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AFFIDAVIT OF PLAINTIFF ON ATTACHMENT.

(FILED OCTOBER 15, 1919.)

ESSEX COUNTY CIRCUIT COURT.

PAUL F. JAUDEL, Plaintiff, vs. OSWALD SCHOELZKE, Defendant.	Action at Law Affidavit.

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

Paul F. Jaudel, being duly sworn according to law, on his oath, deposes and says that on or about September 10, 1919, one Carl Olfson, residing at No. 36 Lawrence Avenue, West Orange, New Jersey, was authorized by Oswald Schoelzke, the defendant herein, to solicit offers for the sale of certain land and premises situated at No. 149 Hilton Avenue, in the Township of South Orange, New Jersey; that on the morning of September 17, 1919, the said Carl Olfson, on the direction of deponent sent a telegram to the said Oswald Schoelzke, making an offer of $4,400.00 for the aforesaid land and premises and advised that the said Oswald Schoelzke, if he desired to accept said offer, to wire his acceptance direct to deponent; that at 11:37 A. M. of the same day plaintiff received a telegram from said Oswald Schoelzke accepting said offer; that on September 19, 1919, said Oswald Schoelzke notified deponent that he would not carry out his said agreement and would not deliver a deed to deponent and that the said Oswald Schoelzke has ever since defaulted in said agreement although deponent was at all times ready,

Affidavit of Plaintiff on Attachment.

willing and able to purchase said property and to pay the consideration therefor.

And deponent further says that as a result of the breech by the said Oswald Schoelzke of his contract deponent lost an opportunity to sell said premises at an advance of $1,500 upon the price deponent had agreed to pay and the value of said premises is $1,500.00 in excess of the contract price.

And deponent further says that by virtue of the foregoing facts he has a claim and cause of action against the said Oswald Schoelzke amounting to $1,-500.00.

And deponent further says that the said Oswald Schoelzke is not a resident of the the State of New Jersey, but resides at No. 19, Elm Street, New Haven, Connecticut, and that a summons cannot be served upon him in this state.

Sworn and subscribed to before me this tenth day of October, 1919.

FRANK J. CARLTON,
Notary Public of N. J.

PAUL F. JAUDEL.

Commission expires 9-2-20.

Memorandum of Bond Filed October 15, 1919.

At the time of issuing writ of attachment, a bond was executed by a plaintiff, National Surety Co., and approved by Supreme Court Commissioner and filed on October 15, 1919.

ORDER DIRECTING WRIT OF ATTACHMENT TO ISSUE

(FILED OCTOBER 15, 1919.)

I, Milton M. Unger, a Supreme Court Commissioner of New Jersey, upon reading the affidavit of Paul F. Jaudel in the foregoing stated matter, and having duly considered the same, and being satisfied by the proof submitted in the said affidavit that the above-named Paul F. Jaudel, plaintiff, has a cause of action against the above-named Oswald Schoelzke, the particulars of which are specified in said affidavit, and that the defendant is not a resident of the State of New Jersey, and that the summons cannot be served in this state, do order and hereby award to the above-named plaintiff a writ of attachment in the Essex County Circuit Court in the sum of $1,500.00 against the goods and lands, rights and credits, moneys and effects belonging to the defendant in this state; and I do further order that the said plaintiff give a bond to the said defendant in the sum of Three Hundred Dollars ($300.00) with sufficient sureties to indemnify said defendant for all damages resulting from said attachment, and taxed costs of suit, if the suit should be discontinued or dismissed, or if judgment therein should be given for the defendant.

MILTON M. UNGER,
Supreme Court Commissioner.

Dated, October 11, 1919.

WRIT OF ATTACHMENT.

(FILED OCTOBER 15, 1919.)

ESSEX COUNTY, SS.

The State of New Jersey to the Sheriff of the County of Essex, Greeting:

We command you that you attach Oswald Schoelzke, of and by all his rights and credits, moneys and effects, goods and chattels, lands and tenements in whosoever hands the same may be; and those rights and credits, moneys and effects, goods and chattels, lands and tenements, safely kept, so that he be and appear before the Circuit Court at Newark, in the County of Essex aforesaid, on the Fourth day of November next ensuing, to answer unto Paul F. Jaudel in a suit in attachment for the sum of $3,000.00 and have you there this writ.

L. S.

Witness Worrall F. Mountain, Esquire, Judge of our said Court, at Newark aforesaid the fifteenth day of October, in the year of Our Lord One Thousand Nine Hundred and Nineteen.

JOHN H. SCOTT,
Clerk.

FLEMING & HANDFORD,
Attorneys of Plaintiff,
790 Broad Street,
Newark, N. J.

RETURN OF WRIT OF ATTACHMENT.

By virtue of the above stated and hereto annexed Writ to me directed, I did on the 16th day of October, 1919, at the suit of the Plaintiff above named, in the presence of Michael Newman (a creditable person), attach the rights and credits, moneys, effects, goods, chattels, lands and tenements of the said defendant, and particularly all his right, title and interest of, in and to the hereafter described: as per annexed list of real estate situate, lying and being in the township of South Orange, N. J.

No other rights, moneys or effects, goods or chattels, lands or tenements of the said defendant being found in my County.

JOHN R. FLAVELL, Sheriff.
By FRANK S. FEINDT,
Special Deputy.

We, the undersigned, Frank S. Feindt, Special Deputy Sheriff, and Michael Newman, Freeholder of the County of Essex, hereby value and appraise the rights and tenements of the said defendant at the sum of $4,000.00.

FRANK S. FEINDT,
Special Deputy Sheriff.
MICHAEL NEWMAN,
Freeholder.

DESCRIPTION OF PROPERTY ATTACHED.

TO THE SHERIFF OF THE COUNTY OF ESSEX, STATE OF NEW JERSEY:

The property to be attached is all the right title and interest of Oswald Schoelzke in and to the following described lands and premises:—

"All that tract or parcel of land and premises hereinafter particularly described, situate, lying, and being in the Township of South Orange in the County of Essex and State of New Jersey.

"Beginning on the Southerly side of Hilton Avenue at a point distant Westerly two hundred feet from the South Westerly course of said avenue and Rutgers Street; thence; (1) Southerly at right angles to said Avenue one hundred feet; thence (2) Westerly parallel with said Avenue thirty seven and one-half feet; thence (3) Northerly at right angles to said avenue one hundred feet to the Southerly side of same; thence (4) Easterly along said side of same thirty-seven and one-half feet to the place of beginning."

Being the premises known as Number 149 Hilton Avenue, Hilton, New Jersey.

FLEMING & HANDFORD,
Attorneys of Plaintiff,
790 Broad Street,
Newark, N. J.

NOTICE OF MOTION TO QUASH.

(FILED NOVEMBER 22, 1919.)

Dear Sirs:

Please take notice that on Saturday, November 8, 1919, at ten o'clock in the forenoon, or as soon thereafter as the court may hear the same, I shall apply to the Honorable Worrall F. Mountain, Judge of the Essex County Circuit Court, at the Essex County Court House, Newark, N. J., for an order quashing and setting aside writ of attachment heretofore issued in this matter on October 15, 1919, for the following reasons:

1. That the affidavit whereon the order for the same is founded does not disclose a claim for liquidated damages, but rather a claim for unliquidated damages.

2. Because the affidavit, neither in form or substance, complies with the statute and is defective.

3. Because the said writ was obtained and issued contrary to law.

4. For irregularity in said writ.

Dated November 6, 1919.

Yours respectively,

CHARLES A. WOODRUFF,
Attorney for Defendant.

To Messrs. Fleming & Handford,
Attorneys for Paul F. Jaudel, Plaintiff.

RULE TO QUASH.

(FILED NOVEMBER 26, 1919.)

It appearing to the court that affidavit upon which writ of attachment heretofore issued herein, is not sufficient in form and substance, and does not comply with the statute, and is defective, and that the writ was obtained and issued contrary to law:

It is, therefore, on this Twenty-fourth day of November, A. D. 1919, ORDERED by the court that the writ of attachment issued in the above stated cause, be quashed and set aside and for nothing holden, and that the said plaintiff pay to the defendant the costs of this order to be taxed.

On motion of
CHARLES A. WOODRUFF,
Attorney for Defendant.

Let the above Rule be entered on the minutes.
WORRALL F. MOUNTAIN,
Circuit Court Judge.

NOTICE AND GROUND OF APPEAL.

(FILED JANUARY 7, 1920.)

To Charles A. Woodruff, Esq., Attorney of Defendant:

TAKE NOTICE that the plaintiff appeals to the Court of Errors and Appeals in the last resort in all causes in New Jersey from the whole of the judgment entered in this cause, upon the following ground:

The Trial Court erred in holding that the affidavit upon which the writ of attachment heretofore issued in this cause was not sufficient in form and substance, and did not comply with the statute, and was defective, and that the writ was obtained and issued contrary to law.

FLEMING & HANFORD,
Attorneys of Appelant.

CLERK'S CERTIFICATE.

I, John H. Scott, Clerk of the Essex County Circuit Court of the State of New Jersey, do hereby certify that the foregoing is a true copy of the Notice and Ground of Appeal in the above stated cause, as the same remains on file in my office.

In Testimony Whereof, I have set my hand and the seal of said Court, at Newark, this Seventh day of January, A. D. 1920.

JOHN H. SCOTT,
Clerk.

(SEAL)

New Jersey Court of Errors and Appeals

PAUL F. JAUDEL,
Plaintiff-Appellant,

vs.

OSWALD SCHOELZKE,
Defendant-Respondent.

On Appeal from Essex County Circuit Court.

BRIEF ON BEHALF OF PLAINTIFF-APPELLANT

This is an appeal by the plaintiff from an order made by Circuit Court Judge Mountain on November 24, 1919, quashing and vacating a writ of attachment issued pursuant to an order of Supreme Court Commissioner Milton M. Unger, dated October 11, 1919.

The order quashing the writ was based on the ground that the affidavit upon which the writ was issued was not sufficient in form and substance, and did not comply with the statute, and was defective, and that the writ was obtained and issued contrary to law.

The attachment was granted by Supreme Court Commissioner Unger under Section 84 of the Practice Act, Revision of 1903, as amended by Chapter 114 of the Laws of 1907, permitting the issuance of an attachment "upon proof by affidavit, or otherwise, to the satisfaction of a court or judge or Supreme Court Commissioner, that the plaintiff has a cause of action, the nature and particulars of which he shall specify, and that the defendant absconds from his creditors or is not a resident of this state, and that summons cannot be served."

FACTS

The writ was issued on the 15th day of October, 1919, by direction of Supreme Court Commissioner Unger upon affidavit of the plaintiff and proof by his attorneys, and appropriate security, and was levied upon property of the defendant, a non-resident of the State

of New Jersey and residing at New Haven, in the State of Connecticut.

On the 15th day of November, 1919, the defendant appearing specially, applied, on notice to the plaintiff, to Circuit Court Judge Mountain for an order to quash and set aside the said writ on the following grounds: (1) That the affidavit whereon the order for the same was founded did not disclose a claim for liquidated damages, but rather a claim for unliquidated damages; (2) Because the affidavit, neither in form or substance, complied with the statute and was defective; (3) Because the said writ was obtained and issued contrary to law; and (4) For irregularity in said writ.

The learned Court, having heard the respective counsel on questions of law, reserved decision upon the motion to quash, and then, on the the 24th day of November, 1919, without further notice to the plaintiff, quashed the writ of attachment upon the ground that the affidavit upon which the writ was issued was not sufficient in form and substance, and did not comply with the statute, and was defective, and that the writ was obtained and issued contrary to law.

In the interval between the time when the writ of attachment was issued and the time when the writ was quashed, the defendant and wife conveyed the property attached to a third party. Therefore, it being impossible to attach property of the defendant in the State of New Jersey by means of a new writ, it was necessary to appeal from the judgment of the Circuit Court.

It is respectfully submitted that the learned Court erred in holding as a matter of law that the affidavit upon which the order for the writ was issued was not sufficient in form and substance to set forth a cause of action. On the motion to quash, the facts set forth in the affidavit were not disputed, hence, the Court must have assumed them to be true, and, assuming them to be true, must have held as a matter of law that they did not show the plaintiff had a cause of action. In this, it is respectfully submitted, the Court erred because the facts clearly state the making of a contract, its breach

by the defendant, damage to the plaintiff; and that the defendant is a non-resident of the State of New Jersey and that summons cannot be served upon him in this state. But, if the Court was not satisfied that the affidavit was sufficient in form and substance, then it was the duty of the Court, it is respectfully submitted, to have examined into the truth of the facts before quashing the writ as required by Sections 86, 61 and 62 of the Practice Act of 1903.

FIRST POINT

An order quashing a writ of attachment is in effect an order in the nature of a final judgment, and may be reviewed by appeal.

Defiance Fruit Co. v. Fox, 76 *N. J. L.* 482.
Knight v. Cape May Sand Co., 83 *N. J. L.* 597.
Hanford v. Duchastel, 87 *N. J. L.* 205.

SECOND POINT

Under Sec. 84 of the Practice Act of 1903 (C. S. 4076) a writ of attachment will issue in causes of action for unliquidated damages.

Hotel Registry Corp. v. Stafford, 70 *N. J. L.* 528.
Hisor v. Vandiver, 83 *N. J. L.* 433.

THIRD POINT

To obtain the writ of attachment, it is respectfully submitted, it is only necessary to make out a prima facie case.

6 *Corpus Juris* 108.

"To entitle plaintiff to an attachment . . . it is sufficient to make out a prima facie case; and if the facts and circumstances stated in the affidavit have a legal tendency to make out a good reason

for issuing an attachment and fairly call upon the judge or officer to whom it is presented to exercise his judgment on the weight of the evidence, the proceeding is not void for lack of jurisdiction, although the officer may have erred in his estimate as to the weight of the evidence."

In *Painter v. Houston,* 28 *N. J. L.* 121, in denying a motion to discharge an order for a capias ad respondendum, where the same procedure is followed as in obtaining and quashing the writ under Section 84 of the Practice Act of 1903 and supplements, the court says (page 124):

"Upon the third and last objection, that the affidavits are insufficient in themselves, we think the defendants can claim no discharge. The facts set forth clearly make out a *prima facie* case of indebtedness, which is all that is required by the act."

Loeser v. Rosman, 10 *N. Y. S.* 415.

"No reason is perceived why uncontradicted affidavits upon which an attachment is granted should not be construed with reasonable liberality."

The New York cases in this brief are based upon the New York statute permitting the magistrate in certain cases to order an attachment on proof by affidavit or otherwise to the effect that there is an existing cause of action, and therefore the cases are in point in construing the New Jersey act.

Lee v. La Companie, etc., 2 *N. Y. St. Rep.* 612.

"It is not necessary now, in order to secure the benefit of the provisional remedy of attachment, to do more than establish a *prima facie* case."

Globe Yarn Mills v. Bilbrough, 21 *N. Y. S.* 2.

In refusing to quash a writ of attachment, at page 4, the Court said:

"In granting provisional remedies, courts do not proceed upon the technical rules of evidence regulating the final determination of the rights of parties on a trial. They allow affidavit evidence; they dispense with cross-examination; they are content with *prima facie* proof. If from the evidence before them an inference of the requisite fact may be drawn sufficiently cogent to satisfy their judgment, it is enough to authorize the order."

On the argument before the Circuit Court, the case of Hanford v. Duchastel, 87 N. J. L. 205, was exclusively relied upon by the defendant. But, it is respectfully submitted, that case is not in conflict with the above stated principal of law. That case merely holds that Section 84 of the Practice Act as amended by P. L. 1907, p. 273, permitting the issuance of a writ of attachment "upon proof by affidavit or otherwise" means proof of facts sufficient to establish such particulars, *and not mere belief or conclusions of the witness,* citing Kennedy ads. Chumar, 26 N. J. L. 305. In the latter case Elmer, J., states the rule to be that the plaintiff, in order to obtain the writ of attachment, *"must not swear to conclusions of law but to facts . . ."* And the plaintiff *did swear to facts* in the case *sub judice.* He did not swear to a single conclusion of law. *Every statement* contained in his affidavit, it is respectfully submitted, is one of *fact.* And the facts thus stated in the affidavit were never for one moment disputed on the motion to quash.

Counsel for the appellant have carefully examined all the briefs as well as the state of the case containing Chief Justice Gummere's opinion in Hanford v. Duchastel and it is submitted, with all deference to the Circuit Court Judge, that case does not conflict with the above stated principle of law and was not authority for quashing the writ herein.

By conclusions of law, it is respectfully submitted, are meant such statements as the defendant "disposed of his property *with intent* to defraud his creditors" or "un-

lawfully and unjustly refused to apply funds for the payment of his debts," Kipp v. Chamberlin, 20 N. J. L. 656, and not *facts* which make out a *prima facie* cause of action.

Furthermore, the decision in Hanford v. Duchastel, *supra.*, as stated in the last sentence of the opinion, rested upon the point of substantive law that, even granting that the affidavits were true and competent, still they alleged mere *constructive notice* on the part of the defendant of the breach of trust, and *constructive notice* does not constitute a cause of action in a court of law.

FOURTH POINT

Statements in affidavits will be presumed to have been made on personal knowledge unless it appears affirmatively and by fair inference that they could not have been and were not made on such knowledge.

In *Paul DeLaney Co. v. Joseph Freedman Co.*, 108 Atl. 435, the affidavit on attachment (which was the only proof before the Supreme Court Commissioner as shown by the state of the case) stated that deponent was president of the plaintiff corporation but it did not state that he was familiar with the facts thereinafter set forth. Nevertheless Mr. Justice Bergen says: "I think the order of the Commissioner was justified by the facts laid before him . . ." And we feel sure that the learned Justice made this statement only after his usual careful deliberation.

Anderson v. Wehe, 17 N. W. 426 (*Wisc.*).

"It will be observed that the affiant swears positively to the amount due. Why should he be required to state the means of his knowledge any more than the plaintiff himself, if he had made the affidavit and sworn positively to the facts. If one swears to facts positively, they are presumed to be within his knowledge, and if they were not, he is guilty of perjury just as much as if they were false."

Lacker v. Dreher, 55 *N. Y. S.* 979.

The affidavit of an attorney for the plaintiff showed that the defendant was arrested for larceny on November 17th, gave bond for appearance on November 22nd but absconded on November 18th and did not appear, and that on November 14th and 15th defendant conveyed his property to his wife's sister. No papers were produced or attached to the affidavit. At page 981 the Court said:

"It is to be assumed, I think, that the attorney for plaintiff had knowledge of the conveyances by the defendant of his property to his wife's sister. He states the conveyances positively, and makes particular reference to every parcel of land conveyed. I think it is a fair inference from such statement that he had knowledge of the facts therein averred. The proof of such conveyances would naturally be found as a matter of record, and an examination of such record would enable the person to make such statement as matter of fact from the knowledge derived from examination. The same thing is true of the prosecution for larceny."

Yellow Pine Co. v. Atlantic Lumber Co., 47 *N. Y. S.* 79; *aff.* 50 *N. Y. S.* 1,135.

An affidavit for an attachment was made by the vice-president of the plaintiff corporation. The written instrument on which the suit was founded was not produced. At page 80 the Court said:

"The vice-president states that he derives his knowledge and information from the possession of the written instrument upon which the action is brought, from an examination of the books of the corporation, and from conversations with the employees. It is plain that in managing the affairs of the corporation the officers acquire familiarity with its concerns by the investigation of the books, and by information received from the various employees of the different departments acquired in the regular routine of official service. A business knowledge of

the affairs of the corporation is obtained, and such business knowledge is sufficient for the purpose of an affidavit, and often for giving common law evidence upon the trial. In a case like this for the recovery of damages arising out of a contract for delivering property it would be manifestly impracticable in taking the alert steps necessary to obtain an attachment to visit each employee who had personal and direct knowledge of the delivery of a load of lumber and of the precise time when it was delivered; nor is it essential that it should be done. The business practical knowledge acquired by the affiant from his presumed investigations and the duties of his service is sufficient for the purpose of an affidavit for an attachment."

In *Paul DeLaney Co. v. Joseph Freedman Co.*, 108 Atl. 435 (under Sec. 84 of the Practice Act of 1903), the written contract made between plaintiff and defendant was not attached to the affidavit nor made a part of it and yet Mr. Justice Bergen in his opinion says: "I think the order of the Commissioner was justified by the facts laid before him . . ," the learned Justice undoubtedly having in mind the principle of law above set forth.

6 *Corpus Juris* 112.

"Knowledge required by law in affidavits on attachment is not necessarily upon the personal observation of the affiant, and if the instruments in question are in his possession the assertion of knowledge is not unfounded, but is such as is contemplated by the statute."

To the same effect see:

Hayden v. Mullins, 78 *N. Y. S.* 553.
Ladenburg v. Commercial Bank, 39 *N. Y. S.* 119.
American Exchange Natl. Bank v. Voisen, 44 *Hun* (*N. Y.*) 85.
Foster v. Rogers, 64 *N. Y. S.* 652.

Geduld v. Baltimore & O. R. Co., 127 *N. Y. S.* 317.
Hanson v. Marcus, 40 *N. Y. S.* 951.

FIFTH POINT

To obtain the writ of attachment, it is not necessary to prove every statement contained in the affidavit by the strictest rules of evidence. These are questions properly arising at the trial.

A. The statute appointing Supreme Court Commissioners, and giving them authority to order a writ of attachment to issue under Section 84 of the Practice Act of 1903, does not give them power to issue subpœnas *ad testificandum* and subpœnas *duces tecum*, or to take depositions outside of the State of New Jersey, and from the very nature of an affidavit, it is impossible to force the affiant to make it.

B. Furthermore, no subpœna could issue at or before the time the order for attachment is granted because no suit is yet pending.

40 *Cyc., page* 2164.

"The pendency of some action or proceeding in a court is necessary in order to warrant the issuance of process for witnesses."

Chambers v. Oehler, 107 *Iowa* 155, 77 *N. W.* 853.

A Justice of the Peace issued a subpœna where no case was pending. The witness failed to appear and was imprisoned for contempt. He instituted an action against the Justice for false imprisonment.

"We take it that the pendency of some proceedings in court is necessary in order to warrant the issuance of process for witnesses. There being no case pending in this instance, the justice had no authority to issue a subpœna for a witness. The subpœna having been issued without authority, the plaintiff was justified in disobeying it."

Dudley v. McCord, 22 *N. W.* 920 (*Iowa*).

H. & S. Claimed to be stockholders in the Central Iowa Ry. Co. They filed a petition before a Justice of the Peace averring that they were about to commence an action for an injunction against the company to prevent its carrying out certain pretended contracts. They averred that in order to obtain the information necessary for commencing the action they needed the affidavits of A, B and C. An order was made, under an Iowa statute, granting the subpœnas. The witnesses failed to appear, and were imprisoned. They obtained a writ of *habeas corpus* and contended that they were not obliged to obey the subpœnas because there were no proceedings pending in any court authorizing the Justice to take their testimony. *The Court held* that there was no action pending in which the affidavits were to be used, and so the proceedings were irregular, and the defendants should be released from imprisonment.

After citing with disapproval two earlier Iowa cases, at page 921, the Court continued:

> "It is to be observed, further, that in each there was an action pending, and the affidavit was sought for use in the action."

The inconvenience, and in many cases the impossibility, of obtaining the writ of attachment if the affidavits and proofs must adhere to the strictest rules of evidence, will readily be appreciated by this honorable Court.

Suppose, for example, A, a non-resident of New Jersey, but who owned property situated in this state, upon which a writ of attachment might be executed, wrote a letter to B, an Agent of C, making a contract that would bind A and C, or orally made a contract with B, an Agent of C, that would bind A and C. A refuses to perform the contract. B tells C of the matter, but finding that C desires to commence suit against A by attachment, refuses to deliver the letter to C or to "make proof by affidavit or otherwise" to enable C to obtain the

order for attachment. In such case the Supreme Court Commissioner could not issue a subpœna *duces tecum* to B, because no suit is pending (and B may also be outside of his jurisdiction) and no suit could ever be pending if the strictest proof were required to be before the Court or officer giving him jurisdiction to order the writ to issue.

Thus would the act, part of the machinery for redress of legal wrongs, by which the plaintiff is entitled to justice as well as the defendant, be turned into mockery.

In the case *sub judice,* the best evidence of the telegrams could only be produced by the telegraph company, and this was refused unless it were subpœnæd *duces tecum.* The same is true as to evidence by Carl Olfson, the agent of defendant. These subpœnas, as stated above, the Supreme Court Commissioner had no authority to issue.

The foregoing argument will more fully explain the underlying motives of the Courts in the following cases, in holding that it is not necessary to prove every statement contained in the affidavit by the strictest rules of evidence.

Seidel v. Peschkaw, 27 *N. J. L.* (*S. Court*) 427; 432.

An order for bail was sustained where bills of exchange were in issue and the bills of exchange were not produced before the Commissioner but were described in the affidavit.

"It is further objected, that the nature and particulars of the demand are not sufficiently specified. As to the acceptances or bills of exchange, the affidavit of the plaintiff specifies that they were thirty-one in number, drawn by the defendant to his own order, and endorsed by him, upon the plaintiff and accepted by him. It states the amount, in florins, for which they were severally filled up, and the time of their maturity respectively. This is a sufficient specification of the nature and of the particulars of this part of the demand.

"No precise date of the bills is set forth; the time of their issue may be gathered from the statements of the transactions between the parties, but the precise time is not stated. That is not indispensable to the sufficiency of the affidavit nor to the validity of the bills. There may have been no dates, and if so, it could not have been set out as descriptive of the bills."

Brandly v. American Butter Co., 114 *N. Y. S.* 896; *aff.* 119 *N. Y. S.* 1115.

"An attachment is a provisional remedy in an action, and, subject to certain rules and specific conditions, a warrant may be granted to a plaintiff in an action upon such proofs as are satisfactory to the judge granting it. Code Civ. Proc., #636. All that is required is that the information furnished by the affidavits presented upon the application shall be such that a person of reasonable prudence should be willing to accept and act upon it. Buell v. Van Camp, 119 N. Y. 160; 23 N. E. 538."

Ladenburg v. Commercial Bank, 39 *N. Y. S.* 119.

This was a suit instituted by attachment to recover the proceeds of a bill of exchange. The affidavit was made by a member of the plaintiff's firm. At page 120 the Court said:

"But the defendant is in error in his belief that the affiant was shown not to have, in fact, sufficient knowledge. Knowledge such as the law requires in affidavits of the present description is not necessarily personal observation of the affiant plaintiff. That the bills of exchange were drawn in Newfoundland and protested in London, while the affiant was in New York,—this is the sum and substance of the defendant's attach upon the affiant's statements. The affidavit was made May 20, 1895, and the last bill was protested December 10, 1894. It was, therefore, quite possible that the bills, with the docu-

mentary evidence of protest, were in the possession of the affiant plaintiff when he made his affidavits; and in view of his assertion of knowledge, we must assume such to be the case, in the absence of evidence to the contrary. If he had these bills and notarial certificates of protest in his possession his assertion of knowledge was not unfounded. That was knowledge within the sense of the statute. Upon the trial he would be required to produce the bills and notarial certificates, but, to *obtain his attachment, he need not append them to his affidavit any more than he need append them to his complaint.*"

To the same effect see:

Foster v. Rogers, 64 *N. Y. S.* 652.

McMahon v. Roseville Trust Co. of Newark, 144 *N. Y. S.* 841.

Globe Yarn Mills v. Bilbrough, 21 *N. Y. S.* 2.

Furthermore, by *legal evidence* required to obtain a writ of attachment, the law could not mean the highest form of evidence, for *affidavits* are never the highest form of evidence because no opportunity for cross-examination is possible.

Globe Yarn Mills v. Bilbrough, supra.

SIXTH POINT

It is respectfully submitted that the procedure followed by the learned Circuit Court in quashing the writ of attachment was not in accordance with the plain provisions of the statute and the adjudications thereunder.

Section 86 of the Practice Act of 1903 (C. S. 4077) provides that the practice and procedure in relation to the writ of attachment and in relation to the vacation thereof when improperly issued, shall be the same as for setting aside an order for bail. This is as follows:

"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." Sec. 61 of the Practice Act of 1903 (C. S. 4071).

A. In determining the sufficiency in fact of the proof upon which the order for the writ of attachment was made, it is only necessary that the officer and the court on review be satisfied as reasonable men that the facts set forth in the affidavit show some ground for issuing the writ.

In the cases of *Wire v. Browning and Hull*, 20 *N. J. L.*, 364; 367; and *Van Wagenen v. Coe*, 22 *N. J. L.*, 531, it was held that the judge can only review the legality and applicability of the statements contained in the plaintiff's affidavit but that the weight of these statements and their credibility rests entirely with the officer who made the order for the writ of attachment.

Since these decisions, however, by statute, the court or judge has been expressly required to determine the sufficiency in fact as well as in law of the proof. *Nix. Dig.* 647, *Sec.* 203, and Sec. 61 of the Practice Act of 1903.

These statutes do not mean, however, it is respectfully submitted, that the court or judge must require the same amount and the same strictness of legal proof that would be required to establish the case in open court but rather that he must merely be satisfied as a reasonable man that there were grounds for issuing the writ. Although the statute allows the court to review the evidence, it does not require a higher degree, kind, or amount of evidence to be produced than was formerly demanded.

Seidel v. Peschkaw, 27 *N. J. L.* 427; 432.
Ladenburg v. Commercial Bank, 39 *N. Y. S.* 119.
Foster v. Rogers, 64 *N. Y. S.* 652.
McMahon v. Roseville Trust Co. of Newark, 144 *N. Y. S.* 841.
Globe Yarn Mills v. Bilbrough, 21 *N. Y. S.* 2.
Brandley v. American Butter Co., 114 *N. Y. S.* 896; *aff.* 119 *N. Y. S.* 1115.

In the case *sub judice* the plaintiff in his affidavit has sworn to *facts*, as within his personal knowledge, which standing alone, it is respectfully submitted, would warrant a reasonable man in concluding that there are sufficient grounds for issuing the writ.

Seidel v. Peschkaw, 27 *N. J. L.* 427; 432.
Anderson v. Wehe, 17 *N. W.* 427 (*Wisc.*).
Lacker v. Dreher, 55 *N. Y. S.* 979.
Yellow Pine Co. v. Atl. Lumber Co., 47 *N. Y. S.* 79; *aff.* 50 *N. Y. S.* 1135.
Hayden v. Mullins, 78 *N. Y. S.* 553.
Ladenburg v. Commercial Bank, 39 *N. Y. S.* 119.
American Exchange National Bank v. Voisen, 44 *Hun* (*N. Y.*) 85.
Foster v. Rogers, 64 *N. Y. S.* 652.
Geduld v. Baltimore & O. R. Co., 127 *N. Y. S.* 317.
Hanson v. Marcus, 40 *N. Y. S.* 951.

Therefore, if the Circuit Court Judge believed these facts to be true, it is respectfully submitted, he erred in quashing the writ.

B. If the Circuit Court Judge was in doubt as to the truth of the facts sworn to in the plaintiff's affidavit, he erred, it is respectfully submitted, in quashing the writ of attachment without first taking testimony concerning the truth of the proofs upon which the order for attachment was made, as provided by Section 62 of the Practice Act of 1903 (C. S. 4071).

Since the entire affidavit is a series of allegations of *facts*, the only ground on which the writ could have been

quashed is that the trial judge did not believe these allegations of facts to be true. If he was not satisfied of the truth of the facts alleged, it is respectfully submitted, the Circuit Court Judge erred when he ordered the writ to be quashed on motion without ordering the defendant to produce counter affidavits and giving the plaintiff an opportunity to produce supplemental affidavits to sustain his case. It is an established practice in New Jersey that, when the truth of affidavits are questioned, a rule to show cause will issue and the court will examine into the facts, by evidence to be produced, by the plaintiff as well as by the defendant.

Section 62 of the Practice Act of 1903 (C. S. 4071) reads as follows:

> "In actions commenced by writ of *capias ad respondendum* at any time within thirty days after a defendant shall have been arrested, a judge of the court out of which said writ issued may on the application of such defendant and on notice to the plaintiff make an order for the taking of testimony concerning the truth of the proofs upon which the order for bail was made, which testimony may be taken orally before said judge or in writing before any supreme court commissioner or examiner or master in chancery that the judge shall designate, and such testimony when taken in writing shall be filed; if from the testimony so taken the judge shall be of opinion that the order for bail should not have been made against any defendant, he shall upon terms make such order for his discharge from arrest and the discharge of his bail as the nature of the case may require; and the giving of bail shall be no waiver of the right to apply for an order to take such testimony."

In *Molina v. Comision Reguladora*, etc., 103 Atl. 397, Mr. Justice Swayze says (P. 398):

> "This is a motion to dissolve an attachment which was issued pursuant to sections 84 and 85 of the

Practice Act (C. S. 4076, 4077). Affidavits have been taken on the part of the defendant. Prior to 1903, we held in an attachment under the act of 1893, the predecessor of sections 84 and 85 of the present Practice Act, that if the affidavits of the plaintiff were sufficient to support the order, it could not be questioned by counter affidavits tending to show their falsity. *Mercantile Bank v. Pequonnock Bank*, 58 *N. J. Law*, 300; 33 *Atl.* 474. Section 86 of the Practice Act of 1903 later enacted that proceedings for the vacation of the order shall be the same as for setting aside an order for bail. These proceedings as far as they relate to a controversy as to the truth of the plaintiff's affidavits, are set forth in Section 62 (C. S. 4071). An order of the court is necessary for the taking of testimony, either orally before the judge or in writing before a commissioner, examiner, or master in chancery designated by the judge."

To the same effect see:

Paul DeLancy Co. v. Joseph Freedman Co., 108 *Atl.* 435.

1. On the trial of the facts upon which the order for the writ of attachment was issued, the party moving to quash must sustain the burden of proof and establish by legal evidence that the writ ought to be quashed.

Morris v. Quick, 45 *N. J. L.* 308; *at page* 309.

If a rule to show cause and the taking of testimony thereunder is not ordered when the truth of the facts set forth in plaintiff's affidavit is in issue, there is no way to dispute their truth, and the affidavits must be taken as true, for if the writ is quashed without proof the plaintiff is deprived of his constitutional right to trial by jury, and is deprived of property without due process of law.

Auspach v. Spring Lake, 58 *N. J. L.* 136; 138.

Wood v. Southern Life & Trust Co., 87 *N. J. L.* 202.

SEVENTH POINT

It is respectfully submitted that the allegation by the plaintiff that one Carl Olfson was the agent of the defendant, did not make the affidavit defective either in form or substance.

A. Because, as has been submitted, the affidavit need only make out a prima facie case, and

B. Because the allegation is coupled with proof as to the conduct of principal and agent.

As was said in *Columbia Delaware Bridge Co. v. Geisse*, 38 *N. J. L.* 39, at page 46, affirmed by Court of Errors and Appeals, at page 580:

> "Agency, as a question of fact, may be proved by the acts, declarations, or conduct of the principal and agent. The proof is not limited to acts or declarations in the presence of the opposite party. The fact of agency may also be proved by such evidence in a collateral proceeding, although the agent was appointed by a power of attorney in writing," citing *2 Greenl. Ev.* #60.

EIGHTH POINT

Where a vendor of real estate wilfully refuses to execute his contract, the measure of damages is the difference between the value of the land when the contract was broken and the contract price.

2 Sutherland, Damages 3rd Ed., ##579; 580.
Drake v. Baker, 34 *N. J. L.* 358.
Massman v. Steiger, 79 *N. J. L.* 442.
Beck v. Staats, 114 *N. W.* 633 (*Neb.*); 16 *L. R. A.* (*N. S.*) 768.
Dady v. Condit, 209 *Ill.* 488; 70 *N. E.* 1088.
Hallett v. Taylor, 177 *Mass.* 6; 58 *N. E.* 154.

Stewart v. McLaughlin, 126 *Mich.* 1; 85 *N. W.* 266; 87 *N. W.* 218.

The plaintiff's affidavit in the cases *sub judice* states this measure of damages, which is fortified by the allegation that he lost an opportunity to sell at an advance of $1,500, thus showing the market value.

NINTH POINT

For an irregularity in the writ of attachment itself, the writ may be amended.

State, Wright pros. v. Moran, 43 *N. J. L.* 49.
Anonymous, 9 *N. J. L. Journal* 346.
Connelly v. Lerche, 56 *N. J. L.* 95.
Emerson v. Thatcher, 6 *Kan. A.* 325; 51 *P.* 50.
Louisville Banking Co. v. Etheridge Mfg. Co., 43 *S. W.* 169.
Munzenheimer v. Manhattan Cloak, etc., Co., 79 *Texas* 318; 15 *S. W.* 389.

6 *Corpus Juris* 183.

"The writ should state the amount of the claim for which it is issued; but where the amount claimed is omitted or erroneously stated the writ is ordinarily amendable in that respect." (Citing Emerson v. Thatcher, *supra*, Louisville Banking Co. v. Etheridge Mfg. Co., *supra*, and Munzenheimer v. Manhattan Cloak, etc., Co., *supra*.

TENTH POINT

The order quashing the writ of attachment should be reversed and the writ reinstated.

Respectfully submitted,
FLEMING & HANDFORD,
Attorneys of Plaintiff-Appellant.

FRED. HERRIGEL, JR.,
Of Counsel.

New Jersey Court of Errors and Appeals

PAUL F. JAUDEL, Plaintiff-Appellant, *v.* OSWALD SCHOELZKE, Defendant-Respondent.	On Appeal from Essex County Circuit Court.

BRIEF ON BEHALF OF DEFENDANT-RESPONDENT.

Facts.

This is an appeal by the plaintiff below from an order made by Circuit Court Judge Mountain, quashing a writ of attachment on the grounds that the affidavit upon which the writ was issued was not sufficient, was defective, and did not comply with the requirements of the statute, and further that the writ was obtained and issued contrary to law. The proceedings instituted by the appellant, who is plaintiff in attachment, against respondent, were by virtue of the provisions of Section 84 of the Practice Act of 1903 (Laws 1903, p. 537), as amended by the Act of 1907 (P. L. 1907, p. 273).

The plaintiff, by his affidavit, attempts to establish a claim for breach of contract of respondent, to convey a certain dwelling property in South Orange Township, Essex County, which he alleges respondent had agreed to sell him for a purchase price of forty-four hundred dollars. The affidavit, which is practically void of evidential facts, attempts to set forth the default, without touching in any manner whether the same was with or without willfulness.

A writ of attachment was issued from the Essex Circuit in the sum of *three thousand dollars* (St. of C., p. 4), based upon an order of a Supreme Court Commissioner (St. of C., p. 3), directing the issuance of a writ in the sum of *fifteen hundred dollars*. The writ issued, and levy was attempted upon the inchoate right of curtesy of defendant in said premises. The order is silent as to any determination as to a sum "established by the proofs to be due to the plaintiff."

Upon notice, defendant-respondent appeared specially and applied for the quashing of the writ, urging the second, third and fourth points set forth in his notice (St. of C., p. 7). After argument on both sides, the Court ordered that the writ be quashed for the reasons set forth in the rule (St. of C., p. 8). No request was made by either side for the taking of affidavits or evidence in any form.

LAW.

I.

The affidavit was insufficient in form and substance, and did not comply with the Statute.

Practice Act (P. L. 1903, p. 560, as amended by P. L. 1907, p. 273) provides: Section 84. "An action may be commenced by attachment * * * *upon proof* * * * *establishing.*" "Second. That the plaintiff *has a cause of action* the *nature and particulars* of which he shall *specify* * * *."

Section 85. "Upon *such proof* being made * * * commissioner shall make an order *awarding* * * * writ * * *; such *order* shall direct that the writ shall issue in actions on contract *for such sum as shall be established by the proofs to be due* to the plaintiff * * *."

Section 84 of the Practice Act of 1903, permitting the issuance of an attachment "upon *'proof'* by affidavit or otherwise" *establishing,* among other things, "that the plaintiff has a cause of action, the *nature and particulars* of which he shall *specify,*" means proof of facts to establish such particulars, and not merely belief or conclusion of the witness. Hanford *v.* Duchastel, E. & A., March 1, 1915, 83 Atl., 586, 87 N. J. L. 205.

The facts set forth in an affidavit for an attachment must be proved by competent evidence, such as will be sufficient to go before a jury. Carpet Co. *v.* Hamilton, 17 N. J. L. 16; Hisor *v.* Vandiver, 83 N. J. L. 433, 85 Atl., 181.

"Proof, * * * when used in a legislative enactment, must comprehend legal evidence, testimony that conforms to the fundamental rules of proof, one of which excludes hearsay evidence, however

trustworthy the informant or however explicit may be the deponent's belief in the truth of what he has heard." Hufty *v.* Wilson, 74 Atl., 138, 78 N. J. L. 241.

The affidavit does not meet the requirements of the Statute that the writ shall issue only upon "proof" "establishing" "the nature and particulars" of the "cause of action."

The affidavit fails to establish by any testimony that would be permitted to go to a jury as evidence:

1. *That there was an enforceable contract.*

The first statement of affidavit, that one Olfson "was authorized" by defendant to "solicit offers for the sale" of certain premises, is neither admissible nor proof of the agency claimed. It in nowise meets the contention of appellant that the allegation is coupled with proof as to conduct of principal and agent. In nowise does it meet the rule laid down in Columbia Delaware Bridge Co. *v.* Geisse, 38 N. J. L. 39, affirmed page 580.

The use of the expression "was authorized," likewise comes into conflict with the rule applied in the Hanford *v.* Duchastel case, forbidding the statement of the mere belief or conclusion of the witness. The attempt to prove the agency might be regarded as of little consequence, save that it has a distinct bearing on the next clause, and in conjunction with it, if regarded as admissible evidence, might be taken as imputing to defendant knowledge of the sending of the telegram. Stripped of value as proof of agency, the next clause fails, for there is then no proof that the telegram "making offer" was received by defendant, and in turn the following telegram "accepting said offer" fails of any tangible connection with defendant.

It is apparent on the face of the affidavit that the clause as to the sending of the telegram is merely hearsay. It reads "* * * Olfson on the direction of deponent, sent the telegram to said Oswald Schoelzke, *making an offer of forty-four hundred dollars* * * *." It is evident that the same was not in deponent's presence and he had no actual knowledge. The language of the telegram is not set forth; we do not know whether the so-called offer was for a free and clear title, or what the same was to be; we are entirely in the dark save the belief and conclusion of the affiant, assuming that the telegram was sent and that it was received. The commissioner, before adjudicating facts, must have facts before him meeting the rules of evidence. The Statute requires that he must have before him the particulars. If the facts claimed are not present by competent evidence, then the plaintiff has failed.

There is an entire absence of any evidence that would take the matter out of the Statute of Frauds. The replying telegram is nowise connected, by admission or otherwise, with the defendant.

The appellant is content to leave the entire statement of his so-called contract with a statement that he received a telegram from defendant "accepting said offer." There is no evidence that the telegram came from the defendant, nor is the so-called telegram, which undoubtedly is in the possession of deponent, set forth, nor an attempt to state its language, nothing but the general conclusion of the appellant. It is to be noted that there is not one word in the affidavit that establishes the receipt by the defendant of the telegram which it is claimed was sent him by Olfson, nor his authorship of the so-called telegram which appellant claims he received. This is particularly striking in view of the fact that the appellant was

in touch with defendant later, from the statement that is made in the next succeeding clause. Had the affidavit stated, for instance, that on inquiry defendant had admitted to deponent that he received the first telegram, and sent the second, then there would have been some admissible evidence, but the affidavit standing as it does presents nothing more or less than a conclusion of the defendant, partly upon hearsay, and partly on his own assumption, that a telegram was sent to and by the defendant. Such general statements of agency, of the sending of telegram by a third party, without production of a copy let alone even an attempt at stating its wording, of the replying telegram, without proof of its authorship, without production of a copy or even a statement of its language, without connecting the so-called contract with defendant, it is submitted falls far short of the requirement of "legal evidence, testimony that conforms to the fundamental rules of proof * * *" spoken of in the Hufty *v.* Wilson case.

2. *It fails to show the breach of any contract.*

The affiant states "that on September 19, 1919, said Oswald Schoelzke *notified deponent* that he would not carry out his said agreement and would not deliver a deed to deponent and that the said Oswald Schoelzke has ever since defaulted in said agreement (St. of C., p. 1, li. 35).

Did defendant write the affiant, or did he see him personally; whichever it may have been should have been stated as a fact. Above all, in either instance, the affidavit to meet the requirements of proof should have stated what defendant said. For all that is shown defendant may have denied any contracting, may have disclaimed the receipt of any telegram or the sending of any, he may have

pleaded entire lack of knowledge of the whole thing, or if not the foregoing he may have asserted some fault of plaintiff or reason that would excuse defendant in every way.

To constitute proof the facts should have been stated.

The use of the language "notified deponent" is paralled with the use of the expression "transmitted" to defendant in the Hanford *v.* Duchastel case (87 N. J. L. 205, 83 Atl., 586), which this Court held was not an evidential manner of stating the claimed facts. In the present instance greater violence is done than in the Hanford case, for here the making or breaking of the case may depend upon the facts at this juncture.

The same may be said of the use of the terms "was authorized" (li. 23), "making an offer" (li. 30), "received" (li. 34), "accepting said offer" (li. 35), "ever since defaulted" (li. 39), "lost an opportunity to sell" (p. 2, li. 5).

In each clause where used the foregoing statements gloss over a failure to establish by a statement of facts the proof insisted upon by the Statute.

3. *It fails to establish any damages warranting the order.*

The statements seeking to establish damages begin with li. 35 and run to the end of the clause, li. 14 on p. 2. Again glaring conclusions of affiant, coupled with his belief and generalities are set forth. We are not afforded the facts as to the manner, form or particulars of the so-called "notification." We do not know, assuming a case otherwise to have been proven, whether the rule of no damage, nominal or substantial damage should have been adjudicated by the commis-

sioner in his order. The reason of the ruling of the Hanford case is apparent. The generalities leave us in the dark as to where the plaintiff stands, if he has any standing at all. Whether the "notification" was such as to excuse a tender by affiant, should likewise have been so stated as a fact matter that it would permit of an adjudication by the commissioner.

In seeking to establish his damages plaintiff says he "lost an opportunity to sell" (p. 2, li. 5) and "the value of said premises is * * *." No facts are stated as to when, with whom, the nature and particulars of the so-called "lost opportunity." It is submitted no such statement would be permitted to go to the jury as an evidential fact. It was just as necessary for the Court to adjudicate on the damage and quantum of the same, as it was for him to adjudicate, that there had been a contract and a breach.

The affiant attempts a statement of value of the property in most general terms, without in any sense qualifying himself as to knowledge of facts. The excuse, claimed by appellant's brief, of difficulty in obtaining witnesses as to certain facts surely meets with no sympathy in this instance, for it is a matter of common knowledge that expert testimony of value is an easily obtained, if not easily purchasable commodity.

The statement "lost an opportunity" means nothing that is evidential. Opportunity has been defined as

> "A fit or convenient time; a time or occasion favorable for some purpose." Standard Dictionary.

II.

The order is defective.

Practice Act 1903, Sec. 85, requires that "such order shall direct that the writ shall issue in actions on contract *for such sum as shall be established by the proofs to be due* to the plaintiff.

The order (St. of C., p. 3) in nowise adjudges that any *sum* has been "established by the proofs to be due to the plaintiff." The question as to absence of proof of damage has been earlier discussed. In view of such the entire absence of an adjudication on this feature is strikingly noticeable.

It is to be noticed that Section 84 deals with the cause of action and its proof; that the first clause of Section 85 refers to the adjudication as to cause of action; that the section then in an additional separate clause provides that the writ "shall issue * * * for such sum as *shall be established* by the proofs *to be due* * * *." It is submitted that in so providing the Legislature meant to emphasize the necessity of a definite adjudication as to the amount due. This order omits, and is hence faulty.

> Hisor *v.* Vandiver, 83 Law 433, 85 Atl., 181.
>
> "It is familiar law that, where the irregularity consists in the omission to state a jurisdictional fact, such omission is fatal to the validity of the entire proceedings."
>
> "The commissioner must adjudicate upon the facts before him, and that he did so must appear upon the face of the order."

III.

The writ is an unauthorized one.

The writ issued is in the sum of three thousand dollars (St. of C., p. 4). The order (St. of C., p. 3, li. 17) directs that a writ issue in the sum of fifteen hundred dollars.

Practice Act 1903, Sec. 86, directs that the writ shall issue for "the sum directed." The writ does not follow the directions of the order, resulting in a levy in exactly double the amount directed. The materiality of this variance is strikingly apparent in view of Section 92 of the Act providing for releasing of the property upon the giving of a bond, as was commented upon by Chief Justice Gummere in the Hisor *v.* Vandiver case, *supra.*

Appellant urges a liberal construction of the requirement of the Practice Act, Section 84, as to the "proof" required. Our courts have never sympathized with such laxity.

Elmer, J., In Kennedy *v.* Chumar, 2 Dutcher 306, in discussing the requirement of "proof," of the Supplement of 1855 to the Attachment Act, and that the facts must be such as, standing alone, might be left to a jury, and the necessity that the Court must determine the sufficiency in fact as well as in law, of the proof, says:

> "* * * so that now whenever the judge is called on to set aside the order, it will be his duty to do so, unless the proof is not only such as might be left to a jury to establish the required particular, but such as satisfies his own mind." * * * "in cases of attachment the result of the order may be to put an end to the business of the defendant, and to produce a state of bankruptcy, injurious not only to him but to other creditors. It is not therefore surprising that the legislature has endeavored so

> carefully to guard this power from abuse; and not only the courts, but the commissioners intrusted with its exercise, are bound to use the utmost caution, and to deny the order, or if granted to set aside, in all cases where the proof fails satisfactorily to establish the requisite particulars, as required by the respective acts."

This doctrine has met with unbroken approval by our courts, of which our more recent decisions are the following cases:

> Hufty *v.* Wilson, 78 N. J. L. 241, 74 Atl., 137;
>
> Hisor *v.* Vandiver, 83 N. J. L. 433, 85 Atl., 181;
>
> Hanford *v.* Duchastel, 87 N. J. L. 205, 83 Atl., 586.

Appellant further contends that it was the duty of the Court upon being satisfied that the affidavit was insufficient in form and substance, to have further examined into the truth of the facts before quashing.

The Court expressly decided the fact question of insufficiency—in effect saying to the plaintiff your "proof" is not here. This complies with Section 61 of the Practice Act.

Section 62 provides a means for the defendant to test out, and meet the truth of plaintiff's proof. The defendant made no such application. The plaintiff had his opportunity on his proof, which failed to meet the approval of the Circuit Court Judge either as to fact or law.

It is respectfully submitted that the action of the Circuit Court Judge in quashing the writ should be sustained.

Respectfully submitted,

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