

INDEX.

	PAGE
Notice of Appeal and Reasons.....	1a
Opinion	3a
Order Reversing Union County Circuit Court..	7a
Notice—Demand for Security.....	1
Notice and Affidavit.....	2
Order Requiring Prosecutor to Give Security for Costs	4
Writ of Certiorari.....	5
Return—By Clerk.....	6
By Sheriff	7
Affidavit of Joseph Freedman.....	9
Order to Give Bond, etc.....	12
Order—Notice of Issue of Attachment.....	14
Order Permitting Plaintiff to File Com- plaint as within Time.....	15
Complaint	16
Order Directing Defendant to Plead.....	19
Rule to Show Cause.....	21
Memorandum	22
Order Dismissing Rule to Show Cause.....	23
Examination of Witnesses.....	25
Joseph Freedman, direct.....	27
Henry J. Weber, direct.....	44
Joseph Freedman, recalled.....	53
Exhibit P 1.....	63
Exhibit—Letter of Joseph Stamler.....	64
Exhibit—Letter of Stamler & Stamler.....	65
Exhibit P 3.....	66
Exhibit P 6.....	67

	PAGE
Exhibit P 4.....	67
Exhibit P 7.....	68
Exhibit 6	71
Exhibit 1 on part of Plaintiff.....	73
Elsie Siston, direct.....	75
cross	80
redirect	88
re-cross	88
Valerie Husbands, direct.....	89
cross	91
Elsie Siston, recalled.....	92
Reasons	94
Exhibit P 2.....	96
Reasons	97

Notice of Appeal and Reasons.
New Jersey Supreme Court

THE PAUL DELANEY COMPANY,
Prosecutor.

vs.

JOSEPH FREEDMAN COMPANY,
et als.,
Defendants.

On Certiorari.
Notice of Appeal
from Order Revers-
ing the Order of the
Union County Cir-
cuit Court and
Quashing the Writ
of Attachment.

10

To:

MESSRS. KALISH & KALISH, Attorneys for Prose-
cutor.

TAKE NOTICE, That the defendants in certiorari
appeal to the Court of Errors and Appeals from the
whole of the Order entered in the above entitled
cause upon the following grounds:

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1. That the Court erroneously determined that
the Circuit Court had before it, the undisputed facts
on the rule to show cause, that the prosecutor was
induced by a sharp trick to send its goods into the
State so that they might be attached.

2. That the Court erroneously determined that
the affidavit was presented to the Supreme Court
Commissioner on the 19th day of December, 1918.

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3. That the Supreme Court was not vested with
the authority to review the findings of facts of the
Union County Circuit Court.

4. That the Union County Circuit Court deter-
mined as a question of fact, that the goods were
not lured into the State of New Jersey, for the pur-
pose of attaching them, and therefore the Supreme

Court was without authority to review that question of fact by proceedings on certiorari.

5. That the Supreme Court was without authority to determine questions of fact or law, which were not raised by the prosecutor below.

6. The Supreme Court has no authority to quash the writ of attachment.

7. Because the Supreme Court erroneously made an Order quashing the writ of attachment, and
10 thereby deprived the Joseph Freedman Company to have all questions of fact determined by a jury.

8. That the Order of the Supreme Court is in contravention of Article 1, Par. 7, of the Constitution of New Jersey, which provides: "The right of a trial by jury shall remain inviolate."

9. That the Circuit Court on the application of the prosecutor determined all questions of fact against the prosecutor and therefore the Supreme Court was without authority to review the findings
20 of fact of the Circuit Court, and therefore the Order of the Supreme Court is contrary to law.

10. Because the said Order of the Supreme Court is in other respects illegal, unjust and void.

11. That the Supreme Court erroneously determined the disputed question of fact as to whether or not the defendant waived and released the prosecutor from any claim for undelivered catsup under the contract of 1917.

Opinion.

NEW JERSEY SUPREME COURT.

THE PAUL DELANEY COMPANY,
Prosecutor,

VS.

JOSEPH FREEDMAN COMPANY,
Defendant.

10

On certiorari to review refusal of the Union County Circuit Court to quash a writ of attachment.

Argued before a single Justice under the statute.

KALISH & KALISH, *for Prosecutor.*

STAMLER & STAMLER, *for Defendant.*

MEM., by

BERGEN, J.

20

The prosecutor, a non-resident corporation, contracted to sell and deliver to the defendant a carload of tomato catsup on or before December 1st, 1917, which *was not fulfilled* for reasons which the prosecutor claims were justifiable, *although disputed by the defendant.* In 1918. the defendant ordered another carload of catsup, but the prosecutor, before shipping it wrote the defendant that it wanted a definite understanding that they were released by defendant from any former claim for undelivered catsup, and that defendant would settle for the shipment without any controversy or legal action. To which defendant replied that if the shipment was made it would "Pay the same in the usual course of business, and that this shipment has no reference to the contract of January 14th, 1917, and that the invoice will be paid in due course of business without any litigation." There-

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upon the prosecutor shipped the catsup to defendant at Elizabeth, N. J., where it arrived December 18th, 1918, and the next day defendant rejected it for lack of required quality and the same day presented affidavits to a Supreme Court Commissioner showing a cause of action for the default on the contract of 1917, and procured from him an order for an attachment, which was issued and the carload of catsup attached at the suit of defendant, who subsequently caused it to be taken from the car and put in storage.

- 10 The prosecutor was allowed by the Circuit Court, a rule to show cause why the writ of attachment should not be quashed, and after the taking of testimony in support of the rule and argument thereon, the court discharged the rule, which is the legal proceeding this writ seeks to review. This method of review is proper but is limited to errors of law, and disputed questions of fact will not be considered. *McAdam v. Block*, 62 N. J. L. 508. *The rule to show cause allowed in this case related only to a*
- 20 *motion to quash the writ, and not why the prosecutor's property should be released from the lien of the attachment, as in Hecksher v. Trotter*, 48 N. J. L. 419, but there seems to be no reason why a writ of attachment may not be quashed, even after appearance, if the evidence shows beyond dispute that it was prosecuted against a person not subject to the writ *Moore v. Richardson & Baldwin*, 65 N. J. L. 530. The cases cited all refer to the ordinary case where the damages are liquidated, but the
- 30 present case is one where the damages are not liquidated and the proceeding is under section 84 and 85 of the Practice Act C. S. vol. 3, 4076. which require an order by the court, or Supreme Court Commissioner awarding the writ. I think the order of the Commissioner was justified by the facts laid before him, but that defendant suppressed or concealed material facts, not disputed, which destroyed his right to seize the goods taken by his direction under

the writ. The fact not disclosed to the Commissioner was that defendant had agreed in writing as a condition for the shipment, to pay for it in the usual course of business, and that it had no reference to the contract of the previous year, but the invoice would be paid without any litigation, this was in reply to a letter of the prosecutor, that before sending the goods they wanted a distinct understanding regarding settlement, and an assurance *that the prosecutor was released from any former claim for undelivered catsup*, and that payment would be made without controversy or legal action. This condition the defendant accepted and the goods were shipped, delivered to the defendant, at once rejected for default in quality, then levied on under the attachment, removed by the defendant from the car, put in storage and still held, and it does not require an overabundance of astuteness to see that the prosecutor was induced, by a sharp trick, to send its goods into this State so that they might be attached, notwithstanding defendant's contract to pay and not litigate. 10 20

If the defendant had submitted this undisputed fact to the Commissioner, as he was bound to do, that officer, without some explanation, could not have found that the alleged cause of action, which the Statute requires existed, for it was waived as a condition of the shipment. *The Circuit Court had before it this undisputed fact on the rule to show cause*, and it clearly appearing, without dispute, that the defendant had waived its former cause of action and agreed to pay without litigation as a condition for the shipment, a cause of action, so far as it related to the former shipment, did not exist, and the Circuit Court should have so decided as a matter of law, and its discharge of the rule was error. 30

The sending of the goods was on condition that defendant would pay for them without litigation

and without any reference to the prior default of the prosecutor in not shipping what it had contracted to ship in 1917, and to this the defendant agreed to induce the shipment of 1918. *The right of defendant to refuse acceptance for want of quality contracted for was not waived*, but its right to enforce the claim for damages arising out of the contract of 1917 was, and its right under the terms of shipment was limited to a rescission of the latter contract and was not extended to the right to institute a litigation against the goods to recover on the earlier contract.

This result renders it unnecessary to determine the other matters raised by the prosecutor, and no opinion thereon is intended to be expressed.

The prosecutor is entitled to have the writ quashed with costs and it is so ordered.

Order Reversing Union County Circuit Court.

NEW JERSEY SUPREME COURT

THE PAUL DELANEY COMPANY,
a corporation,
Defendant-Prosecutor,

vs.

THE UNION COUNTY CIRCUIT
COURT, in and for the County
of Union, WILLIAM B. MAR-
TIN, clerk of said court and
JOSEPH FREEDMAN COMPANY,
a corporation,
Plaintiff-Respondents.

On Certiorari.
Order.

10

The court having inspected the order of William D. Wolfskeil, a Supreme Court Commissioner of this court and the writ of attachment together with all the proceedings for the making of the same and all things touching and concerning the same, and the order discharging the rule to show cause made by the Circuit Court of County of Union, together with all proceedings for the making of the same and all things touching and concerning the same and the transcript and proceedings of the said Circuit Court of the County of Union returned with the certiorari in this cause, the orders and judgment below, and heard the argument of counsel thereon and having duly considered the same do,

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ORDER, That the writ of attachment issued in this cause be quashed, dismissed, set aside and for nothing holden, with costs and that the said prosecutor be restored in all things wherein he hath lost

8a ORDER REVERSING UNION COUNTY CIRCUIT COURT

by reason of the issuance of said writ of attachment or any order or judgment touching or concerning the same.

Entered May 8, 1919, on motion of

KALISCH & KALISCH,
Attorneys for Prosecutor.

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Let this rule be entered,

J. J. BERGEN,
J. S. C.

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New Jersey Supreme Court.

THE PAUL DELANEY COMPANY,
A CORPORATION,

Defendant-Prosecutor,

vs.

THE UNION COUNTY CIRCUIT
COURT IN AND FOR THE COUNTY
OF UNION, AND WILLIAM B.
MARTIN, CLERK OF SAID COURT,
AND JOSEPH FREEDMAN COM-
PANY, A CORPORATION.

Plaintiff-Defendants.

} On Certiorari.

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NOTICE.

(Filed April 5, 1919.)

Messrs. Kalisch & Kalisch, Attorneys for Prosecutor:

GENTLEMEN—Please take notice, that the defendant, the Joseph Freedman Company, does hereby demand, pursuant to the statute in such case made and provided, that the Paul DeLaney Company, prosecutor, a foreign corporation, give security for costs.

Dated April 2d, 1919.

20

STAMLER & STAMLER,
*Attorneys for Defendant, Joseph
Freedman Company.*

Service of the within notice is hereby acknowledged
this 3d day of April, 1919.

KALISCH & KALISCH,
Attorneys for Prosecutor.

NOTICE.

Messrs. Kalisch & Kalisch, Attorneys for Prosecutor:

Please take notice, that in pursuance to the statute in such case made and provided, Joseph Freedman Company, a corporation, one of the defendants in the above-entitled cause, will apply to the Hon. James J. Bergen, on Saturday, the fifth day of April, 1919, at the Court House, in the City of Elizabeth, at ten o'clock in the forenoon of that day, or as soon thereafter as
 10 counsel can be heard, for an order directing that the prosecutor herein give security for costs in pursuance to the statute, and, unless it does so, that further proceedings on said certiorari be stayed, and take further notice that at the same time and place the defendant, Joseph Freedman Company, will apply for an order dismissing the certiorari, for the reason that no affidavit is on file in the office of the Clerk of the Supreme Court upon which the writ of certiorari was allowed, and upon the aforesaid application the annexed affidavit
 20 will be used.

Dated April 2d, 1919.

STAMLER & STAMLER,
*Attorneys for Defendant, Joseph
 Freedman Company.*

AFFIDAVIT.

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

30 John J. Stamler, of full age, being duly sworn according to law upon his oath deposes and says, that he is a member of the firm of Stamler & Stamler, counsel for Joseph Freedman Company, a corporation, one of the defendants in the above-entitled cause; that the said Paul DeLaney Company, the prosecutor, is a corporation of the State of New York, and is not a corporation created or organized as a corporation of the

State of New Jersey, by the laws of the State of New Jersey, and is not a corporation permitted to do business in the State of New Jersey, under and by virtue of the laws of this State, and that the said Paul DeLaney Company is not a resident of this State, and that summons cannot be served upon it; that the reason for the above statement is as follows: That I personally searched the records of the Secretary of State of New Jersey, at the State House, Trenton, N. J., for the purpose of determining whether or not the Paul DeLaney Company is a corporation organized under and by virtue of the laws of the State of New Jersey, or whether it is a foreign corporation permitted to do business in the State of New Jersey, and that I have been informed by one, Mr. Henry J. Weber, who represented himself to me to be the Eastern Representative of said prosecutor, the Paul DeLaney Company, and who testified on behalf of the Paul DeLaney Company, in pursuance to a Rule to Show Cause issued by the Union County Circuit Court, that the said Paul DeLaney Company, the prosecutor, is not a corporation organized under and by virtue of the laws of the State of New Jersey, or permitted to do business in the State of New Jersey, and that it is a corporation of the State of New York, and that no officers or directors reside in the State of New Jersey, upon whom process could be served against the said Paul DeLaney Company, the prosecutor herein.

JOHN J. STAMLER.

Sworn and subscribed to before me this 2d day of April, 1919.

V. E. HUSBANDS,
Commissioner of Deeds of N. J.

Service of the within notice is hereby acknowledged this 3d day of April, 1919.

KALISCH & KALISCH,
Attorneys for Prosecutor.

ORDER REQUIRING PROSECUTOR TO GIVE
SECURITY FOR COSTS.

(Filed April 5, 1919.)

Upon the reading and filing of an affidavit on behalf of the defendant Joseph Freedman Company, a corporation, from which it appears that the Prosecutor herein is a corporation of the State of New York and is not a corporation created or organized as a corporation of the State of New Jersey, by the laws of the State of New Jersey, and is not a corporation permitted to do business in the State of New Jersey, under and by virtue of the laws of the State of New Jersey; and it further appearing that the said defendant did not file a bond as security for costs in compliance with Section 204 of the Practice Act:

It is, therefore, on the fifth day of April, nineteen hundred and nineteen, on motion of Stamler & Stamler, Attorneys for the Defendants, Ordered that the Prosecutor in certiorari give bond to the defendant in the sum of One Hundred Dollars with sufficient securities resident in this State, with a condition to prosecute its action with effect and to pay costs if it discontinues said proceeding, or if the writ of certiorari should be dismissed, or in lieu of such bond the Prosecutor may deposit the sum of One Hundred Dollars with the Clerk of this Court as security to the defendants for costs.

And it is further ordered that the proceedings under the said writ of certiorari, heretofore allowed in this cause, be stayed until such security be given.

Let this rule be entered.

J. J. BERGEN,
Justice Supreme Court.

WRIT OF CERTIORARI.

(Filed April 9, 1919.)

NEW JERSEY, ss.: The State of New Jersey, to the
Union County Circuit Court in and for the
County of Union and William B. Martin,
[L. s.] Clerk of said Court, and Joseph Freedman
Company, a corporation of the State of
New Jersey, Greeting:

We being willing for certain reasons to be certified
of and concerning a certain order made on the twenty- 10
first day of December, 1918, by William D. Wolfskeil,
a Supreme Court Commissioner of the State of New
Jersey, together with all proceedings had for the mak-
ing of the same and all the proceedings supplemental
thereto and had thereon which said order provided as
follows: "and I do hereby award to the above-named
plaintiff a writ of attachment in the sum of \$2,746.26
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 above-named 20
plaintiff give a bond in the sum of \$5,500 with sufficient
sureties to indemnify the said defendant from all dam-
ages arising from said attachment and taxed costs of
suit if the suit shall be discontinued or if judgment
thereon shall be given to the defendant," and of and
concerning a certain writ of attachment issued by virtue
of said order on the twenty-first day of December, 1918,
by William B. Martin, Clerk of the County of Union,
State of New Jersey, and of and concerning a certain 30
order made by Hon. George S. Silzer, Judge of the
Union County Circuit Court, discharging the Rule to
Show Cause why said writ of attachment should not
be quashed, which said Rule to Show Cause was made
by the said Hon. George S. Silzer, on the twenty-
seventh day of February, 1919. We command you that
the said order of the said William D. Wolfskeil, Su-

preme Court Commissioner aforesaid and the said writ of attachment together with all proceedings for the making of the same and all things touching and concerning the same and the order discharging the Rule to Show Cause aforesaid together with all proceedings for the making of the same and all things touching and concerning the same as fully and entirely as before you they remain or are in your custody and control, you do certify and send together with this writ to our Justices
 10 of our Supreme Court of Judicature at Trenton, on the tenth day of April, 1919, that thereon may be caused to be done what of right and according to law ought to be done.

Witness, the Honorable William S. Gummere, Chief Justice of our Supreme Court, at Trenton, this twenty-ninth day of March, 1919.

	KALISCH & KALISCH,
ENOCH L. JOHNSON,	<i>Attorneys.</i>
<i>Clerk.</i>	

20 Allowed. Let this writ be sealed.

J. J. BERGEN,
Justice Supreme Court.

RETURN.

In obedience to the command of this writ to me, William B. Martin, Clerk of the Circuit Court, in and for the County of Union, directed, I do hereby certify and send to our Justices of our Supreme Court of Judicature, at Trenton, within mentioned, the Writ of Attachment, with the Sheriff's return annexed and all
 30 endorsements on said writ; the Affidavit for Attachment; the Order of the Supreme Court Commissioner awarding the writ; the Bond; the Order of Publication and Appointment of Auditor; Order permitting Plaintiff to file Complaint as within time; Complaint; Order

Directing Plaintiff to Plead; Rule to Show Cause: Memorandum, and Order Dismissing Rule to Show Cause, whereof mention is within made, with all things touching and concerning the same, as fully and as entirely as they remain in our said Circuit Court.

In Testimony Whereof, I have hereto set my hand and affixed the seal of said Court, this seventh day of April, A. D. 1919.

[L. S.]

WM. B. MARTIN,
Clerk of the Union County 10
Circuit Court.

By virtue of the annexed writ of attachment to me directed, I did, on the 21st day of December, A. D. 1918, at 12:20 o'clock P. M., of said day, in the City of Elizabeth, County of Union, State of New Jersey, and in the presence of John Seeland, a discreet person of said county, go upon the premises herein described and attach for the plaintiff in said writ named all the goods and chattels, rights and credits, moneys and effects, lands and tenements of the defendant in said writ named, viz.: 20

1329 Cases Catsup @ \$2.60, \$3,455.40
at Central R. R. of N. J., Long Branch Siding, E.
Jersey St., Elizabeth, N. J.

Served writ on Joseph Freedman.

JAMES E. WARNER,
Sheriff.

by JOSEPH BARRY.

Witness, We, James E. Warner, Sheriff, and John Seeland, a discreet and impartial freeholder of said county, do hereby appraise the property described in the above inventory at the sum of three thousand four hundred fifty-five dollars and forty cents (\$3,455.40). 30

JAMES E. WARNER,
JOHN SEELAND.

STATE OF NEW JERSEY, }
COUNTY, } ss.

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

We command you, that you attach The Paul DeLaney
Company, Inc., of and by all 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
10 and tenements, safely keep, so that said defendant be
and appear before the Union County Circuit Court, to
be held at the Court House, in the City of Elizabeth,
on the 26th day of December, 1918, to answer unto
Joseph Freedman Company, a corporation, in an action
upon contract wherein the plaintiff demands the sum of
fifty-five hundred dollars, as is said. And have you
then there this writ.

Witness, George S. Silzer, Esquire, of our said Court,
at Elizabeth aforesaid, the 21st day of December, in the
20 year of our Lord one thousand nine hundred and
eighteen.

WM. B. MARTIN,
Clerk.

STAMLER & STAMLER,
Attorneys.

Filed December 26th, 1918.

UNION COUNTY CIRCUIT COURT.

JOSEPH FREEDMAN COMPANY, A CORPORATION, <i>Plaintiff,</i>	}	AFFIDAVIT. In Attachment.
<i>vs.</i>		
THE PAUL DELANEY COM- PANY, INC., <i>Defendant.</i>		

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

10

Joseph Freedman of full age, being duly sworn on his oath deposes and says that he resides in the City of Elizabeth, County of Union and State of New Jersey, and that he is the president of Joseph Freedman Company, a corporation organized under and by virtue of the laws of the State of New Jersey, with a principal office in the City of Elizabeth, County of Union and State aforesaid.

That the said Joseph Freedman Company has a cause of action against The Paul DeLaney Company, Inc., a corporation of the State of New York, and that the said The Paul DeLaney Company, Inc., is not a corporation created or organized as a corporation of the State of New Jersey by the laws of the State of New Jersey, and that the said The Paul DeLaney Company, Inc., is not a corporation permitted to do business in the State of New Jersey under and by virtue of the laws of this State, and that the said The Paul DeLaney Company, Inc., is not a resident of this State and that summons cannot be served upon it, and that the cause of action against the said The Paul DeLaney Company, Inc., arose in this State.

Deponent further says that the nature of the cause of action and particulars thereof are as follows, to wit: That on the 24th day of January, 1917, The Paul DeLaney Company, Inc., entered into a written contract with Joseph Freedman Company by which contract the

- said The Paul DeLaney Company, Inc., agreed to sell and Joseph Freedman Company agreed to buy 1,254 cases of ketchup containing 2,508 dozen bottles of ketchup, each bottle weighing 13 ounces at the rate of $72\frac{1}{2}$ c. per dozen; that the said goods were to be delivered during the calendar year 1917 f. o. b. Brocton, freight allowed; that the said The Paul DeLaney Company, Inc., failed and refused to deliver to the said Joseph Freedman Company the 1,254 cases of ketchup
- 10 or any part thereof in accordance with the terms of the contract; and relying upon the terms of said contract with The Paul DeLaney Company, Inc., the said Joseph Freedman Company being engaged in the wholesale grocery business in the City of Elizabeth and elsewhere, made contracts with its customers to sell and deliver to them ketchup during the year 1917 at a price agreed upon, and that by reason of the nondelivery of The Paul DeLaney Company, Inc., of the ketchup to the Joseph Freedman Company, the said Joseph Freedman Com-
- 20 pany was obliged to go into the open market and purchase a large quantity of ketchup of the quality and kind specified in the contract at \$1.82 per dozen.

- That during the months of October, November and December of 1917, the market for ketchup of the quality mentioned in the contract was \$1.82 per dozen, or \$3.64 per case, and that by reason thereof, Joseph Freedman Company sustained a loss which was the difference between the contract price of ketchup at $72\frac{1}{2}$ c. per dozen and the prevailing market price that existed during the months of November and December, 1917,
- 30 which was \$1.82 per dozen, and thereby lost the sum of \$1.09 $\frac{1}{2}$ per dozen, and in all amounting to \$2,746.26.

Deponent further says that the sum of \$2,746.26 is still due and owing from the said The Paul DeLaney Company, Inc., no part thereof having been paid whereby an action had accrued to the Joseph Freedman Company from the said The Paul DeLaney Company, Inc., in the sum of \$2,746.26.

JOSEPH FREEDMAN.

Sworn and subscribed before me this 20th day of December, 1918.

V. E. HUSBANDS.

Filed December 21, 1918.

UNION COUNTY CIRCUIT COURT.

JOSEPH FREEDMAN COMPANY, A
CORPORATION,

Plaintiff,

vs.

THE PAUL DELANEY COMPANY,
INC.,

Defendant.

In Attachment.
ORDER.

10

I, William D. Wolfskeil, a Supreme Court Commissioner of the State of New Jersey, upon reading the affidavit of Joseph Freedman and having considered the same, do on this twenty-first day of December, 1918, adjudge and do decide by said affidavit; it is proved to my satisfaction that the Joseph Freedman Company has a cause of action which arose in this State, on contract, and the nature of the cause of action and the particulars thereof are as follows, to wit: That on the 24th day of January, 1917, the Joseph Freedman Company entered into a written contract with The Paul DeLaney Company, Inc., the defendant company, whereby the defendant company was to sell and the plaintiff was to purchase from the defendant 1,254 cases of ketchup containing 2,508 dozen, each bottle weighing 13 ounces, at the rate of 72½c. per dozen; that said goods were to be delivered during the calendar year 1917 f. o. b. Brocton, freight allowed; that the said defendant company failed and refused to deliver to the plaintiff the said 1,254 cases or 2,508 dozen of ketchup or any part thereof in accordance with the terms of the contract; that the market price for said ketchup during

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the months of November and December, 1917, was \$1.82 per dozen, and that by reason thereof the plaintiff sustained a loss which was the difference between the contract price of ketchup at 72½c. per dozen and the prevailing market price that existed during the months of November and December, 1917, which was \$1.82, thereby the plaintiff sustained a loss of \$1.09½ per dozen, in all amounting to \$2,746.26, which sum of money is still due and owing from the said defendant to the plaintiff, and that no part thereof has been paid. And it is provided to my satisfaction that there is due to the said plaintiff from the defendant the sum of \$2,746.26.

The above-named defendant is not a resident of this State and is not a corporation created or organized as a corporation of the State of New Jersey by the laws of the State of New Jersey, and that the said defendant is not a corporation permitted to do business in the State of New Jersey under and by virtue of the laws of this State, and that summons cannot be served upon it; and I do hereby award to the above-named plaintiff a writ of attachment in the sum of \$2,746.26 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 above-named plaintiff give a bond in the sum of \$5,500 with sufficient sureties to indemnify the said defendant from all damages arising from said attachment and taxed costs of suit if the suit shall be discontinued or if judgment thereof shall be given to the said defendant.

80

WILLIAM D. WOLFSKEIL,
Supreme Court Commissioner.

Filed December 21, 1918.

Know All Men by these Presents, That Joseph Freedman Company, principal, and Joseph Freedman and Samuel Stamler, sureties, of the City of Elizabeth, in the County of Union, and State of New Jersey, are held and firmly bound unto The Paul DeLaney Company, Inc., of the State of New York, in the sum of Fifty-five hundred dollars (\$5500), lawful money of the United States of America, to be paid to the said The Paul DeLaney Company, Inc., or to its certain attorney, executors, administrators or assigns; To 10 which payment well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, firmly by these presents. Sealed with our seals and dated the twenty-first day of December, in the year of our Lord one thousand nine hundred and eighteen.

The condition of the above obligation is such, that whereas, the above bounden, Joseph Freedman Company, has this day begun or is about to begin a suit against the said The Paul DeLaney Company, Inc., by writ of attachment to be issued for the sum of \$2,746.26; 20

Now, therefore, the said Joseph Freedman Company shall indemnify the said The Paul DeLaney Company, Inc., for all damages resulting from said attachment and taxed costs of suit if the said suit shall be dismissed or discontinued, or if judgment shall be given for defendant, then this obligation to be void, otherwise to remain in full force.

JOSEPH FREEDMAN COMPANY, 30
by JOSEPH FREEDMAN, *President*;
JOSEPH FREEDMAN, [L. S.]
SAMUEL STAMLER. [L. S.]

Signed, sealed and delivered in the presence of:

LENA FREEDMAN,

Secretary.

[L. S.] Attest.

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

Joseph Freedman and Samuel Stamler, being duly sworn on their oaths say, that they are the sureties in the within-named bond; the said Joseph Freedman says that he is a freeholder in the County of Union and has property subject to execution worth the sum of \$10,000 over and above all his just debts and liabilities, and the said Samuel Stamler says that he is a freeholder in the
10 County of Union and has property subject to execution worth the sum of \$10,000 over and above all his just debts and liabilities.

JOSEPH FREEDMAN,
SAMUEL STAMLER.

Sworn to and subscribed before me this twenty-first day of December, 1918.

V. E. HUSBANDS,
Commissioner of Deeds of N. J.

Filed December 21, 1918.

UNION COUNTY CIRCUIT COURT.

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JOSEPH FREEDMAN COMPANY,
A CORPORATION,

Plaintiff,

vs.

THE PAUL DELANEY COM-
PANY, INC.,

Defendant.

In Attachment.

On Contract.

ORDER.

The writ of attachment in this case having been re-
turned served by the Sheriff of the County of Union to
the present term duly executed, and no appearance hav-
ing been entered in the said cause by the defendant, it
30 is, on this twenty-third day of December, in the year

1918, on motion of Stamler & Stamler, attorneys of plaintiff, Ordered, that a notice of the issuing of said attachment at whose suit, against whose estate, for what sum and when returned, shall be published in the *Elizabeth Evening Times*, once a week for four successive weeks, and it is further ordered, that Samuel Koestler be appointed auditor to adjust and ascertain the amount due to the defendant and each of the applying creditors.

Rule actually entered December 31st, 1918.

GEO. S. SILZER,

10

STAMLER & STAMLER,

Judge.

Attorneys of Plaintiff.

Filed December 21, 1918.

UNION COUNTY CIRCUIT COURT.

JOSEPH FREEDMAN COMPANY,
A CORPORATION,

Plaintiff,

vs.

THE PAUL DELANEY COM-
PANY, INC.,

Defendant.

In Attachment.

ORDER PERMITTING

PLAINTIFF TO FILE

COMPLAINT AS

WITHIN TIME.

20

It appearing to the court that the above-entitled cause was commenced by an attachment in pursuance to the practice act, and that the writ of attachment was made returnable on the 26th day of December, 1918, and that through inadvertence the plaintiff has not filed its complaint within the time required by law, and that the defendant has not filed an appearance to said suit, and application now being made for leave to file said complaint as within time;

30

It is therefore on this thirtieth day of January, 1919, on motion of Stamler & Stamler, of counsel with plaintiff, ordered, that the plaintiff have leave to file said com-

plaint as within time on or before the 1st day of February, 1919.

GEO. S. SILZER,
Judge.

Filed January 31, 1919.

UNION COUNTY CIRCUIT COURT.

10	JOSEPH FREEDMAN COMPANY, A CORPORATION, <i>Plaintiff,</i> <i>vs.</i> THE PAUL DELANEY COM- PANY, INC., <i>Defendant.</i>	}	In Attachment. COMPLAINT.
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20 The plaintiff is a corporation organized under the laws of the State of New Jersey with its principal office in the City of Elizabeth, County of Union and State of New Jersey. The defendant is a corporation of the State of New York and is not a resident of this State, and is not a corporation organized under and by virtue of the laws of the State of New Jersey, or permitted to do business in the State of New Jersey under and by virtue of the laws of the State of New Jersey, and that summons cannot be served upon it.

First Count.

30 1. That said suit was commenced by a writ of attachment in pursuance to the statute in such case made and provided and in pursuance to an order made by William D. Wolfskeil, a Supreme Court Commissioner of the State of New Jersey, on December 21st, 1918, and on file in this court.

2. That on the 24th day of January, 1917, the plaintiff entered into a written contract with the defendant

whereby the defendant agreed to sell and the plaintiff agreed to purchase from the defendant 1,254 cases of ketchup containing 2,508 dozen, each bottle weighing 13 ounces, at the rate of 72½c. per dozen; that said goods were to be delivered during the calendar year 1917 f. o. b. Brocton, New York, freight allowed; a true copy of said contract is hereto annexed and made a part hereof and marked schedule "A."

3. That the said defendant failed and refused to deliver to the plaintiff the said 1,254 cases, or 2,508 dozen of ketchup, or any part thereof in accordance with the terms of the contract. 10

4. That the market price for said ketchup during the months of November and December, 1917, was \$1.82 per dozen, and that by reason thereof the plaintiff sustained a loss of \$1.09 per dozen, which was the difference between the contract price of ketchup at 72½c. per dozen and the prevailing market price that existed during the months of November and December, 1917, which was \$1.82, the loss amounting in all to \$2,746.26, which sum of money is still due and owing from the said defendant to the plaintiff, no part thereof having been paid. 20

Judgment will be claimed in the sum of three thousand dollars (\$3,000).

Second Count.

5. The plaintiff repeats paragraphs 2 and 3 of this complaint.

6. That by reason of the breach of the defendant in the failure to deliver the merchandise in accordance with the terms of the contract herein mentioned the plaintiff sustained damage in the sum of three thousand dollars (\$3,000). 30

Judgment will be claimed for the sum of \$3,000.

STAMLER & STAMLER,
Attorneys of Plaintiff.

Tomato Catsup Contract.

THE PAUL DELANEY CO., INC.,
FOOD PRODUCTS.

BROCTON, N. Y., 1/24-17.

Sold to JOSEPH FREEDMAN & Co., of Elizabeth, N. J.
Cases No. 10, net wt. avd. $8\frac{1}{2}$ oz. . . doz. ea, at . . doz.
Cases No. 11, net wt. avd. $10\frac{1}{2}$ oz. . . doz. ea. at . . doz.
Cases No. 12, net wt. avd. $11\frac{1}{2}$ oz. . . doz. ea. at . . doz.
Cases No. 16, net wt. avd. $17\frac{1}{2}$ oz. . . doz. ea. at . . doz.
10 Crates Glass Jars, gal. $\frac{1}{2}$ doz. ea. at . . doz.
Crates No. 10, Lacq. Tins, 1 doz. ea. at . . doz.

254 cs. 13 oz. avd. (reinstated) 2 at $72\frac{1}{2}$ c. "
1000 " 13 oz. " (new order) 2 at $72\frac{1}{2}$ c. "

F. O. B. Brocton, carload. . . .
freight allowed.

Specifications to be furnished on this contract. . . . 191.

Brand: UNION COUNTY.

Information concerning labels: } This reinstatement cancels
any claim against seller for
non delivery of catsup dur-
ing 1916.

Buyer will furnish.

If buyer furnishes his own labels, an allowance of 50c. per 1000 will be made. Labels are to be delivered F. O. B. seller's factory on or before August 1st, properly imprinted ready for use.

Packed in full weight glass panel style bottles, Crown Cap; bottles to be packed for shipping in corrugated fibre boxes.

30 QUALITY: The quality of the product specified in this contract to be first class; made from clean, thoroughly washed, ripe, New York tomatoes.

GUARANTY: The product specified in this contract is guaranteed against spoilage under normal conditions, and to comply with the Federal Pure Food Laws en-

acted June 30, 1906, and all State Pure Food Laws, and shall be free from all preservatives unless buyer specifies to the contrary.

TERMS: Cash, less 1% discount from net amount of invoice if paid within ten days from its date: 30 days net and due.

Seller shall not be liable for any nondeliveries caused by fire, strikes, casualties or causes beyond its immediate control.

All goods to be shipped and billed as the season's pack 10 is made ready, or before December 1st.

J. Freedman Co., Buyer.

THE PAUL DELANEY CO., INC., Seller.

By

By PAUL DELANEY.

Broker

Salesman, H. J. Weber.

Filed January 31, 1919.

UNION COUNTY CIRCUIT COURT.

JOSEPH FREEDMAN COMPANY,
A CORPORATION,

Plaintiff,

vs.

THE PAUL DELANEY COM-
PANY, INC.,

Defendant.

In Attachment.
ORDER DIRECTING
DEFENDANT TO
PLEAD.

20

It appearing to the court that the above-entitled cause was commenced by attachment under the Practice Act and that the plaintiff has filed its complaint within the time required by law and the order made by this court; and it further appearing that the defendant did 30 not file an appearance to said suit, and that the defendant is a corporation of the State of New York with

principal offices and place of business at Brocton, New York;

It is, therefore, on this first day of February, nineteen hundred and nineteen, ordered that the plaintiff's attorneys mail a true copy of this order and a true copy of the complaint heretofore filed in this cause to the defendant The Paul DeLaney Company, Brocton, New York, by registered mail on or before the fifth day of February, 1919.

- 10 And it is further ordered that a copy of this order be published in the *Elizabeth Evening Times*, a newspaper printed in the City of Elizabeth, on the fifth day of February, 1919, and on the twelfth day of February, 1919, and a copy of said printed notice shall be mailed to the defendant, The Paul DeLaney Company, Inc., Brocton, New York, by registered mail, on or before the eighth day of February, 1919;

- 20 And it is further ordered that the defendant shall, within thirty days from the date hereof, file its answer to said suit, and in default thereof the plaintiff shall be entitled to enter judgment interlocutory against the said defendant in accordance with the practice in such case made and provided.

Let this rule be entered.

J. J. BERGEN,
Justice Supreme Court.

Filed February 1, 1919.

UNION COUNTY CIRCUIT COURT.

JOSEPH FREEDMAN COMPANY,

A CORPORATION,

*Plaintiff,**vs.*THE PAUL DELANEY COM-
PANY, INC.,*Defendant.*

Action at Law.

On Attachment.

RULE TO SHOW CAUSE.

A writ of attachment having issued in the above-entitled cause against the rights and credits, moneys 10
and effects, goods and chattels of the said defendant, etc.,
and application having been made to me, a judge of the
Circuit Court for a Rule to Show Cause why said writ
of attachment should not be set aside and for good
cause shown, it is on this twenty-seventh day of Feb-
ruary, 1919,

Ordered, That the above-named plaintiff show cause,
at the Chancery Chambers, in the City of Jersey City,
Hudson County, State of New Jersey, on eighth day
of March, next, why the writ of attachment in the 20
above-stated cause should not be quashed, and it is
further

Ordered, That both the plaintiff and the defendant
have leave to take testimony upon two days' notice to be
given by either party for that purpose.

On motion of

KALISCH & KALISCH,

Attorneys for Defendant.

GEO. S. SILZER,

Judge.

Filed April 7, 1919.

UNION COUNTY CIRCUIT COURT.

JOSEPH FREEDMAN COMPANY, A CORPORATION, <i>Plaintiff,</i>	}	Action at Law.
<i>vs.</i>		
THE PAUL DELANEY COM- PANY, INC., <i>Defendant.</i>		

Stamler & Stamler, Attorneys for Plaintiff.

10 Kalisch & Kalisch, Attorneys for Defendant.

MEMORANDUM.

This is the return of a rule to show cause why an attachment should not be set aside.

The principal point put forth is that the defendant's goods were lured into the State for the purpose of this attachment. After a careful reading of the testimony, I can find nothing to justify this conclusion.

20 The next point is that there was not sufficient evidence before the Commissioner to warrant the issuing of the writ. There would be much force to this were it not for the fact that the contract was before the Commissioner, marked as an exhibit, and considered by the Commissioner. All of which is overlooked in defendant's brief.

30 It is also argued that the proceeding must fall because the order of the Commissioner does not comply with the statute. I cannot see any substantial difference as used, in the words "arising" and "resulting," but if there was, an examination of the bond shows that it is executed in accordance with the statute, and the word "resulting" is used. This is also true as to the failure to insert the clause as to "dismissal," for the bond also contains this provision.

The purpose of the order is that the statutory requirements may be furnished, and if they are, defendant

is protected. Plaintiff would be estopped from alleging that he was not bound by his obligation simply because the order omitted some particulars.

As to the ownership of the goods, it is sufficient to say that plaintiff was not obliged to accept goods which it did not think were such as it ordered, taking the chances, of course, of bad judgment or bad faith in so doing. And if so rejected the goods never became the property of anyone but defendant.

Now as to the contention in defendant's brief that it does not appear that the goods were rejected for a valid reason. An examination of Mr. Freedman, especially on page 17, will disclose that the goods were not as represented in the contract. 10

The objection that the goods were in the custody of the railroad company is based entirely upon the sheriff's return, which is merely descriptive, and cannot have much weight when it is met by the testimony of Mr. Freedman, and not contradicted.

Finding no virtue in the contention that the attachment should be set aside, the rule is dismissed, with costs. 20

Judge.

Filed March 31, 1919.

UNION COUNTY CIRCUIT COURT.

JOSEPH FREEDMAN COMPANY,
A CORPORATION,

Plaintiff,

vs.

THE PAUL DELANEY COM-
PANY, INC.,

Defendant.

In Attachment.

ORDER DISMISSING

RULE TO SHOW CAUSE 30

On application of the defendant, a Rule to Show Cause was issued on the 27th day of February, 1919, why the

- writ of attachment should not be set aside, and by said rule leave was given to either party to take testimony, and the Court after considering and examining the moving papers in said cause, together with the affidavit in attachment; the order for the issuance of the attachment; the bond in attachment given by the plaintiff; the levy and return made by the Sheriff of the County of Union under said writ of attachment; the exhibits offered by the parties to this action, and the testimony taken in
- 10 pursuance to the Rule to Show Cause; and the Court also having duly considered the Briefs of Counsel for the respective parties, does hereby determine as follows:
1. That the Supreme Court Commissioner had authority to award the writ of attachment because the affidavit and the written contract between the parties (which contract was marked as an Exhibit by the Supreme Court Commissioner) does contain proof that the plaintiff had a cause of action against the defendant as required by Section 84 of the Practice Act, and that
 - 20 the findings of fact by the Commissioner were sufficient to base an order for the issuance of a writ of attachment.
 2. That the Order of the Supreme Court Commissioner is not defective and does comply with Section 85 of the Practice Act.
 3. That the Clerk of the Union County Circuit Court was properly authorized to issue the writ of attachment.
 4. That there was proof before the Supreme Court Commissioner showing that there was due to the plaintiff the sum of \$2,746.26.
 - 30 5. That the property attached was the property of the defendant, a nonresident, and were not in transit in custody of a common carrier.
 6. That the goods were not lured into the State of New Jersey for the purpose of attaching them.
 7. That the bond given by the plaintiff in compliance with the order of the Supreme Court Commissioner was executed in accordance with the statute in such case made and provided.

8. That the goods shipped by the defendant to the plaintiff, and attached by the Sheriff of the County of Union under the writ, were rejected by the plaintiff for a valid reason.

It is therefore, on this twenty-ninth day of March, 1919, on motion of Stamler & Stamler, of counsel with the plaintiff, ordered that the Rule to Show Cause heretofore issued in this cause on the application of the defendant, be and the same is hereby dismissed, with costs to be taxed;

10

And it is further ordered that the Clerk of this Court be, and is hereby directed, in taxing the costs of the plaintiff on this order, to include such sums of money as the plaintiff, by affidavit shall prove, it has actually expended in payment for the original or court copy of the depositions taken in pursuance to the Rule to Show Cause.

GEO. S. SILZER,

Judge.

Filed April 1, 1919.

UNION COUNTY CIRCUIT COURT.

20

JOSEPH FREEDMAN COMPANY, A
CORPORATION,

*Plaintiff,**vs.*

PAUL DELANEY COMPANY, A
CORPORATION,

Defendant.

Action at Law.
On Contract.

EXAMINATION OF WITNESSES.

(Filed April 3, 1919.)

Examination of witnesses taken before me, Samuel
Koestler, a Master in Chancery of the State of New
Jersey, at my office, No. 207 Broad Street, Elizabeth,

30

N. J., on the 5th day of March, 1919, at 2 P. M., pursuant to Rule to Show Cause made in the above-entitled cause and upon consent of the attorneys of the respective parties. Said attorneys having consented that said depositions might be taken stenographically and reproduced to typewriting, and that the signature of all witnesses be waived.

Appearances—Mr. Harry Kalisch, of Kalisch & Kalisch, for Defendant; Mr. John J. Stamler, of Stamler & Stamler, for Plaintiff.

SAMUEL KOESTLER,
Master in Chancery of New Jersey.

Joseph Freedman, a witness having been called by the defendant, and having first been duly sworn according to law, on his oath says.

By Mr. Kalisch.

Q. The Joseph Freedman Company is the plaintiff in this suit?

A. Yes, sir.

Q. How are you connected with the corporation?

20 A. President of the Corporation.

Q. And you are also the general manager.

A. Yes, sir.

Q. And all business is transacted through you for the company?

A. Yes, sir.

Q. Just what is the nature of the business you do, that is, the corporation?

A. Wholesale grocery business.

Q. And you sell to retailers?

30 A. Right.

Q. Have you a railroad siding connected with your establishment?

A. Yes, sir; that is across the way.

Q. Does it come on to your property?

A. No, sir.

Q. It is next to your property?

A. Yes, sir.

Q. And when the goods which you purchase are unloaded, how are they taken over to your place of business?

A. By trucks.

Q. By trucks?

A. Automobile trucks or horse and wagon.

Q. What is the distance they have to go to get to your place?

A. About 200 or 300 feet.

Q. And is there a fence that surrounds this property? 10

A. No, sir.

Q. Just an open lot?

A. Yes.

Q. Just an open lot in the rear of your property where they are unloaded?

A. In the yard not far from where the business is located.

Q. You say the goods are unloaded in the yard, the back yard, from the trucks?

A. Yes, sir. 20

Q. And the truck get them?

A. Yes.

Q. From the siding across the street?

A. Yes.

Q. You load them from the freight car on to the truck?

A. My men do that.

Q. Your men or the railroad men?

A. My men.

Q. How many trucks were there? 30

A. I do not know, it depends how many I needed.

Q. How are the trucks run, by horse or automobile?

A. Horses and automobiles.

Q. Do you remember the shipment that was delivered on the 18th of December, from the defendant, Paul DeLaney Company; do you remember that shipment?

A. I do not know the exact date; I remember the shipment.

Q. When and where did you receive the shipment?

A. I do not remember; the receiving clerk was there, and he is always there to receive shipments.

Q. Did you receive this shipment?

A. No, sir.

Q. Who got them?

A. The receiving clerk.

Q. Who removed the good from the car?

A. Why, the trucks.

10 Q. Who removed the goods from the car?

A. My men. They placed the goods on the truck.

Q. Who placed them on the trucks?

A. Why, the driver and the helpers from the inside.

Q. Your men?

A. Yes.

Q. Where did they take the goods?

A. We hired a cellar to put them away.

Q. They were removed directly to that cellar?

A. Yes, sir.

20 Q. When did you hire that cellar?

A. I hired it the same day I had to empty the car.

Q. Is that what you do generally?

A. No, I have warehouse enough.

Q. And from whom did you hire this cellar?

A. From a letter-carrier.

Q. What is his name?

A. He owns the post office, his name is Felix Mc-Tiernan.

Q. Where is that located?

30 A. At the corner of Third and Livingston Streets.

Q. And you hired it on the same day that the goods arrived?

A. The very same day, about when we unloaded the car.

Q. Did you have the cellar before you unloaded the car or after?

A. The same afternoon when I had to unload the car I went out and hired the cellar.

Q. The same afternoon you had to unload the car you went out and got this cellar?

A. Yes, sir.

Q. That was before you unloaded?

A. Yes, sir.

Q. When did you get word that the car had arrived?

A. I don't remember the date.

Q. Was it the same day you hired the cellar?

A. No, sir.

Q. You got word the car arrived after you hired the cellar? 10

A. No.

Q. When did you hire the cellar?

A. I hired the cellar when they moved the car on the track to be unloaded.

Q. When did you hire the cellar?

A. Before I unloaded it.

Q. That was when you hired the cellar?

A. Yes, sir.

Q. Now, how long before the car was unloaded did you hire the cellar? 20

A. Probably a half hour.

Q. A half hour before you touched the goods or went to the car, where it was standing to be unloaded, you went and got this cellar?

A. Yes.

Q. How long a time did you lease it for?

A. Indefinitely.

Q. Indefinitely?

A. Yes.

Q. Did you pay rent? 30

A. Yes.

Q. How much rent did you pay?

A. \$5.00.

Q. Did you hire it for a month?

A. I did.

Q. You hired it for a month.

A. I did.

Q. Did you pay for it?

A. Yes, sir.

Q. Had you ever hired it before?

A. No, sir.

Q. Now, do you remember calling to Mr. Stamler's office about the claim against the Paul DeLaney Company?

A. Yes, sir.

Q. Do you remember when you went?

A. About one and one-half or a year ago.

10 Q. Can you give me the date?

A. I don't remember exactly.

Q. Can you give me the month?

A. No, sir.

Q. Do you remember it was about that time, October 25th, 1917, when you went to see Mr. Stamler, your lawyer, about the claim which is the subject-matter of this suit?

A. About that time.

20 Q. How often, since that time, did you call to see him about the same matter?

A. I don't run after Mr. Stamler. I don't know whether I saw him again.

Q. Did you see him more than once about that claim?

A. I do not remember whether I saw him again about that claim.

Q. Did you see him in 1918?

A. Yes, sir.

Q. About this claim?

A. No, sir; I have not seen him about this claim.

30 Q. I show you a letter dated December 19th, 1918, from Stamler & Stamler to the Paul DeLaney Company, in which Mr. Stamler writes, "We have this day prepared necessary papers for a writ of attachment to issue against the rights and credits of your company in the State of New Jersey on the claim of the Joseph Freedman Company, on its contract made with you on the twenty-fourth day of January, 1917." I call your attention to that letter and ask you whether you remem-

ber being at Mr. Stamler's office at any time near that time?

A. I may have been.

Q. Do you remember how long before this letter was written you were there?

A. No, sir.

Q. Was it a month or a week?

A. I could not say.

Q. Do you remember that you were there concerning the subject matter of this suit?

10

A. I don't recall whether it was in relation to that letter.

Q. Do you remember signing an affidavit in preparation of this writ of attachment?

A. I do remember signing the paper. I don't remember whether it was in reference to this letter or not.

Q. This letter reads, "We have this day prepared the necessary papers for a writ of attachment," and that letter is dated December 19th; and I ask you whether in the preparation of the papers in the writ of attachment, you were in the office to sign the affidavit?

20

A. I don't remember whether it was that time.

Q. Do you remember the date when you were there?

A. No, sir.

Q. Now, on the 10th you wrote a letter to the Paul DeLaney people, did you not?

A. Yes, sir.

Q. Where was that letter written?

A. In Mr. Stamler's office.

Q. And you signed it?

A. Yes, sir.

30

Q. So, you were there on the 10th?

A. I did not remember what date I was there and signed that letter.

Q. December 10th, 1918, you were in Mr. Stamler's office the day the letter was written?

A. I was there.

Q. That letter is dated December 10th, 1918?

A. Yes.

Mr. Kalisch—I offer this letter in evidence, a true copy of said letter reads as follows:

“ELIZABETH, N. J., December 10th, 1918.
Messrs. Paul DeLaney & Co., Brocton, N. Y.
Gentlemen:

10 Your Mr. Henry J. Weber, the Eastern representative is now in my office and requested me to inform you that if you will ship a car of kep-sup in pursuance to contract dated June 25th 1918, that he will pay the same in the usual course of business and that this shipment has no reference to the contract of January 24th, 1917, and that the invoice will be paid in due course of business without any litigation.

Yours truly,

J. FREEDMAN.”

Marked *Exhibit 1*.

Q. Now, on the day that letter was written and dated, which was December 10th, 1918, you were in Mr. Stamler's office to sign it?

20 A. Yes, sir.

Q. I call your attention to that letter of December 10th, and I ask you who dictated it?

A. Mr. Stamler.

Q. Mr. Stamler, in your presence?

A. Mr. Weber wanted the letter to be written this way and Mr. Stamler dictated it to his stenographer in our presence, and I signed it.

Q. Had you, before you wrote this letter, received from the Paul DeLaney Company a letter in reference to the 1918 shipment?

30 A. Yes, sir.

Q. And was this letter of December 10th, which is marked *Exhibit 1*, in answer to their letter of December the 2d?

A. I presume so. Yes, sir.

Mr. Kalisch—The letter is offered as *Exhibit 2* and a true copy is as follows:

“12 2 1918.

Joseph Freedman & Co.,
Elizabeth, New Jersey.

Gentlemen:

We are pleased to advise that your car of UNION COUNTY Catsup is packed and ready for shipment, but before shipping we want to have a distinct understanding in regard to settlement for same, and will ask that you kindly give us your assurance that we are released by you from any former claime for undelivered capsup, and that you will settle for this shipment in accordance with the terms of invoice and at price billed, without any controversy or legal action. 10

If you will kindly wire us collect this assurance upon receipt of this letter we will make shipment immediately, confirming your wire by letter.

We feel that a bonefide understanding in the matter will avoid any possible misunderstanding or controversy. After thoro investigating the case the Federal Board of Commissioners ruled that we had done the best we could, weather conditions considered, and exempted us from any blame. Our buyers have taken the same attitude and nearly all of our this season's capsup output has been shipped to our old customers, and billed and paid for at this year's prices. 20

Promptly upon receipt of your wire your car will go forward. The catsup we are shipping you is first-class product and we are confident will give your trade excellent satisfaction. 30

Yours very truly,

THE PAUL DELANEY Co., INC.,
DeLaney."

PD-K

Q. The letter marked *Exhibit 2*, the one I just showed you, was received by you at your place of business?

A. Yes, sir.

Q. Then you brought it down to Mr. Stamler?

A. Yes, sir.

Q. I call your attention to a letter written by Stamler & Stamler, dated December 19th, 1918, and addressed to the Paul DeLaney Company, and ask you whether you ordered that letter to be sent by your attorney?

A. Mr. Stamler handles all my correspondence and naturally he did it according to my instructions.

10

Mr. Kalisch—It is stipulated by counsel that all letters and telegrams, written by one party to the other, or by their attorneys, shall be entered in evidence without formal proof. Copies of which are hereto annexed and made part hereof.

Letter of December 19th, 1918, Stamler & Stamler, marked *Exhibit 3*.

Q. You say letter marked *Exhibit 3* was written by your instructions?

A. Yes, sir.

20

Q. Now, Mr. Freedman, in hiring this cellar, what was your object in hiring this cellar, to store these goods?

A. Yes, sir.

Q. Were they rejected goods?

A. Yes, sir.

Q. So, therefore, you separated them from your own goods.

A. Yes, sir.

Q. Because they were rejected?

30

A. Because they were rejected on account of quality.

Q. Because they were rejected on account of quality, you hired the cellar to store them?

A. Yes, sir.

Q. Now, I show you a contract dated January 24th, 1917, and I ask you whether that is the contract which you made with the defendant and which is the subject-matter of this suit?

A. Yes, sir.

Q. That is the one?

A. Yes, sir.

Mr. Kalisch—Contract is offered in evidence and marked *Exhibit 4* and it is admitted that a copy of it is contained in the complaint in this cause of action.

Cross-examination, by Mr. Stamler :

Q. *Exhibit 4* shown to you by counsel was the contract which you made on January 24th, 1917, with The Paul DeLaney Company for the delivery to you of 1,254 cases of catsup? 10

A. Yes, sir.

Q. Did you get any of that catsup?

A. No, sir.

Mr. Kalisch—This is all objected to. It is not cross-examination and it has absolutely no bearing upon the present issue. It is irrelevant and immaterial.

Q. I show you a letter dated September 7th, 1917. Mr. Stamler—I offer it in evidence and ask that it be marked *Exhibit 1* on the part of the plaintiff. 20

Mr. Kalisch—I object to it on the ground that it is immaterial and irrelevant at this time in this proceeding and is not cross-examination.

Letter of September 7th, 1917, is marked *Exhibit P-1*.

Q. Did you follow out the instructions contained in that letter?

Mr. Kalisch—I object to that on the ground that it is irrelevant and immaterial and not cross-examination, and calls for a legal conclusion. 30

A. I did.

Q. Did you in compliance with the letter of September 7th, 1917, send to The Paul DeLaney Company the labels they requested in that letter?

Mr. Kalisch—I object upon the ground that it is not cross-examination and is irrelevant and immaterial.

A. Yes.

Q. Did you get the goods?

Mr. Kalisch—I object upon the same grounds.

A. No, sir.

Q. Now, Mr. Freedman, you made a contract with The Paul DeLaney Company in June of 1918?

A. Yes, sir.

Q. I show you the contract and ask you whether that is the contract?

10 A. It is.

Mr. Stamler—I offer it in evidence and it is marked *Exhibit P-2*.

Q. After the making of this contract, what did you do in relation to the contract?

A. Ordered the goods.

Q. After the ordering of the goods what did you do?

A. I go out and sell against it.

Q. What else?

A. And make contracts against it.

20 Q. Did you in this case make contracts?

Mr. Kalisch—I ask that that be stricken out as it is immaterial and irrelevant and not proper cross-examination, as I asked him nothing concerning any 1918 contract.

A. Certainly.

Q. Last year you received a letter from The Paul DeLaney Company asking you to send money for re-printing labels, did you get such a letter?

A. Yes, and a bill.

30 Q. Did you pay for it?

Mr. Kalisch—I object, as it is irrelevant and immaterial and is not cross-examination.

A. Yes, I sent the money to The DeLaney Co.

Q. You received this letter from The Paul DeLaney Company, which is marked *Exhibit 2*, on behalf of the defendant?

A. Yes.

Q. You received that letter, you recall it?

A. Yes, sir.

Q. Did you reply to that letter until Mr. Weber came to see you?

A. No.

Q. And who is Mr. Weber?

Mr. Kalisch—I object, as it is irrelevant and immaterial and not cross-examination, and it is impossible, except through hearsay, to say who Mr. Weber is.

Q. Who is Mr. Weber?

A. He is supposed to represent The Paul DeLaney 10 Company.

Q. You met him where?

A. That day when he came to see me.

Q. Where?

A. Down at my office.

Q. Where did you go with him?

Mr. Kalisch—I object as it is irrelevant and immaterial and not cross-examination, and whatever Mr. Weber said or did could not have a binding effect upon the defendant.

20

A. We went to Stamler & Stamler's office.

Q. What happened there on December 10th?

Mr. Kalisch—I object to this question on the same grounds as the previous question.

A. Mr. Weber wanted me to write a letter and told Mr. Stamler just what he wanted written. Mr. Stamler dictated to his stenographer and the letter was signed by me, then Mr. Stamler told him—

Mr. Kalisch—I object on the same ground as objected to the previous questions.

30

A. Mr. Stamler told Mr. Weber that this has nothing to do with the claim what Mr. Freedman has against the DeLaney Company, and Mr. Freedman is going to take the catsup according to his contract, and I am going to file suit against the Paul DeLaney Company for the loss of our previous contract.

Q. What did Mr. Weber say?

Mr. Kalisch—I object to what Mr. Weber said on the same grounds as previously mentioned.

A. I don't blame you, it is not more than right.

Q. After that conversation the letter was written?

A. Yes, sir.

Q. Did Mr. Weber promise to do something for you at that time?

Mr. Kalisch—I object.

A. Mr. Weber said he would try to do all in his power to try to straighten this matter out.

Q. What matter out?

10 Mr. Kalisch—I object.

A. For the last catsup.

Q. When Mr. Weber called to see you on December 10th, what did he say he came there for?

A. To straighten out the matter.

Q. Who sent him there?

Mr. Kalisch—I object.

20 A. Paul DeLaney Company sent him over to tell me that the car of catsup is ready to be shipped, it was in the car, but they wanted me to give them a letter stating that I would pay for that catsup and stating that there would be nothing in connection with the other car of catsup.

Q. To whom was this letter of December 10th given?

Mr. Kalisch—I object on the same grounds as previously mentioned.

A. It was given to Mr. Weber, and he took it away with him.

30 Q. The next you heard about this catsup was when you received notice from the Railroad Company that the merchandise had arrived.

A. Yes, sir.

Q. Have you got a record in your office or anywhere when this car of catsup arrived?

A. Yes, sir.

Q. You have a record?

A. Yes, sir.

Q. You have not got it here?

A. No, sir.

Q. The car came to Elizabeth on the 18th of December?

A. Yes, sir.

Q. Did you open the car yourself?

A. The car was opened on the track by my men.

Q. On the same day it came in?

A. Yes, sir.

Q. What did you do?

A. They brought me in a carton of catsup.

Q. How many bottles are in a carton?

10

A. Two dozen.

Q. Why did they bring them in?

A. For me to examine.

Q. Is that the practice?

A. Yes, sir.

Q. Everything that arrives?

A. Yes, sir.

Q. And did you examine it that day?

A. Yes, sir.

Q. What did you find?

20

A. I found the catsup to be thin and smelled of garlic. It is an inferior catsup that I could not handle or sell to my trade.

Q. Was that the quality of catsup that you contracted for?

Mr. Kalisch—I object on the ground that the contract speaks for itself, and that he could not change the terms of any written instrument.

A. No, sir.

Q. How did you determine that the quality is not according to the contract? What did you do?

31

A. I had previous catsup from them and from other concerns which showed the difference in quality.

Q. What else did you do to determine the quality? Did you test it yourself?

A. I did test it myself and others tested it.

Q. What did you find?

A. I found it to be thin and bitter and it has a garlic

smell, and therefore I could not use the catsup under that condition.

Q. What do you mean by thin?

A. Watery, all liquid.

Q. You mean it is too liquid?

A. Yes, sir.

Q. On the next day, December 19th, did you telegraph to The Paul DeLaney Company?

A. Yes, sir.

10 Q. Was it or was it not the first time that you came into my office, the time this telegram was sent, after the arrival of this car of catsup?

A. Yes, sir.

Q. In relation to the car of catsup, that is, from December 10th to December 19th, you had not been in my office relating to this car of catsup?

A. No, sir.

Q. And on December 19th, a telegram was prepared in my office, by me, which was sent to Paul DeLaney Company?

20

A. Yes, sir.

Q. Is this a copy of the telegram?

A. It is. Just exactly.

Mr. Stamler—Copy of telegram and marked *Exhibit P-3*.

Q. And on the same day, December 19th, 1918, another letter was sent to Henry J. Weber, agent and representative of The Paul DeLaney Company?

A. Yes, sir.

30 Q. On the same day the letter, *Exhibit P-3*, was also dictated and mailed?

A. Yes, sir.

Q. At the time these letters were dictated and telegram sent, where were the goods?

A. Down on the track in the car.

Q. When did you hire from McTiernan the cellar; was it before or after you saw me?

A. It was two or three days after I saw you.

Q. After the 19th day of December?

A. Yes, sir.

Q. And did you get a receipt from McTiernan for your \$5.00?

A. Yes, sir.

Q. Does that show the date when you actually hired it?

Mr. Kalisch—I object to that on the ground that the receipt speaks for itself and you can't offer evidence to show what it contains; I also object to the previous question on the ground 10 that it has no bearing upon the present issue.

A. Yes, sir.

Q. Do you recall that after this suit was started, Mr. Weber came to see you again?

A. Yes, sir.

Q. And you came with him to my office?

A. Yes, sir.

Q. What was the object of that call?

A. He had a letter in evidence that Paul DeLaney Company authorized him to make a settlement upon 20 certain terms stated in that letter.

Q. At that time did you bring with you the samples of the merchandise which were shipped to you against the contract of June 25th, 1918?

A. Yes, sir.

Q. Were they examined by you in presence of Mr. Weber and myself, at that time?

A. Yes, sir.

Q. Did you show Mr. Weber why you rejected that car? 30

Mr. Kalisch—I object as it is irrelevant and immaterial and that Mr. Weber is not authorized to make any statement binding on the defendant.

A. Yes, sir.

Q. Did Mr. Weber read that letter to you?

A. Yes, sir.

Q. And was a copy of that letter made in my office at that time?

A. Yes, sir.

Mr. Stamler—Copy of letter 1-8-19 offered for identification and marked *Exhibit P-4* for identification.

By Mr. Kalisch.

Q. I show you a letter dated January 17th, 1919, written by your attorney, and ask you whether that letter was written by your instructions?

10 A. It was.

Marked *Exhibit 6*.

Q. This letter, *Exhibit 6*, was written by your instructions?

A. Yes, sir.

Q. Now, Mr. Freedman, you say that you opened up a case of catsup, how many bottles did you take out?

A. We opened this case and about six other cases and took out two bottles from each case.

Q. How many did you test?

20 A. Fourteen bottles.

Q. How many cases were there on the car?

A. I did not count them.

Q. How many did you order under this contract?

A. According to the contract. 1350 cases.

Q. 1350 cases, and in each case how many bottles were there?

A. Two dozen in each case.

Q. That makes 42,400 bottles?

A. Yes, sir.

30 Q. And out of that you examined 14 bottles?

A. Yes, sir.

Q. What did you find the matter with the catsup?

A. It was thin and liquid like.

Q. What other trouble?

A. It had a smell of garlic.

Q. Anything else?

A. That is about all.

Q. They were absolutely unmarketable?

A. I don't say that.

Q. Could you not use them?

A. It was of inferior quality.

Q. Could you sell them for the same price if they were not objectionable?

A. No, sir.

Q. You could not?

A. No, sir.

Q. Now, you say that is is your custom to take out boxes and examine them before you unload?

A. Yes, sir.

10

Q. Where were you unloading these boxes?

A. On the track.

Q. Who helped you unload it?

A. My men did it.

Q. Your men?

A. I don't do it.

Q. Where did they bring the boxes to?

A. One case was brought in the office.

Q. What did you do with the other six?

A. We opened them in the car.

20

Q. Who did?

A. They brought the bottles to me, they took out a couple of bottles in each case.

Q. They took out a couple of bottles in each case?

A. Yes, sir.

Q. And the balance were left in the car?

A. Yes, sir.

Q. And then you made up your mind to reject them when you examined them?

A. Yes, sir.

30

Q. Now, who is this man McTiernan?

A. He is a letter carrier, he is the person who owns the post office.

Q. How near to your place of business?

A. About a block.

Q. On which there is a railroad siding?

A. No, sir.

Q. How do you get the goods into his place?

A. The front way.

Q. How did you do it, with a wagon?

A. Yes, sir.

Q. And where is his place, on the top floor?

A. In the cellar.

Q. And does he work as a letter carrier?

A. Yes, sir.

Q. What time of the day was it that you examined this catsup?

A. I can't remember.

10 Q. In the afternoon or morning?

A. I could not say whether it was morning or afternoon.

Mr. Henry J. Weber, sworn for complainant.

By Mr. Kalisch.

Q. Mr. Weber, what is your business?

A. I am in the commission business, I am a broker.

Q. Have you any connection with the defendant, Paul DeLaney Company?

20 A. No, sir.

Q. Do you handle their goods?

A. I sell them on a commission basis.

Q. Do you handle other people's goods?

A. Yes, sir.

Q. Did you represent them at all?

A. No more than anybody else.

Q. What do you mean by that?

A. When I get goods from them, I sell them, when I get goods from other people I also sell them.

80 Q. You are an independent concern?

A. For the past 18 months, almost 2 years.

By Mr. Stamler.

Q. You are simply a dummy, as far as The Paul DeLaney Company is concerned?

Mr. Kalisch—I object; that is a misstatement of the evidence.

A. I am a broker, I sell on a commission basis only.

Q. Do you know that you are under oath?

A. Yes, sir.

Q. Are you the eastern representative of that company?

A. I used to be.

Q. When did you sever your connections?

A. About two years I have been selling for myself.

Q. Were you not the eastern representative of the company on December 23d, 1918?

A. No.

Q. Sure of that?

10

A. Positively.

Q. You are sure you are not lying; just examine this letter of December 23d, and see whether you did not tell an untruth when you said you were not the eastern representative of the company?

A. The name "Eastern Representative" is very often used by my stenographer.

Q. Did you sign this letter?

A. I did.

Mr. Stamler—I offer the letter in evidence. 20

Letter of December 23d, 1918, is offered in evidence and marked *Exhibit P-6*.

Mr. Kalisch—I object to it, however, on the ground that it is irrelevant and immaterial.

Q. On December 10th, 1918, you came with Mr. Freedman to the office of Stamler & Stamler; what was the object of that call?

Mr. Kalisch—I object to it on the ground that it is not cross-examination.

Mr. Stamler—I make him my own witness. 30

A. I came here with Mr. Freedman from his office to receive his written statement that he would not bring legal action against The Paul DeLaney Company for the catsup, which the said company was unable to deliver in 1917, and that the car which Mr. Freedman had ordered in 1918 would be paid for in the regular way.

Q. On whose behalf did you come?

A. I came at the request of The Paul DeLaney Company, simply out of courtesy, because they asked me; I did not even make that sale.

Q. You came on behalf of The Paul DeLaney Company?

A. Yes.

Q. At that time the question of the contract of 1917 came up, did it not, in our office?

A. Oh, yes.

10 Q. And at that time I on behalf of Mr. Freedman told you that Mr. Freedman intends in good faith to pay for the car of catsup about to be shipped, and had no reason to refuse to make a statement in writing to that effect?

A. That is correct.

Q. At that time I also told you that I did not believe that The Paul DeLaney Company treated Mr. Freedman right on the 1917 contract?

Mr. Kalisch—I object as it is irrelevant and immaterial.

20 A. I recall you making a statement, something to that in effect.

Q. And at that time I also said that we were going to sue The Paul DeLaney Company, at some future time, for the 1917 contract?

A. No, that I do not recall.

Q. And did you not at that time state that "I really don't blame you, I can't understand why The Paul DeLaney Company did not give you part of the catsup of their 1917 shipment"?

30 A. I made no such statement.

Q. When you left my office did you not understand that Mr. Freedman intended to pay for the car of catsup in transit, and that Mr. Freedman in the future would sue The Paul DeLaney Company?

A. No.

Q. You did not understand that at all?

A. No.

Q. And I did not make that clear to you?

A. No.

Q. Was there talk about that, about suing The DeLaney Company in the future?

A. No, because I would have mentioned or spoken of that in my letter to The Paul DeLaney Company.

Q. Giving them the answer as to what transpired in Elizabeth?

A. Yes, sir.

Q. Will you now say, Mr. Weber, that no such conversation took place?

10

A. I don't think I forgot it.

Q. You are sure about that?

A. I don't think I forgot it, as it is a very serious question.

Q. Don't you recall that I took out the letters and correspondence at that time between The Paul DeLaney Company and our office in reference to that claim, and even told you that The Paul DeLaney Company never answers a letter?

A. You spoke about your not receiving a letter, but you did not show me any letters that I know of. 20

Q. Do you recall that I took out the file of letters and had them before me at that time?

A. That may be so but I do not know what you had in your hand.

Q. Did I not show you the letter of December 7th, 1918, which is marked *Exhibit P-1*?

A. Mr. Stamler, I could not swear to that.

Q. Do you recall that the reason for my showing you the letter was that you stated that the company stated to you that they had no catsup to make deliveries with in 1917? 30

A. I do not.

Q. Did you tell us why they did not deliver in 1917?

A. Yes, but I don't recall it was on account of your having shown me that letter.

Q. Did you not, at that time, state to us that the company was unable to make any of the deliveries in 1917?

A. Most of the deliveries, that is, I did not have a right to say that. I do not know what was delivered, but I do know about a number of my people did not get their full quota, if any.

Q. Your people, you mean the sales you made?

A. The sales I made the year before for The Paul DeLaney Company.

10 Q. And then was it not a fact that I showed you the letter of December 17th, 1917, wherein they state they were now ready to make delivery, kindly send the labels?

A. Mr. Stamler, I don't know.

Q. You also recall that I stated to you at that time that Mr. Freedman had this claim in the hands of a New York attorney?

A. I don't remember.

Q. And that The Paul DeLaney Company did not even answer the New York attorney?

A. I don't remember.

20 Q. You agreed with us at that time that The DeLaney Company did not treat the plaintiff right?

A. I don't think so.

Q. I show you a little pamphlet, what is that?

A. That is from the S. J. Austin Company, which I represent.

30 Q. Does that letter show on the heading, "Henry J. Weber, 522 Kinney Building, Newark, N. J., November 23d, 1918. To the Stockholders of The Paul DeLaney Co., Brocton, N. Y., and Lin-Del Company of Buffalo, N. Y."?

A. Yes.

Q. Why did you issue this letter?

A. This is a private letter of my own, that I issue to the people who bought stock in these companies, and I told them about my trip to the company and what I found.

Q. And at that time you were no longer the eastern representative of The Paul DeLaney Company?

A. Oh, no.

Exhibit marked *Exhibit P-7* for identification.

Q. You took up the contest of this case on behalf of The Paul DeLaney Company?

A. I simply came down here out of courtesy, with that letter. I have nothing to do with The Paul DeLaney Company, or with the sale of merchandise in 1918.

Q. You went to the office of Mr. Kalisch and made a statement and you employed him as counsel, did you not?

10

A. Yes.

Q. And who directed you to do that?

A. I was asked to look for counsel to represent us and as Mr. DeLaney could not come down so I was asked to look after it.

Q. And you told them at that time that you were the eastern representative?

A. I don't think I did.

Q. You handed over to Mr. Kalisch all the correspondence in this case?

20

A. Yes, sir.

Q. And you also told him the history of the case and made him acquainted with it?

A. As much as I knew.

Q. Mr. Kalisch dictated an affidavit in this case in your hearing?

A. No.

Q. I will show you a paper and ask you whether you saw it before?

A. I do not know anything about this.

30

Q. Sure?

A. Positively not.

Q. Were you there when Mr. Kalisch dictated this to his stenographer?

A. No.

Q. You came to Elizabeth subsequently in connection with this matter?

A. Yes.

Q. After the attachment suit was started, do you recall that?

A. Yes.

Q. You called for the purpose of trying to settle up this matter?

A. With that letter. Yes, sir, I did that.

Q. It is not a fact that the letter of December 19th, written to you by Stamler & Stamler, is referred to in your letter *Exhibit P-6*?

10 A. I could not tell you whether I am referring to this letter here (indicating letter of December 19th, 1918). I think that my letter P-6 refers to the letter of December 19th, 1918.

Letter of December 19th, 1918, offered in evidence as *Exhibit P-7*.

Q. Did you come to Elizabeth again on January 17th, 1919, when you met Mr. Freedman and came to my office with the samples of the product?

A. Yes.

20 Q. And at that time you came also on behalf of The Paul DeLaney Company?

A. Yes.

Q. They mailed you a letter with express instructions of authority what you can do and not do for making a proposition of settlement?

A. Yes.

Q. Mr. Freedman at that time had catsup of several makes before you, he opened them and tried to show you the difference in the catsups as to quality?

30 A. Yes.

Q. You said you did not know anything about catsup and were not an expert, and you could not determine whether Freedman is right or wrong?

A. Yes.

Q. And at that time you made a proposition to Mr. Freedman that the company is willing to ship to Mr. Freedman 500 cases, 11 oz. "American Maid" at 72c. per dozen, freight allowed to destination, this is 40 per cent. advantage of the amount indicated by the Federal

Board ruling and is an indication of our desire to settle up amicably with the Freedman people?

A. That is about the gist of what I said.

Q. That statement was in a letter addressed to you, and with your kind permission you allowed us to make a copy of that statement?

A. I did not let you copy the whole letter, I told your girl what to write.

Q. I ask you whether that is not a true copy of that portion of the letter sent to you by The Paul DeLaney Company to you? 10

A. I would not swear that is correct.

Q. Is it approximately right?

A. Approximately.

Q. Have you the original letter?

A. I presume that is in our papers.

Mr. Kalisch—I have that letter and agree to the extract.

Marked *P-4* for identification, but offered as a full exhibit. 20

That letter is addressed to Dear Weber and signed Paul DeLaney Company.

Q. You had complete charge over this litigation?

A. Oh, no.

Q. You did not have charge?

A. No. He had nothing to do with it whatsoever.

Q. When did you take the last contract on behalf of The DeLaney Company?

A. I believe it was the Freedman contract in 1917.

Q. Since that time you have not made a single contract? 30

A. No, excepting one sale to the Zoological Park in New York.

Q. Were you at any time employed by The Paul DeLaney Company to sell its capital stock?

A. No.

Q. That was a different company selling their stock?

Exhibit P-7 for identification refers to The

Paul DeLaney Company, the defendant in this suit.

Mr. Kalisch—I object on the ground that it is not evidence and therefore you cannot state the contents of it.

A. Yes.

Mr. Stamler—I offer *Exhibit P-7* as a full exhibit.

10 Mr. Kalisch—I object on the ground that it is irrelevant and immaterial and that Mr. Weber is not authorized to make any statement for the defendant, Paul DeLaney Company.

20 Mr. Kalisch—It is stipulated by and between counsel that I make this statement: That the affidavit which was shown to Mr. Weber concerning which he was asked whether he signed it, and he answered that he never saw it. That affidavit was drawn by me and used by me in the application for the Rule to Show Cause, which I made before Judge Silzer, and I informed Judge Silzer at the time that the affidavit was not signed, but that when it was signed that I would give a copy to Mr. Stamler. Mr. Stamler said it would make no difference and he would take the copy unsigned. The reason it was not signed was that I had no opportunity to get hold of Mr. Weber before going to Elizabeth on the day I made the application, and after the application was made I showed the affidavit to Mr. Weber, and he informed me without reading it through that the first part in which I named him as the sales agent was incorrect, beyond that Mr. Weber never signed or read the affidavit. I had not been informed as to what capacity Mr. Weber occupied in reference to the defendant company.

80

By Mr. Stamler.

Q. Did you see any other member of The Paul DeLaney Company in reference to this suit?

A. No, but I drew my inference from the correspondence which was supplied me, and I learned afterwards that my inference was a wrong one.

Joseph Freedman, recalled.

By Mr. Kalisch.

Q. Mr. Freedman, you testified that the trouble that you found with the catsup was that it was liquid and that it smelled of garlic; those were the two objections you had to it?

10

A. Yes, sir.

Q. When you say it was liquid, what do you mean?

A. Catsup is supposed to contain so much tomato and vinegar added to it, where this catsup contained more vinegar in proportion to what it was supposed to contain.

Q. Do you know the percentage of vinegar it ought to contain?

A. I do not know exactly.

Q. Do you know the proportion of solids it is supposed to contain?

20

A. No.

Q. Did you make a chemical analysis?

A. No.

Q. What examination did you make of that particular catsup?

A. I took that catsup from the bottle and poured some of it on a blotter, very little catsup was left and the vinegar spread all over the blotter. To show me how much catsup this bottle contained as against the vinegar.

30

Q. That is the only test you made in reference to the thinness?

A. Yes.

Q. The only test you made to show the thinness is that you poured some of the catsup on a blotter and the liquid spread over the blotter, and from that you concluded that there was too much vinegar in the makeup of the catsup, in that particular bottle of catsup you examined?

A. Yes, sir.

Q. The other objection was that it contained garlic?

A. Yes, it was. It tasted bitter and had a garlic smell.

Q. It was bitter and had a garlic smell?

A. I tasted it; it tasted bitter and had a garlic smell.

Q. Now, the catsup which you had used previously contained no garlic?

A. It was not that nature of catsup.

10 Q. It had no garlic in it at all?

A. I don't know whether it had garlic in it or not, I could not taste it.

Q. Did you examine it?

A. Yes.

Q. And you could not detect any garlic in it?

A. No, sir.

Q. Did you separate the liquid from the solid when you examined this catsup?

A. Yes, sir.

20 Q. How did you do that?

A. I poured some on the blotter.

Q. You poured the catsup on the blotter?

A. Yes, sir.

Q. That is the only test you made to determine the liquid it contained?

A. I tested the catsup and I found it to be very thin.

Q. That is all you detected in the test that it was thin?

A. It was bitter and it tasted of garlic.

30 Q. Any other substance out of it?

A. No, sir.

Q. What other ingredient did you detect when you tasted it—garlic?

A. It tasted bitter and had a garlic smell and was thin.

Q. What about the vinegar? Did you taste the vinegar?

A. I tasted the vinegar with the catsup.

Q. Could you taste the vinegar?

A. Yes, sir.

Q. Was it predominant; was it the most predominant ingredient you tasted?

A. The vinegar. I could taste the vinegar, bitterness and garlic taste.

Q. When you poured the catsup on the blotter, how did you know what the liquid was that spread out on the blotter?

A. I knew it was the vinegar.

10

Q. Did you taste the vinegar?

A. I did not; no.

Q. How did you know what liquid there was on that blotter when you poured out the catsup?

A. I presumed that it was the vinegar.

Q. You presume that?

A. Yes.

Q. You don't know that as a matter of fact what it was?

A. No.

20

Q. And you could not say under oath that that liquid that you saw on the blotter was vinegar?

A. No, I could not say.

Q. Now, where did you make that test?

A. At the office.

Q. Whose office?

A. My office.

Q. At your office?

A. Yes, sir.

Q. And who was present?

30

A. All my men, the office help.

Q. You took one box into your office?

A. Yes, sir.

Q. How many cases did you take to the office?

A. We took about six cases.

Q. Two bottles out of each case?

Q. And did you take a little from each bottle?

A. Yes, sir.

Q. And poured it on a blotter?

A. Yes, sir.

Q. Each one you poured on a blotter?

A. Yes, sir.

Q. How much did you take from each bottle?

A. About a half bottle.

Q. About a half bottle of each one?

A. Not at one time.

Q. How much of each bottle did you pour out?

A. I did not measure it or weigh it.

10 Q. How much of each bottle of catsup did you pour out?

A. I took about an inch in diameter.

Q. As much as you could get in a teaspoon?

A. More.

Q. About what you could get in a teaspoon?

A. A teaspoon from each bottle I poured out on the blotter.

Q. You poured that on a blotter?

A. I poured out a half bottle, a teaspoonful at each time.

20 Q. You used up a half of fourteen bottles?

A. At different times.

Q. When you took one bottle, for instance, you poured out a teaspoonful and deposited it on the blotter?

A. Yes.

Q. And emptied that teaspoonful on the blotter, and you tasted that first before you put it on the blotter?

A. I did not put it in a teaspoon from the bottle on the blotter; I put on the blotter as much as would fill a teaspoon.

30 Q. And you emptied it then directly from the bottle?

A. Yes, sir.

Q. When did you taste it, before you made each one of these little piles on the blotter?

A. Yes, sir.

Q. You first put it on the blotter?

A. No, it was this way. I poured it on a piece of scrap paper and tasted the catsup.

Q. How did you taste it, right from the paper?

A. Yes, sir.

Q. And what kind of paper was it?

A. On an envelope. Old envelopes we get in the morning mail, and which we cut open, we use them for scrap paper.

Q. From that scrap paper you tasted that catsup?

A. Yes, sir.

Q. Then what did you do with the catsup you just tasted?

10

A. I had to swallow the catsup.

Q. And then the paper on which you put it you threw away?

A. Yes, sir.

Q. That was the process each time?

A. Yes, sir.

Q. You did that how many times from each bottle?

A. I cannot figure it out.

Q. How many times on this occasion?

A. I do not know how many times on that occasion. 20

Q. You now say that you do not know how many times you emptied some catsup from that particular bottle?

A. No.

Q. You tasted the catsup from this paper?

A. Yes.

Q. Did you do it more than once?

A. Oh, yes.

Q. Did you do it more than half a dozen times?

A. Yes.

30

Q. You emptied about half a bottle on that occasion?

A. Yes, sir.

Q. And you did it in the way you have just described, by taking a piece of scrap paper and emptied as much on the scrap paper as would fill a teaspoon about and then you would taste it, then you would throw the scrap paper away?

A. Yes, sir.

Q. Then you would take another piece of scrap paper and repeat that operation probably two or three times?

A. Yes, sir.

Q. On that one piece of scrap paper?

A. Yes, sir.

Q. Until about half of the fourteen bottles were emptied?

A. Yes.

Q. You say you did that on scrap paper?

10 A. Yes. When we get in the mail, I take the envelopes the mail comes in and I cut them up into small squares and I pour a little catsup on each one of them; I put them up to my mouth, taste the catsup and throw them away.

By Mr. Stamler.

Mr. Freedman—I direct you not to further answer unless you fully realize what your answers are. Mr. Kalisch is trying to show by your testimony that you consumed fourteen half bottles in the test on that occasion.

20

Q. How many squares of this paper did you use?

A. I don't know.

Q. Was it more than one?

A. Yes, sir.

Q. More than a dozen?

A. Yes.

Q. More than two dozen?

A. I don't know.

Q. More than five dozen?

30

A. I don't know.

Q. More than ten dozen?

A. I don't know.

Q. More than twenty dozen?

A. I don't know.

Q. You say, under oath, that you do not know how many squares you used?

A. I did not count them.

Q. You did not use each square more than once?

A. No, sir.

Q. Each square you used only once?

A. Yes.

Q. That was the test upon which you rejected this catsup?

A. Yes, sir.

Q. Will you tell me when you used the blotter?

A. Yes, sir.

Q. When you used the blotter?

A. In the meantime while I tasted the catsup.

Q. You have testified that you tested this catsup by pouring it upon old scrap paper cut up in squares?

A. Yes, sir.

Q. And that every time you poured out the catsup you would taste it and swallow it and then throw the paper away?

A. Yes.

Q. When did you use the blotter?

A. In the meantime.

Q. In the meantime what did you do?

A. I did not stay there all day and lick the catsup. After we opened the bottle I tasted the catsup several times and poured some on the blotter in the meantime, and also gave others some to taste from the same bottle.

Q. How many did you taste?

A. I don't remember.

Q. How many of these squares of paper with catsup did you taste?

A. About three or four times.

Q. That is all you tested?

A. Yes, sir.

Q. And did any one else test any?

A. Yes, sir.

Q. Now, therefore, all you know from your own personal knowledge of this catsup is by the taste of it from three or four squares you tasted?

A. Yes.

Q. What you have said concerning this shipment of catsup is based upon those three or four tests you made?

A. Yes, from each bottle.

Q. Then you therefore took more than three or four tastes?

A. Yes.

Q. You took from each bottle three or four tastes?

A. Yes.

Q. So you took four times fourteen?

A. No, I did not take from all the bottles, I took three or four times from perhaps ten or twelve bottles and others took tastes out of the bottles.

10 Q. Did the others make the test on the blotter?

A. The blotters were lying on the desk in the office.

Q. Who were those other people who tested the catsup?

Mr. Stamler—I object and direct witness not to answer for the reason that the plaintiff is not obliged to disclose his case.

By Mr. Kalisch.

Q. Mr. Freedman, do you refuse to answer on your
20 counsel's advice?

Mr. Freedman—I do.

Q. So you really swallowed about forty teaspoons full of catsup that day?

A. I can't say; more or less.

Q. Did you take more than one from each one bottle?

A. Yes.

Q. What was the number you did take from each one bottle?

A. About three tests.

30 Q. You did not detect the objectionable ingredient from your first test of any one bottle?

A. First, when I took it, I found it was so, then I took another taste to find out whether it was so to make sure.

Q. Then after you made sure you took another taste?

A. I did not say I took another taste. I took the third taste to still make it sure.

Q. Did you take three tastes to make it sure?

A. Yes, sir.

Q. Can you tell me what date you made the tests?

A. We examined it on the 18th; the very same day.

By Mr. Stamler.

Q. How many years have you been in the grocery business?

A. For 26 years.

Q. In making your tests did you use your eyes?

A. Sure.

Q. What did your eye test show?

10

A. That it was thin in proportion.

Q. You also compared that catsup at that time with the catsup of other makes?

A. We have other makes; yes.

By Mr. Kalisch.

Q. When did you make that comparison, on the same day?

A. Yes, sir.

Q. How did you make that comparison?

20

A. On the blotter.

Q. Did you put it on the blotter before you put it on the scrap of paper?

A. No, sir.

Q. You put it on the scrap of paper first?

A. Yes, sir.

Q. And then you put it on the blotter?

A. Yes, sir.

Q. First you put it on the scrap of paper and then on the blotter?

30

A. Yes, sir.

Q. From the tests you say you have made you determined that this catsup did not meet your requirements?

A. Right. Not the requirements according to what we had in previous years from them.

Q. You made the same test with those you had previous years?

A. Yes, sir.

Q. And the particular thing in which they failed was that there was too much liquid; that it had a taste of garlic and was bitter; those are the only three objections your test revealed?

A. Yes, sir.

Q. And upon those grounds you rejected it?

A. Yes, sir.

Q. You say you don't remember the date these tests were made?

10 A. The day of the arrival of the goods.

Q. When the car came in?

A. Not when they backed up the car.

By Mr. John J. Stamler.

On December 10, 1910—I mean December 10, 1918—Mr. Freedman and Mr. Weber came to my office relating to the shipment of a car of catsup from the defendant. Mr. Weber stated at that time that he was sent by The Paul DeLaney Company to obtain a letter from Mr. Freedman to the effect that Mr. Freedman
20 will forego any litigation that he had against The Paul DeLaney Company against the contract of 1917. That the car of catsup was packed and ready to be shipped, but until that letter is forthcoming The Paul DeLaney Company would not send the merchandise. I, thereupon, stated to Mr. Weber that under no circumstances could they get a release from the Freedman Company in settlement of the contract of 1917; that they were legally obliged to deliver the goods under the contract of 1918; that in view of the fact that Mr. Freedman
30 had already sold part of the 1918 product, I would advise Mr. Freedman to write a letter to The DeLaney Company, stating that upon the arrival of the goods under the contract of 1918 the merchandise would be paid for without litigation, but told Mr. Weber to inform The DeLaney Company that Mr. Freedman would insist on bringing suit against The Paul DeLaney Company on the contract of 1917. Mr. Weber

thought that was satisfactory, and I dictated the letter in his presence, which is in evidence.

The next step in the case was on December 19th, 1918, Mr. Freedman came to my office at about noon hour—

Mr. Kalisch—I object to this on the ground that it is incompetent and cannot bind the defendant.

—and at that time I dictated the telegram and the two letters, one to The DeLaney Company and the other to Mr. Weber, which were heretofore offered in evidence. 10
At the same time I procured the samples of the product in question, and on that day I submitted the same to Mr. Louis Hersh and Mr. Herman Hersh for their tests, and, relying upon their statements that the merchandise was not a good delivery and the statement of Mr. Freedman, the attachment proceeding was commenced. The papers were dictated by me on December 19th, 1918.

I do not know on what day they were actually sworn to. 20

By Mr. Kalisch. No questions.

I have only now to offer the original affidavit, which is on file in the County Clerk's office, and which is the foundation of this writ of attachment.

EXHIBIT P-1.

THE PAUL DELANEY CO., INC.

30

BROCTON, N. Y., Sept. 7, 1917.

Joseph Freedman & Co.,

Elizabeth, N. J.

Gentlemen:

We are about ready to start our private label catsup pack and find upon an inventory of stock, that we will need at least 1000 Union County catsup labels, 13 ounce,

to enable us to fill your order. We will need both body and neck labels.

You understand that while we have a stock of your labels on hand, there is always some wasted, which is unavoidable, therefore we ask that you kindly send these labels to us immediately, so there will be no delay in making shipment of your order.

Yours truly,

THE PAUL DELANEY CO., INC.

By E. A. McCLURE.

10

McC-AEP

EXHIBIT.

October 25th, 1917.

The Paul DeLaney Co., Inc.,
Brocton, N. Y.

Gentlemen:

20 Joseph Freedman Co., of Elizabeth have placed in my hands the correspondence relating to a certain contract of catsup dated January 24th, 1917, and also all of the correspondence including your letter of the 20th inst., advising my client that you will be unable to give them any of the merchandise.

I am satisfied that you are taking unreasonable stand in this matter. That, although it may be true that the crop of tomatoes were not up to your expectation, nevertheless, you packed some catsup and my clients are entitled to a proportionate share thereof.

30 Furthermore, I am advised that you could go into the open market and purchase all of the tomatoes you desired if you would only pay for them.

I, therefore, expect that I will receive from you a prompt reply advising me that you are going to adjust the honest claim of my client without litigation.

A prompt reply will be to the interest of both parties.

Yours truly,

JOHN J. STAMLER.

JJS-R

EXHIBIT.

December 19th, 1918.

The Paul DeLaney Co.,
Brocton, N. Y.

Gentlemen:

We have this day prepared necessary papers for a writ of attachment to issue against the rights and credits of your Company in the State of New Jersey on the claim of the Joseph Freedman Co. on its contract made with you on the 24th of January, 1917. 10

Under that contract you agreed to sell our clients 1254 cases, 13 oz. Ketchup at 72½c. per dozen. By reason of your failure to make delivery our clients were obliged to purchase in the open market merchandise at \$1.82 per dozen therefore sustaining a loss of \$2746.28 plus \$15.48 for labels amounting in all to \$2761.76.

Unless an immediate settlement is made of that claim the judicial machinery will be put in motion. Wire reply. 20

Yours truly,
STAMLER & STAMLER.

JJS-R

EXHIBIT P-7.

December 19th, 1918.

Henry J. Weber, Esq.,
Agent & Representative for
The Paul DeLaney Company,
522 Kinney Building,
Newark, N. J.

30

Dear Sir:

Our client, Joseph Freedman Company, have this day wired as follows:

"The Paul DeLaney Co.,
Brocton, N. Y.

Car of ketchup, contract June 25, arrived.

We reject the same on the ground of poor quality. Wire immediate disposition. Notified your agent Henry J. Weber.

JOSEPH FREEDMAN Co.

'Phone 2185 Eliz.

- 10 Further confirming the telegram we beg to advise you that the ketchup in question is poor in quality because it does not contain sufficient pulp to make the goods marketable. The same was inspected by two very reliable dealers who confirm our client's statement.

If you will advise us when you will be at our office we will have Mr. Freedman present and go over the entire matter.

Yours truly,

STAMLER & STAMLER.

20

EXHIBIT P-3.

COPY OF TELEGRAM.

December 19th, 1918.

The Paul DeLaney Co.,
Brocton, N. Y.

- 30 Car of Ketchup, contract June 25 arrived. We reject the same on the ground of poor quality. Wire immediate disposition. Notified your agent Henry J. Weber.

JOSEPH FREEDMAN Co.

'Phone 2185 Eliz.

EXHIBIT P-6.

THE PAUL DELANEY Co., INC.

BROCTON, N. Y.

522 Kinney Building.

NEWARK, N. J., December 23d, 1918.

Messrs. Stamler & Stamler,

207 Broad Street,

Elizabeth, N. J.

Gentlemen:

10

I have your letter as regarding the carload of catsup shipped to Mr. Joseph Freedman for The Paul DeLaney Co. of Brocton, N. Y.

I personally have not seen the catsup, but I am confident that the quality is the same as our firm has always put up.

My advice to Mr. Freedman is to accept this carload of catsup by all means and my advice is well meant for Mr. Freedman and I believe that you will do him a favor in advising him to take that carload of catsup 20 off of the track now.

I have no authority whatsoever to do anything further in this case.

Very truly yours,

H. J. WEBER,

Eastern Representative.

HJW/d

EXHIBIT P-4 FOR IDENTIFICATION.

30

1-18-19.

After a thorough investigation of the matter you probably are aware that the Federal Commissioners permit to re-instate only 10% of last Year's unfilled contracts.

You are hereby authorized to ship to Joseph Freedman Co. 500 cases 24 11 oz. American made catsup at 72½c. per doz. Freight allowed to destination. This

is 40% advantage over the amount indicated by the Federal Board ruling and is an indication of our desire to settle up amicable with the Freedman people.

EXHIBIT P-7 FOR IDENTIFICATION.

10 HENRY J. WEBER
522 Kinney Building
Newark, N. J.

Nov. 23, 1918.

To the Shareholders of The Paul DeLaney Co., Brocton, N. Y., and Lin-Del Company, of Buffalo, N. Y.

Having just returned from another trip to The Paul DeLaney and Lin-Del Companies, accompanied by a prominent citizen of South Orange, who is a shareholder in both companies, I am most happy to give you a few facts as to the progress up to date in both companies.

20 In my last letter I stated that a pleasant surprise was in store for all Paul DeLaney shareholders. I can now state that this surprise is surely on its way. Your management certainly has made wonderful progress during the past season.

Although but three years old, our products are sold throughout America and "Over There"; and to give you an idea as to the future I might state that our labels are now ordered in ten million lots instead of one million lots.

80 You will be interested to know that up to date our catsup shipments since August 22 have aggregated 59,142 cases, leaving to be shipped 43,989 cases more; and we expect to fill every order we have booked. We are now packing catsup from our pulp made from whole, fresh tomatoes. Our catsup shipments in all will amount to approximately 70 railroad cars.

Our bookings to date on American Maid cider total

34 cars, and we are, of course, just at the beginning of the cider season.

We have just received 15 carloads of A1 apples from which we are pressing as lucious cider as was ever put in a bottle, and numerous more cars have been purchased to supply the demand.

We have only gotten fairly started at jelly, but our bookings to-day, for shipment as soon as packed, cover 10 full carloads of 1,600 cases to the car. We have already shipped a good many thousand cases to our trade. 10

Of strawberry jam we have shipped one full carload.

Of peach jam we have shipped so far two maximum carloads in addition to numerous smaller shipments.

Of grape jam we have orders pending that if consummated will aggregate over 12,000 cases; also on apple butter an order pending for 1,480 cases, but besides that we are shipping both of these products daily.

We have just received an order from the Navy for a carload of American Maid peanut butter for shipment within 25 days. 20

Our sales for the month of September total over \$150,000 and for October \$5,000.

The National Appraisal Company of Boston recently completed an appraisal of the Paul DeLaney Company's plant showing equipment valued at \$575,000. Stock and material on hand worth \$350,000. Surplus up to date \$114,000. Certainly a splendid showing.

Our next production will be mustard, for which we have all the necessary machinery and equipment installed. 30

The condition through which we have passed during the last eighteen months have been so abnormal that we are believing, with anything like reasonable working conditions, we could make a showing that would even be more surprising.

I predicted last spring that we would go "Over the Top" with a business amounting to One Million Dollars, but I believe that we will even go a little higher

than that. I call this "going some" for a company but three years old and having paid its shareholders \$41,900 in quarterly dividends in 18 months.

Now as to the Lin-Del Company.

I can state that we have packed since July, which was our first start, a total of

15 tons of strawberries	16 tons of raspberries
160 tons of cherries,	225 tons of plums
1,100 tons of tomatoes.	

10 and that our sales during July, August and September amounted to \$160,000.

We have single orders amounting from \$20,000 to \$50,000 each.

A \$50,000 order has just been received for canned apples, which means 16,000 bushels of apples for this one order. Besides these huge orders, we are supplying some 200 wholesalers, many of them right here from Newark and vicinity.

20 Many carloads of apples just arrived as we reached the plant and we watched the canning process for several hours. Twelve large apple peeling machines are in constant operation peeling apples as fast as the operators can feed them.

We also saw many carloads of cabbage already in the plant for the manufacture of Liberty Cabbage, for which some large pickling vats are already constructed and others in course of construction for the aging of the cut cabbage.

30 Some splendid improvements have been made and up to date machinery installed. The loading platforms have been placed under roofs and all the buildings will be painted inside and out, for which there was no time during the summer.

EXHIBIT 6.

STAMLER & STAMLER,
207 Broad Street.

ELIZABETH, N. J., January 17th, 1919.

John J. Stamler,
Charles J. Stamler.

Paul DeLaney Co., Inc.,
Brocton, N. Y.

10

GENTLEMEN:

Your Mr. Weber was in our office in connection with the litigation of the Freedman Company against yourself and at that time he advised us that he was authorized to adjust all of the Freedman litigation by shipping to them 500 cases 11 oz. American made Catchup at 72½c. per dozen, freight allowed to destination. This offer was flatly refused by our client.

Mr. Weber, however, suggested that we make a 20 counter proposition of adjusting the entire litigation and therefore advise you *that without waiving any of the right of our client, but purely as a matter of compromise*, we will advise our client to accept the car of Catchup now at Elizabeth as against contract of 1918, and also discontinue the attachment proceedings against your Company upon the express understanding that your Company make an allowance to our client in the sum of \$2000.

STAMLER & STAMLER. 30

JJS-R

Yours truly,

The Tippecanoe factory has done splendid work and as I told you some time ago will become our property by purchase now almost any day.

The management of both companies is second to none in America and has received high recognition in the best bank and trade journals and every stockholder

may well feel proud to be connected with these industries.

These may seem like dry statistics to you, but to us they mean the result of a lot of enthusiastic effort and a mighty lot of good stiff work.

The Lin-Del Company plants will give a mighty good account of themselves, as they are free and clear, and your first dividend check will reach you in January to give us all a good start for 1919.

10

Very truly yours,

H. J. WEBER.

The factory at Tippecanoe City referred to on Page 3 has been purchased.

Other factories will be added from time to time.

200,000 tons of food went "Over There" with Mr. Hoover.

Twenty-five million tons of food must be shipped to Europe by July 1, 1919.

20 THE BEST BENEFactor THAT THE STARVING NATIONS
OF THE WORLD EVER HAD IS
UNCLE SAM.

EVERY SHAREHOLDER IS HELPING AMERICA IN FEED-
ING THE WORLD.

EXHIBIT No. 1 ON PART OF PLAINTIFF.

Dec. 21, 1918.
 WILLIAM D. WOLFSKEIL, } Freedman vs. Delaney.
 Supreme Court Com. }

THE PAUL DELANEY CO., INC.

Food Products New Business

Brocton, N. Y., 1/24-17

Sold to Joseph Freedman & Co., of Elizabeth, N. J. 10

.....Cases No. 10, net wt. avd. 8½ oz.....	doz. ea. at.....	doz.
.....Cases No. 11, net wt. avd. 10½ oz.....	doz. ea. at.....	doz.
.....Cases No. 12, net wt. avd. 11½ oz.....	doz. ea. at.....	doz.
.....Cases No. 16, net wt. avd. 17½ oz.....	doz. ea. at.....	doz.
.....Crates Glass Jars, gal, ½ doz. eac.....	at	doz.
.....Crates No. 10 Lacq. Tins 1 doz. ea.....	at	doz.
254 cs. 13 oz. avd. (reinstated).....	2	at 72½ "
1000 " 13 oz. " (new order).....	2	at 72½ "
.....		at

F. O. B. Brocton, carload.

freight allowed.

Specifications to be furnished on this contract..... 20

191....

Brand: UNION COUNTY.

Information { This reinstatement cancels
 concerning { any claim against seller for
 Labels: { non delivery of catsup during
 { 1916.

Buyer will furnish,

30

.....
 If buyer furnishes his own labels, an allowance of 50c. per 1000 will be made. Labels are to be delivered F. O. B. seller's factory on or before August 1st, properly imprinted ready for use.

Packed in full weight glass panel style bottles. Crown Cap; bottles to be packed for shipping in corrugated fibre boxes.

QUALITY: The quality of the product specified in

this contract to be first class; made from clean, thoroughly washed, ripe, New York tomatoes.

GUARANTY: The product specified in this contract is guaranteed against spoilage under normal conditions, and to comply with the Federal Pure Food Laws enacted June 30, 1906, and all State Pure Food Laws, and shall be free from all preservatives unless buyer specifies to the contrary.

10 TERMS: Cash, less 1% discount from net amount of invoice if paid within ten days from its date; 30 days net and due.

Seller shall not be liable for any nondeliveries caused by fire, strikes, casualties or causes beyond its immediate control.

All goods to be shipped and billed as the season's pack is made ready, or before December 1st.

THE PAUL DELANEY CO. INC. Seller
By Paul DeLaney.

J. Freedman Co. Buyer

20 Broker.....
Salesman H. J. WEBER.....

STATE OF NEW JERSEY, } ss.:
County of Union.

I, Valeria E. Husbands, duly sworn, swear that I will carefully, faithfully and impartially take the evidence in the above-entitled cause according to the best of my skill and understanding, and make a true and correct transcript thereof.

VALERIA E. HUSBANDS.

30

Sworn and subscribed to before me this 7th day of March, 1919.

SAMUEL KOESTLER,
Master in Chancery of New Jersey.

I, Samuel Koestler, one of the Masters in Chancery of New Jersey, do hereby certify the foregoing as the evidence taken before me on March 5th, 1919, pur-

suant to rule to show cause in the above-entitled cause, and by consent of counsel, that said testimony was taken before me stenographically by Valeria E. Husbands, a stenographer selected by me, who was first duly sworn; that said testimony was taken in my immediate presence and hearing from the lips of the witnesses, and that I believe the same accurately states the evidence given.

Dated March 5th, 1919.

SAMUEL KOESTLER, 10
Master in Chancery of New Jersey.

JOSEPH FREEDMAN COMPANY, A }
CORPORATION, }
vs. }
THE PAUL DELANEY CO., INC. }

Examination of witnesses on motion, on Rule to 20
Show Cause.

Transcript of stenographer's notes of evidence, taken in the above-entitled matter, before Hon. GEORGE S. SILZER, Circuit Court Judge, at the Chancery Chambers, No. 1 Montgomery street, Jersey City, New Jersey, on the eighth of March, A. D. 1919, at 10:00 A. M.

Appearances—JOHN J. STAMLER, ESQ., representing the Plaintiff; HAROLD KALISCH, ESQ., representing the Defendant.

Elsie Siston, produced as a witness on behalf of the plaintiff, being duly sworn on her oath, according to law, saith:

Direct examination, by Mr. Stamler.

Q. Mrs. Siston, you have been a stenographer?

A. I have.

Q. And you are married?

A. I am.

Q. On December, during the month of November and December of last year where did you work?

A. Mr. Stamler's office.

Q. I show you notebooks, marked number two and three, and ask you whether you recognize the notebooks?

A. I do.

Q. Whose are they?

A. Mine.

10 Q. And where did you use them?

A. In Mr. Stamler's office.

Q. I want you to turn to—you were told this morning by me why you were coming here?

A. Yes.

Q. And did you examine your notebook for the purpose of finding the papers—dictation, relating to the case of Freedman against DeLaney?

A. I did.

Q. Did you find them?

20 A. I did.

Q. Please refer to them now. And you are showing what?

A. This is an order in—no, that is wrong. From the beginning.

Q. What date is that you are looking at now?

A. Thursday, December 19th, 1918.

Q. 1918? Is that the first work you did on that day?

A. This is the first work.

80 Q. And what does that show was done that morning, that day?

A. This is the case of Peter Breidt City Brewery Company against Horst Company, attachment.

Q. Is that the first work you did that morning?

A. This is the first work; it was an order.

Q. All right. Next.

A. And then the bond.

Q. In the—

A. Same case.

Q. In the Horst case.

A. An affidavit, Emily Fox; that is another matter; then a letter to the Secretary of State.

Q. In reference to what?

A. Paul DeLaney Company.

Q. As to what?

A. "Kindly wire at our expense whether or not The Paul DeLaney Company, Incorporated, a corporation, was organized under the laws of the State of New Jersey——"

Q. Laws of the State of New Jersey?

20

A. Yes.

Mr. Kalisch—That is to?

A. Secretary of State.

Q. Now, the next.

A. Well, that letter isn't finished. "Or whether it has received permission to do business in our State as a foreign corporation."

Q. Next?

A. Then there is a letter to Henry J. Weber.

Q. Relating to what?

20

A. That is relating—

Q. To the Paul DeLaney?

A. That is relating to the case of Paul DeLaney against Freedman.

Q. All right; next?

Mr. Kalisch—What is this?

A. That is the letter to Mr. Weber.

Mr. Kalisch—And this here (indicating)?

A. Yes, sir.

Mr. Kalisch—Part of that letter?

30

A. Yes. This was a letter, too. "If you will advise me when Mr. ——" —somebody—"will be at our office, we will have Mr. Freedman present and go over the entire matter."

Q. That is the last part of the letter?

A. Oh, that must be in reference to the other. That is a letter to Mr. Weber.

Q. That is right.

A. And this is part of the letter.

Q. Next?

A. And this is the affidavit of Joseph Freedman.

Q. Yes. Now, just for the purpose of giving me the affidavit, I want you to read from your notebook the last word of the first paragraph of that affidavit; the last word of the first paragraph.

A. (Reading from notes) "But the Joseph Freedman—a corporation organized under and by virtue of the laws of the State of New Jersey, has its principal office in the City of Elizabeth, County of Union, State
10 of New Jersey, aforesaid."

Q. The last word is "aforesaid"?

A. "Aforesaid."

Q. Now, give me the first word of the second paragraph.

A. "That the said Joseph Freedman Company has a cause of action against The Paul DeLaney Company."

Q. Now, give me the last word of that paragraph.

A. The last word?

Q. Yes.

20 A. "Arose in this State."

Q. And the first word of the next paragraph.

A. "Deponent further says"—

Q. The last of that paragraph.

A. It is about the nature of the cause of action.

Q. No. It is a long one. It is a long paragraph.

A. "1.82 per dozen."

Q. First few words of the next paragraph.

A. "That, during the months of October, November, and December, 1917."

30 Q. The last words of the affidavit.

A. "Deponent further says that the sum of \$2,746.26 is still due and owing from the said Paul DeLaney Company, no part thereof having been paid. Whereby an action had accrued to the Joseph Freedman Company from the said Paul DeLaney in the sum of \$2,746.26."

Q. When did you get this dictation?

A. On December nineteenth.

Q. When did you transcribe it?

A. Well, it was either that day or the twentieth.

Q. Did you, prior to the nineteenth of December, take any affidavit relating to the Paul DeLaney matter?

A. I believe I wrote a letter.

Q. Do you remember who was present in the office at the time that letter was written?

A. Mr. Freedman and another gentleman, I believe it was a representative of DeLaney.

Q. Did you, prior to that time, have any legal dicta- 10
tion in the matter of the Paul DeLaney?

A. Not that I remember.

Q. Well, you have your notebooks here for that period of time? Do you want to examine it to make sure?

A. (Witness looks through two notebooks) Here is a letter to The Paul DeLaney Company.

Q. Well, read it. What date, please?

A. "December tenth, Paul DeLaney Company, Broc-
ton, New York. Your Mr. Henry J. Weber, the East- 20
ern representative"—

Mr. Kalisch—I think that is a letter you have got in evidence.

A. —"is now at our office."

Mr. Stamler—That is correct.

Q. Continue your examination of your notebook for the purpose of ascertaining whether you have in there dictation in relation to this case, between the periods of November 8th, 1918, and December 19th, 1918.

A. Do you want the order in that case? 30

Q. When did you take the order?

A. In the attachment?

Q. Yes. When did you take the order?

A. Friday, December twentieth.

Q. That is when you took the order?

A. Yes.

Q. All right. Do you find anything else?

A. That's all; and I took the bond on that date.

Q. What date?

A. Same day, December twentieth.

Q. That is all you find?

A. I haven't finished yet.

Q. Then look through.

A. That's all I find.

Q. Now, if other dictation were given to you than in those notebooks, would that appear anywhere?

A. No.

10 Mr. Kalisch—What is that?

A. No.

Mr. Stamler—Strike out the answer.

Q. All dictations given to you are contained in those books?

A. Yes.

Mr. Kalisch—That is another matter.

Mr. Stamler—That is all.

Cross-examination, by Mr. Kalisch.

20 Q. When did you see Mr. Stamler concerning your testifying here?

A. This morning.

Q. And where did you see him?

A. At his office.

Q. Did you go over the notebook with him?

A. I did.

Q. Did he tell you what he wanted you to do?

A. He told me, yes.

Q. What did he tell you?

A. Testify as to the date when I took that dictation.

30 Q. And did he tell you that the question involved in this case was as to when it was taken?

A. He told me the question was the date.

Q. The question was the date. Did he tell you what date he wanted to make it appear—that he wanted it to appear that it was taken?

A. No.

Q. Did he tell you that the question of the affidavit being taken on the tenth of December was a very important question involved in the case?

A. Why, he told me the date was.

Q. Was what?

A. Was involved; there was a question of the date.

Q. Did he mention the tenth of December?

A. I don't remember the tenth being mentioned.

Q. Did he mention the eighteenth?

A. No.

Q. Or the nineteenth?

A. No; I don't remember him mentioning any date.

He asked me what date I wrote it, and I looked in my 10
notebook and I found it under that date.

Q. Have you got each one of your pages dated?

A. Not each page.

Q. Some you date and some you do not?

A. I date them each morning

Q. You date them before you take the work?

A. Yes, sir.

Q. Does that appear in your notebook?

A. Yes.

Q. Each page is dated?

A. No.

20

Q. I mean each day's page is dated in the notebook?

A. I date it each morning, and the work on that day
follows that date.

Q. On every one of those pages which represent the
beginning of the day's work, is that dated?

A. Yes.

Q. It appears all through that notebook?

A. The beginning of each day.

Q. Show me that.

30

A. The notebook started November eleventh.

Q. When is that put down? (Referring to the front
of the notebook.)

A. The day I started the notebook.

Q. That is put down when?

A. I didn't do that. This is somebody—

Q. Whose writing is that?

Mr. Kalisch—Pointing to the word “finished” on the outside of the cover of the notebook.

A. I left before I finished the notebook.

Q. Just what date did you leave?

A. Saturday before Christmas.

Q. One minute. Christmas was on the twenty-fifth. Saturday before Christmas.

Mr. Stamler—That was the twenty-first.

Q. You left then on the twenty-first day of December?
10 ber?

A. Yes.

Q. That is correct, is it?

A. That is the Saturday before Christmas.

Q. Turn to the date of December nineteenth, in your book. First, turn to the date of December tenth in your book.

(Witness does so.)

Q. Firday, December tenth,—that is “Tuesday” you got it?

20 A. That is Tuesday.

Q. Where is the calendar? Have you looked over this before? This date this morning?

A. Just now.

Mr. Stamler—She looked for it this morning, yes, in the Court room.

Q. You say that is Tuesday?

Mr. Stamler—Yes.

Q. December tenth?

Mr. Stamler—Yes.

30 Mr. Kalisch—December tenth on Tuesday, right.

Q. Now, just go over that a moment. That was put down before you started your work on December tenth?

A. Yes.

Q. That is December tenth. Is this on this page or this page? What is this, a letter? The first thing you did?

A. A letter to Mr. Blum.

Q. A letter to Mr. Blum. What follows that?

A. A letter to Stein.

Q. Leo Stein of Newark?

Q. What follows that?

A. Letter to David Oterman.

Q. Who is David Oterman? A client?

A. A client. A letter to the sheriff of Monmouth County.

Q. In reference to the present case?

Mr. Stamler—Peter Breidt Brewery.

A. No. Register, Passaic County, Saul Nemser. 10

Q. Has nothing to do with this case?

A. No. Letter to Kalisch and Kalisch.

Q. That is in the Dopkus case. What is this?

A. A letter to the County Clerk. Letter to Wm. A. Dolan.

Q. County Clerk of what?

A. Union County.

Q. About what?

A. With reference to listing some cases.

Q. Nothing else. 20

A. Just listing the Dopkus cases.

Q. There is nothing in reference to this case?

A. No, sir.

Q. Yes?

A. A letter to Mr. Dolan. There is a statement Thorpe to Stamler.

Q. Anything in reference to this case?

A. No. Then an affidavit of Albert Grabon.

Q. In reference to this case?

A. No. And then a lease. 30

Mr. Stamler—Statement of a lease.

A. Then a letter Charles Coop.

Q. In reference to this case?

A. No. Then a letter to Paul DeLaney Company.

Q. What is this?

A. That is addressed to Coop.

Q. That is in reference to the letter you just read, I believe?

A. Yes; Mr. Henry Weber.

Q. All right.

A. Then there is a petition, Union County Surrogate's Court; then there is another letter to the Arbetter Felting (?) Machine Company.

Q. Has no reference to this company?

A. Then that is a recital of a deed.

Q. What is that?

A. I really don't know what that is. "I, William
10 Hansel, Executor of Ernest, deceased."

Q. You don't know what that is?

A. I don't know what case that is.

Q. You can't read her stenography, can you?

A. This was a case I didn't know anything about, and another lawyer told me to make a note about it and show it to Mr. Stamler. "I, William Hansel, Executor"—

Q. All right. What is next?

A. 545-7 Broadway, Elizabeth. Next is—

20 Q. What is that?

A. No; this is a receipt.

Q. Yes; and this?

A. Then a letter to Mr. Wiltsie.

Q. This is all December—

A. Eleventh.

Q. Eleventh; yes.

A. Then this is a statement in the Arbuckle matter; that finishes the notebook.

Q. That finishes the notebook up until December
80 eleventh. Let us go to this one. This one begins on December eleventh. You have not been through this one yet?

A. Yes, sir; I went through this one.

Q. Here?

A. Yes; a memorandum in the case of Roth against Perry.

Q. Thursday, December twelfth?

A. Brief, continued.

Q. Friday, December thirteenth?

A. Sheriff of Monmouth county, letter; sheriff of Morris; a will; then statement of a lease; letter to Isaac Cohen, a notice to produce; a letter to the Peter Breidt City Brewery Company; a statement of a mortgage; letter to Harrison P. Lindabury; a letter to the Mutual Savings Fund. December fourteenth, a letter to Robert J. Kirkland; Peter Breidt City Brewery Company. December sixteenth, proof of claim; a letter to Dean P. Otis; a brief Elizabeth District Court, in the case of McClurg. December seventeenth, letter to Mr. Scheim; statement of an assignment of a mortgage. 10

Q. What date is that?

A. December seventeenth; and this is a certificate for a search; a letter to Philip Schotland; an order in the McClurg case. December nineteenth, order in the attachment case of Peter Breidt City Brewery Company against Horst Company. A bond in the same case, and then the affidavit of Emily Fox; letter to the Secretary of State.

Mr. Stamler—In reference to Paul DeLaney matter? 20

Q. What date is that?

A. (Witness turns back several leaves in her book.) Thursday, December nineteenth.

Q. Thursday, December nineteenth. Yes. You wrote a letter to the—

A. Secretary of State.

Q. Yes. On what date?

A. Thursday, December nineteenth.

Q. Thursday, December nineteenth. What was the contents of that letter? 30

A. "Kindly wire at our expense whether or not The Paul DeLaney Company, Incorporated, a corporation, was organized under the laws of the State of New Jersey, or whether it has received permission to do business in our State as a foreign corporation."

Q. That was on the nineteenth day of December?

A. Yes, sir.

Q. That letter was mailed, is that right?

A. Yes, sir.

Q. Do you know what day of the week that was?

A. It says Thursday.

Q. It is on a Thursday?

A. Yes, sir.

Q. You are positive of that?

Mr. Stamler—There is no question about it.

Q. Now, how many stenographers were in your office when you were employed there?

10 A. Why, when I started—

Q. No, I mean just about a month before you left, say?

A. At that time there was myself and two other girls.

Q. So that there were three stenographers employed in the Stamler office?

A. At that time; yes, sir.

Q. Are they there yet, the other two?

A. Yes.

Q. When you say three, that included you?

20 A. That included me.

Q. The other two are there yet?

A. Yes.

Q. Now, were you all three there every day as a rule?

A. Not from the time I started.

Q. No, I mean around about a month before?

A. Yes.

Q. And when one was busy the dictation would be given to the other stenographer, I suppose?

30 A. The dictation was mainly between another girl and myself.

Q. Well, if one of you was busy he would go to the other?

A. Yes.

Q. Mr. Stamler would go to the other stenographer and give the dictation?

A. Yes.

Q. If the other one was busy he would give the dictation to you?

A. Yes.

Q. And what was the third one there for mostly?
She took dictation also?

A. Occasionally, and then bookkeeping.

Q. Bookkeeping and also dictation. Then was there any dictation given out of the office?

A. Not that I know of.

Q. For instance, would there be any dictation given to Mr. Koestler's office to Mr. Koestler's stenographer?

A. Not while I was there.

Q. If he was particularly rushed?

10

A. Not while I was there.

Q. During the time you were with Mr. Stamler, you do not recall any dictation being given outside of the office?

A. No, sir.

Q. Have you got that calendar there? When did you commence with Mr. Stamler?

A. Is October seventh, Monday?

Q. 1918, you mean?

A. Yes.

20

Q. October seventh is Monday.

A. I started on October seventh and I worked there until the Saturday before Christmas.

Q. You started with Mr. Stamler October seventh, and quit there the Saturday before Christmas?

A. Yes, sir.

Q. And when you came there the other two girls were already there? When you came to Mr. Stamler's office the other two girls were already there?

A. Yes.

30

Q. Now, do you know the names of those other girls?

A. Yes.

Q. What are they?

A. Mrs. Husbands.

Q. Oh, this lady? (Indicating Mrs. Valerie Husbands.)

A. Yes.

Mr. Stamler—And Miss Ready.

Q. Mrs. Husbands and Mrs.—

A. Miss.

Mr. Stamler—Miss Ready.

Q. That is all.

Mr. Stamler—That is all, Mrs. Siston.

Redirect examination, by Mr. Stamler.

Q. Did you take any affidavit in relation to the Paul
10 DeLaney matter prior to the date set forth in your note-
book, while you were in my office?

A. No.

Mr. Kalisch—You better fix the date.

Q. From the time you were in my office until the time
you left, other than shown in your notebook?

A. No, sir.

Q. Did you hear of the case prior to the time when
you first took the dictation?

A. No.

Q. Would you know of the case if such case was
20 pending in the office?

A. What do you mean?

Q. If a case was pending while you were there, in
October or November, would you know of the case?

A. Yes.

Q. If it was pending in October or November. Who
posts the dockets?

A. We all do.

Q. Whoever does the work?

A. Surely.
30

Re-cross examination, by Mr. Kalisch.

Q. Do you open the mail?

A. No, sir.

Q. Who opens the mail?

A. Generally, Mr. Stamler.

Q. Yes. You referred to a letter written on the
nineteenth of December, to the Secretary of State.
Was that letter answered, do you know?

A. I don't know.

Q. You don't know that. What does it say there?
I am asking what does it say in the notebook?

(Mr. Stamler produces a paper writing.)

Mr. Kalisch—That is all. Put it in. You might as well put in the correspondence.

Mr. Stamler—I offer this.

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

(The following is copied from the original *P No. 1*, upon request of counsel.)

"Form C536

7-1-18—25M.

STATE OF NEW JERSEY.

DEPARTMENT OF STATE.

TRENTON, 20th December, 1918.

John J. Stamler, Esq.,

Elizabeth, N. J.

Dear Sir:

Replying to your favor of the 19th inst., and confirming my telegram of this date, I beg to say that so far as our records show, The Paul DeLaney Company, Inc., has never been incorporated under the laws of this State, nor is it a foreign corporation authorized to transact business in this State. 20

Very truly yours,

(Signed) THOS. F. MARTIN,

Secretary of State."

MTS.

Mr. Stamler—I offer the two notebooks in evidence. 30

(Two stenographer's notebooks marked number two, and number three, entered in evidence and marked *Exhibits P No. 2* and *P No. 3*, respectively.)

Valerie Husbands, produced as a witness, on behalf

of the plaintiff, being duly sworn on her oath, according to law, saith:

Direct examination, by Mr. Stamler.

Q. Mrs. Husbands, you are connected with my office?

A. Yes.

Q. And you are a Commissioner of Deeds of New Jersey?

A. Yes.

10 Q. I show you a paper which is the original affidavit filed in the Union County Circuit Court, in the case of Joseph Freedman Company against Paul DeLaney Company, and ask you whether you find your name written on that affidavit?

A. Yes, I do.

Q. And it appears under the Jurat?

A. Yes.

Q. And which part is your writing?

A. The word "20th."

Q. Yes?

20 A. And then "V. E. Husbands, Commissioner of Deeds of N. J."

Q. Did you see Mr. Freedman sign this affidavit?

A. I did.

Q. Did you swear him to it?

A. I did.

Q. On what date did you do that?

A. Twentieth of December, 1918.

30 Q. 1918. Did you see that paper from the time you signed your name thereto until you saw it in the court room now?

A. I didn't.

Q. Will you examine that "20th" and see whether there isn't a change which appears there?

A. It looks that way.

Q. And where does that change appear?

A. In the letter "2."

Mr. Kalisch—Letter or figure?

A. Figure "2."

Q. What was, apparently, underneath that? What was it apparently changed from?

Mr. Kalisch—I object, on the ground she is not called as an expert to give her opinion; if she knows as a fact I haven't any objection.

Q. Do you know?

Mr. Kalisch—From your own personal knowledge.

Q. From your own personal knowledge how that change came about?

10

A. It may be that I intended to write the "19th" and realized it was the 20th.

(Answer repeated by the stenographer.)

Q. And, therefore, what did you do?

A. I wrote the correct date that I took the affidavit, the twentieth of December, 1918.

Q. All right. Now, without looking at this paper, would you know when you took this affidavit?

A. No. I would not know that.

Q. Who transcribed this paper?

20

A. Mrs. Siston.

Q. How do you know?

A. I can tell the girl's work to look at it.

Q. You can tell one another's work?

A. Yes, and further, I know that Mrs. Siston did it.

Q. You do know?

A. Yes.

Q. Why?

A. Because I heard it dictated to her.

Q. I see.

30

Mr. Stamler—Cross-examine.

Cross-examination, by Mr. Kalisch.

Q. Mrs. Husbands, you say that "it may be that I intended to write the '19th' and realized it was the twentieth." That is merely an opinion of yours, isn't it?

A. Yes, sir.

Q. You have no recollection of why that was put in that back?

A. No, I have not.

Q. Are you the bookkeeper also? Were you bookkeeper for Mr. Stamler?

A. Yes, stenographer and bookkeeper.

Q. Stenographer and bookkeeper?

A. Yes.

Mr. Kalisch—Nothing further.

Mr. Stamler—That is all.

Q. You say that this affidavit was taken by Mrs.—

10 A. Mrs. Siston.

Q. Are you able to distinguish the work of different stenographers?

A. Well, I know the way they back up their work; I can tell each one of the girl's backing.

Q. And you are able to say, under oath, it was taken down by Mrs. Siston?

A. I know it was dictated by Mrs. Siston, and she transcribed it.

Q. Dictated by or to Mrs. Siston?

20 A. Dictated to Mrs. Siston.

Mr. Kalisch—All right.

Elsie Siston, recalled.

Direct examination, by Mr. Stamler.

Q. I show you original affidavit filed in Union County Circuit Court in the case of Joseph Freedman Company against Paul DeLaney Company, defendant, and I ask you whether you transcribed that work?

A. I did.

30 Q. You did? When did you transcribe that?

A. Either the day when it was dictated or the next morning.

Q. And is this the affidavit you refer to in your notebook under December nineteenth?

A. Yes; it ends the same.

Mr. Kalisch—It ends the same?

A. Yes.

Q. Read the question. Listen to the question.
(Question repeated by the stenographer.)

A. (Witness compares them.) It must be the same.

Mr. Kalisch: Is it all the same; where does it begin?

A. "Joseph Freedman, of full age" (continuing to read the notes of the affidavit, while Mr. Kalisch held the typewritten copy, which was not taken down in pursuance to Mr. Kalisch's request that it not be put on this record).

Mr. Stamler: That is all. All right.

10

Mr. Kalisch consents that the County Clerk re-seal the original affidavit in this case and deliver it to Mr. Stamler, who will deliver it to Judge Silzer on the argument on Friday next.

(Statement of McTierney, Bond Street, December 24, 1918, entered in evidence and marked Exhibit P No. 4.)

(The copy of Exhibit P. No. 4, as per request, appears on the following page of this record.)

(Copy of Exhibit P No. 4.)

20

STATEMENT.

Elizabeth, N. J., Dec. 24, 1918

McTierney Bond St City

To JOSEPH FREEDMAN CO., Dr.

Reproduction of

a three story

building, appears,

on the original

Exhibit, in same

position this

"box" occupies

Wholesale Grocers

and Commission Merchants

344-346-348 East Jersey St.,

Business Telephone 2185

Residence Telephone 1107—J

30

"Received for rent

in advance of

cellar located at 3rd St. under

Post-office

\$5.00

From Dec. 23 1918 to January 22—1919

(signed) Felix J McTernan.

(In pencil) Monday.

NEW JERSEY SUPREME COURT.

	JOSEPH FREEDMAN & Co., a corporation, Plaintiff-Respondent,	} On Certiorari
	vs.	
10	THE PAUL DeLANEY Co., a corporation, Defendant-Prosecutor.	

Reasons.*(Filed April 15, 1919)*

20 The Paul DeLaney Co., by Kalisch & Kalisch, its attorneys, come and pray that the alleged order made on the twenty-first day of December, 1918, by William D. Wolfskeil, a Supreme Court Commissioner of the State of New Jersey, together with all proceedings had for the making of the same and all the proceedings, supplemental thereto and had thereon, and that the alleged Writ of Attachment issued by virtue of said order and the said alleged order made by Hon. George S. Silzer, Judge of the Union County Circuit Court, discharging the rule to show cause why the said writ of attachment should not be quashed may be set aside and for
30 nothing holden for the following reasons:

1. The Supreme Court Commissioner had no authority to award the Writ of Attachment because the affidavit upon which it was founded does not contain proof that the plaintiff has a cause of action as required by section 84 of the Practice Act.

2. The findings of facts by the Commissioner was not sufficient to base an order on.

3. The order is defective as it does not comply with section 85 of the Practice Act.

4. The clerk had no authority to issue the writ because the *proper* order and proof were not filed with him as required by section 86.

5. There is no proof showing what sum was due the plaintiff, therefore the order awarding the Writ of Attachment for \$2,746.26 was illegal.

6. The property attached did not belong to defendant, but to the plaintiff.

7. The attachment was issued against goods of a non-resident (if title did not pass to plaintiff) in transit in custody of a common carrier. 10

8. The goods were lured into the State of New Jersey for the purpose of attaching them.

9. Because said attachment proceedings were in other respects illegal, unjust and void.

KALISCH & KALISCH,
Attorneys for Defendant.

20

30

Exhibit P 2.

Tomato Catsup Contract.

Duplicate
For Buyer's Files.

Food Products

THE PAUL DELANEY CO., INC.

Brocton, N. Y. June 25, 1918.

Sold to Joseph Freedman Co., of Elizabeth, N. J.

10

.....Cases No. 10, net wt. avd. 81½ oz.....Doz. ea. at.....doz.
Cases No. 11, net wt. avd. 101½ oz.....doz. ea. at..... doz.
 1350..Cases No. 12, net wt. avd. 111½ oz.....doz. ea. at.....1.30 doz.
Cases No. 16, net wt. avd. 17½ oz.....doz. ea. at.....doz.
Crates Glass Jars, gal. ½ doz. each..... at.....doz.
Crates No. 10, Lacq. Tins 1 doz. ea.....at.....doz.
 at.....
 at.....
 at.....

F. O. B. BROCTON, NEW YORK.

Specifications to be furnished on this contract.....191..

BRAND.....UNION COUNTY BRAND.....

Information Concerning Labels:.....

20

.....
 If buyer furnishes his own labels, an allowance of 50c per 1000 will be made. Labels are to be delivered F. O. B. seller's factory on or before August 1st, properly imprinted ready for use.

Packed in full weight glass panel style bottles, Crown Cap; bottles to be packed for shipping in corrugated fibre boxes.

QUALITY: The quality of the product specified in this contract to be first class; made from clean, thoroughly washed, ripe, New York tomatoes.

30

GUARANTY: The product specified in this contract is guaranteed against spoilage under normal conditions, and to comply with the Federal Pure Food Laws enacted June 30, 1906, and all State Pure Food Laws, and shall be free from all preservatives unless buyer specifies to the contrary.

TERMS: Cash, less 1% discount from net amount of invoice if paid within ten days from its date; 30 days net and due.

SUBJECT TO WAR CLAUSE AND GOVERNMENT ACTION

Seller shall not be liable for any nondeliveries caused by fire, strikes, casualties or causes beyond its immediate control.

All goods to be shipped and billed as the season's pack is made ready, or before December 1st.

Joseph Freedman Co....Buyer

By J. Freedman

Broker.....NONE

Salesman.....

The Paul DeLaney Co. Inc. Seller

By...DeLaney.....

Reasons.

UNION COUNTY CIRCUIT COURT.

JOSEPH FREEDMAN Co., a corporation,

Plaintiff,

vs.

THE PAUL DELANEY Co., a corporation,

Defendant.

Action at Law
On Attachment
Reasons.

10

To:

STAMLER & STAMLER, ESQS., Attorneys for Plaintiff,

Sirs:

PLEASE TAKE NOTICE, That the following reasons are relied upon by the defendant:

20

1. The Supreme Court Commissioner had no authority to award the Writ of Attachment because the affidavit upon which it was founded does not contain proof that the plaintiff has a cause of action as required by section 84 of the Practice Act.

2. The findings of facts by the Commissioner was not sufficient to base an order on.

3. The order is defective as it does not comply with section 85 of the practice act.

4. The Clerk had no authority to issue the writ because the *proper* order and proof were not filed with him as required by section 86.

30

5. There is no proof showing what sum was due the plaintiff, therefore the order awarding the Writ of Attachment for \$2,746.26 was illegal.

6. The property attached did not belong to defendant.

7. The Attachment was issued against goods of a non-resident (if title did not pass to plaintiff) in transit in custody of a common carrier.

8. The goods were lured into the State of New Jersey for the purpose of attaching them.

KALISCH & KALISCH,
Attorneys for Defendant.

10

[3598]

20

30

New Jersey Court of Errors and Appeals

THE PAUL DELANEY CO.,

Respondent,

vs.

JOSEPH FREEDMAN CO., a corporation, *et als.*,

Appellants.

On Appeal.

BRIEF OF HARRY KALISCH, of Kalisch & Kalisch, FOR RESPONDENT.

Facts.

On the twenty-fourth day of January, 1917, The Paul DeLaney Co., Inc., a corporation of the State of New York, entered into a written contract with Joseph Freedman Co., a corporation of the State of New Jersey, (a copy of which contract may be found on page 73, State of Case, marked Exhibit 1, on part of plaintiff); by which contract the said Paul DeLaney Co., sold to the said Joseph Freedman Co. 1254 cases of catsup containing 2508 dozen bottles of catsup, each bottle weighing 13 ounces at the rate of 72½c. per dozen; said goods to be delivered during the calendar year 1917 f. o. b. Brocton, freight allowed. There are certain other terms which appear in the contract which will be referred to in this brief, but which it is unnecessary to set forth at the present time. These goods were not delivered by the Paul DeLaney Co., and for this failure to deliver the Paul DeLaney Co., has a valid legal defense.

On the twenty-fifth day of June, 1918, The Paul DeLaney Co., again sold to the defendant, Joseph Freedman Co., by written contract a large shipment of catsup, the terms being identical with those of the contract of the year previous upon which the present suit of the plaintiff is based. No legal steps had been taken by the plaintiff prior to the second sale.

On the second day of December, 1918, the following letter was sent by the Paul DeLaney Co., to the Joseph Freedman Co., which letter is "marked Ex. 2 and will be found on page 32 and 33 of the stated case."

"12 2 1918.

Joseph Freedman & Co.,
Elizabeth, New Jersey.

Gentlemen:

We are pleased to advise that your car of UNION COUNTY Catsup is packed and ready for shipment, but before shipping we want to have a distinct understanding in regard to settlement for same, and will ask that you kindly give us your assurance that we are released by you from any former claims for undelivered catsup, and that you will settle for this shipment in accordance with the terms of invoice and at price billed, without any controversy, or legal action.

If you will kindly wire us collect this assurance upon receipt of this letter we will make shipment immediately confirming your wire by letter.

We feel that a bonafide understanding in the matter will avoid any possible misunderstanding or controversy. After thoro investigating the case the Federal Board of Commissioners ruled that we had done the best we could, weather conditions considered, and exempted us from any blame. Our buyers have taken the same attitude and nearly all of our this season's catsup output has been shipped to our old customers, and billed and paid for at this year's prices.

Promptly upon receipt of your wire your car will go forward. The catsup we are shipping you is first-class product and we are confident will give your trade excellent satisfaction.

Yours very truly,

THE PAUL DELANEY CO. INC.,
DeLaney."

PD-K

The following letter in reply thereto was received on December 10th, 1918, which letter is "Marked Ex. 1, and will be found on page 32 of the Stated Case."

"Elizabeth, N. J., December 10th, 1918.

Messrs. Paul DeLaney & Co.,
Brocton, N. Y.

Gentlemen:

Your Mr. Henry J. Weber, the Eastern representative is now in my office and requested me to inform you that if you will ship a car of catsup in pursuance to contract dated June 25th, 1918, that he will pay the same in the usual course of business and that this shipment has no reference to the contract of January 24th, 1917, and that the invoice will be paid in due course of business without any litigation.

Yours truly,
J. Freedman."

Right here it would be well to note that an agreement exists between counsel, which will be found on page 34 of the Stated Case, that all letters and telegrams written by one party to the other or by their attorneys shall be offered in evidence without formal proof.

On December 18th, 1918, see letter of UNITED STATES RAILROAD ADMINISTRATION, page 97 of Stated Case, a car load of catsup was shipped under the second contract and delivered to the Joseph Freedman Co., over the Central Railroad of New Jersey, at the railroad siding in Elizabeth. This siding was, however, railroad property and was about two or three hundred feet from the warehouse of the Joseph Freedman Co., see page 27 of Stated Case.

On December 19th, 1918, the day following the arrival of the catsup the papers in the present attachment proceedings were prepared, "see letter on page 65 of Stated Case from Stamler & Stamler to the Paul DeLaney Co." On the same day, December 19th, 1918, the Joseph Freedman Co., by telegram rejected the catsup on the ground of poor quality and likewise on the same day through their attorneys sent a letter rejecting the catsup because of poor quality, see pages 65 and 66, Exhibits P. 7 and P. 3. It should be kept in mind that this letter and telegram were sent on the same day that the attachment papers were prepared.

On the twenty-first day of December, 1918, two days after, the Sheriff of Union County attached the catsup under the writ of attachment issued in this case at the Central Railroad of New Jersey, Long Branch siding, East Jersey St., Elizabeth, N. J., see page 7 of Stated Case.

On January 7th, 1919, the Joseph Freedman Co., through their attorneys, Stamler & Stamler, sent the following letter to Paul DeLaney Co., which letter is marked Ex. 6, page 71 of Stated Case.

STAMLER & STAMLER
207 Broad Street

Elizabeth, N. J. January 17th, 1919.

John J. Stamler,
Charles J. Stamler.
Paul DeLaney Co., Inc.,
Brocton, N. Y.

Gentlemen:

Your Mr. Weber was in our office in connection with the litigation of the Freedman Company against yourself and at that time he advised us that he authorized to adjust all of the Freedman litigation by shipping to them 500 cases

110x. American made catsup at 72½c. per dozen, freight allowed to destination. This offer was flatly refused by our client.

Mr. Weber, however, suggested that we make a counter proposition of adjusting the entire litigation and therefore advise you that without waiving any of the right of our client, but purely as a matter of compromise, we will advise our client to accept the car of catsup now at Elizabeth as against contract of 1918, and also discontinue the attachment proceedings against your company upon the express understanding that your company make an allowance to our client in the sum of \$2000.

Yours truly,

JJS-R

Stamler & Stamler.

The significant fact of this letter, which will be more fully commented upon later, is that the Joseph Freedman Co., after having rejected the catsup, because as they say in their letter of December 19th, "marked Ex. P. 7, page 66 of Stated Case, the catsup was not marketable, under their letter of January 17th, 1919, they were willing to accept the car of catsup, "now at Elizabeth as against the contract of 1918, and to discontinue the attachment proceedings, if the Paul DeLaney Co., would compromise with them for the failure to deliver under the contract of 1917."

On the twenty-seventh day of February, 1919, Messrs. Stamler & Stamler and Harry Kalisch, attorney for the Paul DeLaney Co., appeared without notice before Judge Silzer at Elizabeth on application by the attorney for the Paul DeLaney Co., for an order quashing and setting aside the writ of attachment issued in the above case upon two grounds. This application was denied by Judge Silzer, but a rule to show cause was allowed why the writ of attachment in the above stated cause should not be quashed. The reasons assigned by the Paul DeLaney Co., may be found on pages 23, 24 and 25 of Stated Case, fully set forth in the order dismissing said rule to show cause. Evidence was taken under the rule to show cause before Samuel Koestler, a Master in Chancery, and argument was made and Judge Silzer refused to set the writ of attachment aside and dismissed the rule to show cause, all of which appears on pages 22, 23, 24 and 25 of the Stated Case.

On March 29, 1919, a writ of certiorari was allowed, removing the attachment proceedings, and the proceeding under the rule to show cause to the Supreme Court. Nine reasons were assigned why the attachment proceedings should be set aside, all of which may be found on pages 94 and 95 of the State of the Case.

On May 8, 1919, an order was made in said certiorari proceedings setting aside the writ of attachment in said cause, which order may be found on pages 7a and 8a of State of Case. The opinion upon which said order was based appears on page 3a of State of Case.

The present appeal seeks to reverse the order in certiorari proceedings setting aside said writ of attachment. The grounds, upon which the present appeal is based, are set forth on pages 1a and 2a of State of Case.

Argument.

It will be observed that Justice Bergen in the certiorari proceedings based his opinion on only one of the reasons advanced by respondent, viz:

“The goods were lured into the State of New Jersey for the purpose of attaching them.”

Justice Bergen did not express any opinion as to the other reasons. He says,

“This result renders it unnecessary to determine the other matters raised by the prosecutor and no opinion thereon is intended to be expressed.” (See page 6a, State of Case.)

Should this Court find that the reason, upon which Justice Bergen based his decision, was untenable (which is difficult to imagine) still, if the judicial action could be maintained for other reasons, the judgment should not be disturbed.

In the case of *Sadler v. Young*, 75 At. Rep., page 890, Justice Gummere says as follows:

“This decision is directly in point and if it is sound, the judgment under review must be affirmed, for if there was no error in the judicial action complained of, the fact that the reason given for it was untenable, affords no justification for a reversal.” See also *McMichael v. Horay*, 90 N. J. L. 142. See also *Gillespie v. Ferguson*, 78 N. J. L. 470.

For the present, therefore, we will present to this Court the same reasons which were offered to Justice Bergen in the certiorari proceedings, exclusive of the one upon which Justice Bergen bases his opinion and insist that upon those reasons, the Court would have been justified in setting aside the attachment proceedings. The reason which Justice Bergen relies upon in his opinion, will be discussed later.

FIRST—The Supreme Court commissioner had no authority to award the writ of attachment because the affidavit upon which it was founded does not contain proof that the plaintiff has a cause of action as required by Section 84 of the practice act.

The attachment proceedings in this case, which are now under review, were based upon sections 84 to 92 inclusive of the Practice Act. These sections of the Practice Act are not in conflict with the New Jersey Attachment Act; the New Jersey Attachment Act having failed to give relief in certain cases (as for instance in suits for unliquidated damages). The New Jersey Practice Act was passed to provide remedies in cases which the Attachment Act did not cover. This plainly appears from a reading of the case of *Hotel Registry Corporation v. Stafford*, 41 Vroom, page 528, in which Mr. Justice Pitney reviews both acts, with the conclusion that both may exist concurrently. In this case we have only to deal with the sections of the Practice Act referred to above and not with the Attachment Act.

Section 84 of the Practice Act provides as follows:

84. WHEN AN ACTION MAY BE COMMENCED BY ATTACHMENT.

An action may be commenced by attachment against the property, real and personal, of any person, corporation or organization against whom a writ of summons might issue, upon proof by affidavit or otherwise to the satisfaction of the court in which an action is about to be commenced or to a judge or supreme court commissioner, establishing:

FIRST. The facts on which the plaintiff would be entitled to an order to hold a defendant to bail under the provisions of this act; if the defendant be a female, a corporation or an organization, an attachment may issue as if such defendant were liable to arrest in a civil action; but in actions in tort no attachment shall issue hereunder against a corporation upon which a summons can be served; or,

SECOND. That the plaintiff has a cause of action which arose in this State, 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; but no attachment issue hereunder against the rolling stock of a common carrier of another State or against the goods of a non-resident in transit in the custody of a common carrier of this or another state; or,

THIRD. That a cause of action existed against a decedent which survives against his heirs or devisees, and that such heirs or devisees or some of them are unknown, or non-resident, and that there is property in this state which is by law liable to answer such cause of action.

This is an extraordinary statutory remedy, and therefore, every step that is taken must be in strict compliance with the act. The above section says that "an action may be commenced by attachment * * * upon proof by affidavit or otherwise to the satisfaction * * * the Supreme Court Commissioner, establishing, etc."

The word "*proof*" has a definite meaning in legal phraseology, and it means such proof as would be accepted in Court. This necessarily excludes "*hearsay*," "*conclusions of a witness*," or "*opinions of a witness*." In support of this proposition, the cases in this State are not in conflict. From the very earliest decisions, they have with one accord adhered to the principle stated above. In the case of *Ingelis v. Schriener*, 58 N. J. L. on page 120, appears the following:

"These and many other cases hold with respect to the divers statutes, that the word "*proof*" when used in a legislative enactment, means *competent and legal evidence*, so, in other words, testimony that confirms to the fundamental rules of proof, one of which excludes *hearsay evidence*, however trustworthy the informant, or however implicit may be the deponent's belief in the truth of what he has heard."

In the case of *Truax ads Pennsylvania Railroad Co.*, 56 N. J. L. on page 277, appears the following:

"An ex-parte affidavit made for the purpose of awarding a defendant to bail statements to which the affiant could not lawfully testify in open court, are not competent evidence of fraud."

And in the case of *Kennedy ads Israel S. Chumas*, 2 Dutcher, on page 305, appears the following:

"The proof exhibited to a judge or *commissioner* to obtain an order for an attachment under the supplement of 1855 must be proof of *facts* sufficient to establish some one of the particulars required to be provided by the First Section. The mere belief or *conclusions* of the witness are not enough." See *Kip v. Chamberlain*, Spencer 656.

The case of *Hanford v. Duchastel*, 87 N. J. L., deals with the very section which we have under consideration and says on page 206, as follows:

"Section 84 of the Practice Act of 1903 as amended 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 sufficient to establish such particulars *and not mere belief or conclusions of the witness.*”

Other cases in point are: *Hufte v. Theodore D. Wilson*, 78 N. J. L., page 245; *Ex-parte Clark*, 20 N. J. L., page 652; *Githens v. Mount*, 64 N. J. L., page 168; *The Emerald & Phoenix Brewing Co. v. Sutton*, 68 N. J. L., page 246; and last of all is the case of *Hisor v. Vandiver*, 83 N. J. L., page 433, which treats of the very sections which we have under consideration, having established the principle that the proof required by the act means legal proof.

We come next to an inspection of the affidavit in the case to see whether it complies with that requirement. First, the affidavit (page 9, state of case) says, that Joseph Freedman is the president of the Joseph Freedman Co., a corporation. There is nothing to indicate that Joseph Freedman is familiar with the facts set forth in the affidavit so as to qualify him to testify. He says he is the president of the company; that, in itself, does not necessarily give him the information which he sets forth in his affidavit. His duties as president, which we are not made aware of in the affidavit, do not necessarily give him a knowledge of the matters concerning which he speaks. He should have added to the fact that he was president, the following:

“And am familiar with the facts hereinafter set forth.”

It further appears in the affidavit that the contract upon which the suit is founded was a written contract, the affidavit reading as follows:

“That on the 24th day of January, 1917, the Paul DeLaney Co., Inc., entered into a *written* contract with Joseph Freedman Co., by which contract, etc.”

This written contract is not *attached* to the affidavit nor made a part of it, therefore, what the affiant, Joseph Freedman, swears to in the affidavit is purely hearsay, the best evidence being the contract itself; so that the affidavit itself puts beyond dispute the question of the qualifications of Joseph Freedman, the affiant, as a witness concerning the terms of the contract. If he were to take the stand to testify, his evidence concerning the terms of the contract could not be received, and this is the test which the courts have applied in determining whether affidavits in proceedings such as these were defective or not. In court, the contract itself would have been the only evidence that could have

established the terms agreed to between the parties. The witness could not state his recollection of what the contract contained. So, upon this objection alone, the affidavit is fatally defective since it does not comply with the established rule laid down by the courts of this State, and I beg leave to refer again to the case of *Ingelis v. Schriener*, cited above, wherein the Court says:

“That the word “*proof*” when used in a legislative enactment means *competent and legal evidence*, so, in other words, testimony that confirms to the fundamental rules of proof, one of which excludes *hearsay evidence*, etc.”

It further appears on page 2 of the affidavit as follows:

“That the Paul DeLaney Co., Inc., failed and refused to deliver to the said Joseph Freedman Co. the 1,254 cases of catsup or any part thereof *in accordance with the terms of the contract.*”

The terms of the contract not being incorporated in the affidavit, it was impossible for the Commissioner to adjudge what the plaintiff claims in his suit, namely, a failure and refusal to deliver in accordance with the terms of the contract; because, so far as the affidavit and order of the Commissioner are concerned, the Commissioner was only provided with the proof made by Joseph Freedman, the affiant, who testifies to a conclusion.

The order of the Commissioner (see p. 11, state of case) reads as follows:

“I, William D. Wolfskeil, a Supreme Court Commissioner of the State of New Jersey, upon reading the affidavit of Joseph Freedman and having considered the same, do on this 24th day of December, 1918, adjudge and do decide by said affidavit; it is proved to my satisfaction, etc.”

It thus appears that the Commissioner in making his findings relied solely on the Freedman affidavit, and a careful scrutiny of the order shows that it follows almost *verbatim* the affidavit.

Coming back, then, to that part of the affidavit quoted above, it must be apparent that Freedman merely testified to conclusions of law and fact and also, that that part of the affidavit was hearsay. The phrase “*in accordance with the terms of the contract*” implies, in the absence of any other evidence, that Freedman had *concluded* that the defendant had not performed his part of the contract that necessarily requires a knowledge of the facts. How could the Supreme Court Commissioner find

that the defendant had not delivered "in accordance with the terms of the contract" unless he had before him the contract in question? If he accepted merely the sworn statement of Freedman, then he accepted merely a conclusion, and this is also contrary to the principle laid down in the cases cited above. What constitutes a delivery *in accordance with the terms of the contract* would be for the Court to adjudge as a matter of law, for even though the goods contracted for had been delivered, yet that did not necessarily constitute a delivery in accordance with the terms of the contract, as there might be some term in the contract which would make the delivery not in accordance with its terms. To merely make the statement that the goods were not delivered in accordance with the terms of the contract, is to swear to a conclusion, which, as I have stated, is a violation of principles above set forth.

It is further to be observed in the affidavit that the damage claimed which are also part of the "cause of action" required to be set forth by Section 84 of the Practice Act, are not based on facts. On page 2 of the affidavit is the following:

"the said Joseph Freedman Co. was obliged to go into the open market and purchase a large quantity of catsup of the *quality and kind* specified in the contract, at \$1.82 a dozen."

What the *quality and kind* is we are not enlightened about, as the contract is not made part of the affidavit; hence, the statement that Freedman had to go into the market and purchase a large quantity of catsup of the quality and kind specified in the contract, is merely a conclusion and, therefore, is insufficient and improper to base an order on.

Reasons number 2 and 3 may be considered together.

SECOND. The finding of facts by the Commissioner was not sufficient to base an order on.

THIRD. The order is defective, as it does not comply with Section 85 of the Practice Act.

Section 85 of the Practice Act provides as follows:

"Upon *such* proof being made the court, judge or commissioner shall make an order awarding the plaintiff a writ of attachment, etc."

Our contention is, and we have endeavored to show under Reason 1, that the proper proof was not made, hence the Commissioner had not authority to make the order.

Section 85 of the Practice Act further provides:

“That the order shall prescribe the amount of the bond to be given on behalf of the plaintiff to the defendant with sufficient sureties to indemnify the defendant for all damage resulting from the attachment.”

The order says that the plaintiff give a bond, etc., to indemnify the defendant for all damages “*arising from the attachment, etc.*” The phrases “arising from said attachment” and “resulting from said attachment” are not synonymous. The phrase “arising from said attachment” would restrict The Paul DeLaney Co., Inc., to those damages which flow immediately from the issuance of the writ, whereas the phrase, “resulting from said attachment” gives a broader protection to the defendant, Paul DeLaney Co., Inc., and one which the statute contemplates; no other words should have been used, especially when the two phrases are substantially different in meaning.

It further appears in the order that the defendant is to be indemnified for all damages arising if the suit shall be discontinued or judgment thereon shall be given to the said defendant, whereas Section 85 requires, “that the defendant shall also be indemnified if the suit is dismissed.” There is no provision made in the order to cover the dismissal of the suit; that is entirely omitted, so that in that contingency the defendant would be without protection.

It further appears in that order that the writ of attachment is awarded *in* the sum of \$2,746.26, whereas Section 85 says, “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 the plaintiff.*” The words “in the sum of” does not designate any particular sum. It means any amount within \$2,746.26. This same objection is to be found in the last paragraph of the order which provides: “That the plaintiff give a bond in the sum of \$5,500,” whereas Section 85 provides as follows: “which order shall prescribe the amount of the bond to be given, etc.” Neither of these amounts are to be left in uncertainty.

Reasons four and five may be considered together. They are as follows:

FOURTH. The clerk had no authority to issue the writ, because the proper order and proof were not filed with him as required by Section 86.

FIFTH. There is no proof showing what sum was due the plaintiff; therefore the order awarding the writ of attachment for \$2,746.26 was illegal.

The affidavit says and the order finds that the plaintiff had to go into the open market to purchase catsup of the quality and kind specified in the contract and that the market for catsup of the quality and kind specified in the contract was \$1.82 a dozen. The requirements of Section 85 make it necessary to establish by proof what sum is due the plaintiff, for the order shall direct that the writ shall issue for such sum. The proof referred to must be legal proof, and as the contract itself was not offered in evidence to the Commissioner it is purely hearsay on the part of the affiant to make any statement concerning the quality and kind of catsup specified in the contract; by so doing he is merely stating what appears in a written instrument which is not produced.

Section 86 of the act provides as follows:

“Upon filing with the Clerk of the Court out of which a writ of attachment may issue the order awarding such writ and the proof upon which the same is founded and the bond approved by the court, judge or commissioner, such clerk shall issue to the sheriff or other officer a writ of attachment for the sum directed.”

The contention of the defendant is that the clerk was not authorized to issue the writ because the order, the proof and the bond in the form required by the act was not valid. This objection is not technical, as the remedy which is invoked by the plaintiff is statutory and the Legislature safeguarded the property rights of defendants by making certain conditions necessary before the writ would issue, so that a disregard of the terms of the statute is fatal.

SIXTH. The property attached did not belong to defendant.

Section 84 of the act provides:

“That an action may be commenced by attachment against the property, real and personal, of any person, corporation or organization against whom a writ of summons may issue, etc.”

and Section 85 provides:

"That such proof being made the court, judge or commissioner shall make an order awarding the plaintiff a writ of attachment against the goods and lands, rights and credits, etc., belonging to the defendant in this state."

The property which was attached was sold by the defendant to the plaintiff by virtue of a contract entered into by the parties on June 25, 1918, the terms of which are the same as the contract of the year before, which is the basis of this suit, the contract having been offered in evidence by Mr. Stamler and marked Ex. P. 2.

The contention of the defendant is, that the title of the goods passed to the plaintiff and that the plaintiff could not rescind the contract except upon legal grounds. Under the "Sales Act," of this State, the plaintiff under certain conditions is permitted to rescind the contract to sell or the sale and refuse to receive the goods. This right is accorded to the buyer, which in this case is the plaintiff if there was a breach of warranty. Therefore, in order for the plaintiff to be entitled to rescind this contract, it must appear that there was a breach of warranty. Nowhere in the testimony taken does there appear to have been a breach of warranty. The contract calls for certain goods, and, for ought that the testimony shows, these were provided by the defendant. The goods were rejected by the plaintiff because of quality (see pages 65-66, state of case).

The only objection to the goods was, that the catsup was thin and bitter and had a garlic smell. There is nothing in the contract which warrants that the catsup would be free from this objection (if it was an objection), so that we are not dealing with an express warranty.

So far as there being implied warranty, the Sales Act provides what that shall be. Section 15 of the Sales Act, Compiled Statutes, Vol. 4, p. 4650, provides as follows:

"Subject to the provisions of this act and of any statute in that behalf, there is no implied warranty or condition as to the quality or fitness for any particular purpose of goods supplied under a contract to sell or a sale, except as follows:

Then follow the implied warranties referred to, none of which apply to the present case with the possible exception of the second "MERCHANTABILITY," and, according to the evidence in the case, the goods were marketable (see letter Exhibit 6, page 71,

of stated case; also page 42, bottom of page, testimony of Joseph Freedman).

It further appears that 42,400 bottles constituted the 1918 shipment, which was attached, and that out of that and only 14 bottles were examined; the balance of the goods were not even opened. Can it then be said that the goods which were not examined were open to the same objection as those that were examined? We think not, and therefore the rejection by the plaintiff of the entire shipment of goods was unwarranted and failed to reinvest the title in the defendant, so that the attachment was against goods which were owned by the plaintiff by virtue of the contract between the parties.

SEVENTH. The attachment was issued against goods of a non-resident (if title did not pass to plaintiff) in transit in custody of a common carrier.

The second paragraph of Section 84 of the Practice Act provides, *inter-alia*, that,

“* * * but no attachment shall issue hereunder against the rolling stock of a common carrier of another state or against the *goods of a non-resident in transit in the custody of a common carrier of this or another state.*”

It appears from the return made by the Sheriff (see page 7, stated case) that the goods were attached while in transit in the custody of the railroad. The return to the writ says:

“Attached for the plaintiff, 1,329 cases of catsup, etc., at the Central Railroad of New Jersey, Long Branch siding, East Jersey Street, Elizabeth.”

That they were, therefore, in the custody of a common carrier cannot be questioned, nor can the question of their being in transit be raised, because that is settled also by the Sales Act, which provides, on page 4660 of Compiled Statutes, Vol. 4, Section 57, as follows:

“Goods are in transit within the meaning of Section 57.

(b) If the goods are rejected by the buyer and the carrier or other bailee continued in possession of them even if the seller has refused to receive them back.”

Therefore, these goods were not subject to attachment at the time that the Sheriff executed the writ.

EIGHTH. The goods were lured into the State of New Jersey for the purpose of attaching them.

Under the cases in this State a defendant is not amenable to process unless he is in or comes voluntarily within the territorial jurisdiction of the court, and if he is wrongfully, fraudulently or by deceit induced to come within the process of the court, service is not effective either as to his person or property and should be set aside. (See Cyc., Vol. II, page 673, also see *Reed v. Williams*, 29 N. J. L., p. 305.

The evidence in the present case shows beyond doubt that the plaintiff secretly intended to attach the goods of the defendant and accomplished his purpose by ostensibly purchasing the goods and then upon their arrival rejecting them for trifling reasons. The letter dated December 10th, 1918, written for the plaintiff to the defendant and marked Exhibit 1, shows that the plaintiff imposed upon the defendant by representing to him that the goods ordered in 1918 would be paid for as per contract. This letter is set forth fully on page 32 of the state of the case. It was written in the presence of Mr. Freedman by Mr. Stamler, who acted for the plaintiff, and was signed by Mr. Freedman for the plaintiff (p. 32, case). This letter was an answer to a previous letter received from the defendant on December 2nd, 1918, which letter is set forth on page 33 of the state of the case. These two letters together would be sufficient proof of the fact that the plaintiff purposely misled the defendant and induced him to send goods into New Jersey.

It further appears in the testimony that the goods arrived at Elizabeth on December 18th and that on December 19th papers in attachment were prepared by Messrs. Stamler & Stamler (pp. 97 and 98, case, and p. 78). The reason given by the plaintiff for rejecting the goods is that they were not up to quality, yet by a letter dated January 17th, 1919, marked Exhibit 6 (p. 71, case), and in evidence under the arrangement with Messrs. Stamler & Stamler by which all the correspondence between the parties was to go in evidence (p. 34, case), it appears that the plaintiff was willing to accept the car of catsup under contract of 1918 upon condition that the defendant make an allowance for failure to deliver in 1917. No deductions are asked because of poor quality in the 1918 shipment, the only condition is that a settlement be made for the failure to deliver the year previous. This certainly shows that the reason advanced for rejecting the 1918 shipment was a subterfuge, for if

it was in good faith, then certainly plaintiff would not accept, at the contract price, these goods.

And, further, there is nothing in the 1918 contract which requires the goods to have a certain taste (or, rather, not to have a certain taste). The effort on the part of Mr. Freedman to show that the goods were objectionable is almost ludicrous (see state of case, pp. 53-62.) The uncontradicted evidence in the case is that the goods were marketable. (See bottom of p. 42 of stated case.) Certainly, from the evidence there could be no other conclusion but that the goods were lured into the State of New Jersey for the purpose of attaching them, as the reason advanced by the appellant for rejecting them was merely subterfuge.

The authorities even go so far as to say that where a party comes within the jurisdiction voluntarily under an agreement he will be protected where through the adverse party's disregard of his own obligation the appearance is taken advantage of contrary to the terms of the agreement; and this without any regard as to whether there was any premeditated design in procuring the presence of the defendant within the jurisdiction; the mere breach of agreement is held to be sufficient.

(See *Graves v. Graham*, 44 New York Suppl., p. 415; *Allen v. Wharton*, 13 New York Suppl., p. 38; *Byler v. Jones*, Mo. Appeal Reports, 22, p. 623; *Wyckoff v. Packard*, Abbott's New Cases, 20, p. 420; *Dunham et al. v. Cressy et al.*, New York Suppl., 4, p. 13; *Carpenter v. Spooner*, Sandford's Reports, New York Superior Court, 2; *Goupil v. Simonson*, Abbott's Practice Reports, 3, p. 474; *Metcalf v. Clark*, Barbough's Supreme Court Reports, 41, p. 45.)

Certainly, it was an undisputed fact in the case that the goods were sent into New Jersey upon the written assurance that they would not be subjected to legal process for respondent's failure to deliver the goods the year previous. The letters of Dec. 2nd and Dec. 10th (pp. 32-33, stated case) establish that as an undisputed fact, and it was a breach of faith which this court ought not to countenance, to attach the goods. It being an undisputed fact, Justice Bergen was justified in so considering it, even though Judge Silzer found to the contrary.

Respectfully submitted,

HARRY KALISCH,
Kalisch & Kalisch.

59

NEW JERSEY COURT OF ERRORS AND APPEALS

THE PAUL DELANEY CO., INC.,
Respondent,

vs.

JOSEPH FREEDMAN CO., et als.,
Appellants.

} On Appeal.

BRIEF FOR APPELLANTS.

This appeal brings up for review, an order of the Supreme Court made by Mr. Justice Bergen, dated May 8th, 1918, setting aside a writ of attachment issued by the Union County Circuit Court in pursuance to an order made by William D. Wolfseil, Esq., Supreme Court Commissioner, and also an order reversing an order discharging a Rule to Show Cause issued on the 27th day of February, 1919, made by George S. Silzer, Judge of the Union County Circuit Court.

The affidavit presented to the Supreme Court Commissioner upon which the order was made directing the issuance of the writ of attachment is found on page 9-11 of the Record. The order made by the Supreme Court Commissioner directing the issuance of the writ of attachment is found on page 11-12 of the Record.

The Rule to Show Cause obtained by the respondent in the Union County Circuit Court is printed on page 21 of the Record. The Opinion and Order dismissing the Rule to Show Cause made by the Union County Circuit Court is printed on page 22-25 of the Record.

The Opinion of Mr. Justice Bergen reversing the

Union County Circuit Court is printed on pages 3a to 6a of the Record. The Order reversing the Union County Circuit Court and quashing the writ of attachment is printed on pages 7a-8a of the Record.

The reasons assigned by the respondent on its Rule to Show Cause before the Union County Circuit Court is printed on pages 97-98 of the Record. The reasons assigned by the appellants for reversal of the Supreme Court are printed on pages 1a-2a of the Record.

Undisputed Facts.

On the 24th day of January, 1917, the Joseph Freedman Co. entered into a written contract with the Paul DeLaney Co., whereby the Joseph Freedman Company agreed to purchase, and the Paul DeLaney Company agreed to sell to the Freedman Company 1254 cases of catsup at 72½c per doz. (Said statement is based upon "Exhibit No. 1" on the part of the plaintiff and found on page 73 of the Record.)

The Joseph Freedman Company endeavored to procure a performance of the contract but the Paul DeLaney Company refused and neglected to perform the same (see "Exhibit P-1" letter dated September 7th, 1917, on pages 63-64 of the Record; also see "Exhibit" letter dated October 25th, 1917, page 64; also see testimony of Joseph Freedman, on page 65, l. 10-30 inclusive.)

On June 25th, 1918, Joseph Freedman Company made a second contract with the Paul DeLaney Company, whereby the Paul DeLaney Company agreed to sell and deliver to the Joseph Freedman Company 1350 cases of catsup (see contract "Exhibit P-2," p. 96).

That during the year 1918, the Paul DeLaney Company demanded from the Joseph Freedman Company, money for the printing of labels and the

Joseph Freedman Company sent the money so requested (p. 36, l. 24-30).

On December 2nd, 1918, the Paul DeLaney Company wrote to the Joseph Freedman Company that the catsup, under the contract of 1918, was packed and ready for shipment, but before shipping wanted to have a distinct understanding regarding to the settlement for same * * * (p. 33 of the Record).

The Joseph Freedman Company *did not reply to that letter until a Mr. Weber, representative of the Paul DeLaney Company came to see them on December 10, 1918* (p. 37, l. 1-3).

On December 10th, 1918, Mr. Weber, the representative of the Paul DeLaney Company called on Mr. Freedman and thereupon Mr. Weber and Mr. Freedman came to the office of Messrs. Stamler & Stamler (p. 37, l. 10-30; also see testimony of Mr. John J. Stamler, p. 12, l. 15-40). That after Mr. Weber and Mr. Freedman called at the office of Messrs. Stamler & Stamler, Mr. Weber requested the Joseph Freedman Company to write a letter to the Paul DeLaney Company, which is printed on page 32 of the Record. Mr. Freedman on page 37, l. 25-40, testifies as follows: "Mr. Weber wanted me to write a letter and told Mr. Stamler just what he wanted written * * *." "Mr. Stamler told Mr. Weber that this has nothing to do with the claim what Mr. Freedman has against the DeLaney Company, and Mr. Freedman is going to take the catsup according to his contract, and I am going to file suit against the Paul DeLaney Company for the loss of our previous contract."

Q. (P. 37, l. 37). What did Mr. Weber say? A. I don't blame you, it is not more than right.

Q. After that conversation the letter was written. A. Yes, sir.

Q. Did Mr. Weber promise to do some-

thing for you at that time? A. Mr. Weber said he would try to do all in his power to try to straighten this matter out.

Q. What matter out? A. For the last catsup.

The letter of December 10th 1918 was delivered to Mr. Weber (p. 38 of the Record, 1. 25). (See testimony of Mr. John J. Stamler, p. 62-63 of the Record.)

The goods arrived at Elizabeth on December 18th, 1918, (p. 39, 1. 1-2) and it was opened by the plaintiff on the 18th day of December, 1918, (p. 39). The Sheriff made the levy on December 21st, 1918, (p. 7, 1. 15); and the goods were placed in storage December 23rd, 1918, ("Exhibit P-4," p. 93).

The witness, Joseph Freedman was the President and General Manager of the Joseph Freedman Company (p. 26, 1. 20), *and has been engaged in the grocery business for 26 years* (p. 61, 1. 6).

The car was opened on December 18th, 1918, and the witness, Joseph Freedman examined the catsup that day and found the *catsup to be thin and smelled of garlic. It is an inferior catsup that I could not handle or sell to my trade* (p. 39, 1. 20-24). *The catsup was not of the contracted quality* (p. 39, 1. 25-27).

The goods were of an *inferior quality* and Freedman Company *could not sell them* (p. 42, 1. 3-5). The catsup in question was also submitted to Messrs. Louis Hersh and Herman Hersh for their test (p. 63, 1. 12-14). The goods were rejected on the ground of quality (p. 34, 1. 30-32).

On December 19th, 1918, the Joseph Freedman Company, in writing, notified the Paul DeLaney Company, that it rejected the car of catsup under contract of June 25th, 1918, on the ground of poor quality. (See "Exhibit P-3" p. 66; also "Exhibit P-7" pages 65-66.) On December 19th, 1918, the

attorney for the Joseph Freedman Company also wrote a letter to the Paul DeLaney Company renewing the Joseph Freedman Company's claim under the contract of 1917.

The affidavit for attachment was dictated by Stamler & Stamler, on December 19th, 1918. (See p. 63, l. 18). The affidavit was sworn to on December 20th, 1918, and the same was presented to the Supreme Court Commissioner on December 21st, 1918 (p. 11, l. 1-3).

The Order for attachment was made on December 21st, 1918 (p. 12 of the Record, l. 32).

The respondent (the prosecutor below) in the Supreme Court attacks the adjudication of the Circuit Court upon several grounds and for the purpose of argument the appellant will combine the reasons into two sub-divisions:

1.

(Prosecutor's Reason No. 6.) THE PROPERTY ATTACHED DID NOT BELONG TO DEFENDANT BUT TO THE PLAINTIFF.

(Prosecutor's Reason No. 7.) THE ATTACHMENT WAS ISSUED AGAINST GOODS OF A NON-RESIDENT (IF TITLE DID NOT PASS TO PLAINTIFF) IN TRANSIT IN CUSTODY OF A COMMON CARRIER.

(Prosecutor's Reason No. 8.) THE GOODS WERE LURED INTO THE STATE OF NEW JERSEY FOR THE PURPOSE OF ATTACHING THEM.

The above reasons relate to the testimony taken on the Rule to Show Cause issued out of the Circuit Court, and the Circuit Court Judge decided the issues of fact against the prosecutor. (See Order dismissing Rule to Show Cause, p. 24, pars. 5-6-7-8).

oals zuzquinoD nambegnt **A.**

Who was the owner of the property attached?

The undisputed testimony in this case shows that the Freedman Company, in accordance with contract dated June 25th, 1918, ("Exhibit P-2" 96) ordered 1350 cases of catsup, the quality of the product to be first class; made from clean, thoroughly washed ripe New York tomatoes. Mr. Freedman's testimony on that point, which is uncontradicted in the Record, discloses that the catsup was thin and smelled of garlic, an inferior catsup and he could not sell it or handle it or sell it to the trade; the catsup was not of the contracted quality (p. 36 of the Record). The goods were of an inferior quality and the Freedman Company could not sell it (p. 42, 1. 3-5). The goods were rejected on the ground of quality (p. 34, 1. 30-32).

From the above evidence it clearly appears that the Circuit Court properly determined the question of fact that the catsup was not the property of the Joseph Freedman Company, but of the Paul DeLaney Company, for the reason that the Freedman Company ordered catsup of a different quality than the one which was actually shipped to it by the Paul DeLaney Company, and the appellant was within its legal right to reject the catsup.

B.

Were the goods attached in transit and in the hands of a common carrier?

It is true that the Sheriff's return to the writ of attachment to be found on page 7 of the Record states: "That on the 21st day of December, 1918,

the goods were attached at the Central Railroad of New Jersey, Long Branch Siding, East Jersey Street, Elizabeth, N. J.," but the reading of the testimony of Joseph Freedman will clearly demonstrate to the Court that the goods arrived at Elizabeth on December 18th, 1918 (p. 39, l. 1-3). That the car was opened on the siding by the men of the appellant on the same day, that they brought in cartons of the catsup for the purpose of making an examination (p. 39 of the Record).

From the above proof the Circuit Court *determined as a question of fact*, that the property attached was the property of the defendant, a non-resident and were not in transit in custody of a common carrier (p. 24 of the Record, l. 30).

C.

Were the goods lured into the State of New Jersey for the purpose of attaching them?

We admit that it is a well established principle of law, that if the defendant fraudulently lured the merchandise into the State of New Jersey, for the purpose of obtaining jurisdiction over the property of the defendant, and that the writ of attachment in this case ought to be quashed, but we respectfully submit that the Circuit Court in its findings properly determined from the evidence in the case "That the goods were not lured into the State of New Jersey, for the purpose of attaching them" (p. 34, l. 34-35).

The evidence which established at least a disputed question of fact on that point is as follows: That the Paul DeLaney Company was legally obliged to carry out its contract of June 25th, 1918, and deliver the goods to the appellant. That

the Joseph Freedman Company furnished funds with which to print labels for the bottles containing the catsup (p. 33 of the Record).

There is no disputed evidence in the case that the goods shipped by the Paul DeLaney Company to the Joseph Freedman Company *were not of the quality contracted for and therefore the catsup shipped was not the catsup contemplated by the order of June 25th, 1918*, and the correspondence dated December 2, 1918 and December 10, 1918. There is no evidence in the case that the Joseph Freedman Company did not intend to actually pay for the catsup had the goods been in accordance with the contract of June 25th, 1918, and therefore the Circuit Court as a question of fact, properly determined that the goods were not lured into the State of New Jersey for the purpose of attaching (p. 24, l. 35-36). "That the goods shipped by the defendant to the plaintiff, and attached by the Sheriff of the County of Union under the writ, were rejected by the plaintiff for a valid reason" (p. 25, l. 1-5).

The findings of fact by the Circuit Court were based upon actual evidence produced in the case and heretofore referred to.

All other reasons assigned by the prosecutor attack the affidavit of the plaintiff and the order made by the Supreme Court Commissioner.

The above proceedings are founded on the Practice Act. 3 C. S. 4076, which reads as follows:

84. Grounds. An action may be commenced by attachment against the property, real and personal, of any person, corporation or organization against whom a writ of summons might issue, *upon proof by affidavit or otherwise*, to the satisfaction of the court in which an action is about to be commenced to a judge or supreme court commissioner, establishing:

First: The facts on which the plaintiff would be entitled to an order to hold a defendant to bail under the provisions of this act; if the defendant be a female, a corporation or an organization, an attachment may issue as if such defendant were liable to arrest in a civil action; but in actions in tort no attachment shall issue hereunder against a corporation upon which a summons can be served; or,

Second: 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 his state, and that summons cannot be served; but no attachment shall issue hereunder against the rolling stock of a common carrier of another state or against the goods of a non-resident in transit in the custody of a common carrier of this or another state; or

Third: That a cause of action existed against his heirs or devisees and that such heirs or devisees, or some of them are unknown or non-resident, and that there is property in this state which is by law liable to answer such cause of action.

85. Writ ordered upon proof; bond and sureties. Upon such proof being made, the court, judge or commissioner shall make an order awarding the plaintiff a writ of attachment against the goods and lands, rights and credits, money and effects, belonging to the defendant in this state, or if action is brought against the defendant in a representative capacity under his custody or control, which order shall prescribe the amount of the bond to be given on behalf of the plaintiff to the defendant with

sufficient sureties to indemnify the defendant for all damages resulting from the attachment and taxed costs of suit, if the suit shall be discontinued or dismissed or if judgment therein shall be given for defendant; 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 and in actions in tort for such sums as the officer shall under all the circumstances think proper; in case an attachment shall issue an order for bail shall not be made.

The case under review was brought under the 2nd paragraph of Section 84 of the Practice Act, and that section requires the plaintiff to show to the Commissioner *upon proof by affidavit or OTHERWISE*, the following facts:

1. That the plaintiff has a cause of action, the nature and particulars of which he shall specify.
2. That the defendant is not a resident of this State, and that summons cannot be served.

We respectfully submit that the affidavit of Joseph Freedman shows, of his own knowledge, and not from hearsay, that the plaintiff has a good cause of action against the defendant, and that the defendant is not a resident of the State of New Jersey, and that summons cannot be served upon it. That was all the plaintiff was required to prove before the Supreme Court Commissioner and all other statements contained in the affidavit are simply explanatory of the cause of action. There is nothing in the affidavit to show that Mr. Freedman did not have full knowledge of all the facts contained in the affidavit.

It has been held in our State that: "A certiorari bringing up an order of the court quashing an attachment, upon the ground that the order for it was improvidently made, without proof of the facts required by law, will be dismissed, unless it distinctly appears that there was an error in law; the court or judge in such cases being bound to determine the sufficiency of the proof, in fact, this court will not review such decision."

Greenway v. Mead, 26 N. J. L. 303.

We again call your Honors' attention to the fact that the Record discloses that the Supreme Court Commissioner not only considered the affidavit of the plaintiff, page 9 and 10 of the Record, but *also* "Exhibit No. 1 on the part of the plaintiff," being the contract in question. See page 73 of the Record.

The prosecutor in certiorari, no doubt, will raise the question that the affidavit made on behalf of the plaintiff, was insufficient for the reason that the affidavit referred to a written contract and no proper proof thereof was made before the Supreme Court Commissioner.

The statute above referred to directs the Supreme Court Commissioner to issue an Order for a writ of attachment, *upon proof by affidavit or OTHERWISE* to his satisfaction. The Record clearly shows that the contract was before the Supreme Court Commissioner and was considered by him before the making of the Order, and that is evidenced by the fact that the contract, on page 73 of the Record, was marked by the Supreme Court Commissioner as an Exhibit on part of the plaintiff.

It has been held by this Court that the proof is to be to the *satisfaction* of the Commissioner or

Justice of the Supreme Court as the case may be, and its weight and creditability rest with the commissioner, if there be any evidence from which such inference can be legally drawn, his decision is conclusive.

Wire v. Browning & Hull, 20 N. J. L. 367.

It is therefore respectfully submitted that from the affidavit of Joseph Freedman, an inference can be legally drawn from the following statements:

“That he is the President of the Joseph Freedman Company”; “That the Joseph Freedman Company being engaged in the Wholesale Grocery Business in the City of Elizabeth and elsewhere”; “Made contracts with its customers to sell and deliver to them catsup during the year 1917 at a price agreed upon”; “That the said Joseph Freedman Company was obliged to go upon the open market and purchase a large quantity of catsup of the kind and quality specified in the contract.”

That Joseph Freedman, President of the Company, had actual knowledge of the business of the company, was familiar with the contract and its terms, with the quality of the merchandise bought and with the market price of merchandise, and therefore all essential facts necessary to prove a *prima facie* case was presented before the Supreme Court Commissioner and were included in the affidavit and exhibit in question, and at trial of a cause such proof would constitute a *prima facie* case.

It needs no argument to satisfy the Court that at the trial in the Circuit, the contract being put in evidence as an Exhibit, the witnesses may testify and refer to the contract, its terms &c., and this is what Mr. Freedman did in his affidavit.

Parol evidence is admissible to identify a note or to identify the subject matter.

Martin v. Bell, 3 Harr. 167;

Fitch v. Archibald, 29 N. J. L. 160.

All of the cases cited by the prosecutor in certiorari relate to the first subdivision of Section 84, which gives a cause of action in cases of tort, and have no application to actions brought under the 2nd subdivision of said Section giving a remedy or an attachment in cases of contract actions.

We therefore respectfully submit that the affidavit and order made by the Supreme Court Commissioner are not defective and do comply with Section 84 and 85 of the Practice Act.

III.

The defendant in certiorari insists that the prosecutor in certiorari is now estopped from questioning the validity of the affidavit and order made by the Supreme Court Commissioner for the reason that it obtained a rule to show cause from the Circuit Court Judge and leave was given to either party to take testimony, and the prosecutor availed himself of such opportunity and examined Mr. Freedman, the affiant at length, and that testimony clearly shows that Joseph Freedman, "the affiant, was the general manager of

the Joseph Freedman Company and transacted all its business through him, and that the nature of the business was that of a wholesale grocer (Page 26 of the Record, 1. 20-30); that he, Joseph Freedman, the affiant, made the contract dated January 24th, 1917, on behalf of the Freedman Company, (page 34, 1. 30-35); that he, goes out and sells the goods on behalf of his com-

pany (page 36, 1. 20), and that he was 27 years in the grocery business" all of which facts

now appear in the Record. That Mr. Freedman had an actual knowledge of the grocery business and therefore was competent to give all the testimony referred to in the affidavit.

In determining this question, whether or not a writ of attachment should issue against the defendant, the Court now has before it, not only the affidavit which was the foundation of the writ, but also the testimony of the various witnesses and they all show that the plaintiff, the Joseph Freedman Company entered into a contract with the defendant, which contract is printed in full on page 73 of the Record, and that the defendant breached said contract and is not entitled to any relief from this court.

The defendant also waived the right to question the validity of the writ of attachment for the reason that after the issuance of the writ of attachment, the prosecutor on December 23rd, 1918, sent its Eastern Representative, to negotiate a settlement with the Joseph Freedman Company (page 45 and 46 of the Record). and at that time, Henry L. Weber, the Eastern Representative of the Company, made an offer to settle the controversy, (page 50 of the Record, 1. 20-24).

"Exhibit P-1" for identification on page 67, which was referred to in the testimony of Mr. Weber, clearly shows, that a month after the issuance of the writ of attachment the prosecutor offered to adjust the claim of the Freedman Company.

**The Defendant Before the Circuit Court
Asked for Affirmative Relief and
Thereby Waived All Jurisdictional
Questions.**

The defendant appeared before the Circuit Court on the 21th day of February, 1919, and obtained from Judge Silzer, a rule to show cause, which rule gave leave to defendant to take testimony. The defendant subsequently filed its reasons on said rule to show cause and an examination of the Reasons will disclose that the said defendant not only applied for relief to the Circuit Court on Jurisdictional grounds, but also applied for affirmative relief and asked the Circuit Court to determine questions of fact as follows:

(Reason No. 6.) THE PROPERTY ATTACHED DID NOT BELONG TO DEFENDANT.

(Reason No. 7.) THE ATTACHMENT WAS ISSUED AGAINST GOODS OF A NON-RESIDENT (IF TITLE DID NOT PASS TO PLAINTIFF) IN TRANSIT IN CUSTODY OF A COMMON CARRIER.

(Reason No. 8.) THE GOODS WERE LURED INTO THE STATE OF NEW JERSEY FOR THE PURPOSE OF ATTACHING THEM.

All the moving papers on behalf of the defendant are signed and endorsed "Kalish & Kalish, Attorneys for Defendant, 790 Broad Street, Newark, N. J."

We further call the Court's attention to the fact that the defendant did not enter a special appearance on the record of the Circuit Court, which would permit the defendant to appear specially for the purpose of setting aside the writ of attachment and it does not appear that the defendant reserved his right to appear specially for the purpose of vacating or setting aside the writ of attachment.

We therefore respectfully submit that the de-

defendant *waived any and all objections to the jurisdiction of the Court and waived its right to question the sufficiency of the affidavit in attachment or the Order made by the Supreme Court Commissioner*, by asking the Circuit Court for affirmative relief upon disputed questions of fact, based on testimony taken in pursuance to the Rule to Show Cause issued at the defendant's request, and having invoked the aid of the Circuit Court for the purpose of determining disputed questions of fact, the defendant is now estopped from raising any jurisdictional questions.

In numerous cases it has been held: "That while any steps looking to mere defense of the plaintiff's action would not be deemed a waiver of an objection to the jurisdiction of the Court, properly taken, yet, *if the defendant goes further and asks for affirmative relief*, he will thereby be deemed to have waived the objection, and the Court will have full jurisdiction over his person and property for all purposes of the trial.

Montague v. Marunda, 99 N. West, 653.

In the case above cited the Court held: "That where a defendant makes a motion for affirmative relief in his own behalf, after he has made a special appearance for the purpose of objecting to the jurisdiction of the Court or questioned the sufficiency of the moving papers, the defendant by his action in requesting that Court for affirmative relief, made a general appearance to the action and submitted himself to the jurisdiction of the Court and waived all jurisdictional questions and defects.

The record further discloses, that on April 9th, 1919, the attorneys for the defendant acknowledged a notice of a Motion that the plaintiff will apply to the Circuit Court for an Order to sell the goods attached as perishable property, that

notice was acknowledged by the defendant's attorneys in language following:

"Service of the within Notice is hereby acknowledged this 9th day of April, 1919.

Kalish & Kalish,
Attorneys for Defendant."

On the return day of said application, to wit, on the 12th day of April, 1919, the defendant's attorney appeared and opposed the motion before the Circuit Court, and the Circuit Court held that, in view of the fact that a Writ of Certiorari was then pending, the Circuit Court had no jurisdiction.

The above facts clearly demonstrate that the defendant appeared generally to the action.

And it has been held: "That the signature of a motion by an attorney, generally, without restricting his appearance, for the purpose of motion, is equivalent to a notice of retainer generally and operates as a general appearance."

Dole v. Manley, 11 How. Pr. (N. Y.) 138;
Kelsey v. Covert, 15 How. Pr. (N. Y.) 92.

Reasons for Reversal.

a. THAT THE SUPREME COURT ERRONEOUSLY DETERMINED THE DISPUTED QUESTIONS OF FACT AS TO WHETHER OR NOT THE DEFENDANT WAIVED AND RELEASED THE PROSECUTOR FROM ANY CLAIM FOR THE UNDELIVERED CATSUP UNDER THE CONTRACT OF 1917.

b. THAT THE SUPREME COURT ERRONEOUSLY DETERMINED THAT THE CIRCUIT COURT HAD BEFORE IT THE UNDISPUTED FACTS ON THE RULE TO SHOW CAUSE,

THAT THE PROSECUTOR WAS INDUCED BY A SHARP TRICK TO SEND ITS GOODS INTO THE STATE SO THAT THEY MIGHT BE ATTACHED.

c. THAT THE CIRCUIT COURT ON THE APPLICATION OF THE PROSECUTOR DETERMINED ALL QUESTIONS OF FACT AGAINST THE PROSECUTOR AND THEREFORE THE SUPREME COURT WAS WITHOUT AUTHORITY TO REVIEW THE FINDINGS OF THE CIRCUIT COURT, AND THEREFORE THE ORDER OF THE SUPREME COURT IS CONTRARY TO LAW.

d. THAT THE SUPREME COURT WAS WITHOUT AUTHORITY TO REVIEW THE FINDINGS OF FACT OF THE UNION COUNTY CIRCUIT COURT.

e. THAT THE UNION COUNTY CIRCUIT COURT DETERMINED AS A QUESTION OF FACT, THAT THE GOODS WERE NOT LURED INTO THE STATE OF NEW JERSEY, FOR THE PURPOSE OF ATTACHING THEM, AND THEREFORE THE SUPREME COURT WAS WITHOUT AUTHORITY TO REVIEW THAT QUESTION OF FACT BY PROCEEDINGS ON CERTIORARI.

It has repeatedly been held by this Court that in a case like the present, the writ of certiorari is used not simply to remove the question from the Inferior Court but to correct some error that has crept in the proceedings therein.

Ayres v. Bartlett, 2 Green, pp. 330-332.

The function of writ of certiorari is that of Writ of Error.

Coles v. Blythe, 69 N. J. Law, 661-668.

The Supreme Court in such case has no power to settle disputed facts or review the evidence, but to accept the findings of the Circuit Court upon the facts, if there be any legal evidence to warrant such findings, no intention will be taken against the judgment below, rather in favor of it.

Roehrs v. Remhoff, 55 N. J. Law, 475-478;

Sommers v. Westcoat, 66 N. J. Law, 551-552;

Ryer v. Turkel, 75 N. J. Law, 683.

When on error to the Supreme Court the judgment is again removed into the Court of Errors, this Court in its turn accepts the findings, inquiring only whether there be any legal evidence to sustain them.

Coles v. Blythe, 69 N. J. Law, 666-668;

Doolittle v. Willet, 57 N. J. Law, 398-399;

Ryer v. Turkel, 75 N. J. Law, 683.

But the prosecutor contends and the Supreme Court insists that the testimony of the witness, Joseph Freedman, page 37, 1. 37, and the testimony of Mr. John J. Stamler, pages 62-63 of the Record, should be disregarded for the reason that the letter addressed by the Paul DeLaney Company to the Joseph Freedman Company, dated December 2, 1918, page 33 of the Record, and also the letter delivered by Joseph Freedman to Henry Weber, the Agent of the Paul DeLaney Company on December 10, 1918, page 32 of the Record clearly shows that it was the *so-called secret intention of the Freedman Company to lure the goods into the State of New Jersey, for the purpose of attaching them.*

We respectfully submit that the two letters do

not show any intention nor could any such intention be inferred, in view of the undisputed testimony in the case, *that the goods were not of the contracted quality.*

If it was a disputed fact that the goods were of the contract quality, then in that case, possibly an inference could be drawn, that it was the secret intention of the Joseph Freedman Company to lure such goods into the State, but there is no evidence in this Record.

The letter dated December 10th, 1918, page 32 *does not waive any claim* that the Joseph Freedman Company had against the defendant, but the Joseph Freedman Company agreed: "If you will ship a car of catsup in pursuance to contract dated June 25, 1918, that it will pay the same in the usual course of business, and that this shipment has no reference to the contract of January 24, 1917, and the invoice will be paid in due course of business without any litigation."

The reading of the letter and taking into consideration the testimony (of Messrs. Freedman and Stamler to the effect that they both testified under oath, that at the time the letter was delivered to Mr. Weber, it was expressly understood between the parties that the Joseph Freedman Company would under no circumstances surrender its claim against the defendant company for the undelivered merchandise under the contract of January 24, 1917) it cannot be said that the Joseph Freedman Company waived its claim for the undelivered merchandise under the contract of 1917. At best it can be said that it is a disputed question of fact.

We therefore respectfully submit on that point, that no fraud having been shown to the Court below, and the Circuit Court Judge decided as a question of fact, that the goods shipped by the plaintiff to the defendant and attached by the Sheriff of the County of Union, under the writ

were rejected by the Joseph Freedman Company for a valid reason; and that the property attached was the property of the defendant, a non-resident and were not in transit in custody of a common carrier and that the goods were not lured into the State of New Jersey, for the purpose of attaching them, that the Supreme Court erred in its determination and had no authority to review the questions of fact, and set aside the Order heretofore made by the Circuit Court Judge dismissing the Rule to Show Cause.

Erroneous Statements of Fact Contained in the Opinion of Mr. Justice Bergen.

Mr. Justice Bergen in his Opinion states:

"The prosecutor, a non-resident corporation contracted to sell and deliver to the defendant a carload of tomato catsup on or before December 1st, 1917, which was not fulfilled *for reasons which the prosecutor claims were justifiable * * **" (3a, 1. 24-25).

There is no evidence in the case to support the statement of Mr. Justice Bergen that the prosecutor's act in not fulfilling the contract was justifiable.

On page 42, 1. 3, Mr. Justice Bergen states:

"And the next day defendant rejected it for lack of required quality *and the same day presented affidavits to a Supreme Court Commissioner showing a cause of action * * **"

There is no evidence in the case to support that statement; the fact is and the record discloses, that

the affidavit was presented to the Supreme Court Commissioner on December 21st, 1918 and not on the 19th day of December, 1918, as stated by Mr. Justice Bergen.

On page 5a, l. 25-26, Mr. Justice Bergen states:

"The Circuit Court had before it *this undisputed fact* on the rule to Show Cause, and it clearly appearing, without dispute, that the defendant *had waived* its former cause of action and agreed to pay without litigation as a condition for the shipment, a cause of action, so far as it related to the former shipment, did not exist, and the Circuit Court should have so decided as a matter of law and its discharge of the rule was error."

Possible that statement in the Opinion would be justifiable were it not for the undisputed fact, that the prosecutor did not ship to the Freedman Company catsup of the contracted quality, but in view of the undisputed fact, that the Paul DeLaney Company did not send to the Joseph Freedman Company goods of the contracted quality, there was presented a disputed question of fact to the Circuit Court whether or not the Joseph Freedman Company waived its formed ^{cause} ~~question~~ of action against the Paul DeLaney Company, and the Circuit Court decided that the Freedman Company did not waive its cause of action.

Mr. Justice Bergen also states in his Opinion on page 5a, l. 15-20:

"And it does not require an over abundance of astuteness to see that the prosecutor was induced, by a sharp trick, to send its goods into this state so that they might be attached * * *."

We submit that the Circuit Court was not lack of any abundance of astuteness to see that the prosecutor, the Paul DeLaney Company *did not ship* to the Joseph Freedman Company, catsup of the contracted quality and therefore decided *as a question of fact that no fraud or sharp trick was practiced* on the Paul DeLaney Company. Mr. Justice Bergen in making the statement above referred to for the moment forgot, as he did from the beginning, that there was no dispute in the case, that the goods *shipped were not of the contracted quality*.

Waiver.

A waiver has been defined by the Court to be, "An intention to relinquish a known right and where the facts and circumstances relating to the subject are admitted or clearly established."

West v. Platt, 127 Mass. 372.

Is there any evidence in the case which clearly shows that the Joseph Freedman Company waived a cause of action in the event the Paul DeLaney Company would not ship catsup of the contracted quality?

Is it not a fact, that the Paul DeLaney Company was legally and morally obliged to ship to the Joseph Freedman Company, the catsup under the terms of its 1918 contract?

Mr. Justice Bergen in his opinion on page 6a, 1. 5-6-7 states:

"The right of defendant to refuse acceptance for want of quality contracted for was not waived, but its right to enforce the claim for damages arising out of the contract of 1917 was, x x x."

As we read the statement of Mr. Justice Bergen above set forth, does he not in so many words state: That, had the Paul DeLaney Company upon receipt of the letter of December 10th, 1918, shipped BEANS instead of CATSUP, the letter of December 10th, 1918, would be construed in law, a waiver on the part of the Freedman Company to bring a cause of action on the contract of 1917? That surely cannot be the law. If the letter of December 10th, 1918, was intended to be a waiver or is to be construed as a waiver of the cause of action, it was the duty of the Paul DeLaney Company to ship to the Freedman Company goods of the contracted quality, before it could take advantage of a waiver.

We respectfully submit that the record of the cause does not disclose an undisputed question of fact that the Joseph Freedman Company waived its cause of action, under the contract of 1917, and the Circuit Court on the Rule to Show Cause decided that question against the Paul DeLaney Company, the Supreme Court was therefore without authority to review that question.

Ryer vs. Turkel, 75 N. J. Law, 683.

Counsel for the Paul DeLaney Company, no doubt will argue that the letter of January 17th, 1919, written by Messrs. Stamler & Stamler, on behalf of the Joseph Freedman Company "Exhibit 6" page 71, (written almost a month after the writ of attachment was issued) shows the real intention of the appellant, but your Honors will bear in mind, that letter was written for the purpose of compromising or adjusting a cause of action, and the letter in clear language so states: "Therefore advise you that without waiving any of the rights of our client but purely as a matter of compromise we will advise, &c." (pg. 71. 1. 20-25). That letter was written after a compromise offer was made by the Paul DeLaney Company and in

view of the fact that the Paul DeLaney Company did not accept the terms of that compromise, the contents of the letter has no bearing on the real merits of the case.

**The Supreme Court Had No Authority
to Quash the Writ of Attachment.**

The Order made by Mr. Justice Bergen on the writ of certiorari, pages 7a-8a, directs that the writ of attachment issued in this cause be dismissed, set aside and for nothing holden. The Supreme Court was without authority to make that order; if there were no disputed facts to be determined by the Circuit Court, and the Circuit Court erroneously dismissed the Rule to Show Cause, then in that case the Supreme Court would only have authority to set aside the Order made by the Circuit Court Judge discharging the Rule to Show Cause and not set aside the writ of attachment.

Conclusions.

We therefore respectfully submit that the Order made by the Supreme Court Commissioner is not defective and does comply with Section 85 of the Practice Act; that the Clerk of the Union County Circuit Court was properly authorized to issue the writ of attachment; that there was proof before the Supreme Court Commissioner that there was due to the plaintiff \$2746.26; that the property attached was the property of the defendant, a non-resident and were not in transit in custody of a common carrier, that the goods were not lured into the State of New Jersey for the purpose of attaching them; that the bond given by the plaintiff in compliance with the Order of the Supreme Court Commissioner was executed in accordance with the statute in such case made and provided; that the goods shipped by

the Paul DeLaney Company to the plaintiff and attached by the Sheriff of the County of Union under the writ were rejected by the plaintiff for a valid reason, and that all questions of fact were decided by the Circuit Court against the Paul De Laney Company, the respondent, therefore the Supreme Court was without authority to review the questions of fact, and that as a matter of law the appellant presented a cause of action to the Supreme Court Commissioner upon which an Order was made directing the issuance of the writ of attachment, in pursuance to the statute, and therefore the Order made by the Supreme Court should be reversed and for nothing holden and the Order made by the Circuit Court Judge be affirmed with costs.

STAMLER & STAMLER,
Of Counsel With Appellants.

[3775]

