

Court of Errors and Appeals.

Giuseppe Sozio and
Giovanni Gasparini,

Plaintiffs in Error,

vs.

Vincenzo Giuliano,

Defendants in Error.

} *On Writ of
Error to
Supreme Court.*

Judgment of the Supreme Court in this case for the sum of \$1,250.00, was entered January 29, 1906, (p. 26) on the verdict of a jury, rendered at the Essex Circuit Court in December Term, 1905, by direction of the Chief Justice presiding at said trial. (P. 58). The judgment being against Giuseppe Sozio, as Principal, and Giovanni Gasparini, his Surety, is based on an alleged forfeiture of an insolvent bond, dated March 11, 1905. (See copy of the copy of the bond, p. 2 and 3 Addenda.) It is contended by the plaintiffs in error that an examination of the case will show that there was no breach of the bond, and that, therefore, the judgment is unfounded in law, and should be reversed and set aside.

STATEMENT OF FACTS.

Judgment, in an action of Tort, was rendered against said Giuseppe Sozio in the Essex Circuit Court September 29, 1904, for \$569.67, (p. 1 Addenda.) Subsequently, to wit: On December 5, 1904, (p. 31)

a Capias Ad Satisfaciendum was issued. On this Capias, Sozio was arrested, and, upon furnishing an Insolvent Bond, was released, (p. 32). This *first* bond is not involved in this controversy, nor are any of the proceedings which subsequently took place in the Court of Common Pleas up to March 11, 1905. On the day preceeding the date last mentioned, the Court of Common Pleas of Essex, after an examination on the merits, refused to discharge Sozio as an Insolvent Debtor and remanded him to the custody of the Sheriff, (p. 2, Addenda.) Sozio surrendered himself on said remand and was committed to jail, (pp. 38, 52, 53). While in custody, a second Insolvent Bond was executed by him and Gasparini, (a copy of a copy of which bond is found on pages 2 and 3, Addenda). It is this *second* bond, which is alleged to have been broken and on whose alleged breach the judgment in this case is based.

THE ALLEGED BREACH.

The facts out of which the alleged breach is said to have grown, are as follows: After the execution of this *second* bond, which is dated March the 11th, 1905, Giuseppe Sozio appeared on the opening day of the next Court of Common Pleas, to wit: April 4th, 1905, and presented and filed an *Amended* Petition and requested the Court to designate a day for a hearing thereon. The Court designated as such day, May 27, 1905. (Exhibit, P. 5, pp. 7 and 8). The hearing having been regularly continued by the Court from May 27 to June 24, 1905, Sozio presented himself on that day for *examination* on the merits, by the Court on his said *Amended Petition*. The said Court refused to hear and examine him as an Insolvent Debtor; *summarily dis-*

missing his application on the ground, that it being *his second application*, and the first refusal to discharge him *not* having been based on *the verdict of a Jury*, he was not entitled to make a second application. (Order June 24, 1905, Exhibit P 6 Addenda, p. 8 etc). This extraordinary action of the Court of Common Pleas in refusing to hear an Insolvent Debtor on his second application, was a plain violation of the proviso of Section XV of Insolvent Debtors Act, Revised Statute, page 1731, Act of 1853, Nix. Dig., 1855, p. 357, and it has since been so declared by the Supreme Court, and said order has been set aside on an application by Sozio on a writ of certiorari to review it. (N. J. Sup. Ct. decisions, June Term, 1906, Sozio vs. Common Pleas, on certiorari). In the meantime, however, this judgment was obtained against the said Sozio and his Surety, Gasparini.

THE QUESTION.

The condition of the bond is in the usual form. The relevant condition is to the following effect: "If refused a discharge, he shall surrender himself, immediately, thereafter, to the Sheriff or Keeper of the Jail of said county, there to remain until discharged by due course of law, (p. 3, Addenda.) The sole question in this case is, whether the illegal and unreasonable action of the Essex Common Pleas embodied in its order of June the 24th, 1905, (Exhibit P. 6, Addenda), refusing to hear and examine his application, constituted "*a refusal to discharge*" within the contemplation and meaning of this condition of the Insolvent Bond. That question was raised twice at the trial, (case, p. 46.) Once on a motion to non-suit, which was refused, to which ruling an exception was taken. It was again

raised at the *close* of the trial, by an exception to the charge of the Court, directing a verdict for the plaintiff below, (case, pp. 56-8). It is brought here by the Assignments of Error. It is contended that the question is simply one of the meaning of the bond. The subsidiary questions to wit, those relating to the *legality* of the action of the Court of Common Pleas and to what the petitioner should have done when placed in the unprecedented situation in which the illegal action of the Court of Common Pleas placed him, are of minor importance, although material and relevant. The paramount question, it is submitted, is this: Was the contingency which arose from the action of the Court contemplated and provided for by the condition of the bond, and was any duty imposed thereby, by action of the Court, upon principal and surety, which they were bound to perform, which they did not perform, thereby breaking the conditions of the bond and rendering themselves liable to pay damages to the plaintiff below? We say, confidently, no.

WHAT ARE THE ALLEGATIONS OF THE DECLARATION?

The Narr., consists of four special and the common counts. There is no pretense that any phase of the case comes within the purview of the **Common Counts**. No time, therefore, will be wasted on them.

BREACHES.

The Breaches assigned are four:

First. That the discharge of Giuseppe Sozio was refused by the Court of Common Pleas of the County of Essex, June 24, 1905, (case, p. 5, lines 33,34, etc.), and that thereupon he failed to surrender himself to

the Sheriff or Keeper of the Jail, whereby said bond became forfeited, (case, p. 6.)

Second. That said Giuseppe Sozio, after the giving of said bond, did not appear at the *next* Court of Common Pleas and petition for the benefit of the Insolvent Laws, but made default, whereby said bond became forfeited, &c.

Third. That said Giuseppe Sozio did not appear at *every subsequent Court*, &c., until he was discharged, &c., (case, p. 9, lines 27 &c.)

Fourth. The Breach alleged in the Fourth count is the same one as in the first count, omitting the *date of the alleged refusal* by the Court to discharge, (p. 11, lines 15 and 20.)

The aforesaid breaches alleged in the second and third counts, respectively, merit no discussion. The case, as presented by the plaintiff below, contains no support for them. They are irrelevant to the facts proved. The case shows that Giuseppe Sozio *did* appear at the *next* Court of Common Pleas and *did* petition the Court, &c. The bond was given March 11th, 1905. The petition was dated March 25, 1905, filed April 4, 1905, (Ex. P. 4, p. 6-7, Addenda.) The allegation of the third count that Giuseppe Sozio did not appear at every subsequent Court, &c., is equally unfounded and irrelevant. *There was no subsequent Court of Common Pleas*, at which he could appear, because the fantastic action of the Court of Common Pleas, which created this alleged cause of action, occurred on June the 24th, 1905, at the same April Term in which Sozio had appeared and petitioned, as aforesaid (Ex. P. 6, p. 8, &c.) The plaintiff below considered his cause of action complete and issued his summons and filed his pleadings before the opening of the

next September Term, to wit: as of August 8, 1905, (Narr. p. 2.) The sole question then, on this declaration was, whether the illegal action of the Essex Common Pleas, embodied in its order of June 24, 1905, (Ex. P. 6, Addenda), refusing to hear petitioner and turning him out of Court by dismissing his application, constituted a "Refusal to Discharge" within the meaning of the condition of the Insolvent Bond. That point was raised at the trial, (case, p. 46, &c.) as aforesaid.

CAN THIS JUDGMENT STAND THE ORDER
OF THE COURT OF COMMON PLEAS OF
JUNE 24th, 1905, ON WHICH IT IS
BASED, HAVING BEEN SET
ASIDE AS ILLEGAL?

That this order of June 24, 1905, of the Essex Common Pleas was *illegal*, has been settled as aforesaid, by the Supreme Court, on a certiorari, vacating the order of the Court of Common Pleas. The bond, by its terms, is given to fulfill the requirements of the *Insolvent Laws*; not to obey the caprice and whims of a Court acting outside of its power and jurisdiction. Being illegal and set aside, it seems to the undersigned as if the foundation of the judgment was destroyed; and, therefore, that it should be set aside.

HAD THE INSOLVENT DEBTOR ANY OBLI-
GATION TO IMPRISON OR SURRENDER HIM-
SELF AFTER HIS APPLICATION HAD BEEN
DISMISSED? AND DID HIS FAILURE TO DO
SO CAUSE A BREACH OF HIS BOND?

It will be noted, that, although the Court of Common Pleas, by its order of June 24th, 1905, refused to

hear or examine applicant, it did ^{not} remand him to jail, as provided by law in the case of the refusal to discharge after an examination into the merits, when it has appeared to the Court that the petitioner has concealed property with intent to defraud (Sec. XV Insolvent Debtor's Act, Rev. p. 501). But where the action of the Court is legal, a remand is not necessary.

after a hearing.

Voorhees, et al, vs. Thorn et al, 1 Zab. 77.

But confronted with the unprecedented and illegal situation in which the Court had placed him; unceremoniously turned out of the Court, whose duty it was to hear and examine him as to the truth and justice of his application. Had the Insolvent Debtor any obligation to go back to prison? But there was no remand or warrant. The previous remand made on March the 10th, 1905, (Order, pp. 1-2, Addenda) had been satisfied by his actual incarceration and his release or the execution of the bond in suit. There was no existing order by which the warden could receive him.

Should he have surrendered to the Sheriff? The Sheriff had no warrant to receive him, because the original and only Capias Ad Satisfaciendum issued in the case had been returned six months before, to wit: On December 8, 1904, satisfied by his arrest and furnishing the first bond. The only question then is, was he obliged by virtue of his contract, i. e., his bond, to surrender himself to the Sheriff? It seems not to the undersigned. Because the bond only contemplated legal actions, not illegal on the part of the Court and the obligation to surrender arose only when a legal duty to do so was imposed. But when, as in this case, the Court traveled far beyond its jurisdiction and power in turn-

ing this debtor out of its Court unheard, no duty was imposed upon him to surrender.

WHAT IS THE MEANING OF THE LANGUAGE OF THE BOND.

But, whatever may be said on the foregoing questions, the paramount question still remains, and that is, what is the meaning of the Bond. It is the hope of the plaintiff below to convince this Court that the unlawful action of the Essex Common Pleas; this plain direlection of its duty; this assumption of a power it did not possess; is to be imputed to the debtor and his bondsman as *his* fault, and that this arbitrary refusal of the Court to examine an Insolvent Debtor present and ready to be examined, is the same thing as a *refusal to discharge* after an examination into the merits wherein the Court or Jury has been convinced that the conduct of the Debtor has not been fair, upright and just.

It is contended, that this is not the meaning of the phrase of the bond, "if refused a discharge." That that expression means only, if refused a discharge after an examination into the merits of the case. This is the only construction consistent with the language of the statute and with the unbroken practice of this State and with the only decision of the Supreme Court in point, I refer to the case of

Doremus against Bush, 1 Vr. p. 89-90.

Says Judge Vredenburg in this case: "He, (the Insolvent Debtor), is bound to surrender only upon a refusal of the Court to discharge. The forfeiture of the bond for a refusal to discharge can only happen by the Final Decree of the Court; but, until the Court,

for some reason, makes a Final Decree in the matter, the debtor is not bound to surrender himself into custody. What is meant in the bond by the term "refusal to discharge," is found in the statute itself,

Nix., 380, Sec. 10.

Rev. 501, Sec. 15.

which provides, "that if it shall appear to the Court, or by the verdict of a Jury, that the Debtor has concealed any property with intent to defraud the said Court, it shall remand him to prison. Now, this 10th Section was originally used, long before the Act authorizing the bond, and, it is apparent that the language of the bond was intended to refer expressly to this 10th Section. The *refusal mentioned* in the condition of the bond, is the refusal spoken of in this 10th Section." We submit, that this is the correct interpretation of this phrase. No contrary decision can be cited against this construction. The decision in

Voorhees et al vs. Thorn, et al, 1 Zab. p. 77,

is not, because in that case there had been an examination into the merits and the majority of the judges had not been convinced of the conduct of the applicant had not been fair, upright and just." *A failure to discharge, under such circumstances*, is, of course, equivalent to a refusal to discharge; but it is not at all analogous to this case, where there was a refusal to hear and examine, without reason.

The order of the Court of Common Pleas, therefore, not being within the meaning of the bond and not being contemplated or provided for in the bond, there was nothing in the failure of Sozio to surrender him-

self which could be justly considered a breach of the bond. Sozio had fulfilled all the requirements of the Insolvent Law. He had duly appeared; had duly filed his petition; had duly presented himself in Court; stood ready to submit himself to examination and had done everything incumbent upon him when the Court made its greivous error, and that error should not be imputed to him as his fault.

For these reasons I ask that the judgment of the Supreme Court be set aside and judgment given for the defendant.

JAMES M. TRIMBLE,

Attorney and of Counsel with Plaintiffs in Error.

THE HISTORY OF THE
CITY OF BOSTON

FROM THE FIRST SETTLEMENT
TO THE PRESENT TIME
BY
JOHN B. HENNING, ESQ.
OF THE BARR

IN TWO VOLUMES.
VOL. I.

BOSTON:
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1840.

New Jersey Court of Errors and Appeals.

VENZENZO GIULIANO,	}
Defendant in Error,	
vs.	
GUISEPPE SOZIO, AND GIOVANNI GASPARINI,	
Plaintiffs in Error.	}

POINTS FOR DEFENDANT IN ERROR.

The first assignment of error is what I understand to be the common error, and applies only to the record itself, not to the outbranches thereof, *Briscoe vs. Collins*, 21 Vroom 28; *Loper vs. Sommers*, 42 Vroom 660. I do not understand that it is claimed that any error exists in the record.

SECOND ASSIGNMENT OF ERROR. The alleged illegal admission in evidence of the record of the bond sued on, the objection of defendant being that the proof was too general and indefinite to supply secondary evidence, etc.

"An act for the better protection of Sheriffs," General Statutes, page 3123, Section 59, provides as follows:

"That hereafter all bonds required by law to be taken by any sheriff of this state shall be recorded in the clerk's office of the several counties, in a book to be provided in said clerk's office for that purpose, and upon being so recorded shall have the force and effect

of a recognizance, and that copies of said bonds, duly certified by said clerk, under seal of office, shall be received as evidence in any court of this state, and be as good and available in law as if the original bonds were then and there produced and proved."

This section is somewhat curiously worded, yet it appears to provide definitely for the record of a bond such as the one in question, and though it does not make the record evidence, yet it makes a certified copy of "said bond" evidence. In the absence of such certified copy the record itself when it has been shown as in this case, that such record has been compared with the original and that it is a true copy of such original (state of the case, pages 50 and 51), is certainly available for proof when original is shown to have been lost.

The original bond was shown to have been lost and all due diligence was observed to find the same. A copy shown to be a true copy was then received as the best secondary evidence. (Page 79).

If any further proof of the bond were needed the testimony of the man who drew it and attended to its execution, who testified as to all the essentials of the bond (on page 43, etc.), and the admissions of the defendants (on pages 52-53-54 and 55) would seem to settle the question beyond a doubt. Defendant testified as follows: (page 53). "Q Do you remember signing the bond in this case, which has been put in the suit in this case? A Giovanni Gasparini. Q With Giovanni Gasparini? A Yes, sir." And again (on page 54) Giovanni Gasparini testifies: "Q Now, did you sign the first bond in this case? A Yes, sir. Q And the second time? A Yes, sir."

THIRD AND FOURTH ASSIGNMENTS. That the Justice before whom the case was tried refused a non-suit because the order of the Court of Common Pleas refusing to hear the debtor Giuseppe Sozio, was not a refusal to discharge within the meaning of the bond.

In the case of *Voorhees vs. Thorne, et al.*, 12 ab. 77,

an insolvent bond was sued upon. The debtor appeared, made an application for discharge, court was equally divided, denied demand for trial by jury, the debtor then surrendered himself, petitioned the court at the following term under the same arrest, giving a new bond, and the court being of the opinion that the applicant had been refused his discharge under a former petition, made under the same arrest, dismissed the application and refused to hear the same. The applicant thereupon *did not surrender* himself into custody, but went at liberty, no order having been made by the court. Suit was then brought on this second bond. The debtor subsequently again petitioned the court and was discharged. The court held that under the circumstances the failure of the court to discharge the debtor was tantamount to a refusal of such; that upon such refusal the defendant was bound by the terms of his bond to surrender himself immediately thereafter to the sheriff, failing to do so his bond became forfeited (page 87); that when the court refused to discharge the debtor he had the election either to forfeit his bond by continuing at large, or by immediately surrendering to the sheriff. The court further states: "There can, we think, be no question but that this last order of the 13th of June (order refusing to hear) whether legal or illegal, valid or invalid, so long as it remained in force was the final disposition of the cause, that order still remains unreversed by appellant or superior tribunal, the subsequent proceeding in the same court upon another petition can in no wise affect it. The debtor therefore was refused his petition by the court as an insolvent debtor. Upon such refusal he did not in compliance with the condition of his bond surrender himself immediately thereafter to the sheriff or the keeper of the jail of the County of Somerset, by such omission the bond became forfeited and the plaintiffs entitled to their action." The law as decided in this case, has stood unreversed. See also *Woodruff vs. Barrett*, 3 Gr., 40.

In the present case not only did the debtor not give himself up, but made no attempt to have the decision of the Court of Common Pleas set aside, and evidently considering the fact that he disagreed with the decision aforesaid had the effect of relieving him from further liability under his bond. No action was taken looking toward a review of that decision by the Court of Common Pleas until after a verdict in this case.

Attention is called to the condition of the bond in this case which on page 13 of the printed case and again in the exhibits—

“And shall appear in person at every subsequent court until he shall be duly discharged as an insolvent debtor, and if refused a discharge surrender himself immediately thereafter to the sheriff,” etc.

This defendant did neither (page 54).

It required no rule of court to surrender Sozio. When discharge was refused his obligation was to surrender.

Stedlman vs. Mattix, 9 Vr. 252.

Louis vs. Kashel, 22 Vr. 237.

The 5th, 6th and 7th assignments of error relate to the direction of the verdict by the court.

The defendant moved for a direction of verdict in his favor.

The party moving for such direction admits not only the facts contained in the evidence against which his motion goes but every conclusion from which a jury might fairly or reasonably infer from that evidence.

6 *A. & E. Ency. of P. & P.*, 693.

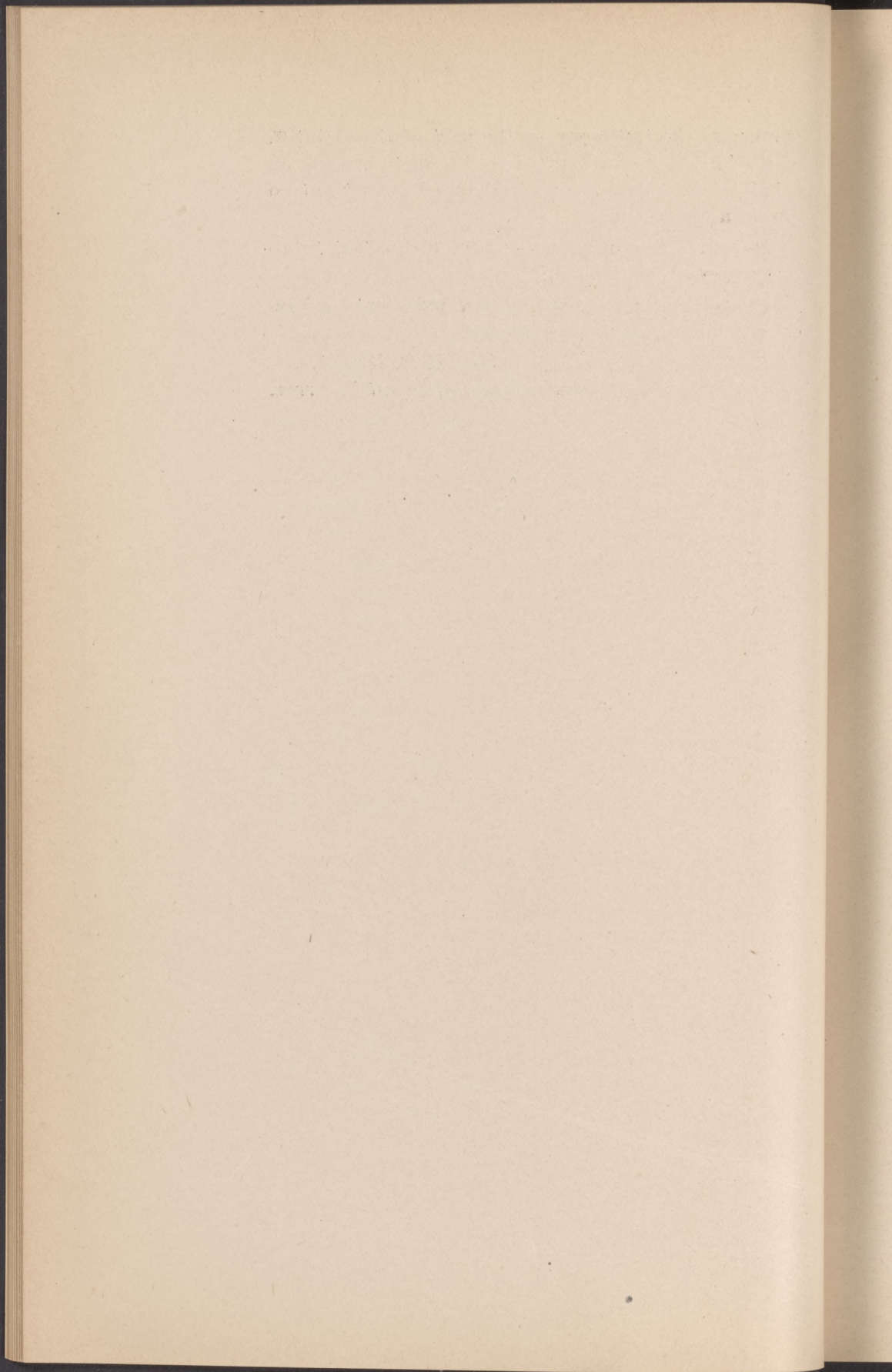
None of the evidence produced by the plaintiff had been controverted in the least degree by the evidence of defendant's witnesses. Indeed the only effect of the evidence of those witnesses was to corroborate and

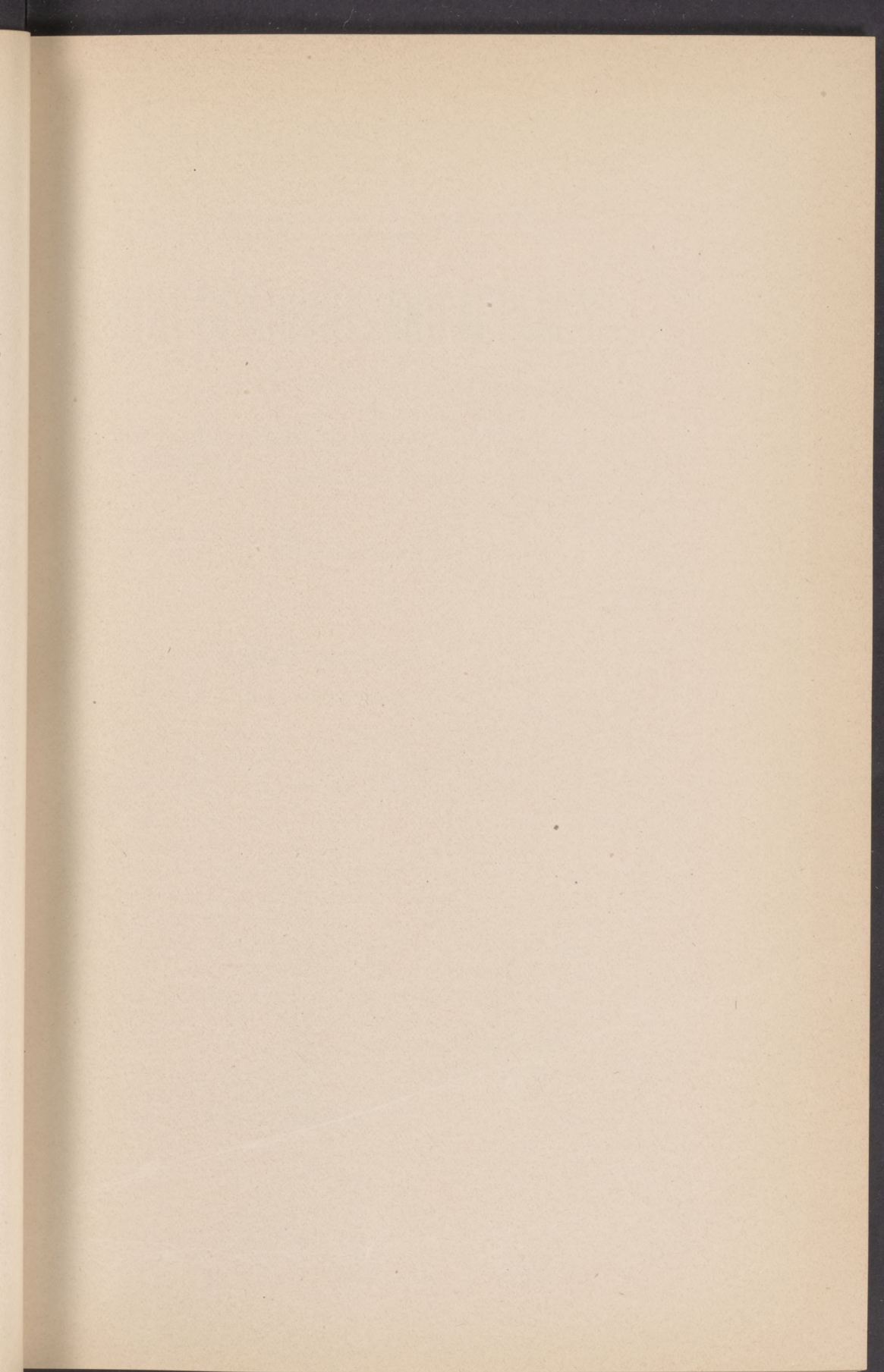
emphasize the testimony on the part of the plaintiff, which having been admitted by the motion made on behalf of defendant for a direction of verdict left no question for the jury.

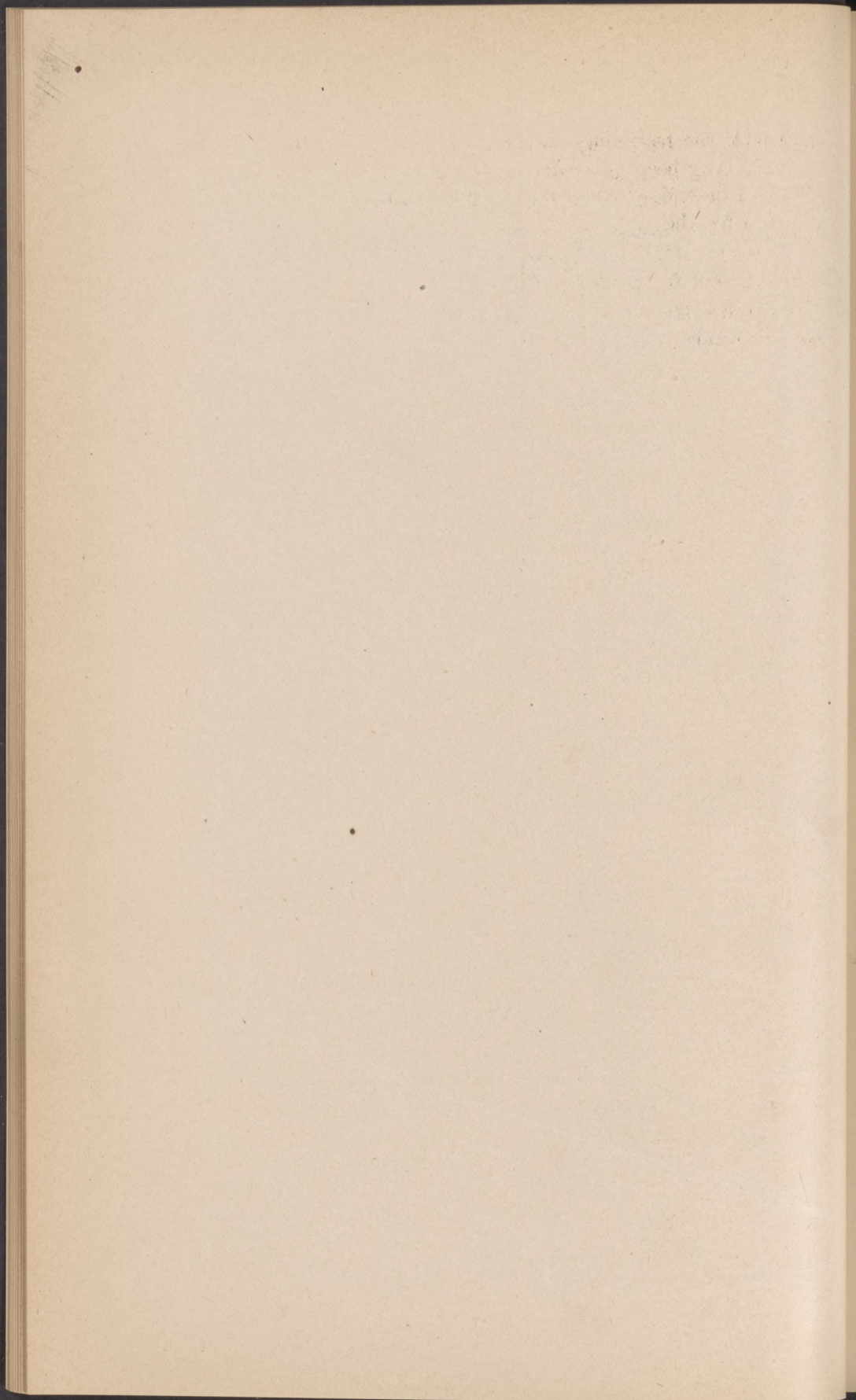
No course was open to the trial justice but to direct a verdict for plaintiff.

It is respectfully submitted that judgment for Vincenzo Giuliano should be affirmed.

HUGH B. REED,
Attorney for Defendant in Error.







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COURT OF ERRORS AND APPEALS

GIUSEPPE SOZIO AND GIOVANNI GASPARINI,	}	On Contract.
Plaintiffs in Error,		
v.		
VINCENZO GIULIANO,		
Defendant in Error.		

WRIT OF ERROR.

[Filed February 21, 1906.]

State of New Jersey, ss.—The State of New Jersey to
the Chief Justice and other Justices of our
[L. s.] Supreme Court of Judicature, greeting:

Forasmuch as in the record and proceedings, and also
in the giving of judgment in a certain plaint which was
in our said Supreme Court of Judicature, before you,
between Vincenzo Giuliano, plaintiff, and Giuseppe Sozio
and Giovanni Gasparini, defendants, in an action on con- 10
tract, manifest error hath intervened, to the great damage
of the said Giuseppe Sozio and Giovanni Gasparini, as it
is said: We being willing that the error, if any there be,
should in due manner be corrected, and full and speedy
justice done to the parties aforesaid in this behalf, do com-
mand you that, if the judgment be thereupon given and
affirmed, then you distinctly and openly send, under your
seal, the record and proceedings aforesaid, with all the

things touching the same, to our judges of our Court of Errors and Appeals in the last resort in all causes, at Trenton, on the twentieth day of February, inst., together with this writ, that the record and proceedings aforesaid being inspected, we may cause to be further done thereupon, for correcting that error, what of right and according to the law and custom of the State of New Jersey ought to be done.

Witness William J. Magie, our Chancellor and President Judge of our said Court of Errors and Appeals, at Trenton aforesaid, the sixth day of February, in the year of our Lord one thousand nine hundred and six, &c.

S. D. DICKINSON,
Clerk.

JAMES M. TRIMBLE,
Attorney.

The answer of the justices of the Supreme Court of the State of New Jersey within named. The record and proceedings whereof mention is within made, with all things touching and concerning the same, we do certify to the Court of Errors and Appeals of said State, in a certain schedule to this writ annexed as within we are commanded.

WM. S. GUMMERE, [L. S.]
C. J.

COPY OF JUDGMENT.

As yet of the eighth day of August, A. D. nineteen hundred and five.

Witness William S. Gummere, Esquire, Chief Justice.
William Riker, Jr., Clerk.

30 Essex County, ss.—Guiseppe Sozio and Giovanni Gasparini, the defendants in this suit, were summoned to answer unto Vincenzo Guiliano, the plaintiff therein, in

an action upon contract, whereupon the said plaintiff, by Hugh B. Reed, his attorney, complains for that whereas the said plaintiff heretofore, to wit, on the twenty-ninth day of September, in the year of our Lord one thousand nine hundred and four, in the Circuit Court of Essex county, by the consideration and judgment of said court recovered against the said Guiseppe Sozio a judgment in tort for the sum of five hundred dollars damages and sixty-nine dollars and sixty-seven cents costs, which in and by the said Essex County Circuit Court 10 were adjudged to the said plaintiff for his damages by reason of said tort, and for his costs and charges by him about his suit in that behalf expended, whereof the said Guiseppe Sozio was convicted.

And the said plaintiff further saith that he, the said plaintiff, for having execution of said judgment afterwards, to wit, on the fifth day of December, nineteen hundred and four, sued and prosecuted out of said court a certain writ called *capias ad satisfaciendum* upon said judgment against the said Guiseppe Sozio directed to the 20 sheriff of the county of Essex, by which said writ said sheriff was commanded to cause to be made the amount of said judgment and costs out of the goods and chattels of the said Guiseppe Sozio, and if sufficient goods and chattels could not be found in his county, then to cause all or the residue, as the case might require, of said damages to be made of the lands, tenements, hereditaments and real estate whereof the said defendant was seized, on the date of entering of said judgment, or at any time afterwards, and further commanded the said 30 sheriff that he should take the body of the said Guiseppe Sozio, if he should be found in his county, and him safely keep in custody until he should be discharged therefrom in due course of law. Which said writ afterwards and before the delivery thereof to said sheriff was duly endorsed requiring him to levy five hundred and sixty-nine dollars and sixty-seven cents besides sheriff's fees and all other incidental expenses, and duly recorded in the office

of the clerk of the county of Essex in accordance with the statute in such case made and provided, and which said writ so endorsed as aforesaid afterwards and before the return thereof, to wit, on the sixth day of December, nineteen hundred and four, was delivered to the said sheriff, who then and from thence hitherto has been and now is sheriff of the county of Essex aforesaid, to be executed in due form of law, by virtue of which said writ the said sheriff afterwards and before the said return
10 day of said writ, to wit, on the eighth day of December, nineteen hundred and four, and within the county of said sheriff, to wit, at Newark aforesaid, took and arrested the said Guiseppe Sozio by his body, and then and there, by virtue of said writ and of the said endorsement so made thereon as aforesaid, detained him in custody in execution for the sum of money so endorsed on said writ as aforesaid, besides sheriff's fees, &c., and kept and detained him in his custody, and the said Guiseppe Sozio so being in the custody of the said sheriff as aforesaid,
20 and not having in any way satisfied said judgment or any part thereof, and not having been in any way discharged therefrom or from any part thereof, and the said judgment being then wholly due and unpaid afterwards, to wit, on the thirteenth day of March, nineteen hundred and five, at Newark, in the county of Essex aforesaid, together with the said Giovanni Gasparini, executed and delivered to the said sheriff of the county of Essex their certain writing obligatory, sealed with their respective seals, and now shown in court here, the date whereof is
30 a certain day and year therein mentioned, to wit, the eleventh day of March, nineteen hundred and five, acknowledged themselves to be held and firmly bound unto the said Vincenzo Guiliano, the said plaintiff, in the sum of twelve hundred dollars, lawful money of the United States of America, to be paid to the said plaintiff, his executors and administrators, which said writing obligatory was and is subject to a certain condition thereunder written, whereby it was recited to the effect following,

to wit, that whereas the said Guiseppe Sozio was then arrested and confined in jail in the county of Essex in the custody of the said sheriff of the county of Essex by virtue of *capias ad satisfaciendum* issued out of the Essex County Circuit Court at the suit of the above-named plaintiff in an action of tort, for the sum of five hundred dollars besides costs, and whereas the said Guiseppe Sozio has made out and delivered to the said William C. Nicoll, said sheriff, an inventory under oath pursuant to the second section of an act entitled "An act for the relief 10 of persons imprisoned on civil process," it was conditioned that if, therefore, the said Guiseppe Sozio should appear before the Court of Common Pleas, then next to be holden in the county aforesaid, and petition said court for the benefit of the insolvent laws of this State, and should in all things comply with the requirements of said insolvent laws, and should appear in person at every subsequent court until he should be duly discharged as an insolvent debtor, and if refused his discharge surrender himself immediately to the sheriff or the keeper of the 20 jail of the said county of Essex, there to remain until discharged by due course of law, then the said obligation should be void, otherwise to remain in force as by the said writing obligatory, a copy whereof is hereto attached and made a part hereof, and the condition thereof will more fully and at large appear, whereupon and upon the giving of the said bond to the said sheriff the said defendant, Guiseppe Sozio, was discharged by the said sheriff from arrest and custody under and upon said *capias ad satisfaciendum*, and although the said judg- 30 ment of the said plaintiff against the said defendant, Guiseppe Sozio, is now in full force and has not been paid nor has any part thereof been paid or satisfied in any way whatsoever, and the discharge of the said Guiseppe Sozio was afterwards, to wit, on the twenty-fourth day of June, nineteen hundred and five, refused by the Court of Common Pleas of the county of Essex to whom the said Guiseppe Sozio had petitioned for dis-

charge in accordance with the condition of the bond aforesaid, and the said Guiseppe Sozio hath not, from the time of the making of the order by which said discharge was refused by said court immediately thereafter, or at any other time, surrendered himself to the said sheriff or to the keeper of the jail of said county of Essex, there to remain until discharged by due course of law, nor has he, said Guiseppe Sozio, in any respect surrendered to said sheriff or to the keeper of said jail, according to the

10 form and effect of the said condition of the said writing obligatory, but hath hitherto wholly neglected and refused, and still wholly neglects and refuses so to do, and from thence has remained and now is at large, whereby said writing obligatory became forfeited to said plaintiff by means whereof and by force of the statute in such case made and provided an action has accrued to said plaintiff to demand and have, of and from the said defendants, the sum of twelve hundred dollars above demanded, and the said defendants, although often so requested to do,

20 have not, nor has either of them, as yet paid the said sum of twelve hundred dollars above demanded, or any part thereof to the said plaintiff, and hath hitherto wholly neglected and refused to do, and still does neglect and refuse to pay the same or any part thereof to the said plaintiff, to the damage of the said plaintiff of twelve hundred dollars, and therefore he brings this suit. And whereas, also, the said Guiseppe Sozio being then in the custody of the sheriff of the county of Essex under a *capias* issued upon a judgment obtained by said plaintiff

30 in the Circuit Court of said county of Essex, for a valuable consideration, the said Guiseppe and Giovanni Gasparini executed and delivered to said sheriff of the county of Essex their certain bond or obligation in writing, sealed with their respective seals, and now shown in court, the date whereof is a certain date and year therein mentioned, to wit, the eleventh day of March, nineteen hundred and five, wherein and whereby they did acknowledge themselves to be held and firmly

bound unto the said plaintiff in the sum of twelve hundred dollars, to be paid to the said plaintiff, his executors and administrators, which said writing obligatory was and is subject to a certain condition thereunder written, which is as follows: "That whereas the said Guiseppe Sozio was then arrested and confined in jail in the county of Essex in the custody of the said sheriff of the county of Essex, by virtue of *capias ad satisfaciendum* issued out of the Essex County Circuit Court at the suit of the above-named plaintiff in an action of tort, for the sum of 10 five hundred dollars, besides costs, and whereas the said Guiseppe Sozio has made out and delivered to the said William C. Nicoll, said sheriff, an inventory under oath pursuant to the second section of an act entitled 'An act for the relief of persons imprisoned on civil process,' " it was conditioned that if therefore the said Guiseppe Sozio should appear before the Court of Common Pleas then next to be holden in the county aforesaid, and petition said court for the benefit of the insolvent laws of this State, should in all things comply with the require- 20 ments of the insolvent laws, and should appear in person at every subsequent court until he should be duly discharged as an insolvent debtor, and if refused his discharge surrender himself immediately to the sheriff or the keeper of the jail of the said county of Essex, there to remain until discharged by due course of law, then the obligation should be void, otherwise to remain in force, as by the said writing obligatory, a copy whereof is hereto attached and made a part hereof and the condition thereof will more fully and at large appear, where- 30 upon and upon the giving of the said bond to the said sheriff the said defendant, Guiseppe Sozio, was discharged by the said sheriff from arrest and custody under and upon said *capias ad satisfaciendum*, and although the said judgment of the said plaintiff against the said defendant, Guiseppe Sozio, is now in full force and has not been paid, nor has any part thereof been paid or satisfied in any way whatsoever, the said plaintiff avers

that the said defendant, Guiseppe Sozio, did not appear before the Court of Common Pleas then next to be holden in the county aforesaid, and petition said court for the benefit of the insolvent laws of this State, according to the form and effect of the said condition of said writing obligatory, but therein wholly failed and made default, whereby said writing obligatory became forfeited by means whereof and by force of the statute in such case made and provided an action has accrued to said plaintiff, 10 to demand and have of and from the said defendant the said sum of twelve hundred dollars, and being so indebted the said defendants promised thereupon to pay to the said plaintiff the said sum of twelve hundred dollars, and the said defendants, although often requested so to do, has not as yet paid the said sum of twelve hundred dollars to said plaintiff or any part thereof, but hath wholly failed and neglected so to do.

And whereas, also, the said Guiseppe Sozio being then in the custody of the sheriff of the county of Essex under 20 a *capias* issued upon a judgment obtained by said plaintiff in the Circuit Court of said county of Essex for a valuable consideration, the said Guiseppe Sozio and Giovanni Gasparini executed and delivered to said sheriff of the county of Essex their certain bond or obligation in writing, sealed with their respective seals, and now shown in court, the date whereof is a certain date and year therein mentioned, to wit, the eleventh day of March, nineteen hundred and five, wherein and whereby they did acknowledge themselves to be held and firmly 30 bound unto the said plaintiff in the sum of twelve hundred dollars, to be paid to the said plaintiff, his executors and administrators, which said writing obligatory was and is subject to a certain condition thereunder written, which is as follows: "That whereas the said Guiseppe Sozio was then arrested and confined in jail in the county of Essex in the custody of the said sheriff of the county of Essex, by virtue of *capias ad satisfaciendum* issued out of the Essex County Circuit Court at the suit of the

above-named plaintiff, in an action of tort, for the sum of five hundred dollars, besides costs, and whereas the said Guiseppe Sozio has made out and delivered to the said William C. Nicoll, said sheriff, an inventory under oath pursuant to the second section of an act entitled 'An act for the relief of persons imprisoned on civil process,' " it was conditioned that if therefore the said Guiseppe Sozio should appear before the Court of Common Pleas then next to be holden in the county aforesaid, and petition said court for the benefit of the insolvent laws of 10 this State, should in all things comply with the requirements of the insolvent laws, and should appear in person at every subsequent court until he should be duly discharged as an insolvent debtor, and if refused his discharge surrender himself immediately to the sheriff or the keeper of the jail of the said county of Essex, there to remain until discharged by due course of law, then the obligation should be void, otherwise to remain in force, as by the said writing obligatory, a copy whereof is hereto attached and made a part hereof, and the con- 20 dition thereof will more fully and at large appear, whereupon and upon the giving of the said bond to the said sheriff the said defendant, Guiseppe Sozio, is now in full force and has not been paid, nor has any part thereof been paid or satisfied in any way whatsoever, the said plaintiff avers that the said defendant, Guiseppe Sozio, did not appear in person at every subsequent court until he was discharged as an insolvent debtor, according to the form and effect of the said condition of said writing obligatory, but therein wholly failed and made default, 30 whereby said writing obligatory became forfeited by means whereof and by force of the statute in such case made and provided an action has accrued to said plaintiff, to demand and have of and from the said defendant the said sum of twelve hundred dollars, and being so indebted the said defendants promised thereupon to pay to the said plaintiff the said sum of twelve hundred dollars, and the said defendants, although often requested so

to do, have not as yet paid the said sum of twelve hundred dollars to said plaintiff, or any part thereof, but hath wholly failed and neglected so to do.

- And whereas, also, the said Guiseppe Sozio being then in the custody of the sheriff of the county of Essex under a *capias* issued upon a judgment obtained by said plaintiff in the Circuit Court of said county of Essex for a valuable consideration, the said Guiseppe Sozio and Giovanni Gasparini executed and delivered to said sheriff
- 10 of the county of Essex their certain bond or obligation in writing, sealed with their respective seals, and now shown in court, the date whereof is a certain date and year therein mentioned, to wit, the eleventh day of March, nineteen hundred and five, wherein and whereby they did acknowledge themselves to be held and firmly bound unto the said plaintiff in the sum of twelve hundred dollars, to be paid to the said plaintiff, his executors and administrators, which said writing obligatory was and is subject to a certain condition thereunder written,
- 20 which is as follows: "That whereas the said Guiseppe Sozio was then arrested and confined in jail in the county of Essex in the custody of the said sheriff of the county of Essex, by virtue of *capias ad satisfaciendum* issued out of the Essex County Circuit Court at the suit of the above-named plaintiff, in an action of tort, for the sum of five hundred dollars, besides costs, and whereas the said Guiseppe Sozio has made out and delivered to the said William C. Nicoll, said sheriff, an inventory under oath pursuant to the second section of an act entitled
- 30 'An act for the relief of persons imprisoned on civil process,' " it was conditioned that if therefore the said Guiseppe Sozio should appear before the Court of Common Pleas then next to be holden in the county aforesaid, and petition said court for the benefit of the insolvent laws of this State, should in all things comply with the requirements of the insolvent laws, and should appear in person at every subsequent court until he should be duly discharged as an insolvent debtor, and if refused

his discharge surrender himself immediately to the sheriff or the keeper of the jail of the said county of Essex, there to remain until discharged by due course of law, then the obligation should be void, otherwise to remain in force, as by the said writing obligatory, a copy whereof is hereto attached and made a part hereof, and the condition thereof will more fully and at large appear, whereupon and upon the giving of the said bond to the said sheriff the said defendant, Guiseppe Sozio, was discharged by the said sheriff from arrest and custody under 10 and upon said *capias ad satisfaciendum*, and although the said judgment of the said plaintiff against the said defendant, Guiseppe Sozio, is now in full force and has not been paid, nor has any part thereof been paid or satisfied in any way whatsoever, and although the said defendant, Guiseppe Sozio, was refused a discharge by said Court of Common Pleas, said plaintiff avers that the said defendant, Guiseppe Sozio, did not thereupon surrender himself immediately to the sheriff or keeper of the jail of said county of Essex according to the form 20 and effect of the said condition of said writing obligatory, but therein wholly failed and made default, whereby said writing obligatory became forfeited by means whereof and by force of the statute in such case made and provided an action has accrued to said plaintiff, to demand and have of and from the said defendant the said sum of twelve hundred dollars, and being so indebted the said defendants promised thereupon to pay to the said plaintiff the said sum of twelve hundred dollars, and the said defendants, although often so requested 30 to do, has not as yet paid the said sum of twelve hundred dollars to said plaintiff, or any part thereof, but hath wholly failed and neglected so to do.

And for that whereas the said defendants heretofore, to wit, on the first day of July, nineteen hundred and five, at Newark, in the county of Essex aforesaid, became and are indebted to the plaintiff in the sum of twelve hundred dollars, the price and value of the goods

sold and delivered by the plaintiff to the defendant at
 his request; and in the like sum of money for the price
 and value of the goods bargained and sold by the plaintiff
 to the defendants at their request; and in the like
 sum of money for the price and value of work done and
 materials for the same provided for the defendants at
 their request; and in the like sum of money for money
 lent by the plaintiff to the defendants at their request;
 and in the like sum of money received by the said de-
 10 fendants for the use of the plaintiff; and in the like sum
 of money for money paid by the plaintiff for the use of
 the defendants at their request; and in the like sum of
 money for interest due by the defendants to the plaintiff
 for the plaintiff having forborne moneys due from the
 defendants to the plaintiff at the defendants' request for
 a long time then elapsed; and in the like sum of money
 for money found to be due by the defendants to the
 plaintiff on an account then and there stated between
 them; and the defendants afterwards, to wit, on the day
 20 and year last aforesaid, in the county aforesaid, in con-
 sideration of the premises, promised to pay the said
 several last-mentioned moneys respectively to the plaintiff
 on request, but the defendants disregarded their
 promises and have not paid, nor has either of them paid,
 any of the said moneys or any part thereof.

Whereof the said plaintiff declares that he is damaged
 in the sum of twelve hundred dollars, and therefore he
 brings this suit.

The following is a bill of the particulars of the demand
 30 and copy of the contract, whereupon the annexed declaration
 is founded:

SCHEDULE.

Amount of judgment, <i>V. Guiliano v. G. Sozio</i>	\$500.00
Costs taxed	69.67
Sheriff's fees and costs of levy, &c.	
Interest and costs make the sum within demand.	

Know all men by these presents, That we, Guiseppe Sozio and Giovanni Gasparini, of the city of Newark, county of Essex and State of New Jersey, are held and firmly bound unto Vincenzo Guiliano, of the same place, in the sum of twelve hundred dollars, lawful money of the United States of America, to be paid to the said Vincenzo Guiliano, his executors and administrators, jointly and severally, firmly by these presents.

Sealed with our seals, and dated the eleventh day of March, in the year of our Lord one thousand nine hundred and five. 10

The condition of this obligation is such that whereas the above bounden Guiseppe Sozio is now under arrest and confined in the jail of the county of Essex, in custody of William C. Nicoll, sheriff of said county of Essex, by virtue of a *capias ad satisfaciendum* issued out of the Essex County Circuit Court at the suit of the above-named Vincenzo Guiliano in an action of tort for the sum of five hundred dollars besides costs, and whereas the said Guiseppe Sozio hath made out and delivered to the said William C. Nicoll an inventory under oath, pursuant to the second section of the act entitled "An act for the relief of persons imprisoned on civil process." 20

Now, therefore, if the said Guiseppe Sozio shall appear before the next Court of Common Pleas, to be holden in the county aforesaid, and petition said court for the benefit of the insolvent laws of this State, and shall in all things comply with the requirements of the said insolvent laws, and shall appear in person at every subsequent court until he shall be duly discharged as an insolvent debtor, and if refused a discharge surrender himself immediately thereafter to the sheriff or keeper of the jail of said county, there to remain until discharged by due course of law, then this obligation to be void, otherwise to remain in force. 30

(Signed) GUISEPPE SOZIO, [L. s.]
GIOVANNI GASPARINI, [L. s.]

Signed and sealed in the presence of

RUDOLPH A. BRAUN.

State of New Jersey, County of Essex, ss.—Giovanni Gasparini, of full age, being duly sworn on his oath, deposes and says, that he is the surety in the within-named bond; that he is a freeholder of the county of Essex and has property in said county subject to execution, worth the sum of five thousand dollars over and above all his just debts and liabilities.

GIOVANNI GASPARINI.

Sworn and subscribed before me at Newark, New Jersey, this eleventh day of March, nineteen hundred and five.

EUGENE DOTTO,
Notary Public.

And the said defendant, Guiseppe Sozio, by James M. Trimble, his attorney, comes and defends the wrong and injury, when, &c., as to the first count of said declaration, and says that the supposed writing obligatory is not his deed, and of this he puts himself on the country, &c.

20 And the said defendant, Guiseppe Sozio, by James M. Trimble, his attorney, comes and defends the wrong and injury, when, &c., and as to the said second, third and fourth counts of the said declaration, says that the supposed writing obligatory therein mentioned is not his deed, and of this he puts himself on the country, &c.

That the said defendant, Guiseppe Sozio, by James M. Trimble, his attorney, comes and defends the wrong and injury, when, &c., and as to the fifth and last counts in said declaration mentioned says that he did not undertake and promise in the manner and form as the said plaintiff hath complained thereof against him, and of this he puts himself on the country, &c.

30 And for a further plea in this behalf, by leave of the court first had and obtained, the said defendant, Guiseppe Sozio, by James M. Trimble, his attorney, comes and defends the wrong and injury, when, &c., and says that

the said defendant ought not to be charged with the said debt, by virtue of the said supposed writing obligatory in the said first, second, third and fourth counts mentioned, because he says that the said Guiseppe Sozio was not arrested under the writ in said declaration mentioned, in manner and form as the said plaintiff hath above thereof in the said declaration and the several counts thereof in that behalf alleged, and of this the said defendant puts himself on the country, &c.

And for a further plea in this behalf, by leave of the 10 court first had and obtained, the said defendant, Guiseppe Sozio, by James M. Trimble, his attorney, comes and defends the wrong and injury, when, &c., and says that the said plaintiff ought not to have and maintain his aforesaid action against this defendant, by virtue of said supposed writing obligatory in the first, second, third and fourth counts mentioned, because he says that the said defendant, Guiseppe Sozio, did, from time to time, and at all times after the making of the said writing obligatory and the said conditions thereof, well and truly 20 observe, perform, fulfill and keep all and singular the articles, clauses, payments, conditions and agreements in the said condition of the said writing obligatory, specified, comprised and in all things therein contained on his part and behalf to be observed, performed, fulfilled and kept according to the tenor and effect, true intent and meaning of the said conditions of the said writing obligatory, and of this he puts himself on the country, &c.

Notice is hereby given that, in support of the several 30 pleas above pleaded, the said defendant, Guiseppe Sozio, in the trial of the above-stated cause, will give in evidence in defense to said action the following matters, to wit:

As to the first count, that it is not true as therein set forth, that the defendant, Guiseppe Sozio, being in custody by the sheriff of the county of Essex, by virtue of a *capias ad respondendum*, dated December fifth, nineteen

hundred and four, to wit, on the thirteenth day of March, nineteen hundred and five, in the city of Newark, in the county of Essex, together with the said Giovanni Gasparini, did execute and deliver to the said sheriff of the county of Essex the said supposed writing obligatory, dated the eleventh day of March, nineteen hundred and five.

- But this defendant will give in evidence and insist that, on the contrary, the said *capias ad respondendum*
- 10 was and has been duly returned to the Circuit Court of the county of Essex by the said sheriff of the county of Essex, on the eighth day of December, nineteen hundred and four, as satisfied by the arrest of the said Guiseppe Sozio and the acceptance by the said sheriff of an insolvent bond; and that the said Guiseppe Sozio, on the eleventh day of March, nineteen hundred and five, was in the custody of the said sheriff as the keeper of the common jail of Essex county, by virtue of an order of the Court of Common Pleas of the county of Essex, and
- 20 not by virtue of the writ of *capias ad respondendum* in the first count of plaintiff's declaration mentioned and referred to; that said order of the said Court of Common Pleas was made on the eleventh day of March, nineteen hundred and five, in the course of proceedings instituted in said court at the December term, nineteen hundred and four, by the said Guiseppe Sozio for his discharge as an insolvent debtor, and that said order of the Court of Common Pleas was made after hearing the application of the said Guiseppe Sozio and after the
- 30 court had refused to discharge him, and that in accordance with said order refusing his discharge and remanding him to the common jail of said county, the said Guiseppe Sozio surrendered himself and was immediately taken, to wit, on the said eleventh day of March, nineteen hundred and five, to the common jail aforesaid, and there was confined until Monday, the thirteenth day of March, nineteen hundred and five, and that while he, the said Guiseppe Sozio, was in actual confinement in said

jail, under said order of remand, the said writing obligatory was made and executed, conditioned for a second application for the discharge of said Sozio as an insolvent debtor, and that the said defendant, Sozio, was thereupon discharged from actual confinement in said jail by the said writing obligatory, to wit, on the thirteenth day of March, nineteen hundred and five; that subsequently the said Sozio appeared at the next term of the Court of Common Pleas, to wit, of the fourth day of April, nineteen hundred and five, being the April term thereof, and 10 petitioned again for his discharge as an insolvent debtor, and that a day was duly designated by the said Court of Common Pleas for a hearing on his said application, and that the said court subsequently adjudicated that said proceedings and said supposed writing obligatory were without authority of law, unlawful and null and void, and that it is not true that the discharge of the said Guiseppe Sozio was, on the twenty-fourth day of June, nineteen hundred and five, refused by the said Court of Common Pleas of the county of Essex, to whom the said 20 Guiseppe Sozio had petitioned for discharge, in accordance with the condition of the writing obligatory mentioned in the said first count of plaintiff's declaration; but, on the contrary, this defendant will give in evidence and insist that the said Court of Common Pleas of the county of Essex refused to hear the said application of Guiseppe Sozio, being his second application as aforesaid, for a discharge as an insolvent debtor, on the ground that there was no authority in the law to institute a second application for discharge as an insolvent 30 debtor, except where the first application had been refused by the verdict of a jury, and that said proceedings were without authority at law, and null and void, and that the said Guiseppe Sozio in all things fully performed all the conditions of the said writing obligatory, and that no one of said conditions was broken, or said penal sum forfeited for breach thereof, but that in all respects said conditions were observed and fulfilled, maintained and performed.

And as to the second count of the said declaration this defendant will give in evidence and insist with trial of said cause, that it is not true that the said Guiseppe Sozio, being then in the custody of the sheriff of the county of Essex, under a *capias* issued upon a judgment obtained by said plaintiff in the Circuit Court of the said county of Essex, the said Guiseppe Sozio and this defendant executed and delivered the said supposed writing obligatory mentioned and described in said second count.

- 10 And this defendant will give in evidence and insist that said writing obligatory was given to the said sheriff, as keeper of the county jail, by the said Guiseppe Sozio, while he was in actual confinement in the said jail, by virtue of an order of remand made by the Court of Common Pleas of the county of Essex at the time and in the course of proceedings and under the circumstances in this notice hereinbefore particularly set forth, and that on being released from said actual confinement by the giving of the said writing obligatory, the said Guiseppe
- 20 Sozio did appear at the next term of the said Court of Common Pleas then next holding in the county of Essex aforesaid, to wit, on the fourth day of April, nineteen hundred and five, and did petition the said Court of Common Pleas for his discharge as an insolvent debtor, according to the form and effect of the said writing obligatory, and did in all respects fulfill, maintain and perform the conditions of the said writing obligatory.

- And as to the third count of the said declaration this defendant will give in evidence and will insist in the
- 30 trial of said cause, that it is not true that the said Guiseppe Sozio, being then in the custody of the sheriff of the county of Essex under a *capias* issued upon a judgment obtained by the said plaintiff in the Circuit Court of the county of Essex, he, the said Guiseppe Sozio and this defendant, executed and delivered to the sheriff of the county of Essex the said supposed writing obligatory in said third count mentioned and described; but, on the contrary, that the said Guiseppe Sozio was in con-

finement in the said county jail in the county of Essex, under an order of remand of the said Court of Common Pleas, made in the course of proceedings and under the circumstances in this notice herein particularly set forth, and that on being released from said actual confinement the said Guiseppe Sozio did appear in person at every subsequent court of the said Court of Common Pleas, according to the form and effect of the said condition of the said writing obligatory.

That as to the fourth count of said declaration this 10
defendant will give in evidence and insist that it is not true that the said Guiseppe Sozio, being then in the custody of the sheriff of the county of Essex, under a *capias* issued upon a judgment obtained by said plaintiff in the Circuit Court of the said county of Essex, he, the said Guiseppe Sozio and this defendant, executed and delivered to the sheriff of the county of Essex the said writing obligatory in said third count mentioned and described, and was refused a discharge by the said Court of Common Pleas; but, on the contrary, will give in 20
evidence and will insist that the said Guiseppe Sozio, being confined in the common jail of the county of Essex, by virtue of an order of remand made by said Court of Common Pleas of the county of Essex in the course of proceedings and under the circumstances hereinbefore set forth, and that it is not true that the said Guiseppe Sozio was refused the discharge by the said Court of Common Pleas, but, on the contrary, this defendant will give in evidence and insist that the said Court of Common Pleas refused to hear the application of said 30
Guiseppe Sozio on the ground that the entire proceedings were without authority of law and null and void, for the reason that the law made no provision for a second application on the part of the insolvent debtor, unless the first application had been refused by the verdict of a jury.

And the said defendant, Giovanni Gasparini, by Sweeney & Scoppettone, his attorneys, comes and defends

the wrong and injury, when, &c., as to the first count of said declaration, and says that the supposed writing obligatory is not his deed, and of this he puts himself on the country, &c.

And the said defendant, Giovanni Gasparini, by Sweeney & Scoppettone, his attorneys, comes and defends the wrong and injury, when, &c., and as to the said second, third and fourth counts of the said declaration says that the supposed writing obligatory therein mentioned is not his deed, and of this he puts himself on the
10 country, &c.

That the said defendant, Giovanni Gasparini, by Sweeney & Scoppettone, his attorneys, comes and defends the wrong and injury, when, &c., and as to the fifth and last counts in said declaration mentioned says that he did not undertake and promise in the manner and form as the said plaintiff hath complained thereof against him, and of this he puts himself on the country, &c.

And for a further plea in this behalf, by leave of the
20 court first had and obtained, the said defendant, Giovanni Gasparini, by Sweeney & Scoppettone, his attorneys, comes and defends the wrong and injury, when, &c., and says that the said defendant ought not to be charged with the said debt, by virtue of the said supposed writing obligatory in the said first, second, third and fourth counts mentioned, because he says that the said Guiseppe Sozio was not arrested under the writ in said declaration mentioned, in manner and form as the said plaintiff hath
above thereof in the said declaration and the several
30 counts thereof in that behalf alleged, and of this the said defendant puts himself on the country, &c.

And for a further plea in this behalf, by leave of the court first had and obtained, the said defendant, Giovanni Gasparini, by Sweeney & Scoppettone, his attorneys, comes and defends the wrong and injury, when, &c., and says that the said plaintiff ought not to have and maintain his aforesaid action against this defendant, by virtue of said supposed writing obligatory in the first, second,

third and fourth counts mentioned, because he says that the said defendant, Guiseppe Sozio, did, from time to time, and at all times after the making of the said writing obligatory, and the said conditions thereof, well and truly observe, perform, fulfill and keep all and singular the articles, clauses, payments, conditions and agreements in the said condition of the said writing obligatory specified, comprised and mentioned in all things therein contained on his part and behalf to be observed, performed, fulfilled and kept according to the tenor and 10 effect, true intent and meaning of the said conditions of the said writing obligatory, and of this he puts himself on the country, &c.

Notice is hereby given that, in support of the several pleas above pleaded, the said defendant, Giovanni Gasparini, in the trial of the above-stated cause, will give in evidence in defense to said action the following matters, to wit:

As to the first count, that it is not true as therein set forth, that the defendant, Guiseppe Sozio, being in 20 custody by the sheriff of the county of Essex, by virtue of a *capias ad respondendum*, dated December fifth, nineteen hundred and four, to wit, on the thirteenth day of March, nineteen hundred and five, in the city of Newark, in the county of Essex, together with the said Giovanni Gasparini, did execute and deliver to the said sheriff of the county of Essex the said supposed writing obligatory, dated the eleventh day of March, nineteen hundred and five.

But this defendant will give in evidence and insist that, 30 on the contrary, the said *capias ad respondendum* was and has been duly returned to the Circuit Court of the county of Essex by the said sheriff of the county of Essex, on the eighth day of December, nineteen hundred and four, as satisfied by the arrest of the said Guiseppe Sozio and the acceptance by the said sheriff of an insolvent bond; and that the said Guiseppe Sozio, on the eleventh day of March, nineteen hundred and five, was in the cus-

tody of the said sheriff as the keeper of the common jail of Essex county, by virtue of an order of the Court of Common Pleas of the county of Essex, and not by virtue of the writ of *capias ad respondendum* in the first count of plaintiff's declaration mentioned and referred to; that said order of the said Court of Common Pleas was made on the eleventh day of March, nineteen hundred and five, in the course of proceedings instituted in said court at the December term, nineteen hundred and four, by the

10 said Guiseppe Sozio for his discharge as insolvent debtor, and that said order of the Court of Common Pleas was made after hearing the application of the said Guiseppe Sozio and after the court had refused to discharge him, and that in accordance with said order refusing his discharge and remanding him to the common jail of said county, the said Guiseppe Sozio surrendered himself and was immediately taken, to wit, on the said eleventh day of March, nineteen hundred and five, to the common jail aforesaid, and there was confined until Monday, the

20 thirteenth day of March, nineteen hundred and five, and that while he, the said Guiseppe Sozio, was in actual confinement in said jail, under said order of remand, the said writing obligatory was made and executed, conditioned for a second application for the discharge of said Sozio as an insolvent debtor, and that the said defendant, Sozio, was thereupon discharged from actual confinement in said jail by the said sheriff as the keeper of said jail, on the delivery to him of said writing obligatory, to wit, on the thirteenth day of March, nineteen

30 hundred and five; that subsequently the said Sozio appeared at the next term of the Court of Common Pleas, to wit, of the fourth day of April, nineteen hundred and five, being the April term thereof, and petitioned again for his discharge as an insolvent debtor, and that a day was duly designated by the said Court of Common Pleas for a hearing on his said application, and that the said court subsequently adjudicated that said proceedings and said supposed writing obligatory were without authority

of law, unlawful and null and void, and that it is not true that the discharge of the said Guiseppe Sozio was, on the twenty-fourth day of June, nineteen hundred and five, refused by the said Court of Common Pleas of the county of Essex, to whom the said Guiseppe Sozio had petitioned for discharge, in accordance with the condition of the writing obligatory mentioned in the said first count of the plaintiff's declaration; but, on the contrary, this defendant will give in evidence and insist that the said Court of Common Pleas of the county of Essex refused to hear the said application of Guiseppe Sozio, 10 being his second application as aforesaid, for a discharge as an insolvent debtor, on the ground that there was no authority in the law to institute a second application for discharge as an insolvent debtor, except where the first application had been refused by the verdict of a jury, and that said proceedings were without authority at law, and null and void, and that the said Guiseppe Sozio in all things fully performed all the conditions of the said writing obligatory, and that no one of said conditions 20 was broken, or said penal sum forfeited for breach thereof, but that in all respects said conditions were observed and fulfilled, maintained and performed.

And as to the second count of the said declaration this defendant will give in evidence and insist with trial of said cause, that it is not true that the said Guiseppe Sozio, being then in the custody of the sheriff of the county of Essex, under a *capias* issued upon a judgment obtained by said plaintiff in the Circuit Court of the said county of Essex, the said Guiseppe Sozio and this defendant 30 executed and delivered the said supposed writing obligatory mentioned and described in said second count.

And this defendant will give in evidence and insist that said writing obligatory was given to the said sheriff, as keeper of the county jail, by the said Guiseppe Sozio, while he was in actual confinement in the said jail, by virtue of an order of remand made by the Court of Common Pleas of the county of Essex at the time and in the

course of proceedings and under the circumstances in this notice hereinbefore particularly set forth, and that on being released from said actual confinement by the giving of the said writing obligatory, the said Guiseppe Sozio did appear at the next term of the said Court of Common Pleas then next holding in the county of Essex aforesaid, to wit, on the fourth day of April, nineteen hundred and five, and did petition the said Court of Common Pleas for his discharge as an insolvent debtor, according
10 to the form and effect of the said writing obligatory, and did in all respects fulfill, maintain and perform the conditions of the said writing obligatory.

And as to the third count of the said declaration this defendant will give in evidence and will insist in the trial of said cause, that it is not true that the said Guiseppe Sozio, being then in the custody of the sheriff of the county of Essex under a *capias* issued upon a judgment obtained by the said plaintiff in the Circuit Court of the county of Essex, he, the said Guiseppe Sozio and
20 this defendant, executed and delivered to the sheriff of the county of Essex the said supposed writing obligatory in said third count mentioned and described; but, on the contrary, that the said Guiseppe Sozio was in confinement in the said county jail in the county of Essex, under an order of remand of the said Court of Common Pleas, made in the course of proceedings and under the circumstances in this notice herein particularly set forth, and that on being released from said actual confinement the said Guiseppe Sozio did appear in person at every sub-
30 sequent court of the said Court of Common Pleas, according to the form and effect of the said condition of the said writing obligatory.

That as to the fourth count of said declaration this defendant will give in evidence and insist that it is not true that the said Guiseppe Sozio, being then in the custody of the sheriff of the county of Essex, under a *capias* issued upon a judgment obtained by said plaintiff in the Circuit Court of the said county of Essex, he, the

said Guiseppe Sozio and this defendant, executed and delivered to the sheriff of the county of Essex the said writing obligatory in said third count mentioned and described, and was refused a discharge by the said Court of Common Pleas; but, on the contrary, will give in evidence and will insist that the said Guiseppe Sozio, being confined in the common jail of the county of Essex, by virtue of an order of remand made by said Court of Common Pleas of the county of Essex, in the course of proceedings and under the circumstances hereinbefore 10 set forth, and that it is not true that the said Guiseppe Sozio was refused the discharge by the said Court of Common Pleas, but, on the contrary, this defendant will give in evidence and insist that the said Court of Common Pleas refused to hear the application of said Guiseppe Sozio on the ground that the entire proceedings were without authority of law and null and void, for the reason that the law made no provision for a second application on the part of the insolvent debtor, unless the first application had been refused by the ver- 20 dict of a jury.

Therefore let a jury thereupon come before our Chief Justice, or some other justice of the Supreme Court of the State of New Jersey, at a Circuit Court to be holden at Newark, in and for the county of Essex, on the second Tuesday of December, A. D. nineteen hundred and five, by whom, &c., and the same day is given to the parties aforesaid there, &c.

And now at this day, to wit, the twenty-ninth day of January, A. D. nineteen hundred and six, before our said 30 Supreme Court at Trenton, comes the said plaintiff, by his attorney aforesaid and the justices before whom, &c., having first sent hither his record had before him in these words, to wit:

Afterwards, to wit, at a Circuit Court holden at Newark, in and for the county of Essex, before his Honor William S. Gummere, Chief Justice of the Supreme Court, on the tenth day of January, in the year of our

Lord one thousand nine hundred and six, according to the form of statute in such case made and provided, comes as well the said plaintiff as the said defendants by their respective attorneys within mentioned, and the jurors of the jury between the parties aforesaid in the plea aforesaid, being summoned, also come, who, to speak the truth of the matters and things within contained, being chosen, tried and sworn, say upon their oath that the defendants are indebted to the plaintiff in the sum of
 10 twelve hundred dollars, the debt within mentioned, in manner and form as in the plaintiff's declaration alleged, and in addition they assess the damages of the plaintiff on occasion of the detaining of the within debt over and above his costs and charges by him about his suit in this behalf expended, to six cents, and for those costs and charges.

Therefore it is considered that the said plaintiff do recover against the said defendants his said damages by the jury in form aforesaid found to be one thousand two
 20 hundred dollars, and also fifty dollars and ten cents for his costs and charges aforesaid by the court now here adjudged to the said plaintiff and with his assent, which said damages, costs and charges in the whole amount to one thousand two hundred and fifty dollars and ten cents.

Judgment signed the twenty-ninth day of January, A. D. nineteen hundred and six.

WM. S. GUMMERE, *C. J.*

I, William Riker, Jr., clerk of the Supreme Court of the State of New Jersey, do certify that the foregoing is
 30 a true copy of the judgment entered in the above-stated cause as the same remains of record in my office.

In testimony whereof I have set my hand and the seal of said court at Trenton, this sixteenth day
 [L. s.] of February, A. D. nineteen hundred and six.

WM. RIKER, JR.,
Clerk.

ASSIGNMENTS OF ERROR.

[Filed April 3, 1906.]

Afterwards, that is to say, on the third Tuesday of February, in the year of our Lord one thousand nine hundred and six, in the Court of Errors and Appeals of the last resort in all causes of the State of New Jersey, come the said Guiseppe Sozio and Giovanni Gasparini, by James M. Trimble, their attorney, and say that in the record and proceedings aforesaid, and also in the matters recited and contained in the said bill of exceptions, and 10 also in giving the verdict and judgment aforesaid, there is manifest error in this, to wit, that by the record aforesaid it appears that the judgment in form aforesaid was given for the said Vincenzo Guiliano against the said Guiseppe Sozio and Giovanni Gasparini, whereas, by the law of the land, judgment ought to have been given for the said Guiseppe Sozio and Giovanni Gasparini.

Second. That there is also error in this, to wit, for that the said justice before whom, &c., at and upon the aforesaid trial of the said issue so joined between the 20 parties aforesaid, illegally admitted in evidence as a sworn copy of the original paper, a copy of the bond or writing obligatory supposed to have been executed by the said defendants and being sued on in said suit for a supposed forfeiture thereof against the objection of the said defendants that the proof was too general and indefinite to supply the secondary evidence of a lost deed or bond, to which ruling of said judge the said defendants did then and there except and tendered their bill of exceptions, and prayed that the same might be sealed according 30 to the statute in such case made and provided, and it was sealed accordingly.

Third. That there is manifest error in this, to wit, for that the justice before whom, &c., and upon the aforesaid trial of the said issue so joined between the parties aforesaid, unlawfully did refuse to order a judgment of

nonsuit against the said Vincenzo Guiliano, the said plaintiff, although said motion was duly made at the close of plaintiff's case, to which ruling of said justice the said defendants did then and there except and tender this their bill of exceptions, and prayed that the same might be sealed according to the statute in such case made and provided, and it was sealed accordingly.

Fourth. That there is manifest error in this, to wit, for that the justice before whom, &c., and upon the
10 aforesaid trial of the said issue so joined between the parties aforesaid, unlawfully did refuse to order a judgment of nonsuit against the said Vincenzo Guiliano, the said plaintiff, although said motion for nonsuit was duly made at the close of plaintiff's case, on the ground that there had been no forfeiture of the bond, and that the order of the Court of Common Pleas refusing to hear the debtor, said Guiseppe Sozio, the insolvent debtor, was not a refusal to discharge within the meaning of the bond, to which ruling of said justice the said defendants did
20 then and there except, and tended this their bill of exceptions, and prayed that the same might be sealed according to the statute in such case made and provided, and it was sealed accordingly.

Fifth. That there is manifest error in this, to wit, for that the justice before whom, &c., at and upon the aforesaid trial of the said issue so joined between the parties aforesaid, did illegally charge and direct that the jury return a verdict in favor of the plaintiff below, to wit, said Vincenzo Guiliano against the said defendants
30 below, to wit, the said Guiseppe Sozio and the said Giovanni Gasparini, to which charge and direction of verdict the said defendants did then and there except and tender their bill of exceptions and prayed that the same might be sealed according to the statute in such case made and provided, and it was sealed accordingly.

Sixth. That there is manifest error in this, to wit, for that the justice before whom, &c., at and upon the aforesaid trial of the said issue so joined between the parties

aforesaid, when the case was closed, refused to direct a verdict for the defendants, although duly requested so to do.

Seventh. That there is manifest error in this, to wit, for that the justice before whom, &c., at and upon the aforesaid trial of the said issue so joined between the parties aforesaid, when the case was closed, refused to direct a verdict for the defendants, although requested so to do upon the following grounds, to wit, on the grounds urged in support of the motion for nonsuit, and 10 upon the further ground that before there can be any forfeiture of an insolvent bond there must be adjudication of the court that the conduct of the defendant has not been fair, upright and just, and also that there must be an order of the court remanding the debtor to the custody of the sheriff.

Therefore the said plaintiffs in error pray that the judgment aforesaid, by reason of the aforesaid errors, and of the other errors appearing in the record and proceedings aforesaid, be reversed, annulled and for nothing 20 holden, and that the said Guiseppe Sozio and Giovanni Gasparini may be restored to all things they have lost on occasion of the said judgment, &c.

JAMES M. TRIMBLE,
Attorney of Plaintiffs in Error.

Service of within assignments of error acknowledged this April 2d, 1906, and consent that same be filed as of time.

HUGH B. REED,
Attorney of Defendant in Error. 30

JOINDER IN ERROR.

[Filed April 5, 1906.]

And hereupon afterwards, to wit, on the third Tuesday in February, nineteen hundred and six, the said Vincenzo Guiliano, by Hugh B. Reed, his attorney, comes into court and says that there is no error either in the record or proceedings aforesaid or in giving the judgment aforesaid, and he prays that the court here may proceed to examine as well the record and proceedings
10 aforesaid as the matters aforesaid assigned for error, and that the judgment aforesaid in the manner aforesaid given may in all things be affirmed, &c.

HUGH B. REED,*Attorney for and of Counsel with Defendant in Error.*

TESTIMONY.

Transcript of shorthand notes of testimony, taken in the above-stated cause at the trial thereof, at the court house, Newark, N. J., January 10th, 1906.

Before Hon. William S. Gummere, Chief Justice, and
20 a jury.

Hugh B. Reed, for the plaintiff.

James M. Trimble and Sweeney & Scoppettone, for the defendant.

Mr. Reed opened for the plaintiff.

George Mahr, sworn for the plaintiff.

Direct examination by Mr. Reed.

Q. Mr. Mahr, what official position do you hold?

A. Deputy county clerk, Essex county.

Q. I show you a book, Circuit Court Judgments, No. 87, for Essex County, and ask you what that book is?

Mr. Trimble—I would like to interpose an objection that it is immaterial.

The Court—You may answer it.

A. Circuit Court Judgment Record, No. 87, in which is recorded a judgment in the case of Vincenzo Guiliano *v.* Guiseppe Sozio, on September 29th, 1904; damages, \$500; costs, \$69.67; total, \$569.67.

Q. That is the record of a judgment of the Circuit 10 Court?

A. A judgment of the Circuit Court on file in the county clerk's office.

[Said judgment offered in evidence. Objected to as irrelevant. Objection overruled.]

Defendant's counsel prays exception to the ruling of the court and the same is allowed, and signed and sealed accordingly.

WILLIAM S. GUMMERE, C. J.

Q. Was any execution issued on that judgment?

A. Yes, sir; there was a body execution, or *ca. sa.*, 20 issued on it.

Q. Have you that?

A. Mr. Trimble has it.

Q. Is it among those papers?

A. Yes, sir; I have it.

Q. Was that issued from the Circuit Court upon that judgment?

A. Yes, sir; issued out of the Circuit Court and recorded in the county clerk's office.

Q. And was it afterwards returned to that office? 30

A. Yes, sir; returned to the county clerk's office after the sheriff had made his return upon it.

[Said execution offered in evidence.]

Mr. Trimble—What is the date?

Mr. Reed—It was issued the 5th day of December, 1904, returnable at the December Term, 1904.

Mr. Trimble—When was it returned by the sheriff?
 Q. (By Mr. Trimble.) Mr. Mahr, will you read the return?

A. "The within named defendant was arrested December 8th, 1905, and upon furnishing"—

The Court—1905?

Witness—1905, yes, sir.

Mr. Trimble—1904, was it not?

Witness—It states 1905 here.

10 Mr. Trimble—I guess we will all agree that is not right; it is 1904.

Witness—"December 8th, 1904, and upon furnishing an insolvent bond was released. William C. Nicoll, Sheriff."

Further direct.

Q. Now, was a bond returned with that?

A. The bond was returned; yes, sir.

Q. And what was done with the bond?

A. It was recorded in the county clerk's office.

20 Q. (Showing witness book.) Will you tell me if that is the record of that bond?

Mr. Trimble—Now, may it please the court, I want to object to the offer of this record; there is no provision of law that I know of—

The Court—I suppose the bond is the best evidence; where is that?

Mr. Reed—I don't know. This bond was not delivered to me. This is the first bond given; it is, perhaps, not material on this second bond, as Mr. Trimble
 30 states. I thought this would give a clearer idea of just what happened.

The Court—I don't suppose the contents of the bond itself has any materiality in this case. The sheriff returned that a bond was given; Mr. Mahr states that bond was returned with the *ca. sa.* and recorded in the clerk's office on page—

The Witness—159, Book 3 of Bonds.

Mr. Trimble—I withdraw my objection to that.

Q. Was any order made in the Court of Common Pleas with relation to this case?

The Court—Well, after the bond was returned, then, what was the next step.

A. There was a petition made in the Court of Common Pleas.

By the Court.

Q. By the judgment defendant?

A. There was a petition made in the Court of Common Pleas by the defendant to have the benefit of the insolvency act.

Q. That petition was filed when?

A. Filed in the county clerk's office on December 12th, 1904.

Further direct.

Q. Then was there an order setting a day for hearing?

A. The next thing was a petition for order setting down a certain day for hearing.

Q. (By the Court.) Was an order made fixing the 20 day?

A. I believe there is a record on the Common Pleas minutes in regard to the order fixing the day.

Q. Well, there was a hearing on this application?

A. Yes, sir; there was a hearing on the 10th day of March, 1905.

Further direct.

Q. And what order was entered on that day? It is on page 456.

A. The order reads as follows: "The evidence being closed, and the court having heard the arguments of counsel, and heard what could be said for or against the liberation of the petitioner, the court refused the discharge of the petitioner, and ordered him returned into the custody of the sheriff."

Q. (By Mr. Trimble.) That is March 10th, 1905?

A. March 10th, 1905.

Q. What page?

A. Page 456 of the Common Please Court Minutes.

Mr. Reed—I will offer these papers in evidence together with that page of that book.

Further direct.

Q. What is the next record you have in this matter?

A. The next is another petition filed by Guiseppe Sozio for the benefit of the insolvency act, filed April 4th, 1905.

10 Q. Was that accompanied by any other paper?

A. There was an order made by the court setting down Saturday, the 27th day of May, 1905, as a day for hearing the application.

Q. Did any other paper accompany the petition in that matter?

A. No, sir; I believe that is all.

Q. Was any bond received.

A. There was a bond given.

Q. Was that filed in your office?

20 A. It was recorded in our office, and after the record was made it was returned to the sheriff's office.

Q. Where was it recorded?

A. On page 176, in Book 3 of Bonds.

Q. When was that record made?

A. Made on March 13th, 1905.

Mr. Reed—I ask that that be marked for identification.

Q. Then what order followed those you have mentioned?

30 A. An order made by the court; there was a hearing in this matter and an order.

Mr. Trimble—Please to read from the record now; it is very important that we have the exact record.

Witness—There was an order made by the court on the 24th day of June, "Ordered that the said application of the said Guiseppe Sozio for hearing on his said petition be dismissed."

Q. Have you that original order there?

A. Yes, sir.

Q. (By Mr. Trimble.) What is that you have there?

A. An order dismissing the application.

Mr. Trimble—Oh, no; where is the order; let me see it. I ask that it be read as it is offered, your Honor.

[Said order read.]

Mr. Reed—I will offer this in evidence. The petition in this case. The *fi. fa.* in the case of Vincenzo Guiliano v. Guiseppe Sozio, marked "Recorded Essex County Clerk's office, in Book S of Executions, page 604." 10

[The same marked *Exhibit P 1*. Petition of Guiseppe Sozio, an insolvent debtor, filed December 12th. Same marked *Exhibit P 2*. The further petition filed December 13th. Same marked *Exhibit P 3*. Page 456 of the Minutes of the Court of Common Pleas. Petition in the same matter filed April 4th, 1905. Same marked *Exhibit P 4*. A further petition filed the same day. Same marked *Exhibit P 5*. The page in the Minutes of the Court of Common Pleas setting the day for hearing. The order dismissing the petition. The same is marked *Exhibit P 6*.] 20

Cross-examination by Mr. Trimble.

Q. You have produced here one execution, that is all there is among the papers, and that was December of last year?

A. Yes, sir.

Q. Returned December 8th satisfied by the arrest and return of the bond, is that right? 30

The Court—The return speaks for itself.

Q. Is there any other execution issued?

A. I have not searched the records for further execution.

Q. Now, you were asked by his Honor about what was the next thing done after filing the petition in December, 1904, and you gave the order refusing to discharge the

petitioner, March 10th. I want to call your attention to the fact that there is not in the records—turn to the records of the Court of Common Pleas, please, page 396, I think it is.

A. What order have you reference to, Mr. Trimble?

Q. The old book, December; don't you find there an order reciting the appearances?

A. Not on page 396; no, sir.

Q. 398?

10 The Court—Reciting appearances and doing what?

Mr. Trimble—Asking for a day to be fixed for a hearing.

The Court—Not an order asking for a day.

Mr. Trimble—I think there is an order designating the day.

The Court—There was a petition, I understand Mr. Mahr says, asking for fixing a day, and there was an order naming the day; you have already stated that.

Q. Have you found an order there?

20 A. Yes, sir; it is an order on the 13th day of December, 1904, which appoints the 11th day of February, 1905, at the hour of ten o'clock in the forenoon, at the court house, city of Newark, N. J., as the time and place at which the court will attend to hear what can be urged for or against the liberation of the said prisoner.

Mr. Trimble—I should like that to go in evidence.

The Court—Yes.

30 Q. Now, will you turn to page 467, I think it is the old book of minutes; now, do you find any record there, and if so, what is it?

A. An order entered on the 4th day of April, 1905: "Essex County Court of Common Pleas. In the matter of the application of Guiseppe Sozio for his discharge as an insolvent debtor. On petition. Order. The above-named Guiseppe Sozio appearing and asking that a day be fixed for a hearing of his petition * * * I do, on this 4th day of April, 1905, appoint Saturday, the 27th day of May, 1905, at ten o'clock in the forenoon,

at the court house of Essex county, in Newark, as the time and place at which the court will attend to hear what can be alleged for and against the liberation of the said petitioner, on motion of James M. Trimble. Alfred F. Skinner, Judge."

Mr. Trimble—I should like that to go in.

Q. This order you have produced in typewritten shape; do you find a record of it on the minutes?

A. I haven't looked through the minutes to find it.

Q. Will you turn to page 28 of the new minutes? 10

A. It is downstairs.

Mr. Reed—Is that important? You have the original order.

The Court—You may offer the record of this order if you desire.

Mr. Trimble—I don't know as it is of any great importance. I think this is a true copy.

The Court—The order itself is here.

William Nicoll, sworn for the plaintiff.

Direct examination by Mr. Reed. 20

Q. Have you been connected with the county of Essex in an official capacity?

A. I have.

Q. During what period?

A. From November, 1902, until November, 1905, I occupied the office of sheriff.

Q. During your incumbency did you take any insolvency bond from one Guiseppe Sozio?

A. I did.

Q. More than one? 30

A. I did.

Q. Do you recall the date?

A. No, I couldn't say that I do.

Q. I show you a body execution which is marked as returned from your office, and ask you if you recognize that?

A. I do.

Q. And here is a record of a bond given you bearing date the 8th day of December, 1904; do you recall that bond?

A. I do.

Q. (By the Court.) Well, what was it given for?

A. It was given for the application for the benefit of the insolvency law by Sozio.

Q. Then what did you do with Sozio?

A. Sozio was released upon the giving of that bond.

10 Q. Was he returned to your custody after that time?

A. After that time he was returned to my custody.

Q. Do you recall the date of that?

A. I could not say.

Q. I show you the record of the second bond given in the same matter, which appears on page 176 of Book No. 3 of Bonds, and ask you if that recalls to your mind the time of the giving of the second bond?

A. Yes; this bond is dated the 11th day of March, and, as I recollect now, it was about that time that this
20 bond was given me.

Q. Do you recall the circumstance of the giving of the second bond?

A. I recall that Sozio was remanded into my custody after unsuccessfully applying for the benefit of the insolvency laws, and gave this bond for the making of another application, and upon the giving of this bond he was again released.

Q. What was done with that bond?

A. That bond was by me sent into the clerk's office and
30 recorded, and was afterwards returned to me.

Q. What did you do with it?

A. At the conclusion of the second application I turned it over to the attorney of the plaintiff, Mr. Reed.

Q. Did Mr. Sozio, who is mentioned in that bond, ever surrender himself to you after that time?

A. Not since the giving of the second bond.

Q. And your term of office expired what time?

A. November 14th, 1905.

Q. Was he in any manner placed in your custody after that time whether by surrender or——

A. No, not in any way.

Mr. Reed—Now, I wish to offer in evidence the bond then given to the sheriff by Mr. Sozio. The bond, as he states, was delivered by him to me, and I had it in my possession for some time. This suit was brought and declaration filed, and a copy of the bond was inserted in the declaration. After that was done the bond was mislaid by me, or it is not now in my possession; I have in- 10
quired of every person. If you desire I will be sworn, Mr. Trimble.

Mr. Trimble—No, I will take your word for its being missing.

Mr. Reed—I have inquired of every one who had the bond, to my knowledge, during that time. There was a demurrer filed by Mr. Trimble, and I thought that the bond had been placed in the hands of your Honor, and that possibly it might not have been returned to me. I cannot say certainly that I gave it to your Honor at the 20
time of the filing of that demurrer. I am unable to find it among my papers. I have looked through all of them carefully, through my safe, where it would have been placed with the papers in this case, and through my files, the only places where it could possibly be, and I am unable to find it. I desire to offer in evidence——

Mr. Trimble—At this time? Cannot I cross-examine the sheriff first?

Mr. Reed—Excuse me. It would have been proper to permit you to cross-examine the sheriff. 30

Cross-examination by Mr. Trimble.

Q. Sheriff, you say that after the termination of the first proceedings he was remanded to your custody?

A. Yes, sir.

Q. And you know the man?

A. I think I do, although I would not——

Q. Stand up, Mr. Sozio. Is that the man?

A. As I recollect it, that is the man.

Q. Now, when he was remanded to your custody, where was he sent?

A. Sent down to the sheriff's office.

Q. From the sheriff's office where was he sent?

A. I think he gave a bond before leaving the sheriff's office.

Q. I want you to be sure about that. Don't you know he did not? Don't you know he was in jail when he gave
10 the bond?

A. I can't be sure about that detail. That is my recollection of it; that he gave the bond—

Q. Will you swear he gave that bond in your office?

A. No, I won't be certain of it, Mr. Trimble.

Q. Have you any records that will show what became of him?

A. If he became a prisoner in actual confinement at the jail, there would be a record at the jail of the fact that he was there.

20 Q. You understand me, I am talking about the second bond?

A. I thought you were talking of the first bond.

Q. I beg your pardon, no. He was remanded, I said, after the first proceedings; he was remanded to your custody?

A. Yes.

Q. Then can you tell us what became of him on that occasion?

A. On that occasion—I can't tell you in any detail
30 what was done at that time; I simply know that this bond was given to insure a second application, and that upon the giving of that bond he was released; whether he was in actual confinement at the time that bond was given or not, I could not say.

Q. (By the Court.) You mean whether he was in jail or in your office?

A. Actually in jail, or at the sheriff's office, I could not say at this time.

Further cross.

Q. You have no way of refreshing your recollection as to that?

A. Save by the records of the jail, which would show if he actually became a prisoner there.

Q. Where did you get this second bond—from whose hand did you get it?

A. It was his attorney, I think, Mr. Braun, gave it to me.

Q. Personally to you?

10

A. I think so.

Q. Do you remember where you were at that time?

A. There was one bond given in this case down at my private office, down in Broad street, and there was another bond——

Q. I am referring to the second bond.

A. The other bond, as I recall it, was given at the sheriff's office; now, where the first bond was given and where the second bond was given, I am not sure.

Q. You cannot refresh your memory at all about the 20 second bond, where you were or how you got it?

A. I can't be certain; there are a great many of those bonds, you know, given to the sheriff in the course of his term.

Q. Now, you say you delivered this bond to Mr. Reed?

A. I did.

Q. Did you make any written assignment of it to him?

A. No, sir.

Q. No written assignment of this bond to anybody?

A. No, sir.

30

Mr. Reed—The bond is to the plaintiff.

Q. Now, you say that since then, since the giving of the second bond, there never has been any remand by order of the court of this man to your custody?

Mr. Reed—I think he did not say so.

Mr. Trimble—He did say so.

A. I say since the giving of the second bond by this man I have not seen the man, and he has not been in my custody.

Q. Didn't you say a little while ago, sir, that there had been no remand?

A. If I said that I didn't mean there had not been an order remanding the prisoner; I would not know unless the prisoner, in obedience to the order of remand, surrendered himself.

Mr. Reed—I now consider that my statement has been repeated, and with the offer of Mr. Trimble to waive the proof of the bond by the subscribing witness, as I understand he told me he would do, we offer that record of the
10 bond in evidence.

The Court—Is there any objection, Mr. Trimble?

Mr. Trimble—Yes, sir.

The Court—That is not the way to prove the contents of a lost instrument, unless the statute makes the record of the bond evidence. You may prove by your own oath that a certain paper is a copy of the bond; if you made a copy of it you may produce that copy and swear it is a copy.

20 Mr. Reed—I will offer, then, to have the clerk to prove that that is a true copy of the bond.

The Court—You may do that.

Mr. Trimble—At the proper time I wish to interpose an objection to proving the contents of a bond of this character in this way—by a copy.

[Objection overruled.]

The Court—I understand you waive the formal proof.

Mr. Trimble—I did not say I would waive the formal proof unless he had the original paper here. I did not
30 say I would waive formal proof in the case of a copy.

The Court—Who is the subscribing witness?

Mr. Trimble—Mr. Braun; he is here.

Rudolph Braun, sworn for the plaintiff.

Direct examination by Mr. Reed.

Q. Are you acquainted with Mr. Sozio, the defendant in this suit?

A. Yes, sir.

Q. Did you at any time during March, 1905, act for him or do any act in connection with an application to take advantage of the insolvency laws?

A. I did it, at the request of Mr. Trimble, yes.

Q. What was that act?

A. Why, in March I drew up a bond and inventory.

Q. A bond and inventory; what was the nature of the bond?

A. Why, it was a regular bond given in insolvency proceedings.

10

Q. Who executed it?

A. Mr. Gasparini was the surety.

Q. By whom was it executed?

A. By Sozio and Gasparini.

Q. The defendants in this suit?

A. Yes, sir.

Q. And did you witness it?

A. I did.

Q. You say you drew it?

A. I did.

20

Q. Can you tell me the contents of it?

A. I will not attempt it, Mr. Reed.

Q. If you saw the record of the bond from the clerk's office would that be sufficient to refresh your memory?

A. It might, but I am not positive.

Q. Will you turn to page 176 and look at that bond, and tell me if that is a copy of the bond?

A. That may be a copy of it, but I would not swear to it positively.

Q. What was the amount of the bond?

30

A. \$500—\$1,000.

Q. Was it \$1,000 or \$1,200?

A. \$1,200 is right; I beg your pardon.

Q. When is that bond dated you have before you—a copy of which you have before you?

A. This is dated the 11th day of March, 1905.

Q. By whom was the bond you are describing made?

A. I beg pardon.

Q. Who were the bondsmen; who were the parties who were bound by the bond you are describing?

A. Gasparini and Sozio.

Q. To whom was it made?

A. To Vincenzo Guiliano.

Q. To what judgment did it refer?

A. It referred to a judgment recovered by Guiliano against Sozio in the Essex Circuit Court.

Q. In what amount?

10 Mr. Trimble—Now, one moment. I object to that. I don't think there is any reference in that bond to any judgment.

By the Court.

Q. Mr. Braun, can you tell whether the record to which you are referring is identical with the bond which you witnessed, made by these parties——

A. I could not say positively.

Q. Wait until I get through. In the date, and the names of the parties and the amount of the bond, and the
20 names of the persons who executed it, and of the witness, and in the condition of the bond.

A. As to the date and the conditions I can't say positively; as to the remainder I can.

Q. You say you drew a bond for the purpose of enabling this defendant to take the benefit of the insolvent law. Look at the condition of this bond, and tell me whether that is the condition?

A. Yes, sir; it is.

Q. Is that, then, identical with the condition in the
30 bond which you drew?

A. I should say so, yes.

Q. Also in the names of the parties to the bond?

A. Yes, sir.

Q. As to the amount of the bond, \$1,200?

A. \$1,200, yes, sir.

Q. You appear to be the subscribing witness here?

A. Yes, sir.

Q. And the parties who executed the bond are the same

as those who executed the bond that you actually did witness?

A. Yes, sir.

Cross-examination by Mr. Trimble.

Q. You say that you drew up a bond which was executed by Mr. Sozio and a surety; where was Mr. Sozio when he signed that bond that you refer to?

A. I don't know—he was at the jail.

Q. And do you remember whereabouts at the jail?

A. Mr. Trimble, I am mistaken; he was brought down 10 to the sheriff's office to sign the bond; the bond was signed on a Monday; he was taken to the jail on the previous Saturday.

Q. Did you see him in the jail at all?

A. I didn't see him at the jail; no, sir.

Q. That was executed in the sheriff's office, you think?

A. Yes, this was executed in the sheriff's office; yes, sir.

Q. Are you positive about that?

A. I am quite sure.

20

Mr. Reed—I will offer in evidence this copy of the bond.

The Court—Can Mr. Mahr state whether this was a transcript of the bond that was left with him?

George Mahr, recalled for the plaintiff.

By the Court.

Q. Can you tell who made that copy, Mr. Mahr?

A. A young lady in the employ of the county clerk's office.

Q. Is she there now?

30

A. I think she is; yes, sir; I think that is Mrs. Adler's handwriting.

Q. She has probably gone to lunch at this moment?

A. Yes, sir.

Q. When do you expect her back?

A. About half-past one.

The Court—Do you require any further proof as to the bond?

Mr. Trimble—Yes, sir; I think I must, in the interest of my client.

Q. You did not compare it after it was copied?

A. No, sir; I did not.

The Court—You will have to call the young lady, Mr. Reed.

Mr. Reed—That is all, with that exception.

10 The Court—I will reserve you the right to make more formal proof of this paper. With that exception, you close your case?

Mr. Reed—With that exception, I close the case.

Plaintiff rests.

Mr. Trimble—I desire to move for a nonsuit in this case. Assuming that this is the bond, I should like to have the conditions read (reading same). Now, may it please the court, I mean to say to your Honor that there is no forfeiture of this bond; that the conditions of the
20 bond have been entirely complied with. If your Honor will look at the order entered in this case, your Honor will perceive that there was no order remanding this insolvent debtor to the custody of the sheriff.

The Court—It is not necessary.

Mr. Trimble—That may be so, sir; that is only preliminary. There is no examination. There is an illegal refusal to hear, against the plain statute. Section 16 of the Insolvent act says that if refused a discharge, either by the court or by the verdict of a jury, the insolvent
30 debtor shall be remanded to the jail—that was done in this case, and he was sent to the jail—provided, however, that nothing shall interfere with a second application. Now, his Honor Judge Skinner, in a subtle decision, against the plain intent of the statute and against the practice of unnumbered years, refused not to discharge, but refused to hear. That is not provided for by this bond. When it says "If refused a discharge," it means

refused a discharge after he has been examined and his conduct has been found not to be fair, upright and just. And your Honor will perceive that this order offered in evidence here says, "It appearing to the court that the present is a second application of the said Sozio, and that, on his said former application to this court, the discharge of the said Guiseppe Sozio was refused by the court, and that said refusal to discharge was not based on the verdict of the jury, and the court being of opinion that in such insolvent cases no right to a second application exists 10 under the law, as a matter of course, and that the said Sozio is not entitled to make a second application, therefore the application is dismissed." Now, your Honor, it seems to me there are two horns to that dilemma, and on either one this suit must fail, and the plaintiff in this suit ought to be nonsuited. The first is, if his Honor Judge Skinner was right when he said that an insolvent debtor has no right to a second application unless his discharge has been previously refused by a jury, then the second bond was illegal, null and void. If he was wrong, 20 then there has been no forfeiture of the bond; and that he was wrong seems to me to be plain by the unnumbered cases, and by the plain language of the statute.

The Court—I cannot sit here on this application and review Judge Skinner's decision, and I think I have your point clearly enough in mind to dispose of it, without listening to further argument.

Mr. Trimble—Just one other point. It may be that, if this is a judgment, we cannot attack it, as far as that is concerned; but my claim is that this order— 30

The Court—I understand your claim perfectly; I am asking you what your point is?

Mr. Trimble—That this order is not a forfeiture of the bond.

The Court—The question which your motion presents is not only an interesting one, but an important one. It is a question that probably will be decided by a higher court than this, whichever way I decide this matter. My

own impression, without having had any time to give the case careful consideration, is that you are wrong in the legal position that you assume. But very likely I am wrong in thinking that; it is a close question. My idea of the effect of the statute is this: Where a person, after having been arrested on a *capias*, applies for the benefit of the insolvent law, he forfeits the bond if he does not comply with the condition. If the Court of Common Pleas should make an order, after hearing, refusing his
10 discharge, the obligation assumed by him in his bond requires that, without anything further from the Court of Common Pleas, he should surrender himself to the custody of the sheriff. That is the agreement in the bond. The statute says the court shall remand him; but if the court does not perform the duty which the statute imposes upon it, he is under the obligation, so far as the bond is concerned, nevertheless, to surrender himself to the custody of the sheriff. In this case the defendant, the
20 principal on the bond, did surrender himself to the sheriff, perhaps compulsorily, at the termination of the first case. He applied a second time and executed a second bond, which is now the subject-matter of this litigation. If it be true that he was not entitled to prosecute a second application, as Judge Skinner concluded, nevertheless he voluntarily executed this bond, and by means of its execution was restored to his liberty, and he agreed voluntarily, with the sheriff, that if, when his second application came on to be heard, he was refused a discharge on it, he would voluntarily surrender himself forthwith
30 to the custody of the sheriff. He made that application; he was, by necessary inference, refused a discharge, because the court told him he had not any ground to have his application for a discharge considered; he had no standing; he had had his hearing, and that was a finality; his place was in the county jail. The court did not remand him, but he had voluntarily agreed, when the sheriff discharged him, that if his second application should not result in discharge, he would forthwith surrender himself

to the custody of the sheriff; and when, the Court of Common Pleas refusing to even entertain the second application, he neglected to surrender himself forthwith to the custody of the sheriff, it seems to me he broke the condition of that bond which he had voluntarily assumed. For that reason, it seems to me, as the case now stands, the plaintiff is entitled to recover the penalty of the bond. Whether there is a defence which would change the legal situation after it is put in, of course, I know not; but, as the case stands now, I shall rule that your motion to nonsuit should not prevail. I am merely expressing my off-hand view of the situation, appreciating, as I said at the beginning of my remarks, that it is an interesting question, which I hope will go to the higher court, in order that the bar may understand just what the obligation of the defendant is. 10

Defendant's counsel prays exception to the refusal of the court to grant a nonsuit, and the same is allowed, and signed and sealed accordingly.

WM. S. GUMMERE, C. J. 20

Mr. Trimble—There is no defense, except to prove that Mr. Sozio was in jail at the time of the execution of the second bond.

The Court—If you will admit that the record of this bond in the county clerk's office is a true copy of the bond, I can dispose of this case now.

Mr. Trimble—I do not think I ought to admit that.

Recess.

Hattie Adler, sworn for the plaintiff.

Direct examination by Mr. Reed. 30

Q. Miss Adler, I show you page 176 of Book No. 3 of Records of Bonds from the office of the county clerk of Essex county, and ask you to look at the record of the bond there; is that your handwriting?

A. Yes.

Q. Did you copy that bond?

A. I did.

Q. From what?

A. From the original copy.

Q. (By the Court.) The original paper?

A. Paper filed in our office.

Further direct.

Q. Did you compare the record with the original?

10 A. Yes, sir.

Q. (By the Court.) Is it accurate?

A. Yes, sir.

Cross-examination by Mr. Trimble.

Q. Have you any recollection of that particular transaction?

A. No, I have not.

Q. That was just a part of your office duties?

A. Yes, sir.

20 Q. So that you cannot say of your own knowledge, or present recollection, that that is a true copy of the bond, can you?

A. No; I suppose this was brought in the office, and I recorded it, that is all I can say.

Q. You are only testifying to what is your usual habit?

A. Yes, sir.

Q. And how do you know that that was from the original; you were not acquainted with the signatures of the names purporting to be attached to that bond?

30 The Court—She says the original paper filed in the office.

A. It was from the original paper filed in our office.

Q. How do you know that?

A. That is the file that is given to me to record by Mr. Mahr.

Q. (By the Court.) The deputy clerk?

A. Yes, sir.

Further cross.

Q. Do you recollect that, or are you testifying now from what is the usual course in the office?

A. I recollect the bond—I recognize my handwriting.

Q. Do you recollect any particular time when that particular bond was given to you to copy?

A. No, I don't.

By the Court.

Q. When you record a paper filed in the clerk's office, do you always compare the original with the record afterward?

A. Yes, sir.

Q. Always?

A. Always.

Q. So you can say whether or not you compared this paper?

A. I most certainly compared it.

Q. And can you say from your practice that it was either correct, or you made it a correct copy?

A. It was correct.

20

Mr. Reed—I now offer in evidence the recorded copy of the bond.

Mr. Trimble—I object on two grounds; first, that there is no law authorizing the making of a record that shall be evidence of a bond of this character; and, in the second place, that the proof is too general and too indefinite to supply the secondary evidence of a lost deed or bond.

The Court—I will receive the copy as a sworn copy of the original paper.

30

Defendant's counsel prays exception to the ruling of the court, and the same is allowed and signed and sealed accordingly.

WM. S. GUMMERE, *C. J.*

Plaintiff rests.

Mr. Trimble—I desire that it should appear upon the record, either by admission of counsel, or by proof from

the clerk, that it does not appear in these records relating to this insolvent debtor, Guiseppe Sozio, that the Court of Common Pleas ever made any order on the second application remanding him to jail.

The Court—The order speaks for itself; it has been produced.

Mr. Trimble—That particular order does, but I wish it to appear that there is no other order remanding him on the second application, and, consequently, that there
10 is no adjudication on the second application that the defendant had concealed, or kept back any part of his estate, or that his conduct had not been fair, upright or just. If it can appear by admission, that is all right.

The Court—I suppose Mr. Reed will admit there is no adjudication on this second application further than that which has appeared already.

Mr. Reed—There is none that I know of.

Guiseppe Sozio, sworn for the defendant (through the interpreter).

20 Direct examination by Mr. Trimble.

Q. You are Guiseppe Sozio, one of the defendants in this case?

A. Yes, sir.

Q. And you are the Guiseppe Sozio against whom a judgment was obtained by one Vincenzo Guiliano in September, 1904? Is that right?

A. Yes, sir.

Q. Now, do you remember appearing before the Court of Common Pleas, across the hall in this building, as an
30 insolvent debtor?

A. Yes, sir.

Q. Do you recall being examined by the court in March, 1905?

A. Yes, sir.

Q. And what happened to you after the court examined you?

A. I went in jail.

Q. Do you remember what day that was you went in jail?

A. I don't remember precisely.

Q. Do you remember what day of the week it was?

A. Saturday.

Q. Now, when you were in jail, what did they do with you there; how long did they keep you?

A. I was kept in the cell, from the day that I went in and the day that I left, was four days.

Q. Now, what day was it you came out, do you re- 10 member?

A. I think it was Tuesday.

Q. Do you remember signing the bond in this case, which has been put in suit in this case?

A. Giovanni Gasparini.

Q. With Giovanni Gasparini?

A. Yes, sir.

Q. Do you remember going before the Court of Common Pleas a second time?

A. Yes, sir.

20

Q. Do you remember what happened the second time?

A. The judge refused the appeal.

Q. Were you sworn on that occasion?

A. No, sir.

Mr. Reed—I think this is all a matter of record, Mr. Trimble.

Q. Were you in court that day?

A. Yes, sir; me and my bondsman.

Q. Did anybody arrest you, then, after the court refused to hear your appeal?

30

A. No, sir.

Q. How long were you there in the court that day?

A. After the judge refused the appeal—

Q. How long after?

A. Half an hour.

Cross-examination by Mr. Reed.

Q. What day was this you speak of, Mr. Sozio?

A. The second time?

Q. The second time. Well, are you sure that it was on the day when the matter was finally determined by the court?

A. Yes, sir; I spoke with my lawyer.

Q. What month was it in?

A. I don't remember.

Q. March?

A. No, March was the first time.

Q. Well, what was the second time?

10 A. I don't remember.

Q. April, maybe?

A. I don't remember.

Q. What did you do after you left; did you go to the sheriff that time?

A. No, my lawyer tell me that I was free.

Giovanni Gasparini, sworn for the defendant.

Direct examination by Mr. Trimble.

Q. You are one of the defendants in this case?

A. Yes, sir.

20 Q. And you signed the bond, did you, that has been made in this case, or do you recollect about that?

A. Well, I can't talk straight good English, because I don't understand everything; might be some understand, some not understand; it is better interpreter.

[Examination continued through interpreter.]

Q. (Question repeated as follows): And you signed the bond; did you, that has been made in this case, or do you recollect about that?

A. Yes, sir.

30 Q. Now, did you sign the first bond in this case?

A. Yes, sir.

Q. And a second time you signed?

A. Yes, sir.

Q. Now, were you present when the court refused to hear Mr. Sozio's second application?

A. Yes, sir.

Q. Do you remember what day it was?

A. I no remember that.

Q. Was Mr. Sozio there?

A. Oh, yes, sir.

Q. Now, how long were you there that day?

A. Oh, well, after the judge talked about the case I stayed about half an hour more.

Q. Now, what happened after that, if anything, do you recollect?

A. No one said anything to me; I went home.

Q. This was in open court, wasn't it? 10

A. Why, sure; nobody say anything; just before said, "You sign the bail for that fellow," and another time nobody say me anything.

Q. Did you sign your name yourself to a paper?

A. No, sir; the last time I never sign.

Q. Well, what happened, then, if you didn't sign, what did happen? Did anybody sign for you?

A. Nobody; I mean the last time when I was in court.

Q. Well, did you sign a paper before that?

A. Oh, yes. 20

No cross-examination.

Defendant rests.

CHARGE OF THE COURT.

Mr. Trimble—I ask your Honor to direct the jury to find a verdict for the defendant, on the same grounds as urged in support of the motion for nonsuit; and, further, that before there can be any forfeiture of an insolvent bond, there must be an adjudication of the court that the conduct of the defendant has not been fair, upright and just, or that he has withheld, kept back and 30 concealed part of his estate; and also that there must be an order of the court remanding him to the custody of

the sheriff. I also ask your Honor to direct this jury that the question of forfeiture is one of fact for them to decide.

The Court—It is hardly worth while, from what I consider to be the legal aspect of this case, for counsel to sum up. I think the question of law, as I have already intimated, must be resolved against the defendant. In other words, I conceive it to be my duty to instruct the jury to return a verdict, not in favor of the defendant,
10 but in favor of the plaintiff.

The court charged the jury as follows:

GUMMERE, C. J.

GENTLEMEN OF THE JURY—As you have probably gathered, this case is one somewhat technical in its nature. It is a suit on what lawyers call an insolvent debtor's bond. When a man is arrested and confined in jail on a body execution, as it is called, he is entitled, under our law, to apply to the Court of Common Pleas to have his ability to pay investigated, and when the conditions
20 which the law imposes have been complied with, and the fact which the law says will justify a discharge appears, the Court of Common Pleas will discharge him from custody, upon his assigning to a person designated by the Court of Common Pleas all his property, if he has any, or make an assignment, even if he has none. But if the situation which the statute says will justify his discharge does not appear, then the Court of Common Pleas sends him back to the custody of the sheriff; in other words, commits him to jail. Now, in this case the
30 defendant, Sozio, having been arrested on a body execution, made his application to the Court of Common Pleas, and the court heard that application. The first thing that he had to do, after making the application, was to give to the sheriff a bond, the terms of which I will speak about a little more extendedly in a moment. He gave that bond, and the Court of Common Pleas heard his application to be discharged, and, for reasons which seemed

to it good, the court decided he was not entitled to be discharged, and sent him back to the custody of the sheriff, and he went back, surrendered himself to the sheriff. He immediately made another application to the Court of Common Pleas, to be discharged as an insolvent debtor; and, in order that he might have his freedom in the meantime, he gave to the sheriff a bond similar to the one he first gave by which he agreed that he would forfeit \$1,200 in case, when the application was heard, the court refused to discharge him as an insolvent debtor, 10 and he did not immediately surrender himself again to the custody of the sheriff. That is, he said in his bond, in effect, "I am making this second application; if the court discharges me, of course, I am free from liability on this bond; if the court refuses to discharge me I will immediately surrender myself to the sheriff, and if I do not do that I will forfeit \$1,200;" and his friend went surety on the bond, and guaranteed that that should be done, and agreed that he would be equally liable to pay the \$1,200 if Sozio did not surrender himself, in case the 20 court refused to discharge him. They had a hearing on that second application, and the court said, "You are not entitled to make it; I dismiss that application; I will not hear you." Of course, Sozio was not discharged by that. It is quite evident, even to a layman, that a refusal to hear whether a man is entitled to a discharge or not, is a very different thing from discharging him from custody. And so it seems to me—and I charge you, for the purposes of this case—that that is the law; that the refusal of the court to hear that second application was 30 the same thing as refusing to discharge him; and, in order to relieve himself from liability, under this bond, Sozio was bound to go back to the sheriff voluntarily and say, "Here I am, take me into custody." He did not do that; he went away, went home, and has never come back since, so far as this case shows. That is a breach of the condition of this bond which entitles the plaintiff to maintain his action on it. The plaintiff has proven

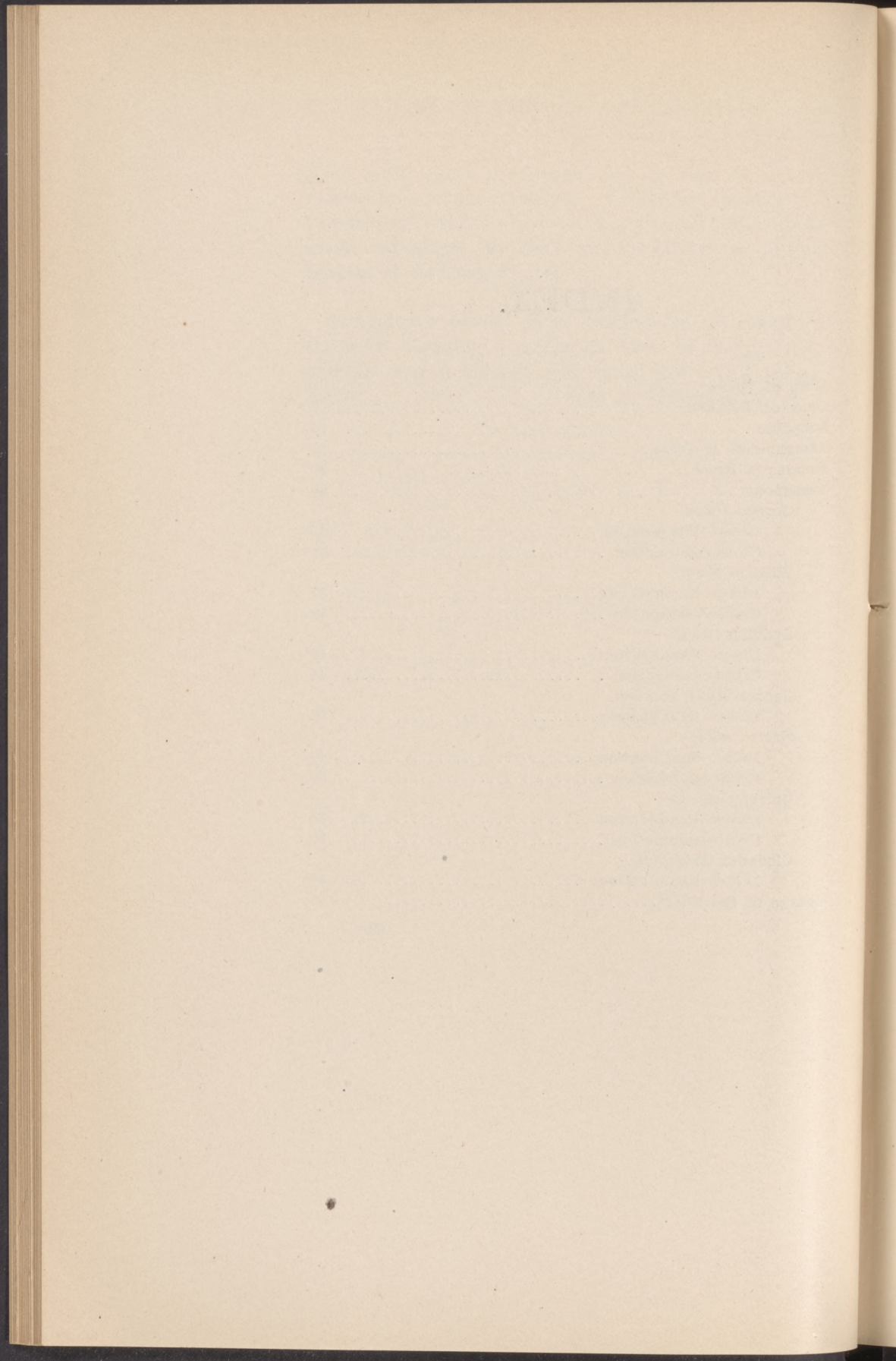
these facts, shown the breach, and his right to recover follows as a matter of course. I therefore instruct you to return a verdict in favor of this plaintiff against both of the defendants, Mr. Sozio and his surety, for the full amount of the bond, \$1,200.

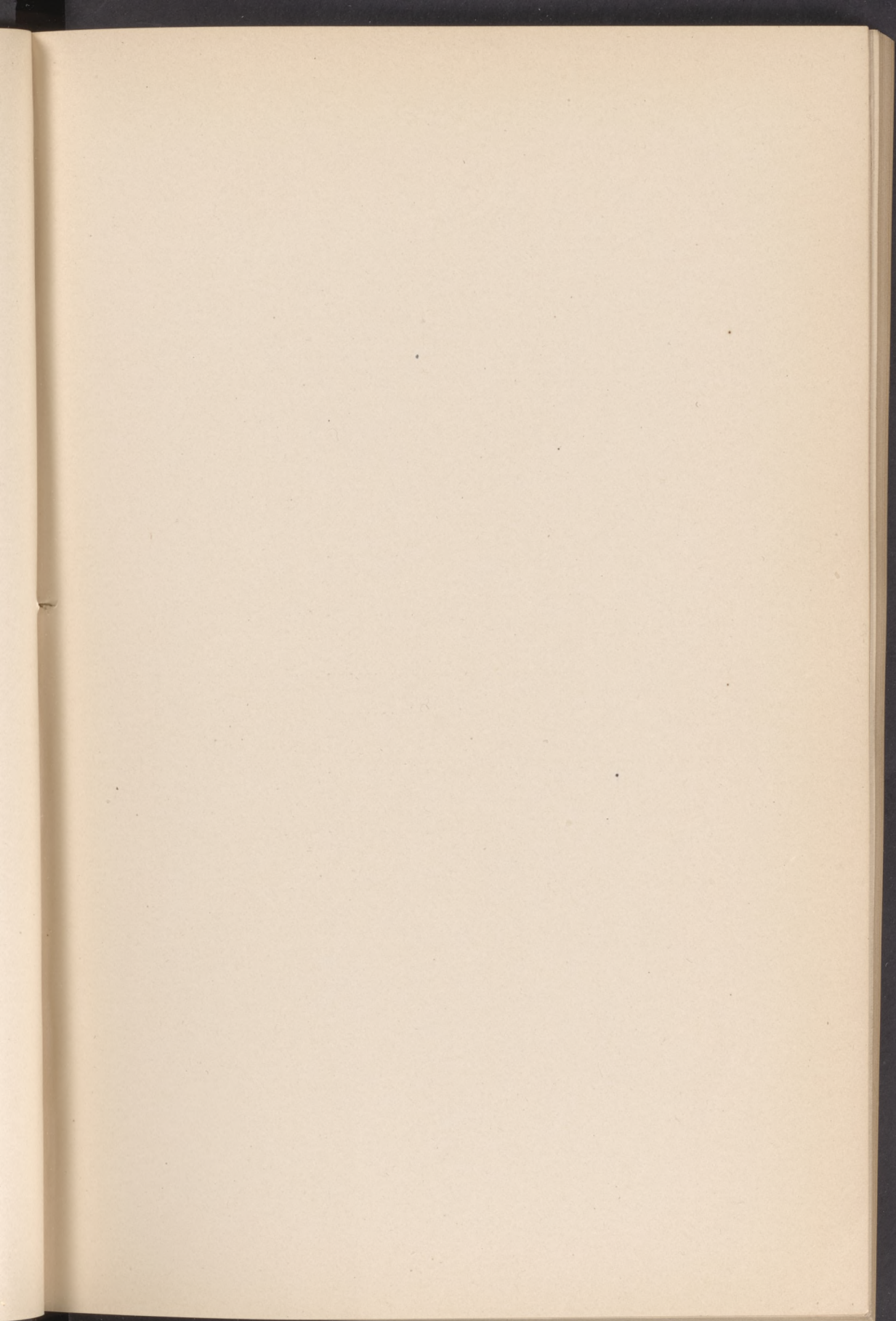
Defendant's counsel prays exception to the charge of the court directing a verdict in favor of the plaintiff, and the same is allowed, and signed and sealed accordingly.

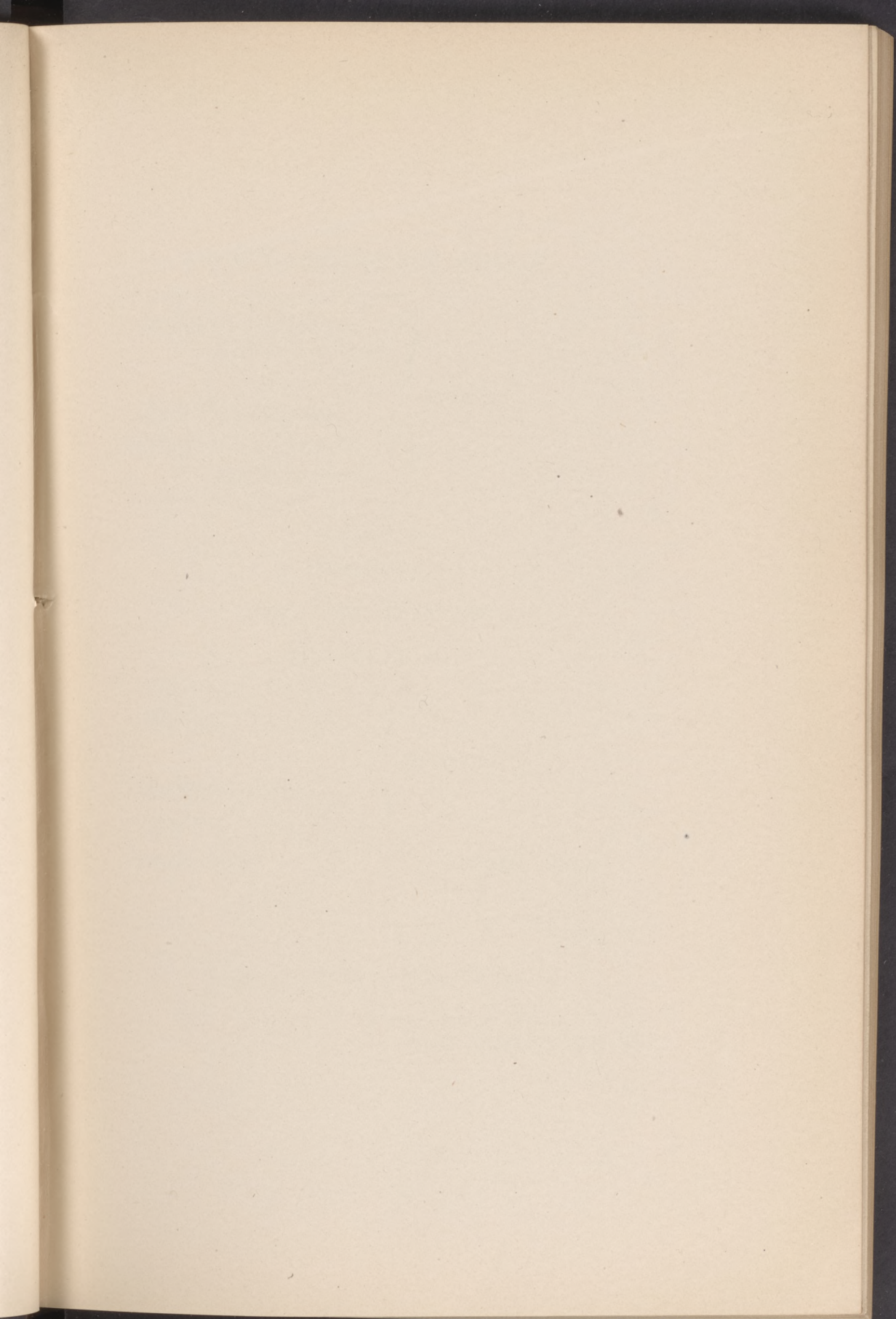
WM. S. GUMMERE, *C. J.*

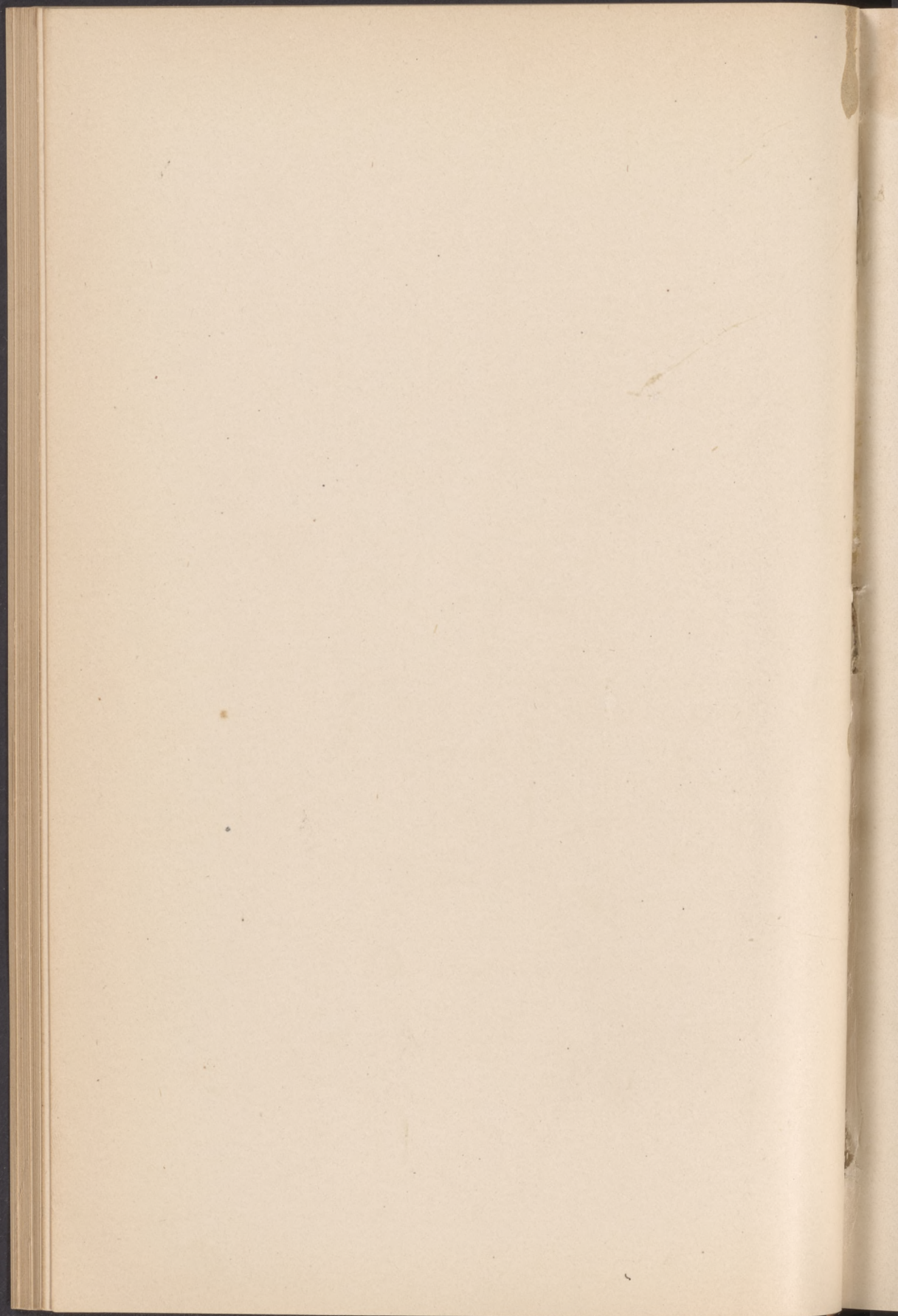
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COURT OF ERRORS AND APPEALS.

VINCENZO GIULIANO,
Defendant in Error.

vs.

GIUSEPPE SOZIO and
GIOVANNI GASPARINI,
Plaintiffs in Error.

In Error.

10

ADDENDA.

JUDGMENT.

20

ESSEX CIRCUIT COURT.

RECORD No. 87.

VINCENZO GIULIANO

vs.

GIUSEPPE SOZIO

In Tort.

30

Sept. 29, 1904.

Damages	\$500.00
Costs	69.67

\$569.67

Page 456 of Common Pleas Minutes.

Essex Common Pleas

Friday March 10, 1905. 40

The Court
Met
Present
Hon. Alfred F. Skinner
Presiding

10 In the matter of the applica-
tion of Guiseppe Sozio an
insolvent debtor, for the bene-
fit of the insolvent law of
State of New Jersey, and the
several supplements thereto. }
Petition for
Discharge.

20 Continued from February 25th, on motion of J. M.
Trimble Esq. attorney for petitioner the Court order on
the further hearing in the matter

Evidence

Guiseppe Sozio R C

The evidence being closed and the court having heard
the arguments of counsel and heard what could be said
for or against the liberation of the petitioner, the Court
refuses the discharge of the petitioner and ordered him to
be returned into the custody of the Sheriff.

30

Copy of Sworn Copy of Bond in Suit.

Know all Men by These Presents, That we, Guiseppe
Sozio and Giovanni Gasparini, of the City of Newark,
County of Essex and State of New Jersey, are held and
firmly bound unto Vincenzo Guiliano of the same place
40 in the sum of Twelve Hundred dollars, lawful money of

the United States of America, to be paid to the said Vincenzo Guiliano, his executors and administrators, jointly and severally, firmly by these presents, Sealed with our seals and dated the eleventh day of March in the year of Our Lord one thousand nine hundred and five.

The condition of this obligation is such, that whereas, the above bounden Guiseppe Sozio is now under arrest and confined in the jail of the County of Essex in custody of William C. Nicoll, Sheriff of said County of Essex by virtue of a *capias ad Satisfaciendum* issued out of the Essex County Circuit Court, at the suit of the above named Vincenzo Guiliano in an action of tort, for the sum of Five Hundred dollars, besides costs and Whereas, the said Guiseppe Sozio hath made out and delivered to the said William C. Nicoll, an inventory under oath, pursuant to the second section of an act entitled "An act for the relief of persons imprisoned on civil process."

Now therefore if the said Guiseppe Sozio shall appear before the next Court of Common Pleas to be holden in the County aforesaid, and petition said Court for the benefit of the insolvent laws of this State, and shall in all things comply with the requirements of the said insolvent laws, and shall appear in person at every subsequent court until he shall be duly discharged an insolvent debtor; and if refused a discharge surrender himself immediately thereafter to the Sheriff or keeper of the jail of said County there to remain until discharged by due course of law, then this obligation to be void, otherwise to remain in force.

GUISEPPE SOZIO	Seal
GIOVANNI GASPARINI	Seal

Signed, sealed and delivered in the presence of

RUDOLPH A. BRAUN.

Recorded March 13, 1905.

ARTHUR HORTON, *Clerk.*

Page 176, Book 3 Bonds.

EXHIBIT P. 1.

EXECUTION.

Ca. Sa. Dated Dec. 5, 1904. Returnable Dec. Term.
Record Essex County Clerks office in Books of
Executions, page 604.

10 Endorsed. The within named defendant was arrested
Dec. 8, 1905 and upon furnishing an insolvent Bond was
released.

WM .C. NICOLL,
Sheriff.

EXHIBIT P. 2.

20 *To the Judges of the Court of Common Pleas of the
County of Essex:*

30 The petition of Giuseppe Sozio, of the city of Newark
in the county of Essex and State of New Jersey respect-
fully sheweth that your petitioner on the eighth day of
December nineteen hundred and four was arrested by
William C. Nicoll, Sheriff of the county of Essex, upon
capias satisfaciendum issued against him at the suit of
Vincenzo Giuliano, in tort, by the Circuit Court of said
county, and is now in the custody of said Sheriff at the
said city of Newark, county of Essex and State of New
Jersey, and your petitioner being so arrested and in cus-
tody did make out and deliver to said Sheriff an in-
ventory, under oath, and did give bond to the said Vin-
cento Giuliano, with sufficient security pursuant to the
second section of the act entitled "An act for the relief
of persons imprisoned on civil process," and is willing to
deliver up to his creditor all his estate, both real and per-
sonal toward the payment of his said creditor, and your
petitioner shows that the following is a just and true ac-
40 count of all his deeds, bonds, notes, books of account,

vouchers, and securities whatsoever, together also with a list of all his creditors with the monies due and owing to each of them to the best of his knowledge.

List of Property.

No goods, chattels, rights, credits, lands, tenements or real estate.

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List of Creditors.

Vincenzo Giuliano \$500 together with costs to be taxed.

Your petitioner therefore prays the benefit of the insolvent laws of this state and that the court will name the time and place at which they will attend to hear what can be alleged for or against his liberation, according to the form of the statute in such case made and provided.

Newark, N. J., December 9th, 1904.

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GIUSEPPE SOZIO

JOSEPH J. PALLITTA

Witness to signature

(Endorsed)—Essex County Common Pleas. In the matter of Giuseppe Sozio, an insolvent debtor. Petition. Filed Dec. 12, 10:52 A. M., 1904. Arthur Horton, Clerk. Essex Court of Common Pleas.

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EXHIBIT P. 3.

In the matter of Giuseppe
Sozio for his discharge
as an insolvent debtor.

} On Petition &c. Order.

The above named Giuseppe Sozio appearing and asking 40

that a day be fixed for a hearing on his petition and on reading and filing the petition of Giuseppe Sozio the petitioner in the above stated cause, I do on this thirteenth day of December, 1904, appoint the eleventh day of February 1905, at the hour of ten o'clock in the forenoon, at the Court House in the city of Newark, New Jersey as the time and place at which the court will attend to hear what can be alleged for or against the liberation of said
 10 petitioner.

ALFRED F. SKINNER, J.

(Endorsed)—Essex Court of Common Pleas. In the matter of Giuseppe Sozio for his discharge as an insolvent debtor. On Petition, &c. James M. Trimble Atty 828 Broad Street, Newark, N. J. Filed, Dec. 13—3:08 P. M. 1904. Arthur Horton, Clerk.

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EXHIBIT P. 4.

To the Judges of the Court of Common Pleas of the County of Essex:

The petition of Giuseppe Sozio, of the city of Newark, in the county of Essex and State of New Jersey, respectfully showeth that your petitioner on the tenth day of March, nineteen hundred and five, was arrested by William C. Nicoll, Sheriff of the county aforesaid, upon
 30 *capias ad satisfaciendum* issued against him at the suit of Vincenzo Giuliano, in tort, by the Circuit Court of said county and is now in the custody of said Sheriff at the common jail of the county aforesaid; and your petitioner, being so arrested and in custody, did make out and deliver to the said Sheriff an inventory, under oath, and did give bond to the said Vincenzo Giuliano, with sufficient security, pursuant to the second section of the act entitled "An act for the relief of persons imprisoned on civil process," and is willing to deliver up to his credit-
 40 ors all his estate, both real and personal, towards the pay-

ment of his said creditors; and your petitioner shows that the following is a just and true account of all his deeds, bonds, notes, books of account, vouchers and securities whatsoever, together also with a list of all his creditors with the moneys due and owing to each of them, to the best of his knowledge, to wit:

LIST OF PROPERTY.

Wearing apparel and clothes worn by petitioner, \$15.00 10

LIST OF CREDITORS.

Vincenzo Giuliano \$500.00 with costs.

Gaetano M. Belfatto \$15.00 with costs.

Your petitioner therefore prays the benefit of the insolvent laws of this State, and that the court will name the time and place at which they will attend and hear what can be alleged for or against his liberation, according to the form of the statute in such case made and provided. 20

Newark, N. J., March 25th, 1905.

GIUSEPPE SOZIO.

(Endorsed)—Essex County Court of Common Pleas.
In the matter of the application of Giuseppe Sozio for his discharge as an insolvent debtor. Petition. Filed, Apr. 4—9:54 A. M., 1905. Arthur Horton, Clerk.

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EXHIBIT P. 5.

Essex County Court of Common Pleas.

In the matter of the application
of Giuseppe Sozio for his
discharge as an insolvent
debtor.

{ On petition &c.
{ Order.

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The above named Guiseppe Sozio, appearing and asking that a day be fixed for a hearing on his petition; and on reading and filing the petition of said Giuseppe Sozio, the petitioner in the above entitled cause, I do on this fourth day of April, nineteen hundred and five, appoint Saturday, the twenty-seventh day of May, 1905, at the hour of ten o'clock in the forenoon, at the Court House of Essex county in Newark as the time and place at which
 10 the court will attend to hear what can be alleged for or against the liberation of said petitioner.

ALFRED F. SKINNER, J.

(Endorsed)—Essex Court of Common Pleas. In the matter of the application of Giuseppe Sozio for his discharge as an insolvent debtor. On Petition, &c. Order. James M. Trimble, Atty. of Petitioner. Filed Apr. 4—
 11:44 A. M. 1905. Arthur Horton, Clerk.

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• EXHIBIT P. 6.

Essex County Common Pleas.

30	In the matter of Guiseppe Sozio for his discharge as an in- solvent debtor.	}	On Petition. Order.
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The above named Guiseppe Sozio, having filed his petition with this court at the present term to be discharged as an insolvent debtor, and the twenty-seventh day of May, 1905, having been designated for the examination of the said debtor, and the said hearing having been regularly postponed by the court to the day of the date hereof, and the said Sozio now presenting himself for examina-
 40 tion by the court on said petition, and Hugh B. Reed,

Esquire, attorney of one of the creditors opposing the same, and it appearing to the court that the present is the second application of the said Sozio, and that on his said former application to this court the discharge of the said Guiseppe Sozio was refused by the Court, and that said refusal to discharge was not based on the verdict of a jury, and the court being of opinion that in such insolvent cases no right to a second application exists, under the law as a matter of course, and that said Sozio is not entitled to make a second application. 10

It is on this 24th day of June, 1905, ordered that the said application of the said Guiseppe Sozio for hearing on his said petition be dismissed.

ALFRED F. SKINNER, J.

On motion of

JAMES M. TRIMBLE,

Attorney for Giuseppe Sozio.

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