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PLEADINGS, ETC.

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EXHIBITS.

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Passaic County Circuit Court

(Filed November 14, 1916.)

QUACKENBUSH AND SON, *Plaintiffs-Appellants,* vs. EDWARD R. ARLINGTON, *Defendant-Appellee.*	*Notice of Appeal.*

To Clifford L. Newman, Esquire,
Attorney of Defendant.

Notice of Appeal.

Sir: —

Take notice that the plaintiff appeals from the whole of the judgment entered in this cause bv the Passaic County Circuit Court to the New Jersey Court of Errors and Appeals on the following grounds:

1. The court gave judgment for the defendant and against the plaintiff, whereas, the court should have found for the plaintiff and against the defendant for the amount of the verdict found by the jury in said cause in favor of the plaintiff.

2. Because the court held that it should have appeared affirmatively that one Beckman was a non-resident.

3. Because the court held that there was a variance between the allegations and proofs.

4. Because the court held that the appearance of the defendant in the attachment suit was not to answer a partnership liability.

5. That no objection was made at the trial as to the failure of the plaintiff to allege or prove the non-residence of one Beckman, and that judgment should not be based on any such failure of proof or to allege the non-residence of one Beckman.

Dated November 13th, 1916.

HORTON & TILT & J. W. DEYOE,
Attys. of Plaintiff-Appellant.

Service of a copy of the within Notice of Appeal acknowledged, this 14th day of November, A. D., 1916.

CLIFFORD L. NEWMAN,
Atty. of Defendant-Appellee.

Writ of Attachment.

PASSAIC COUNTY CIRCUIT COURT.

QUACKENBUSH & SON, a body corporate,

Plaintiff,

vs.

EDWARD ARLINGTON,

Defendant.

Judgment Record.

The plaintiff in this cause filed the following affidavit, viz:—

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

Peter C. Quackenbush of full age being duly sworn according to law on his oath says that he is the treasurer of Quackenbush and Son, a corporation organized under the laws of the state of New Jersey, and that Edward Arlington is not, to deponent's knowledge or belief, resident at this time in the state of New Jersey, and that he owes to said Quackenbush and Son the sum of seven hundred and seventy-seven dollars and nine cents, as nearly as this deponent can ascertain.

PETER C. QUACKENBUSH.

Subscribed and sworn to this 14th day of April, 1914, before me.

(L.S.) HELEN GRANGER,
Notary Public of New Jersey.

And whereupon, the following writ of attachment issued, viz:—

Passaic County, ss.:

The State of New Jersey, to the
(L. S.) Sheriff of the County of Passaic, aforesaid, Greeting:

You are hereby commanded to attach the rights and credits, moneys and effects, goods and chattels, lands and tenements of Edward Arlington wheresoever, in your county, the same may be found, so that the said Edward Arlington be and appear before our Circuit Court, to be holden at Paterson in and for the said County of Passaic on the first day of May next to answer unto Quackenbush & Son, a body corporate, in an action upon contract wherein the said Quackenbush & Son demand one thousand dollars as is said: And have you then there this writ.

Witness, James F. Minturn, Esquire, a judge of our said Circuit Court, at Paterson aforesaid, the fourteenth day of April in the year one thousand nine hundred fourteen.

JNO. J. SLATER,
Clerk.

By
JOS. MORT TOWERS,
Deputy.

HORTON & TILT,
Attorneys.

Afterwards the defendant entered an appearance and gave notice to the plaintiff of his willingness to accept a complaint at the plaintiff's suit.

Thereupon the plaintiff complained as follows:

Complaint.
Answer.

Plaintiff with its principal place of business in the City of Paterson, County of Passaic and State of New Jersey, says that:

(1) It sues for the price of goods sold and delivered to the defendant upon a book account, of which a copy is attached hereto and made a part hereof, and the whole of which is due and unpaid.

The plaintiff demands as damages, the amount due thereon, being seven hundred and fourteen dollars and twenty-three cents ($714.23), with interest thereon from May 6, 1913, besides costs of suit.

HORTON & TILT,
Attorneys for Plaintiff.

(Bill of particulars omitted by consent of counsel.)

Answer.

And the defendant, by an amended answer, answered as follows:

Answering said complaint, said defendant says:

FIRST DEFENSE.

That he did not purchase of the plaintiff any of the goods and chattels mentioned in said complaint and denies the whole thereof.

SECOND DEFENSE.

(1) The account sued on and mentioned in the complaint is charged on the books of the plaintiff to the firm of Arlington & Beckman, the Arlington therein mentioned being this defendant.

(2) That plaintiff accepted from this defendant notes made by this defendant, amounting to three hundred twenty-five dollars, or thereabouts, in full settlement of any claims which said plain-

tiff might have against this defendant by reason of the matters and things set forth in said complaint.

(3) That in consideration of the acceptance of said notes said plaintiff released defendant from any liability to it on account of the matters and things set forth in said complaint.

THIRD DEFENSE.

(1) On December 16th, 1914, this defendant individually and as a member of Arlington & Beckman's Oklahoma Ranch, Wild West Show, was adjudged a bankrupt by the United States District Court, for the Eastern District of New York.

(2) That in the schedules attached to the voluntary petition to be adjudged a bankrupt filed by this defendant as aforesaid, the plaintiff herein was scheduled as a creditor of this defendant, individually, for the sum of three hundred twenty-five dollars, represented by notes made by this defendant; that the plaintiff herein was also scheduled therein as a creditor of plaintiff, as a member of the firm of Arlington & Beckman's Oklahoma Ranch, Wild West Show, to the amount of six hundred dollars.

(3) That plaintiff herein duly filed its claim with the referee in charge of said bankruptcy matter, to whom said matter had been referred by said United States District Court, for the Eastern District of New York, said claim as filed being for the same items of indebtedness alleged in this complaint to be due from the defendant to the plaintiff. Defendant will claim as a matter of law that plaintiff is thereby estopped from proceeding in this suit, having thus submitted itself to the jurisdiction of the said District Court.

Answer.

(4) Such proceedings were had in said matter that on May 21st, 1915, an order was made by said United States District Court, for the Eastern District of New York, discharging this defendant from all of his provable debts existing on December 16th, 1914, either as an individual or as a member of Arlington & Beckman's Oklahoma Ranch, Wild West Show, except such as are not dischargeable, by an act of Congress entitled "An act to create a uniform system of bankruptcy in the United States and Territories." Adopted July 1st, 1898, and the several supplements and amendments thereto.

(5) That the debt alleged by plaintiff to be due in said complaint existed on December 16th, 1914, and defendant herein is discharged and released therefrom.

CLIFFORD L. NEWMAN,
Attorney of Defendant.

Replication.

The plaintiff replied as follows:

Replying to the amended answer, the plaintiff says:

(1) That the plaintiff will object to the first paragraph of the second defense. It does not disclose a legal defense to the action in this regard.

(2) The plaintiff denies the second paragraph the second defense.

(3) The plaintiff denies the third paragraph of the second denfense.

Replying to the third defense to the answer, plaintiff says that:

(1) It will object that the third defense as set forth in paragraphs one, two, three, four and five does not disclose a legal defense to the action.

(2) The defendant cannot preclude the plaintiff from maintaining its action and the recovery of a judgment herein by reason of the defendant's adjudication as a bankrupt by the United States District Court for the Eastern District of New York, individually and as a member of Arlington & Beckman's Oklahoma Ranch, Wild West Show, or by attaching to the defendant's and other schedules in bankruptcy, a statement that the plaintiff is a creditor of the defendant individually or otherwise for the sum and as alleged and set forth in paragraphs (1) and (2) of the third defense.

(3) The plaintiff will object and denies that the plaintiff by reason of filing its claim with the referee in charge of said bankruptcy matter, is now estopped from proceeding to take judgment in this suit. If in the bankruptcy proceedings the debt or claim was proven as a claim secured by the levy under the attachment proceedings here-

in, the fact that the claim was filed with the referee in bankruptcy thereof does not cancel the lien nor prevent the plaintiff from proceeding to take judgment herein. The plaintiff herein did on the 14th day of April, 1914, issue out of the Passaic County Circuit Court a writ of attachment, at the suit of the plaintiff against the defendant herein and said writ of attachment was served and levy made upon the property and estate of the defendant by virtue thereof, on the said 14th day of April, 1914, which thereby became subject to the lien thereof for the plaintiff's demand and which was four months prior to the filing of the petition of bankruptcy by and for the said defendant and by reason thereof the aforesaid lien was not affected by an Act of Congress "An Act to create a uniform system of bankruptcy in the United States and Territories" adopted July 1, 1898 and the several supplements and amendments thereto and the plaintiff should be allowed to prosecute his action to judgment to fix the liability of the surety that was given by the defendant to the plaintiff herein, on a certain bond delivered by the said defendant to the said plaintiff in the aforesaid attachment suit for the release of the property attached in the attachment proceedings herein.

The plaintiff will object that by reason of the alleged discharge of the said defendant as a bankrupt, in the bankruptcy court, as set forth in paragraphs four and five of the third defense, is not a legal defense to the within cause of action nor by reason thereof can it prevent the taking of a judgment herein. The discharge in bankruptcy of the within named defendant does not affect the

lien of the service of the writ of execution and levy thereunder on the bankrupt's property before the bankruptcy proceedings were instituted so as to prevent the plaintiff from recovering judgment against the defendant herein to fix the liability of the surety given by the defendant herein to the plaintiff herein on the attachment bond heretofore given and executed and delivered by the defendant and his surety to the plaintiff herein.

HORTON & TILT,
Attorneys of Plaintiff.

Judgment.

This action was tried before Judge George S. Silzer, with a jury, in the presence of the counsel of the respective parties, at the Passaic County Circuit Court, on March 10th, 1916.

The cause having been heard, the court reserved the question as to whether judgment should be entered for defendant, notwithstanding the verdict of the jury, and the court afterwards heard argument by counsel of the respective parties upon the question so reserved, and being of the opinion that, inasmuch as it does not appear that Beckman, a member of the firm of Arlington & Beckman, which firm contracted the debt set forth in said complaint, was not a resident of the State of New Jersey, or an absconding debtor at the time the attachment herein was issued, the plaintiff cannot recover against the defendant in this suit.

Whereupon, it is adjudged that the complaint of the plaintiff be dismissed, and that the defendant, Edward Arlington, recover of the plaintiff, Quackenbush & Son, a body corporate, his costs, which are taxed at the sum of forty dollars and sixty cents ($40.60).

Judgment entered and signed June 23rd, A. D. 1916, at 9 A. M.

GEO. S. SILZER,
Judge.

Certificate of Clerk.

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

I, John J. Slater, Clerk of said County, and Clerk of the County Courts thereof, do hereby certify that the foregoing is a transcript of the judgment record, in re: Quackenbush & Son, a body corporate, plaintiff, vs. Edward Arlington, defendant, as the same is taken from and compared with the original entry thereof in Book "Y" of Circuit Court judgments for said county, on pages one hundred and eighty-four, etc., now remaining of record in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of the said courts and county, at Paterson, this fourth day of December, A. D., nineteen hundred and sixteen.

(L. S.)

JNO. J. SLATER,
Clerk.

PASSAIC COUNTY CIRCUIT COURT.

QUACKENBUSH AND SON, *Plaintiff*, vs. EDWARD ARLINGTON. *Defendant.*	*Before*: *Hon. George S. Silzer, J. and a Jury.*

PATERSON, N. J., MARCH 10, 1916.

APPEARANCES:

MESSRS. HORTON & TILT,
by Edgar M. Tilt, Esq.,
For the Plaintiff,
CLIFFORD S. NEWMAN, ESQ.,
For the Defendant.
LEVI LASKI, ESQ., of the New York Bar.

(A Jury being empannelled and found satisfactory, they were sworn.)

(Mr. Tilt opens for the Plaintiff.)

Mr. Newman: The Complaint says the plaintiffs sold the goods to Arlington, and in the opening the Counsel says he sold them to Arlington and Beekman, and we aught to know which it is.

The Court: Which is it?

Mr. Tilt: We claim they were partners and both liable.

Mr. Newman: I think the complaint

ought to be amended in that regard; then I might change my plea.

Mr. Tilt: The Court of Errors in the case of Thayer vs. Treat, 10 Vr., laid down the law to be that non-joinder or mis-joinder was not available on a suit started by attachment.

The Court: What was the original action?

Mr. Tilt: The original action was started by attachment against Arlington alone.

The Court: I understand only one of the parties, Edward Arlington, is represented here, and the attachment is issued against some of the goods belonging to him ?

Mr. Newman: The claim is, the plaintiffs say they they are suing for the price of goods sold and delivered to Edward Arlington; now, in the opening the Counsel says in reality it was not for goods sold and delivered to Arlington, but for goods sold and delivered to a partnership of which Arlington is a member.

Mr. Tilt: The Attachment Act permits us to issue an attachment against an individual who was a joint debtor.

Mr. Newman: I am not complaining about your right to issue an attachment, I am complaining about your opening now which does not correspond with your complaint.

The Court: Well, I don't imagine there is very much surprise.

Mr. Newman: No, I am not. Only I think I could amend.

Mr. Tilt: I cannot amend under that case against Treat, where the Court held that non-joinder is not available in an action started by attachment, but it would be by a summons. That seems to be the rule laid down.

Mr. Newman: I am only dealing with the complaint and the opening of Counsel now. He charges us with a personal buying of these goods in his complaint and in his opening he says it was not personal but was sold to the firm of which the defendant was a member. I suppose then the inference is he is going to establish that we are responsible, but that is another proposition.

The Court: Well, I will hear the defence.

(Mr. Newman opens for the Defence.)

Mr. Tilt: I offer in evidence the writ of attachment and the inventory and notice of general appearance.

The Court: As I understand from Mr. Newman's opening there is no dispute that the goods were sold and delivered to the firm. That is the plaintiff's contention too?

Mr. Newman: Yes.

The Court: But you say that the defendant Mr. Arlington was not—

Mr. Newman: I say he was supposed to be out of the firm at the time they were charged to the firm, and then when the charge came along, he was going to South America or some place and did not want to be held up by the matter so he agreed to give his note for one half.

The Court: Then he recognized the indebtedness to the extent of one half.

Mr. Newman: To the extent of the note, not upon this indebtedness. We don't know that we are prepared to admit that the goods were sold and delivered, but we state we did give our notes for half of this amount.

Mr. Tilt: I offer in evidence the writ of attachment with the inventory annexed and the notice of appearance, and also the bond.

Mr. Newman: I don't think that is material.

Mr. Tilt: It is, in the view of the issue, because one of the answers filed by the defendant is that the defendant has been adjudicated bankrupt.

Mr. Newman: That would only come in on the execution.

The Court: I did not hear Mr. Newman raise that question yet.

Mr. Tilt: That is on the other point in the answers, unless he wants to withdraw that part of the defence.

The Court: Is not that a matter of defence to the jury?

Mr. Newman: I don't see anything about that at all, it is not here now. That comes on the question of execution.

The Court: If that becomes relevant I will let the plaintiff put it in afterwards.

WILLIAM D. SEABROOK, sworn as a witness on behalf of the Plaintiff, testifies as follows:

Direct Examination by Mr. Tilt.

Q. Are you in the employ of Quackenbush & Son? A. Yes, sir.

Q. The plaintiffs in this case? A. Yes, sir.

Q. In what capacity? A. As bookkeeper.

Q. Were you bookkeeper in the year 1913? A. Yes, sir.

Q. And you have been for how long, before and subsequent thereto? A. I have been with them nine years in the present month.

Q. Last past? A. Yes, sir; the present month.

Q. Continuously? A. Yes, sir.

Q. Did you make the entries in the books of account of Quackenbush & Son in reference to the claim against Arlington & Beekman? A. I did.

Q. Did you enter them yourself? A. Yes, sir.

Q. Have you the books of original entries here in Court? A. I have, sir.

Q. Will you produce the book where the items are entered first, directly entered? A. There are two of them.

Q. What are the names of those books? A. That is the day book.

Q. It is called the day book? A. Yes, sir.

The Court: This contains the complete account against them?

The Witness: Yes, sir. That is as far as the charges are concerned.

Q. That contains the debit items? A. Yes, sir.

Q. Did you prepare an itemized bill shown in the bill of particulars annexed to the complaint in this case? A. Yes, sir.

Q. (Showing witness paper) This is the itemized statement that you prepared? A. Yes, sir; that is it.

Q. It that a correct statement of the items in your books of original entry? A. Yes, sir.

Q. That is a correct statement of the items in your books of original entry that were charged against Arlington & Beekman? A. Yes, sir.

Mr. Tilt: I offer in evidence the books known as the day books of the Plaintiff.

Mr. Newman: I object to the books being admitted, because they contain the charges against Arlington & Beekman, whereas the complaint alleges the goods here sued for were charged against Edward Arlington.

Objection overruled; Defendant excepts.

Admitted and marked "Plaintiff's Exhibits P-4 and P-5" of this date.

Q. Turn to the account beginning April first, 1913? A. It appears on page 628 of Exhibit P-4.

Q. In Exhibit P-3 is entered under date of April first, 1913, the first charge of the bill? A. Yes, sir.

Q. And in Exhibit P-4, the book here before you, are contained the entries down to what date? A. Down to and including April twenty-sixth, 1913.

Q. And the entries subsequent to that time were made where? A. They are contained in the other book which has been marked Exhibit P-5.

Q. Now, you may turn to this—? A. There is one last charge only, the last charge is made on May sixth, 1913, in the book Exhibit P-5, all the charges being contained in both books.

The Court: I will permit this complaint to be amended so that it shows the goods were sold to a firm of which Mr. Arlington was a member.

Mr. Newman: Then I desire to have leave to amend my answer by setting up the non-joinder of Mr. Beekman as defendant.

The Court: Don't you think a partner is liable for the partnership debt?

Mr. Newman: Possibly so, but I think they have to make both partners defendants.

The Court: Why? In order to reach the partnership liabilities?

Mr. Newman: Because the law says that partners are jointly liable and I don't think you can hold one party and sue upon a joint obligation. That I suppose the Court does not have to pass on now; if I amend my plea I suppose your Honor will pass upon it when the time comes, but I ought to be permitted to amend my plea.

The Court: You mean to plead the non-joinder of the other partner?

Mr. Newman: Yes, sir.

The Court: I will consider that.

Mr. Tilt: Of course, it seems to me, in view of the case of Thayer vs. Treat, that it would not be a defence to plead non-joinder of the other partner because the ac-

tion was commenced by attachment. This is an attachment suit. Instead of a summons being issued as the process, attachment was issued. If I am correct in my view of the case of Thayer vs. Treat, I think I may say that it would be no defence to plead non-joinder or mis-joinder in such an action, though there might be if the suit was started by a summons.

The Court: If it is a substantial right, how does a man get the benefit of it? Can you deprive him of the benefit of the fact by issuing an attachment?

Mr. Tilt: If it is true that this defendant is severally and jointly liable for this debt, how is he hurt? Where is his injury?

The Court: That is just what I asked Mr. Newman. Do you mean to say that you cannot sue an individual partner for a partnership debt and get a personal judgment against him without suing both partners?

Mr. Newman: I think you may be able to get your individual judgment against him, but you have got to sue the partnership. Then that fixes the liability for this partnership debt, then the defendant here may have some recourse against the other defendant.

The Court: But this is a joint and several obligation.

Mr. Newman: I say it is not several. A partnership liability is joint. Not several. In equity it is considered several, but not in law. For equitable purposes they may

set it up, that is the way I understand the law to be.

The Court: You may continue the examination.

Mr. Newman: I would like at this time to enter an exception to the denial of permission to amend.

The Court: I will go over the whole question.

Q. Do you know what the total amount of the debit items is, upon the date of the last charge, which I understand is May sixth, 1913? A. What the total of the debits were?

Q. Yes. Look at the complaint and tell us what the total amount of the debits was? A. Approximately nine hundred and sixteen dollars.

Q. Well, I want to know what it is, if you have it? If you have not got it, calculate it? A. Nine hundred and sixteen dollars and nine cents.

Q. That is the total of the charges up to May sixth, 1913? A. Yes, sir.

Q. That is for what? A. For merchandise.

Q. Subsequent to that date were there any other charges? A. Yes, sir.

Q. What were those? A. Two charges of protest fees on Mr. Arlington's note; January fifth, $1.31, and January 31st, $1.31.

Q. Are those two items entered in your day book, Exhibits P-4 and P-5? A. They are entered in my cash book.

Q. Have you got the cash book here? A. Yes, sir. (Producing)

Q. Were they entered by you? A. Yes, sir.

Q. Is that the place where you first make an entry for such debit charges? A. Yes, sir.

Q. Will you produce thaat cash book? A. Yes, sir. (Producing)

Mr. Tilt: I offer this cash book in evidence.

Admitted and marked "Plaintiff's Exhibit P-6" of this date.

Q. Tell us the page of the cash book where they are entered? A. On page 55 the charge of January fifth—

Mr. Newman: Who are they charged to?

The Witness: They are charged to Arlington & Beekman.

Q. What is the next one? A. Page 65 the charge of January 31st, charged to Arlington & Beekman.

Q. What were the total credits received on account of the indebtedness? A. The total of the credits was $204.48.

Q. Where is that entered? In the cash book? A. Some of them are entered in the day book and some of them in the cash book.

Q. You entered them yourself? A. Yes, sir.

Q. And the paper you have before you, the complaint, correctly states the credits received? A. Yes, sir.

Q. Just read what those credits are, the dates and the items? A. Under date of April 7, 1913, five machine bolts, 1-2x10..... $1.60

April 18, one Grate, 57 1-2 lbs..... 2.88
May 10, 1913, Cash 1.87
May 17, 1913, Cash..... 198.13

$204.48

Q. So that the balance now due is $714.23, with interest? A. Yes, sir.

Q. Have you calculated the interest on that sum to date, March 10th? A. I have.

Q. How much is the interest from May 6th, 1913, to March 10th, 1916, which is the present date? A. It is $110.97.

Q. What is the principal? A. I have got it with interest on $711.61, omitting the interest on the protest fees of $2.62.

Q. The total due then you say is how much? A. $825.20.

Q. You figured the interest on $711.61 from what time to what time? A. From May sixth, 1913, to March 10th, 1916.

Cross examination by Mr. Newman.

Q. I see you have charged there two Arlington notes, let us see those notes, have you got them? A. Yes, sir; (producing).

Q. I show you this note made by Edward Arlington, dated October 31st, 1913, is that one of the notes referred to in your complaint? A. Yes, sir; that is one of them.

Q. That was presented by your firm for payment? A. Yes, sir; through our bank.

Mr. Newman: I will have this note marked for identification.

The said note was marked for identification "Defendant's D-1 for identification" of this date.

Q. I show you another note made by Edward Arlington to your firm, dated October 31st, 1913, is that the other note? A. That is the other note; yes, sir.

Q. That was presented by your firm for payment also? A. Yes, sir.

Mr. Newman: I will have this note marked for identification.

The said note was marked for identification "Defendant's D-2 for identification" of this date.

Q. The two items of cash of which you have entries, do you remember who brought them to your attention? A. Mr. Quackenbush brought those and handed them to me.

PETER C. QUACKENBUSH, sworn as a witness on behalf of the Plaintiff, testifies as follows:

Direct examination by Mr. Tilt.

Q. You are an officer of Quackenbush & Son? A. Yes, sir.

Q. What office do you hold? A. President and Treasurer.

Q. For how many years last past continuously have you been President and Treasurer of the

plaintiff company? A. Since January first, 1910.

Q. Do you know Mr. Edward Arlington, the defendant in this case? A. Yes, sir.

Q. How long have you known him? A. Four or five years.

Q. Do you know Fred Beekman? A. Yes, sir.

Q. How long have you known him? A. About the same time.

Q. Do you know whether or not Arlington & Beekman were partners on April first, 1913? A. Yes, sir.

Q. Were they partners between April first, 1913, and January thirty-first, 1914? A. As far as I know; yes, sir.

Q. What is the nature of the business of Quackenbush & Sons? A. Hardware merchants.

Q. Do you know who opened the account of Arlington & Beekman with your Company? A. Mr. Beekman started it.

Q. He started with you? A. Yes, sir.

Q. How was the account opened? A. Mr. Beekman came to the store and told me—

Q. You cannot tell what you were told; how was it opened, in whose name? A. Arlington & Beekman.

Q. And it has remained so continuously? A. Yes, sir.

Q. Did you ever have a talk with Mr. Beekman or Mr. Arlington, or either or both of them, in reference to this account that you are now suing? A. Yes, sir.

Q. Can you recall the time? A. Why, at different times.

Q. I notice in the complaint there is a credit of May 10, cash $187, May 17, cash $15, who paid that money? A. Mr. Beekman.

Q. Paid to whom? A. To me.

Q. On account of what? A. On account of the account of Arlington & Beekman.

Q. Do you recall about what time that was? A. Why, in May of 1913, I believe, the date I cannot recall.

Q. In your bill of particulars you have May tenth and May seventeenth, was that about the right time? A. About that; yes, sir.

Q. As to Arlington, when did you have a talk with Mr. Arlington about this account? A. Prior to them starting with this show, and in Orange, one of the Oranges, I don't know just where.

Q. What year? A. The same year, 1913.

Q. Do you recall the time of the year? A. The spring of the year, April and May.

Q. Did you have more than one talk with Mr. Arlington about this account? A. Oh, yes.

Q. Do you recall the last conversation you had with Mr. Arlington in reference to this account? A. Why, the last time was when he gave me those two notes, offered me those two notes in New York.

Q. The notes were October 31st? A. I think so; it was about that time.

Q. How did you come to meet Mr. Arlington then? A. By a telephone. Telephoning to him and making an engagement.

Q. What did you go down to see him for? A. For this account.

Q. When you got down to him what did you say

to him in reference to this account? A. We talked it over.

Q. Talked what over? A. The account and the payment of it, etc.

Q. What did he say? A. He said, "The best I have to offer you is my fifty per cent. of the account."

Q. What did you say to him? A. I said, "Mr. Arlington, it was through you that the concern of Arlington & Beekman was given credit," and, I said, "I cannot release you, Mr. Arlington. However, I will take these two notes and, if they are paid, we will credit the Arlington & Beekman account with the proceeds."

Q. What did he say? A. He handed me the two notes.

The Court: All this transaction took place in New York?

The Witness: This latter end of it; yes, sir.

Q. What did he say then? A. We said "Good bye" and he was then getting ready to go to South America.

Q. He handed you the two notes at the conclusion of the conversation? A. After I talked to him; yes, sir.

Q. Did you state to him what the amount of the claim was against Arlington & Beekman? A. That I cannot state, I don't know whether I did or not. He had been rendered statement after statement and I presume he had them in his possession there in New York.

Q. Did you have a statement with you at that time? A. I could not recall that exactly.

Q. You say statements have been rendered to him? A. Yes, sir.

Q. Do you know that to be a fact yourself? A. Well, they were rendered through the regular department, mailed to him, I guess; they never came back.

Q. You know the statements were mailed to him? A. Yes; that is our routine.

Q. To Arlington & Beekman? A. Mr. Arlington, after Mr. Beekman had gone away.

Q. Did you mail statements to Beekman too? A. No, I don't think we did. That is not up to me personally anyway, the mailing of those things out. It is in the department.

The Court: Where is your place of business?

The Witness: At 120 Van Houten street, Paterson, New Jersey; in the hardware business.

Cross examination by Mr. Newman.

Q. What was your object in taking those notes of Mr. Arlington for half of the debt? A. Well, I guess I argued that half a loaf is better than nothing, and we had the conversation before he handed them to me.

Q. That was the very theory upon which you took those notes, that he thereby made himself personally responsible for half of the debt, wasn't it? A. Oh, no.

Q. What did you take them for? What do you mean by a half loaf being better than nothing? A.

Well, you would accept most anything, I guess, rather than nothing.

Q. Then you had nothing, so far as Arlington was concerned, before? A. Yes, we had nothing, we collected nothing.

Q. Then you had his acknowledgment for fifty per cent. of the debt? A. We had his acknowledgment of the entire debt, I think.

Q. But not by two notes? A. Well, I did not give him any credit; the credits did not go through our regular channel either.

Q. What I am anxious to find out is, what object you had in taking his notes for half of the debt, his personal notes? A. Probably on account, that is all.

Q. You did not credit them? A. No, I did not.

Q. You did not—? A. Except, I will say in explaining that, I explained to him prior to my taking those notes from him, if those notes were paid the account of Arlington & Beekman would be credited for the proceeds.

Q. How did that help Arlington any? A. It helped the general account, it would have if they had been paid.

Q. If it had been paid without notes it would help just the same, wouldn't it? A. Yes, sir.

Q. Then, have you any other explanation why you took Arlington's personal notes for half of the debt? A. No, I have not.

Re-direct examination by Mr. Tilt.

Q. If these notes of October 31st, 1913, had been honored and paid would you have released Mr. Ar-

lington for the balance of the account of Arlington & Beekman? A. No, sir.

Q. That was your understanding at the time you took the notes, was it not? I think you so testified? A. Yes, sir.

Plaintiff Rests.

Motion for Non-Suit.

Mr. Newman: I now move for a non-suit upon the ground that there has been no evidence that a partnership existed at the time these goods were sold and delivered.

Mr. Tilt: Mr. Quackenbush just swore they were partners, that Beekman opened the account and that payments were made by Beekman on the account.

The Court: The question was put to him, "Were they partners during that time?" And he said "As far as I know."

The Court: What do you think of this section of the Attachment Act: "An attachment may issue against the separate or joint estate of joint debtors, or any of them, either by his or their proper name or names or by the name or style of the partnership," etc.

Mr. Newman: I don't know whether that fits it or not. It says the estate may be sold. But here they are claiming a personal judgment.

The Court: This is the attachment. After the attachment is issued the judgment is obtained and then the estate may be sold.

Mr. Newman: If he entered no appearance and was served with no complaint,

then does the statute say that the estate may be sold?

The Court: Why do you say "If he entered no appearance?"

Mr. Newman: Because, as I understand the rule and the law, where there are two partners, a partnership, you cannot enter judgment in personam, it must be against both partners; or at least they must both be defendants.

The Court: There are some cases under this section. I have not looked at them.

Mr. Tilt: I will read this case.

The Court: The common law rule was that it was a joint obligation. That may be changed by statute. Do you know of any other statute outside of this Attachment Act which changes the common law rule?

Mr. Tilt: Yes. One case was the case of Corbett vs. Corbett, 50 Law. That was brought up on a motion to quash the writ. But in this case a general appearance was entered which waived aside the irregularity of substance or form of which they are now complaining. Then we have the case of Thayer vs. Treat, that the answer of non-joinder is not available in a proceeding taken by attachment. That is good where the action is begun by process of summons, but not where it is begun by attachment.

The Court: But you started your attachment, not alleging that this is a partnership debt, but alleging that it is a debt of Mr. Ar-

lington alone, and on the strength of that you attached Mr. Arlington's goods. Then you are confronted at the trial by the variance that it is not the debt of Mr. Arlington, but that it is a partnership debt, then, of course, you will either have to be nonsuited upon that ground, that there is a variance, or, there must be an amendment showing that your claim is a debt of a firm of which he is a partner. Now the defendant says that he is a partner and that is the true state of things, as it appears in the proof.

Mr. Laski: But not at that time.

The Court: You don't pretend that Mr. Arlington is alone now?

Mr. Newman: Mr. Beekman was alone while the goods were being bought.

The Court: Mr. Tilt claims there was a partnership, and you claim he was alone. Now we are confronted with the proposition as to whether we can issue an attachment against an individual for a partnership debt. That being a joint obligation. You can do it if the statute has not altered the common law rule.

Mr. Tilt: In Corbett vs. Corbett the question was on a motion to quash the writ because a partner had not been joined. That was on a motion to quash the writ. I say now, it is too late to urge that. You cannot attack a general appearance collaterally which we would be doing if this argument now was available. You cannot at-

tack the form and substance and propriety of issuing the attachment against Arlington alone when a general appearance has been entered.

The Court: You mean they appear and you tell them this is a joint obligation and they thereby waive the right?

Mr. Tilt: Yes, sir; I do. I think they are thereby attacking collaterally the writ, which they cannot do. They cannot attack it collaterally.

Mr. Newman: The difficulty is he charges us with a personal debt and now he turns around and claims that it is a partnership debt.

Mr. Tilt: I will stand on the case of Thayer vs. Treat.

The Court: That simply holds, under the previous Practice Act, no new party may be made defendant in the case.

Mr. Tilt: It also cites the words of the Attachment Act, that a joint obligor is liable individually, I take it. That an attachment may be issued against a joint obligor.

The Court: But, do you think that having started against the defendant as an individual and now proving a joint obligation you can bring him in under that kind of an attachment?

Mr. Tilt: In that suit there was a variance from the original papers, and then counsel moved for a non-suit because of the variance and the Court did not permit it, then counsel for the plaintiff moved to amend and that was allowed, and then there

were further motions to non suit and then counsel for plaintiff again sought to amend and the Court said that was all wrong, it was not necessary for him to amend.

Mr. Newman: I cannot quite understand how the defendant would be supposed to guess what the case of the plaintiff was going to be. He takes up the affidavit which says that he owes the plaintiff five hundred dollars, and I don't see how he could move to quash the writ because he does not know what the debt is until he sees the complaint.

The Court: I will deny the motion and let the case go to the jury and control it myself.

Mr. Newman: I would like to add to the motion that I make it on the ground of variance as well as the ground that there is no proof of partnership existing.

The Court: If the plaintiff does not make the amendment, the motion does not have to be granted, because there is a clear variance. But if the plaintiff makes the amendment, showing that the plaintiff seeks to hold the defendant under this attachment as a joint debtor, a member of a firm, and the defendant then pleads nonjoinder of other parties, that brings the issue squarely up. Then I will deny the motion for the present, and hold that the Plaintiff has that right under this Third Section of the Attachment Act.

Motion denied; defendant excepts.

EDWARD ARLINGTON, sworn as a witness on behalf of the Defendant, testifies as follows:

Direct examination by Mr. Newman.

Q. You are the defendant in this suit? A. Yes, sir.

Q. You and Mr. Fred Beekman were at one time partners, under the name of Arlington & Beekman? A. Yes, sir.

Q. Tell us when this partnership was dissolved? A. In March, 1913.

Q. To whom did you transfer your interest? A. Mr. Beekman. Fred Beekman.

The Court: This date of dissolution was a month before this bill was incurred?

The Witness: Yes, sir, the latter part of March.

Q. Mr. Quackenbush came to see you in New York, as he says, about this bill, when these notes were given? A. He came to see me; yes, sir.

Q. Tell us what conversation took place between you and Mr. Quackenbush when you gave these two notes which have been marked D-1 and D-2 for identification? A. I was about ready to sail for South America and Mr. Quackenbush had called me up on the 'phone and had seen me regarding the account owed by this show of which I had no knowledge, that is Mr. Quackenbush's statement, that the show still owed him money. I had had dealings with Mr. Quackenbush in the past, with other shows for supplies we used in our winter quarters for repairing wagons and things

like that and this account in each and every instance, covering a period of three or four years had always been settled before the show left the winter quarters to go upon the road, and I naturally believed that the same thing applied to the Arlington & Beekman Oklahoma Ranch account, and, the first I knew that there was anything alleged to be due to Mr. Quackenbush was when he told me so, and the reason he came to tell me was he was looking for Mr. Fred Beekman and his whereabouts, his route, where the show was. So at the time I could not give him any more information, because at that time I did not know the route of the show, so the matter dragged along during the summer, and he got no satisfaction from Mr. Fred Beekman, and he insisted he should see me, which he did, and on the thirty-first of October, one day before I was ready to sail for South America, and he went over the account again, explaining, he was intimate with Mr. Fred Beekman in a very friendly way and he knew our affairs, and our personal affairs, and that I explained I was not interested in the matter, but I felt there was a moral obligation there, and as I did not want to be at all harassed or hampered from sailing the next day I agreed if Mr. Quackenbush would relieve me entirely to give him two notes of a hundred and seventy-five and some odd dollars each.

Q. Are they the two notes there? A. Yes, sir.

Q. What is the amount of them? A. $183.53, representing one-half the entire account providing he would absolutely relieve me.

Q. Did he accept those notes no those terms? A. He accepted them and with that stipulation.

Edward Arlington—cross.

Mr. Newman: I offer the notes in evidence, being the same ones which had previously been marked D-1 and D-2 for identification.

Admitted and marked "Defendant's Exhibits D-1 and D-2" of this date.

Cross examination by Mr. Tilt.

Q. You say that was the stipulation, do you mean it was stipulated in writing? A. No. I don't believe we stipulated it in writing. It was just verbal between the two of us.

Q. What were you so worried about prior to your sailing, if you did not owe any part of this account? A. Because I did not want to be stopped from sailing the next day.

Q. How could they stop you from sailing? A. Well, there is ways of stopping men.

Q. They could not arrest you for debt, could they? A. I don't know that.

Q. Were you afraid of arrest? A. I have heard of body attachments being taken out for show property, couldn't they attach my body?

Q. So you were very much concerned about this debt which you knew nothing about, did not owe and yet you gave your notes for fifty per cent. of the bill? A. Yes, sir.

Q. Did you know what the amount of the bill was? A. Yes, sir.

Q. How much was it? A. What Mr. Quackenbush told me it was.

Q. You knew that was correct? A. I took Mr. Quackenbush's word for that; yes, sir.

Q. You had had statements of it? A. Yes, sir.

Q. Who figured out the amount that you were to give notes for? A. Mr. Quackenbush and I did it jointly.

Q. You say that you and Mr. Beekman were not partners on April first, 1913? A. I positively do.

Q. When did you become partners? A. We became partners in this particular venture in December, 1912.

Q. What particular venture do you call this? A. We called this the Arlington & Beekman Oklahoma Ranch.

Q. You became partners when? A. In December, 1912.

Q. When did you dissolve? A. In March, 1913.

Q. In what part of March? A. In the latter part of March.

Q. Did you ever tell Quackenbush you dissolved partnership? A. No, sir.

Q. You never told Quackenbush? A. I told Mr. Beekman and Mr. Beekman told Mr. Quackenbush the whole circumstances.

Q. How do you know he did? A. Because they were very intimate, very friendly, and out together.

Q. You assume he did? A. I assume that, yes.

Q. Did you tell Mr. Quackenbush in 1913, when you gave him these notes that you had dissolved partnership? A. I did not tell Mr. Quackenbush at all.

Q. Why not? A. Because, he knew the whole circumstances. It was not necessary.

Q. How do you know? A. Because he knew the whole condition and the whole proposition, he does not deny it.

Q. You assume he knew it? A. Because, if he had held me, why did he wait till the middle of spring to present the bill to me?

Q. I suppose he thought you were good for it? A. That may be, but why was not Mr. Beekman good for it? Why did he not call on Mr. Beekman at the show and receive the money?

Q. I ask you again, how do you know that Mr. Quackenbush knew that you and Fred Beekman had dissolved your partnership? A. Because, when Mr. Quackenbush first started to collect the account, he did not call on me in reference to the account, he called on me in reference to Mr. Beekman's whereabouts and where he could reach Beekman.

Q. Who do you say owes the account? Fred Beekman alone? A. Fred Beekman owes after the first of April.

Q. Where was Beekman April first, 1913? A. In Lake View, New Jersey.

Q. Where was he in October? A. Somewhere in the South with the show.

Q. You broke up that show, that Oklahoma show, didn't you? A. The show was broke.

Q. When did you break that up? A. I did not break it up; no, sir.

Q. You took part of it, didn't you? A. No, sir; I did not take part of it.

Q. Didn't you take part of that show down south? A. No, sir.

Q. Do you deny that? A. Wait a minute. No, sir. The show was disbanded. The property was sold to pay off the workmen and the labor.

Q. The property was sold? A. Yes, sir; excepting such as Mr. Beekman still retains.

Q. The property that was there at the time of the issue of the attachment belonged to you, did it? A. No, sir.

Q. Then why did you give a bond for the release of that property? A. I was not served, was not attached.

Q. Why did you give a bond for the release of property which you say did not belong to you? A. I did not give any bond.

Q. You did not give any bond? A. No, sir.

Q. Is this your signature on this paper which I now show you? A. No, sir.

Q. That is not your signature? A. No, sir.

Q. Who is O. W. Dow? A. He is adjuster for 101 Ranch.

Q. He is your attorney in fact? A. No, sir.

Q. You knew nothing about this bond? A. Yes, sir; I knew there was a bond issued.

Q. You told Dow to issue a bond? A. No, sir.

Q. Did you give any authority to issue this bond? A. Positively not.

Q. When was the first you heard about this bond? A. A day or so after the bond was issued

Q. How did you hear about it? A. There was a lien made, they had been attached.

Q. What show? A. 101 Ranch show.

Q. You were not interested in 101 Ranch show, were you? A. I was not; no, sir.

Q. Why did they write you? A. Because I was agent for the show.

Q. Agent for whom? A. Agent for 101 Ranch, Wild West.

Q. Who were the principals? A. Miller Brothers, George Arlington.

Q. Who was George Arlington? A. My father.

Q. When did you transfer your interest to your father in that show? A. The interest was transferred the fall of 1913.

Q. How could you transfer it then if you say you did not own it in April, 1913? A. March, 1912.

Mr. Newman: You are talking about two different shows. The one is the Beekman & Arlington show and now you are inquiring about the 101 Wild West Show, which are separate and distinct enterprises.

Q. I am talking about the property that was attached in this suit? A. Yes, sir.

Q. You knew what it was attached in? A. Yes, sir.

Q. In Lake View? A. Yes, sir.

Q. Whose property was that? A. Miller Brothers and Arlington Wild West Show Co.

Q. And that Arlington was George Arlington, your father? A. Yes, sir.

Q. How did he get that? A. For money that he had loaned me.

Q. Who transferred it to him?

Mr. Newman: Objected to as immaterial. Objection overruled; defendant excepts.

A. I transferred it to him.

Q. When? A. In the fall of 1912.

Q. What time in the fall? A. Along in August or September.

Q. Had you then dissolved co-partnership with Beekman? A. Yes, sir.

Q. I thought you did not dissolve until March, 1913? A. No, I had not dissolved co-partnership with Beekman.

Q. You said, on your direct examination—A. No, sir.

Q. Am I mistaken? A. I think you might be.

Q. The latter part of March, 1913? A. Yes, sir.

Q. Are you wrong in that? A. No, sir.

Q. You are right? A. Yes, sir.

Q. Then you did not pass that over to him in November, did you? A. Pass over to who?

Q. To George Arlington? A. The interest in the 101 Ranch show.

Q. I am talking about the interest in the property attached in this suit. Are you talking about the same property? A. You are trying to confuse two properties.

Q. Are you talking to me now in reference to the property attached at Lake View or some other property? A. I am talking about the property attached at Lake View, yes.

The Court: Who did that belong to?

The Witness: Miller and Arlington, 101 Ranch.

Mr. Newman: They are two separate shows and I do not see the materiality.

Mr. Tilt: I am asking when Miller & Arlington got it and he says in the fall of 1912?

The Witness: Yes.

Q. Now, I ask you, did Beekman join in that transfer?

Mr. Newman: That is the reason I object to it, because, it deals with a different firm.

The Court: He has a right to find out whether it is partnership property or not.

Mr. Laski: There are two separate Wild West Shows.

The Court: He has a right to find out from this witness whether there are.

Q. Did Beekman join in this transfer by you? A. No, sir.

Q. He owned it then, in the fall of 1912, didn't he, with you? A. No, sir.

Q. Why not? You were partners in this show, weren't you? A. No, sir.

Q. Beekman and you were partners in the fall of 1912? A. No, sir.

Q. Weren't you and Beekman partners in November, 1912? A. No, sir.

Mr. Newman: In which show?

Q. In any show? A. No, sir; we were not partners in November, 1912.

Q. In any show? A. No, sir; absolutely not.

Q. When did he and you become partners? A. In the 101 Ranch show?

Q. In any show, when did you and he become partners? A. When we became partners? You must not confuse the two. Mr. Beekman had one-eighth interest in the 101 Ranch show in 1912, which was disposed of in September, in the 101 Ranch show. That ended Mr. Beekman. He then took some money which he had and wanted to start this new enterprise which was started in December, 1912. Therefore Mr. Beekman had no interest in the 101 Ranch show and there was no interest of his at any time between September and December.

Q. You were partners in some show in 1912, weren't you? A. No, sir; Mr. Beekman was not.

Q. In no show? A. No, sir.

Q. When had you dissolved? A. Mr. Beekman was bought out September, 1912, of what equity he had in the 101 Ranch.

Q. What partnership was it you dissolved in March, 1913? A. The partnership of Beekman and Arlington in the Oklahoma Rance; that is the 101 Ranch Show that was attached.

The Court: So you claim the property that was attached had nothing to do with either Mr. Beekman or Beekman & Arlington?

The Witness: No, sir; absolutely not.

Q. Didn't Beekman have something to do with the show down there at that time? A. No, sir.

Q. Didn't you split up the show and take your part and go down south with it? A. No, sir.

Q. You knew O. W. Dow? A. Yes, sir.

Q. He apparently signed your name on the sixteenth of April, 1914, as attorney in fact for you, that was wrong, was it? A. That was wrong.

Q. He had no authority? A. He had no authority from me; no, sir.

Q. He never told you he had signed a bond in this attachment suit? A. He did not tell me; no, sir.

Q. You knew nothing about it? A. I knew nothing about it until I was advised by the show.

Q. When was that? A. A couple of days following the attachment.

Q. Did you make any objection? A. I certainly did.

Q. Did you see anyone, did you make any objection? A. I certainly did.

Q. Through whom? A. Through Mr. Laski, the attorney.

Q. Through whom? A. Through Mr. Laski, my attorney.

Q. Did you tell Mr. Laski when you made the objection that Mr. Dow had signed your name to the bond without authority from you? A. This is the first time I have seen the bond.

Q. Did you? A. No, sir.

Q. Why not? A. Because I had not seen the bond.

Q. Did you at any time tell him? A. No, sir.

Q. Why not? A. Because I had not seen the bond and I did not know it had been signed.

Q. You knew a bond had been given in your name; did you? A. No, sir.

Q. How did you know that Dow had signed your name? A. I did not know until five minutes ago that Dow had signed it.

Q. Then this morning is the first time you ever knew that Dow had signed your name to the bond? A. Absolutely; yes, sir.

Q. And that a bond had been given by you? A. Oh, no, sir; I knew that a bond had been given, not by me, by the show.

Q. When did you first learn that a bond had been given by you in your name to release this property attached? A. I never knew it.

Q. You never knew it? A. No, not until five minutes ago.

Q. What was you doing telling Mr. Laski to notify the bonding company it was not your signature? A. I did not notify the bonding company it was not my signature.

Q. Didn't you tell Mr. Quackenbush when he went down to see you about this account that you had divided this show and you had taken part of it down south and Beekman had taken the other part? A. No, sir.

Q. You never told him that? A. No, sir.

Q. You did not? A. No, sir.

Q. Didn't Mr. Quackenbush see two wagons down at the depot with the name 101 Oklahoma Show? A. I cannot tell what Mr. Quackenbush saw.

Q. You say they did not go down there? A. Yes, sir; I say that the 101 Owlahoma Show did not go down there.

WILLIAM D. SEABROOK, re-called as a witness on behalf of the Defendant, testifies as follows:

Direct examination by Mr. Newman.

Q. I show you a letter of Quackenbush & Son dated February 21st, 1914, did you sign that and send it on behalf of the Plaintiff? A. Yes. That is right.

Mr. Newman: I offer this letter in evidence.

Admitted and marked "Defendant's Exhibit D-3" of this date.

No Cross Examination.

Defendant Rests.

PETER C. QUACKENBUSH, re-called as a witness on behalf of the Plaintiff in rebuttal, testifies as follows:

Direct examination by Mr. Tilt.

Q. I call your attention to this letter Exhibit D-3 and ask you if you are acquainted with the subject matter? A. This letter was sent—

Q. Do you know the occasion of sending that letter? A. We have in our warehouse a trunk and a box of Mr. Fred Beekman's, and when he

left the grounds at Lake View he put it in our warehouse and asked us if we would keep it for him and he took our receipt . I think this is a letter in reference to it. We have been trying to locate Mr. Beekman to find out where and when and what to do with those two cases, one is a trunk and one is a case.

Q. Is that the occasion of that letter? A. I think this is it. Mr. Seabrook and I have both been trying to locate Mr. Beekman at different times, and this is while I was away.

Q. At the time these notes were given, Exhibits D-1 and D-2, did you tell Mr. Arlington that you would release him on the balance of the bill charged to Arlington & Beekman? A. Absolutely not, no, sir.

Q. Do you know about this property down here at Lake View, the show that was stalled down here at Lake View? A. Yes, sir.

Q. What was the name of that show? A. Arlington & Beekman Oklahoma Ranch.

Q. Did Mr. Arlington ever tell you, or speak to you about the disposition of the effects of that show? A. Yes, sir.

Q. What did he tell you about that? A. Mr. Arlington told me they were disbanded in East St. Louis; "Mr. Beekman and I came to some agreement, whereby he took about fifty per cent. of the show and I brought the other fifty per cent. East here. I am now getting it ready to take down South." I was down on the pier when they were loading it in one of the boats, and plenty of the stock had Oklahoma Ranch written onto it and not Miller and Arlington.

Q. Do you know that? A. I saw it.

Q. It was not Miller Brothers & Arlington? A. No, sir.

Q. Can you recall when it was you saw that stuff on the pier? A. Why, it was the day before, I think, Mr. Arlington gave me those notes.

Q. That would be October thirtieth, 1913? A. About that; yes, sir.

Q. Did you ever get any notice of any kind to the effect that there had been a dissolution of co partnership between Arlington and Beekman? A. Never.

Q. Did Arlington ever tell you they had dissolved partnership? A. No, sir. I was introduced again to Mr. Arlington, about four or five weeks prior to their opening the show in December. Mr. Beekman then again introduced me to Mr. Arlington as his partner.

Q. Just prior to the opening of this account? A. Yes, sir. And they told me all about it then.

Q. Did Beekman ever tell you they had dissolved partnership? A. Only when they made the dissolution in East St. Louis after they left here, about six months.

Q. After this attachment was issued? A. Yes, sir.

Cross examination by Mr. Newman.

Q. You and Beekman were quite intimate? A. On business only.

Q. You were quite friendly, of course? A. Well, we sold him lots of stuff.

Mr. Tilt: I object to this as immaterial. Objection overruled; plaintiff excepts.

Q. You were quite intimate with him, you called him Fred? A. I never had anything to do with Mr. Beekman other than business.

Q. You kept his trunk for him? A. Well, I think anybody would do that.

Q. You were very much exercised over the fact that he would not come and get his trunk? A. If you want a further explanation of it I can give it to you.

Q. Were you or were you not anxious that he should come and get his trunk? A. No, only to relieve us of what little responsibility there might be in the trunk.

Q. In view of the fact that he did not come after it for a long time you would probably infer, would you not, that it was not very valuable? A. The goods were locked into it, it had a lock onto it and you would have to break it open if you want to know.

Q. So that your writing this letter inquiring about Beekman's whereabouts was only so that he could get his trunk? You did not care anything about the money he owed you? A. Mr. Beekman was not responsible for this debt, he was not the responsible party of the firm of Arlington & Beekman, and I testified before that it was through Mr. Arlington that credit was given to Arlington & Beekman.

Q. You did not look upon Beekman as responsible did you? A. No; I did not, no, sir.

Q. And yet you only took notes from Mr. Arlington for half the amount? A. I took notes as I testified before.

Q. If you were looking upon Arlington as the responsible man of the firm, why didn't you take notes for the full amount? A. Because he would not give it.

Q. He claimed he was not responsible for it? A. Yes, he claimed it.

Q. After he claimed he was not responsible for all of it you took his notes for half of it? A. No, sir.

Q. Didn't you take notes for half of it? A. I took notes after I explained as I testified a while ago.

Q. But wasn't that the outcome of the conversation where he claimed he was not responsible for the bill? A. He claimed he was responsible for fifty per cent. of the bill.

Q. And then after that you took his notes for fifty per cent? A. I took his notes after that.

Q. Then you did—? A. Sure.

Q. You say you took them upon the theory that half a loaf was better than the whole loaf? A. Yes, sir.

Q. So that when you wrote this letter of February twenty-first, 1913, Exhibit D-3, you were not inquiring about Beekman's whereabouts for the purpose of trying to get your money? A. No, sir; I guess not, he had not anything to give.

Q. But he was the one that was more friendly with you of the two? A. He was the business man; Mr. Arlington well said that he was not

around very often, Mr. Beekman was the entire business man.

Q. All the debts were contracted by Beekman then? A. By Beekman through introduction and looking up Mr. Arlington's responsibility.

Q. Whatever transactions Arlington had had with you he had always paid you before? A. He had had no transaction with me in a business way. If we ever had any talks it was admitting his debt, acknowledging receipt of statements, etc., and talking with the man down here at Lake View down here on the lot, and he said "You will have to let us go a little further Mr. Quackenbush, we have not got the necessary money."

Q. Mr. Arlington was interested in the New Jersey Car Company, wasn't he? A. I don't know.

Q. Didn't you sell him some goods? A. No, sir; I did not.

Testimony Closed.

Charge of the Court.

The Court: Gentlemen, we are going to dispose of this case. I may say to you, we are going to put this in the form of a special verdict. We are going to put questions to you, which you may take up. They are all written out and will be handed to you, so that you cannot go wrong about it. You will simply answer those questions, and then I will determine the law as applied to the facts as you find them.

Charge of the Court.

1. Did the plaintiff Quackenbush & Son accept two notes of the defendant Arlington in settlement of all claims against Arlington?

And, if you answer that the plaintiff did accept those two notes in that way, then you need not go any further at all, because then the claim must be on the two notes, for the amount of the two notes.

If you find that the plaintiff did not accept the two notes, then you take up the next question, were Beekman & Arlington partners on and after April first, 1913, that is the time when this bill was incurred? If you find they were not partners, then of course, that ends the matter. If you find they were partners, then you put down the amount of the claim against the two partners.

This written memorandum of those questions will go out with you. I have written it as plainly as I can make it. I think you will have no trouble in understanding it and in disposing of it.

(Mr. Newman then sums up for the Defendant.)

(Mr. Tilt then sums up for the Plaintiff.)

The Court then charges the Jury as follows:

The Court: Gentlemen of the Jury, Questions of fact are being submitted to you so that the Court may know what you have determined the facts to be, and then I can apply the law to the situation according as you find the facts.

The plaintiff sues for a book account

which was kept in the name of Beekman & Arlington, upon which there is due $825.20.

The suit is against Mr. Arlington alone, and his defence is, that, after this bill had been incurred by somebody in the name of the partnership, Mr. Arlington was asked to pay it, and, whether he was a member of the partnership or was not, that he determined that he would stand fifty per cent. of it, as he put it, as a moral obligation, and gave his notes on that date in payment of that amount. And your first problem is to determine that question, did he do that? If those notes were given by Mr. Arlington and accepted by Mr. Quackenbush in settlement of any claim Mr. Quackenbush might have against Mr. Arlington as a member of the partnership, or not as a member of the partnership then, of course, that would end Mr. Arlington's responsibility on the book account. Because, you see, if the notes were accepted, they were taken in the place of the book account, and then the plaintiff's remedy would be, so far as Mr. Arlington was concerned, to sue upon those two notes, and hold Mr. Arlington for the amount of the notes, which, if they were accepted by Mr. Quackenbush, were the extent of the obligation which he accepted, and it makes no difference whether those notes were paid when they came due or whether they were not paid; if they were accepted by Mr. Quackenbush as full pay-

ment for the account of Mr. Arlington, those notes are still outstanding and can be pressed against Mr. Arlington in a suit brought for that purpose. So you will see, with those notes in Mr. Quackenbush's hands he could not have relied upon this book account and also upon the notes. So your first question is, were the notes accepted?

If you find that the notes were accepted, then, of course, you need not answer anything further. You simply answer the question first put. Because, then, the matter is determined. If you find that the notes have been accepted, Mr. Quackenbush must look to Mr. Arlington on those notes for the amount for which they were accepted. So that, if you find that the notes were substituted for any claim the plaintiff might have had, that is the end. You need not bother about answering any more questions.

If you find that Mr. Quackenbush did not accept the notes of Mr. Arlington and release him, your next question is, was there a partnership existing at the time this account was incurred between Mr. Beekman and Mr. Arlington? That is the second disputed question.

You see, Mr. Arlington says he had ended this partnership previous to the time this bill was incurred. That he does not owe it, never did owe it. That Mr. Beekman who

incurred this bill, had no right to involve him in this obligation, that there was no obligation, that there was no partnership existing. On the other hand you have heard Mr. Quackenbush testify as to the conversation between him and Mr. Arlington and it is for you to determine whether there was a partnership, on all the evidence you have before you, between Beekman and Arlington, at the time this bill was incurred.

If you have already found that the notes were given and accepted, you will not need to answer this last question, as I have already stated to you.

Have I made it clear to you how you shall take up these questions and answer them? I have written out the questions so that you may not be mistaken about your questions, and I have said, to the first question, if the answer of the Jury is "Yes" the notes were taken in place of the book account, then you need not go any further. If you find "No" they did not take the notes, they you must determine whether Mr. Arlington was a partner or not, so that I may determine how much he is responsible, if he was a partner, or if he is not responsible if he was not a partner.

So take the questions and answer them as I have indicated them to you.

(The Jury then retired.)

Findings of the Jury.

The jurors returned into court and say they have agreed upon their verdict and by the fore man, present the following questions with answers thereto, as follows:

1. Did the plaintiff, Quackenbush & Son, accept the two notes of defendant, Arlington, in settlement of all claims against Arlington?

Answer: No.

2. If the answer of the jury is "Yes," then the jury need not go any further.

If the answer of the jury is "No," then answer the following questions:

1. Were Beekman and Arlington partners on and after April 1, 1913?

Answer: Yes.

2. If you find they were partners, after April 1, 1913, what amount do you find is due, on the account sued upon?

Answer: $825.20.

Defendant's Requests.

The defendant thereupon objected to the entry of judgment against him and requested the court to enter judgment in his favor upon the following grounds:

1. It being found by the jury that the debt was the debt of Arlington & Beekman, a partnership, the suit should have been against Edward Arlington and Fred Beekman, partners trading as Arlington & Beekman.

2. It does not appear that the other defendant, Beekman, was not at the time the attachment was issued, a non-resident of the State of New Jersey, or an absconding debtor.

3. The affidavit states that the debt is due from Arlington, without reference to any liability as a partner and plaintiff cannot declare or recover in this suit on a debt for which it is alleged the defendant is liable as a partner.

Opinion of the Court.

(Filed June 19, 1916.)

PASSAIC COUNTY CIRCUIT COURT.

QUACKENBUSH & SON, *Plaintiffs,* vs. EDWARD ARLINGTON, *Defendant.*	*In Attachment.*

Messrs. Horton & Tilt, for Plaintiffs.

Mr. Clifford Newman, for Defendant.

Memorandum.

The plaintiffs, having sold merchandise to Arlington and Beckman, partners, issued an attachment against Arlington alone, upon an affidavit, that *Arlington* was indebted to the plaintiffs.

The affidavit, complaint and proofs, all fail to show that Beckman, the other partner, is not a resident of New Jersey and since it must affirmatively appear, that the other partner is a non-resident, no judgment built on such a foundation could stand.

Corbit vs. Corbit, 50 N. J. L., 363.
Bray vs. Eng. Co., 75 Eq., 447.

On the face of the papers, there was no evidence of invalidity, but when proof was submitted, and it appeared that there was a variance between the allegations and the proofs, and that the

debt was a partnership one, defendant was entitled to a dismissal.

Subsequent proceedings were however permitted, in order to give plaintiffs a chance to establish their claim, if possible. At the end of the case, however, there was still no evidence, that Beckman was a non-resident.

There was no waiver by the defendant, at any time, and his appearance to the attachment was merely to answer that which had been alleged against him, not a partnership liability.

If the plaintiffs had truthfully stated the facts in the affidavit, a motion to dismiss the attachment could have been made at once. Can it be said that one waives his rights by appearing and answering an untruthful affidavit? Defendant had no right to assume that on the trial plaintiffs would allege a partnership debt when they already had sworn otherwise.

The case of Thayer vs. Treat, 39 L. 157, cited by plaintiff's counsel, is authority for but a single proposition; namely, the application of Sec. 39 of the Practice Act, and nothing more.

Conceding, however, all that counsel contends for, it still appears in the case *sub judice*, that nothing is of record regarding the residence of the partner Beckman, a thing held to be most essential in every case where the point has been raised.

Judgment will be entered for the defendant.

GEO. S. SILZER,
Judge.

Exceptions.

PASSAIC COUNTY CIRCUIT COURT.

QUACKENBUSH & SON,
Plaintiffs-Appellants,
vs.
EDWARD R. ARLINGTON,
Defendant-Appellee.
} *In Attachment.*

Exceptions.

The plaintiff prays an exception wherein the court gave judgment for the defendant and against the plaintiff, whereas, the court should have found for the plaintiff and against the defendant for the amount of the verdict found by the jury in said cause in favor of the plaintiff.

Also prays an exception wherein the court held that it should have appeared affirmatively that one Beckman was a non-resident.

Also prays an exception wherein the court held that there was a variance between the allegations and proofs.

Also prays an exception wherein the court held that the appearance of the defendant in the attachment suit was not to answer a partnership liability.

Exceptions allowed.

GEO. S. SILZER,
Judge.

New Jersey Court of Errors and Appeals

QUACKENBUSH & SON, Appellant, vs. EDWARD ARLINGTON, Appellee.	On Appeal from Passaic County Circuit Court.

BRIEF FOR APPELLEE.

Facts of the Case.

Plaintiff has appealed from a judgment entered in the Passaic County Circuit Court, in favor of the defendant in this cause.

On April 14th, 1914, plaintiff took out an attachment against the defendant, upon an affidavit which recited the alleged non-residence of the defendant "and that he owes to said Quackenbush & Son the sum of $777.09." There was no reference in the affidavit as to the nature of the claim.

After appearance entered by the defendant, plaintiff served its complaint, alleging that it sued "for the price of goods sold and delivered to the defendant upon a book account, of which a copy is attached hereto, etc." The book account attached (not printed in the State of the Case) had no heading as to whom the goods were charged.

Upon the trial of the case, plaintiff offered in evidence to substantiate its complaint, its books of original entry, wherein the goods were charged as having been sold and delivered to Arlington & Beckman (State of the Case, p. 18). These books were admitted over the objection and exception of the defendant. Thereupon the Court (State of the Case, p. 19) permitted the complaint to be amended by alleging that the goods were sold to a firm, of which Mr. Arlington was a member. The defendant thereupon sought leave to amend his answer by setting up the non-joinder of Beckman, and which application the Court took under consideration (line 31). Defendant thereupon entered an exception to the denial of permission to amend (State of the Case, p. 21). At the close of plaintiff's case, defendant moved for a non-suit on the ground (1) that there was no evidence that Arlington and Beckman were partners at the time of the sale and delivery (State of the Case, p. 30), and in addition thereto, on the ground of a variance (State of the Case, p. 34).

The Court thereupon restated the permission to amend the complaint as it had done before, and permitted the defendant to plead non-joinder (State of the Case, p. 34).

The Court took the matter in hand and very sensibly (p. 34, lines 10 to 20) decided to have the jury pass upon all the disputed questions of fact, and then control the judgment on the question of law involved.

The defendant disclaimed responsibility for the debt and alleged that he was not in partnership with Beckman on April 1st, 1913, when the goods where purchased; and further, that one time, when he was about to sail for South America, the plaintiff came to him on the pier and insisted upon the payment of this bill; that in order not to have his

plans interfered with, he gave plaintiff his note for one-half of the amount, which he claimed was to be accepted by plaintiff in full satisfaction of his liability to plaintiff by virtue of any claim for the amount due for said goods. While acknowledging receipt of the notes, plaintiff denied that they were accepted in satisfaction of the alleged indebtedness of defendant. These two questions, therefore, together with the amount due upon the bill, were submitted to the jury and they resolved all of them against the defendant (State of the Case, p. 57). The goods, of course, had been ordered by Beckman and charged by the plaintiff to the firm of Arlington & Beckman.

After the verdict of the jury, the defendant thereupon objected to the entry of judgment against him and requested the Court to enter judgment in his favor upon the following grounds:

(1) It being found by the jury that the debt was the debt of Arlington & Beckman, a partnership, the suit should have been against Edward Arlington and Fred Beckman, partners trading as Arlington & Beckman.

(2) It does not appear that the other defendant, Beckman, was not at the time the attachment was issued, a non-resident of the State of New Jersey, or an absconding debtor.

(3) The affidavit states that the debt is due from Arlington, without reference to any liability as a partner, and plaintiff cannot declare or recover in this suit on a debt for which it is alleged the defendant is liable as a partner.

The Court thereupon, after due consideration, as shown in its memorandum (State of the Case, p. 59), ordered judgment to be entered in favor of the defendant.

The obligation of the defendant, if there was any, was joint with that of Beckman.

It is settled that in law the liability of partners is joint, and not several.

Brown v. *Fitch,* 33 *N. J. L.,* 418.
George on Partnership, p. 372.

The firm is the contracting party and each partner is not a debtor for the whole amount in the ordinary sense of an individual debt.

Curtis v. *Hollingshead,* 14 *N. J. L.,* 402, 409, 410.

Plaintiff could not maintain his suit on a joint debt against the defendant alone, without accounting for its failure to make the other joint debtor a defendant.

Plaintiff relies upon the third section of the Attachment Act, which provides for an attachment against one of several joint debtors. The cases, however, are in complete accord upon the doctrine that an attachment cannot be taken out against one joint debtor, unless the other joint debtors are also non-resident or absconding.

Curtis v. *Hollingshead,* 14 *N. J. L.,* 402.
Barber v. *Robeson,* 15 *N. J. L.* 17
Corbit v. *Corbit,* 50 *N. J. L.* 363
Bray v. *English Co.,* 75 *N. J. E.,* 447.

The duty of showing the non-residence of the other joint debtor rests upon the plaintiff.

Corbit v. *Corbit, ibid.*

Plaintiff has laid considerable stress in its brief on the case of *Thayer* v. *Treat,* but, as was pointed out by Judge SILZER, there was but one point involved in that case, and that was whether then Section 39 of the Practise Act applied to an attachment suit, and therefore the Court's attention was directed simply to that one point. That case, however, holds that non-residence of the defendants is an essential element.

The objections of defendant were not too late.

Plaintiff contends that this objection should have been raised prior to the appearance of the defendant. The affidavit and the complaint both alleged a personal indebtedness of the defendant, and there was therefore nothing to call forth any objection of non-joinder from the defendant.

As was said by Chief Justice HORNBLOWER in *Curtis* v. *Hollingshead, ibid* (p. 410):

> "An intelligent and honest plaintiff would hardly venture to make affidavit that Curtis was indebted to him in a certain amount, for goods sold and delivered to him, if they had been sold and delivered to W. M. Cade & Co." (A partnership of which Cade was a member.)

Upon the amendment of the complaint alleging a partnership indebtedness, defendant promptly alleged non-joinder, and, upon the jury deciding that defendant and Beckman were partners when the debt was contracted, he again raised the same objection in opposition to the entry of judgment. This practise was proper, as will hereafter appear.

Nor can defendant be estopped from raising this question after appearance, where the fact that it was a joint debt is alleged by the plaintiff after the appearance, because an appearance simply acknowledges that the defendant is brought into court to answer the demands which plaintiff may lawfully present in such action.

Hecksher v. *Trotter,* 48 *N. J. L.*, 424.

As was set up in the objection to the entry of judgment, plaintiff could not declare nor recover upon a joint debt unless it appeared that the other joint debtor was a non-resident. The writ was against the defendant alone, upon an allegation in the affidavit of an individual indebtedness.

If the appearance of the defendant operated to relieve plaintiff of his obligation to establish non-residence under the Attachment Act, and the suit then proceeded as if commenced by summons, he was still under the same obligation to join Beckman as a defendant, or show facts which would relieve him from this obligation.

If the case were governed by the law of a suit commenced by summons, subsequent to the appearance of defendant, then it would be governed by Section 2 of our act concerning obligations and joint debtors; but I contend that the obligation resting upon plaintiff when it took out its writ of attachment continued throughout the case, and that the writ is the basis of its judgment.

It would be a peculiar situation if a creditor of a partnership where all the partners were residents of the State, could sue one of the partners individually, primarily for the partnership debt. My

contention is that one joint debtor is entitled to the benefit of the judgment against his co-obligor as well as himself, unless his co-obligor is not a resident of the State, so that the Court cannot obtain jurisdiction over him.

The case of *Blessing* v. *McLinden,* 81 *N. J. L.,* 379, is the leading case in this State, by this Court, dealing with this statute. It is cited by plaintiff in its brief. In that case the suit was commenced against both joint contractors, and the writ was returned *non est* as to the other defendant, which satisfied the obligation resting upon the plaintiff.

Speaking of the facts in that case, and as a result of his discussion of the principles involved therein, and of this statute, Chancellor PITNEY sums up the situation in these words:

> "The result is that where one of two joint debtors resides within this jurisdiction and the other is a non-resident, and is not found to be served with process in this State, the plaintiff may have his judgment against the resident debtor, omitting the other. This was the practical outcome, in ordinary cases, under the common law practise of outlawry."

It is quite plain from this declaration that a similar practise would not be permitted on the part of the plaintiff where both defendants resided within the jurisdiction of the Court.

The defendant sufficiently challenged the jurisdiction of the Court to enter judgment where there was but one defendant, and it appeared on the papers that it was a joint debt.

Plaintiff contends that the objection should have been raised by a plea in abatement. In the first place, pleas in abatement were abolished by our new Practise Act, Section 38, now Rule 56 of the Supreme Court. In the next place, a plea in abatement, or its equivalent was unnecessary where it appeared on the face of the declaration, or some other pleading of the plaintiff, that the party omitted was still living, as well as that he jointly contracted.

Coles v. *McKenna*, 80 *N. J. L.*, 48.
Rex v. *Young*, 2 *Anstruther*, 448, 452.

The object of the plea in abatement was to advise the plaintiff that defendant claimed that the obligation was joint with himself and some other person who should have been joined as a defendant, and also that this defendant was living. It is quite obvious that such a course on the part of a defendant would be unnecessary where he himself alleged that it was a joint debt, and it did not appear that the other joint contractor was dead. In such a situation the defendant, instead of a plea in abatement, might demur, move in arrest of judgment, or sustain a writ of error.

Coles v. *McKenna*, *ibid.*
1 *Chitty*, 46.

Plaintiff having alleged the sale and delivery of the goods to the joint debtors on April 1st, 1913, the presumption that the defendant Beckman was still living on April 14th, 1914, when the writ issued, continued.

Where it is shown that a person is living and there are no facts or circumstances to overcome it, that presumption continues for a reasonable time.

Chamberlayne on Evidence, Section 1090.
Wilson v. *Hodges,* 2 *East,* 313.
Bartley v. *Boston Ry. Co.,* 198 *Mass.,* 163; 83 *N. E.,* 1093.

In this latter case the presumption was assumed for at least three years.

See also notes, 1 *Chitty,* 46, 9th Am. Ed.

Defendant therefore was not obliged to make any objections other than those already made, one being made during the progress of the trial and one prior to the entry of judgment. Counsel for appellant, in its brief, say that the case was tried upon the theory that both defendants were non-residents. There was no such theory as this on the part of the defendant. Appellant's brief (p. 4) says that defendant stated in his testimony that Beckman went to South America. This is incorrect. Defendant was the one that was going to South America. The State of the Case (p. 39) says Beckman was in Lake View, N. J., on April 1st, 1913, when the bill was contracted, which is a place in the outskirts of Paterson, and if there is any presumption to be gained from this, the presumption would be that he still continued to be a resident of this State until a writ against him had been returned *non est.*

There was no obligation on the part of the defendant, in view of the facts appearing in the pleadings of the plaintiff, to show affirmatively the non-residence of Beckman.

This obligation rested upon plaintiff. It was pursuing an unusual course in instituting a suit and entering a judgment against one of two joint contractors, and the obligation rested upon it to

show that it was within the state of facts which would entitle it to this extraordinary remedy. As was said by the Court in *Corbit* v. *Corbit, ibid,* on page 365, referring to the burden of showing non-residence of the co-contractor, in order to get the writ of attachment: "The Court will not infer, where it appears in the affidavit that defendant is but one of several joint debtors, that the other is a non-resident, there is no ground for such presumption."

This same reason is analogous where it appears in the pleadings that defendant is a joint debtor and there is a presumption of his co-debtor being alive.

I therefore submit that the judgment should be affirmed.

CLIFFORD L. NEWMAN,
Of Counsel with Appellee.

New Jersey Court of Errors and Appeals

QUACKENBUSH & SON, Plaintiffs-Appellants, vs. EDWARD R. ARLINGTON, Defendant-Appellee.	Action at Law. On Appeal from the Judgment of the Passaic County Circuit Court.

This suit was brought in the Circuit Court, County of Passaic, and tried before Judge SILZER and jury.

The suit was commenced by attachment. The affidavit on which the writ was issued sets forth that Edward R. Arlington was not a resident of the State of New Jersey, and that he owed the plaintiff the sum of $777.09 (see state of case, p. 3).

The defendant entered a general appearance and the plaintiff thereupon served him with the complaint charging that the defendant was indebted to the plaintiff for the sum of $714.23, with interest from May 6, 1913, on book account, copy of which was attached.

The defendant answering set up his

First defense, a denial of the purchase of said goods and chattels.

Second defense, the account sued on and mentioned in the complaint is charged on the books

of the plaintiff to the firm of Arlington & Beekman, said Arlington being the defendant in this suit.

That the plaintiff accepted of the defendant notes amounting to $325, or thereabouts, in full settlement of the claim which the plaintiff might have against the defendant by reason of the matters and things set forth in the complaint.

In consideration of said notes the plaintiff released the defendant from any liability he had on account of the matters and things set forth in aforesaid complaint.

Third defense, the defendant, individually and as a member of Arlington & Beekman, was adjudged a bankrupt by the United States District Court of the Eastern District of New York and that the plaintiff herein was scheduled as a creditor of the defendant individually for the sum of $325, represented by notes, etc., and also as a creditor of the plaintiff as a member of the firm of Arlington & Beekman to the amount of $600; that the defendant was discharged from the debt alleged to be due from said complaint.

The plaintiff joined issue on the answer of the defendant (see state of case, pp. 4-10).

The case was tried in the Passaic Circuit Court of the January term. It closed on plaintiff's cause (see state of case, p. 30).

The defendant's counsel moved for a nonsuit on grounds:

1. That there was not any evidence that a partnership existed at the time the goods were ordered and delivered and (see state of case, p. 34) adds further ground that there is a variance.

He does not state what the variance was and the Court admitted an amendment and denied the motion for a nonsuit.

The defendant was then sworn as a witness and the plaintiff's witnesses were recalled in rebuttal.

The Judge submitted to the jury the following propositions:

1. Did the plaintiff Quackenbush & Son accept two notes of defendant Arlington in settlement against all claims against Arlington? If you find that the plaintiff did not accept two notes, then

2. Were Beekman & Arlington partners on and after April 1, 1913, at the time when this bill was incurred?

The jury answered the questions as follows:

1. Did the plaintiff Quackenbush & Son accept the two notes of Arlington's in settlement of all claims against Arlington?
Answer, No.

2. Were Beekman & Arlington partners on and after April 1, 1913?
Answer, Yes.

3. What amount do you find is due on the account sued upon?
Answer, $825.20 (see state of case, p. 57).

After the jury had rendered its verdict the defendant then objected to accepting judgment against him on the following grounds:

1. The jury found that the debt was the debt of Arlington and Beekman and suit should have been against them as partners.

2. It does not appear that Beekman was a non-resident of New Jersey as an absconding debtor at the time the attachment was issued.

3. That the affidavit stated that the debtor was due from Arlington without reference to any liability as a partner and the plaintiff cannot declare or recover in this suit on a debt for which it is alleged the defendant is liable as a partner.

I.

The plaintiff insists that these requests of the defendant, which were made after the case was tried and the verdict rendered by the jury, should not be considered, as they were not raised during the progress of the trial.

The answer of the defendant shows that he clearly knew the matter for which he was sought to be held and the issues raised by the answer were the only issues that were raised during the trial.

After a case is tried and the jury charged, and the verdict returned, neither party has the right to raise new issue. The case was tried upon the theory that the defendant and Beekman were non-residents and no suggestions were made otherwise.

Arlington, in his testimony, says that Beekman went to South America and also that they disbanded at St. Louis (see state of case, pp. 36, 39, 47, 48, 49, 50). The defendant knew that Beekman was a non-resident and for that reason never raised the defense in the pleadings, or during the trial.

The Court, in its opinion, held (see state of case, p. 59):

1. That the complaint and proof failed to prove that Beekman and the other partner were non-residents of New Jersey and that such must be affirma-

tively proven, and that there was a variance between the face of the papers and the proof.

These issues were not raised by the answer of the defendant. He knew what suit was brought for because he sets up in his pleadings the defenses:

First, that there was no partnership.

Second, that the claim either against him individually or against him as a partner was discharged and released by reason of his bankruptcy.

Third, acceptance of notes and release.

Here are the issues and the plaintiff insists that under these issues there was nothing which required him to prove that the other defendant was a non-resident.

II.

The question as to Beekman being a non-resident was not raised at the trial.

If it had been, it would have been a simple matter to prove that he was a non-resident. In reading over the case the testimony of the defendant there appears sufficient evidence for the jury to find that he was a non-resident, if that question had been submitted to them. The Judge says (59): "The affidavits, complaint and proofs fail to show that Beekman, the other partner, is not a resident of New Jersey, and since it does not affirmatively appear that the other partner is a non-resident, no judgment built on such a foundation could stand."

While this statement might be correct on a notice to set aside an attachment if no appearance or waiver had filed, in the case at bar, by the answer filed, defendant waives any such proof and places himself upon these defenses: *One,* the denial of partnership, the *second,* of discharge through bank-

ruptcy which issues were found against him by the jury, and the *third,* release and discharge.

III.

The Court says (60), "The defendant had no right to assume that on the trial the plaintiff would allege a partnership debt when they had already sworn otherwise."

Here again the Court entirely overlooked the pleadings. The defendant himself knew the claims upon which he was being sued, and states in his pleadings that he was not a partner, and further sets up that he had settled the partnership debt by his own notes, and that he was discharged from partnership and individual indebtedness through bankruptcy.

The plaintiff insists that the issues having been made by the defendant prior to the trial the plaintiff was entitled to make whatever amendments were necessary in order for his complaint to correspond with the issue which the defendant raised. By so doing there could be no surprise and there was no surprise to the defendant by any such amendment. The case was tried on the issues raised by the pleadings. The Judge in his charge to the jury leaves them to determine (1) whether plaintiff accepted notes of defendant in settlement of claim against Beekman & Arlington, (2) whether a partnership existed at the time the debt was incurred. These were the issues raised at the trial. The plaintiff is entitled to a judgment for the amount found in his favor by the jury.

The plaintiff insists that the point of law raised by the defendant after the trial, and the verdict of

the jury, and by the Judge in his opinion, are not material in this suit.

Of the discussion of the case set forth in the opinion of the Court, the plaintiff says:

1. The affidavit upon which the attachment was issued in this case was in the proper form.

In the case of *Thayer* v. *Treat,* 39 *N. J. L.,* page 150, the Court held that attachment can be issued by force of the statute against one of several joint debtors when all of such debtors are non-residents.

In such proceedings if the defendant appears and pleads a non-joinder, such plea was bad (157).

In this case the affidavit for attachment was made by R. H. Thayer that Webster Treat owed the plaintiff the sum of $266.10 and was a non-resident. Appearance was entered for the defendant Treat.

The declaration alleged that Treat, Smith and others were indebted to the plaintiff, and etc.

Treat demurred and plaintiff answered by declaring against Treat alone.

The defendant pleaded joint obligations and the Court held (see state of case, p. 145), that when two or more are jointly bound or indebted either as joint obligors, partners or otherwise the writ of attachment may be issued against their separate or joint estate, or both, of such joint debtors or any of them either by his or their proper name or names or by the name or style of the partnership.

The Court says that Section 6, Attachment Act, means that in case of joint debt, attachment may be issued against one of the joint-debtors and that if three persons are of the debtors, and the judgment proceeds against one alone, it is the estate of that one which will be affected, for it is his interest in the property attached that is levied upon and consequently such interest alone can be sold.

According to the writ in *Thayer* v. *Treat* the defendant was properly in court and no objections have been made to fail to prove non-residence of the other defendant, the plaintiff would be entitled to the judgment.

In the case of *Corbet* v. *Corbet* (50 *N. J. L.*, 363) the Court held that in proceeding in attachment against one of several debtors the non-resident of the other joint-debtor must appear affirmatively in the affidavit procuring the writ.

This decision was reached on a motion to quash the writ.

But this case does not apply to the case at bar because a general appearance was entered and the defendant filed answer setting up *that he was not a partner, that he had settled the debt* and *that he was not a partner, that he was discharged by bankruptcy* without making any objection to the form on the affidavit or non-joinder parties.

In the case of *Connelly* v. *Lerche* (56 *N. J. L.*, 95) the Court held that after such appearance the suit proceeds *in personam* as a proceeding *in rem* as to the property attached and that a motion to quash the attachment and proceedings thereunder would be refused.

In the case of *Blessing* v. *McLinden* (81 *N. J. L.*, 379) the Court held (see state of case, p. 383) a non-joinder of one of several contractors can be availed of only by a plea in abatement.

The Court will only consider questions which arise during the trial and will not consider the abstract question which does not arise on existing facts.

Meader v. *Corwell,* 58 *N. J. L.,* page 375.
Funk & Wagnalls Co. v. *Stamm,* 88 *Atl.,* page 1050.

In the case of *Titus* v. *Penn. R. R.,* reported in 92 *Atlantic Reporter,* page 944, our Court of Errors held, that "Defendant's answer not containing any statement of the fact showing contributory negligence on the part of the plaintiff, and not pleading such a defense according to its legal effect, and such an issue not arising out of the complaint, the defense of contributory negligence was not put in issue, and not being available on the trial, cannot be raised on appeal."

"In this case it was held that the question raised was not necessary to be considered because it was not pleaded as a defense."

The record shows that the plaintiff was allowed to amend his complaint to read that Arlington & Beekman were partners and that the account was against the partnership for goods sold and delivered to the partners, etc., and proof was made and allowed thereon, the defendant's counsel cross-examining the witnesses in reference thereto. Nevertheless, the defendant did not amend his answer or include in his defense any allegations as to the non-residence of the partner Beekman, and the case went to the jury without the defendant raising this issue, so that the question thus raised now is not, however, necessary to be considered, except it was pleaded as a defense.

In the case of *Roberson* v. *Crichfield,* reported in 94 *Atlantic Reporter,* page 583, our Court of Errors held, "Where a question discussed in the briefs on appeal was not raised below in its legal aspect, it cannot be considered on an appeal."

The plaintiff insists that judgment should be rendered in favor of the plaintiff for the amount found to be due him by the jury.

Respectfully submitted,

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