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New Jersey Supreme Court

ESSEX COUNTY.

SAMUEL PAPARO, *Plaintiff,* vs. BENJAMIN FARBER, *Defendant.*	*Transcript of Pleadings for Trial.*

Meyer C. Ellenstein and Wolber & Gilhooly, attorneys for plaintiff.

Benjamin M. Weinberg, attorney for defendant.

TRANSCRIPT OF PLEADINGS.

Complaint

Plaintiff, Samuel Paparo of the Town of Irvington, County of Essex and State of New Jersey, says that:

1. On June 27, 1927 the defendant and one Vincent Reno entered into a recognizance to the plaintiff, whereby the defendant and the said Vincent Reno acknowledged themselves and each severally for himself to owe to the plaintiff the sum of $10,000 upon the express condition that if the said Vincent Reno be condemned in an action at law in the New Jersey Supreme Court at the suit of the plaintiff (the plaintiff in said action at law being the same as in this present action) he shall pay the costs and condemnation of the Court, or render himself into the custody of the Sheriff of the County of Essex for the same,

or if he fail so to do, that the said Benjamin Farber will pay the costs and condemnation for him or render him into the custody of the Sheriff of the said county.

2. On June 20, 1928, judgment was rendered in the New Jersey Supreme Court holden at Newark, New Jersey in the sum of $10,000 for the plaintiff Samuel Paparo against the said Vincent Reno after trial and verdict and costs thereon taxed in the sum of $72.28.

3. On June 28, 1928 a writ of *capias ad satisfaciendum* and *fieri facias de bonis et terris,* addressed to the Sheriff of Essex County was issued out of said court on said judgment against the body of the said Vincent Reno and his lands and tenements and goods and chattels, rights and credits, which writ was returned by the said sheriff unsatisfied.

4. The said judgment recovered on June 20, 1928 is unpaid and unsatisfied and no part thereof paid to the plaintiff.

5. The recognizance referred to is unpaid and unsatisfied and still in full force and effect and no part thereof paid to the plaintiff.

6. The said Vincent Reno has not rendered himself into the custody of the Sheriff of Essex County nor has the said Benjamin Farber, defendant herein, rendered the said Vincent Reno into the custody of said sheriff.

7. The defendant owes the plaintiff the sum of $10,000, as set forth in Schedule A annexed hereto and made a part hereof.

8. Annexed hereto and made a part hereof and marked Exhibit B is a copy of said recognizance.

Judgment will be claimed in the amount of $10,000, together with lawful interest and costs of suit.

MEYER C. ELLENSTEIN,
Attorney of Plaintiff.

SCHEDULE A.

Judgment in favor of Samuel Paparo..$10,000.

SCHEDULE "B."

NEW JERSEY SUPREME COURT.

DANIEL PAPARO, *Plaintiff,*	*Action at Law.*
vs.	
VINCENT RENO, *Defendant.*	*Recognizance.*

STATE OF NEW JERSEY, COUNTY OF ESSEX. } *ss.*

BE IT REMEMBERED, that on the twenty-seventh day of June, nineteen hundred and twenty-seven Vincent Reno and Benjamin Farber of the County of Essex, New Jersey, personally appeared before me, Henry Hahn, one of the Supreme Court Commissioners of the State of New Jersey, and severally acknowledged themselves to owe unto Daniel Paparo the plaintiff, the sum of Ten thousand ($10,000) dollars, each

to be levied upon their several goods and lands upon condition that if the defendant, Vincent Reno shall be condemned in this action, at the suit of Daniel Paparo, the plaintiff, he shall pay the costs and condemnation of the Court or render himself into the custody of the sheriff of said county, for the same, or if he fails so to do, that the said Benjamin Farber will pay the costs and condemnation for him, or render him into the custody of the sheriff of the said county.

Taken and acknowledged the day and year above written before me.

HENRY HAHN,
A Supreme Court Commissioner of
New Jersey.

VINCENZO RENO (SEAL)
BENJ. FARBER (SEAL)

NEW JERSEY SUPREME COURT.

DANIEL PAPARO,	*Plaintiff,*	*Action at Law.*
vs.		
VINCENT RENO,	*Defendant.*	*Justification.*

STATE OF NEW JERSEY,
COUNTY OF ESSEX. } *ss.*

Benjamin Farber, being duly sworn, on his oath says, that he is the surety in the within-named bond; that he is a freeholder in the County of Union, New Jersey, and resides at 96 Cherry street, Rahway, N. J. and has property subject to execution worth the sum of twenty thousand ($20,000) dollars, over and above all his just debts and liabilities.

BENJ. FARBER.

Subscribed and sworn to before me, this 27th day of June, 1927.

HENRY HAHN,
Supreme Court Commissioner of New Jersey.

Filed August 4, 1928.

Answer.

The defendant, by way of answer to the plaintiff's complaint, says:

1. He admits that on June 27, 1927, he entered into a recognizance to the plaintiff, whereby he and one Vincent Reno acknowledged themselves indebted to the said plaintiff, as stated in said recognizance, to which, this defendant, for greater certainty, begs to refer.

2. He has no knowledge or information as to the allegations in paragraphs 2, 3, and 4, and leaves the said plaintiff to make due proof thereof.

3. He denies the allegations in paragraph 5.

4. He has no knowledge as to the allegations in paragraph 6, concerning the actions of the said Vincent Reno.

5. He denies the allegations in paragraph 7.

DEFENSES.

By way of separate and distinct defenses to plaintiff's complaint, this defendant says:

FIRST SEPARATE DEFENSE.

The capias *ad satisfaciendum* issued at the instance of the above-named plaintiff, against one Vincent Reno, mentioned in plaintiff's complaint, did not remain in the hands of the sheriff for the period of four days before its return, unsatisfied, as required by law.

SECOND SEPARATE DEFENSE.

While the proofs submitted at the time the order to hold to bail in the action brought by

WOLBER AND GILHOOLY
COUNSELLORS AT LAW
PRUDENTIAL BUILDING
763 BROAD STREET
NEWARK, N. J.
MULBERRY 3343

JOSEPH G. WOLBER
EDWARD J. GILHOOLY
JOHN H. YAUCH, JR.
THOMAS GLYNN WALKER

June 9, 1930.

Mr. Victor T. L. Meyers, Sergeant-at-Arms,
New Jersey Court of Errors and Appeals,
State House,
Trenton, New Jersey.

My dear Mr. Meyers:

During the oral argument on the appeal in the case of Paparo vs. Farber counsel was given permission to enter into a stipulation pertaining to certain facts in connection with the appeal. We enclose herewith eighteen copies of the stipulation and would kindly ask you to distribute the same among the members of the court.

Thanking you, we are,

Very truly yours,

Wolber & Gilhooly.

EJG:M
ENC.

the said plaintiff against the said Vincent Reno, was made, upon which proofs the said order to hold to bail, as aforesaid was made, showed that the said Vincent Reno was guilty only of alienating the affections of the wife of the said plaintiff, Samuel Paparo, the complaint filed in the action brought by the said plaintiff against the said Vincent Reno, for whom this defendant became surety on the recognizance, upon which, this action is based, is variant to and amendatory of the said original proofs submitted by the said plaintiff, which variations and amendments are as follows:

(a) The said complaint against the said Vincent Reno, charged in the first count, that he, the said defendant, Vincent Reno, was guilty of alienating the affections of plaintiff's wife, and with having illicit intercourse with her.

(b) Said complaint, in its second count, charged said Vincent Reno with having wilfully and maliciously slandered the said Samuel Paparo, by reason of untruthful statements concerning his being diseased with an ailment known as syphillis.

(c) Said complaint, in its third count, charged that said Vincent Reno, as a practicing physician in the City of Newark, County of Essex and State of New Jersey, did maliciously advise plaintiff that he had a venereal disease known as syphillis, for which he, the said Vincent Reno, undertook to treat him, the said plaintiff, but that by reason of the careless, negligent and wilful conduct of the said Vincent Reno, in and about his course of treatment, to the said plaintiff, he, the said plaintiff suffered great bodily injury and anguish of mind and consequent money

loss and damage, wherefore the said recognizance given by this defendant, Benjamin Farber, became null and void and of no force and effect whatever.

THIRD SEPARATE DEFENSE.

The amount of damages claimed by the plaintiff, Samuel Paparo, in his action against the defendant, Vincent Reno, was the sum of $50,000 on the first count of his complaint; the sum of $25,000 on the second count of his complaint, and the sum of $10,000, on the third count of his complaint, while the amount to which the said Vincent Reno was held to bail, was $5,000, and the recognizance given by him was in double said sum, or $10,000, whereby and because of the actions brought by the said plaintiff against the said Vincent Reno, in the amounts hereinabove mentioned, the said recognizance given by this defendant, Benjamin Farber, became null and void and of no force and effect whatever.

FOURTH SEPARATE DEFENSE.

A general verdict was rendered in favor of the said plaintiff against the defendant, Vincent Reno, on all the counts mentioned in the "Second Separate Defense," filed herein, by the jury before whom the said cause of action of the said Samuel Paparo against the said Vincent Reno, was tried, in the sum of $10,000; whereby and because of the fact that the proofs submitted at the time the order to hold to bail was made, upon which proofs the said order to hold to bail, as aforesaid, was made, showed that the said Vincent Reno was guilty only of alienating the affections of the wife of the said plaintiff, Samuel Paparo, the said recognizance given by

this defendant, Benjamin Farber, became null and void and of no force and effect whatever.

FIFTH SEPARATE DEFENSE.

The judgment obtained by the said plaintiff against the said Vincent Reno, was in the sum of $10,000, damages, and costs amounting to $72.28, which is in excess of the amount for which the said defendant is liable, if he is at all liable to the said plaintiff, in damages, wherefore, the said recognizance given by this defendant, Benjamin Farber, became null and void and of no force and effect whatever.

BENJAMIN M. WEINBERG,
Attorney of Defendant.

Filed December 10, 1928.

Reply.

The plaintiff, replying to the amended answer of the defendant says that:

1. The matters set forth and contained in the first, third and fifth separate defenses do not constitute a legal defense to the complaint and at or after the trial the plaintiff will move to strike out said defenses on that ground.

2. As to the matters set forth in the second separate defense, the plaintiff admits it to be true that the complaint filed by him against Vincent Reno contained three counts; viz, the first count charged the said Vincent Reno with having alienated the affections of plaintiff's wife; the second count charged the said Vincent Reno with having slandered the plaintiff; the third count

charged the said Vincent Reno with malpractise as a physician. Plaintiff alleges that the third count in said complaint, viz, the charge of malpractise, was withdrawn at the time of the trial and said count was abandoned by the plaintiff, and said action was presented to the jury on the charge of alienation of affections and slander and no other charge. Plaintiff alleges that the judgment obtained by him against the said Vincent Reno was not a departure from the affidavits upon which the order to hold to bail was entered.

3. As to the matters set forth in the fourth separate defense the plaintiff denies that a general verdict was rendered in favor of him against the defendant, Vincent Reno, on all the counts mentioned in the "second separate defense," of this defendant's answer, but on the contrary the plaintiff alleges that a verdict was rendered in his favor in the sum of ten thousand dollars ($10,000) on the charge of alienation of affections and slander. The plaintiff further says that the Supreme Court Commissioner made an adjudication that sufficient proof had been given to satisfy him that Samuel Paparo had a suit or cause of action against Vincent Reno for slander and for the alienation of the affections of Rose Paparo, wife of Samuel Paparo, by the said Vincent Reno.

MEYER C. ELLENSTEIN and
WOLBER & GILHOOLY,
Attorneys for Plaintiff.

Filed October 25, 1929.

Rejoinder.

The defendant, by way of rejoinder to plaintiff's "Reply to Amended Answer," of this defendant, says:

1. Although the said Vincent Reno was held to bail on the charges that he was alienating the affections of the wife of the said plaintiff, Samuel Paparo, and had slandered him, the said Samuel Paparo, there was no legal proof before the Commissioner who made the order to hold the said Vincent Reno to bail, that he, the said Vincent Reno, had slandered the said plaintiff, wherefore, and by reason of the fact that the said plaintiff thereafter declared against this defendant in an action for slander, the said defendant was discharged as surety for the said Vincent Reno, and plaintiff is now without remedy against this defendant.

2. The defendant alleges that in view of the admission by the said plaintiff, in his "Reply to Amended Answer," that the complaint filed against the said Vincent Reno, contained a count alleging a cause of action for damages for malpractice as a physician; and because of the further fact that there were no proofs before the Commissioner of such a right of action, and that the said Vincent Reno was not held to bail on any such allegation or charge, this defendant was discharged as surety for the said Vincent Reno, and the said plaintiff is without remedy against this defendant.

3. Defendant further alleges that the said plaintiff did not withdraw the count demanding damages for malpractice, as aforesaid, but on the contrary, this defendant alleges that the

said plaintiff, upon the trial of the action brought by him against the said Vincent Reno, attempted to prove said malpractice, but failed to do so, and therefore, his attempted withdrawal thereafter, or abandonment of the said count, as alleged in plaintiff's "Reply to Amended Answer," was immaterial and of no consequence, and this defendant was thereupon discharged as a surety for the said Vincent Reno, and the said plaintiff is without legal remedy against him.

BENJAMIN M. WEINBERG,
Attorney for Defendant.

Filed January 10, 1929.

I, FRED L. BLOODGOOD, Clerk of the Supreme Court of the State of New Jersey do certify that the foregoing is a true transcript of the pleadings in the above-stated cause as the same remain on file in my office,

IN TESTIMONY WHEREOF I have set my hand and the seal of said Court (SEAL) at Trenton, this third day of December, A. D. nineteen hundred and twenty nine.

FRED L. BLOODGOOD,
Clerk.

CONSENT TO AMENDMENT OF RECOGNIZANCE.

NEW JERSEY SUPREME COURT.

ESSEX COUNTY.

SAMUEL PAPARO, *Plaintiff,*	*Action at Law.*
vs.	*Consent to Amendment of Recognizance.*
BENJAMIN FARBER, *Defendant.*	

It is hereby consented and agreed that the recognizance signed by Benjamin Farber, as bail, in an action brought by the above-named plaintiff against one Vincent Reno, in which the plaintiff's name is stated as "Daniel Paparo" be amended so that wherever the name "Daniel Paparo," appears, in the said recognizance, it shall be substituted by and changed to the name "Samuel Paparo."

Dated: December 6, 1928.

BENJAMIN M. WEINBERG,
Attorney for Defendant.

STIPULATION.

NEW JERSEY SUPREME COURT.

ESSEX COUNTY.

SAMUEL PAPARO, *Plaintiff,*		*Action at Law.*
vs.		
BENJAMIN FARBER, *Defendant.*		*Stipulation.*

It is hereby stipulated and agreed by and between the attorneys for the respective parties in the above-entitled cause as follows:

1. Annexed hereto are all of the affidavits upon which the order to hold Vincent Reno to bail was based.

2. Annexed hereto is a copy of the order to hold to bail.

3. Annexed hereto is the complaint and answer in the suit of Samuel Paparo vs. Vincent Reno.

4. Annexed hereto is a recognizance entered into by Vincent Reno and Benjamin Farber to Samuel Paparo, together with justification of surety thereon.

5. Annexed hereto is an excerpt from the testimony in the suit of Samuel Paparo vs. Vincent Reno.

6. It is stipulated and agreed that the foregoing shall be received in evidence to the same effect as if the originals had been produced.

Stipulation.

7. It is further stipulated and agreed that on June 28, 1928, a writ of capias *ad satisfaciendum* and *fieri facias et bonis et terris* was issued out of the New Jersey Supreme Court, directed to the Sheriff of Essex County, against the body of the said Vincent Reno, and his lands and tenements, goods and chattels, rights and credits, and that the writ was returned "*non est*" as to the defendant's body, and unsatisfied as to his lands, tenements, goods and chattels.

8. It is fu rther stipulated and agreed that the writ was received by Conrad Deuchler, Sheriff of Essex County, on July 2, 1928 and was returned, as aforesaid, on said last mentioned date.

9. It is further stipulated and agreed that Benjamin Farber has not rendered Vincent Reno into the custody of the Sheriff of the County of Essex, nor has he paid the costs and condemnation of the court.

10. It is further stipulated and agreed that a final judgment was rendered in favor of the plaintiff, Samuel Paparo and against Vincent Reno in the New Jersey Supreme Court on June 23, 1928 for the sum of ten thousand dollars ($10,000) damages and seventy-two dollars and twenty-eight cents ($72.28) costs.

11. It has been heretofore stipulated and agreed that the recognizance signed by Benjamin Farber as bail in an action brought by the said Samuel Paparo against one Vincent Reno, in which the plaintiff's name is stated as "Daniel Paparo" be amended so that wherever the name "Daniel Paparo" appears in said recognizance,

it shall be substituted by and changed to the name "Samuel Paparo."

WOLBER & GILHOOLY,
Attorneys for Plaintiff.

BENJAMIN M. WEINBERG,
Attorney for Defendant.

STATE OF NEW JERSEY,
COUNTY OF ESSEX. } *ss.*

SAMUEL PAPARO, of full age, being duly sworn according to law upon his oath deposes and says:

That I have been legally married to Rose Paparo for the past seven years and had been living happily with her until about February 9, 1927.

That I am about to commence an action against Vincent Reno and that the ground of said action is as follows:

On or about the 11th day of February, 1927 the said Vincent Reno did wilfully, wrongfully, unjustly and maliciously induce Rose Paparo, my wife, to leave me and did thereby alienate the affections of my wife, and the said Vincent Reno did further induce my wife, Rose Paparo to come to his residence at #200 Highland avenue, Newark, N. J. to live with him and the said Vincent Reno has been living with the said Rose Paparo since that time to the present and is still living with her.

My wife, Rose Paparo, first met the said Vincent Reno, on or about February 1, 1927 at his office at 85 Clifton avenue, Newark, N. J. where she went to accompany a friend who was being treated by Reno. On or about the 8th day of February, 1927 Reno induced my wife to undergo some sort of treatment at his office where he

told her she was diseased and that it would be necessary for him to examine me. About three days later I went to see Reno and he took a blood test and informed me that I had syphyllis and that I was the cause of my wife's syphylletic condition.

The said Reno thereupon suggested that if my wife, Rose Paparo would be a nurse in his office, he would treat her without charge otherwise he would have to charge me $60 each week for treating both my wife and myself. He instructed my wife and me not to have intercourse with each other for a period of at least two years.

My wife, who was very much worried about our conditions, persuaded me to allow her to work for Reno as a nurse in consideration of his treatment of her. I finally permitted her to do so and she came home every night for a period of about three weeks. During that period Reno urged me on numerous occasions to either separate from or divorce my wife so that he could more easily cure both of us.

On or about March 1, 1927 I became suspicious and was examined by another physician who found nothing wrong with me. I told my wife about it and insisted that she leave Reno's employ and be examined by another physician. The following night my wife did not come home. I phoned Reno and asked for my wife and he told me he knew nothing about her and refused to tell me where she was. Since then and at present my wife has been living at Reno's home at 200 Highland avenue, Newark, New Jersey while she worked at his office. I repeatedly went to see my wife at Reno's office on Clifton avenue to ask her to return to me but she refused saying that Reno said we were both diseased. I told her to go to another doctor to see whether she

had any sickness but she refused. During these visits to Reno's office and home he repeatedly told me in the presence of my wife that the best thing to do was to obtain a divorce.

I saw Reno on numerous occasions during the months of March, April and May, 1927 at the above addresses to try to induce him to permit my wife to return to me and the last time I saw him in his office, on or about May 20th, I told him that if he did not release my wife, I would start legal action against him, whereupon he Vincent Reno said to me that as soon as I started any trouble for him, he would leave this State and take my wife with him and I would never see either him or my wife again, and he warned me that if I came near him again he would leave with my wife.

SAMUEL PAPARO.

Subscribed and sworn to before
me this 25th day of June,
1927.

MEYER C. ELLENSTEIN,
Attorney at Law of N. J.

STATE OF NEW JERSEY,
COUNTY OF ESSEX. } *ss.*

MARY FULGINITI, being duly sworn according to law, upon her oath, deposes and says:

That I am the sister of Rose Paparo; that on or about February 1, 1927 she and I were at the office of Vincent Reno at 85 Clifton avenue, Newark, N. J, while he was treating a friend whom we accompanied to his office. While we were at Reno's office on the date aforesaid, said Reno

asked whether my sister Rose Paparo was single and when he was told that she was not, he said that he had a sweetheart who looked just like her whom he was crazy about and he made other complimentary remarks to my sister. Said Vincent Reno at the time and place aforesaid also offered to treat my sister's father-in-law who was ill at the time without charge because of his admiration of Rose as he expressed it and he did later treat Rose's father-in-law without charge but insisted that Rose accompany him to the said father-in-law's home.

About March 2, 1927, Samuel Paparo, my sister's husband told me that Rose did not come home and after he told me what had happened I called Vincent Reno on the telephone and asked him where my sister was. He told me he didn't know. The next day my sister, Rose Paparo phoned me and said she would not go home because her husband was diseased and he had ruined her life. She said she was going to get a divorce. I phoned Vincent Reno and he finally told me that my sister was staying at the St. Francis Hotel in Newark, N. J. I went to the hotel to ask her to return to her husband but she would not because she said Reno had told her her husband was diseased.

I tried to see my sister again, two days later, when I discovered she was living at Reno's house. I went to his home at 200 Highland avenue, Newark, N. J. and to his office at 85 Clifton avenue, Newark, N. J. numerous times during March, 1927 to induce him to permit my sister to return to her husband Samuel Paparo. He refused to listen to me, or let me see my sister and when I told him that Samuel would take legal action against him if he refused to let my sister return home, he Vincent Reno said that he would leave

New Jersey and go away with my sister so that my sister's husband would not find either of them.

MARY FULGINITI.

Subscribed and sworn to before
me this 25th day of June,
1927.

MEYER C. ELLENSTEIN,
An Attorney at Law of New Jersey.

STATE OF NEW JERSEY, }
COUNTY OF ESSEX. } *ss.*

RAFFEALA PAPARO, being duly sworn according to law upon her oath deposes and says:

That I am the mother of Samuel Paparo; that numerous times during the month of March I went to Vincent Reno at 85 Clifton avenue in the City of Newark, County of Essex and State of New Jersey to ask him to send my daughter- in-law back to her husband Samuel Paparo. Vincent Reno told me that my son Samuel Paparo had been to see said Vincent Reno to ask him to send his wife Rose Paparo back to her husband Samuel Paparo. Vincent Reno told me that if my son came around there again to see him or tried to make trouble for him, he Vincent Reno, would go back to California immediately and would take my son's wife Rose Paparo with him, and I would never see my daughter-in-law again.

RAFFEALA PAPARO.

Subscribed and sworn to before
me this 23rd day of June,
1927.

JANET C. KERU,
Notary Public of New Jersey.

Stipulation—Order to Hold to Bail.

NEW JERSEY SUPREME COURT.

ESSEX COUNTY.

SAMUEL PAPARO, *Plaintiff,*	*Action at Law.*
vs.	
VINCENT RENO, *Defendant.*	*Order to Hold to Bail.*

I, MILTON M. UNGER, a Supreme Court Commissioner of the State of New Jersey, having read the affidavits of Raffeala Paparo, Mary Fielginiti and Samuel Paparo, and having duly considered them, do hereby adjudge that sufficient proof has by said affidavits been given to satisfy me that Samuel Paparo has a suit and cause of action, against Vincent Reno for slander and for the alienation of the affections of the said Rose Paparo, wife of Samuel Paparo by the said Vincent Reno, and that said Vincent Reno intends to leave the jurisdiction of this court, and will not be present in the jurisdiction of this court at the time of the rendition of the judgment.

It is, therefore, ORDERED, that the said Vincent Reno be held in bail in the sum of five thousand dollars ($5,000) to answer unto the said Samuel Paparo in an action at law.

Dated this 27th day of June, A. D., 1927.

MILTON M. UNGER,
Supreme Court Commissioner.

Stipulation—Transcript of Pleadings.

Entered June 28, 1927.
On motion of,
MEYER C. ELLENSTIEN,
Attorney.

NEW JERSEY SUPREME COURT.

ESSEX COUNTY.

SAMUEL PAPARO, *Plaintiff*, *vs.* VINCENT RENO, *Defendant.*	*Transcript of Pleading for Trial.*

Meyer C. Ellenstein, attorney for plaintiff.
William Ross Strickland, attorney for defendant.

(Summons issued June 27, 1927.)

The plaintiff, Samuel Paparo, residing in the Town of Harrison, County of Hudson and State of New Jersey complaining of the defendant says that:

FIRST COUNT.

1. He was legally married to Rose Paparo on October 12, 1920 in Brockton, Mass., that he had lived happily with his wife in marital relationship from that date up to the time of the acts hereinafter complained of.

2. That at various times hereinafter mentioned, the defendant, Vincent Reno, contriving wilfully, knowingly, wrongfully, unjustly and maliciously intending to injure, prejudice and aggrieve the plaintiff in his enjoyment of the companionship, aid, society, protection and happiness derived from his wife did perform the acts hereinafter charged and thereby did alienate his wife's affections.

3. The defendant, Vincent Reno, did first meet the plaintiff's wife, Rose Paparo, on or about the 1st of February, 1927, while the said Rose Paparo, was accompanying a friend to the office of the defendant who is a practicing physician in the City of Newark, New Jersey; that at said time the defendant by means of flattery and other acts did maliciously induce said Rose Paparo, the plaintiff's wife to return to his office at various times thereafter and did wrongfully and maliciously undertake to treat Rose Paparo wife of the plaintiff, for a contagious disease known as syphyllis when in fact the said Rose Paparo was not afflicted with said disease.

4. That on or about the 8th day of February, 1927, the defendant did inform Rose Paparo that it would be necessary for him to examine plaintiff and did induce plaintiff's wife to persuade plaintiff to call at defendant's office. Plaintiff did call at defendant's office and after an examination by defendant was wrongfully, maliciously and unjustly informed in the presence of plaintiff's wife that he was afflicted with a certain contagious and infectious disease commonly known as syphyllis, that defendant Vincent Reno did wilfully, maliciously, knowingly, unjustly intending to prejudice plaintiff's wife against the plaintiff, inform said Rose Paparo that her dis-

eased condition was acquired from plaintiff, her husband and defendant did further instruct the said Rose Paparo, to abstain from sexual intercourse with her husband the plaintiff, for a period of at least two years and did at different times thereafter advise both plaintiff and his wife to divorce each other.

5. That the defendant, Vincent Reno, by means of the acts hereinbefore complained of did wilfully, knowingly, wrongfully, unjustly and maliciously induce the plaintiff's wife, Rose Paparo, to leave her husband and to live with defendant in illicit relationship and defendant did and still does up to the present time, improperly, wrongfully and with evil intent harbor plaintiff's wife and did and still does up to the present time persuade her not to return to plaintiff her husband.

6. That by reason of the wilful, wrongful, unjust, malicious and evil acts of the defendant, hereinbefore complained of, the defendant Vincent Reno, has prejudiced and aggrieved plaintiff in his enjoyment of the companionship and society, protection and happiness derived from his wife, Rose Paparo, and has alienated the affection of the plaintiff's wife, that the defendant, Vincent Reno, has by his evil acts defiled the marriage bed of plaintiff, has invaded plaintiff's exclusive right to marital intercourse with his wife, that the said defendant has induced plaintiff's wife to violate her conjugal duties and has deprived plaintiff of his consortium with his wife, of his comfort in her society in that respect in which her right is peculiar and exclusive.

7. That by reason of the defendant's acts plaintiff, Samuel Paparo, has suffered and will

suffer untold mental agony and wounded sensibilities.

8. By reason of all of which as aforesaid said plaintiff has been damaged by the defendant in the sum of fifty thousand ($50,000) dollars.

WHEREFORE, plaintiff demands as damages on the first count against the defendant the sum of fifty thousand ($50,000) dollars together with all costs and disbursements in this suit.

SECOND COUNT.

1. That on or about the 20th day of February, 1927 and at various times thereafter, the said defendant, Vincent Reno, did have certain conversations with persons other than the plaintiff who attempted to induce said Vincent Reno to permit Rose Paparo, wife of plaintiff to return to her husband.

2. That during the aforementioned conversations the said Vincent Reno did falsely and maliciously say of the plaintiff the following:

> "He (meaning Samuel Paparo) is diseased. He has syphillis and his wife would be a damned fool to go back to him."

3. The defendant made the foregoing statement regarding the plaintiff at the times aforesaid, maliciously did well knowing the same to be false and slanderous.

4. The plaintiff by reason of the foregoing false and slanderous statement wilfully and maliciously made by the said defendant, has been injured in his good name, fame and credit and brought into scandal, disgrace and infamy with and amongst the members of his community and other worthy citizens of the state and defendant

has thereby caused the plaintiff to be by those neighbors and citizens suspected of being afflicted with the infectious and contagious disease so maliciously and falsely attributed to him.

5. By means of said false, slanderous statement, maliciously and wantonly made by the defendant to other persons, the former associates in business and society of plaintiff have refused and still refuse to have any transaction or relations with the plaintiff.

6. By reason of all of which as aforesaid, plaintiff has been damaged by the defendant in the sum of twenty-five thousand ($25,000) dollars.

WHEREFORE, plaintiff demands as damages against the defendant on this second count the sum of twenty-five thousand ($25,000) dollars together with all costs and disbursements in this suit.

THIRD COUNT.

1. The defendant, Vincent Reno, is a practising physician in the City of Newark, County of Essex and State of New Jersey.

2. That on or about the 11th day of February, 1927 and at various times thereafter for a period of less than a month, the plaintiff did call at the office of said defendant for medical advice care and attention.

3. That it was the duty of said defendant, as a practising physician to carefully, properly, honestly and with a view to the welfare of his patient advise, care for and treat them in the manner aforesaid and this duty he owed to the plaintiff at the aforementioned times.

4. At the times aforementioned, while plaintiff was under the advice, care and treatment of plaintiff, defendant did wilfully, knowingly, wrongfully, carelessly, negligently and maliciously advise plaintiff that he was afflicted with a venereal disease commonly known and designated as syphyllis.

5. That in accordance with said wrongful, careless, negligent and improper advice, plaintiff did undertake to treat and did treat plaintiff for said disease to plaintiff's great damage and injury.

6. That as a result of said wilful, malicious, careless and negligent acts of defendant, plaintiff suffered great bodily injury in the course of said treatment.

7. And as a result of such wilful and malicious and negligent malpractice by the defendant, the plaintiff has suffered untold mental anguish.

8. By reason of such wilful and negligent malpractice by the defendant, plaintiff did expend and will become liable to expend large sums of money both to the defendant and for other medical attention.

9. By reason of all of which as aforesaid plaintiff has been damaged by the defendant in the sum of ten thousand ($10,000) dollars.

WHEREFORE, Plaintiff demands as damages against the defendant on this third count the sum of ten thousand ($10,000) dollars together with all costs and disbursements in this suit.

MEYER C. ELLENSTEIN,
Attorney for Plaintiff.

Filed July 1, 1927.

Stipulation—Recognizance.

Defendant, of the City of Newark, County of Essex and State of New Jersey, says that:

1. He denies the truth of the matters contained in the complaint, defendant reserves the right to move to have order to hold to bail set aside and to take testimony, on notice to plaintiff's attorney for that purpose.

W. R. STRICKLAND,
Attorney for Defendant.

Filed August 15, 1927.

NEW JERSEY SUPREME COURT.

DANIEL PAPARO, *Plaintiff*, *vs.* VINCENT RENO, *Defendant.*	*Action at Law.* *Recognizance.*

STATE OF NEW JERSEY, COUNTY OF ESSEX. } *ss.*

BE IT REMEMBERED, that on the twenty-seventh day of June, nineteen hundred and twenty-seven, Vincent Reno and Benjamin Farber, of the County of Essex, New Jersey, personally appeared before me, Henry Hahn, one of the Supreme Court Commissioners of the State of New Jersey, and severally acknowledged themselves to owe unto Daniel Paparo the plaintiff, the sum of ten thousand ($10,000) dollars each to be levied upon their several goods and lands upon condition that if the defendant, Vincent Reno

shall be condemned in this action, at the suit of Daniel Paparo, the plaintiff, he shall pay the costs and condemnation of the Court or render himself into the custody of the sheriff of said County for the same, or if he fails so to do, that the said Benjamin Farber will pay the costs and condemnation for him, or render him into the custody of the sheriff of the said county.

Taken and acknowledged the day and year above written, before me.

HENRY HAHN,
A Supreme Court Commissioner
of New Jersey.

VINCENT RENO (SEAL)
BENJ. FARBER (SEAL)

Stipulation—Justification.

NEW JERSEY SUPREME COURT.

DANIEL PAPARO, *Plaintiff*,		*Action at Law.*
vs.		
VINCENT RENO, *Defendant.*		*Justification.*

STATE OF NEW JERSEY, COUNTY OF ESSEX. } *ss.*

BENJAMIN FARBER, being duly sworn, on his oath says, that he is the surety in the within-named bond; that he is a freeholder in the County of Union, New Jersey, and resides at 96 Cherry Street, Rahway, N. J., and has property subject to execution worth the sum of twenty thousand ($20,000) dollars, over and above all his just debts and liabilities.

BENJ. FARBER.

Subscribed and sworn to before me, this 27th day of June, 1927.

HENRY HAHN,
Supreme Court Commissioner of New Jersey.

Stipulation—Excerpt from Testimony.

NEW JERSEY SUPREME COURT.

ESSEX CIRCUIT.

June 19, 1928.

SAMUEL PAPARO, *Plaintiff,* *vs.* VINCENT RENO, *Defendant.*	*Action at Law.*

Before Hon. Worrall F. Mountain, *J.*, and a jury.

For the plaintiff appears Meyer C. Ellenstein.

For the defendant appears William R. Strickland.

(A jury is called and sworn.)

Mr. Ellenstein opens for the plaintiff.

Mr. Strickland opens for the defendant.

SAMUEL PAPARO, plaintiff, being duly sworn, testifies as follows:

Re-direct examination by Mr. Ellenstein.

Q When you broke into that door was your wife and Dr. Reno both in that one room? A In the same room, surely. He was hiding in the closet in that room.

Q He was hiding in the closet in that room? A Yes, sir.

Q There was one bed there? A Yes, sir.

Q The bed looked as though it had been used? A Surely.

The Court: Is there any proof or are you going to offer any proof that the defendant is a physician?

It is denied by the defendant that he was a physician, because if he was not you cannot prove malpractice.

Mr. Ellenstein: Iam not prepared to offer the proper proof that he was a physician, licensed to practice in the State at that time; I am not prepared to prove that.

The Court: The defendant filed a denial of everything. If you cannot prove that, your third count is out, because if he is not a physician he cannot be guilty of malpractice.

Q (By Mr. Ellenstein.) Did Dr. Reno ever tell you that he was a physician?

The Court: No, that is not proof.

Mr. Ellenstein: Well, then we will waive that count.

Stipulation—Excerpt from Testimony.

STATE OF NEW JERSEY,
COUNTY OF ESSEX. } *ss.*

LAWRENCE SQUIRE, of full age, deposes and says as follows:

I am one of the stenographers attached to the Essex County Courts. As such I took shorthand notes of the proceedings had at the trial of the above-entitled cause, and the foregoing is a true copy of a portion thereof.

LAWRENCE SQUIRE.

Sworn and subscribed to before
me this ninth day of November, A. D. 1928.

JNO. MACLAUCHLAN,
Supreme Court Examiner of New Jersey.

OPINION.

Filed January 30, 1930.

NEW JERSEY SUPREME COURT.

ESSEX COUNTY.

SAMUEL PAPARO,
Plaintiff,

vs.

BENJAMIN FARBER,
Defendant.

Opinion.

MOUNTAIN, *J.*

There are two reasons why the plaintiff cannot recover against the defendant who gave bail in accordance with the stipulation signed in this case for one Vincent Reno:

(1) The writ of capias *ad satisfaciendum* was received by the Sheriff of Essex County on July 2, 1928, and returned "*non est*" on the same day. The rule at common law which has been followed in this state requires that a ca. sa. shall lie in the sheriff's office for a period of four days before being returned "*non est inventus.*"

Armstrong v. *Davis,* 1 N. J. L. 110;
Boggs v. *Chichester,* 13 N. J. L. 209;
Hunt v. *Allen,* 23 N. J. L. 622.

(2) In the original action brought by Paparo against Reno, the order to hold the bail was based upon affidavits alleging slander and alienation of affections. When the complaint was filed by Paparo against Reno a count for malpractice was added. The immediate effect of this was to en-

large the liability of the bail. At the time of the trial the count for malpractice was eliminated. The jury rendered a general verdict against the defendant for $10,000. This additional count to the complaint made without the consent of the surety, the defendant in this case, discharges him from his undertaking.

Penny v. *Penny,* 102 Atl. 257;
1 *Tidds Practice* (1st Amer. Ed. 242).

Judgment will be rendered for the defendant against the plaintiff.

WORRALL F. MOUNTAIN,
Circuit Court Judge.

PLAINTIFF'S EXCEPTION.

Filed January 30, 1930.

NEW JERSEY SUPREME COURT.

ESSEX COUNTY.

SAMUEL PAPARO, *Plaintiff*,	*Action at Law.*
vs.	*Plaintiff's Exception.*
BENJAMIN FARBER, *Defendant.*	

Exception by the plaintiff to the ruling of the Court in ordering judgment in favor of the defendant, Benjamin Farber, and against the plaintiff, Samuel Paparo, is hereby noted and allowed as of January 27, 1930.

Dated: January 29, 1930.

WORRALL F. MOUNTAIN,
Circuit Court Judge.

POSTEA.

Filed January 28, 1930.

NEW JERSEY SUPREME COURT.

ESSEX COUNTY.

SAMUEL PAPARO, *Plaintiff,*	*Action at Law.*
vs.	
BENJAMIN FARBER, *Defendant.*	*Postea.*

This action was tried before the Honorable Worrall F. Mountain, one of the Circuit Court Judges, to whom the said cause was duly referred by the Honorable William S. Gummere, Chief Justice of the above said court, for trial without a jury in the presence of the counsel for the respective parties, at the Essex Circuit on January 16, 1930, on an agreed state of facts prepared and signed by said counsel.

After a consideration of the facts and the law applicable thereto, it is hereby adjudged that the said defendant, Benjamin Farber, be and he hereby is discharged from all liability under a certain recognizance given by him in a certain action brought by the above-named plaintiff against one Vincent Reno.

It is, thereupon, on this 27th day of January, 1930, ORDERED that judgment be rendered in favor of the defendant Benjamin Farber, and against the plaintiff Samuel Paparo.

WORRALL F. MOUNTAIN,
Circuit Court Judge.

JUDGMENT.

NEW JERSEY SUPREME COURT.

SAMUEL PAPARO, *Plaintiff*, vs. BENJAMIN FARBER, *Defendant.*	*Action at Law. On Postea.* *Judgment for Defendant.*

Benjamin M. Weinberg, attorney.

Judgment entered this twenty-ninth day of January, A. D., nineteen hundred and thirty in favor of defendant and against the plaintiff for the sum of costs.

W. S. GUMMERE,
C. J.

I, FRED L. BLOODGOOD, Clerk of the Supreme Court of the State of New Jersey, do certify that the foregoing is a true copy of the judgment entered in above-stated cause which said judgment is recorded in this office in Vol. 32 of Judgments, page 89.

IN TESTIMONY WHEREOF, I have set my hand and the seal of said Court at Trenton, this thirtieth day of January, A. D., nineteen hundred and thirty.

(SEAL)

FRED L. BLOODGOOD,
Clerk.

NOTICE OF APPEAL.

NEW JERSEY SUPREME COURT.

SAMUEL PAPARO, *Plaintiff,* vs. BENJAMIN FARBER, *Defendant.*	*Action at Law.* *Notice of Appeal.*

To Benjamin M. Weinberg, Esq., attorney for defendant, 738 Broad street, Newark, New Jersey.

Dear Sir:

PLEASE TAKE NOTICE that the plaintiff appeals to the Court of Errors and Appeals from the whole of the judgment in this cause.

Respectfully yours,

MEYER C. ELLENSTEIN,
Attorney of Appellant.

WOLBER AND GILHOOLY,
Of Counsel with Appellant.

Dated: January 29, 1930.

Service of the within Notice of Appeal is hereby acknowledged this 4th day of February, 1930.

BENJAMIN M. WEINBERG,
Attorney of Defendant.

Filed February 6, 1930.

GROUNDS OF APPEAL.

New Jersey Court of Errors and Appeals

SAMUEL PAPARO, *Plaintiff-Appellant,* *vs.* BENJAMIN FARBER, *Defendant-Respondent.*	*Grounds of Appeal.*

The appellant states the following grounds of appeal:

1. The Court erred in ruling that the plaintiff could not recover against the defendant because the writ of capias *ad satisfaciendum* did not lie in the sheriff's office for a period of four days before being returned *"non est inventus."*

2. The Court erred in ruling that the plaintiff could not recover against the defendant because the order to hold to bail was based upon affidavits alleging slander and alienation of affection and the complaint filed by the plaintiff against Vincent Reno contained in addition to the allegations of slander and alienation of affection a count for mal-practise, although the count for mal-practise was eliminated at the time of the trial.

Respectfully yours,

MEYER C. ELLENSTEIN,
Attorney of Appellant.

WOLBER AND GILHOOLY,
Of Counsel with Appellant.

Grounds of Appeal.

Service of the within Grounds of Appeal is hereby acknowledged this 4th day of February, 1930.

BENJAMIN M. WEINBERG,
Attorney of Defendant-Respondent.

Filed February 6, 1930.

New Jersey Court of Errors and Appeals

SAMUEL PAPARO, Plaintiff-Appellant, vs. BENJAMIN FARBER, Defendant-Respondent.	Action at Law.

MEMORANDUM. OF APPELLANT.

In June, 1928, Samuel Paparo who is the above named plaintiff, caused one Vincent Reno to be taken into custody upon a capias ad respondendum on an order to hold to bail issued by Milton M. Unger, one of the Supreme Court Commissioners of the State of New Jersey under date of June 27, 1927. The order to hold to bail was issued on the affidavits presented to the Supreme Court Commissioner. Copies of these affidavits and the order to hold to bail are annexed to the stipulation which has been executed by the attorneys in the present action, (S. C., p. 16). Vincent Reno was taken into custody by the Sheriff of the County of Essex and thereafter was liberated upon the giving of a certain recognizance by himself and Benjamin Farber, the defendant in this action, in the amount of Ten thousand dollars ($10,000.00). In drafting the recognizance the Supreme Court Commissioner, Henry Hahn, described Samuel Paparo as Daniel Paparo but that error has been

cured by a stipulation between the attorneys for the respective parties hereto whereby the name Daniel Paparo is amended to read Samuel Paparo wherever it has appeared in the recognizance. The error in the recognizance therefore plays no part in this litigation. On June 23, 1928, Samuel Paparo obtained a judgment in the amount of Ten thousand dollars ($10,000) against Vincent Reno in the Essex Circuit of the New Jersey Supreme Court, (S. C., p. 15). Costs were taxed at Seventy two dollars and twenty eight cents ($72.28). On June 28, 1928, a writ of capias ad satisfaciendum and fieri facias de bonis et terris was issued out of the New Jersey Supreme Court directed to the Sheriff of Essex County against the body of the said Vincent Reno and his lands and tenements, etc. The writ was returned "non est" as to the defendant's body and unsatisfied as to his lands, tenements, etc. The writ was received by the Sheriff of Essex County on July 2, 1928 and was returned, as aforesaid, on the last mentioned date, (S. C., p. 15). Benjamin Farber, the defendant in this action, has never rendered Vincent Reno into the custody of the Sheriff of the County of Essex nor has he paid the costs of condemnation of the court, and the judgment is still unsatisfied, (S. C., p. 15). The within action was brought to recover the sum of Ten thousand dollars ($10,000) from Benjamin Farber on the aforesaid recognizance. The pleadings in this action appear fully in the transcript certified by the Clerk of the Supreme Court, (S. C., p. 15).

The stipulation which was signed by the attorneys for both parties has eliminated all disputed questions of fact and the only questions presented were legal ones.

This cause was heard by Mountain, J., in the

Essex Circuit on the pleadings and facts as stipulated by counsel and resulted in a judgment in favor of the defendant, (S. C., p. 34). In the opinion filed by the Circuit Court Judge it is stated that there were two reasons why the plaintiff can not recover against the defendant. The first ground was that the writ of capias ad satisfaciendum was received by the Sheriff of Essex County on July 2, 1928, and was returned "non est" on the same day. It was held that the rule of the common law which has been followed in this state requires that a capias satisfaciendum shall lie in the Sheriff's office for a period of four days before being returned "non est inventus", and for that reason the plaintiff's action could not lie.

The second reason why it was held that the plaintiff could not recover against this defendant was because there was a departure in the pleadings in the action against the bail from the allegations contained in the affidavits upon which the order to hold to bail was entered.

These two points were the only ones in controversy as the remaining allegations of the answer were abandoned.

We shall take up these two questions in the order stated in the opinion of Judge Mountain.

Plea that Capias Satisfaciendum did not lie in hands of Sheriff for four days is not good in action against the bail.

This plea does not go to the merits of the case and is purely a dilatory plea, and were the defendant to succeed on this plea alone the greatest effect which it could have would be to non-suit the plaintiff. The success of this plea would not finally dispose of the plaintiff's right of action.

It is respectfully submitted that this plea is not sound in law. It is contended that if the defendant was desirous of availing himself of this attack on the capias ad satisfaciendum he should have taken direct proceedings against the return. It is the appellant's contention that a plea that the execution did not lie in the hands of the Sheriff for four days, exclusive of the return day, can not be urged in an action on a recognizance. The Practise Act and the rules of the Supreme Court will be examined in vain for any such requirement. It is not statutory. It has, however, been held in this state, that the rules and practise of the Court of King's Bench recognized at the time of our Revolution are in force and regulate the practise of this court, except insofar as they have become inapplicable or have been superceded by acts of the Legislature or by new and positive rules of this court. *Van Winkle* vs. *Alling, et al.* 17 N. J. Law, 446. In the last cited case it appears that it was a requirement of one of the rules of the Court of King's Bench that in order to hold the bail on the recognizance it was necessary to issue out a capias ad satisfaciendum and it is therein stated that it was the practise to permit the writ to lie in the hands of the Sheriff for a period of four days. We do not dispute that such was the practise, but we do contend that the bail can not attack the return of the execution in any collateral proceeding, but that if any attack is to be made on the return it must be made directly thereto. When the defendant in the original action, (Reno) failed to pay the condemnation of the court or render himself into the custody of the Sheriff it became incumbent upon Farber, the defendant herein, to pay the condemnation for him or to render him. He did neither. Reno is

at liberty and the judgment is unpaid. This appears from the stipulation. It is admitted that the condition of the recognizance is sufficiently broad to require the plaintiff to issue a capias and have it returned "non est" in order to hold the bail. This was done. It is urged that the plaintiff is required to do nothing further. The early case of *Sandon* vs. *Proctor, et al.*, 7 Barnewall & Creswell Rep. 800 (108 Eng. Rep. p. 922) expressly decided this point in favor of the contention now being made by us. That case was argued in and determined by the Court of King's Bench, and the following is taken from the opinion in that case.

> BAYLEY, *J.* "The question in this case is, whether it is an answer to an action on the recognizance, for the bail to say, that the capias ad satisfaciendum sued out against the principal had not lain in the Sheriff's Office for that period of time which by the rule of court it ought to have done to charge the bail?"
>
> "In Elliott vs. Lane (1 Wils. 334), to scire facias against the bail the defendant pleaded no ca. sa. against the principal; the plaintiff replied a ca. sa. and a return non est inventus. The defendant rejoined that the ca. sa. did not lie four days in the Sheriff's Office, and upon demurrer the Court held the rejoinder could not be pleaded. The decision appears by the report to have proceeded on the ground that the rejoinder was a departure from the plea; but if the matter alleged in the rejoinder had been a defense on the merits, the defendant would undoubtedly have applied for leave to amend on payment of costs. No such application having been made, that case shews by inference that a mere irregularity can not be pleaded.
>
> The same question presented itself to the

consideration of this court in Powell vs. Taylor, Mich. 28 G 3, cited by Mr. Tidd in his Practise (page 1129, 9th Edit), to shew that the bail can not take advantage of a mere irregularity, by pleading. He there says, "they (the bail) may also plead in discharge of their liability, that there was no capias ad satisfaciendum sued out and returned against the principal and if there be a void writ, it is as none. But if the writ be merely irregular as if it were sued out after a year, without a scire facias, or made returnable on a day out of term, or if it has not lain four days in the Sheriff's Office, the bail can not take advantage of the irregularity by pleading."

"In Cherry vs. Powell (L D. & R. 50), this Court again decided that such an irregularity could not be pleaded. But it is insisted, that the suing out of a ca. sa. against the principal is rendered necessary only by the rules and practise of the Court, and that as the omission to sue out a ca. sa. is a good plea, the matter stated in this rejoinder may also be pleaded. But it seems to me that the obligation to sue out a ca. sa. results by law from the terms of the recognizance. The language of the condition of the recognizance, is, "if the principal shall not pay the damages, or render himself." The latter words, "or render himself", have been construed to import that the principal is to render in discharge of his bail only when the plaintiff has, by suing out a ca. sa., intimated an intention to take the body of the defendant." * * * *

Holroyd, *J.* "I have entertained some doubts in this case, and those doubts were caused by some expressions which fell from the court in Dudley vs. Watchhorn. But I am now satisfied that a mere matter of practice can not be pleaded. There is a material distinction between those things which

are required to be done by the common or statute law of the land, and things required to be done by the rules or practise of the Court. Anything required to be done by the law of the land must be noticed by the Court of Errors; but a Court of Error can not notice the practise of another Court. A plea that no ca. sa. has issued, or that the defendant died before the return of the ca. sa. is good, because, according to the construction which the law puts on the recognizance of bail, the defendant is not required by law to render until the return day of the ca. sa. The party entering into the recognizance engages that the defendant shall pay the damages, or render himself. The latter words have been construed to import, not that the defenadnt is bound to render at all events, but only in case he is required by the plaintiff in the action so to do; and the suing out of the ca. sa. is notice to the bail that the plaintiff does require the defendant to be rendered. If this matter may be pleaded, a Court of Error may reverse our judgment. Any matter which may be taken advantage of in a Court of Error may properly be pleaded; but mere matter or irregularity, depending on the rules of another court, of which rules a Court of Error can not be supposed to have any knowledge, can not be pleaded."

LITTLEDALE, *J.* "Upon this record the practise of the Court of King's Bench is not stated, and a Court of Error can not take notice of the practise of another Court. The record is, therefore, defective. But if the practise of the Court had been set out on the record, it would make no difference. For the practise of the Court can not be pleaded. That very point was decided in Ball vs. Manucaptors of Russell (2 Ld. Raym 1176 Salk 2,602) to which I have already referred, and Powell vs. Taylor cited

in Tidd's Practise (p. 1129, 9th Edit)., and in Warmsley vs. Macey (5 B. Moore, 168). The decision in Dudley vs. Watchhorn (16 East, 40), was perfectly made, because by the general law of the land a ca. sa. must issue into the county in which the action was brought. Upon the authorities, therefore, I am of opinion, that, generally speaking, a mere rule or matter of practise can not be pleaded. But then it is insisted, that the suing out of a ca. sa. against the principal, in order to fix the bail, is required only by the rule or practise of the Court; I am of the opinion that that is rendered necessary by the recognizance. The condition of the recognizance is, that the defendant shall pay the damages, or render himself. Now, if this had been a common contract the principal would be bound to render within a reasonable time after the judgment, but inasmuch as the object of the recognizance is to secure to the plaintiff in the action satisfaction of his judgment, it has been construed with reference to that object; and as the plaintiff may at his election sue out execution either against the property or the person of the defendant, the condition has held to be satisfied if the principal be rendered within a reasonable time after the plaintiff has notified his intention to have execution against the person of the defendant. As long ago as the 38 Eliz. it was held, that the render required in the recognizance was to be intended a render upon process awarded. The suing out of the process, therefore, is not a matter required by any rule or practise of the Court, but by the recognizance, and on that ground it is a good plea, that no ca. sa. issue. *But the recognizance does not require that the ca. sa. shall remain in the Sheriff's Office four days exclusive of the return day and an intervening Sunday. An allegation that it has not remained for that time in the Sher-*

iff's office, shews that the party has broken a rule of the Court, but not that the condition of the recognizance is satisfied." (Italics ours).

Judgment was rendered for the plaintiff.

An examination of the recognizance will disclose that the defendant admitted himself indebted to Samuel Paparo in the amount of Ten thousand dollars ($10,000). Let us then examine the condition in the recognizance. It states an admission of indebtedness in the amount aforesaid, upon condition, that if the defendant, Vincent Reno, was condemned in that action, the said Vincent Reno would pay the costs and condemnation, or render himself into the custody of the Sheriff, or if the said Vincent Reno failed so to do, the said Benjamin Farber would pay the costs and condemnation for him, or render him into the custody of the Sheriff of said County. It will, therefore, appear that there is no further condition expressed in the rocognizance to the effect that the execution must lie in the hands of the Sheriff for any particular length of time. It is admitted in the case at bar that the execution was returned at once by the Sheriff and did not remain in his hands for a period of four days. Admitting that it is necessary to issue a capias ad satisfaciendum before the bail can be held it is submitted that the issuance of such writ becomes necessary only as a means of notifying the bail that the plaintiff requires the defendant to be rendered. No notice of the issuance of this writ is required to be given to the bail, but on the contrary the bail is under a duty to search the records himself. *Van Winkle* vs. *Alling*, Supra. The writ which was issued by the plaintiff was a valid writ not a void one. If a valid writ is issued and

there is any irregularity in the return, the bail, under the authorities of the cases hereinbefore set forth, must make a direct attack on the return of the writ. This has not been done in the case at bar. We have examined the authorities in this jurisdiction and can find no statement of law to the effect that the failure of the writ to lie in the hands of the Sheriff for four days is a defense in an action on a recognizance. In *Van Winkle* vs. *Alling,* Supra, the action was dismissed because the plaintiff did not declare in debt on recognizance nor did he proceed by way of scire facias and not because of any defect in the return of the ca. sa. The recent case of *Jupin* vs. *Jupin,* 3 N. J. Misc. p. 163 (127 A. 588) is not in point on the precise question now under consideration. In that case it was urged that the capias had not been permitted to remain in the Sheriff's Office for four days prior to its return and that the bail could not be affected excepting after a ca. sa. was properly returned non est inventus. The question in the case at bar was not properly before the court and was not decided because it was held that the plea was not in conformity with the true facts because as a matter of fact the capias had been in the Sheriff's hands for the requisite period.

In *Armstrong* vs. *Davis Bail of Carson,* 1 N. J. Law, 130, (p. 110 Star paging) an application was made to enter an exoneretur on the bail piece on the ground that the principal was dead and for a stay of all proceedings against the bail. It was there urged that the ca. sa. did not lie in the Sheriff's Office at least four days before the return. The proceedings were stayed and the bail exonerated. This case is not in point because the bail in that case made a direct attack on the return it-

self. This the defendant has not done here. It it submitted that the case of *Boggs* vs. *Chichester,* 13 N. J. Law 209 is not in point on the question under consideration. In that case there was only two days between the date of the ca. sa. and its return. An application was made to quash the ca. sa. and the application prevailed. There was also an application in that case to set aside the summons issued against the defendants and the bail for the reasons set forth on page 210 of the report, but none of these reasons pertain to the defense urged in this case. These authorities, we submit sustain the position taken by the plaintiff in this case that unless a direct proceeding is taken to attack the return of the writ the bail can not avail himself of such a defense in an action on the recognizance.

For the foregoing reasons we are of the opinion that the defendant should not have prevailed on this dilatory plea.

There was no departure prejudicial to bail.

The defendant seeks to avoid liability on the recognizance by his second separate defense by alleging a departure by the plaintiff in the complaint from the affidavits upon which the order to hold to bail was made. The contention of the defendant by this defense is that he should not be held to answer as bail for any charges other than those presented in the affidavits upon which the order to hold Vincent Reno was entered. The answer of the plaintiff to this defense is that there was no departure insofar as the judgment rendered against Vincent Reno was concerned because the count of mal-practise was abandoned at the trial. The suit of Paparo against Reno was tried in the Essex

Circuit and the attorney for the plaintiff was interrogated by the trial judge as to whether or not he was going to offer any proof that Vincent Reno was a physician. Mr. Ellenstein who appeared for the plaintiff in that litigation announced that he was not prepared to offer any proof that Vincent Reno was a physician and thereupon Mr. Ellenstein announced that he would waive that count. (S. C., pp. 31-32) An excerpt from the testimony taken at the trial is annexed to the stipulation from which all of the foregoing clearly appears. The original complaint in Paparo against Reno is also annexed to the stipulation. In that case the first count charged alienation of affections. The second count charged that the said Vincent Reno slandered Samuel Paparo. The third count charge mal-practise on the part of the said Reno and as we have hereinbefore pointed out, the third count was abandoned at the trial. The jury rendered a verdict in favor of the plaintiff for Ten thousand dollars ($10,000) and there was nothing in the verdict to indicate on what count the verdict was rendered so we will have to accept it as a general verdict in favor of the plaintiff on the issues submitted to the jury by the trial judge. As far as the judgment against Reno is concerned it is manifest that it was rendered on a charge of alienation of affections and slander and not on the charge of mal-practice because that last mentioned charge was expressly withdrawn. There was an express adjudication by the Supreme Court Commissioner that sufficient proof had been presented by affidavits to satisfy him that Samuel Paparo had a suit and cause of action against Vincent Reno for Slander and for the alienation of the affections of Rose Paparo. This adjudication by the Supreme Court Commissioner settled

that question. The defendant in this cause undertook to pay the condemnation in such a suit or surrender the defendant, Vincent Reno. The judgment which went against Reno was no broader than the adjudication made in the order to hold to bail and therefore the defense as set forth in the second separate defense of defendant's answer is without merit.

Our Practise Act now permits the joinder in one action of several causes of action. This was not permitted at common law. For the purpose of argument let us assume that the plaintiff had clearly established a cause of action on the three counts of the complaint. He could, at the close of the case, have requested the trial judge to instruct the jury to assess damages specially on the charge of mal-practise and on the charge of alienation and slander. In that manner no objection could have been made by the bail that he was burdened by a judgment on a complaint different from that for which he undertook to pay the condemnation. We can understand the rule of the common law that the plaintiff could not vary from the charges set forth in the affidavits to hold to bail but this was due to the fact that the practise of the common law did not permit a joinder of several causes of action. Our Practise Act must be taken into consideration in all of the cases dealing with the rule of departure.

It seems to us that the plea of the defendant comes too late. The bail is under a duty to be vigilant in connection with the prosecution of any cause of action against the principal defendant. In Volume 1, Tidd's Practise 294 the following appears.

> "And it is too late to move to enter an exoneretur on the bail piece on the ground

> of a variance between the declaration and the affidavit to hold to bail, after bail put in and justified, declaration delivered, plea demanded, and time allowed for pleading."

And this rule is founded upon logic. If the bail cannot move to enter an exoneretur then how much more is the bail liable after the judgment has been entered against the defendant in the action. If it was too late to move to enter an exoneretur because time had been allowed for pleading then it seems to us that no advantage could ever be taken of a departure after judgment had been entered. However, we contend and feel that we have successfully established that the judgment which was actually obtained was no departure whatsoever from the affidavits and the order to hold to bail.

We are not concerned whether or not the affidavits upon which the order to hold to bail was made contained sufficient statements to have warranted the Supreme Court Commissioner in his ~~pleadings~~ findings that the plaintiff had a cause of action against Reno for alienation of affection and slander. In our opinion the affidavits are sufficiently broad but such a question can not be presented in an action against the surety after judgment against the principal. *State* (*Watson*) vs. *Noblett,* 65 N. J. Law 506; *Ferengo* vs. *Moskowitz,* 130 A. 814; *Logan* vs. *Lawshee,* 62 N. J. Law 567.

Conclusion.

For the foregoing reasons we respectfully submit that judgment should not have been entered for the defendant. If the learned trial judge was correct in his conclusion that the plaintiff could not prevail in this action because the writ did not

lie in the hands of the Sheriff for four days then he should have ruled that the plaintiff's action was premature and the latter should have been non-suited. We do not think that the defendant should have prevailed on this ground as we have hereinbefore pointed out.

We respectfully submit the learned trial judge erred in holding that the plaintiff could not recover against the defendant because the count for mal-practise was added in the suit against Reno. This count was withdrawn as has heretofore been stated and therefore with the withdrawal of this count the plaintiff could only proceed on the counts for alienation of affection and slander. We do not think *Penny* vs. *Penny,* 88 N. J. Eq., 160 (102 A, 257) is in point. In that case the wife instituted suit for divorce on a mensa et thoro for extreme cruelty and a writ of ne exeat issued. Later the wife procured leave to amend by setting up facts indicating that her husband had abandoned her without justification and had refused to maintain and support her. It is thus apparent that her second cause of action was entirely different than the first and the surety was subjected to an entirely different cause of action. We do not dispute that had a general judgment been entered in the case at bar on the three counts which included mal-practise that the surety would have been prejudiced but when the count for mal-practise was withdrawn the action was no broader than that contained in the affidavits. In *Penny* vs. *Penny,* Vice Chancellor Backes cited a statement from Corpus Juris, Volume 6, page 294 as follows:

> "Any alterations or amendments in the writ or pleadings whereby a different or new cause of action is created, and the bail is thereby subjected to a different or addi-

tional responsibility, or is otherwise placed in a situation which materially changes the legal nature of their obligation operate to discharge the bail, *unless the judgment is rendered on the original demand only.*" (Italics ours)

For the reason that the bail was not subjected to any greater liability than he originally undertook we respectfully submit that the plaintiff should have been permitted to recover on the recognizance.

Respectfully submitted,

MEYER C. ELLENSTEIN,
Attorney of Appellant.

EDWARD J. GILHOOLY,
Of Counsel.

New Jersey
Court of Errors and Appeals

SAMUEL PAPARO, Plaintiff-Appellant, vs. BENJAMIN FARBER, Defendant-Respondent.	Action at Law On Appeal from New Jersey Supreme Court.

BRIEF ON BEHALF OF DEFENDANT-RESPONDENT.

FACTS.

Although the facts in this case are rather fully stated in plaintiff's memorandum, it may perhaps be somewhat helpful to the court, if counsel for the defendant should give a synopsis of the case, which is substantially as follows:

The defendant and one Vincent Reno heretofore entered into a recognizance to the plaintiff in a tort action brought by him against the said Vincent Reno, whereby they, Benjamin Farber and Vincent Reno, acknowledged themselves jointly and severally indebted to the plaintiff in the sum of $10,000, upon the express condition that if the said Vincent Reno be condemned in an action at law, which the said plaintiff had commenced against the said Vincent Reno, he, the said

Vincent Reno, would pay the costs and condemnation of the court, or render himself into the custody of the Sheriff of Essex County for the same, and that in the event that he, the said Vincent Reno, failed so to do, that the said defendant Benjamin Farber would pay the costs and condemnation for the said Vincent Reno, or render the said Vincent Reno into the custody of the said Sheriff of Essex County. (Usual form of a recognizance.)

The said plaintiff obtained judgment against the said Vincent Reno in the sum of $10,000, but said Vincent Reno failed to surrender himself to the Sheriff and failed to pay the amount of the judgment rendered against him as aforesaid. The present action is now brought for the purpose of recovering the amount of the judgment and costs against the above-named defendant, Benjamin Farber, pursuant to the terms of the recognizance mentioned as aforesaid, although under the admitted facts the ca. sa. was returned by the Sheriff the same day that it was received by him.

ARGUMENT OF THE LAW.

Two questions only are presented to the court. One deals with the alleged right of the plaintiff to maintain his cause of action against the defendant, and the other deals with the question of whether the plaintiff's present action is premature.

In view of the order in which the argument is made by plaintiff's counsel, the counsel for the defendant will adopt the same order and argue

FIRSTLY: That plaintiff's action against the defendant is premature for the reason that plaintiff did not comply with the practice prevailing at common law, and in our courts, which requires that a ca. sa. shall lie in the Sheriff's office for a period of four days before being returned *non est inventus;* and

SECONDLY: That the plaintiff, Samuel Paparo, having in his original action against Vincent Reno, added a cause of action to his complaint—viz., a count for malpractice—which cause of action was neither alleged nor specified in the affidavit or order to hold to bail, the condition of the recognizance given by the defendant, Benjamin Farber, is satisfied and plaintiff's cause of action against him is lost.

In citing from the decisions of the court, it is to be understood, unless otherwise herein stated, that *all italics are mine.*

POINT 1.

THE CA. SA. NOT HAVING LAIN IN THE SHERIFF'S OFFICE FOR FOUR DAYS, AS REQUIRED BY THE PRACTICE OF THIS COURT, THE ACTION AGAINST THIS DEFENDANT IS PREMATURE.

The practice prevailing in our courts requires that a ca. sa. must lie in the Sheriff's office at least four days before it can be returned *non est inventus.*

The rule above referred to is laid down in the early case of *Armstrong* v. *Davis,* 1 N. J. L. 110,

and in the case of *Boggs* v. *Chichester*, 13 N. J. L. 209, where it was held that the bail could take advantage of the failure to retain the same for four days, as required by the rule.

Chief Justice Ewing, in the Boggs case, *supra*, referred to the right of the bail to avail themselves of the irregularity herein insisted upon, saying (at page 211):

> "The bail may avail themselves of this objection. Where the ca. sa. is directed to the officer in order to charge and fix the bail, they have an interest in the proceedings. For it is in the nature of notice and they have a right to object to irregularity in it. This principle has been adopted in practice. In the case cited from Coxe's reports, the bail made the objection.
>
> "As to the validity of the objection, there can be no doubt that the ca. sa. should have been four days in the hands of the officer, for the return thereof. This is the settled practice in England, has been recognized as the practice of this court, and is founded on reason and justice. The case in Cox. Rep. is directly in point. The Practice Act, it is true, has been passed since, and in this particular is silent. We, therefore, stand upon the practice as settled in Cox. Rep. It would be wrong to fix the bail with the payment of large sums, without some opportunity of protecting themselves; and this, too, upon little more than two days, and upon a summons taken out during the same term, and served personally. The term may expire before the bail could procure the defendant, if residing at a distance. The ca. must be quashed."

Also in the case of *Hunt* v. *Allen,* 23 N. J. L. 622, this doctrine was affirmed by the Court of Errors and Appeals. The opinion by Chief Justice Green is as follows:

> "Bail to the action, who are bound for the defendant's appearance after judgment, may take advantage of an illegality or even an irregularity in the *capias ad satisfaciendum* because it is in the nature of notice to them, and therefore they are interested in the proceeding." (Citing *Boggs* v. *Chichester, supra.*)

This rule was also upheld in the later case of *Jupin* v. *Jupin,* 127 Atl. 588, 3 N. J. Misc. 163. The only conceivable difference between the statement in that case and in the others, is that the fact was in dispute, but the rule was, nevertheless, declared and upheld.

Inasmuch as the ca. sa. issued by the plaintiff in the original action against Vincent Reno did not remain in the Sheriff's hands for a period of four days—which is herein admitted by the plaintiff—the present action cannot be maintained against the bondsman, Benjamin Farber.

Argument has been made by the plaintiff in the brief that the question herein raised, being one involved in the adjective side of the law, should not be noticed by the court, and a distinction is attempted in the citations offered, between the issuance of the ca. sa. itself and the requirement as to the time it shall lay in the hands of the Sheriff. Neither of these provisions, admittedly, are incorporated in the bond but the courts have spelled out of those conditions the requirement for an issuance of a ca. sa.

As to the failure to comply with the rule of the court as to its remaining in the Sheriff's hands, plaintiff argues that this is merely a practice of the court.

If the cases cited by the plaintiff, however, are carefully read, it will be found that the defendants in those cases have insisted that, because the ca. sa. had not been in the hands of the Sheriff for a period of four days, the condition of the recognizance was satisfied to the same extent that it would be if no ca. sa. had been issued at all.

Discussions seem to have taken place in some of the cases cited by the plaintiff as to whether the failure to have the ca. sa. remain for four days in the Sheriff's office could be taken advantage of by a plea (which is today your "answer") or by a rejoinder (see *Elliot* v. *Lane,* cited on page 5 of plaintiff's brief).

Quoting from Littledale, J., as set forth on the bottom of page 8 of plaintiff's brief, we find practically that what the Court decided, was, that

> "An allegation that it (the ca. sa.) has not remained for that time (four days) in the Sheriff's office, shows that *the party has broken a rule of the court, but not that the condition of the recognizance is satisfied.*"

We do not here contend, as was contended in the above case, that the recognizance is satisfied because the ca. sa. did not remain in the Sheriff's office for four days before its return, but we do insist that under our practice and procedure, rules of the court are not intended to be broken and they must, in all instances, be complied with, unless that rule is set aside by the court making it.

This defendant could not have availed himself of the irregularity before, and until, he was actually served with process in the case. He had no means of knowing when the ca. sa. was lodged with the Sheriff, and he therefore had no means of knowing how soon after its lodgement it would be returned. *He had a right to rely upon the rule of our courts that such a writ will remain with the Sheriff for the period required,* and if action is brought against him before such time, he has the right to make his objection by answer, which is the old common law plea, which was done in the instant case.

Plaintiff's attorney argues that the point taken is a technical one. This is undeniable. So is plaintiff's cause of action against the bondsman.

In an action of this kind, the bondsman has always been considered as a favored suitor and every protection is thrown about him, and that is as it should be. He is not an original debtor. He is simply called upon to answer for the default of another and he fights, and is not condemned for fighting and using every technicality with which the law itself abounds and surrounds him.

This defendant therefore respectfully insists that the Circuit Court's action in denying plaintiff a recovery is fully justified under the authorities hereinabove set forth.

POINT 2.

THE PLAINTIFF, SAMUEL PAPARO, HAVING IN HIS ORIGINAL ACTION AGAINST VINCENT RENO, ADDED A CAUSE OF ACTION TO HIS COMPLAINT—VIZ., A COUNT FOR MALPRACTICE—WHICH CAUSE OF ACTION WAS NEITHER ALLEGED NOR SPECIFIED IN THE AFFIDAVIT OR ORDER TO HOLD TO BAIL, THE CONDITION OF THE RECOGNIZANCE GIVEN BY THE DEFENDANT, BENJAMIN FARBER, IS SATISFIED AND PLAINTIFF'S CAUSE OF ACTION AGAINST HIM IS LOST.

If the argument made hereunder satisfies the court as to its correctness in point of law, its decision hereunder will be dispositive of the issue.

It is admitted by the pleadings and stipulation filed in this cause that the order made by the Supreme Court Commissioner to hold the defendant Vincent Reno to bail, adjudicated that the said plaintiff has a suit and cause of action against Vincent Reno *for slander and for the alienation of the affections of Rose Paparo, wife of said plaintiff.*

The "Amended Reply to the Amended Answer" filed by the plaintiff, shows that there was added to the complaint filed by him in this cause, in addition to the counts charging *slander* and *alienation,* a *third* count which charged the said Vincent Reno with malpractice as a physician.

Plaintiff argues in his brief that although the original causes of action were amended by adding thereto the new charge of malpractice, this count was dropped at the trial, and that therefore no harm has been done the defendant.

Before examining the record in this case, let us first determine what constitutes the "record" in any given case.

In the case of *Margolies* v. *Goldberg,* 101 N. J. L. 75, this court was called upon to determine what constitutes a judicial record. After referring to several cases, Chancellor Walker said (at page 78):

> "Of course, in its broad and general signification the word 'record' means a written memorial. It may be of legislative acts, judicial proceedings, record of conveyances and other instruments, etc., and counsel generally, and the judges often refer to the state of the case before the court as a record, or as the record. But this must not be confused with the *record strictly so-called* in judicial proceedings, which includes the pleadings and judgment, and does not include the evidence, charge of the court, bills of exception, bills of particulars, etc." (Italics used by the court.)

Reference is further made to a case in the King's Bench, where it was shown that the common law record contained "the declaration, plea, award of venire, postea, verdict, judgment, motion in arrest of judgment, decision of the court and judgment thereon awarding writ of possession." (No testimony mentioned.)

An examination of the record in the instant case shows, *inter alia,* a complaint containing three counts (one more cause than contained in the original charge) and a postea, of which the following is a copy:

"NEW JERSEY SUPREME COURT

ESSEX COUNTY

SAMUEL PAPARO, Plaintiff, vs. VINCENT RENO, Defendant.	Postea.

This case was tried before Judge Worrall B. Mountain to whom the same was referred with a jury at the Essex County Circuit on June 20, 1928.

The jury rendered a general verdict against the defendant and in favor of the plaintiff for Ten Thousand Dollars ($10,000.00).

WORRALL F. MOUNTAIN,
Circuit Court Judge.

A true copy

FRED L. BLOODGOOD,
Clerk."

The plaintiff attempts to vary, alter and amend the record of the court by producing a partial transcript of the testimony showing that after being unable to complete his proofs under the malpractice count, he stated that he would drop the same. It is obvious that this cannot be done. This attempted dropping of the count mentioned cannot avail the plaintiff for the reason that, as will be herein shown, the real damage comes in

in declaring for a cause of action independent of that, which was not made known to the defendant at the time he entered into the recognizance. Defendant might have been willing to have gone bail for the two causes of action mentioned in the Commissioner's order, but not for the third one which was added to plaintiff's complaint after the recognizance was signed.

Who can estimate the damage and injury that was done to the bail when counsel opened his case and, as he was obliged to do under our statute, stated to the jury *the three causes of action* against the defendant. This in itself must be presumed to have caused damage and injury. In addition to this, the taking of testimony on the malpractice count, although withdrawn after the court pointed out the plaintiff's failure to make certain necessary proofs, further injured the plaintiff by placing before the jury some evidence in support of plaintiff's opening.

As we read the cases hereinafter cited, we feel that the point made in the various decisions referred to deals simply with any "material amendment to a cause of action without the consent of the sureties." Such amendment, we insist, *per se*, destroys the plaintiff's cause of action and brings about, automatically, a discharge of the bail.

Penny v. *Penny*, 102 Atl. 257 is a case in point. The following is an extract from the opinion by Vice Chancellor Backes:

> "That a material amendment to a cause of action upon which, as amended, the plaintiff relies for judgment, without the consent of the sureties, discharges the

sureties, is uniformly laid down in the text books and the reports of decisions. I will quote from a few only.

"'In *Corpus Juris,* Vol. 6, p. 924, Pp. 91, it is tersely put thus: "Any alterations or amendments in the writ or pleading whereby a different or new cause of action is created, and the bail is thereby subjected to a different or additional responsibility, or is otherwise placed in a situation which materially changes the legal nature of their obligation operate to discharge the bail, unless the judgment is rendered on the original demand only."'

"To the same effect is *Pingry on Suretyship and Guaranty* (2nd Ed.), p. 424, Pp. 412; p. 426, Pp. 413; *Tidd's Practice,* Vol. 1, Pp. 293, 449. In *Wood* v. *Denny,* 7 Gray (Mass.) 540, the declaration on the common money counts was amended by adding a count on a guaranty of a debt due by a third person to plaintiff. In discharging the bail, the Supreme Court held that: 'In the first of these actions, the new count on a guaranty of a debt due from a third person to the plaintiffs was not for the same cause of action as the money counts, and could not have been given in evidence on these counts. *Whether as between the parties to the action, the filing of that count was properly allowed, is not now in question. As to the bail, we are of the opinion that it discharged him from his undertaking. He became bail in an action for money had and received; money lent and money paid, as set forth in the writ and declaration against the principal, and not in an action on a guaranty, by the principal, of the plaintiff's claim on another.* The rule by which the court is to decide whether an amendment discharges bail, or dissolves an

attachment so as to let in subsequently attaching creditors, is correctly stated by Mr. Justice Wilde, as follows: "*Amendments in form merely will not dissolve an attachment, or discharge bail. To have this effect, the amendment must be such as to let in some new demand or new cause of action.*" *Haven* v. *Snow,* 14 Pick. (Mass.) 33; *Wight* v. *Hale,* 2 Cush. (Mass.) 493 (48 Am. Dec. 677). See also, *Haynes* v. *Morgan,* 3 Mass. 310. *In the case before us the amendment did let in a new cause of action, which was not known, even by the attorney, until after the writ, declaration, and arrest were made. In England, bail are not liable for any cause of action, different from that which is stated in the process or in the affidavit to hold to bail.* 1 *Tidd's Practice* (1st Amer. Ed.) 242; *Wilks* v. *Adcock,* 8 T. R. 27; *Wheelwright* v. *Jutting,* 7 Taunt. 304; *Thompson* v. *Macirone,* 4 D. & R. 619.'

"Other cases in Massachusetts are *Prince* v. *Clark,* 127 Mass. 599; *Dunsmoor* v. *Bankers' Surety Co.,* 206 Mass. 23, 91 N. E. 907. Cases in other states are *Pell* v. *Grigg,* 4 Cow. (N. Y.) 426; *Bryan* v. *Bradley,* 1 N. C. Taylor, 177; *Bradhurst* v. *Pearson,* 32 N. C. 55; *Hamlin* v. *McNiel,* 32 N. C. 306; *Cassidy* v. *Saline County Bank,* 7 Ind. T. 543, 104 S. W. 829; *Fish* v. *Barbour,* 43 Mich. 19, 4 N. W. 502.

"In *Hyer* v. *Smith,* 3 Cranch, C. C. 437, Fed. Cas. No. 6979, Chief Justice Cranch said that '*the court is clearly of the opinion that if the plaintiff amends his declaration by adding a count upon a cause of action, which could not be given in evidence upon the original declaration as sent out with the writ, or which is not contained in the affidavit to hold to bail, the bail must be discharged.*'

"And in *Carrington* v. *Ford*, 4 Cranch, C. C. 231, Fed. Cas. No. 2449, he observed:

"That the reason for discharging bail upon amending the declaration is that *it would be unjust to charge the bail upon a cause of action different from that upon which the bail was originally given* or where the amendment is of a defect existing at the time of entering bail and which would have defeated the plaintiff's action but for such amendment.

"The question was put at rest early in this state in the case of *Robeson* v. *Thompson*, 9 N. J. Law 97, where the affidavit to hold to bail disclosed that the suit was on a book account, but the cause of action as set out in the declaration was on a special agreement to pay the debt in question. In declaring the variance fatal and the surety exonerated, the Supreme Court said:

"'Courts of justice suffer slight variances to be taken advantage of in this way. 2 Taunton 107; 6 Term Reports 363; 7 Term Reports 80; 13 East 273. And it is right they should do so. *Whoever attacks the liberty of the citizen should know the grounds on which he does it. Our statute requires an affidavit of the cause of action, in order to hold to bail. And it should be stated truly. And bail may safely come forward, and protect the debtor from imprisonment, even where he is liable, if that liability rests upon different grounds from those stated in the affidavit.*'"

Other legal statements follow:

In 6 *Corpus Juris* 924, it is stated that:

"Bail is discharged if plaintiff declares against the defendant for a different cause of action from that which was expressed in

> the process or in a different form of action taken from that in which the bail was taken."

It has been also held that:

> "The bail are discharged if plaintiff declares against defendant by a different name or for a different cause of action from that expressed in the affidavit to hold to bail." (Citing *Robeson* v. *Thompson,* 9 N. J. L. 97.)

This principle is affirmed in 3 *Encycl. of Pl. & Pr.* 187, as follows:

> "The obligations of special bail are in the nature of those of sureties, always and properly recognized as being *strictissimi juris,* and discharged by anything that so affects the nature and extent of their contract, as by *reasonable probability to increase risk or liability.*"

A rather exhaustive search fails to disclose any approval by the courts in any case where an action in tort has been brought on definite allegations, bail put in, and thereafter an amended tort demand inserted in the declaration.

CONCLUSION.

It is quite significant that the conclusion at which the learned Trial Court arrived, in rendering judgment for the defendant herein, is in harmony with the decisions above cited. He, it was, before whom the original action of *Paparo* v. *Reno* was tried and he, therefore, was in the advantageous position of determining the injury which undoubtedly resulted to the bail when the additional count for malpractice was added to

plaintiff's complaint after bail was perfected, although said count was attempted to be withdrawn by the plaintiff after failure to make due proof thereof.

The strict record of this case discloses:

(a) an original charge of slander and alienation of affections made by Paparo against Reno;

(b) Bail given by Farber—this defendant—on that charge;

(c) a complaint charging slander, alienation *and malpractice;* and

(d) a Postea showing a general verdict on the complaint.

For the reasons herein urged, the happening at the trial should not be considered by this Court. It is no part of the record in the cause, and cannot undo the mischief which resulted from the enlargement of plaintiff's cause of action after bail was put in by the defendant.

It is, therefore, respectfully submitted that for the reasons herein set forth, the judgment rendered by the court below in favor of the defendant should not be disturbed, and that plaintiff's appeal be dismissed, with costs.

Respectfully submitted,

BENJAMIN M. WEINBERG,
Attorney for and of Counsel with Defendant-Respondent.

42 argued

42 MAY.T.1930

Filed after the Oral Argument by leave of Court.

C. Baker writes out.

STIPULATION.

New Jersey Court of Errors and Appeals

SAMUEL PAPARO, *Plaintiff-Appellant,* *vs.* BENJAMIN FARBER, *Defendant-Respondent.*	*On Appeal from New Jersey Supreme Court.* *Stipulation.*

It is hereby stipulated and agreed by and between counsel for the respective parties hereto, that, in addition to the matters of record which appear in the printed State of Case which has been submitted to this Court, the record shows the following filed papers in the case of *Samuel Paparo* v. *Vincent Reno,* to wit:

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" 27, "	Recognizance entered into by defendant, Vincent Reno.
" 27, "	Order made holding defendant Reno to bail.
" 27, "	Capias, with complaint attached, served.
" 28, "	Above order filed.
" 29, "	Recognizance filed with Supreme Court Clerk.
July 1, 1927	Original capias with complaint annexed filed with Supreme Court Clerk.

Stipulation.

It is also herein stipulated that the Ca. Sa. which was issued against the defendant Reno was dated June 28, 1928, and that the same provides, inter alia, that the Sheriff shall "cause to be made the sum of $10,072.28, which to Samuel Paparo, plaintiff, lately in our Supreme Court at Trenton, before the Justices of our said Court, for his damages which he had sustained and which were adjudged to him in an action at law, and also for his costs and charges by him about his suit in this behalf expended, whereof the said defendant is convicted, as appears of record, etc."

EDWARD J. GILHOOLY,
Of Counsel with Plaintiff-Appellant.

BENJAMIN M. WEINBERG,
Counsel for Defendant-Respondent.

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EDWARD J. GILHOOLY,
Of Counsel with Plaintiff-Appellant.

BENJAMIN M. WEINBERG,
Counsel for Defendant-Respondent.

Filed after the Oral Argumen
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July 1, 1927	Original capias with complaint annexed filed with Supreme Court Clerk.

Stipulation.

It is also herein stipulated that the Ca. Sa. which was issued against the defendant Reno was dated June 28, 1928, and that the same provides, inter alia, that the Sheriff shall "cause to be made the sum of $10,072.28, which to Samuel Paparo, plaintiff, lately in our Supreme Court at Trenton, before the Justices of our said Court, for his damages which he had sustained and which were adjudged to him in an action at law, and also for his costs and charges by him about his suit in this behalf expended, whereof the said defendant is convicted, as appears of record, etc."

EDWARD J. GILHOOLY,
Of Counsel with Plaintiff-Appellant.

BENJAMIN M. WEINBERG,
Counsel for Defendant-Respondent.

STIPULATION.

New Jersey Court of Errors and Appeals

SAMUEL PAPARO, *Plaintiff-Appellant,* *vs.* BENJAMIN FARBER, *Defendant-Respondent.*	*On Appeal from New Jersey Supreme Court.* *Stipulation.*

It is hereby stipulated and agreed by and between counsel for the respective parties hereto, that, in addition to the matters of record which appear in the printed State of Case which has been submitted to this Court, the record shows the following filed papers in the case of *Samuel Paparo* v. *Vincent Reno,* to wit:

June 27, 1927	Affidavits to Hold to Bail filed with Supreme Court Commissioner.
" 28, "	Above mentioned affidavits filed with Supreme Court Clerk.
" 27, "	Recognizance entered into by defendant, Vincent Reno.
" 27, "	Order made holding defendant Reno to bail.
" 27, "	Capias, with complaint attached, served.
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EDWARD J. GILHOOLY,
Of Counsel with Plaintiff-Appellant.

BENJAMIN M. WEINBERG,
Counsel for Defendant-Respondent.

STIPULATION.

New Jersey Court of Errors and Appeals

SAMUEL PAPARO, *Plaintiff-Appellant,* *vs.* BENJAMIN FARBER, *Defendant-Respondent.*	*On Appeal from New Jersey Supreme Court.* *Stipulation.*

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EDWARD J. GILHOOLY,
Of Counsel with Plaintiff-Appellant.

BENJAMIN M. WEINBERG,
Counsel for Defendant-Respondent.

Filed after the Oral Argument by leave of Court.

STIPULATION.

New Jersey Court of Errors and Appeals

SAMUEL PAPARO, *Plaintiff-Appellant,* *vs.* BENJAMIN FARBER, *Defendant-Respondent.*	*On Appeal from New Jersey Supreme Court.* *Stipulation.*

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EDWARD J. GILHOOLY,
Of Counsel with Plaintiff-Appellant.

BENJAMIN M. WEINBERG,
Counsel for Defendant-Respondent.