of any such persons.” *Lammon v. Feusier and Brugier*, 111 U. S. 17, 19.

“A seizure of the goods of A under cover of process against B is official misconduct in the officer making the seizure; and is a breach of the condition of his official bond, where that is that he will faithfully perform the duties of his office. The reason for this is, that the trespass is not the act of a mere individual but is perpetrated *colore officii*.” *Ibid* page 21, citing *State v. Jennings*, 4 Ohio St. 418.

“He was an officer, had authority to attach goods on mesne process on a suitable writ, professed to have such process and thereupon took the plaintiff’s goods. He therefore took the goods *colore officii*, and though he had no sufficient warrant for taking them, yet he is responsible to third persons because such taking was a breach of his official duty.” *Ibid* page 21.

The Circuit Court erred in giving judgment for the defendants-in-error which should have been in favor of the plaintiff-in-error, as well as in finding that there was no law which would justify the constable in receiving a cash deposit from the plaintiff Elliott whose goods he had attached, such a procedure being clearly authorized by sections 71 and 18 of the District Court Act, and in finding that the

constable's taking the money was an act not done by virtue of his office but by color of his office.

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

PIERRE F. COOK,
Attorney of plaintiff-in-error.

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constable's taking the horse was an act not done by virtue of his office but by color of his office.

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

PIERRE F. COOK,

Attorney of plaintiff-in-error.