Lewis, Moot & Lewis,
Attorneys and Counselors,
Buffalo, N.Y.
GEORGE L. LEWIS, ADELBERT MOOT,
L. L. LEWIS, JR

Nov. 26, 1892.

My dear Judge:-

Your brief material did not reach me until Thanksgiving day. I had already prepared a brief for the printer, but I overhauled the last part of it and put in the authorities and propositions on jurisdiction, contained in yours to me.

The willful part is not of much consequence in the Court of Appeals, because they will treat that as having been passed upon below. The only question they will really consider will be whether or not, first, we can raise the question of jurisdiction and the insufficiency of the affidavit, in the way which we took to raise it; second, whether or not the initial affidavit conferred jurisdiction upon the Court to make the orders complained of. The Special Term thought the affidavit insufficient, but that we could only review the orders on appeal therefrom. I pointed out to the General Term that this was erroneous, in as much as the Statute and the cases both agree that orders made ex parte or by default, cannot be reviewed by appeal, but that the correct practice is to move to set them aside, as we did. The General Term still held the affidavit insufficient, but thought we should have moved to set the orders aside before the Judge who granted them, and I have now pointed out to the Court of Appeals that this view is equally erroneous, because motions are made every day before judges, to set aside injunctions, attachments, orders of [illegible] and

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like orders, on the ground that the affidavits on which they were granted were not sufficient to warrant the orders made.

The Special County Judge is regarded as a Justice of the Supreme Court, in a case of this character, and, therefore, the case cannot be argued on the theory of limited jurisdiction. As the case was pending in the Supreme Court, and he was regarded as sitting in the Supreme Court, the jurisdiction of the Court and the Judge is not limited.

The cases you cite, however, have a clear application, for the reason that no judge or justice of the Supreme Court has power to grant the orders complained of, except upon an affidavit showing by "competent written evidence" the jurisdictional facts which are required to be shown before the order can be made.

It comes down, then, to this.- Are affidavits on information and belief alone, competent written evidence, and, if not, can orders based on such affidavits be set aside on motion, as we undertook to set them aside?

The authorities seem to be conclusive on the first proposition, if authorities on so plain a proposition are necessary at all, and the Statute itself, Code Sec. 2433, Sub. 1, settles the second.

I shall go down to-morrow night and do the best I can, and, in the course of three or four weeks, you will probably know the result.

Very hastily yours,
Adelbert Moot.

To
Hon. A. W. Tourgee,
Mayville, N.Y.

Per W.