



bond made 31st January, 1830, by the said Higgens, in the penal sum of one thousand dollars, &c.” The objection to this affidavit is, that the affiant does not state how he knows of the indebtedment. And the case of *Wright v. Cogswell* [Case No. 18,074] is referred to as sustaining the objection. In that case the affidavit stated, “that he was informed, and verily believes, the defendant was justly indebted, &c.” And this, the court say, is no more than any one could say from the legal import of the obligation. That the statute required something more than the belief of the affiant.

Now, the affidavit under consideration states the indebtedment in positive terms. The affiant says the defendant is justly indebted to the plaintiffs in the sum specified. Is it necessary to state how he came by this knowledge? It would seem to me not. He swears to the fact, and he could not do so without a personal knowledge of the fact. And can it be presumed, against his statement, that he has not a knowledge of the fact. This would be in violation of all known rules of construction, and especially in giving a construction to an affidavit. This was an *ex parte* proceeding. No notice was necessary, and of course there could be no cross-examination. And what the witness has sworn to must be taken as true, and it seems to me that the affidavit is as full and as positive as the statute requires. I am, therefore, in favor of overruling the motion. The district judge differed in his construction of the affidavit under the statute, but the court being divided the motion failed.

<sup>1</sup> [Reported by Hon. John McLean, Circuit Justice.]