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TESTIMONY FOR DEFENDANT.

PLAINTIFF'S EXHIBITS.

Summons.

(July 9, 1926.)

THE STATE OF NEW JERSEY TO ROBERT W. GRANGE AND WILLIAM G. SLOANE:

YOU ARE SUMMONED to answer the annexed complaint of John Simmons Co., (L. S.) a corporation of the State of New York, in an action at law in the New Jersey Supreme Court.

And take notice that unless you file your answer to said complaint with the Clerk of the New Jersey Supreme Court at Trenton within twenty days after service upon you of this writ and the annexed complaint, the plaintiff may proceed in the suit and judgment may be entered against you.

WITNESS, HON. WILLIAM S. GUMMERE, Chief Justice of our said New Jersey Supreme Court, at Trenton, this 8th day of July, 1926.

EDWARD J. KELLEHER,
Clerk.

HEYMAN & HEYMAN,
Attorneys for Plaintiff.

Complaint.

(July 9, 1926.)

NEW JERSEY SUPREME COURT,

MERCER COUNTY CIRCUIT.

JOHN SIMMONS CO., a corporation of the State of New York,
Plaintiff,

v.

ROBERT W. GRANGE and WILLIAM G. SLOANE,
Defendants.

Action at Law.

Plaintiff, a corporation of the State of New York, says:

(1) On or about September 14, 1922, plaintiff caused to be instituted in the City Court of the City of New York, in the State of New York, which said Court was and is a Court of general jurisdiction for the recovery of debts not in excess of $5,000.00 and has jurisdiction over all persons served with its process in the said City of New York or who may duly appear by attorney in actions pending against them in said Court, a suit against the above named defendants herein to recover from them the sum of $1,485.84, together with legal interest thereon, which said sum was due from the defendants to the said plaintiff, among other things, for goods, wares and merchandise sold and delivered by the plaintiff to the said defendants, which were of the agreed price and reasonable value of $253.47, and for the price of goods, purchased by and delivered to one Charles

Sedden, of the value of $1,232.37, as agreed upon by the plaintiff and the said defendants, the payment of which said sum the defendants guaranteed to the complainant.

(2) After a judgment by default entered on October 16, 1922, in the said City Court of New York against the above named defendant, Robert W. Grange, for the sum of $1,533.66, both of said defendants applied to the said City Court of the City of New York on or about the 25th day of October, 1922, for the vacation of the said judgment and permission for the above named defendants to enter their Answer to the complaint therein, and that thereupon such proceedings were had upon the said application; that the City Court of the City of New York vacated and set aside said judgment of October 16, 1922, and permitted the above named defendants to file their Answer to the complaint of the plaintiff.

(3) Thereupon in the said City Court of the City of New York, such proceedings were had; that afterward, by the consideration and judgment of the said City Court of the City of New York, plaintiff recovered and a judgment was entered in favor of the said plaintiff, against the said defendants, on February 23, 1923, in the aforesaid action, in the sum of $1,533.75 damages, and $21.49 costs of suit.

(4) Thereafter, one of the defendants herein William G. Sloane, applied to the said City Court of the City of New York for an Order vacating and setting aside the aforesaid judgment of February 23, 1923, on the grounds, that he, the said William G. Sloane, was never served with Summons and Complaint in said suit and that no At-

torney was either authorized to appear or Answer for him or on his behalf.

(5) That the application of the said William G. Sloane for an Order to set aside said judgment having been duly heard, the said Court, on July 15, 1924, refused to set aside the said judgment, and made its Order to that effect.

(6) That thereafter the said defendant William G. Sloane appealed from the last mentioned Order of the said City Court of the City of New York to the Supreme Court of the State of New York, which is a Court of general jurisdiction, and that the judgment of the City Court of the City of New York was thereafter on November 11, 1924, affirmed by the said Supreme Court of the State of New York; and thereafter, on November 28, 1924, the said affirmance of said judgment of the said Supreme Court was by the said City Court of the City of New York made in all respects its own order; and said judgment remains in full force, virtue and effect.

(7) That the costs of the appeal amounted to the sum of $35.00 in favor of the said plaintiff and against the defendant William G. Sloane.

(8) That there is now due and owing thereon to the said plaintiff from the defendants, the sum of $1,555.24, together with interest from February 23, 1923, amounting to $313.12, plus the sum of $35.00, together with interest thereon from December 6, 1924, amounting to $3.29, making a total of $1,906.65, no part thereof having been paid.

Plaintiff therefore demands judgment against the defendants in the sum of $1,906.65, with interest from July 1, 1926, and costs of suit.

HEYMAN & HEYMAN,
Attorneys for Plaintiff.

Answer.

(August 3, 1926.)

NEW JERSEY SUPREME COURT,

MERCER COUNTY CIRCUIT.

JOHN SIMMONS COMPANY, a corporation of the State of New York,
Plaintiff,
v.
ROBERT W. GRANGE and WILLIAM G. SLOAN,
Defendants.
} Action at Law.

Defendant William G. Sloane residing in the Township of Lawrence, County of Mercer, and State of New Jersey, answering the complaint of the plaintiff, says that:

1. He denies so much of Paragraph 1 as alleges that there was due to the plaintiff from him the amount claimed for goods, wares and merchandise sold and delivered also the amount claimed on an alleged guarantee of payment for goods sold and delivered to one Charles Sedden, but on the contrary, says that no moneys were due or owing by him either as an individual or jointly with said Robert W. Grange, or in any manner whatsoever for any purpose or thing whatsoever. He has no knowledge concerning such portion of the allegation in Paragraph 1 which sets forth the jurisdiction of the Court or institution of suit, and therefore neither admits nor denies the same, but does deny that the said Court ever acquired jurisdic-

tion over the person or property of him, this defendant, and further denies that he received notice or knowledge of the institution of such suit against him prior to the entry of judgment against him in said Court.

2. He denies paragraph 2 of the Complaint.

3. He denies paragraph 3 of the Complaint.

4. He denies paragraph 4 of the Complaint.

5. He denies paragraph 5 of the Complaint.

6. He denies paragraph 6 of the Complaint.

7. He denies paragraph 7 of the Complaint.

8. He denies paragraph 8 of the Complaint.

FIRST SEPARATE DEFENSE.

At the time of the institution of the suit upon which judgment was recovered in the City Court in the City of New York, in the State of New York, this defendant was not indebted to the plaintiff either as an individual, nor jointly with any other person in the amount of money sued for, nor in any other amount for any reason, purpose or thing whatsoever.

SECOND SEPARATE DEFENSE.

At the time of the institution of suit against this defendant in the City Court of the City of New York, in the State of New York, and both prior and subsequent thereto this defendant was not a resident of the State of New York, and at the time of the entry of judgment against this defendant in said City Court of the City of New York, and both prior and subsequent thereto, this defendant was not a resident of the State of New

York, but on the contrary, at the time of the institution of the suit aforesaid, and the entry of judgment thereon as aforesaid, and at all times prior and subsequent to such occasions this defendant was a resident of the State of New Jersey. No notice was given to this defendant of the institution of said suit, and no knowledge was acquired by him of the institution thereof. No summons nor other process was served upon this defendant in the State of New York or at any other place. No appearance was entered by this defendant in said suit, nor was any appearance entered by any other person or persons under the authority of this defendant nor with his knowledge or consent. No answer or other pleading was filed by this defendant nor by any person or persons for him under his authority or with his knowledge or consent. No jurisdiction was ever acquired over the person or property of this defendant by the City Court of the City of New York aforesaid, and any judgment entered in said Court is by reason of the aforesaid allegations improper, invalid, entirely void, and of no effect as against this defendant, and the plaintiff is therefore barred of a right of recovery on said judgment against this defendant in the Courts of this State.

THIRD SEPARATE DEFENSE.

At the time of the entry of judgment against this defendant the plaintiff well knew that he had no claim as against this defendant and further knew that this defendant had a just and meritorious defense against the alleged claim, and further knew that this defendant had not been served with summons or other process out of the City Court of New York, in the State of New York, and no ap-

pearance had been entered by this defendant nor with his knowledge, authorization or consent, and that no answer or other pleading had been filed by this defendant nor with his knowledge, consent or authorization, and that this defendant at the time of the institution of suit, and entry of judgment was a resident of New Jersey, and had no residence in the State of New York and that the Court aforesaid had no jurisdiction over the person or property of this defendant but with full knowledge of all such facts, fraudulently entered and had entered the judgment against this defendant in said City Court of New York, and by reason of such fraud, said plaintiff is barred of a right of recovery on such fraudulent and improper judgment in the Courts of this State.

FOURTH SEPARATE DEFENSE.

This defendant hereby makes all of the allegations of the first, second and third separate defenses a part of this defense and further says that by reason thereof the City Court of New York, in the State of New York, did not prior to the entry of judgment in said Court, nor at the time of entry thereof, acquire jurisdiction over the person or property of this defendant and that said judgment was therefore improperly and improvidently entered and is therefore null and void, and of no effect as against this defendant, and the plaintiff is therefore barred of any right of recovery on such judgment in this Court and in any other Court in this State.

BRENNER & KRESCH,
Attorneys of Defendant
William G. Sloan.

Reply.

(December 31, 1926.)

NEW JERSEY SUPREME COURT,

MERCER COUNTY CIRCUIT.

JOHN SIMMONS COMPANY, a corporation of the State of New York,
Plaintiff,
v.
ROBERT W. GRANGE and WILLIAM G. SLOAN,
Defendants.
} Action at Law.

Plaintiff, in reply to the defendant's answer, says:

(1) It denies all of the allegations contained in the defendant's answer.

HEYMAN & HEYMAN,
Attorneys for Plaintiff.

Postea.

NEW JERSEY SUPREME COURT,

MERCER COUNTY CIRCUIT.

JOHN SIMMONS Co., a corporation of the State of New York, *Plaintiff*, *v.* ROBERT W. GRANGE and WILLIAM G. SLOANE, *Defendants.*	Action at Law.

This case was tried before Hon. Ralph W. R. Donges, Circuit Court Judge, with a jury at the Mercer Circuit, on September 23, 1927.

The said Judge directed the jury to return a verdict against the defendant, William G. Sloane, and in favor of the plaintiff, John Simmons Co., a corporation of the State of New York, for Two Thousand forty dollars ($2,040.00), and the jury did accordingly return a verdict against the said defendant and in favor of the said plainitff for the said sum of Two Thousand forty dollars ($2,040.00).

RALPH W. E. DONGES,
Judge.

Rule for Final Judgment.

NEW JERSEY SUPREME COURT.

JOHN SIMMONS Co., a corporation of the State of New York, *Plaintiff*, *v.* WILLIAM G. SLOANE (or Sloan), Impld., &c., *Defendant.*	Action at Law. On Postea.

It is ordered that judgment be and hereby is entered in favor of plaintiff and against the defendant for the sum of two thousand and forty dollars, besides costs to be taxed *nisi*.

Entered September 30, 1927. On motion of

HEYMAN & HEYMAN,
Attorneys.

$2040.00
60.18

$2100.18

A true copy.

EDWARD J. KELLEHER,
Clerk.

Notice of Appeal and Grounds.

NEW JERSEY SUPREME COURT,

MERCER COUNTY.

JOHN SIMMONS CO.,
Plaintiff,

v.

ROBERT W. GRANGE and WILLIAM G. SLOAN,
Defendants.

} On Appeal.

To Messrs. Heyman and Heyman, Attorneys for Plaintiff-Appellee.

TAKE NOTICE that the appellant, William G. Sloan appeals to the Court of Errors and Appeals in the last resort in all causes in New Jersey from the whole of the judgment entered in this cause upon the following grounds.

1. Because the Supreme Court erred in granting the motion for a direction of verdict in favor of the plaintiff-appellee against the defendant William G. Sloan, appellant.

2. Because the Supreme Court erred in refusing to grant the motion to direct a verdict in favor of the defendant William G. Sloan appellant against the plaintiff-appellee.

BRENNER & KRESCH,
Attorneys of Appellant.

Case.

SUPREME COURT,

MERCER CIRCUIT,

Trenton, N. J., September 23, 1927.

Before—Hon. RALPH W. E. DONGES, Jr., and a Jury.

JOHN SIMMONS CO., a corporation of the State of New York,
Plaintiff,

against

ROBERT W. GRANGE and WILLIAM G. SLOAN,
Defendants.

} Action at Law.

Present: For the Plaintiff, HEYMAN & HEYMAN, by BENJAMIN HEYMAN, Esq.
For the Defendant WILLIAM G. SLOAN, ADLER & ADLER, by ALFRED A. BRENNER, Esq.

(A Jury was selected and sworn.)

Counsel for the respective parties thereupon opened to the Jury, in substance, as follows:

Mr. Heyman: If your Honor please, and you Ladies and Gentlemen of the Jury, this suit is on a judgment recovered in the State of New York. We say that the Plaintiff instituted suit in the State of New York against two defendants, Robert W. Grange and William G. Sloan; that an answer was filed by the defendants in that suit in New York and a judgment was recovered by the plaintiff against both defendants. Thereafter, this defendant Sloan came into Court, the City Court of the City of New York, and said to the Judge of that

Court that he was never served with a summons in this suit; he didn't live in New York; the attorney who filed the answer in his behalf had no authority to file that answer; and he therefore asked this Court to set aside that judgment insofar as he was concerned and permit him to come in and file an answer. That issue was heard before the Court in the City of New York and the Court refused to set aside the judgment. He took an appeal, and the higher Court dismissed the appeal and affirmed the judgment of the Court below.

Now, it is on that judgment that we are bringing this suit, and we are asking for the amount of the judgment in the City Court of New York, $1906.65 with interest from July 1, 1926. We will show you that we are entitled to your verdict.

Mr. Brenner: If your Honor please, and you Ladies and Gentlemen of the Jury, Major Sloan was in partnership at one time, in New York, with a man named Robert W. Grange. That partnership was dissolved. The date, I think, of that dissolution was the end of 1921, maybe in December. After that partnership was dissolved, Grange, in order to get the benefit of Major Sloan's name—he was well known over there—continued the business without our knowledge, consent or acquiescence, under the old firm name of Sloan & Grange. Thereafter, Grange guaranteed an account of someone else for goods that were delivered to this individual. Sloan did not know that individual; Grange did, and was doing business with him, and because he was doing business with him, he guaranteed this account.

Grange also bought some merchandise, a small amount, something under $250.00, this all being done without Major Sloan's knowledge, and without him having anything to do with it.

Grange did not pay this guarantee for the merchandise that wasn't paid for by the man he stood good for. Suit was, therefore, instituted in New York in the City Court, but they started suit not against the man who received the merchandise, but against Grange & Sloan. Major Sloan who was a resident of New Jersey knew nothing about that; he had no residence nor place of business in New York, and he didn't know the suit was being instituted in New York against him, and did not contest the matter.

The attorneys who had brought that New York suit realized they had no jurisdiction over Sloan and therefore when they took their judgment, they took it against Grange alone and not against Sloan. When Grange saw that judgment had been entered by default, he went to Morrell, Bates, Topping & Anderson for the purpose of getting it opened up for answer.

Sloan had never been served. Anderson, who handled the matter, was somewhat careless in making the application and when he made the application, he made it as for both Sloan and Grange and that was the first time Sloan's name ever came into the proceedings. Sloan never had anything against him. The application was made in New York, and then, in the same careless way, when he filed an answer to the suit in New York, he filed it on behalf of both Grange and Sloan. Major Sloan never heard of Anderson; never knew him, and never saw him, and the answer was filed without Sloan's consent.

The matter was brought to trial, and Grange alone appeared. Motion was made for a summary judgment, that is a judgment on the pleas without anybody being heard. Anderson appearing for

both defendants' judgment was rendered for the first time against both Sloan and Grange. Major Sloan knew nothing about it, and was never liable for it. He then learned through his New York attorney who evidently had seen it in the New York record or report, that there was a judgment against Major Sloan, and knowing he was his New York representative, got in touch with Major Sloan. He realized he was not indebted to anybody and then made application to open this up. The New York Court, realizing that a New Jersey resident was also responsible for that debt, refused to open it up. He appealed, and that likewise failed to open it up.

We are going to show you that Major Sloan has never had an opportunity to be heard. We are going to show you that if the case were heard in New York and the case had come up regularly, there would be no question about the facts. He did not guarantee an account, and did not know the man for whom it was guaranteed. He never ordered any merchandise, and does not owe this concern one dollar. They realize that. They could bring suit in our courts directly against Sloan, and they having jurisdiction could determine whether he is indebted for that money. That is what we are asking in this case; that we have an opportunity to defend the suit on its merits.

Mr. Heyman: If the Court please, I move for a direction of the verdict in favor of the plaintiff on the pleadings and on the law in the case. The proofs, from the opening, are that an answer was filed on behalf of this defendant, whether authorized or unauthorized, it was filed in his behalf; that judgment was entered against this defendant in the City Court of the City of New York; there-

after, this defendant personally and voluntarily appeared in that same court on an application to set aside that judgment; that application was denied and judgment was entered and an order affirming the judgment drawn; that thereafter, voluntarily he appealed to the Appellate Court in the State of New York from the entry of this judgment on an order denying his application to open, and that appeal was dismissed and judgment finally was entered against him.

Now, we say that, firstly, on the question of fact as to whether or not the answer was filed with his authority, we say that inasmuch as he appeared in the City Court of New York where the judgment was originally entered and the Appellate Court to which he appealed it is *res adjudicata,* and he is bound by the ruling of the Court which he selected.

Your Honor well knows that if no appeal or no application had been made by this defendant to the Court in New York and judgment had been permitted to stand as it was at that time and suit started on that judgment in this State, there is no question that this defendant would then have had the right to set up no service and no appearance by his authority, but having selected his forum and having tried out that very issue and it having been decided, it is our contention that that constitutes a binding judgment against him. It is our contention that having selected his own forum he is now bound by the decision of it.

The Court: Have you any authorities?

Mr. Heyman: There is no case in this State. I think I can say with absolute safety that there is no case in this State directly in point. No case has ever been decided where the defendant, after judg-

ment, has appeared in a foreign Court for this particular purpose. The only thing that I have been able to find, if your Honor please, is what I find in C. J., in which we find this expression:

> "Where it has been determined by a direct proceeding by the court of last resort in the State in which a decree was rendered that the court rendering it had power to enter it, the courts of other states must give it full faith and credit."

That is identically the situation.

The Court: Citing what authority?

Mr. Heyman: *Van Muter* v. *Sankey,* 148 Ill., and 36 Miss. 628. The section is—

> "A contention that a former judgment is void for want of jurisdiction over the subject matter which turns on the construction of a statute of a foreign state where the judgment was rendered, is not maintainable where the judgment has been affirmed by the court of last resort of that state."

McLain v. *Parker,* 88 Kan., 129 Pac., and then in 237 U. S., 469. That is the only thing in close proximity to the facts that I have been able to discover.

The Court: First, for the purpose of the record, the stenographer not having taken the openings—it is my practice always to have the openings taken because sometimes motions are made on the openings as in this case—I take it there is no dispute that after the application from the pleadings that there was a judgment entered in the City Court of New York, and that the defendant Sloan appeared and made a motion to open that judgment

in that Court. The application being denied, he took an appeal, raising the question of the lack of jurisdiction of the New York City Court, and that the Appellate Court denied his application to have the judgment opened, and that the judgment still, on that affirmation, remains of record in New York?

Mr. Brenner: With this modification, if the Court please, that the appearance in the City Court of New York was a special appearance raising only the question of jurisdiction, and that the appearance to the Appellate Court in New York was a special appearance raising only the question of jurisdiction.

Mr. Heyman: That isn't so.

Mr. Brenner: I contend that it is.

Mr. Heyman: Here are the appearances. You don't dispute the record?

Mr. Brenner: I am not disputing the Record. I am positive that the record shows special appearance that raises only the question of jurisdiction. The question of jurisdiction necessarily makes the appearance a special appearance. This case was never gone into on its merits. It was on a rule to show cause to vacate the judgment because of the failure to serve process.

The Court: And the Court of original jurisdiction held that the defendant was in Court, and when the Court of Appeals—

Mr. Brenner: No, the Court of original jurisdiction refused. I presume that it is a matter of discretion in the New York Courts, the same as in our Courts until the contrary is established—that a refusal to open a judgment entered is a matter of discretion, and it was but in the exercise of that discretion that it refused to open up the case.

The Court: I will hear you.

Mr. Heyman: In view of the fact that the Court wants to get the facts on the record, may I say that I offer in evidence at this time the exemplified copy of the record of the judgment in the City Court of New York as it appears as of today, and that Judge Brenner has agreed with me that he will not dispute the jurisdiction of the City Court of the City of New York if the defendant were properly before the Court.

The Court: That is, it had jurisdiction over the subject matter of the suit?

Mr. Brenner: Yes.

The Court: The question is to the right of jurisdiction over the party.

Mr. Brenner: Yes.

Mr. Heyman: May I say that this application which has an application which was an application on behalf of this defendant was made by Walter B. Topping, Attorney for the defendant and appearing as special counsel for the defendant William G. Sloan and that the notice of appeal from the City Court of the City of New York to the Appellate Term of the Supreme Court, First Department, was made by Walter B. Topping, Attorney for defendant, William G. Sloan, page 1, not appearing specially, but appearing for defendant, William G. Sloan.

Mr. Brenner: As a special appearance, of course, which this must be based on. The special appearance by motion was by Mr. Topping appearing for Sloan on application to vacate this judgment on the ground of lack of jurisdiction. That being refused, there was no change of this situation, because his application, as this entire record will show, was based entirely upon this matter of jurisdiction.

Now, I disagree with counsel when he says there are no cases in this State on the subject matter of this suit. As a matter of fact, there is a case in this State that goes much farther than I realized a case could go; *McGee and Lupey* v. 34 N. J. Law, at page 286. That was a rather peculiar situation. There was a suit started against two partners of an alleged partnership, the same as here, in the New York Courts. One of the partners was a resident of New York. Service was had against the New York resident and judgment entered in New York only as against the one who had been served, making it a little bit different from the situation we have here. The matter was tried on its merits and judgment was entered against the New York resident. Suit was thereafter started in the Courts of this State as against both, that is, against that defendant, who had been served in New York, appeared in New York, tried the case on the merits in New York and succeeded in getting a judgment against him. When the case was tried in New Jersey, or when suit was instituted in New Jersey, that defendant in New York then raised a question of jurisdiction, holding that inas-much as service was not made on both defendants in New York, that no suit could be instituted in this State against the one who had been served in New York. The Court said as to that proposition, this:

> "A want of jurisdiction in the Court of New York with respect to one of the defendants, is the defense contained in this plea, and the counsel of the plaintiff in obviation of this objection, in the first place insists that it is not competent for the defendant who was duly summoned before the foreign

tribunal to raise this question. The argument is, that the exception is personal to the party over whom there was no jurisdiction, but this ground is not tenable. This is a suit on a charge against two parties, and the judgment in the present proceeding must be against neither or both. If the record sued on does not disclose a joint cause of action, the result is, that by the admission of the pleadings, a misjoinder appears, which is an inexcusable and fatal difficulty."

The Court held, therefore, that there could be a judgment against that defendant in the Court of our own State, even though he was served and defended in the New York Courts.

The decision in that case goes against the defendant but only because the question of jurisdiction was not properly raised. The Court said if it was raised, it would have had a different termination.

The Court: It is apparent that this discussion will probably occupy sometime, so I think we will recess now until 1:30.

Mr. Brenner: I might call your attention to the case of *Glissing* against *Clinton* 81 N. J. Law. It is reported at page 379. The only part that will interest your Honor is the portion on page 385. The other part of the case goes to a different proposition.

(Adjournment for Noon Recess.)

Afternoon Session, September 23, 1927.

Mr. Heyman: I don't know whether I have made myself perfectly clear to your Honor.

The Court: The thing that occurs to me is that

in view of the fact that you have now offered the record of the New York Court that perhaps your motion is premature, and that you ought to perhaps make—

Mr. Heyman: Perhaps so. It occurred to me too.

The Court (Continuing): You better make your case, and we will have to deal with the questions as they arise.

Mr. Heyman: May I ask Judge Brenner to admit on the record that the filing of an answer by an attorney, if authorized, in the City of New York, State of New York, under the State of New York statute, is equivalent to personal service.

Mr. Brenner: Right.

The Court: Then perhaps you can stipulate some further facts if they are, in truth, that an appearance was entered by the defendant Sloan for the purpose of questioning the jurisdiction over him of the City Court of New York.

Mr. Brenner: We will admit that a special appearance was entered for him in the City of New York for the purpose of questioning the jurisdiction.

The Court: And that question was raised, determined adversely to him, an appeal was taken to the Appellate Court of New York State, and that that question was by that Court determined adversely to him.

Mr. Brenner: Yes, sir.

The Court: The Courts in New York in both instances holding that they had jurisdiction over him as well as of the subject matter?

Mr. Brenner: I don't know that I can go that far.

The Court: Wasn't that question raised?

Mr. Brenner: It was not raised by him, but this

all was on rule to show cause whether or not the determination of the Court should be vacated.

The Court: Because it had no jurisdiction over him.

Mr. Brenner: Correct.

The Court: But he was not in court, you contend?

Mr. Brenner: But I don't think the Court went so far as to determine that it did have jurisdiction, that I don't know, and the record doesn't seem to show that. I happen to have the briefs that were used in the New York case and I know that on that motion, the argument was made that it was a matter of discretion on the part of the Court and that it would not be above the discretion to permit that judgment to stand. Whether the Court held it had jurisdiction or not,—

The Court: I take it there is no question that this judgment has not been paid?

Mr. Brenner: No, no question.

Mr. Heyman: May I offer a suggestion? That the application to set aside, vacate the judgment of the City Court of New York was based upon the statements of this defendant that the appearances as filed, or as disclosed by the answer, the first answer filed in his behalf, was unauthorized.

Mr. Brenner: I don't know about that.

Mr. Heyman: That is the question of fact which is raised on which the defendant is attempting to come before this Court now.

The Court: Perhaps in view of the fact of this stipulation that there is a judgment appearing in the State of New York against this defendant, and that these proceedings were had, I can dispose of the matter without taking proof.

Mr. Brenner: As soon as Mr. Heyman puts in

his case, I intend to make a motion for nonsuit.

The Court: Well, the exemplified copy of the record will be accepted and marked in evidence.

Mr. Heyman: I understand the defendant admits on the record that the judgment is unpaid?

Mr. Brenner: Yes, there is no question about that.

The Court: You had better mark the exhibit.

(Record referred to marked Plaintiff's Exhibit 1.)

Mr. Heyman: I will rest.

Mr. Brenner: If the Court please, I move for a nonsuit upon the ground that the New York Court at the time that the judgment was rendered against this defendant was without jurisdiction to enter a judgment because no service had ever been made upon this defendant. The record shows this situation—I think I outlined it to the jury, but to make sure, I will incorporate it as a part of this motion. The record shows that a suit was instituted against Grange and Sloan claiming against them that they were responsible for the payment of this debt, part of which was for a guarantee and part of which was for goods sold and delivered. I don't think there is any dispute about the fact that the partnership—he says that is on the record—that the partnership had been dissolved. The record shows that service was made on Grange; no service being made upon Sloan. The record further shows that Grange did not answer, nor did Sloan, evidently having no knowledge of the existence of the suit; that a judgment by default was entered as against Grange; no judgment going against Sloan; that the firm of Morrell, Bates, Topping & Anderson thereafter authorized to ap-

pear for Grange but having no authority as shown by the affidavit of Anderson to appear for Sloan, made an application that this default judgment should be opened. At that time there was no judgment against Sloan, the default going only as against Grange; that when they made that application they made it in such a way as to indicate that they represented both defendants, although having no authority to do so; that the case was opened and judgment, summary judgment entered on motion of plaintiff's counsel. It appeared by the answer that both defendants were defending against this action although there was no proof of service against Sloan.

Up to that point, it seems to me that there can be no question, under *Penwell* against *Neff* in the Federal Court and under our own decisions, that the Court of New York never having procured service on Sloan, he never having been in Court, he never having appeared, that there could be no judgment against him. As I understand the plaintiff's position now, that inasmuch as an application was made to vacate this judgment, that that is a submission to the jurisdiction of the New York Courts. The record, however, shows clearly to the contrary. In the City Court of New York, the application was made based on the proposition that there was no service and therefor no jurisdiction. At the time that application was made, the attorney for Major Sloan appeared specially in the making of that application. It seems to me that that special appearance carries through the Appellate Court, because at no time in the City Court nor in the Appellate Court was the merits of this controversy gone into. It was always a matter of challenging the jurisdiction of the New York

Courts. Whether he entered a general appearance or not, it does not seem to me to make very much difference, because the only question raised was the question of jurisdiction and not a general appearance for the purpose of disputing the merits of this controversy.

Under the case which I brought to your Honor's attention, it seems to me it entirely disposed of this matter, that the Court never having acquired jurisdiction, that on this application for a vacation of the judgment, that it could not acquire jurisdiction; that the case never having been decided on its merits insofar as this defendant is concerned, that no verdict could be based upon the foreign judgment.

For that reason, I respectfully submit we are entitled to a nonsuit.

The Court: The motion will be denied.

Mr. Brenner: Your Honor will allow me an exception.

(Defendant's counsel prays an exception to this ruling of the Court. Exception allowed.)

WILLIAM G. SLOAN, the defendant, sworn in his own behalf, testified as follows:

Direct examination by Mr. Brenner:

Q. Major, where do you live. A. I live in Lawrence Township on the Province Line Road.

Mr. Heyman: I can't hear you.

The Witness: I live in Lawrence Township on the Province Line Road.

Q. And you have some official connection, have you not, some official connection in the State? A. I have.

Q. What is that connection? A. I am State Highway Engineer.

Q. Do you know Robert W. Grange? A. I do.

Q. And you were once in partnership with him, were you not? A. I was.

Q. Was that partnership subsequently dissolved? A. It was.

Mr. Heyman: I object to this line of questions. I think this question is determined in the City Court of the City of New York and the Supreme Court, Appellate Term, and this defendant is bound by the findings of that Court.

The Court: I suppose the purpose of this is to show the merits, is it, Judge Brenner?

Mr. Brenner: No, the purpose of it is more to show that jurisdiction was not acquired by the service upon one party who may be held to be the agent of the other party—for that purpose.

The Court: Entertaining the view that I do, that if the defendant submitted the question to the New York Court of its jurisdiction over him that he is bound by it, perhaps an offer by you of what you want to prove would meet the situation.

Mr. Brenner: I want to prove, if the Court please, the same thing that appears in what I said on the motion for a nonsuit.

The Court: First, that there are no merits in the claim against this defendant.

Mr. Brenner: Exactly.

The Court: And secondly, that he never was in the New York Court.

Mr. Brenner: Right, sir.

The Court: They are the two questions, I take it, you want to raise.

Mr. Brenner: Yes, sir.

The Court: Now, of course, believing that when this defendant raised the question of the jurisdiction over him in the New York Court he was bound by the determination of that Court, and can't challenge it here, that, of course, would likewise give the New York Court jurisdiction over the subject-matter and for the determination of the merits. It would seem to me, therefore, that both questions are disposed of by the determination of the New York Courts.

Mr. Brenner: Your Honor is going to hold that way?

The Court: That is the conclusion which I have reached. It appears, I take it by the record offered and by the statements of counsel, and stipulations of facts, that although this defendant was not served, that an answer was filed for him, whether authorized or otherwise, by counsel, in the suit in New York, and that the New York Court held that this defendant Sloan was in that Court and subject to its jurisdiction. I think that settles the question of the jurisdiction of that Court. If the defendant Sloan had not raised that question in that Court,

I think there is no doubt he could raise it here, but I think that a defendant who submits himself, whether it be by special appearance or general appearance, to raise the question of jurisdiction of a sister State and has that question determined adversely, precludes himself from raising it on the suit in

this State upon that judgment, so that I think I must sustain the objection.

Mr. Brenner: Will your Honor permit me to make my offer complete and—

The Court: I thought you had. Yes.

Mr. Brenner (continuing): I will rest my case.

The Court: I think it is wise to do that. We ought to have a complete record. I suppose counsel will get into the record everything that may be germane.

Mr. Brenner: I want to establish, then, through this witness, that not only was he not served with process, but that the attorneys, the New York attorneys who filed the answer apparently in his behalf were not authorized to represent him in that suit, and that he did not acquiesce in their filing the answer for him. I think that will complete it.

The Court: That is all you offer to show?

Mr. Brenner: That is all my offer is, and I understand if I do offer that, and if appropriate objection is made, your Honor will sustain the objection?

The Court: Yes. And I understand Mr. Heyman does object.

Mr. Heyman: Of course, I do object.

The Court: And I will sustain the objection.

Mr. Brenner: Your Honor will permit me an exception to your Honor's ruling?

The Court: Yes.

(Defendant's counsel prays an exception to this ruling of the Court. Exception allowed.)

Mr. Brenner: I think, then, that will conclude our case, and I will withdraw the witness.

WITNESS EXCUSED.

Mr. Heyman: If the Court please, I move for a direction of the verdict in favor of the plaintiff for the sum of $1,906.65.

The Court: Is there any question about the amount, Judge Brenner?

Mr. Brenner: I think not.

Mr. Heyman (continuing): Plus interest on that sum from July 1, 1926, amounting to $133.45. $1,906.65 is the judgment.

The Court: What does that make?

Mr. Heyman: $2,040.10.

The Court: I might say I have already indicated my view that the question submitted to the New York Court was whether or not the defendant Sloan in that case had actually submitted himself by an answer, to the jurisdiction of the Court. The Court determined adversely this claim which was the same as that embodied in the offer here of proof that there was no such authorization. Therefore, I take it this Court is bound to adopt the conclusion of the Courts of New York that the defendant Sloan was under the jurisdiction of that Court.

Otherwise, it would seem to me that the Full Faith and Credit Laws would mean nothing, if after a determination of a question of fact arising in the progress of a suit in the Court of a sister State adversely to a party, that he might still raise it and have this Court pass upon the soundness of the conclusion of a question which obviously that Court, when raised there, had power to pass upon.

Plaintiff's Exhibit 1.

That, it seems to me disposes of the question, and the plaintiff is entitled to judgment.

Ladies and Gentlemen: You will return a verdict in favor of the plaintiff and against both defendants—both defendants are here—only the one defendant.

Mr. Heyman: The suit is only against one of the defendants, Sloan.

The Court (continuing): Against William G. Sloan for the sum of $2,040.10.

Mr. Brenner: To complete the record, following my application for a nonsuit, I want to get on the record that I am making an application for a direction of verdict, which I presume, under your Honor's finding, would be denied.

The Court: Denied.

Mr. Brenner: And I ask an exception.

The Court: Your exception will be noted.

Mr. Brenner: I also ask an exception to the direction of the verdict.

The Court: It will be noted.

Plaintiff's Exhibit 1.—Exemplified Copy of Judgment Roll, Orders of Appellate Term, City Court and Remittitur.

THE PEOPLE OF THE STATE OF NEW YORK,
BY THE GRACE OF GOD, FREE AND INDEPENDENT:

To all to whom these Presents shall come, GREETING:

KNOW YE, that we, having inspected the Files of the CITY COURT OF THE CITY OF NEW YORK, do find their remaining on file a certain Judgment Roll, Orders of Appellate Term, City Court and Remittitur in an action wherein John Simmons Co. Plaintiff, and Robert W. Grange and William G. Sloane Defendants, in the words and figures following, to wit:

Plaintiff's Exhibit 1.

NOTICE OF APPEAL.

CITY COURT OF THE CITY OF NEW YORK.

JOHN SIMMONS CO.,
Plaintiff,

against

ROBERT W. GRANGE and WILLIAM G. SLOAN,
Defendants.

Notice of Appeal.

SIRS:

PLEASE TAKE NOTICE, that the defendant William G. Sloan, in the above entitled action hereby appeals to the Appellate Term of the Supreme Court, First Department, from the order made and entered in the above entitled action and filed in the office of the clerk of the City Court of the City of New York on the 15th day of July, 1924, which order denied the motion of the defendant William G. Sloan to vacate and set aside the Judgment entered herein on February 23rd, 1923, as against the defendant William G. Sloan; and this appeal is taken from each and every part of said order.

Dated July 25th, 1924.

Yours etc.,

WALTER B. HOPPING,
Attorney for defendant William G. Sloan,
50 Church Street,
New York City.

Plaintiff's Exhibit 1.

To

WEISSBERGER & LEICHTER, Esqs.,
Attorneys for the plaintiff,
93-99 Nassau Street,
New York City.

FRANK J. GOODWIN, Esq.,
Clerk of the City Court of the
City of New York.

ORDER APPEALED FROM.

Index Number 11200. Year 1922.

CITY COURT OF THE CITY OF NEW YORK.

SPECIAL TERM, PART 1.

Present—Hon. JOHN L. WALSH, Justice.

JOHN SIMMONS COMPANY,
Plaintiff,

against

ROBERT W. GRANGE *et an.*,
Defendants.

The following papers used on this motion argued, this day.

	Papers Numbered
Notice of Motion and Affidavits Annexed	1-2-3-4-5
Answering Affidavits	6-7-8
Exhibits 9-10-11-12-13-14	

Upon the foregoing papers this motion to set aside and vacate judgment is denied.

Dated July 15th, 1924.

J. L. W.,
J. C. C.

Plaintiff's Exhibit 1.

NOTICE OF MOTION.

CITY COURT OF THE CITY OF NEW YORK.

JOHN SIMMONS Co.,
Plaintiff,

against

ROBERT W. GRANGE and WILLIAM G. SLOAN,
Defendants.

SIRS:

PLEASE TAKE NOTICE, that upon the Judgment Rolls filed herein, in the office of the Clerk of this Court, on October 16, 1922, and on February 23, 1923, respectively, and upon the annexed affidavits of William G. Sloan, verified June 14, 1924, Laurence A. Anderson, verified June 10, 1924, Walter B. Hopping verified June 16, 1924, and Jacob W. Winkler, verified June 16, 1924; and upon the pleadings and proceedings in this action; the undersigned will move this Court, at Special Term Part I for motions thereof, to be held at the City Court House, Brownstone Building #32 Chambers Street, Borough of Manhattan, City County and State of New York, on the 20th day of June, 1924, at 10 o'clock in the forenoon of said day, or as soon thereafter as counsel can be heard, for an order vacating and setting aside the judgment entered herein, on February 23, 1923, against the defendant William G. Sloan; on the grounds that the said William G. Sloan was never served with the summons and complaint herein, and that no one was either authorized to appear or answer for him, or

Plaintiff's Exhibit 1.

on his behalf, and for such other and further relief as to the Court may seem just and proper.

Dated, New York, June 16, 1924.

Yours, &c.,

WALTER B. HOPPING,
Attorney for defendant, and appearing specially for defendant William G. Sloan,
Office and P. O. Address,
50 Church Street,
Borough of Manhattan,
City of New York.

To

WEISSBERGER & LEICHTER, Esqs.,
Attorneys for plaintiff,
Office and P. O. Address,
99 Nassau Street,
Borough of Manhattan,
City of New York.

Plaintiff's Exhibit 1.

AFFIDAVIT OF WILLIAM G. SLOAN IN SUPPORT OF MOTION.

CITY COURT OF THE CITY OF NEW YORK.

JOHN SIMMONS CO.,
Plaintiff,

against

ROBERT W. GRANGE and WILLIAM G. SLOAN,
Defendants.

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

WILLIAM G. SLOAN, being duly sworn, deposes and says:

That he is the William G. Sloan named as a defendant in the above entitled action. That he resides at Princeton, New Jersey, and that his office is in the City of Trenton, New Jersey.

Deponent requests an order of this Court, vacating and setting aside a judgment erroneously entered against him, personally, without service of the summons upon him, and without his personal appearance in the action, and without any intended or authorized appearance in his behalf by any attorney.

The facts upon which deponent asks for this relief are as follows:

The judgment sought to be vacated was entered February 23, 1923, for the sum of $1555.24, in favor of John Simmons Co., against Robert W. Grange and William G. Sloan. The complaint purports to set forth two causes of action against Robert W.

Grange and William G. Sloan, as co-partners, growing out of a guaranty and for goods sold and delivered on or about the 31st day of May, 1922. At this time deponent was not a member of the firm of Grange and Sloan; said co-partnership had been dissolved December 31, 1921, and deponent thereafter had no interest whatever in the said business, which was thereafter conducted by Robert W. Grange.

That deponent had no information or knowledge whatever of the transactions set forth in the complaint or of the pending litigation; that he was not served with a summons and did not appear in the action and did not authorize any attorney to appear in his behalf.

That deponent did not learn of the action or entry of the judgment until advised by his attorney, Walter B. Hopping of 50 Church Street, New York City, sometime in November, 1923, and he thereupon requested his said attorney to investigate said judgment and proceedings and take proper action to protect his rights.

Deponent was thereafter advised that Messrs. Morrell, Bates, Topping and Anderson, attorneys of 27 Cedar Street, New York City, had served an answer in said action purporting to be for both defendants.

Deponent further states that he never retained Messrs. Morrell, Bates, Topping and Anderson or authorized appearance in said action by them in his behalf in this or any other litigation; that said attorneys never have acted as his attorneys or counsel in any business and deponent alleges that such appearance was a mistake on the part of said attorneys and without any authority whatever from the deponent.

Deponent respectfully refers to an affidavit submitted herewith, made by Laurence A. Anderson, of the firm of Morrell, Bates, Topping and Anderson, verified June 10, 1924, from which it appears that said attorneys admit that they had no authority to represent deponent and that interposing an answer for both defendants was an error, and in which he expresses the hope that the Court will vacate the judgment to the end that any prejudice that may have been worked against your deponent may be corrected.

WILLIAM G. SLOAN

Sworn to before me this 14th day of June, 1924.

CHARLES FISHBERG,
Notary Public of N. J.

No. 11631.

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

I, HARRY C. HARTPENCE, Clerk of the County of Mercer, and also Clerk of the Circuit Court and Court of Common Pleas, holden therein the same being Courts of Record do hereby certify that Charles Fishberg, Esq. whose name is subscribed to the acknowledgment, proof or affidavit of the annexed instrument and thereon written is and was at the time of taking same a Notary Public in and for said State, dwelling in said County, Commissioned and sworn and duly authorized by the Laws thereof to take the proofs and acknowledgments of deeds or other instruments of writing and affidavits to be recorded in said State and that I am well acquainted with the handwriting of said official and verily believe that the signature thereto is genuine.

Plaintiff's Exhibit 1.

(*) IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said County and Court at Trenton, this 14 day of June A. D. nineteen hundred and twenty-four.

HARRY C. HARTPENCE
[SEAL] Clerk.

(*) Seal of said Notary not required to be filed.

AFFIDAVIT OF LAURENCE A. ANDERSON IN SUPPORT OF MOTION.

CITY COURT OF THE CITY OF NEW YORK.

JOHN SIMMONS CO.,
Plaintiff,

against

ROBERT W. GRANGE and WILLIAM G. SLOAN,
Defendants.

State of New York,
County of New York, } ss.:

LAURENCE A. ANDERSON, being duly sworn, says: That he is an attorney at law and a member of the firm of Morrell, Bates, Topping & Anderson, attorneys of record for the defendants in the above entitled action, and that he was personally in charge of this case.

Deponent, through his firm, appeared and entered an answer for both of the defendants. Plaintiff made a motion to strike out the answer and for judgment on the pleadings, which motion was granted by Mr. Justice Walsh by an order entered February 21st, 1923, and judgment was entered

Plaintiff's Exhibit 1.

on February 23rd, 1923, in favor of the plaintiff and against both of the defendants, for $1555.24.

The deponent did not have authority to represent the defendant, William G. Sloan, in this case. The defendants Grange and Sloan were partners doing business as "Grange & Sloan" up to December 31st, 1921. At the time this suit was brought and the judgment entered the defendant, William G. Sloan had withdrawn from that partnership and at the said times was not a member of the said firm. There were, about the time of this suit, February, 1923, numerous actions against the partnership of Grange & Sloan, which grew out of contracts made prior to the withdrawal of Mr. Sloan. The deponent, in appearing and answering this case overlooked the fact that the action was brought against Robert W. Grange and William G. Sloan individually, and did not name the partnership. Deponent feels very deeply his mistake in this matter and hopes that the Court will vacate the judgment to the end that any prejudice that may have been worked against the defendant William G. Sloan may be corrected.

LAURENCE A. ANDERSON.

Sworn to before me this 10th day of June, 1924.

CHAS. H. TOPPING,
Notary Public,
New York County No. 77.
New York Register's No. 5022.
Commission expires March 30, 1925.

Plaintiff's Exhibit 1.

AFFIDAVIT OF WALTER B. HOPPING IN SUPPORT OF MOTION.

CITY COURT OF THE CITY OF NEW YORK.

JOHN SIMMONS CO.,
Plaintiff,

against

ROBERT W. GRANGE and WILLIAM G. SLOAN,
Defendants.

State of New York,
City of New York, } ss.:
County of New York,

WALTER B. HOPPING, being duly sworn, deposes and says:

That he is an attorney at law, with an office at #50 Church Street, Borough of Manhattan, City of New York. That he is the attorney for the above named defendant William G. Sloan, and that he appears specially in this action, for the purpose of making a motion to vacate and set aside a judgment against the above named defendant William G. Sloan, in favor of the plaintiff, entered in the office of the Clerk of this Court on the 23rd day of February, 1923, for the sum of $1555.24.

The grounds for the motion are, that the defendant William G. Sloan was not served with the summons in this action and he did not appear herein, and further that no attorney was authorized by said defendant, Sloan, to appear in his behalf.

That by error on the part of Messrs. Morrell, Bates, Topping and Anderson, the attorneys for the

Plaintiff's Exhibit 1.

defendant Robert W. Grange, an answer was served, which on its face purported to be served on behalf of both defendants; whereas said attorneys had no authority, and admitted that they had no authority to appear or answer for the defendant William G. Sloan.

Reference is made to the affidavit of Laurence A. Anderson, a member of the firm of Messrs. Morrell, Bates, Topping and Anderson, verified June 10, 1924, admitting said error and joining in the request for the relief asked for.

The defendant Sloan resides at Trenton, New Jersey, and is State Highway Engineer of the State of New Jersey, with an office at Trenton, New Jersey, and bears a very high reputation.

The causes of action set forth in the complaint against the defendants as co-partners are alleged to have arisen on or about the 31st day of May, 1922; whereas the co-partnership of Grange and Sloan was dissolved December 31, 1921, and thereafter the defendant Sloan had no interest in the business of the firm, the same being thereafter conducted and continued by the said Robert W. Grange.

That it was not until November 1923, that doponent learned that a judgment had been entered against his client, William G. Sloan, and began an investigation of the matter and reported such investigation by letter to Mr. Sloan at Trenton, New Jersey. The defendant Sloan alleges that this is the first information or knowledge of any kind he had concerning the matter involved or the litigation.

Negotiations were taken up with the attorneys for the plaintiff with a view to vacating said judgment by consent, but such consent was refused.

Plaintiff's Exhibit 1.

Deponent after a considerable delay due to absence from his office and pressure of business on the part of Mr. Laurence A. Anderson a member of the firm of Messrs. Morrell, Bates, Topping and Anderson, has finally received from Mr. Anderson the affidavit referred to above, explaining the mistake on the part of his firm in serving an answer for the defendant Sloan and admitting that he was without authority and joining in the request for the relief asked for.

The judgment of record against the defendant William G. Sloan is a great injury to his name and reputation. Wherefore, deponent asks an order of this Court vacating and setting aside the said judgment as against the defendant William G. Sloan, and directing that the Clerk of this Court mark said judgment vacated and set aside, by order of the Court.

WALTER B. HOPPING

Sworn to before me this 16th day of June, 1924.

JACOB W. WINKLER,
Commissioner of Deeds,
City of New York.

Residing in Bronx County, Certificates filed in Bronx, New York, and Kings Counties.

County Clerk's No.		Register's No.
13	Bronx County	3045
114	New York County	26041
120	Kings County	6035

Commission expires May 13, 1926

Plaintiff's Exhibit 1.

AFFIDAVIT OF JACOB W. WINKLER IN SUPPORT OF MOTION.

CITY COURT OF THE CITY OF NEW YORK.

JOHN SIMMONS CO.,
Plaintiff,

against

ROBERT W. GRANGE and WILLIAM G. SLOAN,
Defendants.

State of New York,
City of New York,
County of New York, } ss.:

JACOB W. WINKLER, being duly sworn, deposes and says:

That he is an attorney at law, with office at #50 Church Street, Borough of Manhattan, City of New York; that he is associated with Walter B. Hopping, the attorney for William G. Sloan, named as one of the defendants in the above entitled action.

That he has examined two Judgment Rolls on file in the above entitled action, in the office of the Clerk of this Court, which two said Judgment Rolls were filed respectively on October 16, 1922 and on February 23, 1923. That the first Judgment Roll filed herein in the above entitled action contains the summons, complaint, the affidavit of service of the summons and complaint and the statement for judgment. That the affiidavit of service shows that the said summons and complaint was served only on the defendant Robert W.

Plaintiff's Exhibit 1.

Grange, and the judgment herein in the first Judgment Roll rendered judgment only against the defendant Robert W. Grange.

That the complaint herein sets forth two causes of action, one on a written guaranty and the other for goods sold and delivered. Reference is hereby made to said Judgment Rolls as though fully and at length set forth herein.

The defendants named in the summons and complaint are Robert W. Grange and William G. Sloan, and the cause of action set forth in the complaint is alleged to have arisen on or about May 31, 1922.

Deponent further says that there is no proof of service on the defendant, William G. Sloan, nor was there any notice of appearance by any attorney on behalf of said defendant, William G. Sloan; that the said judgment rendered on October 16, 1922 was rendered against the defendant, Robert W. Grange and was a judgment by default.

Thereafter and on or about December 27, 1922 an order was entered in the above entitled action, based upon a stipulation entered into between Weissberger and Leichter, attorneys for the plaintiff, and Messrs. Morrell, Bates, Topping and Anderson, attorneys at 27 Cedar Street, New York City, who purported to appear for both defendants, Robert W. Grange and William G. Sloan, which said order vacated the judgment entered herein on October 16, 1922, and further provided that service of the answer on the attorneys for the plaintiff on October 25, 1922 be deemed good and sufficient service of said answer.

That the answer served on the plaintiff's attorney herein on October 25, 1922 was served after the time to answer had expired and was served by Messrs. Morrell, Bates, Topping and Anderson,

Plaintiff's Exhibit 1.

which purported to answer in behalf of both defendants, the plural defendants being used.

That thereafter and on or about February 15, 1923, Weissberger and Leichter, attorneys for the plaintiff herein made a motion returnable herein February 21, 1923, to strike out the answer of the defendants, and for judgment in favor of the plaintiff against the defendants, which motion was not opposed, and which motion was granted without opposition, and an order entered February 21, 1923, granting judgment to the plaintiff and against the defendants.

That judgment was duly entered on February 23, 1923, in favor of the plaintiff and against both defendants for the sum of $1555.24.

JACOB W. WINKLER

Sworn to before me this 16th day of June, 1924.

MARY A. JAHODA
Notary Public Kings Co. #154
Certificate filed N. Y. Co. #225
New York Co. Registers #5047

Plaintiff's Exhibit 1.

ANSWERING AFFIDAVIT OF PHILIP WIEGAND.

CITY COURT OF THE CITY OF NEW YORK.

JOHN SIMMONS COMPANY,
Plaintiff,

against

ROBERT W. GRANGE and WILLIAM G. SLOAN,
Defendants.

State of New York,
County of New York, } ss.:

PHILIP WIEGAND being duly sworn deposes and says that he is Credit Manager of the plaintiff herein, and familiar with the facts in the above entitled action, which was commenced on or about the 25th day of September, 1922; that the plaintiff herein alleges two causes of action, first: Upon the guarantee made by the defendants whereby they guaranteed the payment for delivery of certain materials to one Charles T. Seddon, in the amount of $1204.85, by a guarantee in writing over the signature of the defendants, dated the 31st day of May, 1922, that the same was modified by the amount thereof being increased to $1232.37, by the modification in writing over the signature of the defendants, dated the 19th day of June, 1922.

That the original guarantees of May 31st, 1922, June 19th, 1922, as well as other letters from the defendants, to the plaintiff, dated the 24th day of March, 1922, and the 18th day of April, 1922, are hereby made a part hereof, and will be submitted to the court on the argument of this motion. That

Plaintiff's Exhibit 1.

the same are on printed letterheads which read as follows:

GRANGE AND SLOAN
Engineers—Builders

ROBERT W. GRANGE	527 Fifth Ave.	Telephone
WILLIAM G. SLOAN	New York	Murray Hill 4946"

That the plaintiff are manufacturers and jobbers of plumbers and steamfitters supplies; that the defendants are buliders and were engaged in the construction of the premises 18 East 74th Street in the Borough of Manhattan, City of New York; that the defendants employed the said Charles T. Seddon to do the plumbing work etc. in said building; that the material furnished by the plaintiff to the said Seddon was plumbing materials which went into said premises; that the defendants specified said material and are familiar with the same.

The second cause of action is to recover $253.47 for goods sold and delivered to the defendants, which were also used upon the same premises.

When the defendants first offered to guarantee the payment of the materials sold to the said Seddon as aforesaid, the plaintiff herein was given to understand that Grange and Sloan was a copartnership composed of the defendants, and the plaintiff accordingly gave credit on the strength of the said guaranty, believing that it was doing business with the defendants as the plaintiff had every right to by reason of the statements and representations made to it.

That I am informed by plaintiff's attorneys herein, and verily believe to be true, that the defendant Grange defaulted in his answer herein, and that thereafter and in October, 1922, the defendants moved to open their default and set aside the judgment entered herein. This motion was

brought on on an affidavit, order to show cause, and proposed answer of the defendants. The back sheet is endorsed as follows: "Morrell, Bates, Topping & Anderson, attorneys for defendants, Office and P. O. Address, 27 Cedar Street, Borough of Manhattan, New York City," which of course, is an appearance on behalf of both the defendants herein. The said affidavit and order to show cause is hereto annexed and made a part hereof, from which it will be seen that each of the defendants are referred to therein, and appear by the same attorneys. That the said default was opened, judgment was vacated and set aside and that defendants interposed an answer herein. That the complaint and the answer herein are hereto annexed and made a part hereof, from which it will be seen that the plaintiff specifically alleges that the defendants were copartners, trading under the firm name and style of Grange & Sloan at the time of plaintiff's transactions, which is not denied in the answer of the defendants herein.

That on or about the 9th day of December, 1922, the plaintiff received the following letter from the defendants:

December 9th, 1922.

Re: BERRY RESIDENCE
18 East 74th Street

THE JOHN SIMMONS COMPANY,
110 Centre Street, New York.

GENTLEMEN:

Upon investigation and in checking over our records we find that we have guaranteed the account of Charles T. Seddon for materials furnished by you in the amount

$1232.37 and that you did furnish and deliver material on this job to Seddon in that amount. We also find that we purchased from you and you sold to us and delivered at the same job further material in the amount of $253.47. We are therefore indebted to you and were indebted to you before you commenced suit against us in the amount of $1485.84, being the two items referred to.

Our contract and extras for this job is with Mrs. L. N. Berry and for the amount of $64,881.66 on account of which we have been paid the sum of $58,287.54. We have completed the contract and have earned the balance due thereon which is now payable to us. There are no offsets, counterclaims or defenses to the payment of this balance now due and payable to us.

We trust with the above explanation that it will convince you that we intend to pay you in full and that you are fully secured. We request that you accept these statements and upon the same consent to vacate the judgment entered against us and permit us to interpose our answer.

Very truly yours,

GRANGE AND SLOAN
By ROBERT W. GRANGE

After receiving the above letter the attorneys for the defendants herein requested, as I am informed and verily believe to be true, that we wait a few weeks when the entire amount herein would be paid, but which was not done. Thereafter and about February, 1923, the plaintiff made a motion

herein on notice to the attorneys for the defendants herein, for judgment on the pleadings, affidavits and exhibits therein under Rule 113 of the Rules of Civil Practice, which motion was granted and judgment entered in favor of the plaintiff and against the defendants. That a copy of the order granting said motion, together with notice of entry was served on the attorneys for the defendants on the 24th day of February, 1923, and the judgment herein with notice of entry thereof was served upon the attorneys for the defendants herein on the same day, the said attorneys giving admission of service on the said order and the said judgment as attorneys for the two defendants herein, in fact, on all of the papers served in this action, motion papers and otherwise, the attorneys for the defendants herein as aforesaid gave admission of service as attorneys for each of the defendants herein, and on papers served on behalf of the defendants herein the said attorneys signed as attorneys for each of the defendants herein.

That the judgment herein was docketed in the office of the Clerk of the County of New York on the 23rd day of February, 1923. Thereafter an execution upon said judgment, against the property of the defendants herein, was on the 24th day of February, 1923, duly issued to the Sheriff of the County of New York. Thereafter an order was made herein for the examination of each of the judgment-debtors; that the defendant Grange was served with said order, was partly examined, and then failed and refused to appear and defaulted upon the adjourned day. That the defendant Sloan could not be served with the said order for his examination, although diligent effort was made to do so. The defendant Grange appeared on the said

examination by the same attorneys. If the appearance had not been interposed on behalf of the defendant William G. Sloan the plaintiff would have continued its efforts to and would have served the said Sloan with the summons and complaint in this action. Having assumed, as we believe we had a right to, that we had a final judgment against each of the defendants herein, our papers are not at this moment intact as they were when this action was started, and it would be most difficult, if not impossible, to obtain all our papers and even the witnesses by whom we could prove that so far as the plaintiff is concerned, Grange & Sloan was a partnership consisting of the defendants and continued so to be up to the time the action herein was commenced. That at no time did the plaintiff have any notice that the defendants had dissolved partnership. Under the circumstances if the judgment herein is vacated, it may be impossible to prove our case herein at the present time. Annexed hereto and made a part hereof, is the affidavit of A. Wallace McCrea and M. M. Leichter. The reason that this affidavit is made by your deponent is the fact that plaintiff is a corporation and your deponent is familiar with all of the matters herein.

The motion herein should be denied with costs.

PHILLIP WEIGAND.

Sworn to before me this
19th day of June, 1924.

CLARA TEPPER,
Notary Public.
Bronx Co. Clks. No. 38, Reg. No. 2627.
N. Y. Co. Clks. No. 288, Reg. No. 6205.
Kings Co. Clks. No. 57, Reg. No. 6128.
Commission Expires March 30, 1926.

Plaintiff's Exhibit 1.

ANSWERING AFFIDAVIT OF A. WALLACE McCREA.

CITY COURT OF THE CITY OF NEW YORK.

JOHN SIMMONS CO.,
Plaintiff,

against

ROBERT W. GRANGE and WILLIAM G. SLOAN,
Defendants.

City of New York,
State of New York, } ss.:
County of New York,

A. WALLACE MCCREA, being duly sworn, deposes and says, that I am an architect, duly licensed to practice my profession in the State of New York, and have been engaged in the practise of architecture for the past 16 years.

That I was the architect who designed the plans and was in complete charge of the remodeling of the residence for Mrs. Leontine Berry, at 18 East 74th Street, in the Borough of Manhattan, City of New York.

That the contract for the improvement of the said premises was made with the defendants Robert W. Grange and William G. Sloan, conducting business under the name of Grange & Sloan, and was dated the 25th day of August, 1921.

That the defendants proceeded with the work contemplated under said contract, but never fully completed the same.

That all certificates, of which there are a number, were issued by me to Grange & Sloan as a partnership, and all payments made under said contract, which payments are very numerous, were made by check to the order of Grange & Sloan, as a partnership. That at no time was any notice given to myself, as the architect, or to Mrs. Berry with whom the agreement was made, in word, substance or effect, that the partnership firm of Grange & Sloan was dissolved. The fact is, that after December 31st, 1921, numerous checks and numerous certificates were issued and delivered to Grange & Sloan as a partnership as I have above stated.

That this affidavit is made by your deponent and not by Mrs Berry for the reason that Mrs. Berry is not acquainted with any of the facts and had no transactions with the said Grange & Sloan, that your deponent was in complete charge of all matters under said agreement and all notices, communications and transactions arising out of the Berry residence in the improvement thereof, was had with your deponent, who was in complete charge thereof.

A. WALLACE MCCREA.

Sworn to before me this 18th day of June, 1924.

SEWELL T. TYNG,
Notary Public.

N. Y. Co. 239, Reg. No. 5203.
Certificate filed in Kings Co. No. 31, Reg. No. 5110.
Also in Bronx Co. No. 23, Reg. No. 110.
Queens Co. No. 1991, and Westchester Co.
Commission expires March 30, 1925.

Plaintiff's Exhibit 1.

Plaintiff's Exhibit 1.

ANSWERING AFFIDAVIT OF MILTON M. LEICHTER.

CITY COURT OF THE CITY OF NEW YORK.

JOHN SIMMONS CO.,
Plaintiff,

against

ROBERT W. GRANGE and WILLIAM G. SLOAN,
Defendants.

City & County of New York, ss.:

MILTON M. LEICHTER, being duly sworn deposes and says that he is a member of the firm of WEISSBERGER & LEICHTER, attorneys for the plaintiff above named; that he has read the affidavit of Phillip Wiegand verified the 19th day of June, 1924, hereto annexed, and that all statements herein with reference to Counsel for the plaintiff are correct and true.

That after the service of the summons and complaint herein, the defendant Grange defaulted in his answer and that thereafter and in October, 1922, the defendants moved to set aside the judgment entered herein. The motion papers on that motion, served by Morrell, Bates, Topping & Anderson, attorneys for the defendants were returnable on the 27th day of October, 1922. Just before that day Mr. Anderson, of that law firm was in touch with me and represented that this matter would be settled and requested an adjournment of his motion, and upon that representation the motion was adjourned from time to time from October 26th, 1922, until the 8th day of December, 1922.

Plaintiff's Exhibit 1.

I have found three (3) of the written stipulations adjourning the defendant's said motion, which were prepared by the attorneys for the defendants herein and each of which are signed by said attorneys as "Attorneys for Defendants." These three (3) stipulations, one dated November 1st, 1922, adjourning the motion to November 8th, 1922, another dated, November 14th, 1922, adjourning the motion to November 27th, 1922 and the other, dated December 1st, 1922, adjourning the motion to December 8th, 1922, are hereto annexed and made a part hereof. These stipulations are submitted to the Court to show that all during this time these attorneys knew that they had appeared in this action for both of the defendants.

I also submit as a part hereof the stipulation herein dated the 7th day of December, 1922, which also clearly indicates that the attorneys well knew and understood that they represented and appeared for both of the defendants and that the letter from the defendants to the plaintiff dated the 9th day of December, 1922, was sent in behalf of both the defendants.

M. M. LEICHTER.

Sworn to before me this 26th day of June, 1924.

CLARA TEPPER,
Notary Public.
Bronx Co. Clks. No. 38, Reg. No. 2627.
N. Y. Co. Clks. No. 288, Reg. No. 6205.
Kings Co. Clks. No. 57, Reg. No. 6128.
Commission Expires March 30, 1926.

Plaintiff's Exhibit 1.

EXHIBIT 9. ORDER TO SHOW CAUSE.

CITY COURT OF THE CITY OF NEW YORK.

JOHN SIMMONS CO.,
Plaintiff,

against

ROBERT W. GRANGE and WILLIAM G. SLOAN,
Defendants.

Upon reading the annexed affidavit of ROBERT W. GRANGE, verified the 25th day of October, 1922, and the copy of the proposed answer herein, verified on said day and on motion of Morrell, Bates, Topping and Anderson, attorneys for defendants,

ORDERED, that the plaintiff herein show cause at Special Term Part I of this Court to be held at the Court House thereof in the Brownstone Building at #32 Chambers Street, Borough of Manhattain, City, County and State of New York, on the 27th day of October, 1922, at 10 o'clock in the forenoon thereof or as soon thereafter as counsel can be heard, why an order should not be made directing that the judgment entered herein by default in favor of the plaintiff against the defendant on the 16th day of October, 1922, be opened and the exexcution issued thereon on October 17, 1922, be vacated and set aside and that all proceedings on said judgment be vacated and set aside; that the said defendants be permitted to serve as an answer to the complaint herein the answer annexed hereto with the same force and effect in every respect as if the defendants had served their answer within the time allowed by law. In the meantime and

Plaintiff's Exhibit 1.

until the hearing and determination of this application and the entry of an order thereon that all proceedings on the part of the plaintiff be stayed.

Service of a copy of this order and the annexed affidavit and answer upon the attorneys for the plaintiff and the Sheriff of New York County on or before October 26, 1922, shall be deemed sufficient.

Dated, New York October 26, 1922.

EDWARD B. LA FETRA,
J. C. C.

EXHIBIT 10. AFFIDAVIT OF ROBERT W. GRANGE.

CITY COURT OF THE CITY OF NEW YORK.

JOHN SIMMONS CO.,
Plaintiff,

against

ROBERT W. GRANGE and WILLIAM G. SLOAN,
Defendants.

State of New York,
County of New York, } ss.:

ROBERT W. GRANGE being duly sworn deposes and says, that he is one of the defendants in the above entitled action and is familiar with the transaction involved therein. That the summons and complaint in this action were served upon the defendants on or about the 14th day of September 1922. Immediately thereafter he sent the same to the attorney who was then representing the de-

fendants with instructions to represent the defendants in this action. That neither he nor the defendants were advised as to any further action in the matter until they were informed that a judgment had been entered by default in favor of the plaintiff. The judgment by default was entered in this action by the plaintiff against the defendants in the Clerk's office of this Court for $1,533.66 on October 16, 1922, and thereafter and on October 17, 1922, a transcript of said judgment was entered in the office of the Clerk of New York County.

That this action is based on a guarantee by the defendants for certain obligations of one Charles T. Seddon to the plaintiff. The defendants did not authorize the plaintiff to sell to the said Seddon the amount of the material as alleged in the complaint and for which judgment is entered and did not guarantee the payment of the said amounts as alleged. The defendants have not purchased from the plaintiff at any time goods, wares and merchandise of the agreed price and value of $253.47 as alleged in paragraph "IX" of the complaint and the defendants are unable to understand this allegation. Deponent has fully and fairly stated the case to Laurence A. Anderson of the firm of Morrell, Bates, Topping and Anderson, attorneys for the defendants and he is advised by said counsel after such statement and verily believes that the defendants have a good and substantial defense on the merits to the action.

WHEREFORE, deponent respectfully requests that the judgment entered herein for $1,533.66 be vacated and set aside and the execution issued thereon be vacated and that the defendants be allowed to enter their answer to the complaint herein, a copy of which proposed answer is hereto annexed.

No other application has been made for the relief requested herein. The reason for asking for an order to show cause is to prevent the property of the defendants from being sold by the Sheriff under the execution issued herein.

ROBT. W. GRANGE.

Sworn to before me this 25th day of October, 1922.

RUTH FERGUSON,
Notary Public,
N. Y. County.

EXHIBIT 11. COMPLAINT.

CITY COURT OF THE CITY OF NEW YORK.

JOHN SIMMONS CO.,
Plaintiff,

against

ROBERT W. GRANGE and WILLIAM G. SLOAN,
Defendants.

The plaintiff complaining of the defendants alleges as follows:

1. FOR A FIRST CAUSE OF ACTION.

I. That at all the times hereinafter mentioned the plaintiff was and still is a domestic corporation.

II. Upon information and belief that at all of such times, the defendants were and still are copartners trading under the firm name and style of Grange and Sloan.

Plaintiff's Exhibit 1.

III. Upon information and belief that at all of such times, the defendants were the contractors upon and engaged in the construction of the Berry residence at 18 East 74th Street, New York City.

IV. That on or about the 31st day of May, 1922, in consideration that the plaintiff sell and deliver merchandise on credit to one Charles T. Sedden, the defendants in writing, copy of which is hereto annexed marked Exhibit "A" and made a part hereof, guaranteed and promised to be answerable to the said plaintiff for the payment by the said Charles T. Sedden of the price of goods theretofore or thereafter purchased by and delivered to the said Charles T. Sedden, not to exceed the sum of $1,204.85.

V. That thereafter and about the 19th day of June, 1922, for a valuable consideration, the said guarantee was modified in writing by the amount thereof being increased to $1,232.37.

VI. Upon information and belief that thereafter and on the faith of said guarantee and between the 29th day of March, 1922, and the 13th day of June, 1922, the plaintiff at the special instance and request of the said Charles T. Sedden duly sold and delivered to the said Charles T. Sedden goods, wares and merchandise which were of the agreed price and reasonable value of $1,232.37.

VII. That payment thereof has been duly demanded from the defendants and the said Charles T. Sedden, but they and each of them failed and refused to pay the same.

For a Second Cause of Action.

VIII. The plaintiff realleges the allegations contained in paragraphs I and II of the first cause of action herein.

Plaintiff's Exhibit 1.

IX. That heretofore and between the 5th day of July, 1922, and the 29th day of July, 1922, the plaintiff at the special instance and request of the defendants duly sold and delivered to the defendants goods, wares and merchandise which were of the agreed price and reasonable value of $253.47.

X. That no part of the said sum has been paid although duly demanded.

Wherefore plaintiff demands judgment against the defendants for the sum of $1,232.37 with interest from the 13th day of June, 1922, on the first cause of action herein and for the sum of $253.47 with interest thereon from the 29th day of July, 1922, besides the costs and disbursements of this action.

Weissberger & Leichter,
Attorneys for plaintiff,
Office and P. O. Address,
93-99 Nassau Street,
Borough of Manhattan,
City of New York.

Plaintiff's Exhibit 1.

EXHIBIT 12, BEING EXHIBIT A OF COMPLAINT.

EXHIBIT A.

ROBERT W. GRANGE — Telephone
WILLIAM G. SLOAN — Murray Hill 4946

GRANGE AND SLOAN
Engineers and Builders,
527 - 5th Avenue,
New York.

MAY 31, 1922

Re: 18 East 74th Street,
THE JOHN SIMMONS CO.,
110 Center Street,
N. Y.

Attention Mr. Weigand,
Credit Department.

GENTLEMEN:

We acknowledge receipt of your letter of today calling our attention to the fact that you have made deliveries to date to Charles T. Sedden in amount $1,204.85. This amount we guarantee, but we do not guarantee any further items until such matters are taken up with us before hand, as we understand from Mr. Sedden this covers all the materials needed by him. Kindly acknowledge receipt of this letter.

Very truly yours,

GRANGE AND SLAON
By HARRY GRUNDY.

HG/F

Plaintiff's Exhibit 1.

EXHIBIT 13. ANSWER.

CITY COURT OF THE CITY OF NEW YORK.

JOHN SIMMONS CO.,
Plaintiff,

against

ROBERT W. GRANGE and WILLIAM G. SLOAN,
Defendants.

The defendants by Morrell, Bates, Topping & Anderson, their attorneys, answering the complaint herein, set forth and allege:

FIRST: Denies each and every allegation set forth and contained in the paragraph of the complaint herein numbered "IV," except that they admit that they gave to the plaintiff a writing similar to paper attached to the complaint marked Exhibit A.

SECOND: Denies each and every allegation set forth and contained in the paragraph of the complaint herein numbered "V."

THIRD: Denies that they have sufficient knowledge or information upon which to base a belief as to each and every allegation set forth and contained in a paragraph of the complaint herein numbered "VI."

FOURTH: Denies each and every allegation set forth and contained in the paragraph of the complaint herein numbered "IX."

WHEREFORE defendants demand judgment

Plaintiff's Exhibit 1.

against the plaintiff, dismissing the complaint herein with their just costs and disbursements.

MORRELL, BATES, TOPPING & ANDERSON,
Attorneys for defendants,
Office and Post Office Address,
27 Cedar Street,
Borough of Manhattan,
New York City.

STATE OF NEW YORK }
County of New York } ss.

ROBERT W. GRANGE being duly sworn deposes and says that he is one of the defendants in the within action; that he has read the foregoing answer and knows the contents thereof, that the same is true of his own knowledge except as to the matters therein stated to be alleged upon information and belief and that as to those matters he believes the same to be true.

ROBT. W. GRANGE.

Sworn to before me this 25th day of October 1922.

RUTH FERGUSON,
Notary Public,
N. Y. County.

Plaintiff's Exhibit 1.

EXHIBIT 14. STIPULATION OF DEC. 27th, 1922.

CITY COURT OF THE CITY OF NEW YORK.

JOHN SIMMONS COMPANY,
Plaintiff,

against

ROBERT W. GRANGE and WILLIAM G. SLOAN,
Defendants.

IT IS HEREBY STIPULATED AND AGREED by and between the attorneys for the plaintiff and the attorneys for the defendants herein, upon the letter from the defendants to the plaintiff, dated December 9, 1922, and the statements therein contained that the judgment entered in the clerk's office of this Court on the 16th day of October, 1922, in favor of the plaintiff against defendants for the sum of $1,533.66 be vacated and set aside and that the service of the answer on the attorneys for the plaintiff on October, 25, 1922, be deemed good and sufficient service of same.

Dated, New York, December 27, 1922.

WEISSBERGER & LEICHTER,
Attorneys for plaintiff.

MORRELL, BATES, TOPPING & ANDERSON,
Attorneys for defendants.

Plaintiff's Exhibit 1.

STIPULATION OF NOVEMBER 1ST, 1922.

CITY COURT OF THE CITY OF NEW YORK.

JOHN SIMMONS COMPANY,
Plaintiff,

against

ROBERT W. GRANGE and WILLIAM G. SLOAN,
Defendants.

It is hereby stipulated and agreed by and between the attorneys for the respective parties herein, that the order to show cause why judgment entered by default should not be opened, be and the same hereby is adjourned for argument to the 8th day of November, 1922.

Dated, November 1st, 1922.

W & L
Attorneys for Plaintiff

MORRELL, BATES, TOPPING & ANDERSON,
Attorneys for Defendants.

Plaintiff's Exhibit 1.

STIPULATION OF NOVEMBER 14TH, 1922.

CITY COURT OF THE CITY OF NEW YORK.

JOHN SIMMONS COMPANY,
Plaintiff,

against

ROBERT W. GRANGE and WILLIAM G. SLOAN,
Defendants.

It is hereby stipulated and agreed by and between the attorneys for the respective parties herein, that the order to show cause why judgment entered by default should not be opened, be and the same hereby is adjourned for argument to the 27th day of November, 1922.

Dated November 14th, 1922.

W & L
Attorneys for Plaintiff.

MORRELL, BATES, TOPPING & ANDERSON,
Attorneys for Defendants.

Plaintiff's Exhibit 1.

STIPULATION OF DECEMBER 1ST, 1922.

CITY COURT OF THE CITY OF NEW YORK.

JOHN SIMMONS CO.,
Plaintiff,

against

ROBERT W. GRANGE and WILLIAM G. SLOAN,
Defendants.

It is hereby stipulated and agreed by and between the attorneys for the respective parties herein, that the order to show cause why judgment entered by default should not be opened, be and the same hereby is adjourned to the 8th day of December, 1922, at the same time and place.

Dated December 1st, 1922.

WEISSBERGER & LEICHTER,
Attorneys for Plaintiff.

MORRELL, BATES, TOPPING & ANDERSON,
Attorneys for Defendants.

Plaintiff's Exhibit 1.

AFFIDAVIT OF NO OPINION.

SUPREME COURT: APPELLATE TERM.

JOHN SIMMONS CO.,
Plaintiff,

against

ROBERT W. GRANGE and WILLIAM G. SLOAN,
Defendants.

State of New York,
County of New York, } **ss.:**

WALTER B. HOPPING, being duly sworn, deposes and says that he is the attorney for the defendant William G. Sloan in this action, and is familiar with all the facts and circumstances connected therewith, and with the Order from which this Appeal was taken; that no opinion was given upon the decision of the motion resulting in the Order herein appealed from.

WALTER B. HOPPING.

Sworn to before me this 6th day of August, 1924.

JACOB W. WINKLER,
Commissioner of Deeds,
City of New York.

Residing in Bronx County. Certificates filed in Bronx New York and Kings Counties.

County Clerk's No.		Register's No.
13	Bronx County	3045
114	New York County	26041
120	Kings County	6035

Commission expires May 13, 1926

Plaintiff's Exhibit 1.

STIPULATION WAIVING CERTIFICATION.

CITY COURT OF THE CITY OF NEW YORK.

JOHN SIMMONS CO.,
Plaintiff,

against

ROBERT W. GRANGE and WILLIAM G. SLOAN,
Defendants.

Pursuant to Section 77 of the New York City Court Act, it is hereby stipulated that the papers as hereinbefore printed consist of true and correct copies of the Notice of Appeal, the Order Appealed From, and all the papers upon which the Court below acted in making the Order Appealed From and the whole thereof now on file in the office of the Clerk of the City Court of the City of New York; and certification thereof in pursuance of said Section is hereby waived.

Dated, New York, August 6th, 1924.

WEISSBERGER & LEICHTER,
Attorneys for Plaintiff-Respondent.

WALTER B. HOPPING,
Attorney for Defendant, William G. Sloan, Appellant.

Plaintiff's Exhibit 1.

ORDER.

At a Special Term, Part II, of the City Court of the City of New York, held at the Court House at the Brownstone Building, #32 Chambers Street, Borough of Manhattan, City of New York, on the 28th day of November, 1924.

Present—Hon. PETER SCHMUCK, Chief Justice.

JOHN SIMMONS CO.,
Plaintiff-Respondent,

against

ROBERT W. GRANGE and WILLIAM G. SLOAN,
Defendants,

WILLIAM G. SLOAN,
Appellant.

The above named William G. Sloan having appealed to the Appellate Term of the Supreme Court, First Department, from the order of the City Court of the City of New York on the 15th day of July, 1924, in favor of the plaintiff and against the defendant William G. Sloan and said Appellate Term of the Supreme Court by an order dated the 11th day of November, 1924, having duly affirmed said order with $10.00 costs and disbursements to the plaintiff

Now on reading and filing the remittitur of the said Appellate Term of said Supreme Court together with a certified copy of said order entered upon said appeal dated the 11th day of November, 1924, and upon motion of Weissberger & Leichter, attorneys for the plaintiff, it is

Plaintiff's Exhibit 1.

ORDERED that the said order of the said Appellate Term of the Supreme Court duly entered in the office of the Clerk of the County of New York on the 11th day of November, 1924, be and the same hereby is in all respects made the order of this Court.

Enter,

P. S.,
Chief Justice of the City Court
of the City of New York.

6K
JJB

ORDER OF AFFIRMANCE.

At an Appellate Term of the Supreme Court, First Department, held at the County Court House, Borough of Manhattan, City of New York, on the 11th day of November, 1924.

Present—Hon. CHARLES L. GUY,
Hon. NATHAN BIJUR,
Hon. GEORGE V. MULLAN, Justices.

JOHN SIMMONS CO.,
Plaintiff-Respondent,
against
ROBERT W. GRANGE and WILLIAM G. SLOAN,
Defendants,
WILLIAM G. SLOAN,
Defendant-Appellant.

Order on Appeal from The City Court or the Municipal Court.

The above named William G. Sloan having ap-

Plaintiff's Exhibit 1.

pealed to the Appellate Term of the Supreme Court, First Department, from an order of the City Court of the City of New York, entered on the 15th day of July, 1924, and the said appeal having been heard, and due deliberation having been had thereon,

IT IS ORDERED that the order so appealed from be and the same is hereby affirmed with $10.00 costs and disbursements.

Enter,

C. L. G.,
Justice, Supreme Court,
Sitting in Appellate Term.

A Copy.

(Seal)

JAMES A. DONEGAN,
Clerk.

O. E. B.

BILL OF COSTS.

11200—1922.

CITY COURT OF THE CITY OF NEW YORK.

JOHN SIMMONS CO.,
Plaintiff-Respondent,
against
ROBERT W. GRANGE and WILLIAM G. SLOAN,
Defendants,
WILLIAM G. SLOAN,
Defendant-Appellant.

Costs of Plaintiff-Respondent.

Plaintiff's Exhibit 1.

COSTS.
DISBURSEMENTS.

Paid Printing Points	$25.00
Costs on Appeal	10.00
	$35.00

I hereby certify that I have taxed this Bill of Costs at $35.00 on notice.

F. J. GOODWIN,
Clerk.

City of New York, }
County of New York, } ss.:

MILTON M. LEICHTER, one of the attorneys for the plaintiff-respondent in the above-entitled action, being duly sworn, says that the foregoing disbursements have been made in said action or may be necessarily made or incurred therein and that the copies of documents or papers as charged herein were actually and necessarily obtained for use.

M. M. LEICHTER.

Sworn to before me this 6th day of December, 1924.

CLARA TEPPER,
Notary Public.
Bronx Co. Clk's No. 38; Reg. No. 2627.
N. Y. Co. Clk's No. 288; Reg. No. 6205.
Kings Co. Clk's No. 57; Reg. No. 6128.
Com. expires March 30, 1924.

Plaintiff's Exhibit 1.

BILL OF COSTS.

CITY COURT OF THE CITY OF NEW YORK.

JOHN SIMMONS CO.
against
ROBERT W. GRANGE and WILLIAM G. SLOAN.
} Costs of

COSTS.

Costs before Notice of Trial	$15.00

DISBURSEMENTS.

Clerk's Fees on Entering Judgment and per folio	$ .90	
Satisfaction Piece	.37	
Transcript and Filing N. Y. Co.	.47	
Certified Copy Judgment	.07	
Sheriff's Fees on Execution	2.20	
Cost of Entering Judgment on Oct. 16, 1922	.62	
Cost of Docketing Transcript Oct. 16/22	.35	
Cost of Sheriff N. Y. Co. Oct. 16/22	2.20	
		6.49
Total		$21.49

I hereby certify that I have taxed this Bill of Costs at $21.49.

F. J. GOODWIN,
Clerk.

Plaintiff's Exhibit 1.

City of New York, }
County of New York, } ss.:

MILTON M. LEICHTER, one of the attorneys for the plaintiff in the above-entitled action, being duly sworn, says that the foregoing disbursements have been made in said action or may be necessarily made or incurred therein, and that the copies of documents or papers as charged herein were actually and necessarily obtained for use.

M. M. LEICHTER.

Sworn to before me this 23rd day of February, 1923.

GEORGE COOPER,
Notary Public.
Bronx Co. Reg. No. 10.
Cert. filed N. Y. Co. No. 187; Reg. No. 3139.
Kings Co. No. 18; Reg. No. 3103.
Com. expires March 30, 1923.

ORDER GRANTING MOTION FOR JUDGMENT.

Index Number 11200 Year 1922.

CITY COURT OF THE CITY OF NEW YORK.

Special Term, Part .

Present: Hon. JOHN L. WALSH, Justice.

JOHN SIMMONS CO.
against
ROBERT W. GRANGE and ano.

Papers Submitted, Special Term, Feb. 21-23, Numbered 1-5.

The following papers used on this motion on default this day.

Plaintiff's Exhibit 1.

Papers Numbered.
Notice of Motion and Affidavits Annexed.....1-2-3
Exhibits 4-5

Upon the foregoing papers this motion is granted and judgment ordered for plaintiff for the relief prayed for in the complaint.

Dated February 21st, 1923.

J. L. W.,
J. C. C.

COMPLAINT.

CITY COURT OF THE CITY OF NEW YORK.

JOHN SIMMONS CO.,
Plaintiff,
against
ROBERT W. GRANGE and WILLIAM G. SLOAN,
Defendants,

Papers Submitted, Special Term, Feb. 21-23, Numbered 4.

The plaintiff complaining of the defendants alleges as follows:

FOR A FIRST CAUSE OF ACTION.

I. That at all the times hereinafter mentioned the plaintiff was and still is a domestic corporation.

II. Upon information and belief that at all of such times the defendants were and still are copartners, trading under the firm name and style of Grange & Sloan.

III. Upon information and belief that at all of

such times the defendants were the contractors upon and engaged in the construction of the Berry residence at 18 East 74th Street, New York City.

IV. That on or about the 31st day of May, 1922, in consideration that the plaintiff sell and deliver merchandise on credit to one Charles T. Seddon, the defendants in writing, copy of which is hereto annexed marked Exhibit A and made a part hereof, guaranteed and promised to be answerable to the said plaintiff, for the payment by the said Charles T. Seddon of the price of goods theretofore or thereafter purchased by and delivered to the said Charles T. Seddon, not to exceed the sum of $1204.85.

V. That thereafter and about the 19th day of June, 1922, for a valuable consideration, the said guaranty was modified in writing, by the amount thereof being increased to $1232.37.

VI. Upon information and belief that thereafter and on the faith of the said guarantee and between the 29th day of March, 1922, and the 13th day of June, 1922, the plaintiff, at the special instance and request of the said Charles T. Seddon, duly sold and delivered to the said Charles T. Seddon goods, wares and merchandise which were of the agreed price and reasonable value of $1,232.37.

VII. That payment thereof has been duly demanded from the defendants and the said Charles T. Seddon, but they and each of them failed and refused to pay the same.

FOR A SECOND CAUSE OF ACTION.

VIII. The plaintiff realleges the allegations contained in paragraphs I and II of the first cause of action herein.

IX. That heretofore and between the 5th day of July, 1922, and the 29th day of July, 1922, the plaintiff, at the special instance and request of the defendants, duly sold and delivered to the defendants, goods, wares, and merchandise, which were of the agreed price and reasonable value of $253.47.

X. That no part of the said sum has been paid, although duly demanded.

WHEREFORE, plaintiff demands judgment against the defendants for the sum of $1,232.37 with interest thereon from the 13th day of June, 1922, on the first cause of action herein, and for the sum of $253.47 with interest thereon from the 29th day of July, 1922, besides the costs and disbursements of this action.

WEISSBERGER & LEICHTER,
Attorneys for Plaintiff,
Office & P. O. Address,
#93-99 Nassau St.,
Borough of Manhattan,
City of New York.

ANSWER.

CITY COURT OF THE CITY OF NEW YORK.

JOHN SIMMONS CO.,
Plaintiff,

against

ROBERT W. GRANGE and WILLIAM G. SLOAN,
Defendants.

Papers Submitted, Special Term, Feb. 21, 1923, Numbered 5.

The defendants, by Morrell, Bates, Topping &

Plaintiff's Exhibit 1.

Anderson, their attorneys, answering the complaint herein, set forth and allege:

First.—Denies each and every allegation set forth and contained in the paragraph of the complaint herein, numbered "IV," except that they admit that they gave to the plaintiff a writing, similar to paper attached to the complaint, marked "Exhibit A."

Second.—Denies each and every allegation set forth and contained in the paragraph of the complaint herein, numbered "V."

Third.—Denies that they have sufficient knowledge or information, upon which to base a belief as to each and every allegation set forth and contained in the paragraph of the complaint herein, number "VI."

Fourth.—Denies each and every allegation set forth and contained in the paragraph of the complaint herein, numbered "IX."

Wherefore, the defendants demand judgment against the plaintiff dismissing the complaint herein, with their justs costs and disbursements.

Morrell, Bates, Topping & Anderson,
Attorneys for Defendants,
Office & P. O. Address,
No. 27 Cedar Street,
Borough of Manhattan,
New York City.

Plaintiff's Exhibit 1.

NOTICE OF MOTION.

CITY COURT OF THE CITY OF NEW YORK.

John Simmons Co.,
Plaintiff,
against
Robert W. Grange and William G. Sloan,
Defendants.

Papers Submitted, Special Term, Feb. 21-23, Numbered 1.

Sir:

Please Take Notice that upon the annexed affidavit, the pleadings herein, and upon all proceedings had herein, a motion will be made before one of the Judges of this Court, at Special Term, Part I thereof, to be held at the Court House, #32 Chambers St., in the Borough of Manhattan, City of New York, on the 21st day of February, 1923, at 10:00 o'clock in the forenoon of said day, or so soon thereafter as Counsel can be heard, that an order be made herein, striking out the answer of the defendant, and for judgment in favor of the plaintiff, and against the defendants as prayed for in the complaint herein, pursuant to the Rules of Practice and the Statute herein, and that the plaintiff have such other and further relief in the premises as may seem just and proper, besides the costs of this motion.

Dated, New York, February 15th, 1923.

Yours &c.,

Weissberger & Leichter,
Attorneys for Plaintiff,
Office & P. O. Address,
#93-99 Nassau Street,
Borough of Manhattan,
City of New York.

Plaintiff's Exhibit 1.

AFFIDAVIT

CITY COURT OF THE CITY OF NEW YORK.

JOHN SIMMONS CO.,
Plaintiff,
against
ROBERT W. GRANGE and WILLIAM G. SLOAN,
Defendants.

Papers Submitted, Special Term, Feb. 21-23, Numbered 2.

State of New York, }
County of New York, } ss.:

PHILIP WIEGAND, being duly sworn, deposes and says that he is the credit manager of the plaintiff herein, and familiar with the facts in the above entitled action, which was commenced by the personal service of the summons and complaint herein, upon the defendants, on or about the 25th day of September, 1922, that the complaint herein alleges two causes of action; first, upon the guarantee made by the defendants, whereby they guaranteed payment for the delivery of certain material to one Charles T. Sedden in the amount of $1,204.85; that the said guarantee is in writing over the signature of the defendants and is dated May 31st, 1922, the original of which is in the possession of your deponent; that the same was modified by the amount thereof being increased to $1,232.37 by a modification in writing, over the signature of the defendants, dated June 19th, 1922, the original of which is in possession of your deponent; that the defendants are builders and were engaged in the construction of the premises 18 East 74th St., in

Plaintiff's Exhibit 1.

the Borough of Manhattan, City of New York; that they employed the said Charles T. Sedden to do the plumbing work, etc., in said building; that the material furnished by the plaintiff to the said Sedden were plumbing materials, which went into the said premises; that the defendants specified the said material, are familiar with the same and know that the same went into the said premises. In fact the plaintiff only furnished the said materials on the strength of the defendants guarantee and had the defendants not guaranteed the payment of the same, the plaintiff would not have sold, and would not have furnished the said materials. That on the 2nd day of June, 1922, the plaintiff procured from the said Sedden an assignment to it in the amount of $1,204.85, which assignment recited that the said sum of $1,024.85 was true and correct in all respects and assigned to this plaintiff that amount which was then owing by the defendants to the said Sedden for the work he had performed and the materials he had furnished on the said premises. The original of said assignment is in the possession of your deponent, and a duplicate thereof was duly sent to the defendants on June 2nd, 1922; that the defendants received the said assignment, received the statements and letters showing the materials furnished by the plaintiff, and have never at any time questioned the correctness thereof. In fact the office of the defendants admitted this to me on the telephone and promised repeatedly to pay the same which they did not do.

The second cause of action is to recover $253.47 for goods sold and delivered to the defendants, which also were used upon the same premises. That the defendants received the said materials

and promised to pay for the same, and did not do so.

That I am informed by the plaintiff's attorneys herein, that the defendants defaulted in the service of their answer herein, and that judgment was entered herein in favor of the plaintiff and against the defendants by default, and that thereafter in October, 1922, the defendants moved to open their default and set aside the judgment against them; that the default of the defendants was opened and the judgment recovered against them vacated and set aside, and their said proposed answer accepted as of the service thereof with the motion papers aforesaid as of October 25th, 1922.

That on or about the 9th day of December, 1922, the plaintiff received the following letter from the defendants:

December 9th, 1922.

Re Berry Residence
18 East 74th Street
The John Simmons Company,
110 Centre Street, New York.

Gentlemen:

Upon investigation and in checking over our records we find that we have guaranteed the account of Charles T. Seddon for materials furnished by you in the amount $1,232.37 and that you did furnish and deliver material on this job to Seddon in that amount. We also find that we purchased from you and you sold to us and delivered at the same job further material in the amount of $253.47. We are therefore indebted to you and were indebted to you before you commenced suit against us in the

amount of $1,485.84 being the two items referred to.

Our contract and extras for this job is with Mrs. L. N. Berry and for the amount of $64,881.66 on account of which we have been paid the sum of $58,287.54. We have completed the contract and have earned the balance due thereon which is now payable to us. There are no offsets, counterclaims or defenses to the payment of this balance now due and payable to us.

We trust with the above explanation that it will convince you that we intend to pay you in full and that you are fully secured. We request that you accept these statements and upon the same consent to vacate the judgment entered against us and permit us to interpose our answer.

Very truly yours,

GRANGE AND SLOAN
By ROBERT W. GRANGE

After receiving the above letter the attorneys for the defendants herein requested, as I am informed by plaintiff's attorneys, and verily believe to be true, that we wait a few weeks when the entire amount herein would be paid; that we did wait a few weeks and then our attorneys attempted to communicate with the attorneys for the defendants with reference to the payment of our indebtedness herein, but up to this time they have been unable to get any definite response from them, and it is my opinion that the defendants are merely attempting to obtain all the delay possible and forstall the inevitable judgment herein; that the defendants have no defense herein, have admitted

Plaintiff's Exhibit 1.

their indebtedness to the plaintiff over their signature as above set forth, the original of which letter and defendants guarantees will be produced in court upon the argument of this motion; that the plaintiff's verified complaint and the answer of the defendants are hereby made a part hereof, and will be submitted to the court on the argument hereof.

I therefore ask that an order be made herein striking out the answer of the defendants, and for judgment herein in the amount set forth in the complaint herein, for which no previous application has been made.

PHILLIP WIEGAND.

Sworn to before me this 15th day of February, 1923.

GEORGE COOPER,
Notary Public,
Bronx Co. 21, Reg. 10.
Certificate filed N. Y. Co. 157, Reg. 3159.
Kings Co. 18, Reg. 3103.
Commission expires March 30, 1925.

Plaintiff's Exhibit 1.

AFFIDAVIT.

CITY COURT OF THE CITY OF NEW YORK.

JOHN SIMMONS CO.,
Plaintiff,

against

ROBERT W. GRANGE and WILLIAM G. SLOAN,
Defendants.

Papers Submitted, Special Term, Feb. 21-25, Numbered 3.

City & County of New York, ss.:

MILTON M. LEICHTER, being duly sworn, deposes and says that he is a member of the firm of Weissberger & Leichter, attorneys for the plaintiff above named; that he has read the affidavit of Philip Wiegand verified the 15th day of February, 1923, hereto annexed, and that all statements therein with reference to counsel for the plaintiff are correct and true.

M. M. LEICHTER.

Sworn to before me this 16th day of February, 1923.

GEORGE COOPER,
Notary Public,
Bronx Co. 21, Reg. 10.
Certificate filed N. Y. Co. 157, Reg. 3159.
Kings Co. 18, Reg. 3103.
Commission expires March 30, 1923.

Plaintiff's Exhibit 1.

ORDER.

CITY COURT OF THE CITY OF NEW YORK.

JOHN SIMMONS CO.
Plaintiff,

against

ROBERT W. GRANGE and WILLIAM G. SLOANE.
Defendants.

The above entitled action having been duly commenced by the personal service of the summons and complaint upon the defendants herein within the City and State of New York, and the defendants having duly appeared and answered herein, and the plaintiff having made a motion herein to strike out the answer of the defendants, and for judgment in its favor and against the defendants, as prayed for in the complaint herein, and the said motion having come duly on to be heard and this court having made, entered and filed an order herein granting the said motion and directing judgment for the plaintiff for the relief prayed for in the complaint, to wit the sum of $1,232.37 with interest thereon from the 13th day of June, 1922, namely $49.29, and the sum of $243.57 with interest thereon from the 29th day of July, 1922, namely $8.52, making in the aggregate $1,533.75, and the plaintiff's costs having been duly taxed in the sum of $21.49.

Now on motion of Weissberger & Leichter, attorneys for the plaintiff, it is

ORDERED AND ADJUDGED that John Simmons Co., the plaintiff herein, recover of Robert W. Grange

Plaintiff's Exhibit 1.

and William G. Sloan, the defendants herein, the sum of $1,533.75, and the sum of $21.49 the costs and disbursements taxed herein, making in the aggregate the sum of $1,555.24 and that the plaintiff have execution therefor against the defendants.

Dated, New York, February 23, 1923.

FRANK J. GOODWIN,
Clerk.

CERTIFICATION.

All which we have caused by these to be Exemplified and the Seal of the City Court of the City of New York to be hereunto affixed.

Witness, Peter Schmuck, Esquire, Chief and Presiding Justice of our said Court, at the Court House, No. 32 Chambers Street, in The City of New York, this 22nd day of May A. D., 1925.

HARRY C. PERRY,
[SEAL] Clerk.

CITY COURT OF THE CITY OF NEW YORK.

JOHN SIMMONS CO.

against

ROBERT W. GRANGE and WILLIAM G. SLOANE.

I, PETER SCHMUCK, Chief and Presiding Justice of the City Court of The City of New York, do hereby Certify that Harry C. Perry, whose name is subscribed to the preceding exemplification, is the Clerk of the said City Court of The City of New

Plaintiff's Exhibit 1.

York, duly appointed and sworn, and that full faith and credit are due to his official acts. I further certify that the Seal affixed to the said exemplification is the Seal of the said City Court of The City of New York, and that the attestation thereof is in due form of law.

Dated, New York, May 22, 1925.

PETER SCHMUCK,
Chief and Presiding Justice of the City
[SEAL] Court of The City of New York.

State of New York, }
City of New York, } ss.:

I, HARRY C. PERRY, Clerk of the City Court of The City of New York, do hereby certify that Peter Schmuck, whose name is subscribed to the preceding Certificate, is the Chief and Presiding Justice of the City Court of The City of New York, duly elected and sworn, and that the signature of said Justice to this Certificate is genuine.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the Seal of the said Court, this 22nd day of May, 1925.

HARRY C. PERRY,
[SEAL] Clerk.

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New Jersey Court of Errors and Appeals

JOHN SIMMONS COMPANY,
Plaintiff-Appellee,

v.

ROBERT W. GRANGE,
Defendant,

and

WILLIAM G. SLOAN,
Defendant-Appellant.

} On Appeal.

BRIEF OF DEFENDANT-APPELLANT WILLIAM G. SLOAN.

Statement of Facts.

On September 14, 1922, John Simmons Company instituted suit in the City Court of the City of New York to recover the amount of an alleged claim of $1,533.66 against Robert W. Grange and William G. Sloan as defendants. Service of process was made on Grange alone.

No answer being filed, judgment by default was thereafter entered against Robert W. Grange. Subsequently, Grange made application to open the default and by permission of the Court an answer was filed by him but inadvertently signed by his attorneys in such manner as to indicate that they represented both defendants. Motion was subsequently made to strike out the answer and enter summary judgment and although the judgment as originally entered by default was

against Grange alone, upon this application judgment was entered not only against Grange but also against the defendant, Sloan.

Sloan subsequently applied to the City Court of New York to have the judgment opened as to him alleging as his grounds that he had not been served with summons or other process, that no attorney was authorized to appear for him, that the Court was therefore without jurisdiction and the judgment should not have been entered against him. His application was denied and from such a denial an appeal was taken to the Supreme Court which refused to disturb the order of the Court appealed from and permitted the judgment to stand (Complaint, pp. 2-4).

Upon the judgment in the Court of New York suit was instituted in the Supreme Court of this State by the issuance of summons on July 8, 1926 (Case, p. 10).

To the complaint annexed to the summons, answer was filed denying the allegations of the complaint and setting forth as separate defenses that the Court of New York was without jurisdiction in that, at the time that suit was instituted against him in New York, he was not a resident of that State, his residence being in New Jersey, that he was not served with process in the State of New York, that no notice was given to him and he had no knowledge of the institution of the suit in New York, that no answer or other pleading had been filed with his knowledge, acquiescence, or consent by any attorney authorized to represent him in defending such suit, that the Court of New York was without jurisdiction to enter judgment against him, that the judgment was therefore invalid and could not be sued upon in the courts of this State (Answer, pp. 5-8). To this answer a reply was filed generally denying the allegations of the answer (Reply, p. 9).

The action was thereafter heard before Judge Donges and a jury at the Mercer Circuit and upon motion of plaintiff's counsel, the jury was directed, over objection of counsel for the defendant Sloan, to find a verdict in favor of the plaintiff against that defendant for the amount demanded. To this ruling objection was made and exception allowed (Case, p. 32, lines 3-25).

Pursuant to the judgment of the Court a verdict was returned in favor of the plaintiff and against the defendant Sloan in the amount of $2,040 (Case, p. 10), and a judgment final entered for the plaintiff against that defendant in such amount (Case, p. 11).

From this judgment an appeal was taken into this Court upon the ground that the Court erred in directing the verdict in favor of the plaintiff and further that it erred in not directing a verdict as requested in favor of the defendant Sloan (Case, p. 12).

Argument.

The facts in this case are practically undisputed and for the most part are gathered from the record of the Courts of New York which was introduced in evidence in the form of an exemplified copy. This record shows the following:

Complaint was filed in the City Court of the City of New York alleging an indebtedness of the defendants, Grange and Sloan (Case, pp. 61-64). Thereafter on October 16, 1922, judgment by default was entered in favor of the plaintiff in the action (Case, p. 60, lines 10-15). Application was thereupon made to open the default and an order allowed directing the plaintiff to show cause why the default should not be opened; the order being dated October 26, 1922 (Case, pp. 58-59). On December 27, 1922, a stipulation was entered into under which the judgment was opened (Case, p.

67) and answer was filed (Case, pp. 65-66), the answer bearing the signature of Morrell, Bates, Topping & Anderson, they signing as "Attorneys for Defendants."

On February 15, 1923, notice was given of a motion to strike out the answer and enter summary judgment (Case, p. 83) and on February 23, 1923, pursuant to such notice, an order was made that such summary judgment be entered (Case, pp. 90-91).

It will be observed that this order recites that "personal service of summons and complaint was made upon the defendants within the City and State of New York and that they appeared and answered thereto" (Case, p. 90, lines 15-21). Further examination of the record will show, as indicated herein that this was not the fact. Sloan had not been served.

The defendant Sloan thereafter gave notice that motion would be made to vacate the judgment upon the ground that he was not a resident of the State of New York, that no summons or complaint had been served upon him, and that no one was authorized to appear for him (Case, pp. 35-36).

In support of this application, there was filed by him an affidavit in which he alleges that the first information which he had that a suit had been instituted against him was when he was advised by his personal attorney of the entry of judgment.

He further says in his affidavit that the attorneys who had filed the answer were not authorized to appear for him, that they had never acted as his counsel in that suit nor in any other business (Case, pp. 37-39). The allegation made by him was further supported by the affidavit of Anderson, a member of the firm of Morrell, Bates, Topping & Anderson, in which it is alleged that prior to the institution of suit against Grange and Sloan they

had dissolved the partnership which previously existed and that he had not authority to represent Sloan and that the answer filed in Sloan's behalf was filed through mistake on his part (Case, pp. 40-41).

A further supporting affidavit by Jacob W. Winkler showed that he had examined the judgment roles which disclosed that the affidavit of service indicated that service was made only on the defendant Grange and that the first judgment entered by default was only against that defendant. The answer filed by the attorneys representing Grange when application for vacation of the default judgment was made is signed in such manner as to indicate that they appeared for both defendants (Case, pp. 45-47). In doing this they were entirely without authority.

Notwithstanding this proof, the Justice of the City Court without opinion refused to vacate the judgment (Case, p. 34). That no opinion was given is certified to in the affidavit of Hopping filed in the Appellate Court (Case, p. 71). From the refusal of the Justice of the City Court to vacate the judgment, appeal was taken to the Appellate Term of the Supreme Court (Case, p. 33) and likewise without opinion, affirmance was entered in that Court (Case, pp. 73-75).

Little testimony was introduced at the trial, the plaintiff merely offering the exemplified copy of the judgment. The defendant produced Sloan as a witness in his own behalf and attempted to examine him but the Court suggested that in view of the determination arrived at by him after opening, and as the result of colloquy between himself and counsel, his decision would be that as the defendant Sloan had applied for a vacation of the judgment in the courts of New York and had appealed from the adverse ruling of the

City Court, that he had submitted himself to the jurisdiction and it therefore would be useless to take the testimony of this witness. The further suggestion was made that there be placed on the record what the defendant would by this witness attempt to establish (Case, p. 29).

Accordingly, it was stated in the record that the intention was to establish that the defendant Sloan had not been served with process, that the New York attorneys who had filed the answer in his behalf were not authorized to represent him and that he had not acquiesced in the filing thereof and that he had a meritorious defense to the action (Case, p. 30). This offer being made, the Court determined that even though this testimony were regularly given by the witness, that his determination must, of necessity, be that a verdict should be directed for the plaintiff and the motion of this defendant for direction of verdict in his favor denied and in accordance with that decision the jury was directed to return a verdict for the amount sued upon against the defendant Sloan. Objection was made and appropriate exceptions allowed (Case, p. 32).

The law seems well settled that where, as here, the defendant being sued is not a resident of the State in which the suit is pending and has not been served with process and does not voluntarily appear, the Court obtains no jurisdiction over him and any judgment obtained against him is invalid.

Pennoyer v. *Neff,* 95 U. S. 714;
Haddock v. *Haddock,* 201 U. S. 567.

The rule established by the Federal decisions has been adopted and followed by the authorities in our own State.

Blessing v. *McLinden,* 81 N. J. L. 379-386.

In an earlier case in recognition of the established doctrine, it was held that where suit was instituted against joint debtors, if service was made on one but not upon the other and the non-resident debtor did not appear voluntarily resulting in judgment being given only against him upon whom service has been made, that the judgment would not be recognized in a suit thereon in the courts of this State even though the objection came from the debtor who had been served and voluntarily appeared.

Mackay & Lusher, ads. *Gordon,* 34 N. J. L. 286.

Our courts have gone to the extent of holding that although the record of a foreign judgment indicates that there was an appearance through an attorney which in the absence of contradictory evidence would be conclusive proof of his authority to appear, that such authority may be drawn into question by the pleadings and disproved by the evidence.

Price v. *Ward,* 25 N. J. L. 225.

At the trial the appellee did not seem to take issue with the contention that originally the Court of New York did not acquire jurisdiction over the person of the defendant Sloan in view of the fact that the evidence was uncontradicted that no service had been made upon him and that he had not voluntarily appeared.

The contention made, however, was that in view of the further fact that Sloan subsequently made application to vacate the judgment against him and later appealed from the adverse decision, that he thereby submitted himself to the jurisdiction of the New York courts and is now barred from questioning the validity of the judgment.

It will be observed that neither in the Trial Court where application to vacate was made, nor in the Appellate Court was any opinion given which would indicate that there was a finding that the Court had acquired jurisdiction. Presuming that the courts of that State were familiar with and were obliged to follow the established law as laid down by the Federal cases, the natural conclusion is that this question was not considered but to the contrary, that its refusal was predicated upon the determination that the application was addressed to the discretion of the Court and that in the exercise of that discretion, there was authority to deny the application.

The contention that a person who questions the jurisdiction of the Court thereby submits himself to its jurisdiction has not met the approval of this Court.

In *McGuiness* v. *McGuiness*, 72 N. J. E. 381, Chief Justice GUMMERE said:

> "I have no criticism of the ruling which declares that a defendant who in one breath challenges the jurisdiction of the Court in a pending suit and in the next asks relief against the plaintiff on the merits in the same litigation, submits himself generally to the jurisdiction, for I can imagine no more potent act of submission by a party defendant in a pending suit than the asking that affirmative judicial action be taken in his behalf for meritorious reasons. * * * The view however that the fact of an application to set aside a void judgment for meritorious reasons which is refused consideration by the Court operates to give life to the judgment and converts it into an outstanding obligation against the defendant seems to me of doubtful soundness. When a defendant over whom the Court has not acquired jurisdiction appears in a pending suit and seeks relief upon the merits, he afterwards has his day in court; he may contest

> the plaintiff's claim and if the form of litigation permits it, may even have an affirmative judgment in his favor.
>
> "His appearance confers upon the Court jurisdiction to proceed to judgment. But a defendant who appears in Court for the purpose of obtaining relief against a judgment which is *coram non judice* and seeks that relief both upon jurisdictional and upon meritorious grounds, never has had his day in Court if a hearing on the meritorious question is denied him. The judgment at the time when he appears is a nullity. If he seeks to have it declared void solely upon the ground of want of jurisdiction in the Court to pronounce it, the Court must so declare it. If he further asserts that on the merits of the case the judgment should not have been rendered against him and asks to have it vacated and an opportunity afforded him of being heard on the merits, on what theory of law is it to be said that he has, by this act, given life to a judgment which before had no legal existence, and by the same act has forever barred himself from the right to have it opened, no matter how complete a defense he may have had to the suit upon the merits?
>
> "I am inclined to think that, in order to render jurisdiction complete, there must be not only the offer of the defendant to submit himself to the jurisdiction by praying relief from the void judgment upon meritorious grounds, but also acceptance of the offer on the part of the court by a consideration and determination of the meritorious question presented."

It is true and the argument will probably be made that this statement is *dicta.* Bearing in mind, however, that the entire Bench concurred in the decision, it certainly indicates that if the question were squarely before the Court at the time that the opinion was rendered, that the decision of the Court would have been that a liti-

gant is not barred from questioning the validity of a judgment rendered by a Court that had never acquired jurisdiction over his person, whether it be a Court either of our own or of a foreign state, merely because he had applied for a vacation of an invalid judgment and had appealed from an adverse decision upon jurisdictional grounds.

Although an examination of the authorities has failed to reveal any decision in this State which has directly dealt with the question now at issue, the trend of the decisions apparently is that no judgment shall be held valid where the litigant has been unsuccessful in procuring the opportunity to be heard on the merits.

In *Moulin* v. *Trenton Mutual, etc., Insurance Co.,* 24 N. J. L. 222, after a review of the decisions of our own State and other jurisdictions, the following principle was enunciated:

> "It is the principle of the common law and of common justice that no man shall be condemned unheard, a principle applicable as well to civil as to criminal cases. Before judgment is pronounced, the court should see that the defendant had an opportunity of being heard and of making his defenses.
>
> "An examination of all the cases results in the establishment of the following proposition: that the judgment of the court of general jurisdiction in any State of the Union is equally conclusive upon the parties in all the other States as in the State in which it was rendered. This fact is subject to two qualifications: (1) If it appear by the record that the defendant was not served with process and did not appear in person or by attorney, such judgment is void; (2) If it appear by the record that the defendant appeared by attorney, he may disprove the authority of such attorney to appear for him * * * from the course of the authorities and of the principles which govern them, there can be no doubt of

> the power of this Court to inquire into the jurisdiction of the Court before which the judgment in question was rendered."

In an earlier decision, Chief Justice HORNBLOWER said:

> "To suffer a verdict to stand which has been rendered against a man in his absence in a suit he never heard of until after he has been tried and condemned would be a reproach to any civilized community and could not be tolerated for a moment."
>
> *McKelway & Gray* ads. *Jones,* 17 N. J. L. 345.

In realization of the danger which confronted a person sued upon a foreign judgment obtained in his absence without process and without the opportunity to be heard, the Legislature of this State, following the principles previously laid down by our courts for the guidance of our courts in future litigation passed a statute applicable to the present situation. The provision of the statute being as follows:

> "In any suit upon a foreign judgment or a judgment in any court out of this State, the defendant or person sought to be affected by such judgment may show that the defendant therein was not summoned, did not appear or was not within the jurisdiction of such foreign court, notwithstanding, it may be recited in the record of such proceeding that he was summoned or did appear or was within the jurisdiction of the court; and such recital shall not conclude said defendant or estop him from proving that the same is not true" (P. L. 1900, p. 336) 2 C. S. P. 2225, Section 16.

It will be observed that the language of the statute is without qualification or restriction. There is nothing to indicate that merely because a litigant made application in a foreign jurisdic-

tion to be permitted to wipe out an invalid judgment realizing that if the merits of the controversy were heard, that he might satisfy the Court that the claim of the plaintiff is without merit, that he is barred of the opportunity of clearing his name and reputation from the stain and blemish of an invalid, improper and unlawful judgment under the penalty that if he seeks redress in that Court, that he is thereby forever barred the opportunity to be heard in the courts of his own State.

On the contrary, the language of the statute is that he is not concluded or estopped "in any suit upon a foreign judgment" from showing that the Court was without jurisdiction to render the judgment against him.

It will probably be argued that because Hopping, the attorney in New York who made the application for vacation of judgment, signed as attorney for the defendant upon notice of appeal, that he thereby submitted this defendant to the jurisdiction of the New York courts. An examination of the original notice of motion for vacation will reveal the fact that he signed as attorney, and "appearing specially" for the defendant William G. Sloan (Case, pp. 35-36).

In taking the appeal, the notice of appeal was signed by him merely as attorney for the defendant Sloan (Case, p. 33). In view of the fact that those proceedings were instituted only for the purpose of questioning the jurisdiction of the Court over the defendant, it would seem ridiculous to hold that the mere failure to use the words "specially appearing" or similar language would so far confer jurisdiction on the New York courts as to bar this Court from giving any consideration to the defense interposed at the trial in the courts of this State. Such argument has not met the approval of this Court, it having been stated:

> "The defendant challenged the proceedings which he sought to have set aside upon the sole ground of lack of jurisdiction; and he asked for no relief upon any other ground either meritorious or non-meritorious. His appearing in Court for the specific purpose of challenging the jurisdiction was under the cases not a general appearance to the suit and that without regard to whether his challenge was successful or not."
>
> *McGuiness* v. *McGuiness, supra.*

Although there is but little authority in this State on the questions here involved, both the text writers and Courts of other States have stated it as the uniform rule that an application for vacation of an invalid judgment or an appeal from an adverse decision on such application, will not bar a defendant when being sued upon such foreign judgment from interposing a defense upon jurisdictional grounds.

In 2 R. C. L. 332 in Section 13, the rule is stated as follows:

> "In case of a judgment void for want of service of process, the defendant does not waive the question of jurisdiction or validate the void judgment by an appearance in support of a motion to set the judgment aside. The course of such a moving party at the same time consenting and asking that the Court shall hear and adjudicate upon the cause, may justify the court in entertaining the cause and proceeding as in an action pending in which the defendant has voluntarily appeared. But in thus urging his legal right and thus invoking and consenting to the future action of the Court, the moving party should not be determined to have conferred jurisdiction retrospectively so as to render valid the previous judgment which, being unsupported by any authorized judicial proceedings was not merely voidable but void and in legal effect a nullity."

In the following section of the same volume, 2 R. C. L. 332, Section 14, it is stated:

> "It is generally held that the taking of an appeal by a defendant not served with process does not have the effect of validating the proceedings previously had which were void for want of jurisdiction over his person."

In a note in 33 Ann. Cas. (1914 C) at page 696, supported by numerous cases throughout the country, the following rule is stated:

> "It is undoubted that if a judgment is invalid for want of jurisdiction of the person of the defendant, a motion to set it aside based solely on such lack of jurisdiction does not operate as a general appearance or cure the defect of jurisdiction."

For the reasons urged, we believe that the Trial Court should have permitted the defendant to show that the City Court of New York had not acquired such jurisdiction as would have warranted the entry of the judgment against him and that in holding upon the offer of such defense that even though established the defendant was barred of his right of so asserting, and although established that the verdict would, of necessity, have to be directed against him was in error in directing such verdict and that the judgment should therefore be reversed.

Respectfully submitted,

BRENNER & KRESCH,
Attorneys and of Counsel
with Defendant-Appellant
William G. Sloan.

New Jersey Court of Errors and Appeals

FEBRUARY TERM, 1928.

Case No.

JOHN SIMMONS COMPANY,
Plaintiff-Appellee,

v.

WILLIAM G. SLOAN,
Defendant-Appellant.

On Appeal.
Action at Law.

BRIEF FOR PLAINTIFF-APPELLEE.

Statement of Facts.

The plaintiff's suit was brought upon a judgment recovered in New York against the defendant. The defense is (Case, p. 7, lines 15-25) *inter alia* that no appearance was entered by the defendant in the suit in New York, nor was any appearance entered by any other person or persons under the authority of the defendant or with his knowledge or consent.

The record of the New York suit shows (1) the judgment there recovered against the defendant (Case, pp. 90-91), and, (2) the proceedings subsequently taken there by the defendant to have the judgment set aside upon the following grounds (Case, p. 35, lines 35, *et seq.*); (a) he was never served with the summons or complaint, (b) no one was either authorized to appear or answer for him, or on his behalf. He also applied (Case, p. 36); "for such other and further relief as to the Court may seem just and proper." In support of these contentions and this application he submitted to the New York Court (1) his own affidavit (Case, p. 37); (2) an affidavit of the member of the firm that represented him and filed his answer in the suit (Case, pp. 40-41); (3) an affidavit of the attorney then representing him on the motion to

set aside the judgment (Case, pp. 42, 43, 44); (4) and an affidavit of another attorney associated with the motion attorney (Case, pp. 45, 46, 47). These affidavits, it will be noted, bear upon both his liability to the plaintiff upon the original cause of action, and upon the question of his appearance in the suit. In opposition to these affidavits, which clearly raised the question of merits, as well as the alleged surprise, the present plaintiff filed the following affidavits printed on pages 48 to 57 of the case: (1) The affidavit of the plaintiff's credit manager setting forth the letter (Case, p. 50-51) of the defendant's partner, dated December 9, 1922, which letter concedes their indebtedness in very exact language, and pleads for a vacation of the judgment already entered against him (which judgment the plaintiff did consent to open); (2) the affidavit of the architect (Mr. McCrea) in charge of the improvement on which the plaintiff's goods were used (Case, p. 49, lines 10-20) for which improvement the defendant and his partner had the contract, dated August 25, 1921, and (3) the affidavit of plaintiff's attorney, to which are annexed numerous stipulations of adjournments (Case, pp. 56-57, 69-70), signed by the firm that represented both defendants in the original action.

Judge WALSH, in the City Court, upon all these affidavits after argument, on July 15, 1924, denied the defendant's motion (Case, p. 34). Thereupon the defendant (Case, p. 33) gave notice of appeal to the Appellate Term of the Supreme Court of New York which heard the matter. Justices GUY, BIJUR and MULLAN (Case, p. 74) after due deliberation, with all the affidavits before them, affirmed the order of the City Court (p. 75). The City Court, pursuant to practice, made this order its order at a Special Term on November 28, 1924 (Case, p. 73). No further proceedings were thereafter taken by the defendant and, on July 8, 1926, the present suit was started in New Jersey.

THE PLAINTIFF CONTENDS:

1. The question of the jurisdiction of the New York Court is res adjudicata.

2. Full faith and credit should be given by the New Jersey Courts to the judgment recovered in New York.

1. The question of the jurisdiction of the New York Court is res adjudicata.

This Court will note, of course, that the present contentions of the defendant were put forward by him first upon his motion in the City Court of New York, and then after its adverse decision, upon his appeal from that court to the Appellate Division of the New York Supreme Court. The procedure is much the same, we suppose we may say, as if after a judgment in one of our District Courts an application was made to open a judgment, because of lack of jurisdiction, and after the Court had weighed the evidence on the motion and had refused to interfere, from its determination an appeal had been taken to our Supreme Court. In such an event, and under similar circumstances, it could hardly be expected that the courts of a sister state would give no effect to our proceedings. Surely it would not examine the question of jurisdiction anew. If the courts of a sister state were so to act, the doctrine of *res adjudicata* (apart from the question of the faith and credit to be given to foreign judgments, under the constitutional mandate) would go by the boards. And yet, the logic of the defendant's present appeal carries him to the same conclusion here.

No authority upon the subject of the doctrine of *res adjudicata*, we assume, need be submitted to this Court, but in our examination of the Fed-

eral cases, we have found the case of *Forsyth* v. *Hammond,* 166 U. S. 506, 17 S. C. Rep. 665; 40 L. Ed. 1095, in which Justice BREWER dwells upon the topic so cogently that we think, for the convenience of this Court, we should here print a few of his salient paragraphs:

> "But back of any criticism of the reasoning of the Supreme Court in its two opinions lies the fact of its decision.
>
> "The city of Hammond sought to bring within its limits, among other territory, the lands of plaintiff. After action by the city council, the city instituted proceedings before the county commissioner, which proceedings were subsequently taken by appeal, as prescribed by statute, to the circuit court, a court of general jurisdiction, and in that court a decree was entered annexing plaintiff's lands to the city of Hammond. Were or were not these proceedings valid, and was or was not such decree a binding adjudication which neither the city nor the plaintiff could elsewhere dispute? That question certainly is one of a judicial nature. Now, it is no less a judicial function to consider whether those proceedings and that decree were valid and effective, and determine that they were and operated to annex plaintiff's territory to the city, than to enter upon a like consideration, and determine that they were invalid and ineffective to make such annexation. The decision of the supreme court of Indiana was in favor of the validity, that of the court of appeals against their validity, and, if it is judicial to hear and determine one way, it is likewise judicial to hear and determine the other. If action by the state tribunals stopped with the decree of the trial court, it might be said that the plaintiff did not voluntarily seek that forum. She was brought in by appropriate process, and compelled to there litigate the question. *But after an adverse decree she insisted that it was not only erroneous but void, and voluntarily commenced an action*

> *in the supreme court of that state to have that claim established.* She invoked the jurisdiction of that court. She summoned the city of Hammond into that forum, and there challenged the decree of the circuit court,—challenged it for error, and also for lack of jurisdiction. The questions both of error and of jurisdiction were certainly judicial in their nature, and questions within the undoubted cognizance of the supreme court. *She voluntarily sought its judgment.* Can she, after its decision, be heard in any other tribunal to collaterally deny the validity thereof? Does not the principle of *res adjudicata* apply in all its force? *Having litigated a question in one competent tribunal and been defeated, can she litigate the same question in another tribunal acting independently and having no appellate jurisdiction?* The question is not whether the judgment of the supreme court would be conclusive as to the question involved in another action between other parties, *but whether it is not binding between the same parties in that or any other forum.* The principles controlling the doctrine of *res adjudicata* have been so often announced, and are so universally recognized, that the citation of authorities is scarcely necessary. Though the form and causes of action be different, a decision by a court of competent jurisdiction in respect to any essential fact or question in the one action is conclusive between the parties in all subsequent actions. Cromwell *v.* County of Sac, 94 U. S. 351; Lumber Co. *v.* Buchtel, 101 U. S. 638; Stout *v.* Lye, 103 U. S. 66; Nesbit *v.* Independent Dist., 144 U. S. 610, 12 Sup. Ct. 746; Railway Co. *v.* Wharton, 152 U. S. 252, 14 Sup. Ct. 608; Last-Chance Min. Co. *v.* Tyler Min. Co., 157 U. S. 683, 15 Sup. Ct. 733."

2. Full faith and credit should be given by the New Jersey Courts to the judgment recovered in New York.

The United States Constitution provides (Article IV, Section 1):

> "Full Faith and Credit shall be given in each State to the Public Acts, Records and judicial Proceedings of every other State."

This constitutional provision, of course, means what it purports to mean. Judge DONGES was required to pass on three essential questions: (1) Has the question of defendant's appearance in the New York suit been litigated by the parties? (2) Are the parties bound by the determination of the Court in which the question was litigated? (3) Should full faith and credit be given to such a judicial proceeding?

That he correctly analyzed the situation is shown by his remarks at pages 28 and 29 of the case. Should he have permitted the defendant to litigate again this question of jurisdiction? We can think of no reason why he should; for if he did permit the question to be tried again, there would be no end of litigation.

To demonstrate the weakness of the defendant's present contention, one has but to posit the plight of the plaintiff, if the defendant had been successful in his attempt to vacate the judgment in New York. In such case, the plaintiff, suing here upon its original judgment, would not be permitted to demonstrate that the New York Court had erred in vacating that judgment, but plaintiff would be rightly met by the plea of *res adjudicata,* and as the record would show the adjudication, its suit here would be dismissed *instanter.*

Vice-Chancellor Van Fleet considered a kindred situation in *Royal Arcanum* v. *Carley,* 52 N. J. Eq.

642 (646-650). What he says, as to a situation which is the converse of the present, is illuminating:

> "But suppose there was sufficient evidence in the case to convince this court that the Colorado court had been deceived and induced to do what it would not have done if no deception had been used, could this court, in the proper exercise of its jurisdiction under interstate law, deny all effect to the action of the Colorado court in setting aside the decree of divorce and dismissing suit, and then adjudge that, by force of such judicial action here, the suit was reinstated in the Colorado court and full force and effect restored to the decree of divorce? This court, as already stated, may deny full faith and credit to the judicial proceedings of a sister state, when it is proved that they are the product of fraud, but the question here goes far deeper and is of much wider import. It is this, can this Court, on being convinced that a court of a sister state has been misled by deception, reinstate in that court a suit which that court has dismissed, and resurrect and give life and vigor to a judgment which that court has nullified? This court, in my judgment, has no such power. To do so would not be merely denying faith and credit to the judicial proceedings of a sister state, but it would be an attempt to pronounce here, in a judicial proceeding once pending in a court of a sister state, such judgment as this court believes that court, on the facts before this, would pronounce. This court would thus attempt to give force and effect here to a judgment which that court has not pronounced. In my judgment, no tribunal, other than the one in which the divorce suit was instituted in Colorado, has power to reinstate that suit or to restore life and vigor to the decree, which, by its judgment as it now stands, is a nullity."

This Court will note that this is not the case of a defendant who has not appeared at all in the

foreign court nor of a judgment reached *pro forma* without an examination of the defendant's rights, but it is that of a defendant who has deliberately chosen to appear in a foreign court to invoke its judgment, and, disappointed by the result, now asks our courts to say the foreign court erred. The nice question before this Court is: DOES THE SPECIFIC ADJUDICATION AGAINST THE DEFENDANT AS TO JURISDICTION MEAN ANYTHING? Shall it be said to the defendant: Yes, you are a good sportsman; your first trial does not count; and the law of *res adjudicata* has in your case a private exception; any ruling against you is so much waste paper? If you were sued on this New York judgment in Pennsylvania, and you raised the question there of your appearance in the New York suit, and the Pennsylvania Court ruled against you, yet in a suit here on the judgment recovered in Pennsylvania, we would let you raise again the question of your original appearance in New York. And so on *ad infinitum*.

We are, therefore, unable to perceive how, unless he disregarded the doctrine of *res adjudicata*, Judge DONGES could have escaped directing a verdict for the plaintiff.

Our examination of the authorities discloses that no case in this State deals with a situation like the present, where the defendant has had his day in court upon the specific question of a disputed appearance in the foreign jurisdiction; but what we think is almost the exact question has been decided by the United States Supreme Court, unanimously, in *Chicago Life Insurance Co.* v. *Cherry*, 244 U. S. 25; 37 S. C. Rep. 492; 61 L. Ed. 966, where Justice HOLMES said:

> "This is a suit in Illinois upon a judgment recovered in Tennessee against the Insurance Companies, plaintiffs-in-error. They pleaded

and set up at the trial that there never was a valid service upon them in Tennessee and that the judgment was void. The defendant-in-error (the plaintiff) showed in reply, without dispute, that the defense was urged in Tennessee by pleas in abatement; that, upon demurrer to one plea and upon issue joined on the other, the decision was for the plaintiff; and that the judgment was affirmed by the higher courts. The plaintiff had judgment at the trial in Illinois, the judgment was affirmed by the appellate court, and a writ of certiorari was denied by the supreme court of that state. The Insurance Companies say that the present judgment deprives them of their property without due process of law. Other sections of the Constitution are referred to in the assignments of error, but they have no bearing upon the case.

"The ground upon which the present judgment was sustained by the appellate court was that, as the issue of jurisdiction over the parties was raised and adjudicated after full hearing in the former case, it could not be reopened in this suit. *The matter was thought to stand differently from a tacit assumption or mere declaration in the record that the court had jurisdiction.*

"A court that renders judgment against a defendant thereby tacitly asserts, if it does not do so expressly, that it has jurisdiction over that defendant. But it must be taken to be established that a court cannot conclude all persons interested by its mere assertion of its own power (Thompson *v.* Whitman, 18 Wall. 457, 21 L. ed. 897), even where its power depends upon a fact and it finds the fact (Tilt *v.* Kelsey, 207 U. S. 43, 51, 53 L. ed. 95, 99, 28 Sup. Ct. Rep. 1). A divorce might be held void for want of jurisdiction although the libellee had appeared in the cause. Andrews *v.* Andrews, 188 U. S. 14, 16, 17, 38, 47 L. ed. 366, 367, 373, 23 Sup. Ct. Rep. 237. There is no doubt of the general proposition that, in a suit upon a judg-

ment, the jurisdiction of the court rendering it over the person of the defendant may be inquired into. National Exch. Bank *v.* Wiley, 195 U. S. 257, 49 L. ed. 184, 23 Sup. Ct. Rep. 70; Haddock *v.* Haddock, 201 U. S. 562, 573, 50 L. ed. 867, 871, 26 Sup. Ct. Rep. 525, 5 Amm. Cas. 1. But when the power of the court in all other respects is established, *what acts of the defendant shall be deemed a submission to its power is a matter upon which states may differ.* If a statute should provide that filing a plea, in abatement, or taking the question to a higher court, should have that effect, it could not be said to deny due process of law. *The defendant would be free to rely upon his defense by letting judgment go by default.* York *v.* Texas, 137 U. S. 15, 34 L. ed. 604, 11 Sup. Ct. Rep. 9; Western Life Indemnity Co. *v.* Rupp, 235 U. S. 261, 272, 273, 59 L. ed. 220, 224, 225, 35 Sup. Ct. Rep. 37. If, *without a statute, a court should decide as we have supposed the statute to enact, it would infringe no rights under the Constitution of the United States. That a party that has taken the question of jurisdiction to a higher court is bound by its decision was held in Forsyth* v. *Hammond,* 166 U. S. 506, 517, 41 L. ed. 1095, 1099; 17 Sup. Ct. Rep. 665. *It can be no otherwise when a court so decides as to proceedings in another state.* It may be mistaken upon what to it is matter of fact, the law of the other state. But *a mere mistake of that kind is not a denial of due process of law.* Pennsylvania F. Ins. Co. *v.* Gold Issue Min. & Mill. Co., 241 U. S. 93, 96, 61 L. ed. 610, 37 Sup. Ct. Rep. 344. Whenever a wrong judgment is entered against a defendant, his property is taken when it should not have been; but whatever the ground may be, if the mistake is not so gross as to be impossible in a rational administration of justice, it is no more than the imperfection of man, not a denial of constitutional rights. *The decision of the Illinois courts, right or wrong, was not such a denial.* If the Tennessee judgment had

been declared void by Illinois, this court might have been called upon to decide whether it had been given due faith and credit. National Exch. Bank *v.* Wiley, 195 U. S. 257, 49 L. ed. 184, 25 Sup. Ct. Rep. 70. But a decision upholding it upon the ground taken in the present case does not require us to review the Tennessee decision or to go further than we have gone. An objection that a copy of the document sued upon should have been filed with the declaration is a matter of state procedure, and not open here."

It may be argued by the defendant that the Trial Court gave no effect to Section 16 of the Evidence Act 2 Compiled Statutes, page 2225. As the defendant did not deny that he submitted to the determination of the City Court of New York the question of the authority of his original attorney to appear and file answer for him, the provisions of the Evidence Act do not apply to this case. We concede that there was no service of summons upon the defendant in New York, but we insist that his appearance by authorized attorneys was the equivalent of the service of the summons (and this he concedes himself; Case, p. 23, lines 10-20). Nor does he deny that the question of the authority of the attorneys to appear and answer for him was fully litigated in New York.

What Chief Justice BEASLEY said in *Elsasser* v. *Haines,* 52 N. J. L., page 16, shows the attitude of our courts on this subject. He says:

> "In settling these judicial transactions between the states, resting as they do in part upon constitutional mandate, and in part upon international comity, matters of procedure should, as far as practicable, be put out of sight, and the questions presented should be tested by a reference as little as possible to mere form, and as much as possible to the fundamental principles and max-

ims of jurisprudential justice. Referring to this subject, Judge STORY forcibly says: 'Every such judgment ought to be presumed to be correct and founded in justice.' Story Confl. L. 1304. In my estimation the judgment now in question, with respect to its legal effect, is substantially the same as a common law judgment of the same class, and while a distinction between them may be predicated, no real difference can be shown."

The same jurist thus expresses himself in *Mackay and Lusher ads Gorden, et al.*, 34 N. J. L., page 291:

"Whatever judicial dominion, then, any state, as an independent government, has, every other state, when such dominion has assumed the form of a judgment, is bound, by its fealty to the constitution, to respect and enforce. The only question in such cases is as to what is the jurisdiction which is rightfully possessed and exercised. I can perceive no limit to such a jurisdiction, except such as is prescribed by the maxims of natural justice. Every independent government is at liberty to prescribe its own methods of judicial process, and to declare by what forms parties shall be brought before its tribunals. But in the exercise of this power, no government, if it desires extraterritorial recognition of its acts, can violate those rights which are universally esteemed fundamental and essential to society. Thus, a judgment by the court of a state against a citizen of such state, in his absence, and without any notice, express or implied, would, it is presumed, be regarded in every external jurisdiction as absolutely void and unenforcible. Such would certainly be the case if such judgment was so rendered against the citizen of a foreign state. The courts of many of the states have refused to give effect to judgments of this latter description. To this extent the subject is devoid of difficulty. But it does not sufficiently appear

that the case now before us is to be regulated by this principle. The defendant does not show that if he shall be concluded by the judgment in question, any maxim of general law or natural equity will be infringed. He does not allege that his co-defendant, who was not summoned, was not, at the time of the institution of the original suit, and that he is not now, a citizen of New York, and in every respect subject to the laws of such state. He may have known of the service of the summons upon his partner, or even have been present at the time of such service. It is impossible for this court to assume that circumstances do not exist which will make this judgment against both the original defendants not only legal, but entirely equitable. Pleas of this character must present strong *prima facie* defences. This has not been effected in the present instance. This view is not without the support of authority. I refer to the opinion of Chief Justice GREEN, in the case of Gilman *v.* Lewis, which is appended to the report of the case of Moulin *v.* Insurance Co., 4 Zab. 246. Indeed, the plea in that case was fuller in its statement of facts evincive of an absence of jurisdiction than the one now before this court, and yet it was declared to be insufficient for the purpose of defense to the judgment."

We direct attention to another expression of Justice HOLMES, in *Michigan Trust Company* v. *Ferry*, 288 U. S. 348; 33 S. C. Rep. 552; 57 L. Ed. 874:

"Ordinarily jurisdiction over a person is based on the power of the sovereign assenting it to seize that person and imprison him to await the sovereign's pleasure. But when that power exists and is asserted by service at the beginning of a cause, or if the party submits to the jurisdiction in whatever form may be required, we dispense with the necessity of maintaining the physical power, and attribute the same force to the judgment or decree

whether the party remain within the jurisdiction or not. *This is one of the decencies of civilization that no one would dispute.* It applies to article 4, § 1, of the Constitution, so that if a judicial proceedings is begun with jurisdiction over the person of the party concerned, it is within the power of a state to bind him by every subsequent order in the cause. Nations *v.* Jackson, 24 How. 195, 203, 204, 16 L. ed. 628, 631, 632."

For the convenience of the Court we print the following excerpt from *Cherry* v. *Chicago Life Insurance, et als.*, 190 Illinois Appeals, page 70:

"The substantial question presented has to do with the jurisdiction of defendants by the Tennessee courts. This issue was raised by appropriate pleadings in the case in the Circuit Court of Chester county, and there it was adjudged that the court had jurisdiction of the defendants. Defendants then sued out of the Civil Court of Appeals of Tennessee a writ of error seeking to revise and correct the judgment of the Circuit Court. Upon hearing, the Civil Court of Appeals considered a transcript of the record from the Circuit Court, which included the evidence, and rendered an opinion discussing at length the question of jurisdiction and affirming the judgment of the lower court and entered a judgment for plaintiff against the defendants. Subsequently the Supreme Court by its order found that the Circuit Court did have jurisdiction of the defendants, and ordered the writ of certiorari dismissed and entered judgment for costs. There can be no doubt that the question of jurisdiction was adjudicated in the Tennessee courts, on a writ of error sued out by themselves.

"The claim of defendants is that regardless of this adjudication they may raise the same question whenever and wherever in any other State than Tennessee suit is brought on this judgment. After an examination of the cases

cited in support of this claim, we have found none directly in point. The decisions cited by defendants have to do with cases where the court entering judgment assumed jurisdiction but did not expressly consider or pass upon the question of its jurisdiction, or where there is a mere recital in the judgment rendered by the court of another State that it did have jurisdiction, and it was held in *Forsyth* v. *Barnes,* 228 Ill. 326, that this mere recital would not prevent the courts of another State from inquiring into the question of jurisdiction. Other of the decisions discuss the question whether a court of appellate jurisdiction is precluded from inquiring into the question of jurisdiction of the lower court by the fact that defendant may have filed a special appearance to contest the point of jurisdiction, and when defendant's contention was overruled filed an answer to the merits of the case. Such a case is *Harkness* v. *Hyde,* 98 U. S. 476. The case before us manifestly does not fall within any of these classes, for we have here a case where the issue of the jurisdiction of the parties was raised and adjudicated after full hearing,—all of which appears from the proceedings in this case and not merely as a matter of recital. As against the position of defendants we find a statement in 2 Black on Judgments, sec. 901, which meets with our approval:

" 'Before leaving this point it is necessary to remark that there is good authority for the proposition that if it appears affirmatively from the record of the judgment, and *as a matter of adjudication,* that the defendant had legal notice of the suit or duly authorized an appearance to be entered for him, then he is no longer at liberty to allege a want of jurisdiction. The reason of this is obvious. In such a case, the question of jurisdiction would be one of the grounds of defense to the original action, there set up and adjudicated, and of course equally concluded with any other defense. And hence the principle which forbids

a re-examination of the merits of the controversy would apply.'

"In accord with this is the decision in *Van Matre* v. *Sankey,* 148 Ill. 536, where the Court says, on page 553: 'It having been determined, upon direct proceeding, by the court of last resort of the State in which the decree was rendered, that the court of common pleas had jurisdiction to enter the decree, we are required to give it full faith and credit.' And in *Chicago Title & Trust Co.* v. *National Storage Co.,* 260 Ill. 485, the Court, in discussing the adjudication of a jurisdictional question by another court, used the following language:

"'An estoppel by verdict is but another branch of the doctrine of *res adjudicata,* and it rests upon the same principle of law,—that is, that a matter once litigated between parties to a final judgment in a court of competent jurisdiction cannot again be controverted. When this doctrine is applied to a single question or point arising in the course of litigation which has finally been adjudicated it is designated as an estoppel by verdict, and the same question or point cannot again be litigated between the same parties in the same or any other court at law or in chancery, and neither party, nor their privies, will be permitted to allege anything inconsistent with the finding upon that question. * * * The doctrine of estoppel by verdict applies to questions arising upon an issue as to the jurisdiction of the court as fully and completely as to questions arising upon the trial of a cause upon its merits, and is not affected by the circumstance that the court may ultimately determine that it can go no farther.'

"Other cases holding to the same effect are *Napier* v. *Gidiere* (S. C.), 40 Am. Dec. 613; *Waldo* v. *Waldo,* 52 Mich. 94; *In re Wrisley,* 126 Mich. 109; *McClure* v. *Paducah Iron Co.,* 90 Mo. App. 567; *Kinnier* v. *Kinnier,* 45 N. Y. 535. The reasons given in support of the decisions in these cases seem to us conclusive

against defendants' contention, and we are of the opinion that the judgment of the Tennessee courts is *res judicata* upon the jurisdictional questions which were directly raised and adjudicated there, and that therefore it was not error for the court below to refuse to go into that question."

It is respectfully submitted that the judgment under review should be affirmed.

HEYMAN AND HEYMAN,
Of Counsel with the
Plaintiff-Appellee.

JOHN F. GUGH,
Of Counsel.